

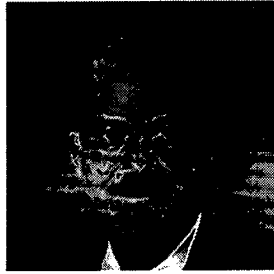
2011

**TORT REFORM
HOUSE SELECT
COMMITTEE**

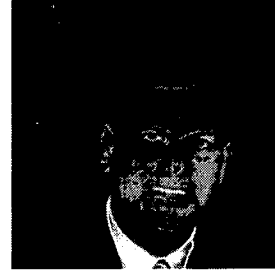
MINUTES

NORTH CAROLINA GENERAL ASSEMBLY
SELECT COMMITTEE ON TORT REFORM

2011-2012 SESSION



Rep. McComas
Chair



Rep. Rhyne
Chair



Rep. Crawford
Vice chair

Rep. Lewis
Vice chair



Rep. Moffitt
Vice chair

Rep. Murry
Vice chair



Rep. Barnhart

Rep. Brisson

Rep. Carney

Rep. Dockham

Rep. Dollar



Rep. Faison

Rep. Gillespie

Rep. Hall

Rep. Hill

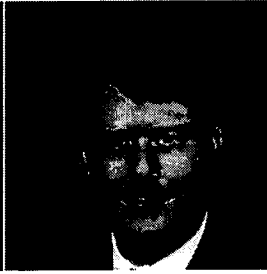
Rep. McGrady

**NORTH CAROLINA GENERAL ASSEMBLY
SELECT COMMITTEE ON TORT REFORM**

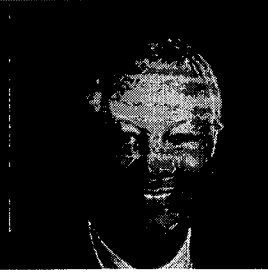
2011-2012 SESSION



Rep. McLawhorn



Rep. Mills



Rep. Owens



Rep. Parfitt



Rep. Randleman



Rep. Samuelson

Rep. Stam

Rep. Weiss

HOUSE COMMITTEE ON TORT REFORM

<u>MEMBER</u>	<u>ASSISTANT</u>	<u>PHONE</u>	<u>OFFICE</u>	<u>SEAT</u>
Rhyne, Johnathan (Co-Chair)	Susan Beaupied Committee Assistant	733-5782	2208	19
McComas, D. (Co-Chair)	Judy Lowe	733-5786	506	6
Crawford, Jim (Vice-Chair)	Linda Winstead	733-5824	1321	24
Lewis, David (Vice-Chair)	Grace Rogers	715-3015	534	20
Moffitt, Tim (Vice-Chair)	Melissa Carter	715-3012	1025	85
Murry, Tom (Vice-Chair)	Linda Sebastian	733-5602	2121	86
Barnhart, Jeff	Joanna Hogg	715-2009	304	18
Brisson, Bill	Caroline Stirling	733-5772	1325	23
Carney, Becky	Ann Jordan	733-5827	1221	91
Dockham, Jerry	Regina Irwin	715-2526	2204	3
Faison, Bill	Lavada Vitale	715-3019	405	84
Dollar, Nelson	Candace Slate	715-0795	307B1	31
Gillespie, Mitch	Cindy Hobbs	733-5862	307B2	7
Hall, Larry	Lisa Ray	733-5872	510	107
Hill, Dewey	Gennie Thurlow	733-5830	1309	22
McGrady, Chuck	Ed Stiles	733-5956	418A	76
McLawhorn, Marian	Susan Burleson	733-5757	1217	59
Mills, Grey	Wanda Benson	733-5741	2221	50
Owens, Bill	Linda A. Johnson	733-0010	611	21
Parfitt, Diane	Katie Landi	733-9892	1017	111
Randleman, Shirley	James White	733-5935	531	43
Samuelson, Ruth	Susan Phillips	715-3009	419B	55
Stam, Paul	Christin Danchi	733-2962	2301	54
Weiss, Jennifer	Cindy Douglas	715-3010	1109	103

North Carolina General Assembly
 Through House Committee on
 House Select Committee on Tort Reform

Date: 06/23/2011
 Time: 10:20
 Page: 001 of 001
 Leg. Day: H-087/S-087

2011-2012 Biennium

Bill	Introducer	Short Title		Latest Action	In Date	Out Date
H0542	Rhyne	TORT REFORM FOR CITIZENS AND BUSINESSES.	*H	Pres. To Gov. 6/ 20/2011	03-31-11	05-10-11
H0709=	Folwell	PROTECT AND PUT NC BACK TO WORK.	*H	Pres. To Gov. 6/ 14/2011	04-14-11	05-26-11
H0709=	Folwell	PROTECT AND PUT NC BACK TO WORK.	*H	Pres. To Gov. 6/ 14/2011	05-27-11	05-27-11
S0033	Tom Apodaca	MEDICAL LIABILITY REFORMS.	*H	Pres. To Gov. 6/ 14/2011	03-22-11	04-19-11
S0435	Fletcher L. Hart	CIVIL PRO./REQUIRE CERTIFICATE OF MERIT.	*H	Ref To Com On House Select Committee on Tort Reform	06-08-11	

'\$' indicates the bill is an appropriation bill.

A bold line indicates the bill is an appropriation bill.

'*' indicates that the text of the original bill was changed by some action.

'=' indicates that the original bill is identical to another bill.

HOUSE SELECT COMMITTEE ON TORT REFORM

AGENDA

February 24, 2011

- I. Welcome and introductions
- II. What is a tort and what is tort reform?
- III. Current trends in tort reform
 - a. Cary Silverman, American Tort Reform Association
- IV. General perspectives on tort reform
 - a. John McMillan
 - b. Joe Knott
 - c. Dick Taylor
 - d. Sammy Thompson
- V. Summary/status of Senate bill
- VI. Next steps
- VII. Adjourn

MINUTES
HOUSE SELECT COMMITTEE ON TORT REFORM
Thursday, February 24, 2011

Upon call of Chairman Rhyne, the House Select Committee on Tort Reform met on Thursday, February 24, 2011 in room 1327 of the Legislative Building. The following members were present: Danny McComas, Johnathan Rhyne, Co-Chairs; Representatives Crawford, Moffitt, Murry, Barnhart, Brisson, Carney, Dockham, Dollar, Gillespie, Hill, Jackson, McGrady, Mills, Owens, Parfitt, Parmon, Randleman, Stam, and Weiss.

Chairman Rhyne called the meeting to order. He and Chairman McComas made opening remarks. Chairman Rhyne introduced Cary Silverman of the America Tort Reform Association who spoke to the committee.

Chairman Rhyne introduced John McMillan who spoke to the committee.

Chairman Rhyne introduced Joe Knott who spoke to the committee.

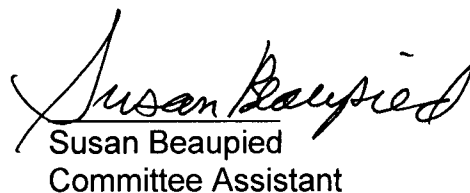
Chairman Rhyne introduced Dick Taylor of North Carolina Advocates for Justice who spoke to the committee.

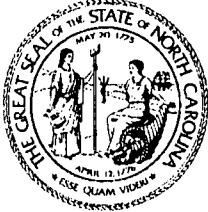
Chairman Rhyne introduced Bill Patterson of the Research Division of the General Assembly. Mr. Patterson explained Senate Bill 33 (see attached).

Chairman Rhyne introduced Sammy Thompson who spoke to the committee.

The meeting adjourned at 11:50 a.m.


Representative Johnathan L. Rhyne
Co-Chair


Susan Beupied
Committee Assistant



SENATE PCS 33: Medical Liability Reforms

2011-2012 General Assembly

Committee:	Senate Judiciary I	Date:	February 15, 2011
Introduced by:	Sens. Apodaca, Brown, Rucho	Prepared by:	Bill Patterson
Analysis of:	PCS to First Edition S33-CSTG-1		Committee Counsel

SUMMARY: *The PCS to Senate Bill 33 will (changes from previous PCS shown in bold):*

- require a finding of gross negligence, wanton conduct or intentional wrongdoing **by the greater weight of the evidence** to recover damages in medical malpractice actions arising out of the furnishing of or failure to furnish emergency medical services required to be provided under federal law
- require separate trials on the issues of liability and damages on motion of any party in medical malpractice actions in which the plaintiff seeks damages of at least \$75,000
- limit noneconomic damages to **\$500,000**
- on motion of any party, require that future economic damages with a present value of at least **\$200,000** must be paid in periodic payments rather than in one lump sum
- require damage awards to specify the amount awarded as noneconomic damages, present economic damages, future economic damages, **loss of future earnings, and loss of future household services**
- **require the court to specify the amount of the appeal bond required to stay execution in all appeals from a money judgment, based on the amount of the judgment, the limits of liability insurance coverage of the appellant, and the net worth of the appellant**
- **require medical malpractice plaintiffs to certify that all medical records pertaining to the alleged injury have been reviewed by the expert witness who is willing to testify as to non-compliance with the applicable standard of care**
- **require each side in a medical malpractice case to provide a written report signed by each expert witness containing the opinions to be offered at trial, limit the expert's trial testimony on direct examination to the scope of the opinion contained in the written report, and bar depositions of experts unless the court otherwise orders for good cause shown, requiring**

CURRENT LAW AND BILL ANALYSIS:

Section 1: Emergency Services Required to be Provided by Federal Law

Current law: G.S. 90-21.12 provides that a "health care provider" is not liable for damages in a "medical malpractice action"¹ unless the trier of fact finds by the greater weight of the evidence that the care

¹ The terms "health care provider" and "medical malpractice action" are defined in G.S. 90-21.11 as follows:

As used in this Article, the term "health care provider" means without limitation any person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, psychology; or a hospital

Senate PCS 33

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provided "was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action."

G.S. 90-21.14 requires a showing of gross negligence, wanton conduct or intentional wrongdoing before liability can be imposed upon any person who receives no compensation for his or her services as an emergency medical care provider, and who renders first aid or emergency health care treatment to a person who is unconscious, ill, or injured under circumstances requiring prompt action in which any delay in treatment would seriously worsen the person's physical condition or endanger the person's life.

Consequently, under current law, providers of emergency medical care who are compensated for their services are subject to liability in malpractice actions under the general standard of care set forth in G.S. 90-21.12.

Bill Analysis: Section 1 amends G.S. 90-21.12 to add new subsection (b) providing that in a medical malpractice action arising out of the furnishing or the failure to furnish services pursuant to obligations imposed by the federal Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd ("EMTALA")², liability may not be imposed unless the trier of fact finds that the defendant's failure to meet the statutory standard of care constituted gross negligence, wanton conduct or intentional wrongdoing. Section 1 also designates the current statutory language as subsection (a) and makes technical and clarifying changes. The first PCS rewrote Section 1 of the original bill by limiting its application to malpractice actions arising out of emergency services required to be provided under EMTALA, and by requiring a finding of gross negligence, wanton conduct or intentional wrongdoing. **The current PCS changes the burden of proof on this issue from "clear and convincing evidence" to "the greater weight of the evidence."**

Section 2: Separate Trials of Liability and Damages

Current law: Courts are currently permitted, but not required, to grant a motion for separate trials of any issues "in furtherance of convenience or to avoid prejudice." G.S. 1A-1, Rule 42(b)(1).

or a nursing home; or any other person who is legally responsible for the negligence of such person, hospital or nursing home; or any other person acting at the direction or under the supervision of any of the foregoing persons, hospital, or nursing home.

As used in this Article, the term "medical malpractice action" means a civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider.

²42 U.S.C. § 1395dd(a) requires that when a patient presents to a hospital emergency department, the hospital is obligated to determine whether the patient has an "emergency medical condition," defined as:

- (A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in—
 - (i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,
 - (ii) serious impairment to bodily functions, or
 - (iii) serious dysfunction of any bodily organ or part; or
- (B) with respect to a pregnant woman who is having contractions—
 - (i) that there is inadequate time to effect a safe transfer to another hospital before delivery, or
 - (ii) that transfer may pose a threat to the health or safety of the woman or the unborn child.

42 U.S.C. § 1395dd(e)(1). If the patient is determined to have an emergency medical condition, then the hospital is obligated to provide treatment necessary to stabilize the medical condition, regardless of the patient's ability to pay for those services, unless transferring the patient to another medical facility for treatment would be more beneficial to the patient. 42 U.S.C. § 1395dd(b), (c).

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Bill Analysis: Section 2 adds a new subdivision (3) to Rule 42(b), applicable in medical malpractice actions in which the plaintiff seeks damages of at least \$75,000 that will:

- require the court, on motion of any party, to order separate trials on the issue of liability and damages
- prohibit the admission of evidence relating solely to compensatory damages until liability is established
- require the same trier of fact to try the liability-related issues and the damages-related issues

Section 3 – Liability Limit for Noneconomic Damages

Current law: There currently is no limit on the amount of noneconomic damages for which a medical malpractice defendant may be found liable. However, trial courts are authorized under Rule 59 of the Rules of Civil Procedure to order a new trial if it appears that excessive or inadequate damages have been given under the influence of passion or prejudice or if the evidence is insufficient to justify the verdict. G.S. 1A-1, Rule 59(a)(6), (7).

Bill Analysis: Section 3 adds a new G.S. 90-21.19 to Article 1B of Chapter 90 of the General Statutes that will:

- impose a cap on noneconomic damages in medical malpractice actions of **\$500,000 per defendant per occurrence (increased by PCS from former \$250,000 cap)**
- define "noneconomic damages" as "damages to compensate for pain, suffering, emotional distress, loss of consortium, inconvenience, physical impairment, disfigurement, and any other non-pecuniary, compensatory damage"
- prohibit informing the jury of the cap on noneconomic damages

Section 4: Periodic Payment of Future Economic Damages

Current law: An award of future damages is reduced to its present value by the trier of fact, to be paid in one lump sum as part of the judgment. N.C. Pattern Jury Instruction – Civil – 810.16.

Bill Analysis: Section 4 enacts a new G.S. 90-21.19A that will:

- require the verdict form to indicate specifically the amount being awarded for future economic damages, **and what amount of the future economic damages, if any, represents damages awarded for loss of future earnings or loss of future household services (added by PCS)**
- in cases where the present value of the future economic damages awarded by the trier of fact is at least **\$200,000 (increased by PCS from former \$75,000 threshold)**, require the court to enter an order on motion of any party that the future economic damages be paid in whole or in part by periodic payments rather than by a lump-sum payment
- require that any judgment ordering future periodic payments also order that the payments be made through a trust fund or purchase of an annuity for the life of the plaintiff on terms approved by the court, including the amount and schedule of the periodic payments
- provide that upon the death of the plaintiff the liability for payment of future periodic payments not yet due will cease, except that the court entering the original judgment may modify the judgment to provide that future periodic payments to compensate the plaintiff for loss of future earnings **or loss of future household services (added by PCS)** shall continue

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to be paid to persons surviving the plaintiff to whom the plaintiff owed a duty of support pursuant to law

Section 5: Form of Verdict in Medical Malpractice Actions

Current law: There is no current statutory requirement that separate elements of damages must be separately stated in a verdict or award of damages.

Bill Analysis: Section 5 enacts a new G.S. 90-91.19B requiring that the verdict or award of damages in a medical malpractice action indicate specifically the amount being awarded for noneconomic damages, present economic damages, future economic damages, **loss of future earnings, and loss of future household services**, and requiring the court to instruct the jury on the statutory definitions of these damages.

Section 6: Modified Appeal Bond (entirely rewritten by current PCS)

Current law: In order to stay execution of a money judgment during the pendency of an appeal, an appellant is required to post a bond equal to the amount of the judgment. However, in cases in which the judgment exceeds \$25 million, the bond is limited to \$25 million, unless the appellee proves that the appellant is seeking to evade the judgment by dissipating, secreting, or diverting its assets. G.S. 1-289.

Bill Analysis: Section 6 amends G.S. 1-289 by requiring the court entering judgment to specify the amount of the bond required to stay execution. This this decision to be made after notice and hearing, and based on the following factors:

- the amount of the judgment
- the amount of the limits of all applicable liability policies of the appellant judgment debtor
- the aggregate net worth of the appellant judgment debtor

Section 6.1: Expert Witness Certification (added by current PCS)

Current Law: Rule 9(j) of the Rules of Civil Procedure requires that the complaint in any medical malpractice action must assert that the plaintiff's expert witness has reviewed "the medical care" given to the plaintiff.

Bill Analysis: The PCS adds a requirement that the complaint assert that the medical expert has reviewed the medical care and "all medical records pertaining to the alleged injury then available to the plaintiff after reasonable inquiry."

Section 6.2: Expert Witness Discovery (added by current PCS)

Current Law: Rule 26(f1) of the Rules of Civil Procedure provides, in pertinent part, that the court conduct a discovery conference in medical malpractice cases, at which the court shall "[e]stablish an appropriate schedule for designating expert witnesses . . . to be complied with by all parties to the action such that there is a deadline for designating all expert witnesses within an appropriate time for all parties to implement discovery mechanisms with regard to the designated expert witnesses.

Bill Analysis: Section 6.2 of the PCS amends Rule 26(f1) to require that each expert witness designation shall be accompanied by a written report prepared and signed by the expert witness, and containing:

Senate PCS 33

Page 5

- a complete statement of all opinions to be expressed and the basis and reasons therefor
- the information considered by the witness in forming the opinions
- the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years
- the compensation the witness is to be paid for the study and testimony
- a listing of any other cases in which the witness has testified as an expert within the preceding four year

Section 6.2 of the PCS would also limit the expert's testimony on direct examination to the fair scope of the expert report disclosed pursuant to this rule. In addition, no depositions of experts would be permitted unless the court otherwise orders for good cause shown.

Section 7: Severability

Bill Analysis: Section 7 of the PCS provides that if Section 3 of the act is declared to be invalid. Sections 4 and 5 of the act are repealed, but the invalidity of Section 3 will not affect other provisions of the act that can be given effect without the invalid provision.

EFFECTIVE DATE: The effective date of the act is October 1, 2011. Sections 1, 3, 4, 5, 6.1 and 6.2 apply to causes of action arising on or after October 1, 2011. Sections 2 and 6 apply to actions commenced on or after October 1, 2011.

S33-SMTG-4(CSTG-1) v1

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

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SENATE BILL 33
PROPOSED COMMITTEE SUBSTITUTE S33-CSTG-1 [v.8]

2/23/2011 4:23:46 PM

Short Title: Medical Liability Reforms.

(Public)

Sponsors:

Referred to:

February 3, 2011

A BILL TO BE ENTITLED

1
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 TO REQUIRE CERTAIN INFORMATION BE
14 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 factsfact is satisfiedfinds 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 at the time of the alleged act giving rise to the cause of action.

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



* S 3 3 - C S T G - 1 - V - 8 *

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

2 "(b) Separate trials. –

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

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

13 (3) Upon motion of any party in a medical malpractice action commenced under
14 Article 1B of Chapter 90 of the General Statutes wherein the plaintiff seeks
15 damages in an amount equal to or greater than seventy-five thousand dollars
16 (\$75,000), the court shall order separate trials for the issue of liability and
17 the issue of damages. Evidence relating solely to compensatory damages
18 shall not be admissible until the trier of fact has determined that the
19 defendant is liable for medical malpractice. The same trier of fact that tried
20 the issues relating to liability shall try the issues relating to damages."

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

23 **"§ 90-21.19. Liability limit for noneconomic damages.**

24 (a) In any medical malpractice action against a health care provider in which the
25 plaintiff is entitled to an award of noneconomic damages, the amount of noneconomic damages
26 for which judgment is entered shall not exceed five hundred thousand dollars (\$500,000) per
27 defendant per occurrence. In the event that any verdict or award of noneconomic damages
28 stated pursuant to G.S. 90-21.19B(1) exceeds five hundred thousand dollars (\$500,000) per
29 defendant per occurrence, the court shall modify the judgment as necessary to conform to the
30 requirements of this subsection.

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

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

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

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

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

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

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

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

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

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

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

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

35 **"§ 90-21.19B. Verdicts and awards of damages in medical malpractice actions; form.**

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

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

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

49 **SECTION 6.** G.S. 1-289 reads as rewritten:

50 **"§ 1-289. Undertaking to stay execution on money judgment.**

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

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

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

32 (1) The amount of the judgment.

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

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

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

43 (c) If the appellee proves by a preponderance of the evidence that the appellant for
44 whom the undertaking has been limited under ~~subsection~~ subsections (a2) and (b) of this
45 section is, for the purpose of evading the judgment, (i) dissipating its assets, (ii) secreting its
46 assets, or (iii) diverting its assets outside the jurisdiction of the courts of North Carolina or the
47 federal courts of the United States other than in the ordinary course of business, then the
48 ~~limitation~~ limitations in ~~subsection~~ subsections (a2) and (b) of this section shall not apply and
49 the appellant shall be required to make an undertaking in the full amount otherwise required by
50 this section."

51 **SECTION 6.1.** G.S. 1A-1, Rule 9(j) reads as rewritten:

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

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

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

33 **SECTION 6.2.** G.S. 1A-1, Rule 26(f1) reads as rewritten:

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

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

1 and testimony; and a listing of any other cases in which the witness has
2 testified as an expert at trial or by deposition within the preceding four years.
3 The party shall supplement the expert's report if the party learns that in some
4 material respect the report is incomplete or incorrect. The expert's direct
5 testimony shall not be inconsistent with or go beyond the fair scope of the
6 expert report as supplemented. The parties shall not depose expert witnesses,
7 unless the court otherwise orders for good cause shown.

8 ..."

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

14 **SECTION 8.** This act becomes effective October 1, 2011. Sections 1, 3, 4, 5, 6.1
15 and 6.2 apply to causes of action arising on or after the effective date. Sections 2 and 6 apply
16 to actions commenced on or after the effective date.

VISITOR REGISTRATION SHEET

Select Committee on Tort Reform

February 24, 2011

Name of Committee

Date

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NAME

FIRM OR AGENCY AND ADDRESS

Andy Ellen	NCLM
Robert F. Schol	Young Men
Jolie Brucan Conn	Cipstrat
Andrew Meehan	Cipstrat
Michelle Frazier	MFS
Ray Jones	UDO
Chris Wolla	all
Amy McConkey	NCBEV
Maura St.	Smith Anderson
Matthew Eistey	Smith Anderson
Jon McKelley	Nelson Mullins
David	SA
Samy Jhup	SA
Philip Eistey	MTJ

VISITOR REGISTRATION SHEET

Select Committee on Tort Reform

February 24, 2011

Name of Committee

Date

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NAME

FIRM OR AGENCY AND ADDRESS

Burt Craige	NCAJ
Dick Tye	NCAJ
Todd Barton	NCAJ
Yan Q 2	City
Paul Pully	NCAJ
Nick Stewart	Rep. McLawhorn
Tucker Knott	N/A
Jessi Hayes	NCHBA
Matthew Brown	NARELL
John Patis	NCAJ
Doug Heas	Williams Murren

HOUSE PAGES

NAME OF COMMITTEE Select Committee on Port Reform DATE Feb 24, 2011

1. Name: Hannah Brockman

County: Gaston

Sponsor: William Current

2. Name: Leas Krenibus

County: Orange

Sponsor: Tillis

3. Name: _____

County: _____

Sponsor: _____

4. Name: _____

County: _____

Sponsor: _____

5. Name: _____

County: _____

Sponsor: _____

Committee Sergeants at Arms

HOUSE SELECT COMMITTEE ON
TORT REFORM

NAME OF COMMITTEE

DATE: FEB 24

Room: 1228

House Sgt-At Arms:

1. Name: Billy Jones

2. Name: Doug Harris

3. Name: Ken Kirby

4. Name:

5. Name:

Senate Sgt-At Arms:

1. Name:

2. Name:

3. Name:

4. Name:

5. Name:

AGENDA

HOUSE SELECT COMMITTEE ON TORT REFORM

Wednesday, March 23, 2011

Room 425

11:00 am

- I. Welcome and opening remarks
- II. Review committee schedule
- III. Presentation of bill
- IV. Speaker
- V. Solicitation of input
- VI. Adjournment

MINUTES
HOUSE SELECT COMMITTEE ON TORT REFORM
Wednesday, March 24, 2011

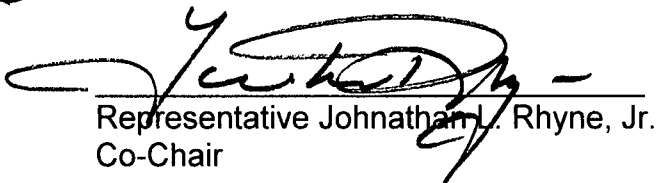
Upon call of Chairman Rhyne, the House Select Committee on Tort Reform met on Wednesday, March 23, 2011, at 11:00 a.m. in room 425 of the Legislative Office Building. The following members were present: Danny McComas, Johnathan Rhyne, Co-Chairs; Tim Moffitt, Tom Murry, Vice-Chairs; Representatives Brisson, Carney, Dockham, Gillespie, McGrady, McLawhorn, Mills, Parfitt, Parmon, Randleman, Samuelson, and Weiss.

Chairman Rhyne called the meeting to order. Chairman Rhyne explained the proposed Tort Reform bill.

Chairman Rhyne introduced John Del Giorgio of GlaxoSmithKline who spoke to the committee (see attached remarks).

The meeting adjourned at 11:50 a.m.

Respectfully submitted,


Representative Johnathan L. Rhyne, Jr.
Co-Chair


Susan Beaupied
Committee Assistant

**TESTIMONY OF JOHN DELGIORNO, ESQ.
GLAXOSMITHKLINE
RESEARCH TRIANGLE PARK
NORTH CAROLINA**

**SUPPORTING DRAFT 2011-MH-13 [V.24], AN ACT TO
PROVIDE TORT REFORM FOR NORTH CAROLINA CITIZENS AND BUSINESSES**

**BEFORE THE NORTH CAROLINA
HOUSE SELECT COMMITTEE ON TORT REFORM**

MARCH 23, 2011

Mr. Chairman and Members of the Committee, I am appearing on behalf of GlaxoSmithKline (“GSK”) to express GSK’s support for civil justice reform and a number of the provisions in Draft 2011-MH-13.

Background

I am Vice President of Government Relations for GlaxoSmithKline and I work closely with the North Carolina Chamber of Commerce on legal reform issues. Before joining GSK 17 years ago, I was a litigation attorney in the Chicago area. I received my J.D. from John Marshall Law School in Chicago and an M.S. in educational psychology from Southern Illinois University.

GSK’s Interest

GSK is a research-based, global health care company with significant operations in Research Triangle Park, North Carolina, employing about 6,000 people throughout the state. GSK is dedicated to helping people do more, feel better, and live longer. Our research staff of highly skilled scientists is among the largest in the pharmaceutical industry. Their considerable expertise and long-established experience in the clinical sciences, biostatistics, epidemiology, pharmacovigilance and health outcomes research ensures that GSK has a robust supply of disease-based information and population perspectives required to identify, develop, and bring to the marketplace, safe and effective medicines that address unmet health needs.

GSK, along with the North Carolina Chamber of Commerce and the business coalition supporting legal reform, strongly believes a state’s legal climate can be a major factor driving a company’s decisions about business investment and job creation. Companies look for fairness and predictability, so they can structure their business dealings to conform to the law. They also look for a cost-effective and efficient civil justice system. This allows business disputes and

legal claims to be resolved effectively, without creating unnecessary distractions or depleting the financial resources and employee time and energy needed to respond to customers' needs for beneficial products and services and to carry out corporate fiduciary responsibilities to return profits to shareholders.

Unfortunately, the U.S. civil liability system is the most expensive in the world, increasingly putting companies in North Carolina and other states at a disadvantage compared with their international competitors. Our country spends 2.2% of its GDP on civil liability costs, twice that of industrialized countries with standards of living comparable to ours.¹ Annual civil liability costs in the United States, on average, have increased more than nominal GDP. Even setting aside judgments and settlements, litigation transaction costs have risen substantially over the past decade and are consuming an increasing percentage of corporate revenues. A recent survey of Fortune 200 companies found that the average litigation cost per company (excluding internal company costs) was *nearly \$115 million in 2008, up 73 percent from \$66 million in 2000* – representing an average increase of 9 percent each year.² Between 2000 and 2008, average annual litigation costs as a percent of revenues increased *78 percent* for the companies providing this data for the full survey period.³ What's more, the U.S. litigation system imposes a

¹ Tillinghast Towers-Perrin, *U.S. Tort Costs and Cross-Border Perspectives: 2005 Update* 4, 6 tbl. 3 (2006), available at http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2006/200603/2005_Tort.pdf.

² Lawyers for Civil Justice et al., *Litigation Cost Survey of Major Companies* 7-8 & fig. 4 (2010). This figure reflects responses from 20 companies in 2000 increasing to 36 companies in 2008. The average litigation costs for the 20 companies responding for all years increased from \$66 million in 2000 to \$140 million in 2008, while the total litigation costs of these 20 companies grew from \$1.3 billion in 2000 to \$2.75 billion in 2008. *Id.* at 8 & fig. 5.

³ *Id.* at 9 & fig. 5 (14 companies responding).

much greater cost burden on companies than systems outside the United States. The survey of Fortune 200 companies found that on average, a company's U.S. litigation costs as a percent of U.S. revenues were *4 to 9 times higher*, depending on the year, than were non-U.S. costs as a percent of non-U.S. revenues.⁴ Imagine a company disadvantaged by these expenses trying to compete for business opportunities and employee talent against foreign companies with a fraction of these costs.

It's not just U.S.-based companies that are disadvantaged – the costs of the U.S. civil justice system adversely affect the economic development of North Carolina and other states, and the prosperity of their citizens too. The disparity in civil liability costs will inevitably affect decisions by corporations about where to invest their resources.⁵ Global competition for foreign investment is increasing, and the changing dynamics of the global economy are affecting the United States' ability to remain a leader. The International Trade Administration at the U.S. Department of Commerce has found that “many foreign investors view the U.S. legal environment as a liability when investing in the United States.”⁶ If civil liability costs are significantly higher in the U.S. than in other countries, and the situation is left unchecked as

⁴ *Id.* at 14 & fig. 9.

⁵ While the U.S. is still a leader in attracting foreign direct investment (“FDI”), its global share of FDI declined from 31 percent in 1980 to 13 percent in 2006. International Trade Administration, U.S. Department of Commerce, *Assessing Trends and Policies of Foreign Direct Investment in the United States* 6 (2008), available at <http://www.trade.gov/publications/abstracts/trends-policies-fdi-2008.asp>.

⁶ *Id.* at 7.

economic differences between countries narrow, the United States will be unable to compete effectively in the global marketplace.⁷

The North Carolina Chamber set forth studies showing that job growth and revenue growth is greater in the states with the best civil justice systems. In 2006 job growth in the 10 states ranked as having the best system was 57% greater than the 10 with the worst systems and the growth of tax revenue was 24% greater.⁸ Since 1995, a series of legal reforms in Texas have created nearly half a million permanent jobs.⁹ GSK believes that the draft bill you have before you, 2011-MH-13, is a good start on legislation to foster a fair, predictable, and cost-effective civil justice system that should help create jobs and economic opportunities for citizens and businesses in North Carolina. We support a number of reforms in the proposed bill.

Regulatory Compliance Defense to Liability

The draft bill includes a regulatory compliance defense that respects the authority of expert government regulators and offers strong incentives for companies to comply with government requirements, appropriately rewarding behavior that is in the public interest. (See Section 3.1.) The bill provides immunity from liability in products liability actions if the product complies with relevant regulatory requirements or government approvals, unless the government

⁷ See Robert E. Litan, *In Their Eyes: How Foreign Investors View and React to the U.S. Legal System* 4 (2007), available at <http://www.instituteforlegalreform.com/issues/docload.cfm?docid-1059>; see also International Trade Administration, U.S. Department of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment* (2008), available at http://www.commerce.gov/NewsRoom/PressReleases_FactSheets/index.htm?ssYear=2008&ssMonth=10 (considering concerns about the impact of U.S. legal system on foreign investment and recommending steps to address them).

⁸ Lawrence J. McQuillan & Hovannes Abramyian, U.S. Tort Liability Index: 2008 Report 53 (Pac. Research Inst. 2008).

approval was obtained by bribery or by the defendant withholding or misrepresenting material facts.

In the context of FDA-regulated medicines, the regulatory compliance defense helps assure that prescription drugs are used appropriately and that beneficial medicines remain available to consumers. It protects public health by ensuring that the FDA controls the content of drug labeling, including any warnings about product risks. The doctrine prevents additional, potentially conflicting warnings from being imposed as a result of state lawsuits.

Regulatory compliance defenses do not absolve a drug manufacturer's responsibility to provide adequate warnings and safety monitoring of its products. They simply recognize that communications on those topics are submitted to the FDA, which holds the final say on drug approvals and label changes in the most practical sense. Moreover, while the United States Supreme Court has held that an FDA approved label does not necessarily preempt state court product liability suits, states are free to enact defenses that recognize the practical interactions of drug manufacturers with their federal regulators. In fact at least seven state legislatures have enacted some form of a regulatory compliance defense specific to FDA-regulated products,¹⁰ and at least nine states have enacted more broadly applicable regulatory compliance defenses.¹¹

(...continued)

⁹ The Perryman Group, *A Texas Turnaround: The Impact of Lawsuit Reform on Business Activity in the Lone Star State*, 3 (Apr. 2008).

¹⁰ These states are Arizona, Colorado, Michigan, New Jersey, Ohio, Oregon, and Texas.

¹¹ These states are Colorado, Florida, Indiana, Kansas, Michigan, North Dakota, Tennessee, Utah, and Wisconsin.

The regulatory compliance defense recognizes, in the context of prescription medicines, that the FDA has the expert staff and institutional experience necessary to collect and analyze a wealth of information to ensure that warnings about a product's risks are appropriate and effective. FDA drug labeling regulations are designed to require consistent, effectively communicated warnings about all known risks of the drug based on reliable scientific evidence, while screening out warnings for inadequately substantiated risks. If warnings are not grounded in science, they can jeopardize public health by creating unfounded fears that discourage doctors or patients from using the medicine, or by diluting the impact of scientifically substantiated warnings.

In fact, according to a 2003 Harris Interactive Survey conducted for the U.S. Chamber of Commerce found that 43% of the doctors surveyed did not prescribe a drug that would have been appropriate for their patients because the drug might be involved in product liability litigation. About 38% of the doctors surveyed reported that their patients had stopped taking a prescribed drug because they found out it might be involved in litigation – and 29% said their patients had refused to take a prescribed drug that might be involved in litigation.

Lay judges and juries lack the expertise of expert agency regulators. They can consider only limited information in the particular matter brought before the court by the plaintiff. In litigation, each lawyer's obligation is solely to represent his or her client zealously. The adversary system of litigation is not designed to regulate the development of prescription drugs or other medical products in the interest of the public health. Differing individual rulings in individual lawsuits could result in multiple de facto "court-created" warnings from fifty different jurisdictions. These de facto court-created warnings could readily impose conflicting legal

requirements on manufacturers who already must comply with FDA regulations and on doctors and patients who might be confused about the relative importance of each warning.

The regulatory compliance defense also can encourage innovation. Robust research and development is the catalyst for safer medical products that may address previously untreatable or poorly controlled conditions. In the FDA context, the defense's limits on liability benefit public health by encouraging manufacturers to invest in the process of researching and developing new medicines. Bringing a new drug to market is risky and expensive. Only one of every 5,000 to 10,000 potential medicines is ultimately approved for patient use by the FDA. On average, obtaining this approval takes 10 to 15 years and costs over \$800 million, with much of the financial investment up front. The FDA approval process is designed to protect consumers from excessive risk, with extensive government oversight of the testing, formulation, manufacture, marketing, and distribution of drug products.

Liability protection is reasonable where the FDA has thoroughly evaluated and approved the drug for safety and efficacy. It gives manufacturers a degree of certainty in making business decisions about whether to develop a potentially promising medicine, as unwarranted and expensive litigation is less likely to undermine the companies significant investment. It also helps keep beneficial products from being pulled from the market out of concerns over the risk of excessive litigation, and helps keep prices stable.

Discouraging the Award of Medical Damages Beyond Those Actually Paid or Incurred

The draft legislation includes an important reform – it seeks to bring transparency to litigation awards and educate juries about claims for medical expenses beyond those actually paid. (See Sec. 1.1.)

In personal injury litigation, a responsible defendant pays for the plaintiff's medical care. The goal is for the plaintiff to be reimbursed for all of his or her reasonable and necessary expenses. The plaintiff is made whole. In most cases, however, defendants have to pay more, often multiple times what the plaintiff or his or her insurer actually pay, for the plaintiffs' medical care.

The discrepancy comes from the difference between the amount of medical expenses billed by a doctor (the "sticker price") and the amount that the plaintiff and his or her insurer actually paid for those services. Nobody ever paid these damages. The plaintiffs' insurer, Medicare or Medicaid have negotiated rates with health care providers. For example, a hospital may charge \$1,500 for an MRI, but the actual amount paid for that MRI might be \$500. The plaintiff may have paid a \$25 co-pay and the insurer paid the remaining \$475. Yet, in litigation, the defendant is often required to pay the full \$1,500 to the plaintiff -- \$1,000 more than anyone ever paid – simply because that amount was printed on the original bill.

For instance, in a typical slip-and-fall accident case recently upheld by a divided Colorado Supreme Court,¹² the amount paid by the plaintiff's insurer for his medical expenses came to \$43,236, while the amount billed, before application of the negotiated rate, was \$74,242. Yet, the defendant, the nonprofit Volunteers of America, was required to pay based on medical costs that included \$31,006 in medical discounts that the company had negotiated with healthcare providers. As this example shows, inclusion of such illusory costs can easily increase awards for damages in personal injury suits by 40% or more.

¹² *Volunteers of America Colorado Branch v. Gardenswartz*, 242 P.3d 1080 (Colo. 2010).

It is enormously wasteful for defendants to “over-compensate” plaintiffs for their medical bills. Aside from increasing the economic damages award, this practice drives up noneconomic and punitive damages as well. These costs tend to be passed on to consumers in the price of goods and services, including health care. The draft legislation addresses this problem by allowing the jury to hear evidence of medical bills reasonably paid and a statement of the amount actually required to satisfy the medical bills incurred but not yet paid, so jurors can make an accurate assessment of the plaintiff’s out-of-pocket medical costs. The jury also would be allowed to hear evidence of the source of any payment and rights of subrogation related to the payment.

This proposed reform would implicate the collateral source rule. The collateral source rule bars courts from considering compensation that the plaintiff has received from other sources. In many cases, the rule leads to double compensation of plaintiffs – once from an insurer, then again through a lawsuit. The rule does not serve a compensatory purpose, but aims to not permit a defendant to benefit from a plaintiff’s prudence in buying insurance. This is seen most clearly when a plaintiff has bought a life insurance policy.

Some courts consider a “negotiated rate” between an insurer and a health care provider as a benefit of the insurance policy and therefore require the jury to determine damages based on the fictional sticker price of medical care rather than the amount actually paid. Other courts find that such write-offs cannot be considered a collateral source because they are never paid and therefore cannot be considered to be “benefits.” This is the more sound conclusion because the core basis of the collateral source rule, the plaintiff’s prudence in purchasing insurance, is irrelevant.

Expert Evidence Reform

The draft bill proposes to adopt the federal “Daubert” rule governing the admission of expert witness testimony. (Sec. 1.5.) When a case goes to trial, information provided by experts on scientific facts and professional opinions can significantly influence the outcome of a case. The research and opinion of a trained expert is taken to be much more reliable than that of a standard witness. For this reason, it is critical that these experts are indeed qualified to deliver facts and educated opinions, especially in complex, high-stakes litigation like that faced by a number of N.C. businesses. But unfortunately, sometimes loose expert standard rules allow the opinions of inappropriately trained experts to masquerade as fact. The draft legislation creates additional requirements for the admission of expert witness testimony to ensure that the testimony is reliable. Also, by helping assure that the federal and North Carolina standards are similar, the bill would help prevent forum shopping while keeping our state’s courts from being flooded with cases based on insufficiently reliable expert evidence that cannot pass muster in federal courts.

Conclusion

The draft tort reform bill is a good and much appreciated step toward creating a fairer environment for all litigants in North Carolina. We look forward in working with the Committee, the Legislature, and the citizens of North Carolina to finalize and enact legislation designed to strengthen the state’s economy and make it more competitive in the national and global marketplace, while continuing to assure that truly injured people are appropriate compensated for their injuries by the responsible parties.

Thank you very much for the opportunity to speak with you today.

VISITOR REGISTRATION SHEET

SELECT COMMITTEE ON TORT REFORM

MARCH 23, 2011

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Nelma Shuill	NC Med Soc., Mission Hosp.
De Kray	NS
John McAlister	NC Chamber
Hugh Tison	NCTA
John DeBorow	GSK
Gary Salamisu	GSK
Lee-Ann Pezom	Carolin State Strategies
Sarah Davis	Deertman Law Group
Kay Paksoy	NASW-NC

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Erin Sember	Eagle Physicians + Assoc. 324 W Wendover Ave Greensboro, NC 27408
Jay Easley	SunTrust - Guilford County resident
Melissa Strickland	Guilford Orthopaedics Greensboro NC
Elizabeth Robinson	NORMA
Andrew Meehan	CapStrat
Bob Steum	NCFA
Debra DeSantis	Jeffers Mann & Artman Peds
Peggy Williams	Jeffers, Mann, Artman Peds
Sheila Elliott	MAG Mutual Jeffers Mann and Artman Peds
Michael Artman	
Larry Mann	Jeffers Mann and Artman. Peds.

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Robert Howard	MCIC
Ork Bolton	Atty -
Lindsay Moore	Rep. Weiss
Joe Lanier	NELSON MULZINS
Charles Marshall	Brooks Pierce
Michelle Brooks	University Health System of Eastern Carolina
Rick Zechini	Prognosis Group

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NABIL SALAMEH M.D	WFU BAPTIST DEPT OF Anesthesiology
Maan AA	Smith Anderson
Greg Flynn	gregflynn.org
ALLEN BETTZ	GIBLW
12th Kayla	Kayla LaFon
Robert PASCHAL	Young Moore
Joseph Phillips	NCFB
Dave Don	SA
Rose Williams	NC DOT
Buy NATEAN	GIBIN
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FIRM OR AGENCY AND ADDRESS

Beacham Way	Health Care Mgt Assoc
Susan Wolf	Wendover OB/GYN & Infertility, Inc
Donna Mosley	Westside OB/GYN Burlington NC
Mary Elizabeth Waldman	Central Cancer Surgery Greensboro, NC
Joy Peters	J.P. Peters
Pam Suer	Creedmoor Centre Medical Assoc, PA
Herman Hutaff	N.P.B.D.
John Burkard MD	Capital Family Physicians
Cardyn Green	Piedmont Adult Medicine
Pat Pully	NCAJ
Dick Taylor	NCAJ
Burton Cange	NCAJ

VISITOR REGISTRATION SHEET

SELECT COMMITTEE ON TORT REFORM

MARCH 23, 2011

Name of Committee

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME

FIRM OR AGENCY AND ADDRESS

Lee Tackitt	NCHS
Lou Wilson	NCAITCF
Pam Saunders	Carolina Neurosurgery & Spine
Chip Bygones	NCHS
Larry McIntyre	Charlotte Radiology
Michael Iacono	Mid Atlantic Emergency Med Assoc PA
Jacob Radman	Onslow Urgent Care
W. H. Polk	Gov. Office.
Calvin B. Marshall	Pathologists' Medical Laboratory, P12 Asheville, NC
ROBERT JEFFERS, MD	JEFFERS, MAW + ARTMAN PEDIATRICS
Don Sipes	Simon Anders

VISITOR REGISTRATION SHEET

SELECT COMMITTEE ON TORT REFORM

MARCH 23, 2011

Name of Committee

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME

FIRM OR AGENCY AND ADDRESS

Susan Valera	NCU
Ally Ell	NCA
Joan Erwin	retired State Lawyer, interested citizen
Betsy Bailey	PENC
Steve Keene	NCMS
Amy White d	NCMS
DAVID BARNES	Pagan Spain U
Gregg Thompson	NFIB
Crystal Collins	NCTA
Ally Ell	Casper

HOUSE PAGES

NAME OF COMMITTEE TORT REFORM DATE 3-23-11

1. Name: GREGORY REAVES

County: MOORE

Sponsor: REP. TILLIS

2. Name: _____

County: _____

Sponsor: _____

3. Name: _____

County: _____

Sponsor: _____

4. Name: _____

County: _____

Sponsor: _____

5. Name: _____

County: _____

Sponsor: _____

Committee Sergeants at Arms

NAME OF COMMITTEE TORT REFORM

DATE: 3-23-2011 Room: 425

House Sgt-At Arms:

1. Name: R. L. CARTER

2. Name: BILL BASS

3. Name: _____

4. Name: _____

5. Name: _____

Senate Sgt-At Arms:

1. Name: _____

2. Name: _____

3. Name: _____

4. Name: _____

5. Name: _____

AGENDA

HOUSE SELECT COMMITTEE ON TORT REFORM

Thursday, March 31, 2011
Room 1327 LB
11:00 AM

- I. Welcome and introductions
- II. Note that tort reform bill has now been filed: HB 542 with sponsors Representatives Rhyne, McComas, Brisson and Crawford
- III. Speakers—each speaker may take 8 minutes. [*Due to time constraints and to be respectful to the other speakers, questions will not be taken today; we will ask the speakers to stay after the meeting for informal questions and to give the committee clerk their contact information for distribution to the members.*]

Dick Taylor/Burton Craig—N.C. Advocates for Justice

Kenneth Kyre—Pinto, Coates, Kyre and Brown

Bill Wilson—AARP

Dr. Charles Bregier—President, N.C. College of Emergency Physicians

Gary Clemmons—Chesnutt, Clemmons & Peacock/Jon Moore/Evan Griffin

David Hood—Patrick, Harper & Dixon

Janet Ward Black—Ward Black Law

Frederick Rom—Womble, Carlyle, Sandridge and Rice

Laurie Sanders/April Messer/Dr. John Faulkner—N.C. Coalition
for Patient Safety

Sammy Thompson—Smith, Anderson, Blount, Dorsett, Mitchell &
Jernigan

Edward LeCarpentier, Lawyers Mutual Insurance Company

Bob Crumley—Crumley and Associates

Julian Philpott/Steve Woodson—N.C. Farm Bureau

MINUTES
HOUSE SELECT COMMITTEE ON TORT REFORM
Thursday, March 31, 2011

Upon call of the Chair, the House Select Committee on Tort Reform met on Thursday, March 31, 2011 in room 1327 of the Legislative Building. The following members were present: Danny McComas, Johnathan Rhyne, Co-Chairs; Jim Crawford, Tim Moffitt, Tom Murry, Vice-Chairs; Representatives Brisson, Carney, Dockham, Hill, McGrady, McLawhorn, Mills, Parfitt, Parmon, Randleman, Stam, and Weiss.

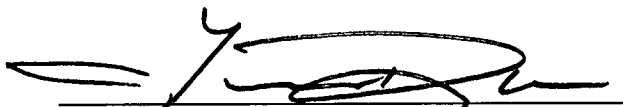
Chairman McComas called the meeting to order. After explaining that each speaker had eight minutes in which to speak, Chairman McComas called the first speaker. The following is a list of those who spoke:

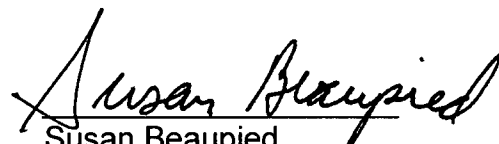
Dick Taylor, N.C. Advocates for Justice
Kenneth Kyre, Pinto, Coates, Kyre and Brown
Bill Wilson, AARP
Dr. Charles Bregier, President, N.C. College of Emergency Physicians
Gary Clemmons, Chesnutt, Clemmons & Peacock
Jon Moore
David Hood, Patrick, Harper & Dixon
Janet Ward Black, Ward Black Law
Frederick Rom; Womble, Carlyle, Sandridge and Rice
Laurie Sanders, N.C. Coalition for Patient Safety
Sammy Thompson; Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan
Edward LeCarpentier; Lawyers Mutual Insurance Company
Julian Philpott; N.C. Farm Bureau
Dr. John Faulkner; N.C. Coalition for Patient Safety

Chairman Rhyne made brief remarks in closing.

Chairman McComas adjourned the meeting at 12:39 pm.

Respectfully submitted,


Representative Johnathan L. Rhyne, Jr.
Co-Chair


Susan Beaupied
Committee Assistant

House Committee Pages / Sergeants at Arms

NAME OF COMMITTEE House Select Com. Test Reform

DATE: 3-31-11

Room: 1228

*Name: Regan Hall

County: Guilford

Sponsor: John Faircloth

*Name: Kathryn COOKE

County: Wake

Sponsor: Paul Stam

Name: _____

County: _____

Sponsor: _____

*Name: _____

County: _____

Sponsor: _____

*Name: _____

County: _____

Sponsor: _____

House Sgt-At Arms:

1. Name: Billy Jones

4. Name: _____

2. Name: Wayne Davis

5. Name: _____

3. Name: Bill MacRae

6. Name: _____

VISITOR REGISTRATION SHEET

SELECT COMMITTEE ON TORT REFORM

MARCH 31, 2011

Name of Committee

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME

FIRM OR AGENCY AND ADDRESS

NAME	FIRM OR AGENCY AND ADDRESS
Chris Nichols	106 Kipling Pl Raleigh, NC
Phillip Miller	Blankenship Miller Lewis Lacey Raley
Jon Moore	Brown Moore & Associates 930 East Blvd., Charlotte, NC
Meredith Hinton	Ricci Law Firm Greenville NC
Bob Sproun	NCFR
Brandon McPherson	Campbell Law
Montague	NMRS
Matthew Easley	Smith Anderson
Steve Woodson	NCFB
John P. Priest	NCAOA
Suzie Adcock	N.C. Lawyers Weekly

VISITOR REGISTRATION SHEET

SELECT COMMITTEE ON TORT REFORM

MARCH 31, 2011

Name of Committee

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME

FIRM OR AGENCY AND ADDRESS

NAME	FIRM OR AGENCY AND ADDRESS
Cady Thomas	NCAR
Allison Waller	Charotte Chamber
Colleen Koclanek	NC College of Emergency Physicians
Charles Bregier MD	" " " "
Cott Wilkiant	New Hanover Regional Medical Center
Janelle A Rhyme MD	Cape Fear Health Net
Dick Carlton	atky,
David V. H. P.	atky
John Hood	JLF
Bob Rosso	Conductal Communitarians
Barbara Conster	BBCC

VISITOR REGISTRATION SHEET

SELECT COMMITTEE ON TORT REFORM

MARCH 31, 2011

Name of Committee

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME

FIRM OR AGENCY AND ADDRESS

Nancy Shimpson	Weyerhaeuser
Joel Maynard	NCAPP
Tacher LeCarpentier	Lawyers Mutual and Natl Structured Settlement Trade Assn
David Stradley	White & Stradley, PLLC
Robert Paschel	Young Mason
Bill Rouse	NC Justice Center
Todd Barlow	NC Advocates for Justice
Matt Wolfe	Parker Poe
Joime King	NCFL
Dave Smith	CAGC
Jason Deans	JCS

VISITOR REGISTRATION SHEET

SELECT COMMITTEE ON TORT REFORM

MARCH 31, 2011

Name of Committee

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME

FIRM OR AGENCY AND ADDRESS

Eileen Townsend	Dept of Public Instruction, Raleigh
Laurie Sanders	N.C. Coalition for Patient Safety
Donn Heron	WILLIAMS MULLAN
ANGELA D. HARRIS	" "
Amy Eller	NCHCFA
Elizabeth Libison	NCHCFA
Yvonne O'Keefe	Smith Anderson
Kristi Huff	NCHCFA
Amy McConkey	NC Bev Assn
Sandy Sands	Umm
Isabel Cooper	Cooper PC

VISITOR REGISTRATION SHEET

SELECT COMMITTEE ON TORT REFORM

MARCH 31, 2011

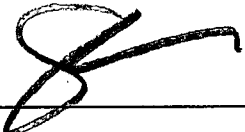
Name of Committee

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME

FIRM OR AGENCY AND ADDRESS

Emily Grimm	MWC
Greg Bethz	GTW
Billy Warden	GTW
De Keady	NCS
Mani Woldy	No rant
Chp Bygott	NCS
Pyth Maynard	
Tom Peterson	CAPERAD
BJ Miller	MOSES CORP
TARA FIELDS	Benchmarks
Joe Bataik	Yancey : Utipil

VISITOR REGISTRATION SHEET

SELECT COMMITTEE ON TORT REFORM

MARCH 31, 2011

Name of Committee

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME

FIRM OR AGENCY AND ADDRESS

Paul Pulley	MCATJ
Burtin Craige	NCAJ
Pringh	NCAJ
Janet Ward Black	Ward Black Law
Gary H. Clemmons	Chesnut, Clemmons + Peacock, P.A.
Bell Wilson	AARP
Sara Fender	IFNC
Sunny Thompson	S.A.
Dunston	S.A.
Becki Gray	John Locke Journalists
Ben Matthea	NCDPJ

AGENDA

HOUSE SELECT COMMITTEE ON TORT REFORM

Thursday, April 7, 2011
Room 1327 LB
11:00 AM

OPENING REMARKS

Representative Danny McComas, Co-Chair
House Select Committee on Tort Reform

AGENDA ITEMS

SB 33 MEDICAL LIABILITY REFORMS

ADJOURNMENT

MINUTES
HOUSE SELECT COMMITTEE ON TORT REFORM
Thursday, April 7, 2011

Upon call of the Chair, the House Select Committee on Tort Reform met on Thursday, April 07, 2011 in room 1327 of the Legislative Building. The following members were present: Danny McComas, Johnathan Rhyne, Co-Chairs; Jim Crawford, David Lewis, Tim Moffitt, Tom Murry, Vice-Chairs; Representatives Barnhart, Brisson, Carney, Dockham, Dollar, Faison, Gillespie, Hall, Hill, McGrady, McLawhorn, Mills, Owens, Parfitt, Randleman, Samuelson, Stam, and Weiss.

Chairman McComas called the meeting to order.

Chairman McComas recognized Rep. Rhyne to explain the proposed committee substitute for Senate Bill 33.

Chairman McComas recognized Rep. Stam to explain amendment #1. The amendment was adopted.

Chairman McComas recognized Rep. Mills to explain amendment #2. The amendment failed.

Chairman McComas recognized Rep. Mills to explain amendment #3. The amendment was tabled.

Chairman McComas recognized Rep. Stam to explain amendment #4. Rep. Rhyne offered a perfecting amendment (4a) which was adopted. Amendment #4 was withdrawn.

Chairman McComas recognized Rep. Faison to explain amendment #5. The amendment failed.

Chairman McComas recognized Rep. Hall to explain amendment #6. The amendment failed.

Chairman McComas recognized Rep. Murry to explain amendment #7. The amendment was adopted.

Chairman McComas recognized Rep. McGrady to explain amendment #8. Rep. Stam offered a perfecting amendment (8a) which was adopted. Amendment #8 was tabled.

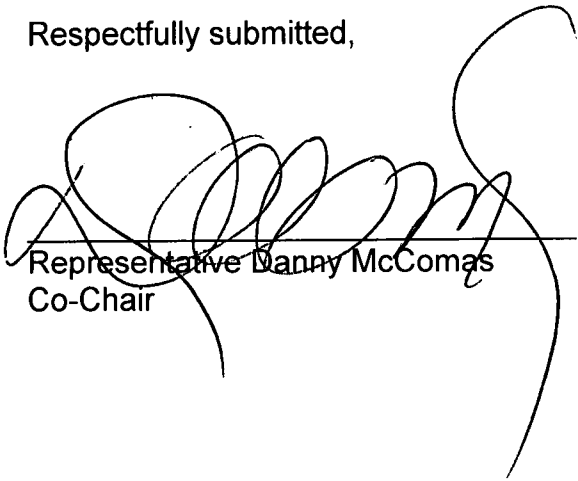
Chairman McComas recognized Rep. Rhyne to explain amendment #9. The amendment was adopted.

Chairman McComas recognized Rep. Hall to explain amendment #10. The amendment failed.

Chairman McComas recognized Rep. Hall to explain amendment #11. After discussion, a division vote was called for. The amendment failed; 9 voting in favor, 15 voting against the amendment.

Chairman McComas dismissed the meeting at 12:48.

Respectfully submitted,



Representative Danny McComas
Co-Chair



Susan Beaupied
Committee Assistant



NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 33

AMENDMENT NO. 1
(to be filled in by
Principal Clerk)

S33-ATG-46 [v.8]

Page 1 of 1

Comm. Sub. [NO]
Amends Title [NO]
Third Edition

Date April 17, 2011

Representative Stam

- 1 moves to amend the bill on page 1, lines 11 - 12, by rewriting those lines to read:
- 2 "yet paid.".
- 3

SIGNED *Stam*
Amendment Sponsor

SIGNED *C*
Committee Chair if Senate Committee Amendment

ADOPTED FAILED TABLED





1.1

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 33

AMENDMENT NO. 2
(to be filled in by
Principal Clerk)

S33-AMH-21 [v.4]

Page 1 of 1

Comm. Sub. [YES]
Amends Title [NO]
S33-CSMH-6

Date April 7, 2011

Representative Mills

- 1 moves to amend the bill on page 1, lines 6 through 12, by deleting those lines;
- 2 and by renumbering the remaining sections accordingly.

SIGNED [Signature]
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED ✓ TABLED _____



* S 3 3 - A M H - 2 1 - V - 4 *



1.1

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 33

AMENDMENT NO. 3
(to be filled in by
Principal Clerk)

S33-ATG-53 [v.1]

Page 1 of 1

Comm. Sub. [YES]
Amends Title [NO]
Third Edition

Date April 7, 2011

Representative Mills

- 1 moves to amend the bill on page 1, lines 9-12, by rewriting those lines to read:
- 2
- 3 "Evidence offered to prove past medical expenses may include all bills reasonably paid and a
- 4 statement of the amounts actually necessary to satisfy the bills that have been incurred but not
- 5 yet paid, unless the amount paid or to be paid is different from the incurred bill because of
- 6 insurance procured by the plaintiff through employment or payment of premium. In the event
- 7 that the amount paid or to be paid is introduced, then evidence of source of payment and rights
- 8 of subrogation related to the payment shall be admissible".
- 9
- 10

SIGNED *[Signature]*
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED ✓





NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 33

AMENDMENT NO. 4
(to be filled in by
Principal Clerk)

S33-ATG-47 [v.5]

Page 1 of 1

Comm. Sub. [YES]
Amends Title [NO]
Third Edition

Date April 7, 2011

Representative Stam

- 1 moves to amend the bill on page 3, line 9, by rewriting the line to read:
- 2 "damages exceeding two hundred fifty thousand dollars (~~\$250,000~~), the court shall".
- 3 \$150,000
- 4

SIGNED Stam
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____



NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. _____

H. B. No. _____

S. B. No. 33

COMMITTEE SUBSTITUTE

DATE April 7, 2011

Amendment No. 4a

(to be filled in by
Principal Clerk)

Rep.) Rhyme JR
Sen.)

1 moves to amend ^{and #4} the bill on page 1, line 2

2 () WHICH CHANGES THE TITLE

3 by deleting the words "two hundred fifty thousand dollars
4 (\$250,000)", and substituting the words
5 "one hundred fifty thousand dollars (\$150,000)".

- 6 _____
- 7 _____
- 8 _____
- 9 _____
- 10 _____
- 11 _____
- 12 _____
- 13 _____
- 14 _____
- 15 _____
- 16 _____
- 17 _____
- 18 _____
- 19 _____

SIGNED _____

ADOPTED FAILED _____ TABLED _____

Set. 1.5



NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 33

AMENDMENT NO. 5
(to be filled in by
Principal Clerk)

S33-ATG-42 [v.2]

Page 1 of 1

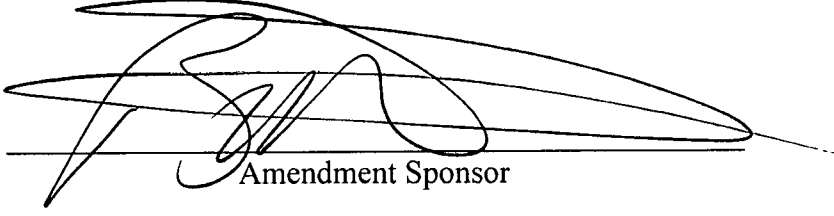
Comm. Sub. [YES]
Amends Title [NO]
Third Edition

Date April 7, 2011

Representative Faison

1
2
3
4
5
6
7

moves to amend the bill on page 3, line 14, by rewriting that line to read:
"relating to damages. The prevailing movant under this subdivision shall pay the reasonable
additional expenses and costs of the opposing party that are incurred as a result of an expert
witness for the opposing party being required to testify a second time during the trial on the
issue of damages."

SIGNED 
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED TABLED _____





NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 33

Sect. 1.6

AMENDMENT NO. 6
(to be filled in by
Principal Clerk)

S33-ATG-57 [v.3]

Page 1 of 1

Comm. Sub. [YES]
Amends Title [NO]
Third Edition

Date April 7, 2011

Representative HALL

- 1 moves to amend the bill on page 3, lines 15 through 36, by deleting those lines in their entirety;
- 2
- 3 and by renumbering the remaining sections of Part I accordingly.
- 4
- 5

SIGNED Larry D. Hall
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED TABLED _____





NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 33

AMENDMENT NO. 7
(to be filled in by
Principal Clerk)

S33-ATJ-4 [v.3]

Page 1 of 1

Comm. Sub. [YES]
Amends Title [NO]
Third Edition

Date April 7, 2011

Representative Murry

- 1 moves to amend the bill on page 3, lines 36 - 37, by adding between the lines the following:
- 2
- 3 "Prior to its deliberations on the issue of punitive damages, the jury shall be instructed on the
- 4 provisions of this subsection."
- 5
- 6

SIGNED Tom Murry
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED FAILED _____ TABLED _____





NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 33

AMENDMENT NO. 8
(to be filled in by
Principal Clerk)

S33-ATG-56 [v.3]

Page 1 of 2

Comm. Sub. [YES]
Amends Title [NO]
Third Edition

Date April 7, 2011

Representative McGrady

1 moves to amend the bill on page 3, lines 36-37, by inserting the following between those lines:

2 "SECTION 1.7. G.S. 1-17 reads as rewritten:

3 "**§ 1-17. Disabilities.**

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

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

12 (1) The person is within the age of 18 years.

13 (2) The person is insane.

14 (3) The person is incompetent as defined in G.S. 35A-1101(7) or (8).

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

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

24 (c) Notwithstanding the provisions of subsection (a) and (b) of this section, a medical
25 malpractice action on behalf of a minor arising out of a health care provider's performance of or
26 failure to perform professional services shall be commenced within the limitations of time
27 specified in G.S. 1-15(c), except that if those time limitations expire before the minor attains
28 the full age of 10 years, the action may be brought before the minor attains the full age of 10
29 years. Notwithstanding the foregoing, if before a minor reaches the full age of 18 years a court
30 has entered judgment or consent order under the provisions of the North Carolina Juvenile
31 Code finding that said minor is an abused or neglected juvenile as defined in G.S. 7B-101, the
32 medical malpractice action shall be commenced within 3 years from the date of such judgment
33 or consent order.



* S 3 3 - A T G - 5 6 - V - 3 *

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 33

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S33-ATG-56 [v.3]

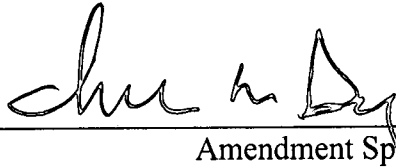
Page 2 of 2

1 (d) Notwithstanding the provisions of subsection (a), an action on behalf of a minor
2 arising out of or relating to a child care facility's provision of child care or failure to provide
3 child care shall be commenced within the periods prescribed in this Chapter, as provided in
4 G.S. 1-15(a), except that if those time limitations expire before the minor attains the full age of
5 10 years, the action may be brought before the minor attains the full age of 10 years.
6 Notwithstanding the foregoing, if before a minor reaches the full age of 18 years a court has
7 entered judgment or consent order under the provisions of the North Carolina Juvenile Code
8 finding that said minor is an abused or neglected juvenile as defined in G.S. 7B-101, the action
9 shall be commenced within 3 years from the date of such judgment or consent order.";

10
11 And on page 9, line 42 by rewriting that line to read:

12 "SECTION 5.2. Sections 1.7, 2.2, 3.1, and 4.2 of this act become effective October
13 1,".

14
15
SIGNED



Amendment Sponsor

SIGNED

Committee Chair if Senate Committee Amendment

ADOPTED _____

FAILED _____

TABLED _____

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. _____

H. B. No. _____

S. B. No. 33

DATE April 7, 2011

Amendment No. 89

(to be filled in by
Principal Clerk)

COMMITTEE SUBSTITUTE

Rep.) Stam

Sen.) _____

Amendment

1 moves to amend the bill on page 281, line 33

2 () WHICH CHANGES THE TITLE

3 by rewriting the line to read:

4 " or consent order, or until the minor ~~now~~ attains
5 the full age of 10 years, whichever is later."

7 and on page 2, line 9, by rewriting
8 the line to read:

10 " shall be commenced within 3 years from
11 the date of such judgment or consent order,
12 ~~or~~ or until the minor attains the full
13 age of 10 years, whichever is later."

SIGNED Stam

ADOPTED

FAILED _____

TABLED



NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 33

AMENDMENT NO. 9
(to be filled in by
Principal Clerk)

S33-ATG-63 [v.1]

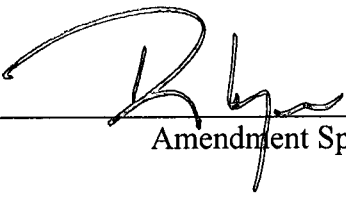
Page 1 of 1

Comm. Sub. [YES]
Amends Title [NO]
Third Edition

Date April 7, 2011

Representative Rhyne

- 1 moves to amend the bill on page 5, line 10, by rewriting the line to read:
- 2
- 3 "Chapter 131E of the General Statutes, or an adult care home licensed".
- 4
- 5

SIGNED 
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED ✓ FAILED _____ TABLED _____





NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 33

AMENDMENT NO. 10
(to be filled in by
Principal Clerk)

S33-ATG-58 [v.1]

Page 1 of 1

Comm. Sub. [YES]
Amends Title [NO]
Third Edition

Date April 7, 2011

Representative HALL

1 moves to amend the bill on page 5, line 46, by writing the line to read:

2
3
4
5
6

"(a) In any medical malpractice action, excluding an action for wrongful death, in which the plaintiff is entitled to an award of".

SIGNED Larry D. Hall
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED TABLED _____



* S 3 3 - A T G - 5 8 - V - 1 *



NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 33

AMENDMENT NO. 11
(to be filled in by
Principal Clerk)

S33-ATG-37 [v.5]

Page 1 of 1

Comm. Sub. [YES]
Amends Title [NO]
Third Edition

Date April 17, 2011

Representative Hall

1 moves to amend the bill on page 6, lines 9 through 13, by rewriting those lines to read:
2 "(2) Noneconomic damages. – Damages to compensate for pain, suffering, emotional
3 distress, loss of consortium, inconvenience, and any other nonpecuniary compensatory
4 damages other than damages to compensate for scars or disfigurement, loss of use of part of the
5 body, permanent injury, or death. "Noneconomic damages" does not include punitive damages
6 as defined in G.S. 1D-5."
7
8

SIGNED

Larry D. Hall
Amendment Sponsor

SIGNED _____

Committee Chair if Senate Committee Amendment

ADOPTED _____

FAILED ✓

TABLED _____



* S 3 3 - A T G - 3 7 - V - 5 *

VISITOR REGISTRATION SHEET

Select Committee on Tort Reform April 7th, 2011
Name of Committee Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Paul Pully	NCAJ
Dick Tugh	ACSO
Sarah Rader	NCAJ
Philip Isley	NAB
Philip Miller	Blanchard Miller Lewis Isley
PRASHANT PATEL	NCINPAC / NCMS
Reum Craig	NCAJ
U. Ryzman	CSS
A. O'Neil	NC med soc
Steve Woods	NLFB
Lore Water	NCAKTCF

VISITOR REGISTRATION SHEET

Select Committee on Tort Reform

April 7th, 2011

Name of Committee

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME

FIRM OR AGENCY AND ADDRESS

Janet Sabangan Mac	NCAITCF
Jay Peterson	JP Assoc
Bradford Snodden	Office of Governor
Ann Harman	NCNA
Brandon McPherson	Campbell Law
Gary Salasano	GSK
Leah Larson	GSK
Lew Ebert	NC Chamber
Preston Howard	MCR
JULIAN PHILSON	NCFB
Bob Jorum	NCFB

VISITOR REGISTRATION SHEET

Select Committee Joint Reform
Name of Committee

4/7/10
Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME

FIRM OR AGENCY AND ADDRESS

Heather Barnett	Williams Muller
BS Miller	Moses Cove
Janet Jones	NCHA
C Smith	NCHCA
Kristi Huff	NCHCFA
Tham Mee	W L Mee
John Gooden	NC Clerks
COLE MANNING	NCAFP
Betsy Barley	PEUC
Fred Bon	Bone & Asso.
LIZ KANOF MD	NC Med Soc

VISITOR REGISTRATION SHEET

Select Committee Joint Reform

4/7/11

Name of Committee

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME

FIRM OR AGENCY AND ADDRESS

Edward Pyles MD	physician
Katherine Ross	PPAB
Ma H Wolfe	PPAB
Adam Smith	attorney
David Crawford	AIA NC
DH Wood	Attorney
Bob Cunniff	Attorney
Greg Gray	NCAFP
Chuck Rich	NCAFP
Jamie Fitzgerald	MLC
Tina Hlabse	attorney

VISITOR REGISTRATION SHEET

Select Committee on Jut Reform

Name of Committee

4/7/11

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME

FIRM OR AGENCY AND ADDRESS

<i>Annaliese Bolph</i>	<i>BRWC</i>
<i>Kevin Reece</i>	<i>Ronda, NC</i>
<i>Bice Wilson</i>	<i>AARP</i>
<i>GREEN BETH</i>	<i>GIBW</i>
<i>BILLY WARDEN</i>	<i>GIBW</i>
<i>Todd Barlow</i>	<i>NCAJ</i>
<i>Kathryn Westcott</i>	<i>AEC/NC</i>
<i>LEA TACKETT</i>	<i>NCAJ</i>
<i>Hatley Robinson</i>	<i>NCRMA</i>
<i>Andy Elton</i>	<i>NCRMA</i>
<i>Jennifer Epperson</i>	<i>NCDOJ</i>
<i>Colleen Kochavele</i>	<i>NCCFP</i>

House Committee Pages / Sergeants at Arms

NAME OF COMMITTEE House Select Committee on Tort Reform

DATE: April 7, 2011

Room: LB 1228

*Name: Caroline Ricciardi

County: Pitt

Sponsor: Mclawhorn

*Name: Jessica Williams

County: Robeson

Sponsor: Graham

*Name: _____

County: _____

Sponsor: _____

*Name: _____

County: _____

Sponsor: _____

*Name: _____

County: _____

Sponsor: _____

House Sgt-At Arms:

1. Name: Bob Rossi

4. Name: _____

2. Name: Wayne Davis

5. Name: _____

3. Name: Billy Jones

6. Name: _____

AGENDA

HOUSE SELECT COMMITTEE ON TORT REFORM

Thursday, April 14, 2011
Room 1327 LB
11:00 AM

OPENING REMARKS

Representative Johnathan Rhyne, Co-Chair
House Select Committee on Tort Reform

AGENDA ITEMS

SB 33 MEDICAL LIABILITY REFORMS
HB 542 TORT REFORM FOR CITIZENS AND BUSINESSES

ADJOURNMENT

MINUTES
HOUSE SELECT COMMITTEE ON TORT REFORM
Thursday, April 14, 2011

Upon call of the Chair, the House Select Committee on Tort Reform met on Thursday, April 14, 2011 in room 1327 of the Legislative Building. The following members were present: Danny McComas, Johnathan Rhyne, Co-Chairs; David Lewis, Tim Moffitt, Tom Murry, Vice-Chairs; Representatives Barnhart, Brisson, Carney, Dockham, Dollar, Faison, Gillespie, Hall, Hill, McGrady, McLawhorn, Mills, Owens, Parfitt, Randleman, Samuelson, Stam, and Weiss.

Chairman Rhyne called the meeting to order.
Representative McComas made a motion to accept the Proposed Committee Substitute for SB 33. The motion carried.

Three amendments were offered for the PCS for SB 33. Amendments 1 and 2 were adopted, amendment 3 failed. (amendments attached)

Representative McComas moved for a favorable report for PCS for SB 33, unfavorable to the original bill. The motion carried.

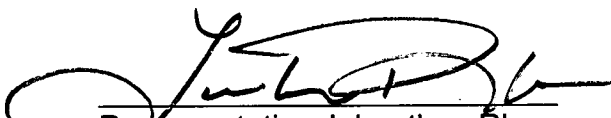
Representative McComas made a motion to accept the PCS for HB 542. The motion carried.

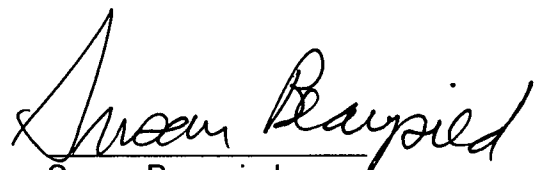
Five amendments were offered for PCS for HB 542. Amendments 1, 4, and 5 were adopted; amendments 2 and 3 failed. (amendments attached)

Representative McComas made a motion for the favorable report to PCS for HB 542, unfavorable to the original bill. The motion was adopted.

Chairman Rhyne dismissed the meeting at 12:12 p.m.

Respectfully submitted,


Representative Johnathan Rhyne
Co-Chair


Susan Beaupied
Committee Assistant

**2011 COMMITTEE REPORT
HOUSE OF REPRESENTATIVES**

The following report(s) from standing committee(s) is/are presented:

By Representative McComas, Rhyne (Chairs) for the Committee on HOUSE SELECT
COMMITTEE ON TORT REFORM.

Committee Substitute for

HB 542 A BILL TO BE ENTITLED AN ACT TO PROVIDE TORT REFORM FOR NORTH
CAROLINA CITIZENS AND BUSINESSES.

With a favorable report as to the committee substitute bill, unfavorable as to the original bill.

(FOR JOURNAL USE ONLY)

_____ Pursuant to Rule 32(a), the bill/resolution is re-referred to the Committee on _____.

Pursuant to Rule 36(b), the (~~House/Senate~~) committee substitute bill/~~(joint) resolution~~
(No. _____) is placed on the Calendar of _____. (The original bill resolution No. _____) is placed
on the Unfavorable Calendar.

_____ The (House) committee substitute bill/(joint) resolution (No. _____) is re-referred to the
Committee on _____. (The original bill/resolution) (House/Senate Committee Substitute Bill/(Joint)
resolution No. _____) is placed on the Unfavorable Calendar.

JC

**2011 COMMITTEE REPORT
HOUSE OF REPRESENTATIVES**

The following report(s) from standing committee(s) is/are presented:

By Representative McComas, Rhyne (Chairs) for the Committee on HOUSE SELECT COMMITTEE ON TORT REFORM.

Committee Substitute for

SB 33 A BILL TO BE ENTITLED AN ACT TO REFORM THE LAWS RELATING TO MEDICAL LIABILITY BY PROVIDING LIMITED PROTECTION FROM LIABILITY TO THOSE REQUIRED BY FEDERAL LAW TO PROVIDE EMERGENCY MEDICAL CARE, BY AUTHORIZING THE BIFURCATION OF TRIALS ON ISSUES OF LIABILITY AND DAMAGES IN CERTAIN ACTIONS, BY LIMITING THE AMOUNT OF NONECONOMIC DAMAGES THAT MAY BE AWARDED, BY AUTHORIZING THE PERIODIC PAYMENT OF FUTURE ECONOMIC DAMAGES IN LIEU OF A LUMP-SUM PAYMENT, BY MODIFYING APPEAL BONDS IN MEDICAL MALPRACTICE ACTIONS, BY CLARIFYING THAT COMPLAINTS ALLEGING MEDICAL MALPRACTICE BY HEALTH CARE PROVIDERS MUST ASSERT THAT ALL MEDICAL RECORDS AVAILABLE TO THE PLAINTIFF HAVE BEEN REVIEWED BY AN EXPERT WITNESS, AND BY REQUIRING THAT CERTAIN INFORMATION BE PROVIDED BY EXPERT WITNESSES.

With a favorable report as to House committee substitute bill, which changes the title, unfavorable as to Senate committee substitute bill.

(FOR JOURNAL USE ONLY)

_____ Pursuant to Rule 32(a), the bill/resolution is re-referred to the Committee on _____.

Pursuant to Rule 36(b), the (House/Senate) committee substitute bill/(joint) resolution (No. _____) is placed on the Calendar of 4-20. (The original bill resolution No. _____) is placed on the Unfavorable Calendar. SCS

_____ The (House) committee substitute bill/(joint) resolution (No. _____) is re-referred to the Committee on _____. (The original bill/resolution) (House/Senate Committee Substitute Bill/(Joint) resolution No. _____) is placed on the Unfavorable Calendar.

_____ Pursuant to Rule 32(a), the bill/resolution is re-referred to the Committee on _____.

_____ Pursuant to Rule 36(b), the (House/Senate) committee substitute bill/(joint) resolution (No. _____) is placed on the Calendar of _____. (The original bill resolution No. _____) is placed on the Unfavorable Calendar.

_____ The (House) committee substitute bill/(joint) resolution (No. _____) is re-referred to the Committee on _____. (The original bill/resolution) (House/Senate Committee Substitute Bill/(Joint) resolution No. _____) is placed on the Unfavorable Calendar.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

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3

SENATE BILL 33
Judiciary I Committee Substitute Adopted 3/1/11
Third Edition Engrossed 3/2/11

Short Title: Medical Liability Reforms.

(Public)

Sponsors:

Referred to:

February 3, 2011

A BILL TO BE ENTITLED

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

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 factsfact is satisfiedfinds 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."



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

2 "(b) Separate trials. –

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

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

13 (3) Upon motion of any party in a medical malpractice action commenced under
14 Article 1B of Chapter 90 of the General Statutes wherein the plaintiff seeks
15 damages in an amount equal to or greater than seventy-five thousand dollars
16 (\$75,000), the court shall order separate trials for the issue of liability and
17 the issue of damages. Evidence relating solely to compensatory damages
18 shall not be admissible until the trier of fact has determined that the
19 defendant is liable for medical malpractice. The same trier of fact that tried
20 the issues relating to liability shall try the issues relating to damages."

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

23 "**§ 90-21.19. Liability limit for noneconomic damages.**

24 (a) In any medical malpractice action in which the plaintiff is entitled to an award of
25 noneconomic damages, the total amount of noneconomic damages for which judgment is
26 entered against all defendants shall not exceed five hundred thousand dollars (\$500,000) per
27 plaintiff. Judgment shall not be entered against any defendant for noneconomic damages in
28 excess of five hundred thousand dollars (\$500,000) for all claims brought by all parties arising
29 out of the same cause of action. On January 1, of every third year, beginning with January 1,
30 2014, the Administrative Office of the Courts shall reset the limitation on damages for
31 noneconomic loss set forth in this subsection to be equal to \$500,000 times the ratio of the
32 consumer price index for November of the prior year to the Consumer Price Index for
33 November 2011. As used in this subsection, "consumer price index" means the Consumer Price
34 Index – All Urban Consumers, for the South urban area, as published by the Bureau of Labor
35 Statistics of the United States Department of Labor. In the event that any verdict or award of
36 noneconomic damages stated pursuant to G.S. 90-21.19B(1) exceeds these limits, the court
37 shall modify the judgment as necessary to conform to the requirements of this subsection.

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

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

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

49 "**§ 90-21.19A. Periodic payment of future economic damages in medical malpractice**
50 **actions.**

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

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

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

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

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

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

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

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

41 **"§ 90-21.19B. Verdicts and awards of damages in medical malpractice actions; form.**

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

- 44 (1) Noneconomic damages.
45 (2) Present economic damages.
46 (3) Future economic damages.
47 (4) Loss of future earnings.
48 (5) Loss of future household services.

49 If applicable, the court shall instruct the jury on the definition of noneconomic damages
50 under G.S. 90-21.19(b) and the definition of future economic damages under
51 G.S. 90-21.19A(a)(1). If applicable, the court shall instruct the jury that present economic

1 damages are those damages for medical treatment, care or custody, loss of earnings, loss of
2 household services, and any other pecuniary damages of the plaintiff up to the date of the
3 verdict or award."

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

5 "**§ 1-289. Undertaking to stay execution on money judgment.**

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

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

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

37 (1) The amount of the judgment.

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

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

41 (b) If the appellee in a civil action brought under any legal theory obtains a judgment
42 directing the payment or expenditure of money in the amount of twenty five million dollars
43 (\$25,000,000) or more, and the appellant seeks a stay of execution of the judgment within the
44 period of time during which the appellant has the right to pursue appellate review, including
45 discretionary review and certiorari, the amount of the undertaking that the appellant is required
46 to execute to stay execution of the judgment during the entire period of the appeal shall be
47 twenty five million dollars (\$25,000,000).

48 (c) If the appellee proves by a preponderance of the evidence that the appellant for
49 whom the undertaking has been limited under subsection (b) of this section is, for the purpose
50 of evading the judgment, (i) dissipating its assets, (ii) secreting its assets, or (iii) diverting its
51 assets outside the jurisdiction of the courts of North Carolina or the federal courts of the United

1 States other than in the ordinary course of business, then the limitation in subsection (b) of this
2 section shall not apply and the appellant shall be required to make an undertaking in the full
3 amount otherwise required by this section."

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

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

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

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

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

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

- 43 ...
- 44 (2) Establish an appropriate schedule for designating expert witnesses,
45 consistent with a discovery schedule pursuant to subdivision (3), ~~to be~~
46 ~~complied with by all parties to the action such that there is a deadline for~~
47 ~~designating all expert witnesses within an appropriate time for all parties to~~
48 ~~implement discovery mechanisms with regard to the designated expert~~
49 ~~witnesses;(3). As to each expert designated, the designation shall be~~
50 accompanied by a written report prepared and signed by the witness. The
51 report shall contain a complete statement of all opinions to be expressed and

1 the basis and reasons therefor; the data or other information considered by
2 the witness in forming the opinions; the qualifications of the witness,
3 including a list of all publications authored by the witness within the
4 preceding 10 years; the compensation the witness is to be paid for the study
5 and testimony; and a listing of any other cases in which the witness has
6 testified as an expert at trial or by deposition within the preceding four years.
7 The party shall supplement the expert's report if the party learns that in some
8 material respect the report is incomplete or incorrect. The expert's direct
9 testimony shall not be inconsistent with or go beyond the fair scope of the
10 expert report as supplemented. Depositions of expert witnesses shall be
11 governed by Rules 26 (b)(4) and 26(f1).

12 "

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

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

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

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SENATE BILL 33
Judiciary I Committee Substitute Adopted 3/1/11
Third Edition Engrossed 3/2/11
PROPOSED HOUSE COMMITTEE SUBSTITUTE S33-CSMH-7 [v.11]

4/13/2011 7:49:47 PM

Short Title: Medical Liability Reforms.

(Public)

Sponsors:

Referred to:

February 3, 2011

A BILL TO BE ENTITLED

AN ACT TO REFORM THE LAWS RELATING TO MONEY JUDGMENT APPEAL
BONDS, BIFURCATION OF TRIALS IN CIVIL CASES, AND MEDICAL LIABILITY.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 1-289 reads as rewritten:

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

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

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



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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), reads as rewritten:

25 "(b) Separate trials. –

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

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

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

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

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

47 (1) The pleading specifically asserts that the medical care ~~has~~ and all medical
48 records pertaining to the alleged negligence and resulting injuries that are
49 available to the plaintiff after reasonable inquiry have been reviewed by a
50 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
 26 as 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

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

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

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

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

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

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

"§ 90-21.12. Standard of health care.

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

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

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

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

1 (a) In any medical malpractice action in which the plaintiff is entitled to an award of
2 noneconomic damages, the total amount of noneconomic damages for which judgment is
3 entered against all defendants shall not exceed five hundred thousand dollars (\$500,000). On
4 January 1 of every third year, beginning with January 1, 2014, the Administrative Office of the
5 Courts shall reset the limitation on damages for noneconomic loss set forth in this subsection to
6 be equal to five hundred thousand dollars (\$500,000) times the ratio of the Consumer Price
7 Index for November of the prior year to the Consumer Price Index for November 2011. In the
8 event that any verdict or award of noneconomic damages stated pursuant to G.S. 90-21.19B(1)
9 exceeds these limits, the court shall modify the judgment as necessary to conform to the
10 requirements of this subsection.

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

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

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

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

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

27 **§ 90-21.19A. Periodic payment of future economic damages in medical malpractice**
28 **actions.**

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

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

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

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

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

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

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

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

19 **"§ 90-21.19B. Verdicts and awards of damages in medical malpractice actions; form.**

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

- 22 (1) Noneconomic damages.
- 23 (2) Present economic damages.
- 24 (3) Future economic damages.
- 25 (4) Loss of future earnings.
- 26 (5) Loss of future household services.

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

33 **SECTION 10. Severability.** – If the provisions of Section 7 of this act are declared
34 to be unconstitutional or otherwise invalid by final decision of a court of competent
35 jurisdiction, then Section 8 and Section 9 of this act are repealed, but the invalidity does not
36 affect other provisions or applications of this act that can be given effect without the invalid
37 provisions. If any other provision of this act or its application to any person or circumstance is
38 held invalid, the remainder of this act or the application of the provision to other persons or
39 circumstances is not affected.

40 **SECTION 11.** Sections 5 and 6 of this act become effective October 1, 2011, and
41 apply to causes of actions arising on or after that date. The remainder of this act becomes
42 effective October 1, 2011, and applies to actions commenced on or after that date.
43



NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 33

AMENDMENT NO. 1
(to be filled in by
Principal Clerk)

S33-ATG-74 [v.2]

Page 1 of 2

Comm. Sub. [YES]
Amends Title [NO]
Third Edition

Date 7/14, 2011

Representative McGrady

1 moves to amend the bill on page 6, lines 32-33, by inserting the following between those lines;

2 "SECTION 10. G.S. 1-17 reads as rewritten:

3 "**§ 1-17. Disabilities.**

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

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

12 (1) The person is within the age of 18 years.

13 (2) The person is insane.

14 (3) The person is incompetent as defined in G.S. 35A-1101(7) or (8).

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

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

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

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

31 (2) If the time limitations in G.S. 1-15(c) have expired and before a minor
32 reaches the full age of 18 years a court has entered judgment or consent
33 order under the provisions of Chapter 7B of the General Statutes finding that



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NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 33

AMENDMENT NO. 1
(to be filled in by
Principal Clerk)

S33-ATG-74 [v.2]

Page 2 of 2

1 said minor is an abused or neglected juvenile as defined in G.S. 7B-101, the
2 medical malpractice action shall be commenced within 3 years from the date
3 of such judgment or consent order, or before the minor attains the full age of
4 10 years, whichever is later.


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

11
12 and by renumbering the remaining sections accordingly;

13
14 and on page 6, line 40 by rewriting that line to read:

15 "SECTION 12. Sections 5, 6 and 10 of this act become effective October 1, 2011, and".
16
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18

SIGNED



Amendment Sponsor

SIGNED

Committee Chair if Senate Committee Amendment

ADOPTED

FAILED

TABLED



NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 33

AMENDMENT NO. 2
(to be filled in by
Principal Clerk)

S33-ATG-59 [v.3]

Page 1 of 1

Comm. Sub. [YES]
Amends Title [NO]
Third Edition

Date April 14, 2011

Representative Mills

1 moves to amend the bill on page 4, lines 41 through 48, by rewriting the lines to read:

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

SIGNED [Signature]
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED ✓ FAILED _____ TABLED _____





**NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 33**

AMENDMENT NO. 3
(to be filled in by
Principal Clerk)

S33-ATG-55 [v.3]

Page 1 of 2

Comm. Sub. [YES]
Amends Title [NO]
Third Edition

Date April 14, 2011

Representative Faison

1 moves to amend the bill on page 6, lines 32-33, by inserting the following between those lines:

2 "SECTION 10. G.S. 1A-1, Rule 26(f1), reads as rewritten:

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

8 ...
9 (2) Establish an appropriate schedule for designating expert witnesses,
10 consistent with a discovery schedule pursuant to subdivision (3), ~~to be~~
11 ~~complied with by all parties to the action such that there is a deadline for~~
12 ~~designating all expert witnesses within an appropriate time for all parties to~~
13 ~~implement discovery mechanisms with regard to the designated expert~~
14 ~~witnesses;~~(3) of this subsection. As to each expert designated, the
15 designation shall be accompanied by a written report prepared and signed by
16 the witness. The report shall contain a complete statement of all opinions to
17 be expressed and the basis and reasons therefor; the data or other
18 information considered by the witness in forming the opinions; the
19 qualifications of the witness, including a list of all publications authored by
20 the witness within the preceding 10 years; the compensation the witness is to
21 be paid for the study and testimony; and a listing of any other cases in which
22 the witness has testified as an expert at trial or by deposition within the
23 preceding four years. The party shall supplement the expert's report if the
24 party learns that in some material respect the report is incomplete or
25 incorrect. The expert's direct testimony shall not be inconsistent with or go
26 beyond the fair scope of the expert report as supplemented. An expert who
27 submits a report in accordance with this subsection shall not be deposed,
28 except pursuant to court order for good cause shown.";

29
30 and by renumbering the remaining sections accordingly.



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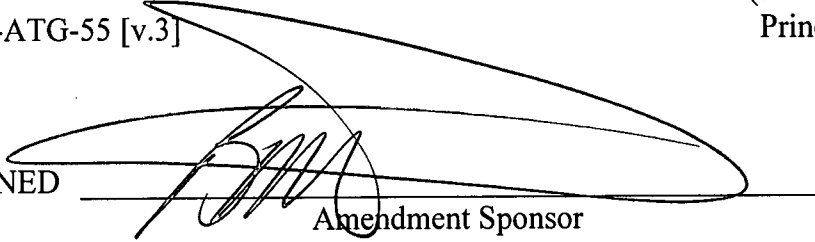
NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 33

AMENDMENT NO. 3
(to be filled in by
Principal Clerk)

S33-ATG-55 [v.3]

Page 2 of 2

SIGNED



Amendment Sponsor

SIGNED

Committee Chair if Senate Committee Amendment

ADOPTED

FAILED



TABLED

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. _____

H. B. No. _____

S. B. No. 33

DATE 4/14/11

Amendment No. 3(a)

(to be filled in by
Principal Clerk)

COMMITTEE SUBSTITUTE S33-CSMH-

Rep.) Stam

Sen.) _____

Amendment 3

1 moves to amend the bill on page 1, line 26-28

2 () WHICH CHANGES THE TITLE

3 by rewriting that line to read:

4 "beyond the fair scope of the expert report as
5 supplemented."

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SIGNED Stam

ADOPTED _____ FAILED _____ TABLED Withdrawn ✓

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

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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

A BILL TO BE ENTITLED

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

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

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



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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 homehome 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.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

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HOUSE BILL 542

Short Title: Tort Reform for Citizens and Businesses. (Public)

Sponsors: Representatives Rhyne, McComas, Brisson, and Crawford (Primary Sponsors).
For a complete list of Sponsors, see Bill Information on the NCGA Web Site.

Referred to: Judiciary.

March 31, 2011

1 A BILL TO BE ENTITLED
2 AN ACT TO PROVIDE TORT REFORM FOR NORTH CAROLINA CITIZENS AND
3 BUSINESSES.

4 The General Assembly of North Carolina enacts:

5 PART I. GENERAL REFORMS

6 SECTION 1.1. Article 4 of Chapter 8C of the General Statutes is amended by
7 adding a new section to read:

8 "**Rule 414. Evidence of medical expenses.**

9 Evidence offered to prove past medical expenses may include all bills reasonably paid and a
10 statement of the amounts actually necessary to satisfy the bills that have been incurred but not
11 yet paid. Evidence of source of payment and rights of subrogation related to the payment shall
12 be admissible."

13 SECTION 1.2. G.S. 1-289 reads as rewritten:

14 "**§ 1-289. Undertaking to stay execution on money judgment.**

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

18 (b) In an action where the judgment directs the payment of money, the court shall
19 specify the amount of the undertaking required to stay execution of the judgment pending
20 appeal as provided in subsection (c) of this section. The undertaking shall be to the effect that if
21 the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the
22 appellant will pay the amount directed to be paid by the judgment, or the part of such amount
23 as to which the judgment shall be affirmed, if affirmed only in part, and all damages which
24 shall be awarded against the appellant upon the appeal, except as provided in subsection (b) of
25 this section. Whenever it is satisfactorily made to appear to the court that since the execution of
26 the undertaking the sureties have become insolvent, the court may, by rule or order, require the
27 appellant to execute, file and serve a new undertaking, as above. In case of neglect to execute
28 such undertaking within twenty days after the service of a copy of the rule or order requiring it,
29 the appeal may, on motion to the court, be dismissed with costs. Whenever it is necessary for a
30 party to an action or proceeding to give a bond or an undertaking with surety or sureties, he
31 may, in lieu thereof, deposit with the officer into court money to the amount of the bond or
32 undertaking to be given. The court in which the action or proceeding is pending may direct
33 what disposition shall be made of such money pending the action or proceeding. In a case
34 where, by this section, the money is to be deposited with an officer, a judge of the court, upon
35 the application of either party, may, at any time before the deposit is made, order the money



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1 deposited in court instead of with the officer; and a deposit made pursuant to such order is of
2 the same effect as if made with the officer. The perfecting of an appeal by giving the
3 undertaking mentioned in this section stays proceedings in the court below upon the judgment
4 appealed from; except when the sale of perishable property is directed, the court below may
5 order the property to be sold and the proceeds thereof to be deposited or invested, to abide the
6 judgment of the appellate court.

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

10 (1) The amount of the judgment.

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

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

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

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

28 SECTION 1.3. Chapter 8 of the General Statutes is amended by adding a new
29 Article to read:

30 "Article 7D.

31 "Admissibility of Collateral Source Payments.

32 "**§ 8-58.25. Certain collateral source payments admissible as evidence.**

33 (a) As used in this section, "collateral source payments" means a payment for any of the
34 following damages for which recovery is permitted in a civil action that is made to or for the
35 benefit of a plaintiff or is otherwise available to the plaintiff:

36 (1) Medical expenses and disability payments under the federal Social Security
37 Act, any federal, State, or local income disability act, or any other public
38 program.

39 (2) Payments under any health, sickness, or income disability insurance or
40 automobile accident insurance that provides health benefits or income
41 disability coverage, and any other similar insurance benefits available to the
42 plaintiff, except life insurance.

43 (3) Payments under any contract or agreement of any person, group,
44 organization, partnership, or corporation to provide, pay for, or reimburse
45 the costs of hospital, medical, dental, or health care services.

46 (4) Payments under any contractual or voluntary wage continuation plan
47 provided by an employer or other system intended to provide wages during a
48 period of disability.

49 (5) From any other source.

50 A collateral source payment does not include gifts, gratuitous contributions or assistance, or
51 payments arising from assets of the plaintiff.

1 (b) In any action, the court shall allow into evidence, if requested by a defendant,
2 collateral source payments paid to or for the benefit of the plaintiff, or that are otherwise made
3 available to the plaintiff, related to the losses or damages alleged in the complaint. Any
4 amounts so allowed shall first be reduced by any payments made by the plaintiff to secure the
5 right to receive the collateral source payment. The court shall allow into evidence, if requested
6 by the plaintiff, rights of subrogation of any collateral source."

7 **SECTION 1.4.** G.S. 8C-702(a) reads as rewritten:

8 (a) If scientific, technical or other specialized knowledge will assist the trier of fact to
9 understand the evidence or to determine a fact in issue, a witness qualified as an expert by
10 knowledge, skill, experience, training, or education, may testify thereto in the form of an
11 ~~opinion.~~opinion, or otherwise if all of the following apply:

- 12 (1) The testimony is based upon sufficient facts or data.
13 (2) The testimony is the product of reliable principles and methods.
14 (3) The witness has applied the principles and methods reliably to the facts of
15 the case."

16 **SECTION 1.5.** G.S. 1A-1, Rule 42(b), reads as rewritten:

17 (b) Separate trials. –

- 18 (1) The court may in furtherance of convenience or to avoid prejudice and shall
19 for considerations of venue upon timely motion order a separate trial of any
20 claim, cross-claim, counterclaim, or third-party claim, or of any separate
21 issue or of any number of claims, cross-claims, counterclaims, third-party
22 claims, or issues.
23 (2) Upon motion of any party in an action that includes a claim commenced
24 under Article 1G of Chapter 90 of the General Statutes involving a managed
25 care entity as defined in G.S. 90-21.50, the court shall order separate
26 discovery and a separate trial of any claim, cross-claim, counterclaim, or
27 third-party claim against a physician or other medical provider.
28 (3) Upon motion of any party in an action in tort wherein the plaintiff seeks
29 damages exceeding seventy-five thousand dollars (\$75,000), the court shall
30 order separate trials for the issue of liability and the issue of damages.
31 Evidence relating solely to compensatory damages shall not be admissible
32 until the trier of fact has determined that the defendant is liable. The same
33 trier of fact that tries the issues relating to liability shall try the issues
34 relating to damages."

35 **SECTION 1.6.** G.S. 1D-25 reads as rewritten:

36 "**§ 1D-25. Limitation of amount of recovery.**

37 (a) In all actions seeking an award of punitive damages, the trier of fact shall determine
38 the amount of punitive damages separately from the amount of compensation for all other
39 damages.

40 (b) Punitive damages awarded against a defendant shall not exceed three times the
41 amount of compensatory damages or two hundred fifty thousand dollars (\$250,000), whichever
42 is greater. If a trier of fact returns a verdict for punitive damages in excess of the maximum
43 amount specified under this subsection, the trial court shall reduce the award and enter
44 judgment for punitive damages in the maximum amount.

45 (c) The provisions of subsection (b) of this section shall not be made known to the trier
46 of fact through any means, including voir dire, the introduction into evidence, argument, or
47 instructions to the jury.

48 (d) Punitive damages awarded in excess of one hundred thousand dollars (\$100,000)
49 shall be awarded by the presiding judge as follows:

- 1 (1) Twenty-five percent (25%) of the amount over one hundred thousand dollars
 2 (\$100,000) shall be remitted to the plaintiff in accordance with applicable
 3 law.
 4 (2) Seventy-five percent (75%) of the amount over one hundred thousand
 5 dollars (\$100,000) shall be remitted to the Civil Penalty and Forfeiture
 6 Fund."

7 PART II. REFORMS APPLICABLE TO MEDICAL MALPRACTICE ACTIONS

8 SECTION 2.1. G.S. 1A-1, Rule 9(j), reads as rewritten:

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

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

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

39 SECTION 2.2.(a) G.S. 90-21.11 reads as rewritten:

40 "§ 90-21.11. Definitions.

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

- 42 (1) ~~the term "health care provider" means~~ Health care provider. – without
 43 limitation Without limitation, any of the following:
 44 a. ~~any~~ A person who pursuant to the provisions of Chapter 90 of the
 45 General Statutes is licensed, or is otherwise registered or certified to
 46 engage in the practice of or otherwise performs duties associated
 47 with any of the following: medicine, surgery, dentistry, pharmacy,
 48 optometry, midwifery, osteopathy, podiatry, chiropractic, radiology,
 49 nursing, physiotherapy, pathology, anesthesiology, anesthesia,
 50 laboratory analysis, rendering assistance to a physician, dental
 51 hygiene, ~~psychiatry, psychology;~~ psychiatry, or psychology.

- 1 b. ~~or a~~ hospital ~~or~~ hospital, a nursing home; home, or an adult care
 2 home licensed under Chapter 131D of the General Statutes.
 3 c. ~~or any~~Any other person who is legally responsible for the negligence
 4 of such person, hospital or nursing home; a person described by
 5 sub-subdivision a. of this subdivision, a hospital, a nursing home, or
 6 an adult care home described by sub-subdivision b. of this
 7 subdivision.
 8 d. ~~or any~~Any other person acting at the direction or under the
 9 supervision of any of the foregoing persons, a person described by
 10 sub-subdivision a. of this subdivision, a hospital, ~~or a~~ nursing
 11 home; home, or an adult care home described by sub-subdivision b. of
 12 this subdivision.

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

- 15 a. ~~a~~A civil action for damages for personal injury or death arising out of
 16 the furnishing or failure to furnish professional services in the
 17 performance of medical, dental, or other health care by a health care
 18 provider.
 19 b. A civil action against a hospital, a nursing home, or an adult care
 20 home licensed under Chapter 131D of the General Statutes for
 21 damages for personal injury or death, when the civil action (i) alleges
 22 a breach of administrative or corporate duties to the patient,
 23 including, but not limited to, allegations of negligent credentialing or
 24 negligent monitoring and supervision; and (ii) arises from the same
 25 facts or circumstances as a claim under sub-subdivision a. of this
 26 subdivision."

27 **SECTION 2.2.(b)** G.S. 90-21.12 reads as rewritten:

28 **"§ 90-21.12. Standard of health care.**

29 (a) Except as provided in subsection (b) of this section, in~~In any medical malpractice~~
 30 action, action for damages for personal injury or death arising out of the furnishing or the
 31 failure to furnish professional services in the performance of medical, dental, or other health
 32 care, the defendant health care provider shall not be liable for the payment of damages unless
 33 the trier of the factsfact is satisfiedfinds by the greater weight of the evidence that the care of
 34 such health care provider was not in accordance with the standards of practice among members
 35 of the same health care profession with similar training and experience situated in the same or
 36 similar communities under the same or similar circumstances at the time of the alleged act
 37 giving rise to the cause of action.

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

46 **SECTION 2.3.(a)** Article 1B of Chapter 90 of the General Statutes is amended by
 47 adding the following new section to read:

48 **"§ 90-21.19. Liability limit for noneconomic damages.**

49 (a) In any medical malpractice action in which the plaintiff is entitled to an award of
 50 noneconomic damages, the total amount of noneconomic damages for which judgment is
 51 entered against all defendants shall not exceed two hundred fifty thousand dollars (\$250,000)

1 per defendant. On January 1 of every third year, beginning with January 1, 2014, the
2 Administrative Office of the Courts shall reset the limitation on damages for noneconomic loss
3 set forth in this subsection to be equal to two hundred fifty thousand dollars (\$250,000) times
4 the ratio of the Consumer Price Index for November of the prior year to the Consumer Price
5 Index for November 2011. In the event that any verdict or award of noneconomic damages
6 stated pursuant to G.S. 90-21.19B(1) exceeds these limits, the court shall modify the judgment
7 as necessary to conform to the requirements of this subsection.

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

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

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

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

22 SECTION 2.3.(b) Article 1B of Chapter 90 of the General Statutes is amended by
23 adding the following new section to read:

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

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

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

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

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

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

49 (d) A judgment authorizing periodic payments of future economic damages shall
50 require that such payments be made through the establishment of a trust fund or the purchase of
51 an annuity for the life of the plaintiff or during the continuance of the compensable injury or

1 disability of the plaintiff, in such form and under such terms as shall be approved by the court.
 2 The establishment of a trust fund or the purchase of an annuity, as required and approved by the
 3 court, shall constitute the satisfaction of the defendant's judgment for future economic damages.

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

14 **SECTION 2.3.(c)** Article 1B of Chapter 90 of the General Statutes is amended by
 15 adding the following new section to read:

16 **"§ 90-21.19B. Verdicts and awards of damages in medical malpractice actions; form.**

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

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

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

30 **SECTION 2.4.** 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) of this subsection. As to each expert designated, the
 43 designation shall be accompanied by a written report prepared and signed by
 44 the witness. The report shall contain a complete statement of all opinions to
 45 be expressed and the basis and reasons therefor; the data or other
 46 information considered by the witness in forming the opinions; the
 47 qualifications of the witness, including a list of all publications authored by
 48 the witness within the preceding 10 years; the compensation the witness is to
 49 be paid for the study and testimony; and a listing of any other cases in which
 50 the witness has testified as an expert at trial or by deposition within the
 51 preceding four years. The party shall supplement the expert's report if the

1 party learns that in some material respect the report is incomplete or
 2 incorrect. The expert's direct testimony shall not be inconsistent with or go
 3 beyond the fair scope of the expert report as supplemented.

4"

5 PART III. REFORM APPLICABLE TO PRODUCTS LIABILITY ACTIONS

6 SECTION 3.1.(a) G.S. 99B-1 reads as rewritten:

7 "**§ 99B-1. Definitions.**

8 When used in this Chapter, unless the context otherwise requires:

- 9 (1) "Claimant" means a person or other entity asserting a claim and, if said
 10 claim is asserted on behalf of an estate, an incompetent or a minor,
 11 "claimant" includes plaintiff's decedent, guardian, or guardian ad litem.
 12 (1a) "Government agency" means this State or the United States, or any agency
 13 of this State or the United States, or any entity vested with the authority of
 14 this State or of the United States to issue rules, regulations, orders, or
 15 standards concerning the design, manufacture, packaging, labeling, or
 16 advertising of a product or provision of a service.
 17 (2) "Manufacturer" means a person or entity who designs, assembles, fabricates,
 18 produces, constructs or otherwise prepares a product or component part of a
 19 product prior to its sale to a user or consumer, including a seller owned in
 20 whole or significant part by the manufacturer or a seller owning the
 21 manufacturer in whole or significant part.
 22 (3) "Product liability action" includes any action brought for or on account of
 23 personal injury, death or property damage caused by or resulting from the
 24 manufacture, construction, design, formulation, development of standards,
 25 preparation, processing, assembly, testing, listing, certifying, warning,
 26 instructing, marketing, selling, advertising, packaging, or labeling of any
 27 product.
 28 (4) "Seller" includes a retailer, wholesaler, or distributor, and means any
 29 individual or entity engaged in the business of selling a product, whether
 30 such sale is for resale or for use or consumption. "Seller" also includes a
 31 lessor or bailor engaged in the business of leasing or bailment of a product."

32 SECTION 3.1.(b) Chapter 99B of the General Statutes is amended by adding the
 33 following new section to read:

34 "**§ 99B-12. Regulatory compliance.**

35 (a) No manufacturer or seller shall be held liable in any product liability action if any
 36 one of the following apply:

- 37 (1) The product alleged to have caused the harm was designed, manufactured,
 38 packaged, labeled, sold, or represented in relevant and material respects in
 39 accordance with the terms of an approval, license, or similar determination
 40 of a government agency, where the approval, license, or similar
 41 determination is relevant to the event or risk allegedly causing the harm.
 42 (2) The product was in compliance with a statute of this State or the United
 43 States, or a standard, rule, regulation, order, or other action of a government
 44 agency pursuant to statutory authority, where the statute or agency action is
 45 relevant to the event or risk allegedly causing the harm and the product was
 46 in compliance at the time the product left the control of the manufacturer or
 47 seller.
 48 (3) The act or transaction forming the basis of the claim involves terms of
 49 service, contract provisions, representations, or other practices authorized
 50 by, or in compliance with, the rules, regulations, standards, or orders of, or a
 51 statute administered by, a government agency.

1 (b) This section does not apply if the claimant proves that the manufacturer or seller at
 2 any time before the event that allegedly caused the harm did any of the following:

3 (1) Sold the product after the effective date of an order of a government agency
 4 to remove the product or service from the market, to withdraw its approval,
 5 or to substantially alter its terms of approval in a manner that would have
 6 avoided the claimant's alleged injury.

7 (2) Intentionally, and in violation of applicable regulations, withheld from or
 8 misrepresented to the government agency information material to the
 9 approval or maintaining of approval of the product, and such information is
 10 relevant to the harm which the claimant allegedly suffered.

11 (3) Made an illegal payment to an official or employee of a government agency
 12 for the purpose of securing or maintaining approval of the product.

13 (c) Nothing in this section shall be construed to (i) expand the authority of any State
 14 agency or State agent to adopt or promulgate standards or regulations where no such authority
 15 previously existed; (ii) reduce the scope of any limitation on liability based on compliance with
 16 the rules or regulations of a government agency applicable to a specific act, transaction, person,
 17 or industry; or (iii) affect the liability of a service provider based on rates filed with and
 18 reviewed or approved by a government agency."

19 PART IV. OTHER REFORMS

20 SECTION 4.1. G.S. 6-21.1 reads as rewritten:

21 "§ 6-21.1. Allowance of counsel fees as part of costs in certain cases.

22 (a) In any personal injury or property damage suit, or suit against an insurance company
 23 under a policy issued by the defendant insurance company and in which the insured or
 24 beneficiary is the plaintiff, instituted in a court of record, upon a finding findings by the court (i)
 25 that there was an unwarranted refusal by the defendant insurance company to negotiate or pay
 26 the claim which constitutes the basis of such suit, instituted in a court of record, where (ii) that
 27 the judgment for recovery of amount of damages recovered is ten thousand dollars
 28 (\$10,000) fifteen thousand dollars (\$15,000) or less, and (iii) that the amount of damages
 29 recovered exceeded the highest offer made by the defendant prior to the commencement of the
 30 trial, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly
 31 licensed attorney representing the litigant obtaining a judgment for damages in said suit, said
 32 attorney's fee to be taxed as a part of the court costs. The attorneys' fees so awarded shall not
 33 exceed the higher of five thousand dollars (\$5,000) or fifty percent (50%) of the damages
 34 awarded.

35 (b) When the presiding judge determines that an award of attorneys' fees is to be made
 36 under this statute, the judge shall issue a written order including findings of fact detailing the
 37 factual basis for the finding of an unwarranted refusal to negotiate or pay the claim, and setting
 38 forth the amount of the highest offer made prior to the commencement of the trial, and the
 39 amount of damages recovered, as well as the factual basis and amount of any such attorneys'
 40 fees to be awarded."

41 SECTION 4.2. The General Statutes are amended by adding a new Chapter to
 42 read:

43 "Chapter 38B.

44 "Trespasser Responsibility.

45 "§ 38B-1. Title.

46 This Chapter may be cited as the Trespasser Responsibility Act.

47 "§ 38B-2. General rule.

48 A possessor of land, including an owner, lessee, or other occupant, does not owe a duty of
 49 care to a trespasser and is not subject to liability for any injury to a trespasser.

50 "§ 38B-3. Exceptions.

1 Notwithstanding G.S. 38B-2, a possessor of land may be subject to liability for physical
2 injury or death to a trespasser in the following situations:

- 3 (1) Intentional harms. – A possessor may be subject to liability if the trespasser's
4 bodily injury or death resulted from the possessor's willful or wanton
5 conduct, or was intentionally caused by the possessor, except that a
6 possessor may use reasonable force to repel a trespasser who has entered the
7 land or a building with the intent to commit a crime.
- 8 (2) Harms to trespassing children caused by artificial condition. – A possessor
9 may be subject to liability for bodily injury or death to a child trespasser
10 resulting from an artificial condition on the land if all of the following apply:
11 a. The possessor knew or had reason to know that children were likely
12 to trespass at the location of the condition.
13 b. The condition is one the possessor knew or reasonably should have
14 known involved an unreasonable risk of bodily injury or death to
15 such children.
16 c. The injured child did not discover the condition or realize the risk
17 involved in the condition or in coming within the area made
18 dangerous by it.
19 d. The possessor failed to exercise reasonable care to eliminate the
20 danger or otherwise protect the injured child.

21 **§ 38B-4. Definitions.**

22 The following definitions shall apply in this Chapter:

- 23 (1) Child trespasser. – A trespasser who is less than 14 years of age or who has
24 the level of mental development found in a person less than 14 years of age.
- 25 (2) Possessor. – A person in lawful possession of land, including an owner,
26 lessee, or other occupant, or a person acting on behalf of such a lawful
27 possessor of land.
- 28 (3) Trespasser. – A person who enters on the property of another without
29 permission and without an invitation, express or implied."

30 PART V. MISCELLANEOUS PROVISIONS

31 **SECTION 5.1.** Severability. – If the provisions of Section 2.3(a) of this act are
32 declared to be unconstitutional or otherwise invalid by final decision of a court of competent
33 jurisdiction, then Section 2.3(b) and Section 2.3(c) of this act are repealed, but the invalidity
34 does not affect other provisions or applications of this act that can be given effect without the
35 invalid provisions. If any other provision of this act or its application to any person or
36 circumstance is held invalid, the remainder of this act or the application of the provision to
37 other persons or circumstances is not affected.

38 **SECTION 5.2.** Sections 2.2, 2.3, 3.1, and 4.2 of this act become effective October
39 1, 2011, and apply to causes of actions arising on or after that date. The remainder of this act
40 becomes effective October 1, 2011, and applies to actions commenced on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

H

D

HOUSE BILL 542
PROPOSED COMMITTEE SUBSTITUTE H542-CSTG-8 [v.2]

4/13/2011 11:00:03 AM

Short Title: Tort Reform for Citizens and Businesses.

(Public)

Sponsors:

Referred to:

March 31, 2011

1 A BILL TO BE ENTITLED
2 AN ACT TO PROVIDE TORT REFORM FOR NORTH CAROLINA CITIZENS AND
3 BUSINESSES.

4 The General Assembly of North Carolina enacts:

5 PART I. GENERAL REFORMS

6 SECTION 1.1. Article 4 of Chapter 8C of the General Statutes is amended by
7 adding a new section to read:

8 **Rule 414. Evidence of medical expenses.**

9 Evidence offered to prove past medical expenses may include all bills reasonably paid and a
10 statement of the amounts actually necessary to satisfy the bills that have been incurred but not
11 yet paid."

12 SECTION 1.2. G.S. 8-58.1 reads as rewritten:

13 **"§ 8-58.1. Injured party as witness when medical charges at issue.**

14 Whenever an issue of hospital, medical, dental, pharmaceutical, or funeral charges arises in
15 any civil proceeding, the injured party or his guardian, administrator, or executor is competent
16 to give evidence regarding the amount of such charges, provided that records or copies of such
17 charges accompany such testimony. ~~The testimony of such a person establishes a rebuttable~~
18 ~~presumption of the reasonableness of the amount of the charges."~~

19 SECTION 1.3. G.S. 8C-702(a) reads as rewritten:

20 "(a) If scientific, technical or other specialized knowledge will assist the trier of fact to
21 understand the evidence or to determine a fact in issue, a witness qualified as an expert by
22 knowledge, skill, experience, training, or education, may testify thereto in the form of an
23 ~~opinion.~~ opinion, or otherwise if all of the following apply:

- 24 (1) The testimony is based upon sufficient facts or data.
25 (2) The testimony is the product of reliable principles and methods.
26 (3) The witness has applied the principles and methods reliably to the facts of
27 the case."

28 SECTION 1.4. G.S. 1D-25 reads as rewritten:

29 **"§ 1D-25. Limitation of amount of recovery.**

30 (a) In all actions seeking an award of punitive damages, the trier of fact shall determine
31 the amount of punitive damages separately from the amount of compensation for all other
32 damages.

33 (b) Punitive damages awarded against a defendant shall not exceed three times the
34 amount of compensatory damages or two hundred fifty thousand dollars (\$250,000), whichever



1 is greater. If a trier of fact returns a verdict for punitive damages in excess of the maximum
2 amount specified under this subsection, the trial court shall reduce the award and enter
3 judgment for punitive damages in the maximum amount.

4 (c) The provisions of subsection (b) of this section shall not be made known to the trier
5 of fact through any means, including voir dire, the introduction into evidence, argument, or
6 instructions to the jury.

7 (d) Punitive damages awarded in excess of one hundred thousand dollars (\$100,000)
8 shall be awarded by the presiding judge as follows:

9 (1) Twenty-five percent (25%) of the amount over one hundred thousand dollars
10 (\$100,000) shall be remitted to the plaintiff in accordance with applicable
11 law.

12 (2) Seventy-five percent (75%) of the amount over one hundred thousand
13 dollars (\$100,000), less a proportionate part of the costs of litigation,
14 including reasonable attorneys' fees, all as determined by the trial judge,
15 shall be remitted to the Civil Penalty and Forfeiture Fund.

16 Prior to its deliberations on the issue of punitive damages, the jury shall be instructed on the
17 provisions of this subsection."

18 PART II. REFORM APPLICABLE TO PRODUCTS LIABILITY ACTIONS

19 SECTION 2.1. G.S. 99B-1 reads as rewritten:

20 "§ 99B-1. Definitions.

21 When used in this Chapter, unless the context otherwise requires:

22 (1) "Claimant" means a person or other entity asserting a claim and, if said
23 claim is asserted on behalf of an estate, an incompetent or a minor,
24 "claimant" includes plaintiff's decedent, guardian, or guardian ad litem.

25 (1a) "Government agency" means this State or the United States, or any agency
26 of this State or the United States, or any entity vested with the authority of
27 this State or of the United States to issue rules, regulations, orders, or
28 standards concerning the design, manufacture, packaging, labeling, or
29 advertising of a product or provision of a service.

30 (2) "Manufacturer" means a person or entity who designs, assembles, fabricates,
31 produces, constructs or otherwise prepares a product or component part of a
32 product prior to its sale to a user or consumer, including a seller owned in
33 whole or significant part by the manufacturer or a seller owning the
34 manufacturer in whole or significant part.

35 (3) "Product liability action" includes any action brought for or on account of
36 personal injury, death or property damage caused by or resulting from the
37 manufacture, construction, design, formulation, development of standards,
38 preparation, processing, assembly, testing, listing, certifying, warning,
39 instructing, marketing, selling, advertising, packaging, or labeling of any
40 product.

41 (4) "Seller" includes a retailer, wholesaler, or distributor, and means any
42 individual or entity engaged in the business of selling a product, whether
43 such sale is for resale or for use or consumption. "Seller" also includes a
44 lessor or bailor engaged in the business of leasing or bailment of a product."

45 SECTION 2.2. Chapter 99B of the General Statutes is amended by adding the
46 following new section to read:

47 "§ 99B-12. Regulatory compliance.

48 No manufacturer or seller of a product that is a drug shall be held liable in any product
49 liability action if the drug alleged to have caused the harm was approved for safety and efficacy
50 by the United States Food and Drug Administration, and the drug and its labeling were in
51 compliance with the United States Food and Drug Administration's approval at the time the

1 drug left the control of the manufacturer or seller. This section does not apply if the claimant
 2 proves that the manufacturer or seller, at any time before the event that allegedly caused the
 3 harm, did any of the following:

- 4 (1) Sold the drug in the United States after the effective date of an order of the
 5 United States Food and Drug Administration to remove the drug from the
 6 market, to withdraw its approval, or to substantially alter the terms of
 7 approval in a manner that would have avoided the claimant's alleged injury.
 8 (2) Intentionally, and in violation of applicable regulations as determined by
 9 final agency action, withheld from or misrepresented to the United States
 10 Food and Drug Administration information material to the approval or
 11 maintaining of approval of the drug, and such information is relevant to the
 12 harm which the claimant allegedly suffered.
 13 (3) Made an illegal payment to an official or employee of a government agency
 14 for the purpose of securing or maintaining approval of the drug."

15 PART III. OTHER REFORMS

16 SECTION 3.1. G.S. 6-21.1 reads as rewritten:

17 "§ 6-21.1. Allowance of counsel fees as part of costs in certain cases.

18 (a) In any personal injury or property damage suit, or suit against an insurance company
 19 under a policy issued by the defendant insurance company ~~and~~ in which the insured or
 20 beneficiary is the plaintiff, instituted in a court of record, upon a finding findings by the court (i)
 21 that there was an unwarranted refusal by the defendant insurance company to negotiate or pay
 22 the claim which constitutes the basis of such suit, instituted in a court of record, where (ii) that
 23 the judgment for recovery of amount of damages recovered is ten thousand dollars
 24 (\$10,000) fifteen thousand dollars (\$15,000) or less, and (iii) that the amount of damages
 25 recovered exceeded the highest offer made by the defendant 30 days or more prior to the
 26 commencement of the trial, the presiding judge may, in his discretion, allow a reasonable
 27 attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for
 28 damages in said suit, said attorney's fee to be taxed as a part of the court costs. The attorneys'
 29 fees so awarded shall not exceed the higher of five thousand dollars (\$5,000) or fifty percent
 30 (50%) of the damages awarded.

31 (b) When the presiding judge determines that an award of attorneys' fees is to be made
 32 under this statute, the judge shall issue a written order including findings of fact detailing the
 33 factual basis for the finding of an unwarranted refusal to negotiate or pay the claim, and setting
 34 forth the amount of the highest offer made 30 days or more prior to the commencement of the
 35 trial, and the amount of damages recovered, as well as the factual basis and amount of any such
 36 attorneys' fees to be awarded."

37 SECTION 3.2. The General Statutes are amended by adding a new Chapter to
 38 read:

39 "**Chapter 38B.**

40 "**Trespasser Responsibility.**

41 "**§ 38B-1. Title.**

42 This Chapter may be cited as the Trespasser Responsibility Act.

43 "**§ 38B-2. General rule.**

44 A possessor of land, including an owner, lessee, or other occupant, does not owe a duty of
 45 care to a trespasser and is not subject to liability for any injury to a trespasser.

46 "**§ 38B-3. Exceptions.**

47 Notwithstanding G.S. 38B-2, a possessor of land may be subject to liability for physical
 48 injury or death to a trespasser in the following situations:

- 49 (1) Intentional harms. – A possessor may be subject to liability if the trespasser's
 50 bodily injury or death resulted from the possessor's willful or wanton
 51 conduct, or was intentionally caused by the possessor, except that a

1 possessor may use reasonable force to repel a trespasser who has entered the
2 land or a building with the intent to commit a crime.

3 (2) Harms to trespassing children caused by artificial condition. – A possessor
4 may be subject to liability for bodily injury or death to a child trespasser
5 resulting from an artificial condition on the land if all of the following apply:

6 a. The possessor knew or had reason to know that children were likely
7 to trespass at the location of the condition.

8 b. The condition is one the possessor knew or reasonably should have
9 known involved an unreasonable risk of bodily injury or death to
10 such children.

11 c. The injured child did not discover the condition or realize the risk
12 involved in the condition or in coming within the area made
13 dangerous by it.

14 d. The possessor failed to exercise reasonable care to eliminate the
15 danger or otherwise protect the injured child.

16 **"§ 38B-4. Definitions.**

17 The following definitions shall apply in this Chapter:

18 (1) Child trespasser. – A trespasser who is less than 14 years of age or who has
19 the level of mental development found in a person less than 14 years of age.

20 (2) Possessor. – A person in lawful possession of land, including an owner,
21 lessee, or other occupant, or a person acting on behalf of such a lawful
22 possessor of land.

23 (3) Trespasser. – A person who enters on the property of another without
24 permission and without an invitation, express or implied."

25 PART IV. MISCELLANEOUS PROVISIONS

26 **SECTION 4.1.** Severability. – If any provision of this act or its application to any
27 person or circumstance is held invalid, the remainder of this act or the application of the
28 provision to other persons or circumstances is not affected.

29 **SECTION 4.2.** Sections 2.1, 2.2, and 3.2 of this act become effective October 1,
30 2011, and apply to causes of actions arising on or after that date. The remainder of this act
31 becomes effective October 1, 2011, and applies to actions commenced on or after that date.



NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
House Bill 542

AMENDMENT NO. 1
(to be filled in by
Principal Clerk)

H542-ATG-67 [v.1]

Page 1 of 1

Comm. Sub. [YES]
Amends Title [NO]
First Edition

Date April 14, 2011

Representative Mills

- 1 moves to amend the bill on page 1, line 11, by rewriting that line to read:
- 2 "yet paid. This rule does not impose upon any party an affirmative duty to seek a reduction in
- 3 billed charges to which the party is not contractually entitled.".
- 4
- 5

SIGNED

[Signature]
Amendment Sponsor

SIGNED

Committee Chair if Senate Committee Amendment

ADOPTED

✓

FAILED

TABLED





NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
House Bill 542

AMENDMENT NO. 2
(to be filled in by
Principal Clerk)

H542-ATG-68 [v.1]

Page 1 of 1

Comm. Sub. [YES]
Amends Title [NO]
First Edition

Date April 14, 2011

Representative Weiss

- 1 moves to amend the bill on page 2, line 18 through page 3, line 14, by deleting those lines;
- 2 and by renumbering the remaining parts and sections accordingly.
- 3

SIGNED Jennifer Weiss
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED TABLED _____





NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
House Bill 542

AMENDMENT NO. 3
(to be filled in by
Principal Clerk)

H542-ATG-70 [v.2]

Page 1 of 1

Comm. Sub. [YES]
Amends Title [NO]
First Edition

Date April 14, 2011

Representative Mills

- 1 moves to amend the bill on page 3, lines 16 through 36, by deleting those lines in their entirety;
- 2
- 3 and on page 3, lines 37 and 38, by rewriting those lines to read:
- 4 "SECTION 3.1. The General Statutes are amended by adding a new Chapter to read:".
- 5
- 6

SIGNED [Signature]
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED TABLED _____



* H 5 4 2 - A T G - 7 0 - V - 2 *



NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
House Bill 542

AMENDMENT NO. 4
(to be filled in by
Principal Clerk)

H542-ATK-43 [v.1]

Page 1 of 1

Comm. Sub. [YES]
Amends Title [NO]
First Edition

Date April 14, 2011

Representative Stamm

- 1 moves to amend the bill on page 3, line 24, by deleting the phrase "fifteen thousand dollars
- 2 (\$15,000)" and substituting the phrase "twenty thousand dollars (\$20,000)".
- 3
- 4

SIGNED Stamm
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED ✓ FAILED _____ TABLED _____





NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
House Bill 542

AMENDMENT NO. 5
(to be filled in by
Principal Clerk)

H542-ATG-71 [v.1]

Page 1 of 1

Comm. Sub. [YES]
Amends Title [NO]
First Edition

Date 4-14, 2011

Representative Murry

1 moves to amend the bill on page 4, line 9, by rewriting that line to read:
2 "known involved an unreasonable risk of serious bodily injury or death to";

3
4 and on page 4, lines 14 through 15, by rewriting those lines to read:

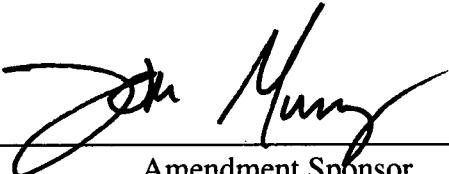
5 "d The utility to the possessor of maintaining the condition and the
6 burden of eliminating the danger were slight as compared with the
7 risk to the child involved.

8 e. The possessor failed to exercise reasonable care to eliminate the
9 danger or otherwise protect the injured child.";

10
11 and on page 4, lines 15 through 16, by inserting the following between those lines:

12 "(3) Position of peril. – A possessor may be subject to liability for physical injury
13 or death to a trespasser if the possessor discovered the trespasser in a
14 position of peril or helplessness on the property and failed to exercise
15 ordinary care not to injure the trespasser."

16
17

SIGNED 
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED ✓ FAILED _____ TABLED _____



GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

H

D

HOUSE BILL 542
PROPOSED COMMITTEE SUBSTITUTE H542-PCS30296-TG-8

Short Title: Tort Reform for Citizens and Businesses.

(Public)

Sponsors:

Referred to:

March 31, 2011

1 A BILL TO BE ENTITLED
2 AN ACT TO PROVIDE TORT REFORM FOR NORTH CAROLINA CITIZENS AND
3 BUSINESSES.

4 The General Assembly of North Carolina enacts:

5 PART I. GENERAL REFORMS

6 SECTION 1.1. Article 4 of Chapter 8C of the General Statutes is amended by
7 adding a new section to read:

8 "**Rule 414. Evidence of medical expenses.**

9 Evidence offered to prove past medical expenses may include all bills reasonably paid and a
10 statement of the amounts actually necessary to satisfy the bills that have been incurred but not
11 yet paid. This rule does not impose upon any party an affirmative duty to seek a reduction in
12 billed charges to which the party is not contractually entitled."

13 SECTION 1.2. G.S. 8-58.1 reads as rewritten:

14 "**§ 8-58.1. Injured party as witness when medical charges at issue.**

15 Whenever an issue of hospital, medical, dental, pharmaceutical, or funeral charges arises in
16 any civil proceeding, the injured party or his guardian, administrator, or executor is competent
17 to give evidence regarding the amount of such charges, provided that records or copies of such
18 charges accompany such testimony. ~~The testimony of such a person establishes a rebuttable~~
19 ~~presumption of the reasonableness of the amount of the charges."~~

20 SECTION 1.3. G.S. 8C-702(a) reads as rewritten:

21 "(a) If scientific, technical or other specialized knowledge will assist the trier of fact to
22 understand the evidence or to determine a fact in issue, a witness qualified as an expert by
23 knowledge, skill, experience, training, or education, may testify thereto in the form of an
24 ~~opinion.~~ opinion, or otherwise if all of the following apply:

25 (1) The testimony is based upon sufficient facts or data.

26 (2) The testimony is the product of reliable principles and methods.

27 (3) The witness has applied the principles and methods reliably to the facts of
28 the case."

29 SECTION 1.4. G.S. 1D-25 reads as rewritten:

30 "**§ 1D-25. Limitation of amount of recovery.**

31 (a) In all actions seeking an award of punitive damages, the trier of fact shall determine
32 the amount of punitive damages separately from the amount of compensation for all other
33 damages.



1 (b) Punitive damages awarded against a defendant shall not exceed three times the
2 amount of compensatory damages or two hundred fifty thousand dollars (\$250,000), whichever
3 is greater. If a trier of fact returns a verdict for punitive damages in excess of the maximum
4 amount specified under this subsection, the trial court shall reduce the award and enter
5 judgment for punitive damages in the maximum amount.

6 (c) The provisions of subsection (b) of this section shall not be made known to the trier
7 of fact through any means, including voir dire, the introduction into evidence, argument, or
8 instructions to the jury.

9 (d) Punitive damages awarded in excess of one hundred thousand dollars (\$100,000)
10 shall be awarded by the presiding judge as follows:

11 (1) Twenty-five percent (25%) of the amount over one hundred thousand dollars
12 (\$100,000) shall be remitted to the plaintiff in accordance with applicable
13 law.

14 (2) Seventy-five percent (75%) of the amount over one hundred thousand
15 dollars (\$100,000), less a proportionate part of the costs of litigation,
16 including reasonable attorneys' fees, all as determined by the trial judge,
17 shall be remitted to the Civil Penalty and Forfeiture Fund.

18 Prior to its deliberations on the issue of punitive damages, the jury shall be instructed on the
19 provisions of this subsection."

20 PART II. REFORM APPLICABLE TO PRODUCTS LIABILITY ACTIONS

21 SECTION 2.1. G.S. 99B-1 reads as rewritten:

22 "§ 99B-1. Definitions.

23 When used in this Chapter, unless the context otherwise requires:

24 (1) "Claimant" means a person or other entity asserting a claim and, if said
25 claim is asserted on behalf of an estate, an incompetent or a minor,
26 "claimant" includes plaintiff's decedent, guardian, or guardian ad litem.

27 (1a) "Government agency" means this State or the United States, or any agency
28 of this State or the United States, or any entity vested with the authority of
29 this State or of the United States to issue rules, regulations, orders, or
30 standards concerning the design, manufacture, packaging, labeling, or
31 advertising of a product or provision of a service.

32 (2) "Manufacturer" means a person or entity who designs, assembles, fabricates,
33 produces, constructs or otherwise prepares a product or component part of a
34 product prior to its sale to a user or consumer, including a seller owned in
35 whole or significant part by the manufacturer or a seller owning the
36 manufacturer in whole or significant part.

37 (3) "Product liability action" includes any action brought for or on account of
38 personal injury, death or property damage caused by or resulting from the
39 manufacture, construction, design, formulation, development of standards,
40 preparation, processing, assembly, testing, listing, certifying, warning,
41 instructing, marketing, selling, advertising, packaging, or labeling of any
42 product.

43 (4) "Seller" includes a retailer, wholesaler, or distributor, and means any
44 individual or entity engaged in the business of selling a product, whether
45 such sale is for resale or for use or consumption. "Seller" also includes a
46 lessor or bailor engaged in the business of leasing or bailment of a product."

47 SECTION 2.2. Chapter 99B of the General Statutes is amended by adding the
48 following new section to read:

49 "§ 99B-12. Regulatory compliance.

50 No manufacturer or seller of a product that is a drug shall be held liable in any product
51 liability action if the drug alleged to have caused the harm was approved for safety and efficacy

1 by the United States Food and Drug Administration and the drug and its labeling were in
 2 compliance with the United States Food and Drug Administration's approval at the time the
 3 drug left the control of the manufacturer or seller. This section does not apply if the claimant
 4 proves that the manufacturer or seller, at any time before the event that allegedly caused the
 5 harm, did any of the following:

- 6 (1) Sold the drug in the United States after the effective date of an order of the
 7 United States Food and Drug Administration to remove the drug from the
 8 market, to withdraw its approval, or to substantially alter the terms of
 9 approval in a manner that would have avoided the claimant's alleged injury.
 10 (2) Intentionally, and in violation of applicable regulations as determined by
 11 final agency action, withheld from or misrepresented to the United States
 12 Food and Drug Administration information material to the approval or
 13 maintaining of approval of the drug, and such information is relevant to the
 14 harm which the claimant allegedly suffered.
 15 (3) Made an illegal payment to an official or employee of a government agency
 16 for the purpose of securing or maintaining approval of the drug."

17 PART III. OTHER REFORMS

18 SECTION 3.1. G.S. 6-21.1 reads as rewritten:

19 "§ 6-21.1. Allowance of counsel fees as part of costs in certain cases.

20 (a) In any personal injury or property damage suit, or suit against an insurance company
 21 under a policy issued by the defendant insurance company ~~and~~ in which the insured or
 22 beneficiary is the plaintiff, instituted in a court of record, upon a finding findings by the court (i)
 23 that there was an unwarranted refusal by the defendant ~~insurance company to negotiate or pay~~
 24 the claim which constitutes the basis of such suit, ~~instituted in a court of record, where~~ (ii) that
 25 the ~~judgment for recovery of amount of damages recovered is ten thousand dollars~~
 26 ~~(\$10,000)~~ twenty thousand dollars (\$20,000) or less, and (iii) that the amount of damages
 27 recovered exceeded the highest offer made by the defendant 30 days or more prior to the
 28 commencement of the trial, the presiding judge may, in his ~~the judge's~~ discretion, allow a
 29 reasonable ~~attorney fee~~ attorneys' fees to the duly licensed ~~attorney~~ attorneys representing the
 30 litigant obtaining a judgment for damages in said suit, said ~~attorney's fee~~ attorneys' fees to be
 31 taxed as a part of the court costs. The attorneys' fees so awarded shall not exceed the higher of
 32 five thousand dollars (\$5,000) or fifty percent (50%) of the damages awarded.

33 (b) When the presiding judge determines that an award of attorneys' fees is to be made
 34 under this statute, the judge shall issue a written order including findings of fact detailing the
 35 factual basis for the finding of an unwarranted refusal to negotiate or pay the claim, and setting
 36 forth the amount of the highest offer made 30 days or more prior to the commencement of the
 37 trial, and the amount of damages recovered, as well as the factual basis and amount of any such
 38 attorneys' fees to be awarded."

39 SECTION 3.2. The General Statutes are amended by adding a new Chapter to
 40 read:

41 "Chapter 38B.

42 "Trespasser Responsibility.

43 "§ 38B-1. Title.

44 This Chapter may be cited as the Trespasser Responsibility Act.

45 "§ 38B-2. General rule.

46 A possessor of land, including an owner, lessee, or other occupant, does not owe a duty of
 47 care to a trespasser and is not subject to liability for any injury to a trespasser.

48 "§ 38B-3. Exceptions.

49 Notwithstanding G.S. 38B-2, a possessor of land may be subject to liability for physical
 50 injury or death to a trespasser in the following situations:

- 1 (1) Intentional harms. – A possessor may be subject to liability if the trespasser's
2 bodily injury or death resulted from the possessor's willful or wanton
3 conduct, or was intentionally caused by the possessor, except that a
4 possessor may use reasonable force to repel a trespasser who has entered the
5 land or a building with the intent to commit a crime.
- 6 (2) Harms to trespassing children caused by artificial condition. – A possessor
7 may be subject to liability for bodily injury or death to a child trespasser
8 resulting from an artificial condition on the land if all of the following apply:
9 a. The possessor knew or had reason to know that children were likely
10 to trespass at the location of the condition.
11 b. The condition is one the possessor knew or reasonably should have
12 known involved an unreasonable risk of serious bodily injury or
13 death to such children.
14 c. The injured child did not discover the condition or realize the risk
15 involved in the condition or in coming within the area made
16 dangerous by it.
17 d. The utility to the possessor of maintaining the condition and the
18 burden of eliminating the danger were slight as compared with the
19 risk to the child involved.
20 e. The possessor failed to exercise reasonable care to eliminate the
21 danger or otherwise protect the injured child.
- 22 (3) Position of peril. – A possessor may be subject to liability for physical injury
23 or death to a trespasser if the possessor discovered the trespasser in a
24 position of peril or helplessness on the property and failed to exercise
25 ordinary care not to injure the trespasser.

26 **"§ 38B-4. Definitions.**

27 The following definitions shall apply in this Chapter:

- 28 (1) Child trespasser. – A trespasser who is less than 14 years of age or who has
29 the level of mental development found in a person less than 14 years of age.
30 (2) Possessor. – A person in lawful possession of land, including an owner,
31 lessee, or other occupant, or a person acting on behalf of such a lawful
32 possessor of land.
33 (3) Trespasser. – A person who enters on the property of another without
34 permission and without an invitation, express or implied."

35 **PART IV. MISCELLANEOUS PROVISIONS**

36 **SECTION 4.1. Severability. –** If any provision of this act or its application to any
37 person or circumstance is held invalid, the remainder of this act or the application of the
38 provision to other persons or circumstances is not affected.

39 **SECTION 4.2.** Sections 2.1, 2.2, and 3.2 of this act become effective October 1,
40 2011, and apply to causes of actions arising on or after that date. The remainder of this act
41 becomes effective October 1, 2011, and applies to actions commenced on or after that date.

VISITOR REGISTRATION SHEET

SELECT COMMITTEE ON TORT REFORM

APRIL 14, 2011

Name of Committee

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Will Culpeper	MVA
Lee Tockall	NRA-S
Leslie B Coman	Capstat
Andrew Meehan	Capstat
Courtney Denning	NC Bar Association
Becki Gray	J & J
John Palumbo	WCAOA
Sara Dixon	NCAP
David Anders	PFFPAC
Richard O'Brien	PFFPAC
Allen Bethel	GBW

VISITOR REGISTRATION SHEET

SELECT COMMITTEE ON TORT REFORM

APRIL 14, 2011

Name of Committee

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME

FIRM OR AGENCY AND ADDRESS

Bill WARDEN

GBW

Fulbright

Bone & Assoc.

Brandon McPherson

Campbell Law

Thomas Hardaway

Phukan

Kay Paksoy

NASW-NC

Bill Haight

Ueryon

Katherine Ross

PPAB

VISITOR REGISTRATION SHEET

SELECT COMMITTEE ON TORT REFORM

APRIL 14, 2011

Name of Committee

Date

PAGE 10

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME

FIRM OR AGENCY AND ADDRESS

Paul Pally	NCAJ
Kerry Sutton	NCAJ
Burtin Crayo	NCAJ
Janet Ward Black	Ward Black Law, Greensboro
Laurie Sanders	N.C. Coalition for Patient Safety
Charles Blanchard	Blanchard, Miller, etc.
Philip Miller	Blanchard Miller
Georg Seidner	PIBV
Butch Gunnell	NCBA
Dick Carbon	atty.
Bradford Sneider	Office of the Governor

VISITOR REGISTRATION SHEET

SELECT COMMITTEE ON TORT REFORM

APRIL 14, 2011


Name of Committee

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME

FIRM OR AGENCY AND ADDRESS

Debra	SA
Sam Thayer	SA
Bo Heath	MWC
Amy White	NCMS
Jennifer Epperson	NC DOJ
Nicole Fisher	John Locke Foundation
Erin Robinson	NORMA
Michelle Frazier	MF+S
Jennifer Cohen	JFC
John McMillan	MF+S
	

House Committee Pages / Sergeants at Arms

NAME OF COMMITTEE Joint Reform

DATE: 4-14-11 Room: Rm 1228

*Name: Jose Moffitt

County: Buncombe

Sponsor: Hager

*Name: Tiaja Smalls

County: Cumberland

Sponsor: Earline Parmon

Name: _____

County: _____

Sponsor: _____

*Name: _____

County: _____

Sponsor: _____

*Name: _____

County: _____

Sponsor: _____

House Sgt-At Arms:

1. Name: Robert Rossi

4. Name: _____

2. Name: Billy Jones

5. Name: _____

3. Name: Wayne Davis

6. Name: _____

REVISED AGENDA

HOUSE SELECT COMMITTEE ON TORT REFORM

Thursday, April 21, 2011
Room 1327 LB
11:00 AM

I. OPENING REMARKS

Representative Johnathan Rhyne, Co-Chair
Select Committee on Tort Reform

II. EXPLANATION OF HB 709

Representative Dale Folwell

III. PUBLIC COMMENT—each speaker may take 5 minutes

1. Lew Ebert--President and CEO of NC Chamber
2. Richard Harper—Attorney, Sylva, NC
3. Jeff Misenheimer—Chair for Workers' Compensation Section of the NC Association of Defense Attorney
4. Don Carter—Columbia Forestry Products
5. Ken Stoller—Senior Counsel, American Insurance Association
6. Bill Wilson—AARP
7. Stephanie Gay—NC Association of Self Insurers
8. Bruce Clarke—President, Capital Associated Industries
9. Gina Cammarano—Attorney, Farah and Cammarano
10. George Ports—Employers Coalition of North Carolina
11. Byron Diggs—Pepsi Bottling Ventures
12. Ted Sawyer—Vocational Rehabilitation Expert
13. Mary Freeman—Tammy Lynn Center, Wake County
14. David Anders—Professional Fire Fighters & Paramedics of NC
15. Levi Grantham—injured worker
16. George Gonzales—injured worker

IV. ADJOURNMENT

MINUTES
HOUSE SELECT COMMITTEE ON TORT REFORM
Thursday, April 21, 2011

Upon call of the Chair, the House Select Committee on Tort Reform met on Thursday, April 21, 2011 in room 1327 of the Legislative Building. The following members were present: Danny McComas, Johnathan Rhyne, Co-Chairs; Jim Crawford, Tom Murry, Vice-Chairs; Representatives Carney, Dollar, Faison, Gillespie, Hall, Hill, McGrady, McLawhorn, Mills, Owens, Parfitt, Randleman, Samuelson, and Weiss.

Chairman Rhyne called the meeting to order.

Chairman Rhyne recognized Representative Folwell to explain HB 709.

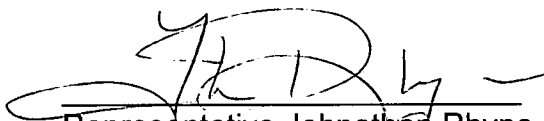
Chairman Rhyne explained the procedures for the public comment time, allowing each speaker to take no more than five minutes.

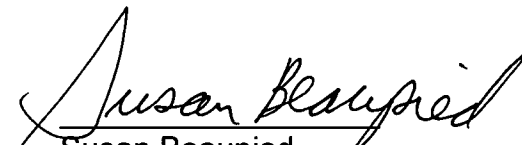
Sixteen people spoke (see Agenda).

Representative Folwell made brief concluding remarks.

Chairman Rhyne adjourned the meeting at 12:27 p.m.

Respectfully submitted,


Representative Johnathan Rhyne
Co-Chair


Susan Beaupied
Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

H

1

HOUSE BILL 709*

Short Title: Protect and Put NC Back to Work. (Public)

Sponsors: Representatives Folwell, Dollar, Hager, and Crawford (Primary Sponsors).
For a complete list of Sponsors, see Bill Information on the NCGA Web Site.

Referred to: Commerce and Job Development, if favorable, Judiciary, if favorable, Finance.

April 7, 2011

A BILL TO BE ENTITLED

1
2 AN ACT PROTECTING AND PUTTING NORTH CAROLINA BACK TO WORK BY
3 REFORMING THE WORKERS' COMPENSATION ACT TO (1) DEFINE "SUITABLE
4 EMPLOYMENT" PERTAINING TO AN EMPLOYEE'S RETURN TO WORK WITHIN
5 RESTRICTIONS OR AFTER REACHING MAXIMUM IMPROVEMENT; (2) MAKE
6 WILLFUL MISREPRESENTATIONS GROUNDS FOR DISQUALIFICATION FROM
7 RECEIVING BENEFITS; (3) PROVIDE THAT PARTIES MAY REACH A SEPARATE
8 CONTEMPORANEOUS AGREEMENT TO RESOLVE ISSUES NOT COVERED BY
9 THE ACT; (4) CLARIFY THE RIGHTS AND RESPONSIBILITIES OF EMPLOYERS
10 AND EMPLOYEES REGARDING MEDICAL EXAMINATIONS, TREATMENT, AND
11 ACCESS TO MEDICAL INFORMATION; (5) CAP THE DURATION OF
12 COMPENSATION FOR TEMPORARY TOTAL DISABILITY; (6) EXTEND FROM
13 THREE HUNDRED TO FIVE HUNDRED THE NUMBER OF WEEKS AN INJURED
14 EMPLOYEE IS ELIGIBLE TO RECEIVE COMPENSATION FOR PARTIAL
15 INCAPACITY; (7) INCREASE THE DEATH BENEFIT AND BURIAL EXPENSE
16 ALLOWANCE; (8) REDUCE THE INDUSTRIAL COMMISSION FROM SEVEN TO
17 FIVE MEMBERS SUBJECT TO LEGISLATIVE CONFIRMATION; (9) PROVIDE
18 THAT COMMISSIONERS AND DEPUTY COMMISSIONERS ARE SUBJECT TO THE
19 CODE OF JUDICIAL STANDARDS; AND (10) REPEAL THE COMMISSION'S FULL
20 EXEMPTION FROM THE ADMINISTRATIVE PROCEDURE ACT, THEREBY
21 SUBJECTING THE COMMISSION TO RULE MAKING PURSUANT TO ARTICLE 2A
22 OF CHAPTER 150B OF THE GENERAL STATUTES AND REQUIRING THE
23 COMMISSION TO READOPT RULES PURSUANT TO THAT ARTICLE.

24 The General Assembly of North Carolina enacts:

25 **SECTION 1.** This act shall be known as the "Protecting and Putting North
26 Carolina Back to Work Act."

27 **SECTION 2.** G.S. 97-2 is amended by adding a new subsection to read:

28 **"§ 97-2. Definitions.**

29 When used in this Article, unless the context otherwise ~~requires~~ requires:

30 ...
31 (22) Suitable employment. – The term "suitable employment" means any
32 employment available that (i) prior to reaching maximum medical
33 improvement is within the employee's work restrictions including
34 rehabilitative employment approved by the employee's treating health care
35 provider or (ii) after reaching maximum medical improvement is



1 employment which the employee is capable of performing considering the
2 employee's education, physical limitations due to the injury, vocational
3 skills, and experience."

4 SECTION 3. Article 1 of Chapter 97 of the General Statutes is amended by adding
5 a new section to read:

6 "**§ 97-12.1. Willful misrepresentation in applying for employment.**

7 No compensation shall be allowed under this Article for injury by accident or occupational
8 disease if the employer proves that (i) at the time of hire or in the course of entering into
9 employment, (ii) at the time of receiving notice of the removal of conditions from a conditional
10 offer of employment, or (iii) during the course of a post-offer medical examination:

- 11 (1) The employee knowingly and willfully made a false representation as to the
12 employee's physical condition;
13 (2) The employer relied upon one or more false representations by the
14 employee, and the reliance was a substantial factor in the employer's
15 decision to hire the employee; and
16 (3) There was a causal connection between false representation by the employee
17 and the injury or occupational disease."

18 SECTION 4. G.S. 97-17 is amended by adding a new subsection to read:

19 "(e) Nothing in this section prevents the parties from reaching a separate
20 contemporaneous agreement resolving issues not covered by this Article."

21 SECTION 5. G.S. 97-25 reads as rewritten:

22 "**§ 97-25. Medical treatment and supplies.**

23 ~~Medical compensation shall be provided by the employer. In case of a controversy arising~~
24 ~~between the employer and employee relative to the continuance of medical, surgical, hospital,~~
25 ~~or other treatment, the Industrial Commission may order such further treatments as may in the~~
26 ~~discretion of the Commission be necessary.~~

27 The Industrial Commission may at any time upon the request of an employee order a
28 change of treatment and designate other treatment suggested by the injured employee subject to
29 the approval of the Commission, and in or health care provider and in such a case the expense
30 thereof shall be borne by the employer upon the same terms and conditions as hereinbefore
31 provided in this section for medical and surgical treatment and attendance. The Commission
32 must find that any change in treatment or health care provider is based upon clear and
33 convincing medical evidence. The Commission shall disregard any opinions of an unauthorized
34 health care provider who evaluated, diagnosed, or treated the employee before the employee's
35 request to change treatment or health care provider was filed with the Commission.

36 The refusal of the employee to accept any medical, hospital, surgical or other treatment or
37 rehabilitative procedure when ordered by the Industrial Commission shall bar said the
38 employee from further compensation until such the refusal ceases, and no compensation shall at
39 any time be paid for the period of suspension unless in the opinion of the Industrial
40 Commission the circumstances justified the refusal, in which case, the Industrial Commission
41 may order a change in the medical or hospital service.

42 If in an emergency on account of the employer's failure to provide the medical or other care
43 as herein specified a physician other than provided by the employer is called to treat the injured
44 employee, the reasonable cost of such the service shall be paid by the employer if so ordered by
45 the Industrial Commission.

46 ~~Provided, however, if he so desires, an injured employee may select a physician of his own~~
47 ~~choosing to attend, prescribe and assume the care and charge of his case, subject to the~~
48 ~~approval of the Industrial Commission."~~

49 SECTION 6. G.S. 97-25.6 reads as rewritten:

50 "**§ 97-25.6. Reasonable access to medical information.**

1 (a) It is the policy of this State that the parties have reasonable access to all medical
2 records, reports, and information that are pertinent to and necessary for the fair and swift
3 resolution of workers' compensation claims. Therefore, an employer is entitled, without the
4 express authorization of the employee, to obtain medical records of the employee and
5 communicate with an employee's health care providers if the requested medical records,
6 reports, and information are:

7 (1) Restricted to the particular evaluation, diagnosis, or treatment of the injury
8 or disease for which compensation, including medical compensation, is
9 sought;

10 (2) Reasonably related to the injury or diseases for which the employee claims
11 compensation; or

12 (3) Related to an assessment of the employee's ability to return to work or
13 perform suitable employment as a result of the particular injury or disease.

14 (b) A party may communicate with the employee's health care providers by written and
15 oral communication if the requesting party notifies the opposing party of the health care
16 provider's response within 15 calendar days. The employer shall make every reasonable effort
17 to limit unnecessary communication with the health care provider.

18 (c) Upon motion by an employee or the health care provider from whom medical
19 records, reports, or information are sought or upon its own motion, for good cause shown, the
20 Commission may make any order which justice requires to protect an employee, health care
21 provider, or other person from unreasonable annoyance, embarrassment, oppression, or undue
22 burden or expense.

23 (d) The provisions of this section shall not apply to communications concerning an
24 independent medical evaluation for the purpose of expert testimony.

25 (e) The Commission shall annually establish an appropriate medical fee to compensate
26 health care providers for time spent communicating with the employer or representatives of the
27 employee.

28 (f) No cause of action shall arise and no health care provider shall incur any liability as
29 a result of the release of medical records, reports, or information pursuant to this Article.

30 (g) Any medical records or reports that reflect evaluation, diagnosis, or treatment of the
31 particular injury or disease for which compensation is sought or is reasonably related to the
32 injury or disease for which the employee seeks compensation shall be furnished by the
33 employee to the employer when requested in writing by the employer.

34 (h) For purposes of this section, the term "employer" means the employer, the
35 employer's attorney, and the employer's insurance carrier or third-party administrator, and the
36 term "employee" means the employee, legally appointed guardian, or any attorney representing
37 the employee.

38 (i) Notwithstanding any provision of G.S. 8-53 to the contrary, and because discovery
39 is limited under G.S. 97-80, records obtained and communications conducted pursuant to this
40 section supersede the prohibition against ex parte communications, and privacy of medical
41 records in the custody of health care providers in matters or proceedings under this Article.

42 ~~Notwithstanding the provisions of G.S. 8-53, any law relating to the privacy of medical~~
43 ~~records or information, and the prohibition against ex parte communications at common law, an~~
44 ~~employer or insurer paying medical compensation to a provider rendering treatment under this~~
45 ~~Article may obtain records of the treatment without the express authorization of the employee.~~
46 ~~In addition, with written notice to the employee, the employer or insurer may obtain directly~~
47 ~~from a medical provider medical records of evaluation or treatment restricted to a current injury~~
48 ~~or current condition for which an employee is claiming compensation from that employer under~~
49 ~~this Article.~~

1 Any medical records or reports, restricted to conditions related to the injury or illness for
2 which the employee is seeking compensation, in the possession of the employee shall be
3 furnished by the employee to the employer when requested in writing by the employer.

4 An employer or insurer paying compensation for an admitted claim or paying without
5 prejudice pursuant to G.S. 97-18(d) may communicate with an employee's medical provider in
6 writing, limited to specific questions promulgated by the Commission, to determine, among
7 other information, the diagnosis for the employee's condition, the reasonable and necessary
8 treatment, the anticipated time that the employee will be out of work, the relationship, if any, of
9 the employee's condition to the employment, the restrictions from the condition, the kind of
10 work for which the employee may be eligible, the anticipated time the employee will be
11 restricted, and the permanent impairment, if any, as a result of the condition. When these
12 questions are used, a copy of the written communication shall be provided to the employee at
13 the same time and by the same means as the communication is provided to the provider.

14 Other forms of communication with a medical provider may be authorized by (i) a valid
15 written authorization voluntarily given and signed by the employee, (ii) by agreement of the
16 parties, or (iii) by order of the Commission issued upon a showing that the information sought
17 is necessary for the administration of the employee's claim and is not otherwise reasonably
18 obtainable under this section or through other provisions for discovery authorized by the
19 Commission's rules. In adopting rules or authorizing employer communications with medical
20 providers, the Commission shall protect the employee's right to a confidential physician-patient
21 relationship while facilitating the release of information necessary to the administration of the
22 employee's claim.

23 Upon motion by an employee or provider from whom medical records or reports are sought
24 or upon its own motion, for good cause shown, the Commission may make any order which
25 justice requires to protect an employee or other person from unreasonable annoyance,
26 embarrassment, oppression, or undue burden or expense."

27 SECTION 7. G.S. 97-27 reads as rewritten:

28 "§ 97-27. **Medical examination; facts not privileged; refusal to be examined suspends**
29 **compensation; other medical opinions; autopsy.**

30 (a) After an injury, and so long as ~~he~~ the employee claims compensation, the employee,
31 if so requested by his or her employer or ordered by the Industrial Commission, shall, subject to
32 the provisions of subsection (b), submit himself to an independent medical examination, at
33 reasonable times and places, by a duly qualified physician or surgeon ~~physician who is~~
34 licensed and practicing in North Carolina and is designated and paid by the employer or the
35 Industrial Commission, even if the employee's claim has been denied pursuant to
36 G.S. 97-18(c).

37 (b) The injured employee shall have ~~has~~ the right to have present at ~~such~~ the
38 independent medical examination any duly qualified physician or surgeon provided and paid by
39 him ~~the employee~~.

40 (c) Notwithstanding the provisions of G.S. 8-53, no fact communicated to or otherwise
41 learned by any physician ~~or surgeon or hospital or hospital employee~~ who may have attended
42 or examined the employee, or who may have been present at any examination, shall be
43 privileged in any workers' compensation case with respect to a claim pending for hearing
44 before the Industrial Commission.

45 (d) If the employee refuses to submit ~~himself to~~ or in any way obstructs ~~such~~ the
46 examination requested by and provided for by the employer, ~~his~~ the employee's right to
47 compensation and ~~his~~ right to take or prosecute any proceedings under this Article shall be
48 suspended immediately until ~~such~~ the refusal or objection ceases, and no compensation shall at
49 any time be payable for the period of obstruction, unless in the opinion of the Industrial
50 Commission the circumstances justify the refusal or obstruction. ~~The employer, or the~~

1 Industrial Commission, shall have the right in any case of death to require an autopsy at the
2 expense of the party requesting the same.

3 (b) ~~In those cases arising under this Article in which there is a question as to the~~
4 ~~percentage of permanent disability suffered by an employee, if any employee, required to~~
5 ~~submit to a physical examination under the provisions of subsection (a) is dissatisfied with such~~
6 ~~examination or the report thereof, he shall be entitled to have another examination by a duly~~
7 ~~qualified physician or surgeon licensed and practicing in North Carolina or by a duly qualified~~
8 ~~physician or surgeon licensed to practice in South Carolina, Georgia, Virginia and Tennessee~~
9 ~~provided said nonresident physician or surgeon shall have been approved by the North Carolina~~
10 ~~Industrial Commission and his name placed on the Commission's list of approved nonresident~~
11 ~~physicians and surgeons, designated by him and paid by the employer or the Industrial~~
12 ~~Commission in the same manner as physicians designated by the employer or the Industrial~~
13 ~~Commission are paid. Provided, however, that all travel expenses incurred in obtaining said~~
14 ~~examination shall be paid by said employee. The employer shall have the right to have present~~
15 ~~at such examination a duly qualified physician or surgeon provided and paid by him. No fact~~
16 ~~communicated to or otherwise learned by any physician or surgeon who may have attended or~~
17 ~~examined the employee, or who may have been present at any examination, shall be privileged,~~
18 ~~either in hearings provided for by this Article or any action at law.~~

19 (e) In any case arising under this Article in which the employee is dissatisfied with the
20 percentage of permanent disability as provided by G.S. 97-31 and determined by the authorized
21 health care provider, the employee is entitled to another opinion solely on the issue of the
22 percentage of permanent disability provided by a duly qualified physician of the employee's
23 choosing who is licensed and practicing in North Carolina and designated by the employee.
24 That physician is paid by the employer in the same manner as health care providers designated
25 by the employer or the Industrial Commission are paid. The Industrial Commission shall
26 disregard any opinions of the duly qualified physician chosen by the employee other than the
27 physician's opinion on the percentage of permanent disability as described in G.S. 97-31. No
28 fact communicated to or otherwise learned by any physician who may have attended or
29 examined the employee, or who may have been present at any examination, shall be privileged,
30 either in hearings provided for by this Article or any action at law.

31 (f) The employer, or the Industrial Commission, has the right in any case of death to
32 require an autopsy at its expense."

33 SECTION 8. G.S. 97-29 reads as rewritten:

34 "§ 97-29. ~~Compensation rates~~ **Rates and duration of compensation for total incapacity.**

35 (a) ~~Except as hereinafter otherwise provided, where~~ Where the incapacity for work
36 resulting from the injury or occupational disease is total, the employer shall pay or cause to be
37 paid, as hereinafter provided, to the injured employee during such total disability a weekly
38 compensation equal to sixty-six and two-thirds percent (662/3%) of his average weekly wages,
39 but not more than the amount established annually to be effective October 1 as provided herein,
40 nor less than thirty dollars (\$30.00) per week.

41 (b) In cases of temporary total and permanent disability, compensation, including
42 medical compensation, shall be paid for by the employer ~~during the lifetime of the injured~~
43 ~~employee. If death results from the injury then the employer shall pay compensation in~~
44 ~~accordance with the provisions of G.S. 97-38.~~ but in no case shall the period covered by the
45 compensation be greater than 500 weeks from the date of the injury, except as provided by
46 subsection (c) of this section. Where an employee can show both a disability pursuant to this
47 section or G.S. 97-30 and a specific physical impairment pursuant to G.S. 97-31, regardless of
48 whether the employee sustained multiple scheduled injuries as a result of the accident, the
49 employee may not collect benefits pursuant to both this section or G.S. 97-30 and G.S. 97-31
50 after reaching maximum medical improvement, but rather is entitled to select the statutory
51 compensation which provides the more favorable remedy.

1 (c) In cases of total and permanent disability compensation, compensation including
2 medical compensation, shall be paid for by the employer during the lifetime of the injured
3 employee. If death results from the injury or occupational disease, then the employer shall pay
4 compensation in accordance with the provisions of G.S. 97-37. An injured employee is
5 presumed to be totally and permanently disabled and qualified for lifetime compensation only
6 if the injured employee has an injury consisting of one or more of the following:

- 7 (1) The loss of both hands, both arms, both feet, both legs, or both eyes as
8 provided by G.S. 97-31(17).
9 (2) Spinal injury involving severe paralysis of both arms, both legs, or the trunk.
10 (3) Severe brain or closed-head injury as evidenced by severe and permanent:
11 a. Sensory or motor disturbances;
12 b. Communication disturbances;
13 c. Complex integrated disturbances of cerebral function; or
14 d. Neurological disorders.
15 (4) Second-degree or third-degree burns of thirty-three percent (33%) or more of
16 the total body surface unless the employer shows that the employee is
17 capable of returning to suitable employment as defined in G.S. 97-2(22).

18 (d) The weekly compensation payment for members of the North Carolina National
19 Guard and the North Carolina State Defense Militia shall be the maximum amount established
20 annually in accordance with the last paragraph of this section per week as fixed herein. The
21 weekly compensation payment for deputy sheriffs, or those acting in the capacity of deputy
22 sheriffs, who serve upon a fee basis, shall be thirty dollars (\$30.00) a week as fixed herein.

23 (e) An officer or member of the State Highway Patrol shall not be awarded any weekly
24 compensation under the provisions of this section for the first two years of any incapacity
25 resulting from an injury by accident arising out of and in the course of the performance by him
26 of his official duties if, during such incapacity, he continues to be an officer or member of the
27 State Highway Patrol, but he shall be awarded any other benefits to which he may be entitled
28 under the provisions of this Article.

29 (f) Notwithstanding any other provision of this Article, on July 1 of each year, a
30 maximum weekly benefit amount shall be computed. The amount of this maximum weekly
31 benefit shall be derived by obtaining the average weekly insured wage in accordance with
32 G.S. 96-8(22), by multiplying such average weekly insured wage by 1.10, and by rounding
33 such figure to its nearest multiple of two dollars (\$2.00), and this said maximum weekly benefit
34 shall be applicable to all injuries and claims arising on and after January 1 following such
35 computation. Such maximum weekly benefit shall apply to all provisions of this Chapter and
36 shall be adjusted July 1 and effective January 1 of each year as herein provided."

37 **SECTION 9.** G.S. 97-30 reads as rewritten:

38 **"§ 97-30. Partial incapacity.**

39 Except as otherwise provided in G.S. 97-31, where the incapacity for work resulting from
40 the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the
41 injured employee during such disability, a weekly compensation equal to sixty-six and
42 two-thirds percent (66 2/3%) of the difference between his average weekly wages before the
43 injury and the average weekly wages which he is able to earn thereafter, but not more than the
44 amount established annually to be effective October 1 as provided in G.S. 97-29 a week, and in
45 no case shall the period covered by such compensation be greater than ~~300~~ 500 weeks from the
46 date of injury. In case the partial disability begins after a period of total disability, the latter
47 period shall be deducted from the maximum period herein allowed for partial disability. An
48 officer or member of the State Highway Patrol shall not be awarded any weekly compensation
49 under the provisions of this section for the first two years of any incapacity resulting from an
50 injury by accident arising out of and in the course of the performance by him of his official
51 duties if, during such incapacity, he continues to be an officer or member of the State Highway

1 Patrol, but he shall be awarded any other benefits to which he may be entitled under the
2 provisions of this Article."

3 SECTION 10. G.S. 97-32 reads as rewritten:

4 "§ 97-32. Refusal of injured employee to accept suitable employment as suspending
5 compensation.

6 If an injured employee refuses ~~employment procured for him suitable to his capacity~~ he
7 suitable employment as defined by G.S. 97-2(22), the employee shall not be entitled to any
8 compensation at any time during the continuance of such refusal, unless in the opinion of the
9 Industrial Commission such refusal was justified. Nothing in this Article prohibits an employer
10 from contacting the employee directly about returning to suitable employment."

11 SECTION 11. G.S. 97-38 reads as rewritten:

12 "§ 97-38. Where death results proximately from compensable injury or occupational
13 disease; dependents; burial expenses; compensation to aliens; election by
14 partial dependents.

15 If death results proximately from a compensable injury or occupational disease and within
16 six years thereafter, or within two years of the final determination of disability, whichever is
17 later, the employer shall pay or cause to be paid, subject to the provisions of other sections of
18 this Article, weekly payments of compensation equal to sixty-six and two-thirds percent (66
19 2/3%) of the average weekly wages of the deceased employee at the time of the accident, but
20 not more than the amount established annually to be effective October 1 as provided in
21 G.S. 97-29, nor less than thirty dollars (\$30.00), per week, and burial expenses not exceeding
22 ~~three thousand five hundred dollars (\$3,500),~~ ten thousand dollars (\$10,000), to the person or
23 persons entitled thereto as follows:

24 ...
25 (3) If there is no person wholly dependent, and the person or all persons
26 partially dependent is or are within the classes of persons defined as "next of
27 kin" in G.S. 97-40, whether or not such persons or such classes of persons
28 are of kin to the deceased employee in equal degree, and all so elect, he or
29 they may take, share and share alike, the commuted value of the amount
30 provided for whole dependents in (1) above instead of the proportional
31 payment provided for partial dependents in (2) above; provided, that the
32 election herein provided may be exercised on behalf of any infant partial
33 dependent by a duly qualified guardian; provided, further, that the Industrial
34 Commission may, in its discretion, permit a parent or person standing in loco
35 parentis to such infant to exercise such option in its behalf, the award to be
36 payable only to a duly qualified guardian except as in this Article otherwise
37 provided; and provided, further, that if such election is exercised by or on
38 behalf of more than one person, then they shall take the commuted amount
39 in equal shares.

40 When weekly payments have been made to an injured employee before
41 his death, the compensation to dependents shall begin from the date of the
42 last of such payments. Compensation payments due on account of death
43 shall be paid for a period of ~~400~~500 weeks from the date of the death of the
44 employee; provided, however, after said ~~400-week~~500-week period in case
45 of a widow or widower who is unable to support herself or himself because
46 of physical or mental disability as of the date of death of the employee,
47 compensation payments shall continue during her or his lifetime or until
48 remarriage and compensation payments due a dependent child shall be
49 continued until such child reaches the age of 18.

50 Compensation payable under this Article to aliens not residents (or about
51 to become nonresidents) of the United States or Canada, shall be the same in

1 amounts as provided for residents, except that dependents in any foreign
2 country except Canada shall be limited to surviving spouse and child or
3 children, or if there be no surviving spouse or child or children, to the
4 surviving father or mother."

5 **SECTION 12.** G.S. 97-77(a) reads as rewritten:

6 "(a) There is hereby created a commission to be known as the North Carolina Industrial
7 Commission, consisting of ~~seven~~ five commissioners who shall devote their entire time to the
8 duties of the Commission. The Governor shall appoint the members of the Commission, ~~one for~~
9 ~~a term of two years, one for a term of four years, one for a term~~ Commission for terms of six
10 years. ~~Of the additional appointments made in 1994, one shall be for a term expiring June 30,~~
11 ~~1996, one for a term expiring June 30, 1998, and two for terms expiring June 30, 2000. Upon~~
12 ~~the expiration of each term as above mentioned, the Governor shall appoint a successor for a~~
13 ~~term of six years, and thereafter the term of office of each commissioner shall be six years. Not~~
14 ~~more than three~~ Two appointees ~~commissioners~~ shall be persons who, on account of their
15 previous vocations, employment or affiliations, can be classed as representatives of ~~employers,~~
16 ~~and not more than three employers.~~ Two appointees ~~commissioners~~ shall be persons who, on
17 account of their previous vocations, employment or affiliations, can be classed as
18 representatives of employees. No person may serve more than two terms on the Commission.
19 Service for any part of a term counts as a term. For the purpose of this paragraph, service prior
20 to its effective date shall be counted in the calculation."

21 **SECTION 13.** G.S. 97-77 is amended by adding a new subsection to read:

22 "(a1) Appointments of commissioners are subject to confirmation by the General
23 Assembly by joint resolution. The names of commissioners to be appointed by the Governor
24 shall be submitted by the Governor to the General Assembly for confirmation by the General
25 Assembly on or before March 1 of the year of expiration of the term. If the Governor fails to
26 timely submit nominations, the General Assembly shall appoint to fill the succeeding term
27 upon the joint recommendation of the President Pro Tempore of the Senate and the Speaker of
28 the House of Representatives in accordance with G.S. 120-121 not inconsistent with this
29 section.

30 In case of death, incapacity, resignation, or vacancy for any other reason in the office of any
31 commissioner prior to the expiration of the term of office, a nomination to fill the vacancy for
32 the remainder of the unexpired term shall be submitted by the Governor within four weeks after
33 the vacancy arises to the General Assembly for confirmation by the General Assembly. If the
34 Governor fails to timely nominate a person to fill the vacancy, the General Assembly shall
35 appoint to fill the remainder of the unexpired term upon the joint recommendation of the
36 President Pro Tempore of the Senate and the Speaker of the House of Representatives in
37 accordance with G.S. 120-121 not inconsistent with this section. If a vacancy arises or exists
38 pursuant to this subsection when the General Assembly is not in session, and the appointment is
39 deemed urgent by the Governor, the commissioner may be appointed and serve on an interim
40 basis pending confirmation by the General Assembly. For the purpose of this subsection, the
41 General Assembly is not in session only (i) prior to convening of the Regular Session, (ii)
42 during any adjournment of the Regular Session for more than 10 days, and (iii) after sine die
43 adjournment of the Regular Session.

44 No person while in office as a commissioner may be nominated or appointed on an interim
45 basis to fill the remainder of an unexpired term, or to a full term that commences prior to the
46 expiration of the term that the commissioner is serving."

47 **SECTION 14.** Article 1 of Chapter 97 of the General Statutes is amended by
48 adding a new section to read:

49 "§ 97-78.1. Standards of judicial conduct to apply to commissioners and deputy
50 commissioners.

1 The standards of judicial conduct provided for judges in Article 30 of Chapter 7A of the
2 General Statutes shall apply to commissioners and deputy commissioners. Commissioners and
3 deputy commissioners shall be liable to impeachment for the causes and in the manner
4 provided for judges of the General Court of Justice in Chapter 123 of the General Statutes.
5 Commissioners and deputy commissioners shall not engage in any other employment, business,
6 profession, or vocation while in office."

7 **SECTION 15.** G.S. 97-80(a) reads as rewritten:

8 "(a) The Commission ~~may make shall adopt~~ rules, in accordance with Article 2A of
9 Chapter 150B of the General Statutes and not inconsistent with this Article, for carrying out the
10 provisions of this Article. ~~The Commission shall request the Office of State Budget and~~
11 Management to prepare a fiscal note for a proposed new or amended rule that has a substantial
12 economic impact, as defined in G.S. 150B-21.4(b1). The Commission shall not take final action
13 on a proposed rule change that has a substantial economic impact until at least 60 days after the
14 fiscal note has been prepared.

15 ~~Processes, procedure, and discovery under this Article shall be as summary and simple as~~
16 ~~reasonably may be."~~

17 **SECTION 16.** G.S. 97-84 reads as rewritten:

18 "**§ 97-84. Determination of disputes by Commission or deputy.**

19 The Commission or any of its members shall hear the parties at issue and their
20 representatives and witnesses, and shall determine the dispute in a summary manner. The
21 Commission shall decide the case and issue findings of fact based upon the preponderance of
22 the evidence in view of the entire record. The award, together with a statement of the findings
23 of fact, rulings of law, and other matters pertinent to the questions at issue shall be filed with
24 the record of the proceedings, within 180 days of the close of the hearing record unless time is
25 extended for good cause by the Commission, and a copy of the award shall immediately be sent
26 to the parties in dispute. The parties may be heard by a deputy, in which event the hearing shall
27 be conducted in the same way and manner prescribed for hearings which are conducted by a
28 member of the Industrial Commission, and said deputy shall proceed to a complete
29 determination of the matters in dispute, file his written opinion within 180 days of the close of
30 the hearing record unless time is extended for good cause by the Commission, and the deputy
31 shall cause to be issued an award pursuant to such determination."

32 **SECTION 17.(a)** G.S. 150B-1(c) reads as rewritten:

33 "(c) Full Exemptions. – This Chapter applies to every agency except:

- 34 (1) The North Carolina National Guard in exercising its court-martial
35 jurisdiction.
- 36 (2) The Department of Health and Human Services in exercising its authority
37 over the Camp Butner reservation granted in Article 6 of Chapter 122C of
38 the General Statutes.
- 39 (3) The Utilities Commission.
- 40 (4) ~~The Industrial Commission.~~
- 41 (5) The Employment Security Commission.
- 42 (6) The State Board of Elections in administering the HAVA Administrative
43 Complaint Procedure of Article 8A of Chapter 163 of the General Statutes.
- 44 (7) The North Carolina State Lottery.
- 45 (8) **(Expires June 30, 2012)** Except as provided in G.S. 150B-21.1B, any
46 agency with respect to contracts, disputes, protests, and/or claims arising out
47 of or relating to the implementation of the American Recovery and
48 Reinvestment Act of 2009 (Public Law 111-5)."

49 **SECTION 17.(b)** G.S. 150B-1(e) is amended by adding a new subdivision to

50 read:

1 "(e) Exemptions From Contested Case Provisions. – The contested case provisions of
2 this Chapter apply to all agencies and all proceedings not expressly exempted from the Chapter.
3 The contested case provisions of this Chapter do not apply to the following:

4 ...
5 **(18) The Industrial Commission.**"

6 **SECTION 17.(c)** The Industrial Commission shall adopt all rules contained in
7 Title 4 of Chapter 10 of the North Carolina Administrative Code as of the effective date of this
8 act in accordance with Article 2A of Chapter 150B of the General Statutes. Any existing rule
9 that has not been readopted by December 31, 2012, shall expire.

10 **SECTION 17.(d)** This section becomes effective May 1, 2011, and applies to
11 claims filed and to rule making commenced on or after that date.

12 **SECTION 18.** As of February 1, 2011, the terms of the seven members of the
13 Industrial Commission are as follows:

- 14 (1) One serves a term expiring April 30, 2011.
- 15 (2) Two serve terms expiring June 30, 2012.
- 16 (3) One serves a term expiring April 30, 2013.
- 17 (4) One serves a term expiring June 30, 2014.
- 18 (5) One serves a term expiring April 30, 2015.
- 19 (6) One serves a term expiring June 30, 2016.

20 The reduction from seven commissioners to five commissioners provided by Section 9 of this
21 act is effective by not filling the two offices that expire June 30, 2012, pursuant to subdivision
22 (2) of this section. The reduction from three commissioners to two in the employee and
23 employer categories of qualification and the qualifications of the fifth commissioner as
24 provided by G.S. 97-77(a) become effective July 1, 2012.

25 **SECTION 19.** This act is effective when it becomes law, with Sections 4, 5, 6, and
26 7 applying as to claims pending on or after that date. Sections 2, 3, 8, 9, 10, 11, and 16 of this
27 act become effective July 1, 2011, and apply to claims arising on or after that date.

House Committee Pages / Sergeants at Arms

NAME OF COMMITTEE To Rt Reform

DATE: 4/21/2011 Room: 1328

*Name: Alexis Barfield

County: New Hanover

Sponsor: Susi Hamilton

*Name: Cooper Blackwell

County: Edgecombe

Sponsor: Jean Farmer-Burnfield

Name: _____

County: _____

Sponsor: _____

*Name: _____

County: _____

Sponsor: _____

*Name: _____

County: _____

Sponsor: _____

House Sgt-At Arms:

1. Name: Young Bag

4. Name: _____

Name: Martha Madison

5. Name: _____

3. Name: Billy Jones

6. Name: _____

VISITOR REGISTRATION SHEET

Joint Reform
HOUSE BANKING COMMITTEE
 Name of Committee

APRIL 21, 2011
 Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME

FIRM OR AGENCY AND ADDRESS

SCOTT A. YATES	109 GEORGE WITTON DR CLAYTON, NC 27520
Mary Bumpers	1231 Friendly George Ch. Rd. Mills Creek NC 28651
Dow DeHors	
Ardena Juller	201 Sawmill Rd Cedar Grove NC 27231
Tris Wickham Jr	3301 CRUISER DR. DURHAM 27705
Paul J. [unclear]	Tyson Inc.
Marc [unclear]	Smith Anderson
Amy Whited	NC Medical Society
Ted Sawyer	500 Via Las Cruces #15 RALEIGH, NC 27615
Byron Diggs	Pepsi Bottling Ventures 1900 Pepsi Way, GARNER, NC 27529
Cheri [unclear]	

VISITOR REGISTRATION SHEET

Sort Reform

HOUSE BANKING COMMITTEE

APRIL 21, 2011

Name of Committee

Date

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NAME

FIRM OR AGENCY AND ADDRESS

Beverly Allen	Sheltonville NC
Greg Verm	NC SA PD
Kendra Hill	Gov Office
Crystal Wallace	Raleigh, NC
Angela V-Staley	Angier, NC
Michael Mainwaring	Kennaschia NC
Arnold Eddy	Concord NC
Danija Burnette	Winston Salem, NC
Nini Green	Hickory - Century Furniture
Sam Taylor	NC Rate Board
Jessica Ellis	Canton - Wegman Packaging

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Dot Pappas
HOUSE BANKING COMMITTEE
 Name of Committee

APRIL 21, 2011
 Date

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NAME	FIRM OR AGENCY AND ADDRESS
James Blake	communications workers of America 5511 W Antterson St. Hope Mills, NC 28348
James Emore	CWA 5511 W ANTTERSON ST. HOPE MILLS, NC 28348
Talmadge Walton Jr	128 Delterra Dr. Youngsville, N.C. 27596
Journey Ledman	PHS Dorco NC 210 27312 83 Tom Womble #
John Welsborn	PFFPNC, LEXINGTON FF ASOC. 844 Rockway Dr LEXINGTON, NC 27295
Rick O'Brien	PFFPNC
Claude Gray	TEAMSTERS Local 391
Steve A. Womble	5512 2220 Aves Rd - James J 5700 2220 Aves Rd - Scott J Steve Moore - Bradson Raleigh, NC
Judi Dixon Lori Allen	
Michelle Morgan	Job Ready Services
Penny Womble Her	Miler-Motte College 3705 Ramsey Street Fayetteville NC 28391

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Joint Reform
HOUSE BANKING COMMITTEE
 Name of Committee

APRIL 21, 2011
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Jeff Mixenheimer	Lewis & Roberts, PLLC
Heidi Chapman	Chapel Hill NC
Joseph Levi Grantham Constance Grantham	Franklinville, N.C. Franklinville, N.C.
Bria Cammarano	Raleigh NC
Richard Anderson	Charlotte NC
Ken Stoller	American Insurance Assoc. (Washington, DC)
Ray Farmer	American Ins Association
Michelle Frazier	MF+S
Hunter Eddie's Grubel	Zebulen, NC
Christopher Pendergraft	Raleigh NC

VISITOR REGISTRATION SHEET

Joel Adams

HOUSE BANKING COMMITTEE

APRIL 21, 2011

Name of Committee

Date

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USA Trucks	Apex NC
Cathy Schaefer	Wake Forest NC
Robert Schaefer	Wake Forest NC
Herb Lewis	Wilson
Rebecca Williams	NC Rate Bureau
Michael Strickland	Council to N.C. Rate Bureau
Robert Paschal	Young Moore
Paul Miller	NCSFA
Katherine A. Picklesimer	Richlands NC
Jerrilla Johnson	Jacksonville NC
Yolanda Pennyfeather	Clayton NC

VISITOR REGISTRATION SHEET

Tort Reform
Name of Committee

4/21/2011
Date

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NAME

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<u>Don Carter</u>	<u>Columbia Forest Products Greensboro NC</u>
<u>Glen Gillette</u>	<u>Professional Fire Fighters and Paramedics of NC</u>
<u>David Anders</u>	<u>" "</u>
<u>JAY KERR</u>	<u>Asheville</u>
<u>James Andrews</u>	<u>NC AFL-CIO</u>
<u>Victor Farah</u>	<u>Atty. Raleigh</u>
<u>Mary Beth McMillan</u>	<u>NC AFL-CIO</u>
<u>John McMillan</u>	<u>Infos</u>
<u>Dick Taylor</u>	<u>NCAAT</u>
<u>John McAlister</u>	<u>NC Chamber</u>
<u>JJ Nevins</u>	<u>WSASI</u>

VISITOR REGISTRATION SHEET

Just Reform
HOUSE BANKING COMMITTEE
Name of Committee

APRIL 21, 2011
Date

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NAME

FIRM OR AGENCY AND ADDRESS

<i>Jon Yurkew</i>	<i>Winterville NC The Roberts Company</i>
<i>Scott Peay</i>	<i>Pitt County Industrial Development Comm.</i>

5

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Joint Reform
HOUSE BANKING COMMITTEE
 Name of Committee

APRIL 21, 2011
 Date

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NAME	FIRM OR AGENCY AND ADDRESS
<i>Lynne Thomas</i>	SELF - <i>Hickory, NC</i>
<i>Drill</i>	NCAJ
<i>Phil Baldwin</i>	NCAJ
<i>Kelli Gonzales</i>	Self Goldsboro
<i>George Gonzalez</i>	Self Goldsboro
<i>Nancy Davis</i>	Durham Public Schools
<i>Charlene Shabazz</i>	OSP
<i>Ana Kim</i>	OSP
<i>Janice Decker</i>	Self
<i>Henry Payne</i>	N.C. Justice Center
<i>Patti Harper</i>	Harper Law Office Sylva, NC

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Sort Reform
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APRIL 21, 2011
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David Shelby <i>ENTER 3542</i>	Salisbury, NC GSW
Forrest Goff	Gulbeed NC.
TRAVIS PAYNE	RALEIGH NC
RAM PEGA	CHARLOTTE, NC
MARCELLA JAMES	J.S.F
VERA L. Waites	Raleigh, N.C.
Marilyn Wrenn	J. S.F
STEVE GARDNER	Durham, N.C.
Ben Whitley	Raleigh, NC
Jocelyn Petley	Raleigh, NC

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APRIL 21, 2011
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NAME

FIRM OR AGENCY AND ADDRESS

Lauren Clarr

Charlotte NC

John Jernigan

Jernigan Law

Leonard Osborne

u u

Kristina Brown

Raleigh, NC

Beth Jo Creed

Jernigan Law

James Hoot

Raleigh, NC

Aly Elle

NCRA

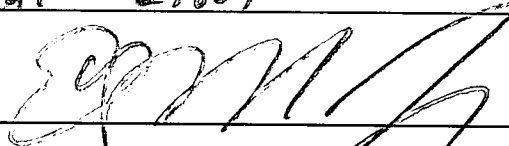
Joe Bazuk

Yance & Utipil

Melinda Crumpler

Yance & Utipil,
 3701 Lakebore rd ste 300
 Raleigh 27607

Ed Moran



Robin Haddock

3674 Moberg Bridge Road

Grimesland NC 21837

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APRIL 21, 2011
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NAME	FIRM OR AGENCY AND ADDRESS
Richard Harper	attly PO Box 395 Sylva, NC 28779
Bob Crumly	Attorney Asheville
Bill Wilson	AARP
Neal Comak	Attly, Raleigh
<i>Keenan</i>	Attly, New Bern, NC
Cameron Albright	
J Goodman	NC CHAMBER
Katherine Ross	AARP
Rob Ennis	Cornelius, NC
Anthony Matano	INDIAN TRAIL, NC
Lauren Potts	Charlotte, NC

VISITOR REGISTRATION SHEET

Toot Reform
 HOUSE BANKING COMMITTEE
 Name of Committee

APRIL 21, 2011
 Date

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NAME	FIRM OR AGENCY AND ADDRESS
Ben Matthews	NC DPI
Eileen Townsend	NC DPI
EDWARD James Boyce	N.C. Local 391 TEAMSTERS.
Abby Hammond	NCC
ERNEST SPIVEY	
Alicia Hudson	Ernie Teich/Anderson Ashv.
Michele + Les Decker	Asheville NC
Sharon & Mike	Asheville NC
Jodie Nolf	IARP
Jane Rouse	IARP
Mark Summitt	Charlotte, NC

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HOUSE BANKING COMMITTEE
 Name of Committee

APRIL 21, 2011
 Date

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NAME	FIRM OR AGENCY AND ADDRESS
Soraal Davis	Protect NC Workers
Troy Bolton-Viguer	Protect NC Workers
Maureen Cern	Protect NC Workers
Jody Roberts	Protect NC Workers
<i>John Plender</i>	NC PMA
LEONARD JERNIGAN	JERNIGAN LAW FIRM
<i>Janice</i>	self
Meggie Shankle	Shankle Law Firm
Brittney Shankle	Shankle Law Firm
Dulce McGuire	Shankle Law Firm
<i>Juan Fitzgerald</i>	MLC

AGENDA

HOUSE SELECT COMMITTEE ON TORT REFORM

Thursday, May 12, 2011
Room 1327 LB
11:00 AM

OPENING REMARKS

Representative Johnathan Rhyne, Co-Chair
House Select Committee on Tort Reform

AGENDA ITEMS

HB 709 PROTECT AND PUT NC BACK TO WORK

1. Staff to explain changes in the bill
2. Comments by Representative Dale Folwell
3. Dick Taylor, NC Advocates for Justice
4. John McAlister, NC Chamber

ADJOURNMENT

MINUTES
HOUSE SELECT COMMITTEE ON TORT REFORM
Thursday, May 12, 2011

Upon call of the Chair, the House Select Committee on Tort Reform met on Thursday, May 12, 2011 in room 1327 of the Legislative Building. The following members were present: Danny McComas, Johnathan Rhyne, Co-Chairs; David Lewis, Tim Moffitt, Tom Murry, Vice-Chairs; Representatives Brisson, Carney, Dockham, Dollar, Faison, Gillespie, Hall, Hill, McLawhorn, Mills, Owens, Parfitt, Randleman, Samuelson, and Weiss.

Chairman Rhyne called the meeting to order to consider the status of HB 709, a bill entitled PROTECT AND PUT NC BACK TO WORK, sponsored by Representative Dale Folwell. Chairman Rhyne recognized Representative Folwell to give an update on the status of and recent negotiations concerning the bill.

Chairman Rhyne recognized staff legal counsel Bill Patterson to explain changes to the bill.

Chairman Rhyne recognized Dick Taylor of the North Carolina Advocates for Justice to give his perspective on the bill.

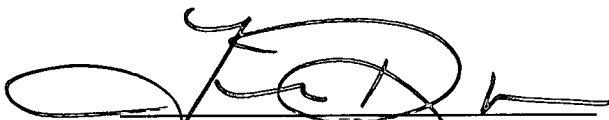
Chairman Rhyne recognized Bob Crumley, president of North Carolina Republican Attorneys, to give his perspective on the bill.

Chairman Rhyne recognized John McAlister of the North Carolina Chamber to give his perspective on the bill.

Chairman Rhyne recognized Representative Folwell to give closing comments.

Chairman Rhyne adjourned the meeting at 11:35 AM.

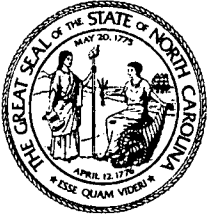
Respectfully submitted,



Representative Johnathan Rhyne
Chairman



Susan Beaupied
Committee Assistant



HOUSE BILL 709: Protect and Put NC Back to Work

2011-2012 General Assembly

Committee: House Select Committee on Tort Reform, if favorable, Insurance	Date: April 29, 2011
Introduced by: Reps. Folwell, Dollar, Hager, Crawford	Prepared by: Bill Patterson
Analysis of: First Edition	Committee Counsel

SUMMARY: *House Bill 709 makes substantive changes to the Workers Compensation Act.*

[As introduced, this bill was identical to S544, as introduced by Sens. Brown, Apodaca, Davis, which is currently in Senate Insurance.]

CURRENT LAW AND BILL ANALYSIS:

In General: Under the Workers Compensation Act, Article 1 of Chapter 97 of the General Statutes ("the Act"), an employee who sustains a compensable injury by accident or occupational disease is eligible for several types of benefits, including indemnity (wage-replacement) and medical benefits.

The Industrial Commission is charged with carrying out the Act's provisions, among its other duties.¹ Seven commissioners appointed by the Governor make the Commission's rules and hear appeals from decisions of deputy commissioners in contested cases. Pursuant to G.S. 150B-1(c)(4), the Commission is exempt from all provisions of the Administrative Procedures Act.

In addition to medical compensation, an employee whose injury has resulted in a loss of wage-earning capacity is entitled to weekly compensation for either total or partial incapacity:

For a total loss of wage-earning capacity, the employee is entitled under G.S. 97-29 to receive weekly compensation in the amount of 2/3 of his or her average weekly wage for as long as that loss lasts, with no limitation on the duration of the benefits. If the total incapacity is permanent, the employee is entitled to receive this compensation for life.

For a partial loss of wage-earning capacity, the employee is entitled under G.S. 97-30 to receive weekly compensation in the amount of 2/3 of the difference in average weekly wage before and after the injury, for as long as the partial loss of wage-earning capacity lasts, but subject to a maximum of 300 weeks.

In addition to compensation for partial or total incapacity, if an employee has a specific physical impairment that falls under the schedule of injuries set forth in G.S. 97-31, the employee is presumed to have suffered a loss of wage-earning capacity. In that case, the employee is entitled to weekly compensation during the "healing period" and, in addition, a lump-sum payment according to the schedule of injuries set forth in the statute.

Employees who are eligible for compensation under G.S. 97-31 for a scheduled injury and who also qualify under either G.S. 97-29 or 97-30 for permanent total or partial disability compensation are permitted to select the more favorable remedy.²

¹ In addition to administering the Workers Compensation Act, the Commission also administers and adjudicates the Tort Claims Act, the Childhood Vaccine-Related Injury Act, the Law Enforcement Officers', Firemen's, Rescue Squad Workers', and Civil Air Patrol Members' Death Benefit Act, and the Act to Compensate Individuals Erroneously Convicted of Felonies.

² Whitley v. Columbia Lumber Mfg. Co., 318 N.C. 89, 348 S.E.2d 336 (1986); Gupton v. Builders Transport, 320 N.C. 38, 357 S.E.2d 674 (1987).

House Bill 709

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Section 2³: Definition of "Suitable Employment"

Current Law: "Suitable employment" is not statutorily defined. "In determining what is 'suitable,' our courts consider similarity of the wages or salary of the pre-injury employment and the post-injury job offer." Dixon v. City of Durham, 128 N.C.App. 501, 506, 495 S.E.2d 380, 384 (N.C.App.,1998).

Employment that is "make work" and that would not be offered to plaintiff by other employers at a comparable wage is not suitable employment. "If the proffered employment does not accurately reflect the person's ability to compete with others for wages, it cannot be considered evidence of earning capacity. Proffered employment would not accurately reflect earning capacity if other employers would not hire the employee with the employee's limitations at a comparable wage level. The same is true if the proffered employment is so modified because of the employee's limitations that it is not ordinarily available in the competitive job market. The rationale behind the competitive measure of earning capacity is apparent. If an employee has no ability to earn wages competitively, the employee will be left with no income should the employee's job be terminated. Termination of the employee would not necessarily signal a bad motive on the part of the employer. An employer facing a business decline reasonably could determine that continued retention of the employee was not feasible. The employee also could be dismissed for misconduct. The employer could, for reasons beyond its control, simply cease doing business." Peoples v. Cone Mills Corp., 316 N.C. 426, 438, 342 S.E.2d 798, 806 (N.C.,1986).

The IC's Rehabilitation Rules define "suitable employment" as "employment in the local labor market or self-employment which is reasonably attainable and which offers an opportunity to restore the worker as soon as possible and as nearly as practicable to pre-injury wage, while giving due consideration to the worker's qualifications (age, education, work experience, physical and mental capacities), impairment, vocational interests, and aptitudes. No one factor shall be considered solely in determining suitable employment." 04 NCAC 10C.0103(g).

Analysis: Section 2 amends G.S. 97-2 to define the term "suitable employment" as any available employment that is within the employee's work restrictions before the employee has reached maximum medical improvement, or that the employee is capable of performing after reaching maximum medical improvement given the employee's education, injury-related physical limitations, vocational skills and experience.

In contrast to current law, this definition does not require that the available employment wage be comparable to the employee's pre-injury wage, and does not exclude "make work," i.e., a position that is not available from any other employer at a comparable wage.

Section 3: Willful Misrepresentation in Applying for Employment

Current Law: None; this section of the bill adds a new section to the General Statutes.

Analysis: Section 3 enacts new G.S. 97-12.1, which disqualifies an employee from receiving compensation under the Act if, in connection with being hired, the employee willfully made a false representation regarding his or her physical condition, the employer relied upon the representation, and there was a causal connection between the representation and the injury or occupational disease for which the employee seeks compensation.

³ Section 1 of the bill states the name by which the Act shall be known ("Protecting and Putting North Carolina Back to Work") and contains no substantive provisions.

House Bill 709

Page 3

Section 4: Settlements Resolving Issues Not Covered by Act

Current Law: None on this precise point; however, current Commission rules for approval of a compromise agreement require a finding that "no rights other than those arising under the provisions of the Workers' Compensation Act are compromised or released." 04 NCAC 10A .0502(a)(5).

Analysis: Section 4 amends G.S. 97-17, which governs settlements of claims brought under the Act, to clarify that nothing in this section prevents the parties from reaching a separate contemporaneous agreement resolving issues not covered by the Act.

Section 5: Changes in Treatment or Health Care Provider

Current Law: Pursuant to G.S. 97-25, the Commission can order such further treatments as it deems necessary in the event of a dispute over continued medical treatment. Upon an employee's request, the Commission can approve other treatment. Subject to Commission approval, an employee can choose a physician to take charge of his case.

Analysis: Section 5 amends G.S. 97-25 to remove the Commission's discretion to order further treatment in the event of a dispute. A change in treatment or provider ordered by the Commission upon the employee's request must be "based upon clear and convincing medical evidence" and the Commission must disregard the opinion of an unauthorized provider who evaluated the employee before the request for a change was filed by the employee. This section also eliminates the employee's current ability to select a physician of his own choosing subject to Commission approval.

Section 6: Access to the Employee's Medical Information

Current Law: Pursuant to G.S. 97-25.6, an employer or its insurer that is paying medical compensation to an employee may obtain the employee's medical records without the employee's consent. Upon written notice to the employee, the employer or its insurer may also obtain records of evaluation or treatment, restricted to a current injury or condition for which the employee seeks compensation. Other communications between the employer/insurer and health care providers not consented to by employee must be approved by Commission and narrowly tailored to the issues involved in the claim.

Analysis: Section 6 amends G.S. 25.6 to grant the employer, its insurer and its attorney a broad general right of access to all medical records and provider information of the employee that involves the evaluation, diagnosis or treatment of the injury or disease for which compensation is sought, that is reasonably related to such injury or disease, or that is related to the employee's ability to return to work or perform suitable employment. The Commission is required annually to set the fee payable to providers to respond to information requests.

Section 7: Medical Examinations/Second Opinions on Permanent Disability Percentage

Current Law: Pursuant to G.S. 97-27, in cases where there is a dispute over the percentage of permanent disability, if the employee disagrees with the results of a physical exam requested by employer or ordered by Commission, the employee is entitled to another opinion by a physician licensed to practice in North Carolina, South Carolina, Georgia, Virginia, or Tennessee.

Analysis: Amends G.S. 97-27 to provide that:

- the employee must submit to an independent medical examination after an injury and for so long as the employee claims compensation, as requested by the employer or as ordered by the Commission, by a physician licensed and practicing in North Carolina, regardless of whether the employee's claim has been denied by the employer

House Bill 709

Page 4

- any refusal by the employee immediately suspends the employee's right to compensation and right to prosecute any proceedings under the Act
- an employee who wishes to challenge the permanent disability rating resulting from the medical examination requested by the employer is entitled to another opinion limited to the issue of the percentage of permanent disability, provided by a physician licensed and practicing in North Carolina, and any opinion on any other issue shall be disregarded by the Commission

Section 8: Duration of Compensation for Total Disability/Injuries Presumed to Render an Employee Totally and Permanently Disabled

Current Law: Pursuant to G.S. 97-29, benefits are payable for as long as an employee's incapacity for work is total. If the employee's disability is determined to be total and permanent, compensation is payable for life. Pursuant to G.S. 97-31(17), loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, is deemed to constitute total and permanent disability.

To be entitled to benefits for total incapacity, "Plaintiff is required to show that he was incapable after his injury of earning any wages in the same or any other employment, and that the incapacity was caused by the compensable injury." Hilliard v. Apex Cabinet Co., 305 N.C. 593, 290 S.E. 2d 682 (1982). "The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury." Russell v. Lowes Product Distribution, 108 N.C.App. 762, 765-766, 425 S.E.2d 454, 457 (1993).

Analysis: Section 8 amends G.S. 97-29 to:

- place a limit on the duration of compensation, including medical compensation, paid for temporary total disability of 500 weeks from the date of the injury
- require an employee who has reached maximum medical improvement and who has one or more scheduled injuries to elect whether to receive compensation under G.S. 97-31 or receive compensation under either G.S.97-29 (temporary total disability) or G.S. 97-30 (temporary partial disability)
- provide that an employee is presumed to be totally and permanently disabled only if the employee has one or more of the injuries specified in new subdivisions (c)(1) through (c)(4) (this would appear to conflict with G.S. 97-31(17), under which an employee who has lost any two of these body parts is presumed to be permanently and totally disabled)

Section 9: Compensation for Partial Incapacity

Current Law: Pursuant to G.S. 97-30, an injured employee is entitled to compensation for partial incapacity for a maximum of 300 weeks from the date of the injury.

Analysis: Section 9 amends G.S. 97-30 to increase the maximum period of compensation for partial incapacity to 500 weeks from the date of the injury.

Section 10: Refusal to Accept Suitable Employment

Current Law: Pursuant to G.S. 97-32, an employee who refuses "employment procured for him suitable to his capacity" is disqualified from receiving compensation during the continuance of the refusal.

House Bill 709

Page 5

Analysis: Section 10 amends G.S. 97-32 to provide that an employee shall not receive compensation for so long as the employee refuses "suitable employment" as defined in G.S. 97-2(22) without justification as determined by the Commission. Section 10 also clarifies that nothing in the Act prohibits an employer from directly contacting the employee about returning to suitable employment.

Section 11: Burial Expense and Compensation to Deceased Employee's Dependents

Current Law: Pursuant to G.S. 97-38, compensation for burial expenses is capped at \$3,500 and the duration of compensation to the dependents of an employee whose compensable injuries resulted in death is capped at 400 weeks from the date of death.

Analysis: Section 11 amends G.S. 97-38 to raise the cap on burial expenses to \$10,000 and to increase the maximum duration of dependent compensation to 500 weeks from the date of death.

Section 12: Terms of Commissioners

Current Law: Pursuant to G.S. 97-77(a), the Industrial Commission comprises seven members serving six-year terms, appointed by Governor. No more than three are employee representatives and no more than three are employer representatives, based on previous vocations, employment or affiliations.

Analysis: Section 12 amends G.S. 97-77(a) to reduce the number of commissioners from seven to five, two of whom shall be classed as employer representatives and two of whom shall be classed as employee representatives, based on their previous vocations, employment or affiliations, and no one of whom may serve more than two terms, including terms served prior to the effective date of this change.

Section 13: Selection of Commissioners

Current Law: None; this section enacts a new subsection G.S. 97-77(a1).

Analysis: Section 13 enacts a new subsection (a1) to G.S. 97-77 requiring legislative confirmation of the Governor's appointments to the Commission, and setting forth the procedure for confirmation of appointments and for filling vacancies in the office of any commissioner prior to expiration of the commissioner's term.

Section 14: Commissioners and Deputy Commissioners Subject to Standards of Judicial Conduct and Impeachment Procedures Provided for Judges

Current Law: Commissioners are "covered persons" subject to the ethical standards of the State Ethics Act, Article 4 of Chapter 138A, including the prohibition against using their public position for private gain, or receiving personal financial gain other than their official salary for performing their public duties. Commissioners and deputy commissioners are not "judges" as that term is used in G.S. 7A-376⁴, which authorizes the Judicial Standards Commission to investigate complaints concerning the qualification or conduct of any judge and to either issue a private letter of caution or a public reprimand for violation of the Code of Judicial Conduct not warranting censure, suspension or removal, and to recommend that the more serious sanctions be imposed by the North Carolina Supreme Court for "willful misconduct in office, willful and persistent failure to perform the judge's duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." The Code of Judicial Conduct as adopted by the Supreme Court is a guide to the meaning of G.S. 7A-376.⁵

⁴ G.S. 7A-374.2(5) provides that "judge" means "any justice or judge of the General Court of Justice of North Carolina, including any retired justice or judge who is recalled for service as an emergency judge of any division of the General Court of Justice."

⁵ In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977)

House Bill 709

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Analysis: Section 14 enacts a new G.S. 97-78.1 prohibiting commissioners and deputy commissioners from engaging in any other employment, business, profession, or vocation while in office, and subjecting them to the standards of judicial conduct provided for judges in Article 30 of Chapter 7A of the General Statutes and to the impeachment provisions applicable to judges under Chapter 123 of the General Statutes.⁶

Section 15: Commission Required to Adopt Rules in Accordance with APA

Current Law: Pursuant to G.S. 97-80(a), the Commission is authorized to make rules for carrying out the provisions of the Act.

Analysis: Section 15 amends G.S. 97-80(a) to require the Commission to adopt rules in accordance with Article 2A of the Administrative Procedures Act.

Section 16: Commission Findings Based on Preponderance of the Evidence of Entire Record

Current Law: G.S. 97-84 authorizes the Commission to find facts and issue awards in determining the disputes before it. "The degree of proof required of a party plaintiff under the Act is the 'greater weight' of the evidence or 'preponderance' of the evidence." Phillips v. U.S. Air, Inc., 120 N.C.App. 538, 541-542, 463 S.E.2d 259, 261 (1995)."

Analysis: Section 16 amends G.S. 97-84 to provide that decisions and findings of fact of the Commission shall be based upon the preponderance of the evidence in view of the entire record.

Section 17: Commission Subject to APA; Exempt from Contested Cases Provisions; Rules Expire if not Readopted by December 31, 2012

Current Law: G.S. 150B-1 exempts the Commission from the requirements of the Administrative Procedures Act ("APA").

Analysis: Section 17 amends G.S. 150B-1 to delete the current statutory exemption of the Commission from the APA, amends G.S. 150B-1(e) to add a new subdivision (18) exempting the Commission from the APA's contested case provisions, requires the Commission to readopt all rules currently in effect pursuant to the procedures in APA Article 2A, and provides that any existing Commission rule that is not readopted by December 31, 2012 shall expire.

Section 18: Remaining Terms of Existing Commissioners

Current Law: Not applicable; this section is uncodified.

Analysis: Section 18 establishes the remaining terms of the current seven commissioners, reduces the number of commissioners from seven to five by providing that the two commissioners whose terms expire on June 30, 2012, shall not be replaced, and requires that the reduction in the employee and employer categories from three each to two each shall become effective July 1, 2012.

EFFECTIVE DATE: This act is effective when it becomes law, with Sections 4, 5, 6, and 7 applying to claims pending on or after that date, and with Sections 2, 3, 8, 9, 10, 11, and 16 applying to claims arising on or after July 1, 2011.

H709-SMTG-21(e1) v5

⁶ Commissioners of the North Carolina Utilities Commission are subject to the same standards under G.S. 62-10(i).

VISITOR REGISTRATION SHEET

HOUSE TORT REFORM

MAY 12, 2011

Name of Committee

Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME

FIRM OR AGENCY AND ADDRESS

DAVID VHIPIL

Yancey - Vhipil

Andy Ellen

NRMA

Amy Whitehead

NC Med Society

Chip Bygones

NCMS

Donk Bertha

[Signature]

Fred Bone

Bone - ASSO.

MARY K. MONTFOURD

NC A. Philip Randolph Inst.

Robert PASCHAL

Young Moore

Kathleen Glaney

Kathleen Shannon Glaney P.A.

Leslie Ogilvie

Interested citizen

Donna Strangren

Injured worker

Victor Farah

Farah & Cummings

STEVEN YHO

INTERESTED CITIZEN + INJURED

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HOUSE TORT REFORM

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Date

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FIRM OR AGENCY AND ADDRESS

NAME	FIRM OR AGENCY AND ADDRESS
James Lemmon	FMC
Geri Cannon	3701 Baron Cooper Pass #203 Raleigh NC 27612
DKT/SL	NCAAP
Henry Patterson	Patterson Haly, 100 Empire Drive, Chapel Hill, NC.
Nancy Cannon	Furber & Cannon Law Firm Raleigh
Dan Deutermau	Deutermau Law Group
Jal Ori	Deutermau Law Group

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James C. Ryz	Woodward Tire Plant
Lauren Clark	Charlotte NC
Crystal Snow	Charlotte NC
Brandon Jacobs	Office of Rep. Daniel McCowan
Jerry Rogers	Raleigh, N.C.
MATTHEW HEALEY	PROTECT NC WORKING FAMILIES
Allison Rogers	Raleigh NC
Laura Jenkins	Laura S. Jenkins, P.C.
Tom Coley	CWA
Todd Martinez	IAFF LOCAL 673 (High Point)
Justin Moody	The Jernigan Law Firm

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NAME	FIRM OR AGENCY AND ADDRESS
David Massengill	Martin & Jones - Raleigh
JOE SEAGROVES	Martin & Jones Raleigh
Busan Bowman	Protect NC Workers
Traci Galvan-Uzges	Protect NC Workers
Maura Osen	Protect NC Workers
Sarah Davis	Protect NC Workers
Kay Paksoy	NASW-NC
Timothy Modlin	—
Charles Castner	—
Jake Cashion	NC Chamber
Calvin Hildreth	NC

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Jasmine Roach	Younce + Vitpil Raleigh, NC
Karen Holland	Younce + Vitpil Raleigh, NC
Carmella Williams	Younce + Vitpil, Raleigh, NC
Anne Harris	Anne Harris, Atty at Law, Greensboro NC 201 Seawall Rd
Orlena Fuller	Cedar Grove, NC 27231 3310 CROSSDALE DR, SUITE 500 DURHAM NC 27705
John Williams Jr.	
Leonard Jernigan	The Jernigan Law Firm Raleigh, NC
Hayes Jernigan	" "
Loa Kost	OSP
Carl Dean	OSP
Charlene Shabazz	OSP

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Inellis Rodriguez	Brent Adams & Assoc
Karen McGraw	Brent Adams & Assoc.
Teresa Pennix	CWA Local 3607
William Burton	CWA
David Anders	PFFPC
Henry Lancaster	WFNC
Sheila W. Chavis	NCAJ
Tia Nicole Bowman	NCAJ
Michael Bertics	Lennon and Camak PLLC
S. Neal Camak	Lennon and Camak, PLLC
Rob Black	TEAMSTERS

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Date

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NAME	FIRM OR AGENCY AND ADDRESS
Paul H. Johnson	Johnson
Walter H. Johnson	Independent
Sara Fender	IFNC
Jennifer Cohen	IFNC
James Andrews	NC State AFL-CIO
Cathy Ruffin	
Angela Bland	
Alice Tjanda	The Tjanda Law Firm
George Gonzalez	Independent
Kelli Gonzales	self
Rebekah Siers	self

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Date

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NAME	FIRM OR AGENCY AND ADDRESS
Chip Younce	Younce & Vitipil 3701 Lake Boone Tr. Raleigh 27607
Melinda Crumpler	Same as above
Adrienne Wilkerson	same as above
Dana Menezes	same as above
W. H. Post	Gov. Office
Melany Smith	Younce & Vitipil
Burtin Cragg	NCAJ
Connie Wilson	ECNC
Katherine Joyce	NCA SA
Alicia Hudson	Crimes Teich Anderson, Ashw.
Steve Brewer	Century Link

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Will Colee	AVR
Penny R. Pierce	The Tejada Law Firm
Richard O'Brien	PFFPNC
Donald Rozavage	PFFPNC
a. j. Craig	LCA
JAMES F MULLINS JR	KATHLEEN GLANCY LAW FIRM/
MICHAEL T POTTER	KATHLEEN GLANCY LAW FIRM
Abby Hammond	NCIC
Alex Montford	NC APRI
Joyce Fowler	NC APRI

House Committee Pages / Sergeants at Arms

NAME OF COMMITTEE House Select Committee on Tort Reform

DATE: 5/12/2011

Room: 1228

*Name: Cortez Atwood

County: Wake County

Sponsor: Tom Tillis

*Name: Ryan Allen

County: Mecklenburg

Sponsor: _____

Name: _____

County: _____

Sponsor: _____

*Name: _____

County: _____

Sponsor: _____

*Name: _____

County: _____

Sponsor: _____

House Sgt-At Arms:

1. Name: Bill MacRae

4. Name: _____

Name: Ken Kirby

5. Name: _____

3. Name: R.L. Carter

6. Name: _____

AGENDA

HOUSE SELECT COMMITTEE ON TORT REFORM

Thursday, May 26, 2011
Room 1327 LB
11:00 AM

OPENING REMARKS

Representative Johnathan Rhyne, Co-Chair
House Select Committee on Tort Reform

AGENDA ITEMS

HB 709 PROTECT AND PUT NC BACK TO WORK

ADJOURNMENT

MINUTES
HOUSE SELECT COMMITTEE ON TORT REFORM
Thursday, May 26, 2011

Upon call of the Chair, the House Select Committee on Tort Reform met on Thursday, May 26, 2011 in room 1327 of the Legislative Building. The following members were present: Danny McComas, Johnathan Rhyne, Co-Chairs; David Lewis, Tom Murry, Vice-Chairs; Representatives Barnhart, Carney, Dockham, Dollar, Faison, Hall, Hill, McLawhorn, Mills, Parfitt, Stam, and Weiss.


The Chairman called the meeting to order to consider HB 709, AN ACT PROTECTING AND PUTTING NORTH CAROLINA BACK TO WORK BY REFORMING THE WORKERS' COMPENSATION ACT.

Representative Murry made a motion to accept a proposed committee substitute. The motion carried. Representative Weiss asked to be excused from any committee vote on the basis of rule 24. The chairman recognized the following people, representing all the stakeholders, who unanimously endorsed the PCS for HB 709: Dick Taylor, Bob Crumley, John McAlister, James Andrews, Kevin Leonard, and Chip Baggett.

The chairman recognized Bill Patterson to explain the bill changes. Chairman Rhyne then recognized Representative Dollar who made a motion to give a favorable report to the PCS. A voice vote was taken, and the ayes were unanimous.

The serial referral to the Insurance Committee was stricken, and the committee substitute for HB 709 was placed on the calendar for a vote on the House floor on May 31st.

Respectfully submitted,



Representative Johnathan L. Rhyne, Jr.
Co-Chair



Susan Beaupied
Committee Clerk

**2011 COMMITTEE REPORT
HOUSE OF REPRESENTATIVES**

The following report(s) from standing committee(s) is/are presented:

By Representative McComas, Rhyne (Chairs) for the Committee on HOUSE SELECT
COMMITTEE ON TORT REFORM.

Committee Substitute for

HB 709 A BILL TO BE ENTITLED AN ACT PROTECTING AND PUTTING NORTH
CAROLINA BACK TO WORK BY REFORMING THE WORKERS' COMPENSATION ACT.

With a favorable report as to the committee substitute bill, which changes the title, unfavorable as to
the original bill.

(FOR JOURNAL USE ONLY)

_____ Pursuant to Rule 32(a), the bill/resolution is re-referred to the Committee on _____.

_____ Pursuant to Rule 36(b), the (House/Senate) committee substitute bill/(joint) resolution
(No. _____) is placed on the Calendar of _____. (The original bill resolution No. _____) is placed
on the Unfavorable Calendar.

_____ The (House) committee substitute bill/(joint) resolution (No. _____) is re-referred to the
Committee on _____. (The original bill/resolution) (House/Senate Committee Substitute Bill/(Joint)
resolution No. _____) is placed on the Unfavorable Calendar.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

H

D

HOUSE BILL 709*
PROPOSED COMMITTEE SUBSTITUTE H709-CSTG-19 [v.8]

5/26/2011 9:44:15 AM

Short Title: Protect and Put NC Back to Work.

(Public)

Sponsors:

Referred to:

April 7, 2011

1 A BILL TO BE ENTITLED
2 AN ACT PROTECTING AND PUTTING NORTH CAROLINA BACK TO WORK BY
3 REFORMING THE WORKERS' COMPENSATION ACT.

4 The General Assembly of North Carolina enacts:

5 SECTION 1. This act shall be known as the "Protecting and Putting North
6 Carolina Back to Work Act."

7 SECTION 2. G.S. 97-2 is amended as follows:

8 "§ 97-2. Definitions.

9 When used in this Article, unless the context otherwise ~~requires~~ requires:

10 ...
11 (19) Medical Compensation. – The term "medical compensation" means medical,
12 surgical, hospital, nursing, and rehabilitative services including, but not
13 limited to, attendant care services prescribed by a health care provider
14 authorized by the employer or subsequently by the Commission, vocational
15 rehabilitation, and medicines, sick travel, and other treatment, including
16 medical and surgical supplies, as may reasonably be required to effect a cure
17 or give relief and for such additional time as, in the judgment of the
18 Commission, will tend to lessen the period of disability; and any original
19 artificial members as may reasonably be necessary at the end of the healing
20 period and the replacement of such artificial members when reasonably
21 necessitated by ordinary use or medical circumstances.

22 ...
23 (22) Suitable employment. – The term "suitable employment" means employment
24 offered to the employee, or if prohibited by the Immigration and Nationality
25 Act, 8 U.S.C. 1324a, employment available to the employee, that (i) prior to
26 reaching maximum medical improvement is within the employee's work
27 restrictions including rehabilitative or other non-competitive employment
28 with the employer of injury approved by the employee's authorized health
29 care provider or (ii) after reaching maximum medical improvement is
30 employment that the employee is capable of performing considering the
31 employee's pre-existing and injury related physical and mental limitations,
32 vocational skills, education and experience and is located within a 50-mile
33 radius of the employee's residence at the time of injury or the employee's
34 current residence if the employee had a legitimate reason to relocate since



1 the date of injury. No one factor shall be considered exclusively in
2 determining suitable employment."

3 **SECTION 3.** Article 1 of Chapter 97 of the General Statutes is amended by adding
4 a new section to read:

5 **"§ 97-12.1. Willful misrepresentation in applying for employment.**

6 No compensation shall be allowed under this Article for injury by accident or occupational
7 disease if the employer proves that (i) at the time of hire or in the course of entering into
8 employment, (ii) at the time of receiving notice of the removal of conditions from a conditional
9 offer of employment, or (iii) during the course of a post-offer medical examination:

10 (1) The employee knowingly and willfully made a false representation as to the
11 employee's physical condition;

12 (2) The employer relied upon one or more false representations by the
13 employee, and the reliance was a substantial factor in the employer's
14 decision to hire the employee; and

15 (3) There was a causal connection between false representation by the employee
16 and the injury or occupational disease."

17 **SECTION 4.** G.S. 97-17 is amended by adding a new subsection to read:

18 "(e) Nothing in this section prevents the parties from reaching a separate
19 contemporaneous agreement resolving issues not covered by this Article."

20 **SECTION 5.** G.S. 97-18 is amended by adding a new subsection to read:

21 "(k) In addition to any other methods for reinstatement of compensation available under
22 the Act, whenever the employer or insurer has admitted the employee's right to compensation,
23 or liability has been established, the employee may move for reinstatement of compensation on
24 a form prescribed by the Commission. If the employer or insurer contests the employee's
25 request for reinstatement, the matter shall be scheduled on a preemptive basis. This subsection
26 shall not apply to a request for a review of an award on the grounds of a change in condition
27 pursuant to G.S. 97-47."

28 **SECTION 6.** G.S. 97-25 reads as rewritten:

29 **"§ 97-25. Medical treatment and supplies.**

30 ~~Medical compensation shall be provided by the employer. In case of a controversy arising~~
31 ~~between the employer and employee relative to the continuance of medical, surgical, hospital,~~
32 ~~or other treatment, the Industrial Commission may order such further treatments as may in the~~
33 ~~discretion of the Commission be necessary.~~

34 ~~The Commission may at any time upon the request of an employee order a change of~~
35 ~~treatment and designate other treatment suggested by the injured employee subject to the~~
36 ~~approval of the Commission, and in such a case the expense thereof shall be borne by the~~
37 ~~employer upon the same terms and conditions as hereinbefore provided in this section for~~
38 ~~medical and surgical treatment and attendance.~~

39 Upon the written request of the employee to the employer, the employer may agree to
40 authorize and pay for a second opinion examination with a duly qualified physician licensed to
41 practice in North Carolina, or licensed in another state if agreed to by the parties or ordered by
42 the Commission. If, within fourteen (14) calendar days of the receipt of the written request, the
43 request is denied or the parties, in good faith, are unable to agree upon a health care provider to
44 perform a second opinion examination, the employee may request that the Industrial
45 Commission order a second opinion examination. The expense thereof shall be borne by the
46 employer upon the same terms and conditions as provided in this section for medical
47 compensation.

48 Provided, however, if the employee so desires, an injured employee may select a health
49 care provider of the employee's own choosing to attend, prescribe and assume the care and
50 charge of the employee's case subject to the approval of the Industrial Commission. In addition,
51 in case of a controversy arising between the employer and the employee, the Industrial

1 Commission may order necessary treatment. In order for the Commission to grant an
2 employee's request to change treatment or health care provider, the employee must show by a
3 preponderance of the evidence that the change is reasonably necessary to effect a cure, provide
4 relief or lessen the period of disability. When deciding whether to grant an employee's request
5 to change treatment or health care provider, the Commission may disregard or give less weight
6 to the opinion of a health care provider from whom the employee sought evaluation, diagnosis
7 or treatment before the employee first requested authorization in writing from the employer,
8 insurer or Commission.

9 ~~The refusal of the employee to accept any medical, hospital, surgical or other treatment or~~
10 ~~rehabilitative procedure~~ medical compensation when ordered by the Industrial Commission
11 shall bar said the employee from further compensation until such refusal ceases, and no
12 compensation shall at any time be paid for the period of suspension unless in the opinion of the
13 Industrial Commission the circumstances justified the refusal, in which case, the Industrial
14 Commission may order a change in the medical or hospital service refusal. Any order issued by
15 the Commission suspending compensation pursuant to G.S. 97-18.1 shall specify what action
16 the employee should take to end the suspension and reinstate the compensation.

17 ~~If in an emergency on account of the employer's failure to provide the medical or other care~~
18 ~~as herein specified~~ compensation, a physician other than provided by the employer is called to
19 treat the injured employee, the reasonable cost of such service shall be paid by the employer if
20 so ordered by the Industrial Commission.

21 ~~Provided, however, if he so desires, an injured employee may select a physician of his own~~
22 ~~choosing to attend, prescribe and assume the care and charge of his case, subject to the~~
23 ~~approval of the Industrial Commission."~~

24 **SECTION 7.** G.S. 97-25.6 is amended as follows:

25 **"§ 97-25.6. Reasonable access to medical information.**

26 (a) Notwithstanding any provision of G.S. 8-53 to the contrary, and because discovery
27 is limited pursuant to G.S. 97-80, it is the policy of this State to protect the employee's right to a
28 confidential physician-patient relationship while allowing the parties to have reasonable access
29 to all relevant medical information, including medical records, reports and information
30 necessary to the fair and swift administration and resolution of workers' compensation claims;
31 while limiting unnecessary communications with and administrative requests to health care
32 providers.

33 (b) As used in this section, "relevant medical information" means any medical record,
34 report or information that is:

- 35 (1) restricted to the particular evaluation, diagnosis, or treatment of the injury or
36 disease for which compensation, including medical compensation, is sought;
37 (2) reasonably related to the injury or disease for which the employee claims
38 compensation; or
39 (3) related to an assessment of the employee's ability to return to work as a
40 result of the particular injury or disease.

41 (c) Relevant medical information shall be requested and provided subject to the
42 following provisions:

- 43 (1) Medical records. – An employer is entitled, without the express
44 authorization of the employee, to obtain the employee's medical records
45 containing relevant medical information from the employee's health care
46 providers. In a claim in which the employer is not paying medical
47 compensation to a health care provider from whom the medical records are
48 sought, or in a claim denied pursuant to G.S. 97-18(c), the employer shall
49 provide the employee with contemporaneous written notice of the request for
50 medical records. The employer shall provide the employee with a copy of

- 1 any records received in response to this request within thirty (30) days of its
2 receipt by the employer.
- 3 (2) Written communications with health care providers. – An employer may
4 communicate with the employee's authorized health care provider in writing,
5 without the express authorization of the employee, to obtain relevant
6 medical information not available in the employee's medical records. The
7 employer shall provide the employee with contemporaneous written notice
8 of the written communication. The employer may request the following
9 additional information:
- 10 a. the diagnosis of the employee's condition;
11 b. the appropriate course of treatment;
12 c. the anticipated time that the employee will be out of work;
13 d. the relationship, if any, of the employee's condition to the
14 employment;
15 e. work restrictions resulting from the condition;
16 f. the kind of work for which the employee may be eligible;
17 g. the anticipated time the employee will be restricted; and
18 h. any permanent impairment as a result of the condition.
- 19 The employer shall provide a copy of the health care provider's response to
20 the employee within ten (10) business days of its receipt by the employer.
- 21 (3) Oral communications with health care providers. – An employer may
22 communicate with the employee's authorized health care provider by oral
23 communication to obtain relevant medical information not contained in the
24 employee's medical records, not available through written communication,
25 and not otherwise available to the employer, subject to the following:
- 26 a. The employer must give the employee prior notice of the purpose of
27 the intended oral communication and an opportunity for the
28 employee to participate in the oral communication at a mutually
29 convenient time for the employer, employee, and health care
30 provider.
- 31 b. The employer shall provide the employee with a summary of the
32 communication with the health care provider within ten (10) business
33 days of any oral communication in which the employee did not
34 participate.
- 35 (d) Additional information submitted by the employer. – Notwithstanding subsection
36 (c) of this section, an employer may submit additional relevant medical information not already
37 contained in the employee's medical records to the employee's authorized health care provider
38 and may communicate in writing with the health care provider about the additional information
39 in accordance with the following procedure:
- 40 (1) The employer shall first notify the employee in writing that the employer
41 intends to communicate additional information about the employee to the
42 employee's health care provider. The notice shall include the employer's
43 proposed written communication to the health care provider and the
44 additional information to be submitted.
- 45 (2) The employee shall have ten (10) business days from the postmark or
46 verifiable facsimile or electronic mail to either consent or object to the
47 employer's proposed written communication.
- 48 (3) Upon consent of the employee or in the absence of the employee's timely
49 response, the employer may submit the additional information directly to the
50 health care provider.

1 (4) Upon making a timely objection, the employee may request a protective
2 order to prevent the written communication, in which case the employer
3 shall refrain from communicating with the health care provider until the
4 Commission has ruled upon the employee's request. In deciding whether to
5 allow the submission of additional information to the health care provider, in
6 part or in whole, the Commission shall determine whether the proposed
7 written communication and additional information are pertinent to and
8 necessary for the fair and swift administration and resolution of the workers'
9 compensation claim and whether there is an alternative method to discover
10 the information. If the Industrial Commission determines that any party has
11 acted unreasonably by initiating or objecting to the submission of additional
12 information to the health care provider, the Commission may assess costs
13 associated with any proceeding, including reasonable attorney's fees and
14 deposition costs, against the offending party.

15 (e) Any medical records or reports that reflect evaluation, diagnosis, or treatment of the
16 particular injury or disease for which compensation is sought or is reasonably related to the
17 injury or disease for which the employee seeks compensation that are in the possession of a
18 party shall be furnished to the requesting party by the opposing party when requested in
19 writing, except for records or reports generated by a retained expert.

20 (f) Upon motion by an employee or the health care provider from whom medical
21 records, reports, or information are sought, or with whom oral communication is sought, or
22 upon its own motion, for good cause shown, the Commission may make any order which
23 justice requires to protect an employee, health care provider, or other person from unreasonable
24 annoyance, embarrassment, oppression, or undue burden or expense.

25 (g) Other forms of communication with a health care provider may be authorized by
26 order of the Industrial Commission issued upon a showing that the information sought is
27 necessary for the administration of the employee's claim and is not otherwise reasonably
28 obtainable under this section.

29 (h) The employer may communicate with the health care provider to request medical
30 bills or a response to a pending written request, or about non-substantive administrative matters
31 without the express authorization of the employee.

32 (i) The Commission shall annually establish an appropriate medical fee to compensate
33 health care providers for time spent communicating with the employer or employee. Each party
34 shall bear its own costs for said communication.

35 (j) No cause of action shall arise and no health care provider shall incur any liability as
36 a result of the release of medical records, reports, or information pursuant to this Article.

37 (k) For purposes of this section, the term "employer" means the employer, the
38 employer's attorney, and the employer's insurance carrier or third-party administrator, and the
39 term "employee" means the employee, legally appointed guardian, or any attorney representing
40 the employee.

41 ~~Notwithstanding the provisions of G.S. 8-53, any law relating to the privacy of medical~~
42 ~~records or information, and the prohibition against ex parte communications at common law, an~~
43 ~~employer or insurer paying medical compensation to a provider rendering treatment under this~~
44 ~~Article may obtain records of the treatment without the express authorization of the employee.~~
45 ~~In addition, with written notice to the employee, the employer or insurer may obtain directly~~
46 ~~from a medical provider medical records of evaluation or treatment restricted to a current injury~~
47 ~~or current condition for which an employee is claiming compensation from that employer under~~
48 ~~this Article.~~

49 ~~Any medical records or reports, restricted to conditions related to the injury or illness for~~
50 ~~which the employee is seeking compensation, in the possession of the employee shall be~~
51 ~~furnished by the employee to the employer when requested in writing by the employer.~~

1 An employer or insurer paying compensation for an admitted claim or paying without
2 prejudice pursuant to G.S. 97-18(d) may communicate with an employee's medical provider in
3 writing, limited to specific questions promulgated by the Commission, to determine, among
4 other information, the diagnosis for the employee's condition, the reasonable and necessary
5 treatment, the anticipated time that the employee will be out of work, the relationship, if any, of
6 the employee's condition to the employment, the restrictions from the condition, the kind of
7 work for which the employee may be eligible, the anticipated time the employee will be
8 restricted, and the permanent impairment, if any, as a result of the condition. When these
9 questions are used, a copy of the written communication shall be provided to the employee at
10 the same time and by the same means as the communication is provided to the provider.

11 Other forms of communication with a medical provider may be authorized by (i) a valid
12 written authorization voluntarily given and signed by the employee, (ii) by agreement of the
13 parties, or (iii) by order of the Commission issued upon a showing that the information sought
14 is necessary for the administration of the employee's claim and is not otherwise reasonably
15 obtainable under this section or through other provisions for discovery authorized by the
16 Commission's rules. In adopting rules or authorizing employer communications with medical
17 providers, the Commission shall protect the employee's right to a confidential physician-patient
18 relationship while facilitating the release of information necessary to the administration of the
19 employee's claim.

20 Upon motion by an employee or provider from whom medical records or reports are sought
21 or upon its own motion, for good cause shown, the Commission may make any order which
22 justice requires to protect an employee or other person from unreasonable annoyance,
23 embarrassment, oppression, or undue burden or expense."

24 SECTION 8. G.S. 97-26 is amended to include a new subsection:

25 "(g1) Administrative Simplification. – The applicable administrative standards for code
26 sets, identifiers, formats, and electronic transactions to be used in processing electronic medical
27 bills under this Article shall comply with 45 C.F.R. 162. The Commission shall adopt rules to
28 require electronic medical billing and payment processes, to standardize the necessary medical
29 documentation for billing adjudication, to provide for effective dates and compliance, and for
30 further implementation of this subsection."

31 SECTION 9. G.S. 97-27 reads as rewritten:

32 "§ 97-27. **Medical examination; facts not privileged; refusal to be examined suspends**
33 **compensation; other medical opinions; autopsy.**

34 (a) After an injury, and so long as ~~he~~ the employee claims compensation, the employee,
35 if so requested by his or her employer or ordered by the Industrial Commission, shall, ~~subject to~~
36 ~~the provisions of subsection (b),~~ submit ~~himself~~ to examination, independent medical
37 examinations, at reasonable times and places, by a duly qualified physician ~~or surgeon who is~~
38 licensed and practicing in North Carolina and is designated and paid by the employer or the
39 Industrial Commission. ~~Commission,~~ even if the employee's claim has been denied pursuant to
40 G.S. 97-18(c). The independent medical examination shall be subject to the following
41 provisions:

- 42 (1) The injured employee ~~shall have~~ has the right to have present at ~~such~~ the
43 independent medical examination any ~~duly qualified~~ physician or surgeon
44 provided and paid by him. ~~the employee.~~
- 45 (2) Notwithstanding the provisions of G.S. 8-53, no fact communicated to or
46 otherwise learned by any physician ~~or surgeon or hospital or hospital~~
47 employee who may have attended or examined the employee, or who may
48 have been present at any examination, shall be privileged ~~in any workers'~~
49 compensation case with respect to a claim ~~pending for hearing before the~~
50 Industrial Commission.

- 1 (3) Notwithstanding the provisions of G.S. 97-25.6 to the contrary, an employer
2 or its agent shall be allowed to openly communicate either orally or in
3 writing with an independent medical examiner chosen by the employer
4 regardless of whether the examiner physically examined the employee.
- 5 (4) If the examiner physically examined the employee, the employer must
6 produce the examiner's report to the employee within ten (10) business days
7 of receipt by the employer, along with a copy of all documents and written
8 communication sent to the independent medical examiner pertaining to the
9 employee.
- 10 (5) If the employee refuses to submit himself to or in any way obstructs such an
11 independent medical examination requested by and provided for by the
12 employer, his the employee's right to compensation and his right to take or
13 prosecute any proceedings under this Article shall be suspended pursuant to
14 G.S. 97-18.1 until such the refusal or objection ceases, and no compensation
15 shall at any time be payable for the period of obstruction, unless in the
16 opinion of the Industrial Commission the circumstances justify the refusal or
17 obstruction. When the employer seeks to suspend compensation under this
18 subdivision, it shall not be necessary for the employer to have first obtained
19 an order compelling the employee to submit to the proposed independent
20 medical examination. Any order issued by the Commission suspending
21 compensation pursuant to G.S. 97-18.1 shall specify what action the
22 employee should take to end the suspension and reinstate the compensation.
23 The employer, or the Industrial Commission, shall have the right in any case
24 of death to require an autopsy at the expense of the party requesting the
25 same.
- 26 (b) In these cases any case arising under this Article in which there is a question as to
27 the employee is dissatisfied with the percentage of permanent disability suffered by an
28 employee, if any employee, required to submit to a physical examination under the provisions
29 of subsection (a) is dissatisfied with such examination or the report thereof, he shall be entitled
30 to have as provided by G.S. 97-31 and determined by the authorized health care provider, the
31 employee is entitled to have another examination solely on the percentage of permanent
32 disability provided by a duly qualified physician or surgeon licensed and practicing of the
33 employee's choosing who is licensed to practice in North Carolina or by a duly qualified
34 physician or surgeon licensed to practice in South Carolina, Georgia, Virginia and Tennessee
35 provided said nonresident physician or surgeon shall have been approved by the North Carolina
36 Industrial Commission and his name placed on the Commission's list of approved nonresident
37 physicians and surgeons, Carolina, or licensed in another state if agreed to by the parties or
38 ordered by the Commission, and designated by him and the employee. That physician shall be
39 paid by the employer or the Industrial Commission in the same manner as physicians health
40 care providers designated by the employer or the Industrial Commission are paid. The
41 Industrial Commission must either disregard or give less weight to the opinions of the duly
42 qualified physician chosen by the employee pursuant to this subsection on issues outside the
43 scope of the G.S. 97-27(b) examination. No fact that is communicated to or otherwise learned
44 by any physician who attended or examined the employee, or who was present at any
45 examination, shall be privileged with respect to a claim before the Industrial Commission.
46 Provided, however, that all travel expenses incurred in obtaining said examination shall be paid
47 by said employee. The employer shall have the right to have present at such examination a duly
48 qualified physician or surgeon provided and paid by him. No fact communicated to or
49 otherwise learned by any physician or surgeon who may have attended or examined the
50 employee, or who may have been present at any examination, shall be privileged, either in
51 hearings provided for by this Article or any action at law.

1 (c) The employer, or the Industrial Commission, has the right in any case of death to
2 require an autopsy at its expense."

3 **SECTION 10.** G.S. 97-29 reads as rewritten:

4 **"§ 97-29. ~~Compensation rates~~ Rates and duration of compensation for total incapacity.**

5 (a) When an employee qualifies for total disability, ~~Except as hereinafter otherwise~~
6 provided, where the incapacity for work resulting from the injury is total, the employer shall
7 pay or cause to be paid, as hereinafter provided by subsections (b) through (d) of this section, to
8 the injured employee during such total disability a weekly compensation equal to sixty-six and
9 two-thirds percent (662/3%) of his average weekly wages, but not more than the amount
10 established annually to be effective ~~October~~ January 1 as provided herein, nor less than thirty
11 dollars (\$30.00) per week.

12 (b) When a claim is compensable pursuant to G.S. 97-18(b), paid without prejudice
13 pursuant to G.S. 97-18(d), agreed by the parties pursuant to G.S. 97-82, or when an employee
14 proves by a preponderance of the evidence that the employee is unable to earn the same wages
15 the employee had earned before the injury, either in the same or other employment, the
16 employee qualifies for temporary total disability subject to the limitations noted herein. The
17 employee shall not be entitled to compensation pursuant to this subsection greater than 500
18 weeks from the date of first disability unless the employee qualifies for extended compensation
19 under subsection (c) of this section.

20 (c) An employee may qualify for extended compensation in excess of the 500 week
21 limitation on temporary total disability as described in subsection (b) only if: (i) at the time the
22 employee makes application to the Commission to exceed the 500 week limitation on
23 temporary total disability as described in subsection (b), 425 weeks have passed since the date
24 of first disability and (ii) pursuant to the provisions of G.S. 97-84, unless agreed to by the
25 parties, the employee shall prove by a preponderance of the evidence that the employee has
26 sustained a total loss of wage earning capacity. If an employee makes application for extended
27 compensation pursuant to this subsection and is awarded extended compensation by the
28 Commission, the award shall not be stayed pursuant to G.S. 97-85 or 97-86 until the Full
29 Commission or an appellate court determines otherwise. Upon its own motion or upon the
30 application of any party in interest, the Industrial Commission may review an award for
31 extended compensation in excess of the 500 week limitation on temporary total disability
32 described in subsection (b), and on such review may make an award ending or continuing
33 extended compensation. When reviewing a prior award to determine if the employee remains
34 entitled to extended compensation, the Commission shall determine if the employer has proven
35 by a preponderance of the evidence that the employee no longer has a total loss of wage
36 earning capacity. When an employee is receiving full retirement benefits under Section 202(a)
37 of the Social Security Act, after attainment of retirement age, as defined in Section 216(l) of the
38 Social Security Act, the employer may reduce the extended compensation by one-hundred
39 percent (100%) of the employee's retirement benefit. The reduction shall consist of the
40 employee's primary benefit paid pursuant to Section 202(a) of the Social Security Act, but shall
41 not include any dependent or auxiliary benefits paid pursuant to any other Section of the Social
42 Security Act, if any, or any cost-of-living increases in benefits made pursuant to Section 215(i)
43 of the Social Security Act.

44 (d) An injured employee may qualify for permanent total disability only if the employee
45 has one or more of the following physical or mental limitations resulting from the injury:

- 46 (1) The loss of both hands, both arms, both feet, both legs, both eyes, or any two
47 thereof, as provided by G.S. 97 31(17).
48 (2) Spinal injury involving severe paralysis of both arms, both legs, or the trunk.
49 (3) Severe brain or closed head injury as evidenced by severe and permanent:
50 a. Sensory or motor disturbances;
51 b. Communication disturbances;

1 c. Complex integrated disturbances of cerebral function; or
2 d. Neurological disorders.

3 (4) Second degree or third degree burns to thirty three percent (33%) or more of
4 the total body surface.

5 An employee who qualifies for permanent total disability pursuant to this subsection, shall
6 be entitled to compensation, including medical compensation, during the lifetime of the injured
7 employee, unless the employer shows by a preponderance of the evidence that the employee is
8 capable of returning to suitable employment as defined in G.S. 97-2(22). Provided, however,
9 the termination or suspension of compensation because the employee is capable of returning to
10 suitable employment as defined in G.S. 97-2(22) does not affect the employee's entitlement to
11 medical compensation. An employee who qualifies for permanent total disability under
12 subdivision (d)(1) of this subsection is entitled to lifetime compensation, including medical
13 compensation, regardless of whether or not the employee has returned to work in any capacity.
14 In no other case shall an employee be eligible for lifetime compensation for permanent total
15 disability.

16 ~~In cases of total and permanent disability, compensation, including medical compensation,~~
17 ~~shall be paid for by the employer during the lifetime of the injured employee. If death results~~
18 ~~from the injury then the employer shall pay compensation in accordance with the provisions of~~
19 ~~G.S. 97-38.~~

20 (e) An employee shall not be entitled to benefits under this section or G.S. 97-30 and
21 G.S. 97-31 at the same time.

22 (f) Where an employee can show entitlement to compensation pursuant to this section
23 or G.S. 97-30 and a specific physical impairment pursuant to G.S. 97-31, the employee shall
24 not collect benefits concurrently pursuant to both this section or G.S. 97-30 and G.S. 97-31, but
25 rather is entitled to select the statutory compensation which provides the more favorable
26 remedy.

27 ~~In cases of total and permanent disability, compensation, including medical compensation,~~
28 ~~shall be paid for by the employer during the lifetime of the injured employee. If death results~~
29 ~~from the injury then the employer shall pay compensation in accordance with the provisions of~~
30 ~~G.S. 97-38.~~

31 (g) The weekly compensation payment for members of the North Carolina National
32 Guard and the North Carolina State Defense Militia shall be the maximum amount established
33 annually in accordance with the last paragraph of this section per week as fixed herein. The
34 weekly compensation payment for deputy sheriffs, or those acting in the capacity of deputy
35 sheriffs, who serve upon a fee basis, shall be thirty dollars (\$30.00) a week as fixed herein.

36 (h) An officer or member of the State Highway Patrol shall not be awarded any weekly
37 compensation under the provisions of this section for the first two years of any incapacity
38 resulting from an injury by accident arising out of and in the course of the performance by him
39 of his official duties if, during such incapacity, he continues to be an officer or member of the
40 State Highway Patrol, but he shall be awarded any other benefits to which he may be entitled
41 under the provisions of this Article.

42 (i) Notwithstanding any other provision of this Article, on July 1 of each year, a
43 maximum weekly benefit amount shall be computed. The amount of this maximum weekly
44 benefit shall be derived by obtaining the average weekly insured wage in accordance with
45 G.S. 96-8(22), by multiplying such average weekly insured wage by 1.10, and by rounding
46 such figure to its nearest multiple of two dollars (\$2.00), and this said maximum weekly benefit
47 shall be applicable to all injuries and claims arising on and after January 1 following such
48 computation. Such maximum weekly benefit shall apply to all provisions of this Chapter and
49 shall be adjusted July 1 and effective January 1 of each year as herein provided.

50 (j) If death results from the injury or occupational disease, then the employer shall pay
51 compensation in accordance with the provisions of G.S. 97-38."

SECTION 11. G.S. 97-30 reads as rewritten:

"§ 97-30. Partial incapacity.

Except as otherwise provided in G.S. 97-31, where the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, a weekly compensation equal to sixty-six and two-thirds percent (66 2/3%) of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than the amount established annually to be effective ~~October~~ January 1 as provided in G.S. 97-29 a week, and in no case shall the ~~period covered by such compensation be greater~~ employee receive more than 300-500 weeks of payments under this section. Any weeks of payments made pursuant to G.S. 97-29 shall be deducted from the 500 weeks of payments available under this section, from the date of injury. In case the partial disability begins after a period of total disability, the latter period shall be deducted from the maximum period herein allowed for partial disability. An officer or member of the State Highway Patrol shall not be awarded any weekly compensation under the provisions of this section for the first two years of any incapacity resulting from an injury by accident arising out of and in the course of the performance by him of his official duties if, during such incapacity, he continues to be an officer or member of the State Highway Patrol, but he shall be awarded any other benefits to which he may be entitled under the provisions of this Article."

SECTION 12. G.S. 97-32 reads as rewritten:

"§ 97-32. Refusal of injured employee to accept suitable employment as suspending compensation.

If an injured employee refuses ~~employment procured for him suitable to his capacity~~ he suitable employment as defined by G.S. 97-2(22), the employee shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified. Any order issued by the Commission suspending compensation pursuant to G.S. 97-18.1 on the ground of an unjustified refusal of an offer of suitable employment shall specify what actions the employee should take to end the suspension and reinstate the compensation. Nothing in this Article prohibits an employer from contacting the employee directly about returning to suitable employment with contemporaneous notice to the employee's counsel, if any."

SECTION 13. Article 1 of Chapter 97 of the General Statutes is amended by adding a new section to read:

""§ 97-32.2. Vocational rehabilitation.

(a) In a compensable claim, the employer may engage vocational rehabilitation services at any point during a claim regardless of whether the employee has reached maximum medical improvement to include, among other services, a one-time assessment of the employee's vocational potential. If the employee (i) has not returned to work or (ii) has returned to work earning less than seventy-five percent (75%) of his average weekly wages and is receiving benefits pursuant to G.S. 97-30, the employee may request vocational rehabilitation services including education and retraining in the North Carolina community college or university systems so long as the education and retraining are reasonably likely to substantially increase the employee's wage-earning capacity following completion of the education or retraining program. Provided, however, the seventy-five percent (75%) threshold is for the purposes of qualification for vocational rehabilitation benefits only and shall not impact a decision as to whether a job is suitable per G.S. 97-2(22). The expense of vocational rehabilitation services provided pursuant to this section shall be borne by the employer in the same manner as medical compensation.

(b) Vocational rehabilitation services shall be provided by either a qualified or conditional rehabilitation professional approved by the Industrial Commission. Unless the parties mutually agree to a vocational rehabilitation professional, the employer may make the

1 initial selection. At any point during the vocational rehabilitation process, either party may
2 request that the Industrial Commission order a change of vocational rehabilitation professional
3 for good cause.

4 (c) Vocational rehabilitation services shall include a vocational assessment and the
5 formulation of an individualized written rehabilitation plan with the goal of substantially
6 increasing the employee's wage earning capacity, and subject to the following provisions:

7 (1) When performing a vocational assessment, the vocational rehabilitation
8 professional should evaluate the employee's medical and vocational
9 circumstances, the employee's expectations and specific requests for
10 vocational training, benefits expected from vocational services, and other
11 information significant to the employee's employment potential. The
12 assessment should also involve a face-to-face interview between the
13 employee and the vocational rehabilitation professional to identify the
14 specific type and sequence of appropriate services. If, at any point during
15 vocational rehabilitation services, the vocational rehabilitation professional
16 determines that the employee will not benefit from vocational rehabilitation
17 services, the employer may terminate said services unless the Commission
18 orders otherwise.

19 (2) Following assessment, and after receiving input from the employee, the
20 vocational rehabilitation professional shall draft an individualized written
21 rehabilitation plan. The plan should be individually tailored to the employee
22 based on the employee's education, skills, experience, and aptitudes with
23 appropriate recommendations for vocational services which may include
24 appropriate re-training, education, or job placement. The plan may be
25 changed or updated by mutual consent at any time during rehabilitation
26 services. A written plan is not necessary if the vocational rehabilitation
27 professional has been retained to perform a one-time assessment.

28 (d) Specific vocational rehabilitation services may include but are not limited to:
29 vocational assessment, vocational exploration, sheltered workshop or community supported
30 employment training, counseling, job analysis, job modification, job development and
31 placement, labor market survey, vocational or psychometric testing, analysis of transferable
32 skills, work adjustment counseling, job seeking skills training, on-the-job training, or training
33 or education through the North Carolina community college or university systems.

34 (e) Vocational rehabilitation services may be terminated by agreement of the parties or
35 by order of the Commission.

36 (f) Job placement activities may commence after completion of an individualized
37 written rehabilitation plan. Return-to-work options should be considered with order of priority
38 given to returning the employee to suitable employment with the current employer, returning
39 the employee to suitable employment with a new employer, and, if appropriate, formal
40 education or vocational training to prepare the employee for suitable employment with the
41 current employer or a new employer.

42 (g) The refusal of the employee to accept or cooperate with vocational rehabilitation
43 services when ordered by the Industrial Commission shall bar the employee from further
44 compensation until such refusal ceases, and no compensation shall at any time be paid for the
45 period of suspension unless in the opinion of the Industrial Commission the circumstances
46 justified the refusal. Any order issued by the Commission suspending compensation per
47 G.S. 97-18.1 shall specify what action the employee should take to end the suspension and
48 reinstate the compensation.

49 **SECTION 14.** G.S. 97-38 reads as rewritten:

1 **"§ 97-38. Where death results proximately from compensable injury or occupational**
 2 **disease; dependents; burial expenses; compensation to aliens; election by**
 3 **partial dependents.**

4 If death results proximately from a compensable injury or occupational disease and within
 5 six years thereafter, or within two years of the final determination of disability, whichever is
 6 later, the employer shall pay or cause to be paid, subject to the provisions of other sections of
 7 this Article, weekly payments of compensation equal to sixty-six and two-thirds percent (66
 8 2/3%) of the average weekly wages of the deceased employee at the time of the accident, but
 9 not more than the amount established annually to be effective October 1 as provided in
 10 G.S. 97-29, nor less than thirty dollars (\$30.00), per week, and burial expenses not exceeding
 11 ~~three thousand five hundred dollars (\$3,500),~~ ten thousand dollars (\$10,000), to the person or
 12 persons entitled thereto as follows:

13 ...
 14 (3) If there is no person wholly dependent, and the person or all persons
 15 partially dependent is or are within the classes of persons defined as "next of
 16 kin" in G.S. 97-40, whether or not such persons or such classes of persons
 17 are of kin to the deceased employee in equal degree, and all so elect, he or
 18 they may take, share and share alike, the commuted value of the amount
 19 provided for whole dependents in (1) above instead of the proportional
 20 payment provided for partial dependents in (2) above; provided, that the
 21 election herein provided may be exercised on behalf of any infant partial
 22 dependent by a duly qualified guardian; provided, further, that the Industrial
 23 Commission may, in its discretion, permit a parent or person standing in loco
 24 parentis to such infant to exercise such option in its behalf, the award to be
 25 payable only to a duly qualified guardian except as in this Article otherwise
 26 provided; and provided, further, that if such election is exercised by or on
 27 behalf of more than one person, then they shall take the commuted amount
 28 in equal shares.

29 When weekly payments have been made to an injured employee before
 30 his death, the compensation to dependents shall begin from the date of the
 31 last of such payments. Compensation payments due on account of death
 32 shall be paid for a period of ~~400~~500 weeks from the date of the death of the
 33 employee; provided, however, after said ~~400-week~~500-week period in case
 34 of a widow or widower who is unable to support herself or himself because
 35 of physical or mental disability as of the date of death of the employee,
 36 compensation payments shall continue during her or his lifetime or until
 37 remarriage and compensation payments due a dependent child shall be
 38 continued until such child reaches the age of 18.

39 Compensation payable under this Article to aliens not residents (or about
 40 to become nonresidents) of the United States or Canada, shall be the same in
 41 amounts as provided for residents, except that dependents in any foreign
 42 country except Canada shall be limited to surviving spouse and child or
 43 children, or if there be no surviving spouse or child or children, to the
 44 surviving father or mother."

45 **SECTION 15. G.S. 97-40 reads as rewritten:**

46 **"§ 97-40. Commutation and payment of compensation in absence of dependents; "next of**
 47 **kin" defined; commutation and distribution of compensation to partially**
 48 **dependent next of kin; payment in absence of both dependents and next of kin.**

49 Subject to the provisions of G.S. 97-38, if the deceased employee leaves neither whole nor
 50 partial dependents, then the compensation which would be payable under G.S. 97-38 to whole
 51 dependents shall be commuted to its present value and paid in a lump sum to the next of kin as

1 herein defined. For purposes of this section and G.S. 97-38, "next of kin" shall include only
2 child, father, mother, brother or sister of the deceased employee, including adult children or
3 adult brothers or adult sisters of the deceased, but excluding a parent who has willfully
4 abandoned the care and maintenance of his or her child and who has not resumed its care and
5 maintenance at least one year prior to the first occurring of the majority or death of the child
6 and continued its care and maintenance until its death or majority. For all such next of kin who
7 are neither wholly nor partially dependent upon the deceased employee and who take under this
8 section, the order of priority among them shall be governed by the general law applicable to the
9 distribution of the personal estate of persons dying intestate. In the event of exclusion of a
10 parent based on abandonment, the claim for compensation benefits shall be treated as though
11 the abandoning parent had predeceased the employee. For all such next of kin who were also
12 partially dependent on the deceased employee but who exercise the election provided for partial
13 dependents by G.S. 97-38, the general law applicable to the distribution of the personal estate
14 of persons dying intestate shall not apply and such person or persons upon the exercise of such
15 election, shall be entitled, share and share alike, to the compensation provided in G.S. 97-38 for
16 whole dependents commuted to its present value and paid in a lump sum.

17 If the deceased employee leaves neither whole dependents, partial dependents, nor next of
18 kin as hereinabove defined, then no compensation shall be due or payable on account of the
19 death of the deceased employee, except that the employer shall pay or cause to be paid the
20 burial expenses of the deceased employee not exceeding ~~three thousand five hundred dollars~~
21 ~~(\$3,500)~~ ten thousand dollars (\$10,000) to the person or persons entitled thereto."

22 **SECTION 16.** G.S. 97-77(a) reads as rewritten:

23 "(a) There is hereby created a commission to be known as the North Carolina Industrial
24 Commission, consisting of ~~seven~~ six commissioners who shall devote their entire time to the
25 duties of the Commission. The Governor shall appoint the members of the ~~Commission, one for~~
26 ~~a term of two years, one for a term of four years, one for a term~~ Commission for terms of six
27 ~~years. Of the additional appointments made in 1994, one shall be for a term expiring June 30,~~
28 ~~1996, one for a term expiring June 30, 1998, and two for terms expiring June 30, 2000. Upon~~
29 ~~the expiration of each term as above mentioned, the Governor shall appoint a successor for a~~
30 ~~term of six years, and thereafter the term of office of each commissioner shall be six years. Not~~
31 ~~more than three~~ Three appointees commissioners shall be persons who, on account of their
32 previous vocations, employment or affiliations, can be classed as representatives of ~~employers,~~
33 ~~and not more than three employers.~~ Three appointees commissioners shall be persons who, on
34 account of their previous vocations, employment or affiliations, can be classed as
35 representatives of employees. No person may serve more than two terms on the Commission,
36 including any term served prior to the effective date of this section. In calculating the number
37 of terms served, a partial term that is less than three years in length shall not be included."

38 **SECTION 17.** G.S. 97-77 is amended by adding a new subsection to read:

39 "(a1) Appointments of commissioners are subject to confirmation by the General
40 Assembly by joint resolution. The names of commissioners to be appointed by the Governor
41 shall be submitted by the Governor to the General Assembly for confirmation by the General
42 Assembly on or before March 1 of the year of expiration of the term. If the Governor fails to
43 timely submit nominations, the General Assembly shall appoint to fill the succeeding term
44 upon the joint recommendation of the President Pro Tempore of the Senate and the Speaker of
45 the House of Representatives in accordance with G.S. 120-121 not inconsistent with this
46 section.

47 In case of death, incapacity, resignation, or any other vacancy in the office of any
48 commissioner prior to the expiration of the term of office, a nomination to fill the vacancy for
49 the remainder of the unexpired term shall be submitted by the Governor within four weeks after
50 the vacancy arises to the General Assembly for confirmation by the General Assembly. If the
51 Governor fails to timely nominate a person to fill the vacancy, the General Assembly shall

1 appoint a person to fill the remainder of the unexpired term upon the joint recommendation of
2 the President Pro Tempore of the Senate and the Speaker of the House of Representatives in
3 accordance with G.S. 120-121 not inconsistent with this section. If a vacancy arises or exists
4 pursuant to this subsection when the General Assembly is not in session, and the appointment is
5 deemed urgent by the Governor, the commissioner may be appointed and serve on an interim
6 basis pending confirmation by the General Assembly. For the purpose of this subsection, the
7 General Assembly is not in session only (i) prior to convening of the Regular Session, (ii)
8 during any adjournment of the Regular Session for more than 10 days, and (iii) after sine die
9 adjournment of the Regular Session.

10 No person while in office as a commissioner may be nominated or appointed on an interim
11 basis to fill the remainder of an unexpired term, or to a full term that commences prior to the
12 expiration of the term that the commissioner is serving."

13 **SECTION 18.** Article 1 of Chapter 97 of the General Statutes is amended by
14 adding a new section to read:

15 **"§ 97-78.1. Standards of judicial conduct to apply to commissioners and deputy**
16 **commissioners.**

17 The Code of Judicial Conduct for judges of the General Court of Justice and the procedure
18 for discipline of judges in Article 30 of Chapter 7A of the General Statutes shall apply to
19 commissioners and deputy commissioners. Commissioners and deputy commissioners shall be
20 liable for impeachment for the causes and in the manner provided for judges of the General
21 Court of Justice in Chapter 123 of the General Statutes."

22 **SECTION 19.** G.S. 97-80(a) reads as rewritten:

23 "(a) The Commission may make shall adopt rules, in accordance with Article 2A of
24 Chapter 150B of the General Statutes and not inconsistent with this Article, for carrying out the
25 provisions of this Article. ~~The Commission shall request the Office of State Budget and~~
26 ~~Management to prepare a fiscal note for a proposed new or amended rule that has a substantial~~
27 ~~economic impact, as defined in G.S. 150B-21.4(b1). The Commission shall not take final action~~
28 ~~on a proposed rule change that has a substantial economic impact until at least 60 days after the~~
29 ~~fiscal note has been prepared.~~

30 Processes, procedure, and discovery under this Article shall be as summary and simple as
31 reasonably may be."

32 **SECTION 20.** G.S. 97-84 reads as rewritten:

33 **"§ 97-84. Determination of disputes by Commission or deputy.**

34 The Commission or any of its members shall hear the parties at issue and their
35 representatives and witnesses, and shall determine the dispute in a summary manner. The
36 Commission shall decide the case and issue findings of fact based upon the preponderance of
37 the evidence in view of the entire record. The award, together with a statement of the findings
38 of fact, rulings of law, and other matters pertinent to the questions at issue shall be filed with
39 the record of the proceedings, within 180 days of the close of the hearing record unless time is
40 extended for good cause by the Commission, and a copy of the award shall immediately be sent
41 to the parties in dispute. The parties may be heard by a deputy, in which event the hearing shall
42 be conducted in the same way and manner prescribed for hearings which are conducted by a
43 member of the Industrial Commission, and said deputy shall proceed to a complete
44 determination of the matters in dispute, file his written opinion within 180 days of the close of
45 the hearing record unless time is extended for good cause by the Commission, and the deputy
46 shall cause to be issued an award pursuant to such determination."

47 **SECTION 21.(a)** G.S. 150B-1(c) reads as rewritten:

48 "(c) Full Exemptions. – This Chapter applies to every agency except:

49 (1) The North Carolina National Guard in exercising its court-martial
50 jurisdiction.

- 1 (2) The Department of Health and Human Services in exercising its authority
- 2 over the Camp Butner reservation granted in Article 6 of Chapter 122C of
- 3 the General Statutes.
- 4 (3) The Utilities Commission.
- 5 (4) ~~The Industrial Commission.~~
- 6 (5) The Employment Security Commission.
- 7 (6) The State Board of Elections in administering the HAVA Administrative
- 8 Complaint Procedure of Article 8A of Chapter 163 of the General Statutes.
- 9 (7) The North Carolina State Lottery.
- 10 (8) **(Expires June 30, 2012)** Except as provided in G.S. 150B-21.1B, any
- 11 agency with respect to contracts, disputes, protests, and/or claims arising out
- 12 of or relating to the implementation of the American Recovery and
- 13 Reinvestment Act of 2009 (Public Law 111-5)."

14 **SECTION 21.(b)** G.S. 150B-(1)(e) is amended by adding a new subdivision to
 15 read:

16 "(e) Exemptions From Contested Case Provisions. – The contested case provisions of
 17 this Chapter apply to all agencies and all proceedings not expressly exempted from the Chapter.
 18 The contested case provisions of this Chapter do not apply to the following:

- 19 ...
- 20 (18) The Industrial Commission."

21 **SECTION 21.(c)** Any existing rule contained in Title 4 of Chapter 10 of the North
 22 Carolina Administrative Code that has not been readopted in accordance with Article 2A of
 23 Chapter 150B of the General Statutes on or before December 31, 2012, shall expire. Any rule
 24 that has been readopted by the Industrial Commission in accordance with G.S. 150B-21.2(g) on
 25 or before December 31, 2012, shall remain in effect until the rule becomes effective pursuant to
 26 G.S. 150B-21.3.

27 **SECTION 22.** As of February 1, 2011, the terms of the seven members of the
 28 Industrial Commission are as follows:

- 29 (1) One serves a term expiring April 30, 2011.
- 30 (2) Two serve terms expiring June 30, 2012.
- 31 (3) One serves a term expiring April 30, 2013.
- 32 (4) One serves a term expiring June 30, 2014.
- 33 (5) One serves a term expiring April 30, 2015.
- 34 (6) One serves a term expiring June 30, 2016.

35 The reduction from seven commissioners to six commissioners provided by Section 16 of this
 36 act shall be effected by not filling one of the two offices that expire June 30, 2012, pursuant to
 37 subdivision (2) of this section.

38 **SECTION 23.** Notwithstanding G.S. 97-31.1, this act is effective when it becomes
 39 law. Sections 4, 5, 6, 7, and 9 apply to claims pending on or after the effective date of this act.
 40 Sections 2, 3, 10, 11, 12, 13, 14, 15 and 20 apply to claims arising on or after the effective date
 41 of this act. Section 21 applies to rules adopted on or after the effective date of this act.

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Date

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DANIEL BAUM	
Carl Dean	DSP
GM GIBSON	TS C
Philip Dwyer	NRG
Ruth Merkle	NCGA
Dean Plunkett	PS.
Jake Cashion	NC Chamber
Allison Waller	Nelson Mullins
George Poets	CAI
Hank Patterson	Patterson Hanky UP

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Gina Cammarano	Attorney
Anteo	NMRS
Debra	FMC Dir
Chuck	SEARC
Dick Taylor	NCAJ
Paul Pully	NCAJ
John Harlin	MFJS
Jennifer Cohen	IFNC
Jamie Fitzgerald	ECNA
Connie Wilson	ECNA

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Cherril Bunk	WWC
Mary Be McMillan	NC AFL-CIO
Michelle Henry	SMITH ANDERSON
Maureen Smith	SMITH ANDERSON
Roberta Bishop	Young Thomas
Cynthia Hatten	HACKLEY
Paul Hatten	T. Hatten
Will Culpepper	AUA
Lu Ann C. Pugh	CSS
Carla Marshall	CCM

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Chadwick	NIMS
Bill Phillips	JWC
Amanda Gladia Kraus	Interny Gous Legal counsel
Will Polk	Ga Office.
DAVID BARNES	PS
George Simpson	CSH
Kay Paksoy	NASW-NC
Sarah Davis	protect NC WORKERS
Henry M Lancaster	ICA/WFNC
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Sammy Robinson	TWC
BRUCE THOMPSON	PARKER POB
J GOODMAN	NC CHAMPS
Whitney CHRISTENSEN	Jordan Price
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Pam Melton	CTL
Donald Rasavage	PFFP NC
Charlene Shabazz	OSP
Ron Kost	OSP
Renee Broun	NC BA
Amy Hammond	NCIC
Butch Gunnells	NC Bev A

House Committee Pages / Sergeants at Arms

NAME OF COMMITTEE HSE Sgt Comm. Tort Reform

DATE: 5-26-11 Room: 1228

*Name: Destinee Clark

County: mecklenburg

Sponsor: Representative Cornam

*Name: Nia Hill

County: Wake

Sponsor: Garland Pierce

*Name: _____

County: _____

Sponsor: _____

*Name: _____

County: _____

Sponsor: _____

*Name: _____

County: _____

Sponsor: _____

House Sgt-At Arms:

1. Name: LARRY ELLIOT

4. Name: _____

2. Name: DOUG HARRIS

5. Name: _____

Name: BOB ROSS

6. Name: _____