ARKANSAS SENATE

84th General Assembly - Regular Session, 2003

Amendment Form

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Subtitle of House Bill No. 1038

""THE CIVIL JUSTICE REFORM ACT OF 2003.""

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Amendment No. 1 to House Bill No. 1038.

Amend House Bill No. 1038 as engrossed, H1/30/03:

Add Senators Altes, Faris, Glover and Higginbothom as co-sponsors of the bill

AND

Page 1, line 23, delete "property" and substitute "medical injury, property"

AND

Page 1, line 28, delete "judgment" and substitute "several judgment"

AND

Page 2, line 7, delete "within" and substitute "not later than"

AND

Page 2, line 7, delete "of" and substitute "prior to"

AND

Page 2, delete line 22, and substitute the following:
"introduced as evidence of liability in any action.

SECTION 3. Increase in percentage of several share.

(a) Notwithstanding the provisions of Sections 1 and 2, in the event a several judgment has been entered against multiple party defendants, a plaintiff, no later than ten (10) days after the entry of judgment, may move the court to determine whether all or part of the amount of the several share for which a defendant is liable will not be reasonably collectible.

(b) If the court determines, based upon a preponderance of the evidence, that any defendant's several share or multiple defendants' several shares will not be reasonably collectible, the court shall increase the percentage points of the several shares, subject to the limitations in

subsections (c) and (d) of this section, of each of the remaining defendants.

(c)(1) If a defendant's percentage of fault is determined by the fact finder to be ten percent (10%) or less, then the percentage points of that defendant's several share shall not be increased.

(2) If a defendant's percentage of fault is determined by the fact finder to be greater than ten percent (10%), but less than fifty percent (50%), then the percentage points of that defendant's several share shall be increased by no more than ten (10) percentage points.

(3) If a defendant's percentage of fault is determined by the fact finder to be fifty percent (50%) or greater, then the percentage points of that defendant's several share shall be increased by no more than twenty (20) percentage points.

(d) Under no circumstances shall the combined increase in the percentage points of the remaining defendants' several shares exceed the lesser of:

(1) A total of one hundred (100) percentage points; or

(2) The total number of percentage points remaining after deducting the percentage of fault of the plaintiff, if any.

(e) Any defendant whose several share has been increased pursuant to this section, and who has discharged his obligation to pay the increased several share, has a right of contribution from the defendants whose several shares were determined by the court to be not reasonably collectible.

(f) The provisions of this section shall not apply to any punitive damages award or judgment.

SECTION 4. Long Term Care Facility Medical Director.

The provisions of Section 3 shall not apply to a medical care provider who is named as a defendant in an action for personal injury, medical injury, or wrongful death based solely on his capacity as medical director of a long term care facility."

AND

appropriately renumber subsequent sections of the bill

AND

Page 2, line 30, delete "section 3" and substitute "section 5"

AND

Page 3, line 9, delete "negligence" and substitute "fault"

AND

Page 3, line 12, delete "negligence" and substitute "fault"

AND

Page 3, delete Section 7. and Section 8. of the bill and substitute the following new sections:

"SECTION 9. Standards for award of punitive damages.

In order to recover punitive damages from the defendant, the plaintiff has the burden of proving that the defendant is liable for compensatory damages and that either or both of the following aggravating factors were present and related to the injury for which compensatory damages were awarded:

(1) That the defendant knew or ought to have known, in light of the surrounding circumstances, that his or her conduct would naturally and probably result in injury or damage and that he or she continued the conduct with malice or in reckless disregard of the consequences from which malice may be inferred; and

(2) That the defendant intentionally pursued a course of conduct for the purpose of causing injury or damage.

SECTION 10. Burden of proof for award of punitive damages.

The plaintiff must satisfy the burden of proof required under Section 9 of this act by clear and convincing evidence in order to recover punitive damages from the defendant.

SECTION 11. Limitations on the amount of punitive damages.

(a) Except as provided in subsection (b) of this section, a punitive damages award shall not be more than the greater of the following:

(1) Two hundred fifty thousand dollars ($250,000); or

(2) Three (3) times the amount of compensatory damages awarded in the action not to exceed one million dollars ($1,000,000).

(b) When the fact finder determines by clear and convincing evidence that, at the time of the injury, the defendant intentionally pursued a course of conduct for the purpose of causing injury or damage and determines that the defendant's conduct did, in fact, harm the plaintiff, then subsection (a) of this section shall not apply.

(c) As to the punitive damages limitations established in subsection (a) of this section, the fixed sums of two hundred fifty thousand dollars ($250,000) set forth in subsection (a)(1) and one million dollars ($1,000,000) set forth in subsection (a)(2) shall be adjusted as of January 1, 2006, and at three-year intervals thereafter, in accordance with the Consumer Price Index rate for the previous year as determined by the Administrative Office of the Courts.

SECTION 12. No right to punitive damages.

Nothing in this act shall be construed as creating a right to an award of punitive damages.

SECTION 13. No limitation on certain judicial duties.

Nothing in this act shall limit the duty of the court, or the appellate courts, to:

(1) Scrutinize all punitive damages awards;

(2) Ensure that all punitive damage awards comply with applicable procedural, evidentiary, and constitutional requirements; and

(3) Order remittitur where appropriate.

SECTION 14. Bifurcated proceeding.

(a) In any case in which punitive damages are sought, any party may request a bifurcated proceeding at least ten (10) days prior to trial. If a

bifurcated proceeding has been requested by either party, then:

(1) The fact finder first shall determine whether compensatory damages are to be awarded; and

(2) After a compensatory damages award determination, the fact finder then shall determine whether and in what amount punitive damages will be awarded.

(b) Evidence of the financial condition of the defendant and other evidence relevant only to punitive damages is not admissible with regard to any compensatory damages determination."

AND

Appropriately renumber the subsequent sections of the bill

AND

Page 4, delete lines 19 through 22 and substitute the following:

"(b) Any evidence of damages for the costs of any necessary medical care, treatment, or services received shall include only those costs actually paid by, or on behalf of, the plaintiff or which remain unpaid and for which the plaintiff or any third party shall be legally responsible."

AND

Page 4, delete lines 31 and 32 and substitute the following:

"(2)(A) The county in which an individual defendant resided;"

AND

Page 4, delete line 36, and Page 5, delete line 1, and substitute the following:

"(3)(A) The county in which the plaintiff resided."

AND

Page 6, delete lines 22 though 34 and substitute the following:

(a) In any action for medical injury, when the asserted negligence does not lie within the jury's comprehension as a matter of common knowledge, the plaintiff shall have the burden of proving:

(1) ~~The~~ By means of expert testimony provided only by a medical care provider of the same specialty as the defendant, the degree of skill and learning ordinarily possessed and used by members of the profession of the medical care provider in good standing, engaged in the same type of practice or specialty in the locality in which he practices or in a similar locality;

(2) ~~That~~ By means of expert testimony provided only by a medical care provider of the same specialty as the defendant that the medical care provider failed to act in accordance with that standard; and

(3) ~~That~~ By means of expert testimony provided only by a qualified medical expert that, as a proximate result thereof, the injured person suffered injuries which would not otherwise have occurred."

AND

Page 7, delete lines 7 through 10 and substitute the following:

"(B) Any evidence of damages for the cost of any necessary medical care, treatment, or services received shall include only those costs actually paid by or on behalf of the plaintiff or which remain unpaid and for which the plaintiff or any third party shall be legally responsible."

AND

Page 7, delete line 21 and substitute the following:
"than by lump sum payment, on such terms and conditions as the court deems just and equitable in order to protect the plaintiff's rights to future payments."

AND

Page 7, delete lines 25 through 36, and page 8, delete lines 1 through 8 and substitute the following:

"(a) ~~If in any action for medical injury, claims, defenses, or denials are intentionally made without reasonable cause and found to be untrue, the party pleading them shall thereafter be subject to the payment of reasonable costs actually incurred by the other party by reason of the untrue pleading.~~ If any action for medical injury is filed without reasonable cause, the party or attorney who signed the complaint shall thereafter be subject to the payment of reasonable costs, including attorneys fees, incurred by the other party by reason of the pleading and appropriate sanctions as determined by the court.

(b)(1) In all cases where expert testimony is required under § 16-114-206, reasonable cause for filing any action for medical injury due to negligence shall only be established by the filing of an affidavit that shall be signed by an expert engaged in the same type of medical care as is each medical care provider defendant.

(2) The affidavit shall be executed under oath and shall state with particularity:

(A) The expert's familiarity with the applicable standard of care in issue;

(B) The expert's qualifications;

(C) The expert's opinion as to how the applicable standard of care has been breached; and

(D) The expert's opinion as to how the breach of the applicable standard of care resulted in injury or death.

(3) The plaintiff shall have thirty (30) days after the complaint is filed with the clerk to file the affidavit before the provisions of subsection (a) apply. If the affidavit is not filed within thirty (30) days after the complaint is filed with the clerk, the complaint shall be dismissed by the court."

AND

Page 8, line 23, delete "which" and substitute "which are not otherwise privileged and which"

AND

Page 8, line 24, delete "directly"

AND

Page 8, delete line 25, and substitute the following:
"plaintiff's injury to be admissible at trial.

16-114-212. Tolling of the statute of limitations.

(a) If, within thirty (30) days prior to the expiration of the applicable statute of limitations, a plaintiff serves written notice of intention to file an action for medical injury, the statute of limitations shall be tolled for ninety (90) days only if the following conditions are met:

(1) The written notice shall be served by certified mail, return receipt requested, upon the medical care provider alleged to have cause the medical injury;

(2) The written notice shall include the following:

(A) The claimant's full name, date of birth, present address and address at time of treatment at issue, and social security number:

(B) The date(s) of the treatment in question and a summary of the alleged wrongful conduct; and

(C) The names and addresses of the known medical care providers relating to the alleged injury; and

(3) An authorization to release medical records signed by the plaintiff, which shall authorize the medical care provider alleged to be liable to obtain pertinent medical records, shall be attached to the notice.

(b) Failure to comply with any of the requirements set forth in subsection (a) shall be deemed to be material and shall result in the statute of limitations not being tolled.

(c) If the plaintiff files an action for medical injury during this tolling period without the requisite affidavit required by § 16-114-209(b)(1) and (2), the complaint shall be dismissed and costs, attorney fees, and appropriate sanctions as determined by the court shall be assessed. The provisions of § 16-114-209 (b)(3) do not apply to cases filed during the tolling period.

(d) If a request for the production of copies of the medical records accompanies the written notice of intention to file an action for medical injury in accordance with subsection (a), and if copies of those medical records are not provided within thirty (30) days of receipt of the notice, then the claimant may file an independent expedited declaratory action seeking a declaration that the medical care provider failed to produce the medical records within the thirty-day period. If the court finds that copies of the medical records were not produced as required by this subsection, the statute of limitations shall be tolled for a period of seventy-five (75) days from the date of the production of the copies of the medical records. If the court finds that the failure to produce copies of the requested medical records is without good cause, the court shall award the claimant his reasonable costs and attorney fees for the declaratory judgment action."

AND

Page 8, delete lines 27 and 28 and substitute the following:

"SECTION 23. Attorney General.

No provision of this Act shall apply to, or alter existing law with respect to any claim, charge, action, or suit brought or prosecuted by the Attorney General.

SECTION 24. Coroner or Medical Examiner.

Nothing in this act shall be construed to diminish or enlarge the powers or duties of a coroner or medical examiner."

AND

appropriately renumber subsequent sections of the bill

AND

Page 9, line 5, add a new section of the bill to read as follows:

SECTION 26. EMERGENCY CLAUSE. It is found and determined by the General Assembly of the State of Arkansas that in this state, existing conditions, such as the application of joint and several liability regardless of the percentage of fault, are adversely impacting the availability and affordability of medical liability insurance; that those existing conditions recently have caused several medical liability carriers to stop offering coverage in the state and have caused some medical care providers to curtail or end their practices; that the decreasing availability and affordability of medical liability insurance is adversely affecting the accessibility and affordability of medical care and of health insurance coverage in this state; that long term care facilities are having great difficulty hiring qualified medical directors because physicians could be held liable for an entire judgment even if they are found to be minimally at fault; and that there is a need to improve access to the courts for deserving claimants; and that this act is immediately necessary in order to remedy these conditions and improve access to health care in this state. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on:

(1) The date of its approval by the Governor;

(2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or

(3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

The Amendment was read the first time, rules suspended and read the second time and _____

By: Senators Luker, Salmon, Hendren, B. Johnson

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VJF535 **Secretary**