S T A T E O F N E W Y O R K

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2009-2010 Regular Sessions

I N S E N A T E

February 27, 2009

Introduced by Sens. VOLKER, ALESI, DeFRANCISCO, O. JOHNSON, MORAHAN, PADAVAN, SEWARD -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the civil practice law and rules and the judiciary law, in relation to dental, medical and podiatric malpractice actions and to establishing a limitation on noneconomic damages in personal injury actions

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 3012-a of the civil practice law and rules, as amended by chapter 507 of the laws of 1987, is amended to read as follows:

S 3012-a. Certificate of merit in medical, dental and podiatric malpractice actions AND ACTIONS AGAINST ALL OTHER PROFESSIONALS. (a) In any action for medical, dental or podiatric malpractice, OR IN ANY ACTION FOR DAMAGES, CONTRIBUTION OR INDEMNITY ARISING OUT OF ALLEGED NEGLIGENCE OF A PROFESSIONAL SUBJECT TO THE PROVISIONS OF TITLE VIII OF THE EDUCATION LAW, the complaint shall be accompanied by a certificate, executed by the attorney for the plaintiff, OR OTHER PARTY ASSERTING THE CAUSE OF ACTION, declaring that:

(1) the attorney has reviewed the facts of the case and has consulted with at least one physician in medical malpractice actions, at least one dentist in dental malpractice actions [or], at least one podiatrist in podiatric malpractice actions, OR AT LEAST ONE PROFESSIONAL IN THE SAME PROFESSION AS THE PERSON OR PERSONS DEFENDANT IN THE SUBJECT SUIT IN OTHER PROFESSIONAL MALPRACTICE OR NEGLIGENCE ACTIONS AND who is licensed to practice in this state or any other state and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, AND WHO HAS SIGNED AN AFFIDAVIT CONCLUDING THAT THERE IS A REASONABLE BASIS FOR THE COMMENCEMENT OF AN ACTION, SUCH AFFIDAVIT SHALL ACCOMPANY THE CERTIFICATE REQUIRED BY THIS SECTION, and

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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that the attorney has concluded on the basis of such review [and], consultation AND AFFIDAVIT that there is a reasonable basis for the commencement of such action; or

(2) the attorney was unable to obtain the consultation AND AFFIDAVIT required by paragraph one of this subdivision because a limitation of time, established by article two of this chapter, would bar the action and that the certificate required by paragraph one of this subdivision could not reasonably be obtained before such time expired. If a certificate is executed pursuant to this subdivision, the certificate required by this section shall be filed within ninety days after service of the complaint; or

(3) the attorney was unable to obtain the consultation AND AFFIDAVIT required by paragraph one of this subdivision because the attorney had made three separate good faith attempts with three separate physicians, dentists [or], podiatrists OR SUBJECT PROFESSIONALS, in accordance with the provisions of paragraph one of this subdivision to obtain such consultation AND AFFIDAVIT and none of those contacted would agree to such a consultation AND AFFIDAVIT.

(b) Where a certificate is required pursuant to this section, a single certificate shall be filed for each action, even if more than one defendant has been named in the complaint or is subsequently named.

(c) Where the attorney intends to rely solely on the doctrine of "res ipsa loquitur", this section shall be inapplicable. In such cases, the complaint shall be accompanied by a certificate, executed by the attorney, declaring that the attorney is solely relying on such doctrine and, for that reason, is not filing a certificate required by this section.

(d) If a request by the plaintiff for the records of the plaintiff's medical or dental treatment by the defendants has been made and such records have not been produced, the plaintiff shall not be required to serve the certificate required by this section until ninety days after such records have been produced.

(e) For purposes of this section, and subject to the provisions of section thirty-one hundred one of this chapter, an attorney who submits a certificate as required by paragraph one or two of subdivision (a) of this section and the physician, dentist [or], podiatrist OR SUBJECT PROFESSIONALS with whom the attorney consulted shall not be required to disclose the identity of the physician, dentist [or], podiatrist OR SUBJECT PROFESSIONALS consulted and the contents of such consultation AND AFFIDAVIT; provided, however, that when the attorney makes a claim under paragraph three of subdivision (a) of this section that he was unable to obtain the required consultation AND AFFIDAVIT with the physician, dentist [or], podiatrist OR SUBJECT PROFESSIONALS, the court may, upon the request of a defendant made prior to compliance by the plaintiff with the provisions of section thirty-one hundred ONE of this chapter, require the attorney to divulge to the court the names of physicians, dentists [or], podiatrists OR SUBJECT PROFESSIONALS refusing such consultation AND AFFIDAVIT.

(f) The provisions of this section shall not be applicable to a plaintiff who is not represented by an attorney.

(g) The plaintiff may, in lieu of serving the certificate required by this section, provide the defendant or defendants with the information required by paragraph one of subdivision (d) of section thirty-one hundred one of this chapter within the period of time prescribed by this section.

(H) THE SUBJECT PROFESSIONAL OR PROFESSIONALS CONSULTED MAY NOT BE A PARTY TO THE LITIGATION.

(I) FOR PURPOSES OF THIS SECTION, A COMPLAINT SHALL INCLUDE A COMPLAINT, THIRD PARTY COMPLAINT, AN ANSWER CONTAINING A COUNTERCLAIM OR A CROSS CLAIM.

S 2. Paragraph 1 of subdivision (d) of section 3101 of the civil practice law and rules, as amended by chapter 184 of the laws of 1988, subparagraph (ii) as amended by chapter 165 of the laws of 1991, is amended to read as follows:

1. Experts. (i) Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. [In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph.]

(ii) In an action for medical, dental or podiatric malpractice, any party may, by written offer made to and served upon all other parties and filed with the court, [offer to disclose the name of, and to] make available for examination upon oral deposition, any person the party making the offer expects to call as an expert witness at trial. Within twenty days of service of the offer, a party shall accept or reject the offer by serving a written reply upon all parties and filing a copy thereof with the court. Failure to serve a reply within twenty days of service of the offer shall be deemed a rejection of the offer. If all parties accept the offer, each party shall be required to produce his or her expert witness for examination upon oral deposition upon receipt of a notice to take oral deposition in accordance with rule thirty-one hundred seven of this [chapter] ARTICLE. If any party, having made or accepted the offer, fails to make that party's expert available for oral deposition, that party shall be precluded from offering expert testimony at the trial of the action.

(iii) Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate. However, a party, without court order, may take the testimony of a person authorized to practice medicine, dentistry or podiatry who is the party's treating or retained expert, as described in paragraph three of subdivision (a) of this section, in which event any other party shall be entitled to the full disclosure authorized by this article with respect to that expert without court order.

S 3. Subdivisions (b) and (c) of section 5031 of the civil practice law and rules, as added by chapter 86 of the laws of 2003, are amended to read as follows:

(b) Awards for all past damages, all damages for future loss of services, all damages for future loss of consortium, all damages in wrongful death actions, and damages for future pain and suffering of

[five hundred] FIFTY thousand dollars or less shall be paid in a lump sum. In any case in which all damages are to be paid in lump sums, the judgment shall be entered on the total of the lump sums, without further regard to this section.

(c) As to any award of damages for future pain and suffering in excess of [five hundred] FIFTY thousand dollars, the court shall determine the greater of thirty-five percent of such damages or [five hundred] FIFTY thousand dollars and such amount shall be paid in a lump sum. The remaining amount of the award for damages for future pain and suffering shall be paid in a stream of payments over the period of time determined by the trier of fact or eight years, whichever is less. The stream of payments for future pain and suffering shall be calculated by dividing the remaining amount of damages for future pain and suffering by the number of years over which such payments shall be made to determine the first year's payment and the payment due in each succeeding year shall be computed by adding four percent to the previous year's payment. The court shall determine the present value of the stream of payments by applying a discount rate to the stream of payments.

S 4. Subdivisions (b) and (e) of section 5041 of the civil practice law and rules, as added by chapter 682 of the laws of 1986, are amended to read as follows:

(b) The court shall enter judgment in lump sum for past damages, for future damages not in excess of [two hundred] fifty thousand dollars, and for any damages, fees or costs payable in lump sum or otherwise under subdivisions (c) and (d) of this section. For the purposes of this section, any lump sum payment of a portion of future damages shall be deemed to include the elements of future damages in the same proportion as such elements comprise of the total award for future damages as determined by the trier of fact.

(e) With respect to awards of future damages in excess of [two hundred] fifty thousand dollars in an action to recover damages for personal injury, injury to property or wrongful death, the court shall enter judgment as follows:

After making any adjustment prescribed by subdivisions (b), (c) and (d) of this section, the court shall enter a judgment for the amount of the present value of an annuity contract that will provide for the payment of the remaining amounts of future damages in periodic installments. The present value of such contract shall be determined in accordance with generally accepted actuarial practices by applying the discount rate in effect at the time of the award to the full amount of the remaining future damages, as calculated pursuant to this subdivision. The period of time over which such periodic payments shall be made and the period of time used to calculate the present value of the annuity contract shall be the period of years determined by the trier of fact in arriving at the itemized verdict; provided, however, that the period of time over which such periodic payments shall be made and the period of time used to calculate the present value for damages attributable to pain and suffering shall be ten years or the period of time determined by the trier of fact, whichever is less. The court, as part of its judgment, shall direct that the defendants and their insurance carriers shall be required to offer and to guarantee the purchase and payment of such an annuity contract. Such annuity contract shall provide for the payment of the annual payments of such remaining future damages over the period of time determined pursuant to this subdivision. The annual payment for the first year shall be calculated by dividing the remaining amount of future damages by the number of years over which such payments

shall be made and the payment due in each succeeding year shall be computed by adding four percent to the previous year's payment. THE ADDITION OF FOUR PERCENT TO EACH OF THE PREVIOUS YEAR'S PAYMENT SHALL BE THE EXCLUSIVE MEASURE OF INTEREST, INFLATION, FOREGONE INVESTMENT OPPORTUNITY AND ANY OTHER MEASURE OF DAMAGE. Where payment of a portion of the future damages terminates in accordance with the provisions of this article, the four percent added payment shall be based only upon that portion of the damages that remains subject to continued payment. Unless otherwise agreed, the annual sum so arrived at shall be paid in equal monthly installments and in advance.

S 5. The civil practice law and rules is amended by adding a new article 50-C to read as follows:

ARTICLE 50-C

LIMITATION ON NONECONOMIC DAMAGES

5051. DEFINITIONS.

5052. DAMAGE AWARDS.

S 5051. DEFINITIONS. AS USED IN THIS ARTICLE:

1. "NONECONOMIC DAMAGES" MEANS SUBJECTIVE, NONPECUNIARY DAMAGES ARISING FROM PAIN, SUFFERING, INCONVENIENCE, PHYSICAL IMPAIRMENT OR DISFIGUREMENT, MENTAL ANGUISH, EMOTIONAL DISTRESS, LOSS OF SOCIETY AND COMPANIONSHIP, LOSS OF CONSORTIUM, INJURY TO REPUTATION, HUMILIATION AND OTHER NONPECUNIARY DAMAGES.

2. "ACTUAL ECONOMIC DAMAGES" MEANS OBJECTIVELY VERIFIABLE PECUNIARY DAMAGES ARISING FROM MEDICAL EXPENSES AND MEDICAL CARE, LOSS OF EARNINGS AND EARNING CAPACITY, BURIAL COSTS, LOSS OF USE OF PROPERTY, COSTS OF REPAIR OR REPLACEMENT OF PROPERTY, COSTS OF OBTAINING SUBSTITUTE DOMESTIC SERVICES, LOSS OF EMPLOYMENT, LOSS OF BUSINESS OR EMPLOYMENT OPPORTUNITIES, REHABILITATION SERVICES, CUSTODIAL CARE AND OTHER PECUNIARY DAMAGES.

3. "PERSONAL INJURY ACTION" MEANS ANY ACTION, INCLUDING BUT IN NO MANNER LIMITED TO MEDICAL, DENTAL AND PODIATRIC MALPRACTICE ACTIONS, WHETHER IN TORT, CONTRACT, OR OTHERWISE, IN WHICH THE PLAINTIFF SEEKS DAMAGES FOR INJURY TO THE PERSON OR WRONGFUL DEATH.

4. "COMPENSATION" MEANS MONETARY AWARDS.

S 5052. DAMAGE AWARDS. IN ANY PERSONAL INJURY ACTION, THE PREVAILING PLAINTIFF MAY BE AWARDED:

1. COMPENSATION FOR ACTUAL ECONOMIC DAMAGES SUFFERED BY THE INJURED PLAINTIFF; AND

2. COMPENSATION FOR NONECONOMIC DAMAGES SUFFERED BY THE INJURED PLAINTIFF, NOT TO EXCEED TWO HUNDRED FIFTY THOUSAND DOLLARS.

S 6. Section 474-a of the judiciary law, as amended by chapter 485 of the laws of 1986, is amended to read as follows:

S 474-a. Contingent fees for attorneys in claims or actions for medical, dental or podiatric malpractice, OR IN ANY CLAIM OR ACTION FOR PROPERTY DAMAGE OR PERSONAL INJURY, INCLUDING DEATH. 1. For the purpose of this section, the term "contingent fee" shall mean any attorney's fee in any claim or action for medical, dental or podiatric malpractice, OR IN ANY CLAIM OR ACTION FOR PROPERTY DAMAGE OR PERSONAL INJURY, INCLUDING DEATH, whether determined by judgment or settlement, which is dependent in whole or in part upon the success of the prosecution by the attorney of such claim or action, or which is to consist of a percentage of any recovery, or a sum equal to a percentage of any recovery, in such claim or action.

2. Notwithstanding any inconsistent judicial rule, a contingent fee in a medical, dental or podiatric malpractice action, OR IN ANY CLAIM OR ACTION FOR PROPERTY DAMAGE OR PERSONAL INJURY, INCLUDING DEATH, shall

not exceed the amount of compensation provided for in the following schedule:

[30] 25 percent of the first $250,000 of the sum recovered;

[25] 20 percent of the next $250,000 of the sum recovered;

[20] 15 percent of the next $500,000 of the sum recovered;

[15] 10 percent of the next $250,000 of the sum recovered;

[10] 5 percent of any amount over $1,250,000 of the sum recovered.

3. Such percentages shall be computed on the net sum recovered after deducting from the amount recovered expenses and disbursements for expert testimony and investigative or other services properly chargeable to the enforcement of the claim or prosecution of the action. In computing the fee, the costs as taxed, including interest upon a judgment, shall be deemed part of the amount recovered. For the following or similar items there shall be no deduction in computing such percentages: liens, assignments or claims in favor of hospitals, for medical care, dental care, podiatric care and treatment by doctors and nurses, or of self-insurers or insurance carriers.

4. In the event that claimant's or plaintiff's attorney believes in good faith that the fee schedule set forth in subdivision two of this section, because of extraordinary circumstances, will not give him adequate compensation, application for greater compensation may be made upon affidavit with written notice and an opportunity to be heard to the claimant or plaintiff and other persons holding liens or assignments on the recovery. Such application shall be made to the justice of the trial part to which the action had been sent for trial; or, if it had not been sent to a part for trial, then to the justice presiding at the trial term calendar part of the court in which the action had been instituted; or, if no action had been instituted, then to the justice presiding at the trial term calendar part of the Supreme Court for the county in the judicial department in which the attorney has an office. Upon such application, the justice, in his discretion, if extraordinary circumstances are found to be present, and without regard to the claimant's or plaintiff's consent, may fix as reasonable compensation for legal services rendered an amount greater than that specified in the schedule set forth in subdivision two of this section, provided, however, that such greater amount shall not exceed the fee fixed pursuant to the contractual arrangement, if any, between the claimant or plaintiff and the attorney. If the application is granted, the justice shall make a written order accordingly, briefly stating the reasons for granting the greater compensation; and a copy of such order shall be served on all persons entitled to receive notice of the application.

5. Any contingent fee in a claim or action for medical, dental or podiatric malpractice, OR IN ANY CLAIM OR ACTION FOR PROPERTY DAMAGE OR PERSONAL INJURY, INCLUDING DEATH, brought on behalf of an infant shall continue to be subject to the provisions of section four hundred seventy-four of this [chapter] ARTICLE.

S 7. This act shall take effect immediately, provided, however, that:

(a) The amendments effected by the provisions of sections one and five of this act shall apply to subject actions commenced on and after such date; and

(b) The amendments effected by the provisions of section six of this act shall apply to retainer agreements executed on or after such date.