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

3187

2011-2012 Regular Sessions

I N S E N A T E

February 11, 2011

Introduced by Sen. HANNON -- 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, in relation to enacting the "medical liability reform act"; and to repeal subparagraph (ii) of paragraph 1 of subdivision (d) of section 3101 of such law and rules relating to disclosure of expert witnesses in medical, dental and podiatric medical malpractice actions

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

Section 1. Short title. This act shall be known and may be cited as the "medical liability reform act".

S 2. 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. (a) In any action for medical, dental or podiatric malpractice, the complaint shall be accompanied by a certificate, executed by the attorney for the plaintiff, 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 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, WITH SUCH AFFIDAVIT TO ACCOMPANY THE CERTIFICATE REQUIRED BY THIS SECTION, and 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

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

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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, in accordance with the provisions of paragraph one of this subdivision to obtain such consultation and none of those contacted would agree to such a consultation.

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

(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 AND AFFIDAVIT 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) WHERE A CERTIFICATE AND AFFIDAVIT IS REQUIRED PURSUANT TO THIS SECTION, THE FAILURE TO TIMELY FILE SUCH CERTIFICATE AND AFFIDAVIT SHALL REQUIRE THAT THE ACTION BE DEEMED A DISMISSAL OF THE COMPLAINT FOR NEGLECT TO FILE THE ACTION FOR THE PURPOSES OF SECTION TWO HUNDRED FIVE OF THIS CHAPTER.

S 3. Section 1600 of the civil practice law and rules, as added by chapter 682 of the laws of 1986, is amended to read as follows:

S 1600. Definitions. As used in this article [the term "non-economic loss" includes but is not limited to pain and suffering, mental anguish, loss of consortium or other damages for non-economic loss]:

1. "NONECONOMIC DAMAGES" MEANS 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 ALL 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, LOSS OF GUIDANCE, 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 ALL OTHER PECUNIARY DAMAGES.

S 4. Section 1601 of the civil practice law and rules, as added by chapter 682 of the laws of 1986 and subdivision 1 as amended by chapter 635 of the laws of 1996, is amended to read as follows:

S 1601. Limited liability of persons jointly liable. 1. Notwithstanding any other provision of law, when a verdict or decision in an action or claim for personal injury is determined in favor of a claimant in an action involving two or more tortfeasors jointly liable or in a claim against the state [and the liability of a defendant is found to be fifty percent or less of the total liability assigned to all persons liable], the liability of [such] A defendant to the claimant for [non-economic loss] THE CLAIMANT'S ACTUAL ECONOMIC DAMAGES AND NONECONOMIC DAMAGES shall not exceed that defendant's equitable share determined in accordance with the relative culpability of each person causing or contributing to the total liability for [non-economic loss] THE CLAIMANT'S ACTUAL ECONOMIC DAMAGES AND NONECONOMIC DAMAGES; provided, however that the culpable conduct of any person not a party to the action shall not be considered in determining any equitable share herein if the claimant proves that with due diligence he or she was unable to obtain jurisdiction over such person in said action (or in a claim against the state, in a court of this state); and further provided that the culpable conduct of any person shall not be considered in determining any equitable share herein to the extent that action against such person is barred because the claimant has not sustained a "grave injury" as defined in section eleven of the workers' compensation law.

2. Nothing in this section shall be construed to affect or impair any right of a tortfeasor under section 15-108 of the general obligations law.

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

SECTION 5051. DEFINITIONS.
5052. DAMAGE AWARDS.

S 5051. DEFINITIONS. AS USED IN THIS ARTICLE:

1. "NONECONOMIC DAMAGES" MEANS 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 ALL 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, LOSS OF GUIDANCE, 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 ALL 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. 1. IN ANY PERSONAL INJURY ACTION, THE PREVAILING PLAINTIFF OR PERSON WHO CLAIMS INJURY BY OR THROUGH SUCH INJURED PLAINTIFF MAY BE AWARDED:

(A) COMPENSATION FOR ACTUAL ECONOMIC DAMAGES SUFFERED BY THE INJURED PLAINTIFF OR OTHER PERSON WHO CLAIMS INJURY BY OR THROUGH SUCH INJURED PLAINTIFF; AND

(B) COMPENSATION FOR NONECONOMIC DAMAGES SUFFERED BY THE INJURED PLAINTIFF OR OTHER PERSON WHO CLAIMS INJURY THROUGH SUCH INJURED PLAINTIFF, OR AS A CONSEQUENCE OF INJURY TO SUCH INJURED PLAINTIFF, NOT TO EXCEED TWO HUNDRED FIFTY THOUSAND DOLLARS.

2. THE DAMAGE AWARD RECOVERABLE FOR A PERSONAL INJURY ACTION SHALL NOT EXCEED THE AMOUNT PERMITTED TO BE AWARDED PURSUANT TO SUBDIVISION ONE OF THIS SECTION REGARDLESS OF THE NUMBER OF DEFENDANTS TO SUCH ACTION. IF A JURY AWARDS AN AMOUNT FOR NONECONOMIC DAMAGES THAT EXCEEDS THE LIMITATION UNDER SUBDIVISION ONE OF THIS SECTION, THE COURT SHALL REDUCE THE AMOUNT TO CONFORM TO THE LIMITATION.

3. NO OTHER PERSONAL INJURY ACTION MAY BE BROUGHT BY THE PREVAILING PLAINTIFF OR OTHER PERSON WHO CLAIMS INJURY THROUGH SUCH INJURED PLAINTIFF, OR AS A CONSEQUENCE OF INJURY TO SUCH INJURED PLAINTIFF, TO RECOVER AMOUNTS FOR THE INJURY OR OCCURRENCE THAT GIVES RISE TO SUCH PERSONAL INJURY ACTION.

4. WHERE A DEFENDANT HAS SUCCESSFULLY PLEADED AND PROVED CONTRIBUTORY NEGLIGENCE ON THE PART OF THE PREVAILING PLAINTIFF PURSUANT TO ARTICLE FOURTEEN-A OF THIS CHAPTER, THE DAMAGE AWARD TO THE PREVAILING PLAINTIFF SHALL BE DIMINISHED FROM THE AMOUNTS AWARDED PURSUANT TO SUBDIVISION ONE OF THIS SECTION BY THE PROPORTION WHICH THE CULPABLE CONDUCT ATTRIBUTABLE TO THE PREVAILING PLAINTIFF BEARS TO THE CULPABLE CONDUCT WHICH CAUSED THE DAMAGES.

5. NOTHING IN THIS SECTION SHALL BE CONSTRUED TO PREVENT THE APPLICATION OF SECTION FORTY-FIVE HUNDRED FORTY-FIVE OF THIS CHAPTER TO A DAMAGE AWARD FOR A PERSONAL INJURY ACTION MADE PURSUANT TO SUBDIVISION ONE OF THIS SECTION.

6. NOTWITHSTANDING ANY OTHER PROVISION OF LAW, THE JURY SHALL NOT BE INSTRUCTED OF THE LIMITATION ON NONECONOMIC DAMAGES AS SET FORTH IN THIS ARTICLE.

S 6. Subparagraph (i) of 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, is amended to read as follows:

(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.]

S 7. Subparagraph (ii) of paragraph 1 of subdivision (d) of section 3101 of the civil practice law and rules is REPEALED and a new subparagraph (ii) is added to read as follows:

(II) NOTWITHSTANDING ANY OTHER PROVISION OF THIS ARTICLE OR OF ARTICLE THIRTY-TWO OF THIS CHAPTER, IN AN ACTION FOR MEDICAL, DENTAL OR PODIATRIC MALPRACTICE, AT THE TIMES AND IN THE SEQUENCE DIRECTED BY THE COURT, SUCH TIMES TO BE PRIOR TO THE SERVICE AND FILING OF A NOTE OF ISSUE UNLESS THE COURT DIRECTS OTHERWISE AND PRESERVES THE RIGHT OF EVERY PARTY TO DEPOSE A PERSON WHOSE DISCLOSURE OCCURS SUBSEQUENT TO THE FILING OF A NOTE OF ISSUE, EACH PARTY SHALL DISCLOSE TO THE OTHER PARTIES THE IDENTITY OF ANY PERSON WHO MAY BE USED AT TRIAL TO PROVIDE EXPERT TESTIMONY IN THE CASE AND EACH SUCH DISCLOSURE SHALL BE ACCOMPANIED BY A WRITTEN REPORT PREPARED AND SIGNED BY SUCH PERSON. THE REPORT SHALL CONTAIN A COMPLETE STATEMENT OF ALL OPINIONS TO BE EXPRESSED AND THE BASIS AND REASONS THEREFOR; THE DATA OR OTHER INFORMATION CONSIDERED BY SUCH PERSON IN FORMING THE OPINIONS; ANY EXHIBITS TO BE USED AS A SUMMARY OF OR SUPPORT FOR THE OPINIONS; THE QUALIFICATIONS OF THE PERSON, INCLUDING A LIST OF ALL PUBLICATIONS AUTHORED BY THE PERSON DURING THE PRECEDING TEN YEARS; THE COMPENSATION TO BE PAID FOR THE PERSON'S CONSIDERATION OF DATA OR OTHER INFORMATION AND FOR HIS OR HER TESTIMONY; AND A LISTING OF ANY OTHER CASES IN WHICH THE PERSON HAS TESTIFIED AS AN EXPERT AT TRIAL OR BY ORAL DEPOSITION WITHIN THE PRECEDING FOUR YEARS. EACH PARTY SHALL BE REQUIRED TO PRODUCE EACH PERSON SO IDENTIFIED BY SUCH PARTY AS AN 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 ARTICLE. UNLESS MANIFEST INJUSTICE WOULD RESULT, THE COURT SHALL REQUIRE THAT THE PARTY NOTICING AN ORAL DEPOSITION OF SUCH AN EXPERT WITNESS PAY SUCH WITNESS A REASONABLE FEE FOR TIME SPENT IN ATTENDING SUCH ORAL DEPOSITION. IF ANY PARTY FAILS TO IDENTIFY A PERSON AS AN EXPERT WITNESS IN ACCORDANCE WITH THE PROVISIONS OF THIS CLAUSE, OR IF ANY PARTY FAILS TO MAKE ANY PERSON IDENTIFIED BY THE PARTY AS AN EXPERT WITNESS AVAILABLE FOR ORAL DEPOSITION IN ACCORDANCE WITH THE PROVISIONS OF THIS CLAUSE, THAT PARTY SHALL BE PRECLUDED FROM OFFERING SUCH EXPERT'S TESTIMONY AT THE TRIAL OF THE ACTION.

S 8. This act shall take effect immediately; except that sections two, three, six and seven of this act shall take effect on the ninetieth day after this act shall have become a law and shall apply to actions commenced and claims filed on or after the effective date of such sections. The provisions of sections four and five of this act shall apply to causes of action and claims accruing on or after the effective date of this act.