STATE OF NEW YORK

1024

2023-2024 Regular Sessions

IN SENATE

January 9, 2023

Introduced by Sen. COONEY -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary

AN ACT to amend the civil practice law and rules, in relation to "economic loss" and damages for health care costs in actions for medical, dental or podiatric malpractice

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Section 1600 of the civil practice law and rules, as added 2 by chapter 682 of the laws of 1986, is amended to read as follows:

3 § 1600. Definitions. <u>1.</u> As used in this article the term "non-economic 4 loss" includes but is not limited to pain and suffering, mental anguish, 5 loss of consortium or other damages for non-economic loss.

As used in this article, the term "economic loss" includes but is
not limited to the cost of medical care, dental care, custodial care,
rehabilitation services, loss of earnings, or other similar damages for
economic loss.

10 § 2. Subdivision 1 of section 1601 of the civil practice law and 11 rules, as amended by chapter 635 of the laws of 1996, is amended to read 12 as follows:

13 1. Notwithstanding any other provision of law, when a verdict or deci-14 sion 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 15 or in a claim against the state and the liability of a defendant is 16 found to be fifty percent or less of the total liability assigned to all 17 persons liable, the liability of such defendant to the claimant for 18 19 non-economic loss and economic loss shall not exceed that defendant's 20 equitable share determined in accordance with the relative culpability 21 of each person causing or contributing to the total liability for non-e-22 conomic loss and economic loss; provided, however that the culpable 23 conduct of any person not a party to the action shall not be considered 24 in determining any equitable share herein if the claimant proves that

EXPLANATION--Matter in <u>italics</u> (underscored) is new; matter in brackets [-] is old law to be omitted.

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1 with due diligence he or she was unable to obtain jurisdiction over such 2 person in said action (or in a claim against the state, in a court of 3 this state); and further provided that the culpable conduct of any 4 person shall not be considered in determining any equitable share herein 5 to the extent that action against such person is barred because the 6 claimant has not sustained a "grave injury" as defined in section eleven 7 of the workers' compensation law.

8 § 3. Section 3012-a of the civil practice law and rules, as amended by 9 chapter 507 of the laws of 1987, is amended to read as follows:

10 § 3012-a. [Certificate] Affidavit of merit in medical, dental and 11 podiatric malpractice actions. (a) In any action for medical, dental or 12 podiatric malpractice, the complaint shall be accompanied by [a certificate, executed by the attorney for the plaintiff, declaring] an affida-13 14 vit of merit executed by a healthcare professional who the plaintiff's 15 attorney or, the plaintiff if not represented by an attorney, reasonably believes is knowledgeable in the relevant issues involved in the partic-16 17 ular action to be an expert physician in a medical malpractice action, an expert dentist in a dental malpractice action or an expert podiatrist 18 in a podiatric malpractice action, stating that[+ 19

(1) the attorney has reviewed the facts of the case and has consulted 20 21 with at least one physician in medical malpractice actions, at least one 22 dentist in dental malpractice actions or at least one podiatrist in podiatric malpractice actions who is licensed to practice in this state 23 or any other state and who the attorney reasonably believes is know-24 25 ledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of such review and consul-26 27 tation that there is a reasonable basis for the commencement of such 28 action; or

29 (2) the attorney was unable to obtain the consultation required by paragraph one of this subdivision because a limitation of time, estab-30 31 lished by article two of this chapter, would bar the action and that the 32 certificate required by paragraph one of this subdivision could not 33 reasonably be obtained before such time expired. If a certificate is 34 executed pursuant to this subdivision, the certificate required by this section shall be filed within ninety days after service of the 35 complaint; or 36

37 (3) the attorney was unable to obtain the consultation required by paragraph one of this subdivision because the attorney had made three 38 39 separate good faith attempts with three separate physicians, dentists or podiatrists, in accordance with the provisions of paragraph one of this 40 subdivision to obtain such consultation and none of those contacted 41 42 would agree to such a consultation] the physician in a medical malprac-43 tice action, or the dentist in a dental malpractice action, or the 44 podiatrist in a podiatric malpractice action has reviewed the complaint in the malpractice action and all medical records supplied by the 45 46 plaintiff's attorney, or plaintiff if not represented by an attorney, 47 and states each of the following with individual particularization to 48 the specifically named defendant or defendants: 49 (1) The applicable standard of practice or care concerning the allega-

50 tions contained in the complaint.

51 (2) The applicable standard of practice or care breached.

52 (3) The actions that should have been taken or omitted in order to 53 have complied with the applicable standard of care.

54 (4) The manner in which the breach of the standard of practice or care 55 was the proximate cause of the plaintiff's injury.

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(b) [Where a certificate is required pursuant to this section, a 1 single certificate shall be filed for each action, even if more than one 2 defendant has been named in the complaint or is subsequently named] 3 Where an affidavit of merit is required pursuant to this section, an 4 5 individual affidavit shall be filed for each named defendant who is a 6 physician, dentist or podiatrist named in the complaint. 7 (c) Where the attorney intends to rely solely on the doctrine of "res 8 ipsa loquitur", this section shall be inapplicable. In such cases, the 9 complaint shall be accompanied by [a certificate] an affidavit, executed 10 by the attorney, declaring that the attorney is solely relying on such 11 doctrine and, for that reason, is not filing [a cortificate] the affida-12 vit of merit required by this section. (d) [If a request by the plaintiff for the records of the plaintiff's 13 medical or dental treatment by the defendants has been made and such 14 15 records have not been produced, the plaintiff shall not be required to serve the certificate required by this section until ninety days after 16 17 such records have been produced] The plaintiff may, in lieu of serving the affidavit of merit required by this section, provide the defendant 18 or defendants with the information required by paragraph one of subdivi-19 sion (d) of section thirty-one hundred one of this chapter within the 20 21 period of time prescribed by this section, provided that the disclosure 22 be executed by the physician in a medical malpractice action, or the dentist in a dental malpractice action, or the podiatrist in a podiatric 23 malpractice action who has reviewed the complaint in the malpractice 24 25 action and all medical records supplied by the plaintiff's attorney. (e) [For purposes of this section, and subject to the provisions of 26 27 section thirty-one hundred one of this chapter, an attorney who submits 28 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 29 30 31 physician, dentist or podiatrist consulted and the contents of such 32 congultation; provided, however, that when the attorney makes a claim under paragraph three of subdivision (a) of this section that he was 33 34 unable to obtain the required consultation with the physician, dentist or podiatrist, the court may, upon the request of a defendant made prior 35 to compliance by the plaintiff with the provisions of section thirty-one 36 37 hundred of this chapter, require the attorney to divulge to the court the names of physicians, dentists or podiatrists refusing such consulta-38 39 tion] The plaintiff's attorney or, the plaintiff if not represented by an attorney, may with good cause shown, file a motion to extend the 40 period of time to file the required affidavit of merit. The motion shall 41 be filed together with the complaint. The court may grant reasonable 42 43 time to file the affidavit of merit, not to exceed ninety days, except 44 the time may be extended beyond ninety days if the court determines that 45 a defendant or non-party has failed to cooperate with access to medical 46 or dental records necessary for the affidavit of merit or that other 47 circumstances warrant extension of time. 48 (f) [The provisions of this section shall not be applicable to a 49 plaintiff who is not represented by an attorney. 50 (g) The plaintiff may, in lieu of serving the certificate required by this section, provide the defendant or defendants with the information 51 52 required by paragraph one of subdivision (d) of section thirty-one hundred one of this chapter within the period of time prescribed by this 53 54 section] Any complaint alleging medical, dental, or podiatric malpractice that is not accompanied by an affidavit of merit as required by 55

56 this section shall be deemed defective as a matter of law and, upon

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motion by the defendant, be dismissed on the merits by the court. Such 1 dismissal shall be with prejudice. 2 § 4. Paragraphs 3 and 4 of subdivision (a) of section 3101 of the 3 4 civil practice law and rules, as amended by chapter 98 of the laws of 5 1993, are amended and a new paragraph 5 is added to read as follows: б (3) a person about to depart from the state, or without the state, or 7 residing at a greater distance from the place of trial than one hundred 8 miles, or so sick or infirm as to afford reasonable grounds of belief 9 that he or she will not be able to attend the trial, or a person author-10 ized to practice medicine, dentistry or podiatry who has provided 11 medical, dental or podiatric care or diagnosis to the party demanding 12 disclosure, or who has been retained by such party as an expert witness; 13 [and] 14 (4) any other person, upon notice stating the circumstances or reasons 15 such disclosure is sought or required [-]; and (5) notwithstanding any provision of subparagraph (i) of paragraph one 16 17 of subdivision (d) of this section to the contrary, in an action for medical, dental or podiatric malpractice, each party shall serve the 18 disclosure described in such subparagraph within sixty days preceding 19 the filing required by rule thirty-four hundred two of this chapter. 20 21 Further, at any time after joinder of issue, any party may, by written 22 notice made to and served upon all other parties and filed with the court; conduct an examination upon oral deposition of any person who has 23 been disclosed as an expert witness by any other party. Each party shall 24 25 be required to produce his or her expert witness for examination upon oral deposition upon receipt of a notice to take oral deposition in 26 27 accordance with rule thirty-one hundred seven of this article and, 28 unless otherwise ordered by the court, all expert witness depositions 29 shall be taken before the filing required by rule thirty-four hundred 30 two of this chapter. If any party, having received such notice, fails to 31 make that party's expert witness available for oral deposition, that 32 party shall be precluded from offering expert testimony at the trial of 33 the action. For purposes of rule thirty-one hundred ten and rule thir-34 ty-one hundred seventeen of this article, an expert witness, as provided in this section, shall be considered a party. Each party seeking the 35 36 deposition of an expert witness shall pay the expert a reasonable fee 37 for the time spent at the deposition. 38 § 5. Paragraph 1 of subdivision (d) of section 3101 of the civil prac-39 tice 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 40 amended to read as follows: 41 42 1. Experts. (i) Upon request, each party shall identify each person 43 whom the party expects to call as an expert witness at trial and shall 44 disclose in reasonable detail the subject matter on which each expert is 45 expected to testify, the substance of the facts and opinions on which 46 each expert is expected to testify, the qualifications of each expert 47 witness and a summary of the grounds for each expert's opinion. However, 48 where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate 49 50 notice thereof, the party shall not thereupon be precluded from intro-51 ducing the expert's testimony at the trial solely on grounds of noncom-52 pliance with this paragraph. In that instance, upon motion of any party, 53 made before or at trial, or on its own initiative, the court may make 54 whatever order may be just. [In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the 55 56 names of medical, dental or podiatric experts but shall be required to

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 (ii) In an action for medical, dental or podiatric malpractice, and party may, by written offer made to and served upon all other partial and filed with the court, offer to disclose the name of, and to mal available for examination upon oral deposition, any person the part making the offer expects to call as an expert witness at trial. With twenty days of service of the offer, a party phall accept or reject to offer by serving a written reply upon all parties and filing a content of the offer chard of the offer, a party phall accept or reject to offer by serving a written reply upon all parties and filing a content of the offer chard offer, a party phall accept or replect the offer chard and the court. Failure to serve a reply within twenty days of the offer chard and be demed a rejection of the offer. If a partice accept the offer, each party shall be required to produce his of the offer, fails to make that party, having made or accepted to offer, fails to make that party's expert available for oral deposition? (iii) (ii) Further disclosure concerning the expected testimony at the trial of the action. (iii) (ii) Further disclosure concerning the expected testimony and provisions concerning fees and expenses as the court may deem appring provisions (a) of this section, may be obtained only by court order upon showing of special circumstances and subject to restrictions as to scop a person authorized to practice medicine, dentistry or podiatry who is the party's treating or retained expenses as the court may deem appring of subdivision (a) of this section, in which event any other party shall be entitled to the full disclosure authorized by this article with or subdivision (a) of this section, in which event any other party shall be entitled to the full disclosure authorized by this article with or subdivision (a) of this section, in which event any other party shall be entitled to the full disclosure authorized by this article with or subdivision (a) of this section to refer the accer	1	disclose all other information concerning such experts otherwise
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40 commissioner of health in regulation; or (b) with respect to all other		
		services, on the basis of Medicaid rates of reimbursement or, where no
		such rates are available, as defined by the commissioner of health in
43 regulation.		
		§ 7. This act shall take effect on the one hundred eightieth day after
		proceedings commenced on or after such date; provided, however, that
		sections four and five of this act shall take effect on the ninetieth
48 day after it shall have become a law.		