

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

H. B. 4399

(By Delegates Manchin, Poore and Hunt)
[Introduced February 2, 2012; referred to the
Committee on the Judiciary.]

A BILL to amend and reenact §55-7B-9 of the Code of West Virginia, 1931, as amended, relating to several liability for health care providers.

Be it enacted by the Legislature of West Virginia:

That §55-7B-9 of the Code of West Virginia, 1931, as amended, be amended and reenacted to read as follows:

ARTICLE 7B. MEDICAL PROFESSIONAL LIABILITY.

§55-7B-9. Several liability.

(a) In the trial of a medical professional liability action under this article involving multiple defendants, the trier of fact shall report its findings on a form provided by the court which contains each of the possible verdicts as determined by the court. Unless otherwise agreed by all the parties to the action, the jury shall be instructed to answer special interrogatories, or the

1 court, acting without a jury, shall make findings as to:

2 (1) The total amount of compensatory damages recoverable by
3 the plaintiff;

4 (2) The portion of the damages that represents damages for
5 noneconomic loss;

6 (3) The portion of the damages that represents damages for
7 each category of economic loss;

8 (4) The percentage of fault, if any, attributable to each
9 plaintiff; and

10 (5) The percentage of fault, if any, attributable to each of
11 the defendants.

12 (b) In assessing percentages of fault, the trier of fact shall
13 consider only the fault of the parties in the litigation at the
14 time the verdict is rendered and ~~shall~~ may not consider the fault
15 of any other person who has settled a claim with the plaintiff
16 arising out of the same medical injury. ~~Provided, That, upon the~~
17 ~~creation of the patient injury compensation fund provided for in~~
18 ~~article twelve c, chapter twenty nine of this code, or of some~~
19 ~~other mechanism for compensating a plaintiff for any amount of~~
20 ~~economic damages awarded by the trier of fact which the plaintiff~~
21 ~~has been unable to collect, the trier of fact shall, in assessing~~
22 ~~percentages of fault, consider the fault of all alleged parties,~~
23 ~~including the fault of any person who has settled a claim with the~~
24 ~~plaintiff arising out of the same medical injury.~~

1 (c) If the trier of fact renders a verdict for the plaintiff,
2 the court shall enter judgment of several, but not joint, liability
3 against each defendant in accordance with the percentage of fault
4 attributed to the defendant by the trier of fact.

5 (d) To determine the amount of judgment to be entered against
6 each defendant, the court shall first, after adjusting the verdict
7 as provided in section nine-a of this article, reduce the adjusted
8 verdict by the amount of any preverdict settlement arising out of
9 the same medical injury. The court shall then, with regard to each
10 defendant, multiply the total amount of damages remaining, with
11 interest, by the percentage of fault attributed to each defendant
12 by the trier of fact. The resulting amount of damages, together
13 with any post-judgment interest accrued, shall be the maximum
14 recoverable against the defendant.

15 ~~(e) Upon the creation of the patient injury compensation fund~~
16 ~~provided for in article twelve-c, chapter twenty-nine of this code,~~
17 ~~or of some other mechanism for compensating a plaintiff for any~~
18 ~~amount of economic damages awarded by the trier of fact which the~~
19 ~~plaintiff has been unable to collect, the court shall, in~~
20 ~~determining the amount of judgment to be entered against each~~
21 ~~defendant, first multiply the total amount of damages, with~~
22 ~~interest, recoverable by the plaintiff by the percentage of each~~
23 ~~defendant's fault and that amount, together with any post-judgment~~
24 ~~interest accrued, is the maximum recoverable against said~~

1 defendant. Prior to the court's entry of the final judgment order
2 as to each defendant against whom a verdict was rendered, the court
3 shall reduce the total jury verdict by any amounts received by a
4 plaintiff in settlement of the action. When any defendant's
5 percentage of the verdict exceeds the remaining amounts due
6 plaintiff after the mandatory reductions, each defendant shall be
7 liable only for the defendant's pro rata share of the remainder of
8 the verdict as calculated by the court from the remaining
9 defendants to the action. The plaintiff's total award may never
10 exceed the jury's verdict less any statutory or court-ordered
11 reductions.

12 ~~(f)~~ (e) Nothing in this section is meant to eliminate or
13 diminish eliminates or diminishes any defenses or immunities which
14 exist as of the effective date of this section, except as expressly
15 noted in this section.

16 ~~(g)~~ (f) Nothing in this article is meant to preclude precludes
17 a health care provider from being held responsible for the portion
18 of fault attributed by the trier of fact to any person acting as
19 the health care provider's agent or servant or to preclude
20 imposition of fault otherwise imputable or attributable to the
21 health care provider under claims of vicarious liability. A health
22 care provider may not be held vicariously liable for the acts of a
23 nonemployee pursuant to a theory of ostensible agency unless the
24 alleged agent does not maintain professional liability insurance

1 covering the medical injury which is the subject of the action in
2 the aggregate amount of at least \$1 million.

NOTE: The purpose of this bill is to eliminate the statutory provisions which conflict with the rule-making authority vested in the judiciary including: (a) The creation of the statutory "empty chair" defense by mandating the procedure of including nonparties on the verdict form in violation of *Louk v. Cormier*, 218 W.Va. 81, 622 S.E. 2d 788 (2005); (b) permitting a verdict credit in the absence of a joint liability in violation of *Pennington v. Bluefield Orthopedics, P.C.*, 187 W.Va. 344, 419 S.E. 2d 8 (1992); and (c) permitting the calculation of a verdict credit in violation of *Board of Education of McDowell Co. v. Zando, Martin & Milstead*, 182 W.Va. 597, 390 S.E. 2d 796(1990).

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.