

Senate Bill No. 456

(By Senators Takubo, Gaunch and Stollings

[Introduced February 11, 2015; referred to the Committee on the Judiciary.]

A BILL to amend and reenact §55-7B-6 of the Code of West Virginia, 1931, as amended, relating to medical professional liability; allowing admissibility of letters of merit in actions against health care providers; and allowing testimony of a health care provider at trial or during a deposition upon issuing a letter of merit.

Be it enacted by the Legislature of West Virginia:

That §55-7B-6 of the Code of West Virginia, 1931, as amended, be amended and reenacted to read as follows:

ARTICLE 7B. MEDICAL PROFESSIONAL LIABILITY.

§55-7B-6. Prerequisites for filing an action against a health care provider; procedures; sanctions.

(a) Notwithstanding any other provision of this code, no person may file a medical professional liability action against any health care provider without complying with the provisions of this section.

(b) At least thirty days prior to the filing of a medical professional liability action against a

1 health care provider, the claimant shall serve by certified mail, return receipt requested, a notice of
2 claim on each health care provider the claimant will join in litigation. The notice of claim shall
3 include a statement of the theory or theories of liability upon which a cause of action may be based,
4 and a list of all health care providers and health care facilities to whom notices of claim are being
5 sent, together with a screening certificate of merit. The screening certificate of merit shall be
6 executed under oath by a health care provider qualified as an expert under the West Virginia rules
7 of evidence and shall state with particularity: (1) The expert's familiarity with the applicable
8 standard of care in issue; (2) the expert's qualifications; (3) the expert's opinion as to how the
9 applicable standard of care was breached; and (4) the expert's opinion as to how the breach of the
10 applicable standard of care resulted in injury or death. A separate screening certificate of merit must
11 be provided for each health care provider against whom a claim is asserted. The person signing the
12 screening certificate of merit ~~shall~~ may have no financial interest in the underlying claim, but may
13 participate as an expert witness in any judicial proceeding. Nothing in this subsection ~~may be~~
14 ~~construed to limit~~ limits the application of Rule 15 of the Rules of Civil Procedure.

15 (c) Notwithstanding any provision of this code, if a claimant or his or her counsel, believes
16 that no screening certificate of merit is necessary because the cause of action is based upon a
17 well-established legal theory of liability which does not require expert testimony supporting a breach
18 of the applicable standard of care, the claimant or his or her counsel, shall file a statement
19 specifically setting forth the basis of the alleged liability of the health care provider in lieu of a
20 screening certificate of merit.

21 (d) If a claimant or his or her counsel has insufficient time to obtain a screening certificate
22 of merit prior to the expiration of the applicable statute of limitations, the claimant shall comply with

1 the provisions of subsection (b) of this section except that the claimant or his or her counsel shall
2 furnish the health care provider with a statement of intent to provide a screening certificate of merit
3 within sixty days of the date the health care provider receives the notice of claim.

4 (e) Any health care provider who receives a notice of claim pursuant to the provisions of this
5 section may respond, in writing, to the claimant or his or her counsel within thirty days of receipt of
6 the claim or within thirty days of receipt of the screening certificate of merit if the claimant is
7 proceeding pursuant to the provisions of subsection (d) of this section. The response may state that
8 the health care provider has a bona fide defense and the name of the health care provider's counsel,
9 if any.

10 (f) Upon receipt of the notice of claim or of the screening certificate of merit, if the claimant
11 is proceeding pursuant to the provisions of subsection (d) of this section, the health care provider is
12 entitled to prelitigation mediation before a qualified mediator upon written demand to the claimant.

13 (g) If the health care provider demands mediation pursuant to the provisions of subsection
14 (f) of this section, the mediation shall be concluded within forty-five days of the date of the written
15 demand. The mediation shall otherwise be conducted pursuant to Rule 25 of the Trial Court Rules,
16 unless portions of the rule are clearly not applicable to a mediation conducted prior to the filing of
17 a complaint or unless the Supreme Court of Appeals promulgates rules governing mediation prior
18 to the filing of a complaint. If mediation is conducted, the claimant may depose the health care
19 provider before mediation or take the testimony of the health care provider during the mediation.

20 (h) Except as otherwise provided in this subsection, any statute of limitations applicable to
21 a cause of action against a health care provider upon whom notice was served for alleged medical
22 professional liability shall be tolled from the date of mail of a notice of claim to thirty days following

1 receipt of a response to the notice of claim, thirty days from the date a response to the notice of claim
2 would be due, or thirty days from the receipt by the claimant of written notice from the mediator that
3 the mediation has not resulted in a settlement of the alleged claim and that mediation is concluded,
4 whichever last occurs. If a claimant has sent a notice of claim relating to any injury or death to more
5 than one health care provider, any one of whom has demanded mediation, then the statute of
6 limitations shall be tolled with respect to, and only with respect to, those health care providers to
7 whom the claimant sent a notice of claim to thirty days from the receipt of the claimant of written
8 notice from the mediator that the mediation has not resulted in a settlement of the alleged claim and
9 that mediation is concluded.

10 (I) Notwithstanding any other provision of this code, a notice of claim, a health care
11 provider's response to any notice claim, ~~a screening certificate of merit and the results of any~~
12 ~~mediation conducted pursuant to the provisions of this section are confidential and are not admissible~~
13 ~~as evidence in any court proceeding unless the court, upon hearing, determines that failure to disclose~~
14 ~~the contents would cause a miscarriage of justice~~ a health care provider's response to any notice of
15 claim, and the results of any mediation conducted pursuant to the provisions of this section are
16 confidential and are not admissible as evidence in any court proceeding unless the court, upon
17 hearing, determines that failure to disclose the contents would cause a miscarriage of justice.
18 However, the health care provider issuing a screening certificate of merit may be called upon to
19 testify regarding the statements of opinions made therein and may be called as a witness at trial.

NOTE: The purpose of this bill is to allow letters of merit to be admissible in actions against health care providers and allows the testimony of a health care provider at trial or during a deposition

upon issuing a letter of merit.

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