

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Engrossed

Committee Substitute

for

Senate Bill 7

BY SENATORS LEONHARDT, CARMICHAEL, ASHLEY,

STOLLINGS, TRUMP AND BLAIR

[Originating in the Committee on the Judiciary;

reported on February 5, 2016.]

1 A BILL to amend and reenact §55-7-13d of the Code of West Virginia, 1931, as amended; and to
2 amend and reenact §55-7B-5 of said code, all relating to establishment of a wrongful
3 conduct rule which applies when plaintiff's criminal conduct bars recovery; prohibiting
4 recovery of damages for a defendant's negligence or gross negligence suffered as a result
5 of a plaintiff's commission or attempted commission of a felony; requiring proximate cause
6 for a bar on recovery; establishing burden of proof for wrongful conduct rule; providing for
7 the applicability of wrongful conduct rule to all civil actions for personal injury and wrongful
8 death, including any and all claims brought against a health care provider under the
9 Medical Professional Liability Act; establishing that the 2016 amendments apply to all
10 causes of action accruing on or after the effective date of those amendments; and
11 applicability.

Be it enacted by the Legislature of West Virginia:

1 That §55-7-13d of the Code of West Virginia, 1931, as amended, be amended and
2 reenacted; and that §55-7B-5 of said code be amended and reenacted, all to read as follows:

ARTICLE 7. ACTIONS FOR INJURIES.

**§55-7-13d. Determination of fault; imputed fault; ~~plaintiff's involvement in felony criminal~~
~~act; when plaintiff's criminal conduct bars recovery; burden of proof;~~
~~limitations; applicability; severability.~~**

1 (a) *Determination of fault of parties and nonparties.*

2 (1) In assessing percentages of fault, the trier of fact shall consider the fault of all persons
3 who contributed to the alleged damages regardless of whether the person was or could have
4 been named as a party to the suit;

5 (2) Fault of a nonparty shall be considered if the plaintiff entered into a settlement
6 agreement with the nonparty or if a defending party gives notice no later than one hundred-eight
7 days after service of process upon said defendant that a nonparty was wholly or partially at fault.

8 Notice shall be filed with the court and served upon all parties to the action designating the

9 nonparty and setting forth the nonparty's name and last-known address, or the best identification
10 of the nonparty which is possible under the circumstances, together with a brief statement of the
11 basis for believing such nonparty to be at fault;

12 (3) In all instances where a nonparty is assessed a percentage of fault, any recovery by a
13 plaintiff shall be reduced in proportion to the percentage of fault chargeable to such nonparty.
14 Where a plaintiff has settled with a party or nonparty before verdict, that plaintiff's recovery will be
15 reduced in proportion to the percentage of fault assigned to the settling party or nonparty;

16 (4) Nothing in this section is meant to eliminate or diminish any defenses or immunities,
17 which exist as of the effective date of this section, except as expressly noted herein;

18 (5) Assessments of percentages of fault for nonparties are used only as a vehicle for
19 accurately determining the fault of named parties. Where fault is assessed against nonparties,
20 findings of such fault do not subject any nonparty to liability in that or any other action, or may not
21 be introduced as evidence of liability or for any other purpose in any other action; and

22 (6) In all actions involving fault of more than one person, unless otherwise agreed by all
23 parties to the action, the court shall instruct the jury to answer special interrogatories or, if there
24 is no jury, shall make findings, indicating the percentage of the total fault that is allocated to each
25 party and nonparty pursuant to this article. For this purpose, the court may determine that two or
26 more persons are to be treated as a single person.

27 (b) *Imputed fault.* — Nothing in this section may be construed as precluding a person from
28 being held liable for the portion of comparative fault assessed against another person who was
29 acting as an agent or servant of such person, or if the fault of the other person is otherwise imputed
30 or attributed to such person by statute or common law. In any action where any party seeks to
31 impute fault to another, the court shall instruct the jury to answer special interrogatories or, if there
32 is no jury, shall make findings, on the issue of imputed fault.

33 (c) ~~Plaintiff's involvement in felony criminal act~~ When plaintiff's criminal conduct bars
34 recovery. — In any civil action, a defendant is not liable for damages that the plaintiff suffers as a
35 result of the negligence or gross negligence of a defendant if:

36 (1) Such damages arise out of ~~the~~ that plaintiff's commission, attempted ~~to commit~~
37 commission or fleeing immediate flight from the commission or attempted commission of a felony
38 and criminal act: *Provided*, That the plaintiff has been convicted of such felony, or if deceased,
39 the jury makes a finding that the decedent committed such felony.

40 (2) That plaintiff's injuries were suffered as a proximate result of the commission,
41 attempted commission or immediate flight from the commission or attempted commission of a
42 felony.

43 (d) *Burden of proof.* — The burden of alleging and proving comparative fault shall be upon
44 the person who seeks to establish such fault. The burden of alleging and proving the defense set
45 forth in subsection (c) of this section shall be upon the person who seeks to assert such defense.

46 (e) *Limitations.* — Nothing in this section creates a cause of action. Nothing in this section
47 alters, in any way, the immunity of any person as established by statute or common law.

48 (f) *Applicability.* — This section applies to all causes of action arising or accruing on or
49 after the effective date of its enactment. The amendments to this section enacted during the 2016
50 session of the Legislature shall apply to all causes of action accruing on or after the effective date
51 of those amendments.

52 (g) *Severability.* — The provisions of this section are severable from one another, so that
53 if any provision of this section is held void, the remaining provisions of this section shall remain
54 valid.

ARTICLE 7B. MEDICAL PROFESSIONAL LIABILITY.

**§55-7B-5. Health care actions; complaint; specific amount of damages not to be stated;
limitation on bad faith claims; filing of first party bad faith claims; when
plaintiff's criminal conduct bars recovery.**

1 (a) In any medical professional liability action against a health care provider no specific
2 dollar amount or figure may be included in the complaint, but the complaint may include a
3 statement reciting that the minimum jurisdictional amount established for filing the action is

4 satisfied. However, any party defendant may at any time request a written statement setting forth
5 the nature and amount of damages being sought. The request shall be served upon the plaintiff
6 who shall serve a responsive statement as to the damages sought within thirty days thereafter. If
7 no response is served within the thirty days, the party defendant requesting the statement may
8 petition the court in which the action is pending to order the plaintiff to serve a responsive
9 statement.

10 (b) Notwithstanding any other provision of law, absent privity of contract, no plaintiff who
11 files a medical professional liability action against a health care provider may file an independent
12 cause of action against any insurer of the health care provider alleging the insurer has violated
13 the provisions of subdivision (9), section four, article eleven, chapter thirty-three of this code.
14 Insofar as the provisions of section three, article eleven, chapter thirty-three of this code prohibit
15 the conduct defined in subdivision (9), section four, article eleven, chapter thirty-three of this code,
16 no plaintiff who files a medical professional liability action against a health care provider may file
17 an independent cause of action against any insurer of the health care provider alleging the insurer
18 has violated the provisions of said section three.

19 (c) No health care provider may file a cause of action against his or her insurer alleging
20 the insurer has violated the provisions of subdivision (9), section four, article eleven, chapter thirty-
21 three of this code until the jury has rendered a verdict in the underlying medical professional
22 liability action or the case has otherwise been dismissed, resolved or disposed of.

23 (d) No action may be filed or maintained against a health care provider pursuant to this
24 article by or on behalf of a person whose damages arise as a proximate result of the commission,
25 attempted commission or immediate flight from the commission or attempted commission of a
26 felony or a violent crime which is a misdemeanor or as a result of a violation of the Uniform
27 Controlled Substances Act, as set forth in chapter sixty-a of this code, so long as the health care
28 provider has not illegally dispensed or prescribed a controlled substance or substances to that
29 person. The burden of alleging and proving that the health care provider acted illegally shall be
30 upon the person who seeks to file the claim.