

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Introduced

House Bill 4008

BY DELEGATES MILLER, ROHRBACH, SUMMERS,
SOBONYA, ESPINOSA, COOPER, MOFFATT,
AMBLER, WAXMAN, BUTLER AND ARVON

[Introduced January 13, 2016;

Referred to the Committee on the Judiciary.]

1 A BILL to amend and reenact §55-7-13d of the Code of West Virginia, 1931, as amended; to
 2 amend said code by adding thereto a new section, designated §55-7-13e; and to amend
 3 and reenact §55-7B-5 of said code, all relating to the establishment of a wrongful conduct
 4 rule; providing legislative findings and purposes; prohibiting the recovery of damages that
 5 arise, in whole or in part, out of a plaintiff's commission or attempted commission of illegal
 6 or immoral acts or transactions; defining "illegal or immoral act or transaction"; providing
 7 for the burden of proof for establishing the commission of illegal or immoral acts or
 8 transactions; requiring proximate cause for a bar on recovery; setting forth exceptions to
 9 wrongful conduct rule; providing for the applicability of the wrongful conduct rule to all civil
 10 actions for personal injury and wrongful death, including any and all claims brought against
 11 a health care provider under the Medical Professional Liability Act; applicability; and
 12 severability.

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; that said code be amended by adding thereto a new section, designated §55-7-13e;
 3 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; recovery of damages for wrongful conduct prohibited; 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~~ Recovery of damages for wrongful conduct
 34 prohibited. – In any civil action, a defendant is not liable for damages that the plaintiff suffers, as
 35 a result of the negligence or gross negligence of a defendant if such damages arise out of the
 36 plaintiff's commission, attempt to commit or fleeing from the commission of a felony criminal act:
 37 ~~Provided, That the plaintiff has been convicted of such felony, or if deceased, the jury makes a~~
 38 ~~finding that the decedent committed such felony, in whole or in part, as a result of the plaintiff's~~
 39 ~~commission or attempted commission of an illegal or immoral act or transaction, as set forth in~~
 40 ~~section thirteen-e, article seven of this chapter.~~

41 (d) *Burden of proof.* – The burden of alleging and proving comparative fault shall be upon
 42 the person who seeks to establish such fault.

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

45 (f) *Applicability.* – This section applies to all causes of action arising or accruing on or after
 46 the effective date of its enactment.

47 (g) *Severability.* – The provisions of this section are severable from one another, so that if
 48 any provision of this section is held void, the remaining provisions of this section shall remain
 49 valid.

**§55-7-13e. Recovery of damages for wrongful conduct prohibited; legislative findings;
 legislative intent and purpose; definitions; burden of proof; exceptions;
 applicability; severability.**

1 (a) Legislative findings – The Legislature hereby finds and declares that:

2 (1) It is the public policy of the State of West Virginia that courts should not provide relief
 3 to a plaintiff who is injured, in whole or in part, because of the plaintiff's own illegal acts;

4 (2) It is against the public policy of the State of West Virginia for criminals to be allowed to
 5 use the courts to profit from their own illegal conduct;

6 (3) It is against the public policy of the State of West Virginia to allow people engaging in
7 illegal conduct to shift responsibility for their illegal acts to other parties;

8 (4) Allowing civil relief for plaintiffs who are injured as a direct result of their illegal conduct
9 would, in effect, condone and encourage illegal conduct;

10 (5) Allowing civil relief for plaintiffs who are injured as a direct result of their illegal conduct
11 would discredit the administration of justice and create a mockery of West Virginia's courts;

12 (6) It is in the interest of justice and judicial economy for courts to address any such claims
13 during summary judgment proceedings; and

14 (7) It is the duty and responsibility of the Legislature to balance the rights of individual
15 citizens to adequate and reasonable compensation with the broad public interest of the citizens
16 of this state to a court system that is perceived as fair and balanced.

17 (b) *Intent and Purpose* – The intent and purpose of this section is to establish a wrongful
18 conduct rule which prohibits any action for damages for personal injury or wrongful death whereby
19 such action arose from injuries sustained, in whole or in part, as a result of a person's own illegal
20 acts. Further, it is the intent and purpose of the Legislature that this section shall overrule the
21 decision of the Supreme Court of Appeals of West Virginia in the case of *Tug Valley Pharm. v. All*
22 *Plaintiffs Below in Mingo Cty*, 773 S.E.2d 627, 2015 W. Va. LEXIS 673 (W. Va. 2015).

23 (c) *Wrongful Conduct Rule*.

24 (1) In any civil action for personal injury or wrongful death, a defendant is not liable for
25 damages that a plaintiff suffers as a result of the negligence or gross negligence of a defendant
26 if:

27 (A) Such damages arise, in whole or in part, out of the plaintiff's commission or attempted
28 commission of an illegal or immoral act or transaction, or immediate flight therefrom; and

29 (B) The plaintiff's injuries were suffered as a proximate result of the commission or
30 attempted commission of the illegal or immoral act or transaction, or immediate flight therefrom.

31 (2) For purposes of this section an "illegal or immoral act or transaction" includes:

- 32 (A) The commission of a felony;
33 (B) The commission of a misdemeanor crime of violence; or
34 (C) A violation of the Uniform Controlled Substances Act, as set forth in chapter sixty-a of
35 this code.

36 The defense authorized by this section shall be established by evidence that the
37 participant has been convicted of such illegal or immoral act or transaction, including conviction
38 based on a guilty plea or plea of no contest, or by proof of the commission or attempted
39 commission of such conduct by a preponderance of the evidence.

40 (d) Exceptions – The bar to recovery provided in subdivision (1), subsection (c) of this
41 section shall not apply if:

42 (1) The illegal act or acts committed by the plaintiff only amount to a violation of a safety
43 statute, such as traffic and speed laws or requirements for workplace safety, and do not rise to
44 the level of serious misconduct sufficient to bar a civil action as set forth in subdivision (1),
45 subsection (c) of this section: *Provided*, That a court may consider the significant degree of harm
46 and punishment associated with such violations, as well as the number of times that a plaintiff
47 has committed such violations, when distinguishing wrongful conduct from a violation of a safety
48 statute;

49 (2) Both the plaintiff and the defendant have engaged in illegal conduct, but the
50 defendant's culpability is greater than the plaintiff's culpability for the injuries, such as where the
51 plaintiff has acted under circumstances of oppression, imposition, hardship, undue influence or
52 great inequality of condition or age: *Provided*, That the bar to recovery provided in subdivision
53 (1), subsection (c) of this section shall still apply if evidence shows that the plaintiff freely and
54 voluntarily consented to participation in the illegal or immoral act or transaction without duress or
55 coercion;

56 (3) A provision of this code specifically authorizes persons similarly situated to the plaintiff
57 to seek recovery for personal injury or wrongful death; or

58 (4) The plaintiff's claims are based upon alleged intentionally tortious conduct, alleged
 59 violations of the United States Constitution or alleged violations of statutes of the United States
 60 pertaining to civil rights.

61 (e) Applicability. – This section applies to all causes of action filed on or after the effective
 62 date of its enactment.

63 (f) Severability. – The provisions of this section are severable from one another, so that if
 64 any provision of this section is held void, the remaining provisions of this section shall remain
 65 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; limitation on recovery of damages for wrongful conduct.

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) An action may not be maintained against a health care provider pursuant to this article
24 by or on behalf of a person whose damages arise, in whole or in part, out of the commission or
25 attempted commission of an illegal or immoral act or transaction, as set forth in section thirteen-
26 e, article seven of this chapter.

NOTE: The purpose of this bill is to establish the wrongful conduct rule, which prohibits the recovery of damages by a plaintiff whose injuries are caused, in whole or in part, by the plaintiff's commission or attempted commission of an illegal or immoral act or transaction.

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