

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Introduced

House Bill 4218

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[Introduced January 19, 2018; Referred
to the Committee on Health and Human Resources
then the Judiciary.]

1 A BILL to amend and reenact §55-7B-6 of the Code of West Virginia, 1931, as amended, relating
 2 to medical professional liability; setting out requirement for an expert who signs a
 3 certificate of merit; allowing for admissibility of certificate of merit in actions against health
 4 care providers; and allowing testimony in a judicial proceeding or by deposition upon
 5 issuing a certificate of merit.

Be it enacted by the Legislature of West Virginia:

ARTICLE 7B. MEDICAL PROFESSIONAL LIABILITY.

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

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

4 (b) At least thirty days prior to the filing of a medical professional liability action against a
 5 health care provider, the claimant shall serve by certified mail, return receipt requested, a notice
 6 of claim on each health care provider the claimant will join in litigation. The notice of claim shall
 7 include a statement of the theory or theories of liability upon which a cause of action may be
 8 based, and a list of all health care providers and health care facilities to whom notices of claim
 9 are being sent, together with a screening certificate of merit. The screening certificate of merit
 10 shall be executed under oath by a health care provider qualified as an expert under the West
 11 Virginia rules of evidence. ~~and~~ The health care provider signing a certificate of merit shall:

12 (1) Be licensed to practice medicine as of the date of the affidavit; and

13 (2) In the twelve months immediately preceding the alleged negligent act has been
 14 engaged in the treatment of patients and/or in the teaching/academic side of medicine in the same
 15 field of medicine as the defendant or defendants; and

16 (3) Be board certified in the same field of medicine if the defendant or defendants is board-
 17 certified. The board certification requirement shall not apply to an expert that began the practice

18 of medicine prior to the existence of board certification in the applicable specialty.

19 The certificate of merit shall state with particularity: (1) The expert's familiarity with the
20 applicable standard of care in issue; (2) the expert's qualifications; (3) the expert's opinion as to
21 how the applicable standard of care was breached; and (4) the expert's opinion as to how the
22 breach of the applicable standard of care resulted in injury or death: Provided, That the healthcare
23 provider submitting a screening certificate of merit in accordance with the provisions of this section
24 must also qualify as an expert pursuant to the provisions of §55-7B-7 of this code. A separate
25 screening certificate of merit must be provided for each health care provider against whom a claim
26 is asserted. The person signing the screening certificate of merit shall have no financial interest
27 in the underlying claim, but may participate as an expert witness in any judicial proceeding.
28 Nothing in this subsection ~~may be construed to limit~~ limits the application of rule 15 of the rules of
29 civil procedure.

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

36 (d) Except for medical professional liability actions against a nursing home, assisted living
37 facility, their related entities or employees or a distinct part of an acute care hospital providing
38 intermediate care or skilled nursing care or its employees, if a claimant or his or her counsel has
39 insufficient time to obtain a screening certificate of merit prior to the expiration of the applicable
40 statute of limitations, the claimant shall comply with the provisions of subsection (b) of this section
41 except that the claimant or his or her counsel shall furnish the health care provider with a
42 statement of intent to provide a screening certificate of merit within sixty days of the date the
43 health care provider receives the notice of claim.

44 (e) In medical professional liability actions against a nursing home, assisted living facility,
45 their related entities or employees or a distinct part of an acute care hospital providing
46 intermediate care or skilled nursing care or its employees, if a claimant or his or her counsel has
47 insufficient time to obtain a screening certificate of merit prior to the expiration of the applicable
48 statute of limitations, the claimant shall comply with the provisions of subsection (b) of this section
49 except that the claimant or his or her counsel shall furnish the health care provider with a
50 statement of intent to provide a screening certificate of merit within one hundred eighty days of
51 the date the health care provider receives the notice of claim.

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

58 (g) Upon receipt of the notice of claim or of the screening certificate of merit, if the claimant
59 is proceeding pursuant to the provisions of subsection (d) or (e) of this section, the health care
60 provider is entitled to prelitigation mediation before a qualified mediator upon written demand to
61 the claimant.

62 (h) If the health care provider demands mediation pursuant to the provisions of subsection
63 (g) of this section, the mediation shall be concluded within forty-five days of the date of the written
64 demand. The mediation shall otherwise be conducted pursuant to rule 25 of the trial court rules,
65 unless portions of the rule are clearly not applicable to a mediation conducted prior to the filing of
66 a complaint or unless the Supreme Court of Appeals promulgates rules governing mediation prior
67 to the filing of a complaint. If mediation is conducted, the claimant may depose the health care
68 provider before mediation or take the testimony of the health care provider during the mediation.

69 (i)(1) Except for medical professional liability actions against a nursing home, assisted

70 living facility, their related entities or employees or a distinct part of an acute care hospital
71 providing intermediate care or skilled nursing care or its employees, and except as otherwise
72 provided in this subsection, any statute of limitations applicable to a cause of action against a
73 health care provider upon whom notice was served for alleged medical professional liability shall
74 be tolled from the date of mail of a notice of claim to thirty days following receipt of a response to
75 the notice of claim, thirty days from the date a response to the notice of claim would be due, or
76 thirty days from the receipt by the claimant of written notice from the mediator that the mediation
77 has not resulted in a settlement of the alleged claim and that mediation is concluded, whichever
78 last occurs.

79 (2) In medical professional liability actions against a nursing home, assisted living facility,
80 their related entities or employees or a distinct part of an acute care hospital providing
81 intermediate care or skilled nursing care or its employees, except as otherwise provided in this
82 subsection, any statute of limitations applicable to a cause of action against a health care provider
83 upon whom notice was served for alleged medical professional liability shall be tolled one hundred
84 eighty days from the date of mail of a notice of claim to thirty days following receipt of a response
85 to the notice of claim, thirty days from the date a response to the notice of claim would be due, or
86 thirty days from the receipt by the claimant of written notice from the mediator that the mediation
87 has not resulted in a settlement of the alleged claim and that mediation is concluded, whichever
88 last occurs.

89 (3) If a claimant has sent a notice of claim relating to any injury or death to more than one
90 health care provider, any one of whom has demanded mediation, then the statute of limitations
91 shall be tolled with respect to, and only with respect to, those health care providers to whom the
92 claimant sent a notice of claim to thirty days from the receipt of the claimant of written notice from
93 the mediator that the mediation has not resulted in a settlement of the alleged claim and that
94 mediation is concluded.

95 (j) Notwithstanding any other provision of this code, a notice of claim, a health care

96 provider's response to any notice claim, a screening certificate of merit and the results of any
97 mediation conducted pursuant to the provisions of this section are confidential and are not
98 admissible as evidence in any court proceeding unless the court, upon hearing, determines that
99 failure to disclose the contents would cause a miscarriage of justice: Provided, That if it appears
100 to the court that a health care provider has incurred attorney fees and costs unnecessarily
101 because the claimant has submitted a notice of claim that asserted unfounded claims or a
102 screening certificate of merit that contains unfounded or unsupported conclusions against that
103 healthcare provider, the court may order the claimant, or the healthcare provider who executed
104 the screening certificate of merit, or both, to pay reasonable attorney fees and costs to the other
105 party.

NOTE: The purpose of this bill is to update the requirements of a certificate of merit.

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