
SENATE BILL 5209

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By Senators Deccio, Rasmussen, Winsley, Hewitt, T. Sheldon, Morton, Parlette, Stevens, Hale, Brandland, Mulliken, McCaslin and Oke

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1 AN ACT Relating to actions against health care providers; amending
2 RCW 4.56.250, 7.70.070, 4.16.350, 7.70.080, 4.22.070, 7.70.030, and
3 7.70.060; adding a new section to chapter 4.28 RCW; adding a new
4 section to chapter 7.04 RCW; adding a new section to chapter 7.70 RCW;
5 and providing a contingent effective date.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

7 **Sec. 1.** RCW 4.56.250 and 1986 c 305 s 301 are each amended to read
8 as follows:

9 (1) As used in this section, the following terms have the meanings
10 indicated unless the context clearly requires otherwise.

11 (a) "Economic damages" means objectively verifiable monetary
12 losses, including medical expenses, loss of earnings, burial costs,
13 loss of use of property, cost of replacement or repair, cost of
14 obtaining substitute domestic services, loss of employment, and loss of
15 business or employment opportunities.

16 (b) "Noneconomic damages" means subjective, nonmonetary losses,
17 including, but not limited to pain, suffering, inconvenience, mental
18 anguish, disability or disfigurement incurred by the injured party,

1 emotional distress, loss of society and companionship, loss of
2 consortium, injury to reputation and humiliation, and destruction of
3 the parent-child relationship.

4 (c) "Bodily injury" means physical injury, sickness, or disease,
5 including death.

6 (d) "Average annual wage" means the average annual wage in the
7 state of Washington as determined under RCW 50.04.355.

8 ~~(2) In ((no action seeking damages for personal injury or death may
9 a claimant recover a judgment for noneconomic damages exceeding an
10 amount determined by multiplying 0.43 by the average annual wage and by
11 the life expectancy of the person incurring noneconomic damages, as the
12 life expectancy is determined by the life expectancy tables adopted by
13 the insurance commissioner. For purposes of determining the maximum
14 amount allowable for noneconomic damages, a claimant's life expectancy
15 shall not be less than fifteen years. The limitation contained in this
16 subsection applies to all claims for noneconomic damages made by a
17 claimant who incurred bodily injury. Claims for loss of consortium,
18 loss of society and companionship, destruction of the parent-child
19 relationship, and all other derivative claims asserted by persons who
20 did not sustain bodily injury are to be included within the limitation
21 on claims for noneconomic damages arising from the same bodily injury.~~

22 ~~(3) If a case is tried to a jury, the jury shall not be informed of
23 the limitation contained in subsection (2) of this section)) an action
24 or arbitration for damages for injury occurring as a result of health
25 care, the injured plaintiff may not recover noneconomic damages
26 exceeding two hundred fifty thousand dollars.~~

27 **Sec. 2.** RCW 7.70.070 and 1975-'76 2nd ex.s. c 56 s 12 are each
28 amended to read as follows:

29 (1) Except as set forth in subsection (2) of this section, the
30 court shall, in any action under this chapter, determine the
31 reasonableness of each party's attorneys' fees. The court shall take
32 into consideration the following:

33 ~~((1))~~ (a) The time and labor required, the novelty and difficulty
34 of the questions involved, and the skill requisite to perform the legal
35 service properly;

36 ~~((2))~~ (b) The likelihood, if apparent to the client, that the

1 acceptance of the particular employment will preclude other employment
2 by the lawyer;

3 ~~((+3))~~ (c) The fee customarily charged in the locality for similar
4 legal services;

5 ~~((+4))~~ (d) The amount involved and the results obtained;

6 ~~((+5))~~ (e) The time limitations imposed by the client or by the
7 circumstances;

8 ~~((+6))~~ (f) The nature and length of the professional relationship
9 with the client;

10 ~~((+7))~~ (g) The experience, reputation, and ability of the lawyer
11 or lawyers performing the services;

12 ~~((+8))~~ (h) Whether the fee is fixed or contingent.

13 (2)(a) An attorney may not contract for or collect a contingency
14 fee for representing a person in connection with an action for damages
15 against a health care provider based upon professional negligence in
16 excess of the following limits:

17 (i) Forty percent of the first fifty thousand dollars recovered;
18 (ii) Thirty-three and one-third percent of the next fifty thousand
19 dollars recovered;

20 (iii) Twenty-five percent of the next five hundred thousand dollars
21 recovered;

22 (iv) Fifteen percent of any amount in which the recovery exceeds
23 six hundred thousand dollars.

24 (b) The limitations in this section apply regardless of whether the
25 recovery is by judgment, settlement, arbitration, mediation, or other
26 form of alternative dispute resolution.

27 (c) If periodic payments are awarded to the plaintiff, the court
28 shall place a total value on these payments and include this amount in
29 computing the total award from which attorneys' fees are calculated
30 under this subsection.

31 (d) For purposes of this subsection, "recovered" means the net sum
32 recovered after deducting any disbursements or costs incurred in
33 connection with prosecution or settlement of the claim. Costs of
34 medical care incurred by the plaintiff and the attorneys' office
35 overhead costs or charges are not deductible disbursements or costs for
36 such purposes.

37 (3) This section applies to all agreements for attorneys' fees

1 entered into or modified after the effective date of this section, and
2 to all attorney fee agreements relating to causes of action filed on or
3 after the effective date of this section.

4 NEW SECTION. **Sec. 3.** A new section is added to chapter 4.28 RCW
5 to read as follows:

6 (1) No action based upon a health care provider's professional
7 negligence may be commenced unless the defendant has been given at
8 least ninety days' notice of the intention to commence the action. If
9 the notice is served within ninety days of the expiration of the
10 applicable statute of limitations, the time for the commencement of the
11 action must be extended ninety days from the service of the notice.

12 (2) The provisions of this section are not applicable with respect
13 to any defendant whose name is unknown to the plaintiff at the time of
14 filing the complaint and who is identified therein by a fictitious
15 name.

16 (3) Failure to comply with this section does not invalidate any
17 proceedings of any court of this state, nor does it affect the
18 jurisdiction of the court to render a judgment therein. However,
19 failure by an attorney at law to comply with the provisions of this
20 section is grounds for professional discipline and the Washington state
21 bar association shall investigate and take appropriate action in any
22 such cases brought to its attention.

23 **Sec. 4.** RCW 4.16.350 and 1998 c 147 s 1 are each amended to read
24 as follows:

25 Any civil action for damages for injury occurring as a result of
26 health care which is provided after June 25, 1976 against:

27 (1) A person licensed by this state to provide health care or
28 related services, including, but not limited to, a physician,
29 osteopathic physician, dentist, nurse, optometrist, podiatric physician
30 and surgeon, chiropractor, physical therapist, psychologist,
31 pharmacist, optician, physician's assistant, osteopathic physician's
32 assistant, nurse practitioner, or physician's trained mobile intensive
33 care paramedic, including, in the event such person is deceased, his
34 estate or personal representative;

35 (2) An employee or agent of a person described in subsection (1) of

1 this section, acting in the course and scope of his or her employment,
2 including, in the event such employee or agent is deceased, his or her
3 estate or personal representative; or

4 (3) An entity, whether or not incorporated, facility, or
5 institution employing one or more persons described in subsection (1)
6 of this section, including, but not limited to, a hospital, clinic,
7 health maintenance organization, or nursing home; or an officer,
8 director, employee, or agent thereof acting in the course and scope of
9 his or her employment, including, in the event such officer, director,
10 employee, or agent is deceased, his or her estate or personal
11 representative;

12 based upon alleged professional negligence shall be commenced within
13 three years of the act or omission alleged to have caused the injury or
14 condition, or one year of the time the patient or his or her
15 representative discovered or reasonably should have discovered that the
16 injury or condition was caused by said act or omission, whichever
17 (~~period expires later, except that~~) occurs first. In no event shall
18 an action be commenced more than (~~eight~~) three years after said act
19 or omission: PROVIDED, That the time for commencement of an action is
20 tolled upon proof of fraud, intentional concealment, or the presence of
21 a foreign body not intended to have a therapeutic or diagnostic purpose
22 or effect, until the date the patient or the patient's representative
23 has actual knowledge of the act of fraud or concealment, or of the
24 presence of the foreign body; the patient or the patient's
25 representative has one year from the date of the actual knowledge in
26 which to commence a civil action for damages.

27 For purposes of this section, notwithstanding RCW 4.16.190, the
28 knowledge of a custodial parent or guardian shall be imputed to a
29 person under the age of eighteen years, and such imputed knowledge
30 shall operate to bar the claim of such minor to the same extent that
31 the claim of an adult would be barred under this section. Any action
32 not commenced in accordance with this section shall be barred.

33 For purposes of this section, with respect to care provided after
34 June 25, 1976, and before August 1, 1986, the knowledge of a custodial
35 parent or guardian shall be imputed as of April 29, 1987, to persons
36 under the age of eighteen years.

37 This section does not apply to a civil action based on intentional

1 conduct brought against those individuals or entities specified in this
2 section by a person for recovery of damages for injury occurring as a
3 result of childhood sexual abuse as defined in RCW 4.16.340(5).

4 **Sec. 5.** RCW 7.70.080 and 1975-'76 2nd ex.s. c 56 s 13 are each
5 amended to read as follows:

6 (1) Any party may present evidence to the trier of fact that the
7 patient has already been compensated for the injury complained of from
8 ((any source except the assets of the patient, his representative, or
9 his immediate family, or insurance purchased with such assets. In the
10 event such evidence is admitted, the plaintiff may present evidence of
11 an obligation to repay such compensation. Insurance bargained for or
12 provided on behalf of an employee shall be considered insurance
13 purchased with the assets of the employee)) a collateral source. In
14 the event the evidence is admitted, the other party may present
15 evidence of any amount that was paid or contributed to secure the right
16 to any compensation. Compensation as used in this section shall mean
17 payment of money or other property to or on behalf of the patient,
18 rendering of services to the patient free of charge to the patient, or
19 indemnification of expenses incurred by or on behalf of the patient.
20 Notwithstanding this section, evidence of compensation by a defendant
21 health care provider may be offered only by that provider.

22 (2) Unless otherwise provided by statute, there is no right of
23 subrogation or reimbursement from a plaintiff's tort recovery with
24 respect to compensation covered in subsection (1) of this section.

25 **Sec. 6.** RCW 4.22.070 and 1993 c 496 s 1 are each amended to read
26 as follows:

27 (1) In all actions involving fault of more than one entity, the
28 trier of fact shall determine the percentage of the total fault which
29 is attributable to every entity which caused the claimant's damages
30 except entities immune from liability to the claimant under Title 51
31 RCW. The sum of the percentages of the total fault attributed to at-
32 fault entities shall equal one hundred percent. The entities whose
33 fault shall be determined include the claimant or person suffering
34 personal injury or incurring property damage, defendants, third-party
35 defendants, entities released by the claimant, entities with any other
36 individual defense against the claimant, and entities immune from

1 liability to the claimant, but shall not include those entities immune
2 from liability to the claimant under Title 51 RCW. Judgment shall be
3 entered against each defendant except those who have been released by
4 the claimant or are immune from liability to the claimant or have
5 prevailed on any other individual defense against the claimant in an
6 amount which represents that party's proportionate share of the
7 claimant's total damages. The liability of each defendant shall be
8 several only and shall not be joint except:

9 (a) A party shall be responsible for the fault of another person or
10 for payment of the proportionate share of another party where both were
11 acting in concert or when a person was acting as an agent or servant of
12 the party.

13 (b) If the trier of fact determines that the claimant or party
14 suffering bodily injury or incurring property damages was not at fault,
15 the defendants against whom judgment is entered shall be jointly and
16 severally liable for the sum of their proportionate shares of the
17 ~~((claimants [claimant's]))~~ claimant's total damages. The exception set
18 forth in this subsection does not apply to persons or entities defined
19 as health care providers in RCW 7.70.020. In all cases governed by
20 chapter 7.70 RCW, the liability of health care providers, irrespective
21 of whether other persons or entities are also at fault, is several
22 only.

23 (2) If a defendant is jointly and severally liable under one of the
24 exceptions listed in subsection ~~((§))~~ (1)(a) or ~~((1))~~(b) of this
25 section, such defendant's rights to contribution against another
26 jointly and severally liable defendant, and the effect of settlement by
27 either such defendant, shall be determined under RCW 4.22.040,
28 4.22.050, and 4.22.060.

29 (3)(a) Nothing in this section affects any cause of action relating
30 to hazardous wastes or substances or solid waste disposal sites.

31 (b) Nothing in this section shall affect a cause of action arising
32 from the tortious interference with contracts or business relations.

33 (c) Nothing in this section shall affect any cause of action
34 arising from the manufacture or marketing of a fungible product in a
35 generic form which contains no clearly identifiable shape, color, or
36 marking.

1 **Sec. 7.** RCW 7.70.030 and 1975-'76 2nd ex.s. c 56 s 8 are each
2 amended to read as follows:

3 No award shall be made in any action or arbitration for damages for
4 injury occurring as the result of health care which is provided after
5 June 25, 1976, unless the plaintiff establishes one or more of the
6 following propositions:

7 (1) That injury resulted from the failure of a health care provider
8 to follow the accepted standard of care;

9 (2) That a health care provider promised the patient or his
10 representative that the injury suffered would not occur;

11 (3) That injury resulted from health care to which the patient or
12 his or her representative did not consent.

13 Unless otherwise provided in this chapter, the plaintiff shall have
14 the burden of proving each fact essential to an award by ((a
15 ~~preponderance of the~~)) clear, cogent, and convincing evidence.

16 **Sec. 8.** RCW 7.70.060 and 1975-'76 2nd ex.s. c 56 s 11 are each
17 amended to read as follows:

18 If a patient while legally competent, or his or her representative
19 if he or she is not competent, signs a consent form which sets forth
20 the following, the signed consent form shall constitute prima facie
21 evidence that the patient gave his or her informed consent to the
22 treatment administered and the patient has the burden of rebutting this
23 by ((a ~~preponderance of the~~)) clear, cogent, and convincing evidence:

24 (1) A description, in language the patient could reasonably be
25 expected to understand, of:

26 (a) The nature and character of the proposed treatment;

27 (b) The anticipated results of the proposed treatment;

28 (c) The recognized possible alternative forms of treatment; and

29 (d) The recognized serious possible risks, complications, and
30 anticipated benefits involved in the treatment and in the recognized
31 possible alternative forms of treatment, including nontreatment;

32 (2) Or as an alternative, a statement that the patient elects not
33 to be informed of the elements set forth in subsection (1) of this
34 section.

35 Failure to use a form shall not be admissible as evidence of
36 failure to obtain informed consent.

1 NEW SECTION. **Sec. 9.** A new section is added to chapter 7.04 RCW
2 to read as follows:

3 A contract for health care services that contains a provision for
4 arbitration of any dispute as to professional negligence may not be a
5 contract of adhesion, nor unconscionable, nor otherwise improper.

6 NEW SECTION. **Sec. 10.** A new section is added to chapter 7.70 RCW
7 to read as follows:

8 (1) The definitions in this subsection apply throughout this
9 section unless the context clearly requires otherwise.

10 (a) "Future damages" includes damages for future medical treatment,
11 care or custody, loss of future earnings, loss of bodily function, or
12 future pain and suffering of the judgment creditor.

13 (b) "Periodic payments" means the payment of money or delivery of
14 other property to the judgment creditor at regular intervals.

15 (2) In any action for damages for injury occurring as a result of
16 health care, the court shall, at the request of either party, enter a
17 judgment ordering that money damages or its equivalent for future
18 damages of the judgment creditor be paid in whole or in part by
19 periodic payments rather than by a lump-sum payment if the award equals
20 or exceeds fifty thousand dollars in future damages. In entering a
21 judgment ordering the payment of future damages by periodic payments,
22 the court shall make a specific finding as to the dollar amount of
23 periodic payments which will compensate the judgment creditor for such
24 future damages. As a condition to authorizing periodic payments of
25 future damages, the court shall require the judgment debtor who is not
26 adequately insured to post security adequate to ensure full payment of
27 such damages awarded by the judgment. Upon termination of periodic
28 payments of future damages, the court shall order the return of this
29 security, or so much as remains, to the judgment debtor.

30 (3)(a) The judgment ordering the payment of future damages by
31 periodic payments must specify the recipient or recipients of the
32 payments, the dollar amount of the payments, the interval between
33 payments, and the number of payments or the period of time over which
34 payments must be made. The payments are only subject to modification
35 in the event of the death of the judgment creditor.

36 (b) In the event that the court finds that the judgment debtor has
37 exhibited a continuing pattern of failing to make the payments, as

1 specified in (a) of this subsection, the court shall find the judgment
2 debtor in contempt of court and, in addition to the required periodic
3 payments, shall order the judgment debtor to pay the judgment creditor
4 all damages caused by the failure to make such periodic payments,
5 including court costs and attorneys' fees.

6 (4) However, money damages awarded for loss of future earnings may
7 not be reduced or payments terminated by reason of the death of the
8 judgment creditor, but must be paid to persons to whom the judgment
9 creditor owed a duty of support, as provided by law, immediately prior
10 to his or her death. In such cases the court that rendered the
11 original judgment, may, upon petition of any party in interest, modify
12 the judgment to award and apportion the unpaid future damages in
13 accordance with this subsection (4).

14 (5) Following the occurrence or expiration of all obligations
15 specified in the periodic payment judgment, any obligation of the
16 judgment debtor to make further payments ceases and any security given
17 under subsection (2) of this section reverts to the judgment debtor.

18 (6) For purposes of this section, the provisions of RCW 4.56.250 do
19 not apply.

20 NEW SECTION. **Sec. 11.** Section 1 of this act takes effect only if
21 chapter . . . (Senate Joint Resolution No. . . . (S-0321/03)), Laws
22 of 2003 is approved by the electorate at the next general election held
23 in this state.

24 NEW SECTION. **Sec. 12.** If any provision of this act or its
25 application to any person or circumstance is held invalid, the
26 remainder of the act or the application of the provision to other
27 persons or circumstances is not affected.

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