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HOUSE BILL 1643

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State of Washington

58th Legislature

2003 Regular Session

By Representatives Pflug, Mastin, Carrell, Alexander, Ericksen and Anderson

Read first time 02/03/2003. Referred to Committee on Judiciary.

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~~((s))~~ (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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