As Reported by the House Insurance Committee

125th General Assembly
Regular Session **Sub. H. B. No. 215**
2003-2004

Representatives Schmidt, Schneider, White, Collier, Peterson, Hollister, Kearns, Wagner, Faber, Gibbs, DeWine, Flowers, Taylor, Setzer, Raga, Reidelbach, Wolpert, Webster, Aslanides, Raussen, Daniels, Carmichael, Blasdel, Koziura, D. Evans, T. Patton, Sferra, Seaver, Hughes, Barrett, G. Smith, Driehaus, Woodard, Olman, Book, Brown

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A B I L L

To amend section 2743.43, to enact sections 2317.43, 2323.421, 2323.45, and 3929.302, and to repeal section 2303.23 of the Revised Code to prohibit the use of a defendant's statement of sympathy as evidence in a medical liability action, establish qualifications for expert witnesses in medical liability actions, regulate the use of affidavits of noninvolvement in medical claims, and regulate the collection and disclosure of medical claims data.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That section 2743.43 be amended and sections 2317.43, 2323.421, 2323.45, and 3929.302 of the Revised Code be enacted to read as follows:

Sec. 2317.43. (A) In any civil action brought by an alleged victim of an unanticipated outcome of medical care or in any arbitration proceeding related to such a civil action, any and all

statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence that are made by a health care provider or an employee of a health care provider to the alleged victim, a relative of the alleged victim, or a representative of the alleged victim, and that relate to the discomfort, pain, suffering, injury, or death of the alleged victim as the result of the unanticipated outcome of medical care are inadmissible as evidence of an admission of liability or as evidence of an admission against interest.

(B) For purposes of this section, unless the context otherwise requires:

(1) "Health care provider" has the same meaning as in division (B)(5) of section 2317.02 of the Revised Code.

(2) "Relative" means a victim's spouse, parent, grandparent, stepfather, stepmother, child, grandchild, brother, sister, half brother, half sister, or spouse's parents. The term includes said relationships that are created as a result of adoption. In addition, "relative" includes any person who has a family-type relationship with a victim.

(3) "Representative" means a legal guardian, attorney, person designated to make decisions on behalf of a patient under a medical power of attorney, or any person recognized in law or custom as a patient's agent.

(4) "Unanticipated outcome" means the outcome of a medical treatment or procedure that differs from an expected result.

Sec. 2323.421. A person licensed in another state to practice medicine, who testifies as an expert witness on behalf of any party in this state in any action against a physician for injury or death, whether in contract or tort, arising out of the

provision of or failure to provide health care services, shall be deemed to have a temporary license to practice medicine in this state for the purpose of providing such testimony and is subject to the authority of the state medical board and the provisions of Chapter 4731. of the Revised Code.

Sec. 2323.45. (A)(1) A health care provider named as a defendant in a civil action based upon a medical claim is permitted to file a motion with the court for dismissal of the claim accompanied by an affidavit of noninvolvement. The defendant shall notify all parties in writing of the filing of the motion. Prior to ruling on the motion, the court shall allow the parties not less than thirty days from the date that the parties were served with the notice to respond to the motion.

(2) An affidavit of noninvolvement shall set forth, with particularity, the facts that demonstrate that the defendant was misidentified or otherwise not involved individually or through the action of the defendant's agents or employees in the care and treatment of the plaintiff, was not obligated individually or through the defendant's agents or employees to provide for the care and treatment of the plaintiff, and could not have caused the alleged malpractice individually or through the defendant's agents or employees in any way.

(B)(1) The parties shall have the right to challenge the affidavit of noninvolvement by filing a motion and submitting an affidavit with the court that contradicts the assertions of noninvolvement made in the defendant's affidavit of noninvolvement.

(2) If the affidavit of noninvolvement is challenged, any party may request an oral hearing on the motion for dismissal. If requested, the court shall hold a hearing to determine if the

defendant was involved, directly or indirectly, in the care and treatment of the plaintiff, or was obligated, directly or indirectly, for the care and treatment of the plaintiff.

(3) The court shall consider all evidence submitted by the parties and the parties' arguments and may dismiss the civil action based upon the defendant's lack of involvement in the elements of the plaintiff's medical claim. The court shall rule on all challenges to the affidavit of noninvolvement within seventy-five days after the filing of the affidavit of noninvolvement.

(4) A court's dismissal of a claim against a defendant pursuant to this section shall not be deemed otherwise than upon the merits and without prejudice. In the event subsequent discovery indicates involvement by the dismissed defendant, then upon the motion of any party the dismissed defendant shall be reinstated as a party defendant by the court.

(C) If the court determines that a health care provider named as a defendant has falsely filed or made false or inaccurate statements in an affidavit of noninvolvement, the court, upon a motion or upon its own initiative, shall immediately reinstate the claim against that defendant, if previously dismissed. Reinstatement of a party pursuant to this division shall not be barred by any statute of limitations defense that was not valid at the time the original affidavit was filed.

(D) In any action in which the defendant is found by the court to have knowingly filed a false or inaccurate affidavit of noninvolvement, the court shall impose upon the person who signed the affidavit or represented the defendant, or both, an appropriate sanction, including, but not limited to, an order to pay to other parties to the claim the amount of the reasonable expenses that the parties incurred as a result of the filing of

the false or inaccurate affidavit, including reasonable attorney's fees.

(E) In any action in which the court determines that a party falsely objected to a defendant's affidavit of noninvolvement, or knowingly provided an inaccurate statement regarding a defendant's affidavit, the court shall impose upon the party or the party's counsel, or both, an appropriate sanction, including, but not limited to, an order to pay to the other parties to the claim the amount of the reasonable expenses that the parties incurred as a result of the submission of the false objection or inaccurate statement, including reasonable attorney's fees.

(F) As used in this section:

(1) "Health care provider" has the same meaning as in division (B)(5) of section 2317.02 of the Revised Code.

(2) "Medical claim" means any claim that is asserted in any civil action against a health care provider and that arises out of the medical diagnosis, care, or treatment of any person. "Medical claim" includes derivative claims for relief.

Sec. 2743.43. (A) No person shall be deemed competent to give expert testimony on the liability issues in a medical claim, as defined in section 2305.113 of the Revised Code, unless:

(1) Such person is licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery by the state medical board or by the licensing authority of any state;

(2) Such person devotes three-fourths of the person's professional time to the active clinical practice of medicine or surgery, osteopathic medicine and surgery, or podiatric medicine and surgery, or to its instruction in an accredited university;

(3) The person practices in the same or a substantially

similar specialty as the defendant. The court shall not permit an expert in one medical specialty to testify against a health care provider in another medical specialty unless the expert shows both that the standards of care and practice in the two specialties are similar and that the expert has substantial familiarity between the specialties.

(4) If the person is certified in a specialty, the person must be certified by a board recognized by the American board of medical specialties or the American board of osteopathic specialties in a specialty having acknowledged expertise and training directly related to the particular health care matter at issue.

(B) Nothing in division (A) of this section shall be construed to limit the power of the trial court to adjudge the testimony of any expert witness incompetent on any other ground.

(C) Nothing in division (A) of this section shall be construed to limit the power of the trial court to allow the testimony of any other ~~expert~~ witness, on a matter unrelated to the liability issues in the medical claim, when that testimony is relevant to the medical claim involved.

Sec. 3929.302. (A) Each authorized insurer, surplus lines insurer, risk retention group, self-insurer, the medical liability underwriting association if created under section 3929.63 of the Revised Code, and any other entity that offers medical malpractice insurance in this state, shall report to the department of insurance at least annually any medical, dental, optometric, or chiropractic claim filed against an insured located in this state, if the claim resulted in any of the following results:

(1) A final judgment in any amount;

(2) A settlement in any amount;

(3) A final disposition of the claim resulting in no indemnity payment on behalf of the insured.

(B) The report required by division (A) of this section shall contain all of the following information:

(1) The name, address, health care provider professional license number, and specialty coverage of the insured;

(2) The insured's policy number;

(3) The date of the occurrence that created the claim;

(4) The name and address of the injured person;

(5) The date that the claim was filed;

(6) The injured person's age and sex;

(7) The total number, names, and health care provider professional license numbers of all defendants involved in the claim;

(8) The date and amount of the judgment, if any, including a description of the portion of the judgment that represents economic loss, noneconomic loss and, if applicable, punitive damages;

(9) In the case of a settlement, the date and amount of the settlement, the injured person's incurred and anticipated medical expenses, wage loss, and other expenses;

(10) The loss adjustment expense paid to defense's counsel, plaintiff's counsel if available, and all other allocated loss adjustment expenses paid;

(11) The date and reason for final disposition, if no judgment or settlement occurred;

(12) A summary of the occurrence that created the claim, including all of the following information:

(a) The name of the institution, if any, and the location within the institution where the injury occurred;

(b) The final diagnosis for which treatment was sought or rendered, including the patient's actual condition;

(c) The operation, diagnostic, or treatment procedure causing the injury;

(d) A description of the principal injury that gave rise to the claim;

(e) The safety management steps that have been taken by the insured to make similar occurrences or injuries less likely in the future.

(13) Any other information required by the superintendent of insurance pursuant to rules adopted in accordance with Chapter 119. of the Revised Code.

(C) The superintendent may prescribe the format and the manner in which the information described in division (B) of this section is reported. The superintendent may, by rule adopted in accordance with Chapter 119. of the Revised Code, prescribe the frequency that the information described in division (B) of this section is reported.

(D) The superintendent may designate one or more rating organizations licensed pursuant to section 3937.05 of the Revised Code or other agencies to assist the superintendent in gathering the information, and making compilations thereof, required by this section.

(E) There shall be no liability on the part of, and no cause of action of any nature shall arise against, any person or entity reporting under this section or its agents or employees, or the department of insurance or its employees, for any action taken that is authorized under this section.

(F) The superintendent shall impose a fine of five hundred dollars against any person designated in division (A) of this section that fails to timely submit the report required under this section. Fines imposed under this section shall be paid into the state treasury to the credit of the department of insurance operating fund created under section 3901.021 of the Revised Code.

(G) Except as specifically provided in division (H) of this section, the information required by this section shall be confidential and privileged and is not a public record as defined in section 149.43 of the Revised Code. The information provided under this section is not subject to discovery or subpoena and shall not be made public by the superintendent or any other person.

(H) The department of insurance shall prepare an annual report that summarizes the closed claims reported under this section. The annual report shall summarize the closed claim reports on a statewide basis, and also by specialty and geographic region. Individual claims data shall not be released in the annual report. Copies of the report shall be provided to the members of the general assembly.

(I) As used in this section, medical, dental, optometric, and chiropractic claims include those claims filed with a medical malpractice insurer against an insured located in this state that either:

(1) Meet the definition of a "medical claim," "dental claim," "optometric claim," or "chiropractic claim" under section 2305.113 of the Revised Code;

(2) Have not been asserted in any civil action, but that otherwise meet the definition of a "medical claim," "dental claim," "optometric claim," or "chiropractic claim" under section 2305.113 of the Revised Code.

Section 2. That existing section 2743.43 and section 2303.23 of the Revised Code are hereby repealed.

Section 3. The General Assembly respectfully requests the Supreme Court to require a plaintiff filing a medical liability claim to include a certificate of expert review with the complaint or to file the certificate of expert review with the court within thirty days after the filing of the claim. The General Assembly respectfully requests that the certificate of expert review require the signature of an expert witness from the same specialty as the defendant; said witness shall be required to meet the evidentiary and case law requirements of a medical expert capable of testifying at trial. A certificate of expert review should be required to state with particularity the expert's familiarity with the applicable standard of care, the expert's qualifications, the expert's opinion as to how the applicable standard of care was breached, and the expert's opinion as to how the breach resulted in the injury or death.

Section 4. The General Assembly respectuflly requests the Supreme Court to amend the Rules of Civil Procedure to incorporate the mandatory discovery disclosure rules embodied in Rule 26 of the Federal Rules of Civil Procedure.