

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Committee Substitute

for

House Bill 4218

BY DELEGATES ELLINGTON, SUMMERS, HOUSEHOLDER,

ROHRBACH, SOBONYA, CRISS, HOLLEN AND FRICH

[Reported February 22, 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; clarifying the required qualifications and basis for an
3 expert who signs the screening 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~~ a brief recitation of the expert's
21 knowledge, skill, experience, training, or education which forms the basis for his/her familiarity
22 with the applicable standard of care; (3) the expert's opinion as to how the applicable standard of
23 care was breached; and (4) the expert's opinion as to how the breach of the applicable standard
24 of care resulted in injury or death: ~~Provided, That the healthcare provider submitting a screening~~
25 ~~certificate of merit in accordance with the provisions of this section must also qualify as an expert~~
26 ~~pursuant to the provisions of §55-7B-7 of this code.~~ A separate screening certificate of merit must
27 be provided for each health care provider against whom a claim is asserted. The person signing
28 the screening certificate of merit shall have no financial interest in the underlying claim, but may
29 participate as an expert witness in any judicial proceeding. Nothing in this subsection ~~may be~~
30 ~~construed to limit~~ limits the application of rule 15 of the rules of civil procedure.

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

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

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

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

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

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

70 (i)(1) Except for medical professional liability actions against a nursing home, assisted
71 living facility, their related entities or employees or a distinct part of an acute care hospital
72 providing intermediate care or skilled nursing care or its employees, and except as otherwise
73 provided in this subsection, any statute of limitations applicable to a cause of action against a
74 health care provider upon whom notice was served for alleged medical professional liability shall
75 be tolled from the date of mail of a notice of claim to thirty days following receipt of a response to
76 the notice of claim, thirty days from the date a response to the notice of claim would be due, or
77 thirty days from the receipt by the claimant of written notice from the mediator that the mediation
78 has not resulted in a settlement of the alleged claim and that mediation is concluded, whichever
79 last occurs.

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

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

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