GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1995

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HOUSE BILL 290

Short Title: Malpractice Reform/HPC. (Public)

Sponsors: Representatives Dickson, Blue, Wright; Alexander, Boyd-McIntyre, Earle, Ives, Pate, Rogers, Russell, Shaw, and Wainwright.

Referred to: Insurance, if favorable, Judiciary II.

February 23, 1995

A BILL TO BE ENTITLED

AN ACT TO REQUIRE CERTAIN PROCEDURES PERTAINING TO MEDICAL MALPRACTICE ACTIONS AS RECOMMENDED BY THE NORTH CAROLINA HEALTH PLANNING COMMISSION.

The General Assembly of North Carolina enacts:

Section 1. Article 1B of Chapter 90 of the General Statutes is amended by adding the following new section to read:

"**§ 90-21.12A. Prescreening of medical malpractice actions.**

(a) As used in this section, unless the context clearly requires otherwise, the term:

(1) 'Qualified expert' means a person, other than a party to the action, who is a licensed member of the same health care profession as the defendant, is board certified in the same or similar professional practice specialty area as the defendant, and, during the course of the person's professional health care practice, has provided health care or treatment for health conditions similar to the condition for which the plaintiff was treated by the defendant.

(2) 'Potentially meritorious' means that the allegations of the pleadings and the medical records and other relevant data reviewed by the qualified expert are sufficient for the qualified expert to reasonably conclude that

the care or treatment was or was not in accordance with the standards of practice established under G.S. 90-21.12.

(b) In an action alleging medical malpractice, the plaintiff's attorney shall certify in the verified pleadings filed that a qualified expert has reviewed the claim and any supporting medical or other relevant data and has signed an affidavit stating that in the qualified expert's opinion the claim is potentially meritorious. The qualified expert may be selected by the plaintiff. The certification requirement of this subsection shall not apply to an action for which the period of limitation will expire within 10 days of the date of filing and, because of these time constraints, the pleadings allege that an affidavit of an expert could not be prepared. In these cases, the plaintiff's attorney shall have 45 days from the date of filing the action to supplement the pleadings with the certification required. The trial court may, on motion, after hearing and for good cause, extend the time as the court determines is in the interests of justice.

(c) A defendant's verified answer to an action alleging medical malpractice shall include certification by defendant's attorney that a qualified expert has reviewed defendant's answer and any supporting data and has signed an affidavit stating that in the qualified expert's opinion the defenses asserted in defendant's answer are potentially meritorious. The qualified expert may be selected by the defendant. The defendant's answer may allege that an affidavit of an expert could not be prepared due to time constraints. In these cases, the defendant's attorney shall have 45 days from the date of filing the answer to supplement the answer with the certification required. The trial court may, on motion, after hearing and for good cause, extend the time as the court determines is in the interests of justice.

(d) The name of or other information identifying the qualified expert who reviewed the claim or answer shall not be included in the filings, nor shall identification of the qualified expert be discoverable in any proceeding held or testimony given in the action filed, except that in proceedings for sanctions against either party's attorney under Rule 11 of the Rules of Civil Procedure, the judge presiding over the Rule 11 proceedings may compel identification of and testimony by the qualified expert for purposes of considering whether Rule 11 sanctions should be ordered.

(e) Nothing in this section shall restrict the right to jury trial or access to the courts."

Sec. 2. G.S. 90-21.12 reads as rewritten:

"**§ 90-21.12. Standard of health care.**

(a) In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

(b) A person competent to testify in a medical malpractice action as to the standard of practice or care shall be qualified to give expert testimony only as provided in G.S. 8-58.15."

Sec. 3. Chapter 8 of the General Statutes is amended by adding the following new Article to read:

"**ARTICLE 7C.**

"**EXPERT TESTIMONY.**

"**§ 8-58.15. Qualification of experts in medical malpractice actions.**

In an action alleging medical malpractice, no person may be qualified to give expert testimony as to the standard of practice or care unless the person is a licensed member of the same health care profession as the defendant, is board certified in the same or similar professional practice specialty area as the defendant, and, during the course of the person's professional health care practice, has provided health care or treatment for health conditions similar to the condition for which the plaintiff was treated by the defendant."

Sec. 4. Chapter 7A of the General Statutes is amended by adding the following new section to read:

"**§ 7A-38.1. Court ordered alternative dispute resolution in medical malpractice actions.**

(a) Purpose. – This section is enacted to require parties to medical malpractice actions to attempt resolution of the dispute through alternative dispute resolution methods before scheduling the action for trial. The purpose of requiring initial resort to alternative dispute resolution methods is to assist the parties in resolving disputes through proceedings that are less costly, time consuming, and adversarial in nature than litigation, and that avoid nonmeritorious actions and provide satisfactory results in meritorious ones.

(b) Definitions. – As used in this section, unless the context clearly requires otherwise, the term:

(1) 'Alternative dispute resolution or ADR' means a procedure for bringing the parties, their attorneys and other persons having authority to settle the parties' claims together to attempt to resolve the dispute by proceedings other than litigation.

(2) 'Early neutral evaluation' means an informal conference wherein the parties present abbreviated written and oral summaries of the case to a neutral evaluator.

(3) 'Mediated settlement conference' means a conference between or among the parties to a medical malpractice action and their representatives conducted by a mediator prior to trial.

(c) ADR Required. – Before a malpractice action may proceed to trial, the parties shall attempt to resolve the case by participating in one of the following alternative dispute resolution methods selected by the parties:

(1) Binding arbitration, conducted by an arbitrator,

(2) Early neutral evaluation, conducted by an evaluator,

(3) Mediated settlement conference, conducted by a mediator,

(4) Nonbinding arbitration, conducted by an arbitrator,
(5) Summary jury trial, presided over by a judge, or
(6) Any other method or proceeding agreed upon by the parties and not inconsistent with this section or with rules adopted pursuant to it for the purpose of resolving the dispute prior to trial.

If, within the time established by the rules to participate in alternative dispute resolution, the parties cannot agree on the ADR method to be used, the senior resident superior court judge of the district in which the action is brought shall order the parties to attempt resolution through early neutral evaluation.

(d) Rules. – The Supreme Court may adopt rules to implement this section.

(e) Selection of Arbitrator, Mediator, or Evaluator. – The parties shall have the right to stipulate to the person who will conduct the arbitration, early neutral evaluation, or mediated settlement conference, subject to the standards and rules established by the Supreme Court. Upon failure of the parties to agree within the time established by the rules, the senior resident superior court judge shall appoint the person who will conduct the selected ADR method.

(f) Attendance of Parties. – The parties to a medical malpractice action ordered to participate in an alternative dispute resolution method pursuant to this section, their attorneys, and other persons having authority to settle the parties' claims, shall attend the ADR proceeding unless excused by rules of the Supreme Court or by order of the senior resident superior court judge.

(g) Costs of ADR Proceeding. – Costs of the ADR proceeding conducted pursuant to this section shall be paid: one share by the plaintiffs, one share by the defendants, and one share by any third-party defendant, unless otherwise ordered by the court or agreed to by the parties. The rules established by the Supreme Court pursuant to this section shall set out a method whereby the parties found by the court to be unable to pay the costs of the ADR proceeding are afforded an opportunity to participate without cost.

(h) Sanctions. – Upon failure of a party or attorney to attend court ordered ADR to the extent required by this section and rules adopted by the Supreme Court, a resident or presiding judge may impose any lawful sanction, including but not limited to the payment of attorneys' fees, mediator, arbitrator, or evaluator fees, and expenses incurred in attending the ADR proceeding, contempt, or any other sanction authorized by G.S. 1A-1, Rule 37(b).

(i) Inadmissibility of Negotiations. – Except for ADR conducted by summary jury trial, all conduct or communications made during the ADR method used shall be presumed to be in compromise negotiations and shall be governed by Rule 408 of the North Carolina Rules of Evidence.

(j) Standards for Persons Conducting ADR. – The Supreme Court is authorized to establish standards for the qualification, conduct, and training of arbitrators, evaluators, and mediators eligible to conduct ADR methods under this section. An administrative fee may be set by the Administrative Office of the Courts to be charged to applicants for approval as arbitrators, evaluators, or mediators.

(k) Immunity. – A person conducting an ADR proceeding pursuant to this section shall have judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice.

(l) Right to Jury Trial. – Nothing in this section or the rules adopted by the Supreme Court pursuant to it shall restrict the right to jury trial."

Sec. 5. The Administrative Office of the Courts shall do the following:

(1) Study the efficiency and effectiveness of requiring that parties to medical malpractice actions attempt to resolve their dispute through alternative dispute resolution proceedings before proceeding to trial. The study shall specifically address whether mandatory alternative dispute resolution is appropriate for all medical malpractice cases, and shall include recommendations on whether and what changes need to be made in order for the ADR system established under Section 4 of this act to accomplish its purposes.

(2) Recommend the amount of a cap on attorneys' fees that may be awarded in medical malpractice cases. The cap shall be on a sliding scale and shall be based on the amount of the award, wherein a larger percentage of the recovery would be awarded to counsel in cases with small awards, and wherein the percentage awarded to counsel would decrease as the amount of the award to the plaintiff increases. In establishing the cap, AOC shall ensure that the cap is not set so low as to create barriers for low-income persons in finding attorneys willing to represent them in medical malpractice actions.

(3) Upon consultation with medical and legal experts and economists, recommend a schedule of awards to be presented to juries in medical malpractice cases for jury guidance and consideration in setting awards for physical injuries, including pain and suffering. The schedule shall be advisory in nature and shall not contain mandatory maximum amounts for awards.

The Administrative Office of the Courts shall report its findings and recommendations on the tasks required under this section to the General Assembly not later than May 1, 1996. The AOC shall indicate in its report whether legislation is necessary to carry out the recommendation.

Sec. 6. (a) The Legislative Research Commission is authorized to study the establishment of a no-fault system for medical malpractice actions. In conducting the study, the Commission may consider whether the no-fault system should be based on the workers' compensation system or should be a more restrictive no-fault system for specific types of injuries. The Commission may also consider the recommendations contained in the final report of the North Carolina Health Planning Commission, and in the reports of the Health Planning Commission's advisory committees.

(b) The Commission may make an interim report to the 1995 Session of the General Assembly, Regular Session 1996, and shall make its final report to the 1997

General Assembly. The Commission shall ensure that copies of its interim report, if any, and its final report are provided to the North Carolina Health Planning Commission.

Sec. 7. Except for Sections 1 through 4 of this act, this act is effective upon ratification. Section 1 of this act becomes effective October 1, 1995, and applies to claims arising on or after that date. Sections 2, 3, and 4 of this act become effective October 1, 1995, and apply to actions commenced on or after that date.