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Introduced and read first time: January 17, 2005

Assigned to: Judiciary

Committee Report: Favorable with amendments

House action: Adopted

Read second time: March 25, 2005

CHAPTER _____

1 AN ACT concerning

2 **Evidence—Health Care Malpractice—Certain Statements and Conduct**
 3 **Quality Health Care Act of 2005**

4 FOR the purpose of ~~prohibiting the use of certain statements and conduct relating to~~
 5 ~~health care in certain civil actions and proceedings as evidence of an admission~~
 6 ~~of liability; defining certain terms; providing for the application of this Act; and~~
 7 ~~generally relating to evidence in certain civil actions and proceedings~~ altering a
 8 certain definition of "health care provider" to include physician assistants for
 9 purposes of certain provisions of law concerning health care malpractice;
 10 requiring that certain health care malpractice awards or verdicts be modified to
 11 the extent of certain payments, reimbursements, or indemnification for past
 12 medical expenses, less certain costs, under certain circumstances; prohibiting
 13 certain recovery and certain claims of subrogation relating to certain payments,
 14 reimbursements, or indemnification under certain circumstances; requiring a
 15 court in certain health care malpractice actions, on a motion by a party, to
 16 employ a neutral expert witness for certain purposes; providing for the payment
 17 of the costs of a certain neutral expert witness under certain circumstances;
 18 limiting venue for certain actions against an insurer of a health care provider

1 under certain circumstances; altering a certain evidentiary rule concerning an
2 apology or expression of regret in certain civil actions and proceedings against
3 health care providers; authorizing the Maryland Insurance Commissioner to
4 determine the surplus of the Medical Mutual Insurance Society is excessive
5 under certain circumstances; prohibiting the Commissioner from approving a
6 rate increase sought by the Society under certain circumstances; establishing a
7 Joint Executive-Legislative Task Force on Health Care Malpractice; providing
8 for the composition, co-chairs, and staff of the Task Force; authorizing the Task
9 Force to study any aspect of the health care, insurance, or civil justice systems
10 related to health care malpractice; requiring the Task Force to report to the
11 Governor and the General Assembly by a certain date; providing for the
12 termination of the Task Force; making stylistic changes; making a certain
13 provision of this Act contingent on the taking effect of a certain provision of
14 another Act; providing for the application of certain provisions of this Act; and
15 generally relating to health care malpractice.

16 BY repealing and reenacting, without amendments,
17 Article - Courts and Judicial Proceedings
18 Section 3-2A-01(a)
19 Annotated Code of Maryland
20 (2002 Replacement Volume and 2004 Supplement)
21 (As enacted by Chapter 5 of the Acts of the General Assembly of the 2004 Special
22 Session)

23 BY adding to

24 BY repealing and reenacting, with amendments,
25 Article - Courts and Judicial Proceedings
26 Section 3-2A-01(f)(1), 3-2A-06(f)(3), (4) and (5), 3-2A-05(h)(2), 3-2A-09(d)(2),
27 and 10-920
28 Annotated Code of Maryland
29 (2002 Replacement Volume and 2004 Supplement)
30 (As enacted by Chapter 5 of the Acts of the General Assembly of the 2004 Special
31 Session)

32 BY repealing and reenacting, with amendments,
33 Article - Courts and Judicial Proceedings
34 Section 6-201 and 6-203(a)
35 Annotated Code of Maryland
36 (2002 Replacement Volume and 2004 Supplement)

37 BY adding to
38 Article - Courts and Judicial Proceedings
39 Section 6-203(f)
40 Annotated Code of Maryland

1 (2002 Replacement Volume and 2004 Supplement)

2 BY repealing and reenacting, with amendments,

3 Article - Insurance

4 Section 24-212

5 Annotated Code of Maryland

6 (2002 Replacement Volume and 2004 Supplement)

7 (As enacted by Chapter (S.B.836/H.B.1359) of the Acts of the General

8 Assembly of 2005)

9 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF

10 MARYLAND, That the Laws of Maryland read as follows:

11 **Article - Courts and Judicial Proceedings**

12 3-2A-01.

13 (a) In this subtitle the following terms have the meanings indicated unless the
14 context of their use requires otherwise.

15 (f) (1) "Health care provider" means a hospital, a related institution as
16 defined in § 19-301 of the Health - General Article, a medical day care center, a
17 hospice care program, an assisted living program, a freestanding ambulatory care
18 facility as defined in § 19-3B-01 of the Health - General Article, a physician, an
19 osteopath, an optometrist, a chiropractor, a registered or licensed practical nurse, a
20 dentist, a podiatrist, a psychologist, a licensed certified social worker-clinical, [and]
21 a physical therapist, OR A PHYSICIAN ASSISTANT licensed or authorized to provide
22 one or more health care services in Maryland.

23 3-2A-05.

24 (h) (2) (i) The application may include a request that damages be reduced
25 to the extent that the claimant has been or will be paid, reimbursed, or indemnified
26 under statute, insurance, or contract for all or part of the damages assessed.

27 (ii) The panel chairman shall receive such evidence in support and
28 opposition to a request for reduction, including evidence of the cost to obtain such
29 payment, reimbursement, or indemnity.

30 [(iii)] (3) (I) AFTER HEARING THE EVIDENCE IN SUPPORT AND
31 OPPOSITION TO A REQUEST FOR MODIFICATION OF AN AWARD, IF A PANEL
32 CHAIRMAN IS SATISFIED THAT MODIFICATION IS SUPPORTED BY THE EVIDENCE,
33 THE PANEL CHAIRMAN SHALL MODIFY THE AWARD FOR DAMAGES FOR PAST
34 MEDICAL EXPENSES TO THE EXTENT THAT THE CLAIMANT HAS BEEN OR WILL BE
35 PAID, REIMBURSED, OR INDEMNIFIED UNDER STATUTE, INSURANCE, OR CONTRACT
36 FOR THOSE DAMAGES, LESS THE COST TO OBTAIN THE PAYMENT, REIMBURSEMENT,
37 OR INDEMNITY.

1 (II) THE DAMAGES FOR PAST MEDICAL EXPENSES IN AN AWARD
2 MAY NOT BE MODIFIED AS TO ANY SUMS PAID OR PAYABLE TO THE CLAIMANT FOR
3 WHICH A RIGHT TO ASSERT A CLAIM OF SUBROGATION AGAINST A DEFENDANT IS
4 EXPRESSLY PROVIDED BY FEDERAL LAW.

5 (4) (I) THIS PARAGRAPH DOES NOT APPLY TO SUMS PAID OR PAYABLE
6 FOR PAST MEDICAL EXPENSES.

7 (II) [After] SUBJECT TO PARAGRAPH (2) OF THIS SUBSECTION,
8 AFTER hearing the evidence in support and opposition to the request, the panel
9 chairman, may modify the award if satisfied that modification is supported by the
10 evidence.

11 [(iv)] (III) The award may not be modified as to any sums paid or
12 payable to a claimant under any workers' compensation act, criminal injuries
13 compensation act, employee benefit plan established under a collective bargaining
14 agreement between an employer and an employee or a group of employers and a
15 group of employees that is subject to the provisions of the federal Employee
16 Retirement Income Security Act of 1974, program of the Department of Health and
17 Mental Hygiene for which a right of subrogation exists under §§ 15-120 and 15-121.1
18 of the Health - General Article, or as a benefit under any contract or policy of life
19 insurance or Social Security Act of the United States.

20 [(v)] (5) An award may not be modified as to any damages assessed
21 for any future expenses, costs, and losses unless:

22 [1.] (I) The panel chairman orders the defendant or the
23 defendant's insurer to provide adequate security; or

24 [2.] (II) The insurer is authorized to do business in this State
25 and maintains reserves in compliance with rules of the Insurance Commissioner to
26 assure the payment of all such future damages up to the amount by which the award
27 has been modified as to such future damages in the event of termination.

28 [(vi)] (6) [Except] NOTWITHSTANDING ANY OTHER PROVISION OF
29 LAW, EXCEPT as expressly provided by federal law, no person may recover from the
30 claimant or assert a claim of subrogation against a defendant for any sum included in
31 the modification of an award.

32 3-2A-06.

33 (f) (3) (i) If the court finds from the evidence that the damages are
34 excessive on the grounds stated in § 3-2A-05(h) of this subtitle, subject to the limits
35 and conditions stated in § 3-2A-05(h) of this subtitle, it may grant a new trial as to
36 such damages or may deny a new trial if the plaintiff agrees to a remittitur of the
37 excess and the order required adequate security when warranted by the conditions
38 stated in § 3-2A-05(h) of this subtitle.

39 (ii) In the event of a new trial granted under this subsection,
40 evidence considered by the court in granting the remittitur shall be admissible if

1 offered at the new trial and the jury shall be instructed to consider such evidence in
2 reaching its verdict as to damages.

3 (iii) [Upon] ON a determination of those damages at the new trial,
4 no further objection to damages may be made exclusive of any party's right of appeal.

5 (4) (I) ON A MOTION BY A PARTY, DAMAGES FOR PAST MEDICAL
6 EXPENSES IN A VERDICT SHALL BE REDUCED ON THE GROUND THAT THE PLAINTIFF
7 HAS BEEN OR WILL BE PAID, REIMBURSED, OR INDEMNIFIED FOR THOSE DAMAGES
8 IN ACCORDANCE WITH THIS PARAGRAPH.

9 (II) THE COURT SHALL HOLD A HEARING AND RECEIVE EVIDENCE
10 ON THE MOTION UNDER THIS PARAGRAPH.

11 (III) IF THE COURT FINDS FROM THE EVIDENCE THAT DAMAGES
12 FOR PAST MEDICAL EXPENSES HAVE BEEN PAID, REIMBURSED, OR INDEMNIFIED,
13 THE COURT SHALL REDUCE THE DAMAGES FOR THE PAST MEDICAL EXPENSES TO
14 THE EXTENT, AND SUBJECT TO THE LIMITS, STATED IN § 3-2A-05(H)(3) OF THIS
15 SUBTITLE.

16 [(4)] (5) [Except] NOTWITHSTANDING ANY OTHER PROVISION OF LAW,
17 EXCEPT as expressly provided by federal law, no person may recover from the plaintiff
18 or assert a claim of subrogation against a defendant for any sum included [in]:

19 (I) IN a remittitur or awarded in a new trial on damages granted
20 under this subsection; OR

21 (II) IN A MODIFICATION OF DAMAGES FOR PAST MEDICAL
22 EXPENSES IN A VERDICT.

23 [(5)] (6) Nothing in this subsection shall be construed to otherwise limit
24 the common law grounds for remittitur.

25 3-2A-09.

26 (d) (2) (I) ON A MOTION BY A PARTY, A COURT SHALL EMPLOY A NEUTRAL
27 EXPERT WITNESS TO TESTIFY ON THE ISSUE OF A PLAINTIFF'S FUTURE MEDICAL
28 EXPENSES OR FUTURE LOSS OF EARNINGS.

29 (II) UNLESS OTHERWISE AGREED TO BY THE PARTIES, A PARTY
30 THAT MOVES TO EMPLOY A NEUTRAL EXPERT WITNESS SHALL PAY THE COSTS OF
31 THE NEUTRAL EXPERT WITNESS WHO IS EMPLOYED UNDER THIS PARAGRAPH.

32 [(2)] (3) (i) A court may on its own motion[, or on motion of a party,]
33 employ a neutral expert witness to testify on the issue of a plaintiff's future medical
34 expenses or future loss of earnings.

35 (ii) Unless otherwise agreed to by the parties, the costs of a neutral
36 expert witness EMPLOYED UNDER THIS PARAGRAPH shall be divided equally among
37 the parties.

1 [(iii)] (4) [Nothing] EXCEPT AS PROVIDED IN PARAGRAPHS (2) AND
2 (3) OF THIS SUBSECTION, NOTHING contained in this subsection limits the authority
3 of a court concerning a court's witness.

4 6-201.

5 (a) Subject to the provisions of §§ 6-202 and 6-203 OF THIS SUBTITLE and
6 unless otherwise provided by law, a civil action shall be brought in a county where the
7 defendant resides, carries on a regular business, is employed, or habitually engages in
8 a vocation. In addition, a corporation also may be sued where it maintains its
9 principal offices in the State.

10 (b) If there is more than one defendant, and there is no single venue
11 applicable to all defendants, under subsection (a) OF THIS SECTION, all may be
12 sued in a county in which any one of them could be sued, or in the county where the
13 cause of action arose.

14 6-203.

15 (a) The general rule of § 6-201 OF THIS SUBTITLE does not apply to actions
16 enumerated in this section.

17 (F) (1) THIS SUBSECTION APPLIES ONLY TO AN ACTION TO RECOVER
18 DAMAGES AGAINST AN INSURER BASED ON THE INSURER'S FAILURE TO SETTLE A
19 HEALTH CARE MALPRACTICE ACTION BROUGHT AGAINST A HEALTH CARE PROVIDER
20 WHO IS INSURED BY THE INSURER.

21 (2) THE ONLY VENUE FOR AN ACTION DESCRIBED IN PARAGRAPH (1) OF
22 THIS SUBSECTION IS IN THE COUNTY IN WHICH THE HEALTH CARE MALPRACTICE
23 ACTION WAS BROUGHT AGAINST THE HEALTH CARE PROVIDER WHO IS INSURED BY
24 THE INSURER.

25 10-920.

26 ~~(A) IN THIS SECTION, "HEALTH CARE PROVIDER" HAS THE MEANING STATED~~
27 ~~IN § 3-2A-01 OF THIS ARTICLE.~~

28 ~~(B) FOR THE PURPOSE OF ANY CIVIL ACTION OR ADMINISTRATIVE~~
29 ~~PROCEEDING AGAINST A HEALTH CARE PROVIDER, AN EXPRESSION OF REGRET OR~~
30 ~~APOLOGY MADE BY OR ON BEHALF OF THE HEALTH CARE PROVIDER, INCLUDING AN~~
31 ~~EXPRESSION OF REGRET OR APOLOGY MADE IN WRITING, ORALLY, OR BY CONDUCT,~~
32 ~~IS INADMISSIBLE AS AN ADMISSION OF LIABILITY FOR ANY PURPOSE.~~

33 (a) In this section, "health care provider" has the meaning stated in § 3-2A-01
34 of this article.

35 (B) THIS SECTION APPLIES TO AN EXPRESSION OF REGRET OR APOLOGY
36 MADE IN WRITING, ORALLY, OR BY CONDUCT.

1 [(b)] (C) [(1)] [Except as provided in paragraph (2) of this subsection, in] IN a
2 proceeding subject to Title 3, Subtitle 2A of this article or a civil action against a
3 health care provider, an expression of regret or apology made by or on behalf of the
4 health care provider TO A VICTIM OF ALLEGED HEALTH CARE MALPRACTICE, ANY
5 MEMBER OF THE VICTIM'S FAMILY, OR ANY INDIVIDUAL WHO CLAIMS DAMAGES BY
6 OR THROUGH THAT VICTIM, OUTSIDE THE PRESENCE OF ANY OTHER INDIVIDUAL, [
7 including an expression of regret or apology made in writing, orally, or by conduct,] is
8 inadmissible as evidence of an admission of liability or as evidence of an admission
9 against interest.

10 [(2) An admission of liability or fault that is part of or in addition to a
11 communication made under paragraph (1) of this subsection is admissible as evidence
12 of an admission of liability or as evidence of an admission against interest in an action
13 described under paragraph (1) of this subsection.]

14 SECTION 2. AND BE IT FURTHER ENACTED, That the Laws of Maryland
15 read as follows:

16 **Article - Insurance**

17 24-212.

18 [(a) If the Society requests a rate increase of more than 7.5% and, at the time
19 of the rate filing, the Society's surplus is more than 500% of its authorized control
20 level risk-based capital, the Commissioner may determine whether the Society's
21 surplus is excessive.

22 (b) If, after a hearing, the Commissioner determines that the surplus is
23 excessive, the Commissioner may order the rates filed to be reduced.]

24 (A) NOTWITHSTANDING ANY OTHER PROVISION OF THIS ARTICLE, THE
25 COMMISSIONER MAY DETERMINE THAT THE SURPLUS OF THE SOCIETY IS
26 EXCESSIVE IF:

27 (1) THE TOTAL SURPLUS IS GREATER THAN THE APPROPRIATE RISK
28 BASED CAPITAL REQUIREMENTS, AS DETERMINED BY THE COMMISSIONER, FOR THE
29 IMMEDIATELY PRECEDING CALENDAR YEAR; AND

30 (2) AFTER A HEARING, THE COMMISSIONER DETERMINES THAT THE
31 SURPLUS IS UNREASONABLY LARGE.

32 (B) IF THE COMMISSIONER HAS DETERMINED THAT THE SURPLUS OF THE
33 SOCIETY IS EXCESSIVE, THE COMMISSIONER SHALL NOT APPROVE A RATE INCREASE
34 SOUGHT BY THE SOCIETY UNTIL THE COMMISSIONER DETERMINES THAT THE
35 SURPLUS OF THE SOCIETY IS NO LONGER EXCESSIVE.

36 SECTION 3. AND BE IT FURTHER ENACTED, That:

37 (a) There is a Joint Executive-Legislative Task Force on Health Care
38 Malpractice.

1 (b) The Task Force consists of the following members:
2 (1) three members appointed by the Governor;
3 (2) three members of the Senate of Maryland, appointed by the President
4 of the Senate; and
5 (3) three members of the House of Delegates appointed by the Speaker of
6 the House.

7 (c) The President of the Senate and the Speaker of the House shall designate,
8 in consultation with the Governor, the co-chairs of the Task Force.

9 (d) The Department of Legislative Services shall provide staff for the Task
10 Force.

11 (e) The Task Force may study any aspect of the health care, insurance, or civil
12 justice systems related to health care malpractice liability, including:

13 (1) structured compensation by periodic payments or annuities for future
14 economic damages included in health care malpractice judgments;

15 (2) health care provided in compliance with the federal Emergency
16 Medical Treatment and Active Labor Act (EMTALA);

17 (3) qualifications for expert witnesses and criteria for expert witness
18 testimony in health care malpractice actions;

19 (4) calculation of economic damages in health care malpractice actions;

20 (5) administrative compensation for a birth-related neurological injury;
21 and

22 (6) health care malpractice insurance reforms.

23 (f) The Task Force shall report its findings and recommendations to the
24 Governor, and in accordance with § 2-1246 of the State Government Article, to the
25 General Assembly on or before December 15, 2005.

26 SECTION 4. AND BE IT FURTHER ENACTED, That §§ 3-2A-09(d)(2) through
27 (4), 6-203(f), and 10-920 of the Courts and Judicial Proceedings Article as enacted by
28 Section 1 of this Act shall be construed to apply only prospectively and may not be
29 applied or interpreted to have any effect on or application to a case filed before the
30 effective date of this Act.

31 SECTION 2- 5. AND BE IT FURTHER ENACTED, That, except as provided in
32 Section 4 of this Act, this Act shall be construed to apply only prospectively and may
33 not be applied or interpreted to have any effect on or application to any ~~civil action or~~
34 ~~administrative proceeding initiated~~ cause of action arising before the effective date of
35 this Act.

1 SECTION 6. AND BE IT FURTHER ENACTED, That Section 2 of this Act shall
2 take effect June 1, 2005, contingent on the taking effect of § 24-212 of the Insurance
3 Article as enacted by Chapter _____ (S.B.836/H.B.1359) of the Acts of the General
4 Assembly of 2005, and if § 24-212 of the Insurance Article as enacted by Chapter
5 (S.B.836/H.B.1359) does not become effective, Section 2 of this Act shall be null and
6 void without the necessity of further action by the General Assembly.

7 SECTION 7. AND BE IT FURTHER ENACTED, That Section 3 of this Act shall
8 take effect June 1, 2005. It shall remain effective for a period of 7 months and, at the
9 end of December 31, 2005, with no further action required by the General Assembly,
10 Section 3 of this Act shall be abrogated and of no further force and effect.

11 SECTION ~~3- 8.~~ AND BE IT FURTHER ENACTED, That, except as provided in
12 Sections 6 and 7 of this Act, this Act shall take effect October 1, 2005.