

AN ACT relating to medical malpractice.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

➔Section 1. KRS 304.40-260 is amended to read as follows:

As used in KRS 304.40-250 to 304.40-320, the following words and terms shall be defined as follows:

- (1) "Health care provider" ***or "provider"*** means any:
 - (a) Physician, osteopath, dentist, podiatrist, nurse or nurse's assistant, ***registered nurse, advanced practice***~~[certified]~~ registered nurse~~[anesthetist]~~, ***licensed practical nurse,*** physical or occupational therapist, ~~[or]~~ psychologist, ***dietitian, or any other health care professional registered, certified, or licensed to practice health care in this state;***~~[any]~~
 - (b) Hospital, medical clinic, medical foundation, health maintenance organization, extended care facility, intermediate care facility, nursing home, emergency treatment center, outpatient medical or surgical center, frontier nursing service, or any other facility or service ***registered, certified, or licensed under the laws***~~[any act]~~ of this state to provide health care within this state; ~~or~~~~[any]~~
 - (c) Officer, director, employer agent thereof; and any corporation, partnership or sole proprietorship which directly provides medical services to its employees;
- (2) "Commissioner" means the commissioner of the Department of Insurance;
- (3) "Patient" means a natural person who receives health care from a licensed health care provider under a contract, express or implied;
- (4) "Claimant" means the patient or spouse, parent, guardian, trustee, or other authorized agent of the patient;
- (5) ~~"Tort" means any legal wrong, breach of duty, or negligent or unlawful act or omission proximately causing injury or damage to another;~~
- (6) ~~"Malpractice" means any tort or breach of contract based on health care or~~

~~professional services rendered, or which should have been rendered, by a health care provider to the patient;~~

~~(7)~~ "Health care" means any act, ~~for~~ treatment, or service performed or furnished, or which should have been performed or furnished, by any health care provider to a patient during that patient's care, treatment, or confinement for a physical or mental condition, including but not limited to staffing, custodial care, basic care, positioning, hydration, nutrition, or other similar patient service; ~~and~~

~~(6)~~~~(8)~~ "Malpractice insurer" means any insurance authority or any insurance company properly engaged in the practice of writing health care ~~malpractice~~ liability insurance under authority of the commissioner of insurance; and

(7) "Health care liability action" means any civil action, including claims against the state or any of its political subdivisions, alleging that a health care provider or providers have caused an injury related to the provision of, or failure to provide, health care to a person, regardless of any other claims, causes of actions, or theories of liability alleged in the complaint on which the action is based; provided, that no provision of KRS 304.40-250 to 304.40-320 shall apply to claims against the state to the extent that the provision is inconsistent with or conflicts with KRS Chapter 44.

➔SECTION 2. A NEW SECTION OF KRS 304.40-250 TO 304.40-320 IS CREATED TO READ AS FOLLOWS:

(1) In a health care liability action, the claimant shall have the burden of proving by expert testimony provided in accordance with subsection (2) of this section:

(a) The recognized standard of acceptable professional practice and the specialty thereof, if any, that the defendant practices. The standard of acceptable professional practice and specialty, if any, shall be the type recognized in the defendant's community or in a community similar to the defendant's community that was in place at the time the alleged injury or

wrongful action occurred;

(b) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with the recognized standard; and

(c) As a proximate result of the defendant's negligent act or omission, the claimant suffered injuries which would not otherwise have occurred.

(2) (a) No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (1) of this section, unless the person was licensed to practice in the state or a contiguous bordering state a profession or specialty which would make the person's expert testimony relevant to the issues in the case and had practiced this profession or specialty in one (1) of these states during the year preceding the date that the alleged injury or wrongful act occurred.

(b) The requirements set forth in paragraph (a) of this subsection shall apply to expert witnesses testifying for the defendant as rebuttal witnesses.

(c) The court may waive the requirements in this subsection if it determines that the appropriate witnesses otherwise would not be available.

(3) In a health care liability action as described in subsection (1) of this section, there shall be no presumption of negligence on the part of the defendant.

(4) In a health care liability action as described in subsection (1) of this section, the jury shall be instructed that the claimant has the burden of proving, by a preponderance of the evidence, the negligence of the defendant. The jury shall be further instructed that injury alone does not raise a presumption of the defendant's negligence.

➔SECTION 3. A NEW SECTION OF KRS 304.40-250 TO 304.40-320 IS CREATED TO READ AS FOLLOWS:

(1) (a) Any person, or that person's authorized agent, asserting a potential claim

for a health care liability action shall give written notice of the potential claim to each health care provider that will be named as a defendant at least sixty (60) days before the filing of a complaint in a health care liability action in any court of this state.

(b) The notice shall include:

1. The full name and date of birth of the patient whose treatment is at issue;
2. The name and address of the claimant authorizing the notice and the relationship to the patient, if the notice is not sent by the patient;
3. The name and address of the attorney sending the notice, if applicable;
4. A list of the names and addresses of all providers being sent a notice; and
5. Medical authorization that is compliant with the federal Health Insurance Portability and Accountability Act permitting the provider receiving the notice to obtain complete medical records from each provider being sent a notice.

(c) Service of the notice is satisfied if, within the statutes of limitations and repose applicable to the provider, one (1) of the following occurs, as established by the specified proof of service, which shall be filed with the complaint:

1. Personal delivery of the notice to the health care provider or an identified individual whose job function includes receptionist for deliveries or for arrival of the provider's patients at the provider's current practice location. Delivery shall be established by an affidavit stating that the notice was personally delivered and the identity of the individual to whom the notice was delivered; or

2. Mailing of the notice:

a. To an individual health care provider at the provider's current business address; provided, that, if the mailing is returned undelivered, within five (5) business days after receipt of the undelivered letter, the notice shall be mailed in the specified manner to the provider's office or business address at the location where the provider last provided a medical service to the patient; or

b. To a health care provider that is a corporation or other business entity at both the address for the agent for service of process, and the provider's current business address, if different from that of the agent for service of process; provided, that, if the mailings are returned undelivered from both addresses, then, within five (5) business days after receipt of the second undelivered letter, the notice shall be mailed in the specified manner to the provider's office or business address at the location where the provider last provided a medical service to the patient.

(d) Compliance with paragraph (c)2. of this subsection shall be demonstrated by filing a certificate of mailing from the United States Postal Service stamped with the date of mailing and an affidavit of the party mailing the notice establishing that the specified notice was timely mailed by certified mail, return receipt requested. A copy of the notice sent shall be attached to the affidavit. It is not necessary that the addressee of the notice sign or return the return receipt card that accompanies a letter sent by certified mail for service to be effective.

(2) If a complaint is filed in any court alleging a claim for a health care liability action, the pleadings shall state whether each party has complied with subsection

(1) of this section and shall provide the documentation specified in subsection (1) of this section. The court may require additional evidence of compliance to determine if the requirements of this section have been met. The court has discretion to excuse compliance with this section only for extraordinary cause shown.

(3) When notice is given to a health care provider as provided in this section, the applicable statutes of limitations and repose shall be extended for a period of one hundred twenty (120) days from the date of expiration of the statute of limitations and repose applicable to that provider. Personal service is effective on the date of that service. Service by mail is effective on the first day that service by mail is made in compliance with subsection (1)(b)2. of this section. In no event shall this section operate to shorten or otherwise extend the statutes of limitations or repose applicable to any claim for a health care liability action, nor shall more than one (1) extension be applicable to any provider. Once a complaint is filed alleging a claim for health care liability action, the notice provisions of this section shall not apply to any person or entity that is made a party to the action thereafter by amendment to the pleadings as a result of a defendant alleging comparative fault.

(4) (a) All parties in an health care liability action covered by this section shall be entitled to obtain complete copies of the claimant's medical records from any other health care provider receiving notice. A party shall provide a copy of the specified portions of the claimant's medical records as of the date of the receipt of a legally authorized written request for the records within thirty (30) days thereafter. The claimant complies with this requirement by providing the providers with the authorized Health Insurance Portability and Accountability Act compliant medical authorization required to accompany the notice. The provider may comply with this subsection by:

1. Mailing a copy of the requested portions of the records with a

statement for the cost of duplication of the records to the individual requesting the records;

2. Informing the individual requesting the records that the records will be mailed only upon advance payment for the records for the stated cost of the records. Any request for advance payment shall be made in writing twenty (20) days after the receipt of the request for medical records. The provider shall send the records within three (3) business days after receipt of payment for the records; or

3. Fulfilling any other method that the provider and the individual requesting the records agree to in writing.

(b) The records received by the parties shall be treated as confidential, to be used only by the parties, their counsel, and their consultants.

(5) In the event that a complaint is filed in good-faith reliance on the extension of the statute of limitations or repose granted by this section and it is later determined that the claim is not a claim in a health care liability action, the extension of the statute of limitations and repose granted by this section is still available to the claimant.

(6) (a) Upon the filing of a healthcare liability action, the named defendant or defendants may petition the court for a qualified protective order allowing the defendant or defendants and their attorneys the right to obtain protected health information during interviews, outside the presence of claimant or claimant's counsel, with the relevant patient's treating health care providers. The petition shall be granted under the following conditions:

1. The petition shall identify the treating health care provider or providers for whom the defendant or defendants seek a qualified protective order to conduct an interview;

2. The claimant may file an objection seeking to limit or prohibit the

defendant or defendants or the defendant's or defendants' counsel from conducting the interviews, which may be granted only upon good cause shown that a treating health care provider does not possess relevant information as defined by the Kentucky Rules of Civil Procedure; and

3. The qualified protective order shall expressly:

a. Limit the dissemination of any protected health information to the litigation pending before the court and require the defendant or defendants who conducted the interview to return to the health care provider or destroy any protected health information obtained in the course of the interview, including all copies, at the end of the litigation; and

b. Provide that participation in any interview by a treating health care provider is voluntary.

(b) Any health care provider's disclosure of relevant information in response to a court order under this section, including but not limited to protected health information, opinions as to the standard of care of any defendant, compliance with or breach of the standard, and causation of the alleged injury, shall be deemed a permissible disclosure under Kentucky law.

(c) Nothing in this subsection shall be construed as restricting in any way the right of a defendant or defendant's counsel from conducting interviews outside the presence of claimant or claimant's counsel with the defendant's own present or former employees, partners, or owners concerning a health care liability action.

➔SECTION 4. A NEW SECTION OF KRS 304.40-250 TO 304.40-320 IS CREATED TO READ AS FOLLOWS:

(1) In any health care liability action in which expert testimony is required by

Section 2 of this Act, the claimant or claimant's counsel shall file a certificate of good faith with the complaint. If the certificate is not filed with the complaint, the complaint shall be dismissed as provided in subsection (3) of this section, absent a showing that the failure was due to the failure of the provider to timely provide copies of the claimant's records requested as provided in Section 3 of this Act or demonstrated extraordinary cause. The certificate of good faith shall state that the claimant or claimant's counsel has consulted with one (1) or more experts who have provided a signed written statement confirming that upon information and belief they:

- (a) Were made aware that their review of the medical records was in connection with a possible health care liability action;
- (b) Were licensed to practice medicine in the state or in a contiguous bordering state and have practiced in one (1) of those states during the year proceeding the date that the claimant's alleged injury occurred; and
- (c) 1. Believe, based on the information available from the medical records concerning the care and treatment of the claimant for the incident or incidents at issue, that there is a good-faith basis to maintain the action consistent with the requirements of Section 2 of this Act; or
 - 2. Believe, based on the information available from the medical records reviewed concerning the care and treatment of the claimant for the incident or incidents at issue and, as appropriate, information from the claimant or others with knowledge of the incident or incidents at issue, that there are facts material to the resolution of the case that cannot be reasonably ascertained from the medical records or information reasonably available to the claimant or claimant's counsel; and that, despite the absence of this information, there is a good-faith basis for maintaining the action as to each defendant

consistent with the requirements of Section 2 of this Act. Refusal of the defendant to release the medical records in a timely fashion, or if it is impossible for the claimant to obtain the medical records, shall waive the requirement that the expert review the medical record prior to expert certification.

(2) Within thirty (30) days after a defendant has alleged in an answer or amended answer that a nonparty is at fault for the injuries or death of the claimant and expert testimony is required to prove fault as required by Section 2 of this Act, each defendant or defendant's counsel shall file a certificate of good faith stating that the defendant or defendant's counsel has consulted with one (1) or more experts, which may include the defendant filing the certificate of good faith, who have provided a signed written statement confirming that upon information and belief they:

(a) Were made aware that their review of the medical records was in connection with a possible health care liability action;

(b) Were licensed to practice medicine in the state or in a contiguous bordering state and have practiced in one (1) of those states during the year proceeding the date that the claimant's alleged injury occurred; and

(c) 1. Believe, based on the information reviewed concerning the care and treatment of the claimant for the incident or incidents at issue, that there is a good-faith basis to allege fault against another consistent with the requirements of Section 2 of this Act; or

2. Believe, based on the information reviewed concerning the care and treatment of the claimant for the incident or incidents at issue, that there are facts material to the resolution of the case that cannot be reasonably ascertained from the information reasonably available to the defendant or defendant's counsel; and that, despite the absence of

this information, there is a good-faith basis for alleging fault against another, whether already a party to the action or not, consistent with the requirements of Section 2 of this Act.

(3) The failure of a claimant to file a certificate of good faith in compliance with this section shall, upon motion, make the action subject to dismissal with prejudice. The failure of a defendant to file a certificate of good faith in compliance with this section alleging the fault of a nonparty shall, upon motion, make the allegations subject to being stricken with prejudice unless the claimant consents to waive compliance with this section. If the allegations are stricken, no defendant, except for a defendant who complied with this section, can assert, and neither shall the judge nor jury consider, the fault, if any, of those identified by the allegations. The court may, upon motion, grant an extension within which to file a certificate of good faith if the court determines that a health care provider who has medical records relevant to the issues in the case has failed to timely produce medical records upon timely request, or for other good cause shown.

(4) (a) Subject only to paragraph (b) of this subsection, the written statement of an expert relied upon in executing the certificate of good faith is not discoverable in the course of litigation.

(b) If a party in a health care liability action subject to this section prevails on the basis of the failure of an opposing party to offer any competent expert testimony as required by Section 2 of this Act, the court may, upon motion, for good cause shown compel the opposing party or party's counsel to provide to the court a copy of each such expert's signed written statement relied upon in executing the certificate of good faith. The medical experts may be compelled for good cause shown to provide testimony under oath, as determined by the court, for the purposes of determining that party's compliance with subsection (1) or (2) of this section.

- (c) If the court, after a hearing, determines that this section has been violated, the court shall award appropriate sanctions against the attorney if the attorney was a signatory to the action and against the party if the party was proceeding pro se. The sanctions may include but are not limited to payment of some or all of the attorney's fees and costs incurred by a party in defending or responding to a claim or defense supported by the noncompliant certificate of good faith. If the signatory was an attorney, the court shall forward the order to the board of professional responsibility for appropriate action. Upon proof that a party or party's counsel has filed a certificate of good faith in violation of this section in three (3) or more cases in any court of record in this state, the court shall, upon motion, require the party or party's counsel to post a bond in the amount of ten thousand dollars (\$10,000) per adverse party in any future health care liability action to secure payment of sanctions for any violation of this section in the case.
- (d) A certificate of good faith shall disclose the number of prior violations of this section by the executing party.
- (e) The Administrative Office of the Courts shall develop a certificate of good faith form to effectuate the purposes of this section.

➔Section 5. KRS 304.40-250 is amended to read as follows:

It is the purpose of KRS 304.40-260 to 304.40-320 to promote the health and general welfare of the inhabitants of the Commonwealth through the adoption of reforms in health care liability actions~~[malpractice claims]~~. Such purpose is hereby declared to be a public purpose for which public funds may be expended.

➔Section 6. KRS 304.40-280 is amended to read as follows:

- (1) In any health care liability~~[malpractice]~~ action against any health care provider, no payment made or offered by or on behalf of the health care provider to the claimant to meet the reasonable expenses of health care, custodial care, loss of earnings,

rehabilitation care, or other essential goods or services, shall constitute or be evidence of an admission of liability on the part of such health care provider, and no such payment or offer shall be admissible in evidence in any such action, except after a verdict for the purpose of offsetting any damages awarded. The court shall reduce the amount of any judgment for damages awarded in such **health care liability**~~[malpractice]~~ action by the amount of any advance payment made by any defendant health care provider or malpractice insurer on behalf of such defendant health care provider to the claimant.

- (2) In any **health care liability**~~[malpractice]~~ action where there is more than one (1) defendant health care provider, and in the event an advance payment made by or on behalf of one (1) or more of said defendants exceeds the respective liability of said defendant making it, the court shall order any adjustment necessary to equate with its percentage liability the amount which said defendant is obligated to pay, exclusive of costs.
- (3) In no case shall an advance payment in excess of any award of damages be repayable by the claimant.

➔Section 7. KRS 304.40-290 is amended to read as follows:

In any **health care liability**~~[malpractice]~~ action in which more than one (1) health care provider is named as a defendant concerning a single injury, the jury shall be instructed that it may apportion damages in different percentages against the defendants or may return a verdict of joint and several liability against two (2) or more defendants.

➔Section 8. KRS 304.40-300 is amended to read as follows:

No **health care**~~[malpractice]~~ liability shall be imposed upon any health care provider on the basis of an alleged breach of any guaranty, warranty, contract or assurance of results to be obtained from any procedure undertaken in the course of providing health care, unless such guaranty, warranty, contract or assurance is in writing and signed by the provider.

→Section 9. KRS 304.40-310 is amended to read as follows:

- (1) All ~~malpractice~~ claims **in a health care liability action** settled or adjudicated to final judgment against a health care provider shall be reported to the commissioner of insurance by the malpractice insurer of the health care provider or the health care provider if self-insured, within sixty (60) days following final settlement or disposition of the claim. The report to the commissioner shall recite the following:
 - (a) Name and address of health care provider involved;
 - (b) Name and address of claimant;
 - (c) Nature of the claim;
 - (d) Damages asserted and alleged injury; and
 - (e) The amount of any settlement or judgment.
- (2) The commissioner of insurance shall forward the name of every health care provider against whom a settlement is made or judgment is rendered to the appropriate licensure board or regulatory agency for review of the fitness of the health care provider to practice his or her profession.
- (3)
 - (a) At any time before a jury is empanelled or before a trial is commenced by a court without a jury, no settlement or other compromise of any claim **in a health care liability action**~~for malpractice~~ shall be effective between a claimant and the fund unless the proposed settlement or other compromise shall have been approved by the commissioner.
 - (b) The commissioner shall prescribe by rule the procedure for submission of settlements or other compromises involving the fund.
 - (c) If the commissioner shall disapprove a proposed settlement or other compromise involving the fund, the claimant may thereafter pursue his or her interests in a court of appropriate jurisdiction and the action of the commissioner shall not be admissible upon any trial of the action.
 - (d) Notwithstanding the provisions of KRS 413.140, when an offer to

compromise or settle has been filed with the commissioner, the statute of limitations made and provided for the commencement of a health care liability ~~an~~ action ~~for malpractice~~ shall not bar any such action until ninety (90) days after notice to the parties of the commissioner's disapproval of any proposed settlement or other compromise.