House Bill 571

By: Representatives Lindsey of the 54th, Willard of the 49th, Smith of the 129th, Chambers of the 81st, Ralston of the 7th, and others

A BILL TO BE ENTITLED

AN ACT

To amend Title 9 of the Official Code of Georgia Annotated, relating to civil practice, so as to provide substantial new procedures relating to the determination of medical malpractice actions; to impose an obligation of presuit investigation on the parties and provide for certain discovery and practice and procedure in connection therewith; to authorize presuit investigation of claims by the courts; to provide for notices prior to filing of actions and discovery and practice and procedure in connection therewith, including an obligation of evaluation by the defendant; to authorize voluntary binding arbitration and provide for the effects of arbitration and refusal to arbitrate; to provide for effects of the foregoing and the parties´ actions in connection with the foregoing on the substantive rights of the parties; to provide for other matters related to, incidental to, and arising out of the foregoing; to provide for an effective date and applicability; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

Title 9 of the Official Code of Georgia Annotated, relating to civil practice, is amended by adding at its end a new Chapter 16 to read as follows:

″CHAPTER 16

9-16-1.

(1) 'Claimant' means any person who has a cause of action for damages based on personal injury or wrongful death arising from medical negligence.

(2) 'Health care provider' means any hospital, ambulatory surgical center, birthing center, or mobile surgical facility as defined and licensed under Chapter 7 of Title 31; any person licensed under Chapter 9, 10A, 11, 11A, 26, 28, 30, 33, 34, 35, 39, or 44 of Title 43; a clinical lab licensed under Chapter 22 of Title 31; a health maintenance organization licensed under Chapter 21 of Title 33; a blood bank; a plasma center; an industrial clinic;

a renal dialysis facility; or a professional association, partnership, corporation, joint venture, or other association for professional activity by health care providers.

(3) 'Investigation' means that an attorney has reviewed the case against each and every potential defendant and has consulted with a medical expert and has obtained a written opinion from said expert.

(4) 'Medical expert' means a person duly and regularly engaged in the practice of his or her profession who holds a health care professional degree from a university or college and who meets the requirements of an expert witness under Georgia law.

(5) 'Medical negligence' means medical malpractice, whether grounded in tort or in contract.

(6) 'Practitioner' means any person licensed under Chapter 34 of Title 43. The term also means any association, corporation, firm, partnership, or other business entity under which such practitioner practices or any employee of such practitioner or entity acting in the scope of his or her employment.

9-16-2.

(a) Presuit investigation of medical negligence claims and defenses pursuant to this chapter shall apply to all medical negligence claims and defenses.

(b) Prior to issuing notification of intent to initiate medical negligence litigation pursuant to this chapter, the claimant shall conduct an investigation to ascertain that there are reasonable grounds to believe that:

(1) Any named defendant in the litigation was negligent in the care or treatment of the claimant; and

(2) Such negligence resulted in injury to the claimant.

Corroboration of reasonable grounds to initiate medical negligence litigation shall be provided by the claimant´s submission of a verified written medical expert opinion from a medical expert at the time the notice of intent to initiate litigation is mailed, which statement shall corroborate reasonable grounds to support the claim of medical negligence.

(c) Prior to issuing its response to the claimant´s notice of intent to initiate litigation and during the time period for response authorized pursuant to this chapter, the prospective defendant or the defendant´s insurer or self-insurer shall conduct an investigation to ascertain whether there are reasonable grounds to believe that:

(1) The defendant was negligent in the care or treatment of the claimant; and

(2) Such negligence resulted in injury to the claimant.

Corroboration of lack of reasonable grounds for medical negligence litigation shall be provided with any response rejecting the claim by the defendant´s submission of a verified written medical expert opinion from a medical expert at the time the response rejecting the

claim is mailed, which statement shall corroborate reasonable grounds for lack of negligent injury sufficient to support the response denying negligent injury.

(d) The medical expert opinions required by this Code section are subject to discovery. The opinions shall specify whether any previous opinion by the same medical expert has been disqualified and, if so, the name of the court and the case number in which the ruling was issued.

9-16-3.

(a) Copies of any medical record relevant to any litigation of a medical negligence claim or defense shall be provided to a claimant or a defendant, or to the attorney thereof, at a reasonable charge within ten business days of a request for copies. It shall not be grounds to refuse copies of such medical records that they are not yet completed or that a medical bill is still owing.

(b) Failure to provide copies of such medical records, or failure to make the charge for copies a reasonable charge, shall constitute evidence of failure by that party to comply with good faith discovery requirements and shall waive the requirement of written medical corroboration by the requesting party.

(c) A hospital shall not be held liable for any civil damages as a result of complying with this Code section.

9-16-4.

(a) Upon the completion of presuit investigation pursuant to this chapter, which investigation has resulted in the mailing of a notice of intent to initiate litigation in accordance with this chapter, corroborated by medical expert opinion that there exist reasonable grounds for a claim of negligent injury, each party shall provide to the other party reasonable access to information within its possession or control in order to facilitate evaluation of the claim.

(b) Such access shall be provided without formal discovery subject to subsection (f) of Code Section 9-16-5, and failure to so provide shall be grounds for dismissal of any applicable claim or defense ultimately asserted.

(c) Failure of any party to comply with this Code section shall constitute evidence of failure of that party to comply with good faith discovery requirements and shall waive the requirement of written medical corroboration by the party seeking production.

(d) No statement, discussion, written document, report, or other work product generated solely by the presuit investigation process is discoverable or admissible in any civil action for any purpose by the opposing party. All participants, including, but not limited to, hospitals and other medical facilities, and the officers, directors, trustees, employees, and

agents thereof, physicians, investigators, witnesses, and employees or associates of the defendant, are immune from civil liability arising from participation in the presuit investigation process. Such immunity from civil liability includes immunity for any acts by a medical facility in connection with providing medical records pursuant to this chapter regardless of whether the medical facility is or is not a defendant.

9-16-5.

(a) As used in this Code section, the term 'claim for medical negligence' or 'claim for medical malpractice' means a claim arising out of the rendering of, or the failure to render, medical care or services.

(b)(1) After completion of presuit investigation pursuant to this chapter and prior to filing a complaint for medical negligence, a claimant shall notify each prospective defendant by certified mail or statutory overnight delivery, return receipt requested, of intent to initiate litigation for medical negligence. Notice to each prospective defendant must include, if available, a list of all known health care providers seen by the claimant for the injuries complained of subsequent to the alleged act of negligence, all known health care providers who treated or evaluated the claimant during the two-year period prior to the alleged act of negligence, and copies of all of the medical records relied upon by the expert in signing the affidavit. The requirement of providing the list of known health care providers may not serve as grounds for imposing sanctions for failure to provide presuit discovery.

(2) Following the initiation of a suit alleging medical negligence with a court of competent jurisdiction and service of the complaint upon a defendant, the claimant shall provide a copy of the complaint to the Composite State Board of Medical Examiners or other appropriate regulatory agency. The requirement of providing the complaint to the Composite State Board of Medical Examiners or regulatory agency does not impair the claimant´s legal rights or ability to seek relief for his or her claim. The Composite State Board of Medical Examiners or regulatory agency shall review each incident that is the subject of the complaint and determine whether it involved conduct by a licensee which is potentially subject to disciplinary action.

(c)(1) No suit may be filed for a period of 90 days after notice is mailed to any prospective defendant. During the 90 day period, the prospective defendant or the defendant´s insurer or self-insurer shall conduct a review as provided in this chapter to determine the liability of the defendant. Each insurer or self-insurer shall have a procedure for the prompt investigation, review, and evaluation of claims during the 90 day period. This procedure shall include one or more of the following:

(A) An internal review by a duly qualified claims adjuster;

(B) Creation of a panel comprised of an attorney knowledgeable in the prosecution or defense of medical negligence actions, a health care provider trained in the same or similar medical specialty as the prospective defendant, and a duly qualified claims adjuster;

(C) A contractual agreement with a state or local professional society of health care providers that maintains a medical review committee; or

(D) Any other similar procedure which fairly and promptly evaluates the pending claim.

Each insurer or self-insurer shall investigate the claim in good faith, and both the claimant and prospective defendant shall cooperate with the insurer in good faith. If the insurer requires, a claimant shall appear before a pretrial screening panel or before a medical review committee and shall submit to a physical examination, if required. Unreasonable failure of any party to comply with this subsection justifies dismissal of claims or defenses. There shall be no civil liability for participation in a pretrial screening procedure if done without intentional fraud.

(2) At or before the end of the 90 days, the prospective defendant or the prospective defendant´s insurer or self-insurer shall provide the claimant with a response:

(A) Rejecting the claim;

(B) Making a settlement offer; or

(C) Making an offer to arbitrate in which liability is deemed admitted and arbitration will be held only on the issue of damages. This offer may be made contingent upon a limit of general damages.

(3) The response shall be delivered to the claimant if not represented by counsel or to the claimant´s attorney, by certified mail or statutory overnight delivery, return receipt requested. Failure of the prospective defendant or insurer or self-insurer to reply to the notice within 90 days after receipt shall be deemed a final rejection of the claim for purposes of this Code section.

(4) Within 30 days of receipt of a response by a prospective defendant, insurer, or self-insurer to a claimant represented by an attorney, the attorney shall advise the claimant in writing of the response, including:

(A) The exact nature of the response under paragraph (2) of subsection (c) of this Code section;

(B) The exact terms of any settlement offer, or admission of liability and offer of arbitration on damages;

(C) The legal and financial consequences of acceptance or rejection of any settlement offer or admission of liability, including the provisions of this Code section;

(D) An evaluation of the time and likelihood of ultimate success at trial on the merits of the claimant´s action; and

(E) An estimation of the costs and attorney´s fees of proceeding through trial.

(d) A notice of intent to initiate litigation shall be served within the period of limitations applicable to the underlying cause of action. During the 90 day period for response to a notice of intent to initiate litigation, the applicable statute of limitations is tolled as to all potential defendants. Upon stipulation by the parties, the 90 day period may be extended and the statute of limitations is tolled during any such extension. Upon receiving notice of termination of negotiations in an extended period, the claimant shall have 60 days or the remainder of the period of the applicable period of limitation, whichever is greater, within which to file suit.

(e) No statement, discussion, written document, report, or other work product generated by the presuit screening process is discoverable or admissible in any civil action for any purpose by the opposing party. All participants, including, but not limited to, physicians, investigators, witnesses, and employees or associates of the defendant, are immune from civil liability arising from participation in the presuit screening process.

(f)(1) Upon receipt by a prospective defendant of a notice of intent to initiate litigation, the parties shall make discoverable information available without formal discovery. Failure to do so is grounds for dismissal of claims or defenses ultimately asserted.

(2) During the period for response to a notice of intent to initiate litigation, informal discovery may be used by a party to obtain unsworn statements, the production of documents or things, and physical and mental examinations, as follows:

(A) Any party may require other parties to appear for the taking of an unsworn statement. Such statements may be used only for the purpose of presuit screening and are not discoverable or admissible in any civil action for any purpose by any party. A party desiring to take the unsworn statement of any party must give reasonable notice in writing to all parties. The notice must state the time and place for taking the statement and the name and address of the party to be examined. Unless otherwise impractical, the examination of any party must be done at the same time by all other parties. Any party may be represented by counsel at the taking of an unsworn statement. An unsworn statement may be recorded electronically, stenographically, or on videotape. The taking of unsworn statements may be terminated for abuses;

(B) Any party may request discovery of documents or things. The documents or things must be produced, at the expense of the requesting party, within 20 days after the date of receipt of the request. A party is required to produce discoverable documents or things within that party´s possession or control;

(C) A prospective defendant may require an injured claimant to appear for examination by an appropriate health care provider. The prospective defendant shall give reasonable notice in writing to all parties as to the time and place for examination. Unless otherwise impractical, a claimant is required to submit to only one examination on behalf of all potential defendants. The practicality of a single examination must be determined by the nature of the claimant´s condition, as it relates to the liability of each prospective defendant. Such examination report is available to the parties and their attorneys upon payment of the reasonable cost of reproduction and may be used only for the purpose of presuit screening. Otherwise, such examination report is confidential and exempt from any discovery or disclosure;

(D) Any party may request answers to written questions, the number of which may not exceed 30, including subparts. A response must be made within 30 days after receipt of the questions; and

(E) Together with the notice of intent to initiate litigation, a claimant must execute a medical information release that allows a prospective defendant or his or her legal representative to take unsworn statements of the claimant´s treating physicians. The statements must be limited to those areas that are potentially relevant to the claim of personal injury or wrongful death. Reasonable notice and opportunity to be heard must be given to the claimant or the claimant´s legal representative. The claimant or claimant´s legal representative has the right to attend the taking of such unsworn statements.

(3) Each request for and notice concerning informal presuit discovery pursuant to this section must be in writing, and a copy thereof must be sent to all parties. Such a request or notice must bear a certificate of service identifying the name and address of the person to whom the request or notice is served, the date of the request or notice, and the manner of service thereof.

(4) Copies of any documents produced in response to the request of any party must be served upon all other parties. The party serving the documents or his or her attorney shall identify, in a notice accompanying the documents, the name and address of the parties to whom the documents were served, the date of service, the manner of service, and the identity of the document served.

(g) Failure to cooperate on the part of any party during the presuit investigation may be grounds to strike any claim made, or defense raised, by such party in suit.

9-16-6.

(a) After the completion of presuit investigation by the parties pursuant to this chapter and any discovery pursuant to Code Sections 9-16-3 and 9-16-4, any party may file a motion

in the circuit court requesting the court to determine whether the opposing party´s claim or denial rests on a reasonable basis.

(b) If the court finds that the notice of intent to initiate litigation mailed by the claimant is not in compliance with the reasonable investigation requirements of this chapter, including a review of the claim and verified written medical expert opinion by an expert witness, the court shall dismiss the claim, and the person who mailed such notice of intent, whether the claimant or the claimant´s attorney, shall be personally liable for all attorney´s fees and costs incurred during the investigation and evaluation of the claim, including the reasonable attorney´s fees and costs of the defendant or the defendant´s insurer.

(c) If the court finds that the response mailed by a defendant rejecting the claim is not in compliance with the reasonable investigation requirements of this chapter, including a review of the claim and verified written medical expert opinion by an expert witness, the court shall strike the defendant´s pleading. The person who mailed such response, whether the defendant, the defendant´s insurer, or the defendant´s attorney, shall be personally liable for all attorney´s fees and costs incurred during the investigation and evaluation of the claim, including the reasonable attorney´s fees and costs of the claimant.

(d) If the court finds that an attorney for the claimant mailed notice of intent to initiate litigation without reasonable investigation, or filed a medical negligence claim without first mailing such notice of intent which complies with the reasonable investigation requirements, or if the court finds that an attorney for a defendant mailed a response rejecting the claim without reasonable investigation, the court shall submit its finding in the matter to State Bar of Georgia for disciplinary review of the attorney.

(e)(1) If the court finds that the corroborating written medical expert opinion attached to any notice of claim or intent or to any response rejecting a claim lacked reasonable investigation or that the medical expert submitting the opinion was not qualified as an expert witness, the court shall report the medical expert issuing such corroborating opinion to the Composite State Board of Medical Examiners or other appropriate regulatory agency. If such medical expert is not a resident of the state, the division shall forward such report to the appropriate out-of-state licensing authority or regulatory agency.

(2) The court shall refuse to consider the testimony or opinion attached to any notice of intent or to any response rejecting a claim of an expert who has been disqualified three times pursuant to this subsection.

9-16-7.

(a) Upon the completion of presuit investigation with preliminary reasonable grounds for a medical negligence claim intact, the parties may elect to have damages determined by an

arbitration panel. Such election may be initiated by either party by serving a request for voluntary binding arbitration of damages within 90 days after service of the claimant´s notice of intent to initiate litigation upon the defendant.

(b) Upon receipt of a party´s request for such arbitration, the opposing party may accept the offer of voluntary binding arbitration within 30 days. However, in no event shall the defendant be required to respond to the request for arbitration sooner than 90 days after service of the notice of intent to initiate litigation. Such acceptance within the time period provided by this subsection shall be a binding commitment to comply with the decision of the arbitration panel. The liability of any insurer shall be subject to any applicable insurance policy limits.

(c) The arbitration shall be conducted in accordance with Article 2 of Chapter 9 of Title 9 or as otherwise agreed to between the parties.

(d) Arbitration pursuant to this Code section shall preclude recourse to any other remedy by the claimant against any participating defendant, and shall be undertaken with the understanding that damages shall be awarded as provided by general law.

(e) Each defendant who submits to arbitration under this Code section shall be liable for damages assessed pursuant to Georgia law.

(f) The fact of making or accepting an offer to arbitrate shall not be admissible as evidence of liability in any collateral or subsequent proceeding on the claim.

(g) A defendant´s or claimant´s offer to arbitrate shall not be used in evidence or in argument during any subsequent litigation of the claim following the rejection thereof.

(h) Any offer by a claimant to arbitrate must be made to each defendant against whom the claimant has made a claim. Any offer by a defendant to arbitrate must be made to each claimant who has joined in a notice of intent to initiate litigation.

(i) The provisions of this Code section shall not preclude settlement at any time by mutual agreement of the parties.

(j) Any issue between the defendant and the defendant´s insurer or self-insurer as to who shall control the defense of the claim and any responsibility for payment of an arbitration award shall be determined under existing principles of law; provided, however, that the insurer or self-insurer´s offer to arbitrate or acceptance of claimant´s offer to arbitrate shall also act as an offer by the insurer or self-insurer to its insured or self-insured to arbitrate all issues of coverage. An insurer or self-insurer shall have the written consent of the defendant before offering to arbitrate or accepting plaintiff´s offer to arbitrate.

(k) A proceeding for voluntary binding arbitration is an alternative to jury trial and shall not supersede the right of any party to a jury trial.

(l) If neither party requests or agrees to voluntary binding arbitration, the claim shall proceed to trial.

(m) If the defendant refuses a claimant´s offer of voluntary binding arbitration:

(1) The claim shall proceed to trial, and the claimant, upon proving medical negligence, shall be entitled to recover damages as provided by law against all codefendants;

(2) The claimant´s award at trial shall be reduced by any damages recovered by the claimant from arbitrating codefendants following arbitration; and

(3) If the claimant shall prevail at trial, he or she shall upon motion to the court be entitled to recover all litigation expenses, excluding attorney´s fees unless otherwise provided by law, associated with the bringing of the action against the defendant.

(n) If the claimant rejects a defendant´s offer to enter voluntary binding arbitration:

(1) The damages awardable at trial shall be in accordance with Georgia law;

(2) If any defendant shall prevail at trial, he or she shall upon motion to the court be entitled to recover all litigation expenses, excluding attorney´s fees unless otherwise provided by law, associated with the defending of the action against the claimant.″

SECTION 2.

This Act shall become effective on January 1, 2006, and shall apply with respect to actions filed on or after that date.

SECTION 3.

All laws and parts of laws in conflict with this Act are repealed.