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H.427

Introduced by Representative Galfetti of Barre Town

Referred to Committee on

Date:

Subject: Court procedure; medical malpractice actions

Statement of purpose of bill as introduced: This bill proposes to establish limits on the amount of damages recoverable in medical malpractice actions and to establish pretrial screening panels for medical malpractice claims.

An act relating to medical malpractice actions

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. 12 V.S.A. § 1914 is added to read:

§ 1914. MEDICAL MALPRACTICE; LIMITATIONS ON DAMAGES

(a) The damages awarded for pain and suffering or other noneconomic loss in an action based on medical malpractice shall not exceed the amount of:

(1) \$250,000.00 per claimant if the defendant is a natural person; and

(2) \$500,000.00 per claimant and \$250,000.00 per defendant if the defendant is not a natural person.

(b) The damages awarded for wrongful death in an action based on medical malpractice shall not exceed the amount of \$500,000.00 per claimant.

1 (c) The amount of punitive damages awarded shall not exceed \$200,000.00
2 or twice the total of economic and noneconomic losses, whichever is greater.

3 Sec. 2. 12 V.S.A. chapter 223 is added to read:

4 CHAPTER 223. SCREENING PANELS FOR
5 MEDICAL INJURY CLAIMS

6 § 7401. FINDINGS, PURPOSE, AND INTENT

7 (a) Availability and affordability of insurance against liability for medical
8 injury is essential for the protection of patients as well as ensuring availability
9 of and access to essential medical and hospital care. This chapter affirms the
10 intent of the General Assembly to contain the costs of the medical injury
11 reparations system and to promote availability and affordability of insurance
12 against liability for medical injury. Claims for medical injury should be
13 resolved as early and inexpensively as possible to contain system costs.
14 Claims that are resolved before court determination cost less to resolve than
15 claims that must be resolved by a court. Meritorious claims should be
16 identified as quickly as possible, as should nonmeritorious claims. Defendants
17 should consider paying or compromising on meritorious claims, and plaintiffs
18 should consider withdrawing or compromising on nonmeritorious claims, as
19 soon as the merits of the claims are known to the parties. Presentation of
20 claims to a medical review panel is intended to help identify both meritorious
21 and nonmeritorious claims without the delay and expense of a court trial. It is

1 essential to the effectiveness of the panel process that panel proceedings be
2 confidential unless and until a matter heard by a panel proceeds to trial. It is
3 equally essential to the effectiveness of the panel process that a panel's
4 unanimous findings be presented to the jury in any matter that is not resolved
5 prior to trial. The panel process will encourage the prompt resolution of claims
6 because both sides will be given an objective view of the merits. If the panel
7 finds that a claim has merit, the defendant will be more likely to pay the claim
8 or negotiate a compromise that is favorable to the claimant. If the panel finds
9 that the claim lacks merit, the claimant is more likely to withdraw the claim or
10 accept a nominal settlement.

11 (b) The purposes of pretrial screening panels are:

12 (1) to identify claims of professional negligence that merit compensation
13 and to encourage early resolution of those claims prior to commencement of a
14 lawsuit; and

15 (2) to identify claims of professional negligence and to encourage early
16 withdrawal or dismissal of nonmeritorious claims.

17 § 7402. DEFINITIONS

18 As used in this chapter:

19 (1) "Action for medical injury" means any action against a medical care
20 provider, whether based in tort, contract, or otherwise, to recover damages on
21 account of medical injury.

1 (2) “Medical care provider” means a physician, physician assistant,
2 registered or licensed practical nurse, hospital, clinic, or other health care
3 agency licensed by the State or otherwise lawfully providing medical care or
4 services, or an officer, employee, or agent thereof acting in the course and
5 scope of employment.

6 (3) “Medical injury” or “injury” means any adverse, untoward, or
7 undesired consequences arising out of or sustained in the course of
8 professional services rendered by a medical care provider, whether resulting
9 from negligence, error, or omission in the performance of such services; from
10 rendition of such services without informed consent or in breach of warranty or
11 in violation of contract; from failure to diagnose; from premature abandonment
12 of a patient or of a course of treatment; from failure properly to maintain
13 equipment or appliances necessary to the rendition of such services; or
14 otherwise arising out of or sustained in the course of such services.

15 § 7403. FORMATION AND PROCEDURE

16 (a) The Supreme Court shall maintain a list of retired judges, persons with
17 judicial experience, and other qualified persons to serve on screening panels
18 under this chapter from which the Chief Justice shall choose a panel chair
19 under subsection (b) of this section. The Court shall maintain lists of health
20 care practitioners and attorneys with litigation experience, recommended by
21 their respective professional organizations to serve on screening panels under

1 this chapter. As directed by the Court, the professional organization of each
2 profession shall inform the Court of the names of volunteers to serve on
3 panels.

4 (b) Screening panel members shall be selected as follows:

5 (1) Upon the entry of a medical injury case, the clerk of the Superior
6 Court in which the medical injury case is filed shall notify the Chief Justice of
7 the Supreme Court.

8 (2) Within 14 days following the return date, the Chief Justice shall
9 choose a retired judge, a person with judicial experience, or other qualified
10 person from the list maintained by the Court to serve as chair of the panel to
11 screen the claim. If at any time the Chair chosen under this subsection is
12 unable or unwilling to serve, the Chief Justice shall appoint a replacement
13 following the procedure in this subsection for the initial appointment of the
14 Chair. Persons other than retired judges or those with judicial experience may
15 be appointed as chair based on appropriate trial experience. If the Chief
16 Justice appoints as chair a person who is not a retired judge or who does not
17 have judicial experience, each side may make one challenge to the
18 appointment.

19 (3) The Chief Justice shall notify the clerk of the name of the person
20 designated to serve as chair and shall provide the clerk with the lists of health
21 care practitioners, health care providers, and attorneys maintained under this

1 section. Upon notification of the Chief Justice's choice of chair, the clerk shall
2 notify the Chair and the parties, and provide them with the lists of health care
3 practitioners, health care providers, and attorneys. The Chair shall choose two
4 or three additional panel members from the lists as follows:

5 (A) One attorney.

6 (B) One health care practitioner. If possible, the Chair shall choose a
7 practitioner who practices in the same specialty or profession as the person or
8 entity accused of professional negligence.

9 (C) Where the claim involves more than one person accused of
10 professional negligence, the Chair may choose a fourth panel member who is a
11 health care practitioner. If possible, the Chair shall choose a practitioner or
12 provider in the specialty or profession of a person accused.

13 (D) When agreed upon by all the parties, the list of available panel
14 members may be enlarged in order to select a panel member who is agreed to
15 by the parties but who is not on the Court's list.

16 (4) The screening panel process is not intended to delay or postpone the
17 trial of a medical injury case. The Superior Court may establish a trial date
18 and all interim deadlines as it would in any other case.

19 (5) The Supreme Court shall establish the compensation of the panel
20 Chair if the Chair is not otherwise compensated by the State. Other panel
21 members shall serve without compensation or payment of expenses.

1 (6) The clerk of the Superior Court in the unit in which a medical injury
2 case is filed shall, with the consent of the Supreme Court, provide clerical and
3 other assistance to the panel Chair.

4 (7) Only challenges for cause shall be allowed. If a panel member other
5 than the Chair is challenged for cause, the party challenging the member shall
6 notify the panel Chair. If the panel Chair finds cause for the challenge, the
7 Chair shall replace the panel member. If the Chair is challenged for cause, the
8 party challenging the Chair shall notify the Chief Justice, who shall replace the
9 Chair upon a finding of cause.

10 (8) The panel, through the Chair, shall have the same subpoena power as
11 exists for a Superior Judge. The Chair shall have sole authority, without
12 requiring the agreement of other panel members, to issue subpoenas.

13 (9) The Vermont Rules of Civil Procedure shall govern discovery
14 conducted under this chapter. The parties shall attempt in good faith to resolve
15 discovery issues themselves. The Chair shall rule on disputes regarding
16 discovery. Any person aggrieved by a Chair's ruling regarding discovery may
17 appeal to the Civil Division of the Superior Court, which shall defer to the
18 Chair's factual findings unless they are clearly erroneous.

19 § 7404. PANEL PROCEDURES

20 (a) All documents filed with the Court in a medical injury action that are
21 part of the screening process are confidential.

1 (b) Within 20 days after the return date, the person or persons accused shall
2 contact the claimant’s counsel and by agreement shall designate a timetable for
3 filing all the relevant medical and provider records necessary to a
4 determination by the panel. If the parties are unable to agree on a timetable
5 within 60 days after the return date, the claimant shall notify the Chair of the
6 panel. The Chair shall then establish a timetable for the filing of all relevant
7 records and reasonable discovery, which shall be filed at least 30 days before
8 any hearing date. The hearing shall be not later than six months from the
9 return date, except when the time period has been extended by the panel Chair
10 in accordance with this chapter.

11 (c) The pretrial screening may be bypassed if all parties agree upon a
12 resolution of the claim by trial.

13 (d) All parties to a claim may, by written agreement, submit a claim to the
14 binding determination of the panel. Both parties may agree to bypass the panel
15 for any reason or may request that certain preliminary legal affirmative
16 defenses or issues be litigated prior to submission of the case to the panel. The
17 panel shall have no jurisdiction to hear or decide, absent agreement of the
18 parties, dispositive legal affirmative defenses, other than comparative
19 negligence. The panel Chair may require the parties to litigate, by motion,
20 dispositive legal affirmative defenses in the Civil Division of the Superior
21 Court prior to submission of the case to the panel. Any such defense, as well

1 as any motion relating to discovery that the panel Chair has chosen not to rule
2 on, may be presented by motion to the Court.

3 (e) Except as otherwise provided in this section, there shall be one
4 combined hearing for all claims under this section arising out of the same set
5 of facts. When a medical injury case has been filed against more than one
6 person accused of medical injury based on the same facts, the parties may,
7 upon agreement of all parties, require that hearings be separated. The Chair
8 may, for good cause, order separate hearings.

9 (f) All requests for extensions of time under this section shall be made to
10 the panel Chair. The Chair may extend any time period for good cause, except
11 that the Chair may not extend any time period that would result in the hearing
12 being held more than 11 months following the return date, unless good cause is
13 shown.

14 (g)(1)(A) On failure of the plaintiff to prosecute or to comply with rules or
15 any order of the Chair or if the plaintiff fails to attend a properly scheduled
16 hearing, and on motion by the Chair or any party, after notice to all parties has
17 been given and the party against whom sanctions are proposed has had the
18 opportunity to be heard and show good cause, the Chair may order appropriate
19 sanctions, which may include dismissal of the case. If any sanctions are
20 imposed, the Chair shall state the sanctions in writing and include the grounds
21 for the sanctions.

1 (B) Unless the Chair or the panel in an order for dismissal specifies
2 otherwise, a dismissal under this subdivision (1) is with prejudice for purposes
3 of proceedings before the panel. A dismissal with prejudice is the equivalent
4 of a finding for the defendant on all issues before the panel.

5 (2)(A) On failure of a defendant to comply with the rules or any order of
6 the Chair, or if a defendant fails to attend a properly scheduled hearing, and on
7 motion by the Chair or any party, after notice to all parties has been given and
8 the party against whom sanctions are proposed has had the opportunity to be
9 heard and show good cause, the Chair may order appropriate sanctions, which
10 may include default. If any sanctions are imposed, the Chair shall state the
11 sanctions in writing and include the grounds for the sanctions.

12 (B) Unless the Chair or the panel in its order for default specifies
13 otherwise, a default under this subdivision (2) is the equivalent of a finding
14 against the defendant on all issues before the panel.

15 (3) Any person aggrieved by a Chair's ruling regarding sanctions may
16 appeal to the Superior Court, which shall defer to the Chair's factual findings
17 unless they are clearly erroneous.

18 § 7405. HEARING

19 (a)(1) The claimant or a representative of the claimant shall present the
20 case before the panel. The person accused of professional negligence or that
21 person's representative shall make a responding presentation. The panel shall

1 afford the parties wide latitude in the conduct of the hearing including, but not
2 limited to, the right of examination and cross-examination by attorneys.

3 Depositions are admissible whether or not the person deposed is available at
4 the hearing. The Chair shall make all procedural rulings, which shall be final.
5 The Vermont Rules of Evidence shall not apply. Evidence shall be admitted if
6 it is the kind of evidence upon which reasonable persons are accustomed to
7 rely in the conduct of their affairs. The panel shall make findings upon
8 evidence presented at the hearing, the records, and any expert opinions
9 provided by or sought by the panel or the parties.

10 (2) After presentation by the parties, the panel may request additional
11 facts, records, or other information from either party to be submitted in writing
12 or at a continued hearing, which continued hearing shall be held as soon as
13 possible. The continued hearing shall be attended by the same members of the
14 panel who have sat on all prior hearings in the same claim, unless otherwise
15 agreed by all parties. Replacement panel members shall be appointed pursuant
16 to this chapter.

17 (b) The panel shall maintain an electronically recorded record. Except as
18 provided in section 7408 of this title, the record shall not be made public, and
19 the hearings shall not be public without the consent of all parties.

20 (c) The Chair of the panel shall attempt to mediate any differences of the
21 parties before proceeding to findings.

1 § 7406. FINDINGS BY PANEL

2 (a) At the conclusion of the presentations, the panel shall make its findings
3 regarding negligence and causation in writing within 30 days by answering the
4 following questions:

5 (1) whether the acts or omissions complained of constitute a deviation
6 from the applicable standard of care by the medical care provider charged with
7 that care;

8 (2) whether the acts or omissions complained of proximately caused the
9 injury complained of; and

10 (3) if fault on the part of the medical care provider is found, whether any
11 fault on the part of the patient was equal to or greater than the fault on the part
12 of the provider.

13 (b) The standard of proof used by the panel shall be as follows:

14 (1) The plaintiff shall prove negligence and proximate causation by a
15 preponderance of the evidence.

16 (2) The defendant shall prove comparative negligence by a
17 preponderance of the evidence.

18 § 7407. NOTIFICATION OF FINDINGS

19 The panel's findings, signed by the panel members, indicating their vote,
20 shall be sent by registered or certified mail to the parties within seven days
21 following the date of the findings. The findings and record of the hearing shall

1 be preserved until 30 days after final judgment or final resolution of the case,
2 after which time they shall be destroyed. All medical and provider records
3 shall be returned to the party providing them to the panel.

4 § 7408. CONFIDENTIALITY AND ADMISSIBILITY

5 (a) Except as provided in this section, all proceedings before the panel,
6 including its final determinations, shall be treated as private and confidential
7 by the panel and the parties to the claim.

8 (1) The findings and other writings of the panel and any evidence and
9 statements made by a party or a party's representative during a panel hearing
10 are not admissible in Court, shall not be submitted or used for any purpose in a
11 subsequent trial, and shall not be publicly disclosed, except as follows:

12 (A) Any testimony or writings made under oath may be used in
13 subsequent proceedings for purposes of impeachment.

14 (B) The party who made a statement or presented evidence may
15 agree to the submission, use, or disclosure of that statement or evidence.

16 (2) If the panel findings as to both the questions under subdivisions
17 7406(a)(1) and (2) of this title are unanimous and unfavorable to the defendant,
18 the findings are admissible in any subsequent trial of the medical injury case.

19 (3) If the panel findings as to any question under subsection 7406(a) of
20 this title are unanimous and unfavorable to the plaintiff, the findings are
21 admissible in any subsequent trial of the medical injury case.

1 (b) The confidentiality provisions of this section shall not apply if the
2 findings were influenced by fraud.

3 (c) The deliberations and discussion of the panel and the testimony of any
4 expert, whether called by a party or the panel, shall be privileged and
5 confidential, and no such person may be asked or compelled to testify at a later
6 court proceeding concerning the deliberations, discussions, findings, or expert
7 testimony or opinions expressed during the panel hearing, unless by the party
8 who called and presented the nonparty expert, except such deliberation,
9 discussion, and testimony as may be required to prove an allegation of fraud.

10 § 7409. MANDATORY INSTRUCTIONS

11 (a) When panel findings are offered and admitted into evidence in a
12 subsequent court action in accordance with section 7408 of this title, the Court
13 shall provide the following information to the jury to provide a basis for the
14 jury to understand the nature of the panel findings and to put the panel findings
15 in context in evaluating all of the evidence presented at the trial:

16 (1) The panel process is a preliminary procedural step through which
17 malpractice claims proceed.

18 (2) The panel in this case consisted of (insert the name and identity of
19 the members).

20 (3) The panel conducts a summary hearing and is not bound by the rules
21 of evidence.

1 (4) The hearing is not a substitute for a full trial and may or may not
2 have included all of the evidence that is presented at the trial.

3 (5) The jury is not bound by the findings of the panel, and it is the
4 jurors' duty to reach their own conclusions based on all of the evidence
5 presented to them.

6 (6) The panel proceedings are privileged and confidential.
7 Consequently, the parties shall not introduce panel documents or present
8 witnesses to testify about the panel proceedings, and they shall not comment
9 on the panel findings or proceedings except as provided in subdivisions (1)
10 through (5) of this subsection.

11 (b) The information specified in subsection (a) of this section shall be
12 provided to the jury when the findings are admitted into evidence and when the
13 Court instructs the jury prior to submitting the case to the jury.

14 § 7410. EFFECT OF PANEL FINDINGS

15 Unanimous findings entered by the panel under subsection 7606(a) of this
16 title shall be implemented as follows:

17 (1) If findings are in the plaintiff's favor, the defendant shall promptly
18 enter into negotiations to pay the claim or admit liability. If liability is
19 admitted, the claim may be submitted to the panel, upon agreement of the
20 parties, for determination of damages. If the claim goes to a trial, the findings
21 of the panel are admissible as provided in subdivision 7408(a)(2) of this title.

1 (2) If the findings are in the defendant’s favor, the plaintiff shall release
2 the claim or claims based on the findings, without payment, or be subject to the
3 admissibility of those findings under subdivision 7408(a)(3) of this title.

4 § 7411. REPORTS

5 (a) The Court Administrator shall collect data on medical injury claims and
6 submit a report on the screening panel process to the House and Senate
7 Committees on Judiciary and to the Commissioner of the Department of
8 Financial Regulation on or before September 30 of each year.

9 (b) The report required by this section shall include the number of medical
10 injury cases filed, pending, and resolved; the number of panel hearings; and the
11 number of panel hearing days during the fiscal year ending on the June 30
12 preceding the report date.

13 (c) The report required by this section shall include, for medical injury
14 cases resolved during the fiscal year:

15 (1) The mean and median lengths of time from initial filing to final
16 resolution.

17 (2) The number and average settlement amount of cases that were
18 resolved prior to the panel hearing.

19 (3) The number and average settlement amount of cases that were
20 resolved after a panel hearing but before a trial.

1 (4) The number and average settlement amount of cases that were
2 resolved by or after a jury verdict.

3 (d) The report required by this section shall include, for medical injury
4 cases in which a panel made findings during the fiscal year:

5 (1) the number of cases that fell into each of the following categories of
6 possible panel hearing results:

7 (A) unanimous for the plaintiff;

8 (B) majority for the plaintiff;

9 (C) unanimous for the defendant; and

10 (D) majority for the defendant; and

11 (2) the status, and, if applicable, the results of the cases in each of the
12 categories listed in subdivision (1) of this subsection.

13 (e) To the extent possible, the report required by this section shall include
14 comparative data from the previous five years.

15 (f) The Commissioner of Financial Regulation shall report to the House
16 and Senate Committees on Judiciary annually, on or before November 1 of
17 each year, on the medical malpractice market and the effects of the panel
18 process established in this chapter. The report shall include, but not be limited
19 to, the average rates of medical liability insurance for categories of medical
20 providers and specialties identified by the Commissioner, the frequency and

1 severity of medical injury claims, and the time for resolution of medical injury
2 claims from first notice to final resolution.

3 (g) The Commissioner of Financial Regulation may adopt rules to collect
4 the data from insurers necessary to prepare the report required by this section.
5 To the extent the Commissioner collects information from insurers regarding
6 individual claims, loss adjustment and other expenses, reserves, indemnity
7 payments, or other financial information that is not otherwise reported to the
8 Commissioner and available to the public, the information shall be treated as
9 examination materials and kept confidential.

10 Sec. 3. EFFECTIVE DATE

11 This act shall take effect on July 1, 2025.