

2005 ASSEMBLY BILL 766

October 17, 2005 – Introduced by Representatives GIELOW, HUEBSCH, NISCHKE, GARD, FREESE, GOTTLIEB, GUNDRUM, HAHN, HONADEL, HUNDERTMARK, JENSEN, JESKEWITZ, KERKMAN, KESTELL, KREIBICH, LAMB, LOEFFELHOLZ, McCORMICK, MOULTON, MURSAU, RHOADES, STRACHOTA, VAN ROY, VOS, M. WILLIAMS, WIECKERT, NERISON, UNDERHEIM, SUDER, FRISKE, OWENS and PETROWSKI, cosponsored by Senators S. FITZGERALD, KAPANKE, BROWN, DARLING, ELLIS, GROTHMAN, KANAVAS, KEDZIE, A. LASEE, LAZICH, LEIBHAM, OLSEN, REYNOLDS, ROESSLER, SCHULTZ, STEPP and ZIEN. Referred to Committee on Insurance.

1 **AN ACT to renumber** 893.55 (1); **to renumber and amend** 893.55 (4) (b) and
2 893.55 (4) (d); **to amend** 655.017, 893.55 (2) and 893.55 (3); and **to create**
3 893.55 (1d) and 893.55 (4) (d) 2. of the statutes; **relating to:** recovery of
4 noneconomic damages in medical malpractice cases.

Analysis by the Legislative Reference Bureau

Under current law, if a defendant in a medical malpractice case is required to pay noneconomic damages, such as for pain and suffering or for loss of society and companionship, the amount of those damages are limited. The current limit on those damages for each occurrence of medical malpractice is \$445,755, and that limit is adjusted annually for inflation. In *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125 (2005), the Wisconsin Supreme Court found that limit to be unconstitutional because the limit violated the equal protection provision of the Wisconsin Constitution.

This bill creates a limit on noneconomic damages for each occurrence of medical malpractice of \$550,000 for persons under the age of 18, and \$450,000 for persons age 18 and over. The bill requires the board of governors that approves any fee changes to the Injured Patients and Families Compensation Fund to report to the legislature

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every two years any suggested changes to these noneconomic damage limits and the reasons why the changes are necessary to meet the intent of the legislature.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 655.017 of the statutes is amended to read:

2 **655.017 Limitation on noneconomic damages.** The amount of
3 noneconomic damages recoverable by a claimant or plaintiff under this chapter for
4 acts or omissions of a health care provider if the act or omission occurs on or after May
5 ~~25, 1995~~ the effective date of this section ... [revisor inserts date], and for acts or
6 omissions of an employee of a health care provider, acting within the scope of his or
7 her employment and providing health care services, for acts or omissions occurring
8 on or after ~~May 25, 1995~~ the effective date of this section ... [revisor inserts date],
9 is subject to the limits under s. 893.55 (4) (d) and (f).

10 **SECTION 2.** 893.55 (1) of the statutes is renumbered 893.55 (1m).

11 **SECTION 3.** 893.55 (1d) of the statutes is created to read:

12 **893.55 (1d) (a)** In this subsection, “fund” means the injured patients and
13 families compensation fund under s. 655.27.

14 (b) The legislature finds the following related to the limitation on noneconomic
15 damages in sub. (4) (d):

16 1. Affordable and accessible health care benefits patients and the public in
17 general.

18 2. A cap on noneconomic damages is one factor necessary to maintain
19 affordability and accessibility.

20 3. A cap on noneconomic damages, together with mandatory liability insurance
21 coverage for health care providers, mandatory participation in the fund by health

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1 care providers, and unlimited economic damage awards, ensures adequate
2 compensation for victims of medical malpractice.

3 (c) The legislature further finds that a medical liability system should promote
4 the following objectives:

5 1. Provide adequate compensation to victims of medical malpractice through
6 economic and noneconomic damages.

7 2. Protect access to health care services across the state and across medical
8 specialities by limiting disincentives for physicians to practice medicine in Wisconsin
9 such as the unavailability of professional liability insurance coverage, high cost of
10 insurance premiums, large fund assessments, or unpredictable or large noneconomic
11 damage awards as recognized by a 2003 U.S. congress joint economic committee
12 report, a 2003 federal department of health and human services study, and a 2004
13 office of the commissioner of insurance report.

14 3. Help contain health care costs by limiting the incentive to practice defensive
15 medicine, which increases the cost of patient care as recognized by a 2002 federal
16 department of health and human services study and a 2003 U.S. congress joint
17 economic committee report.

18 4. Help contain health care costs by providing more predictability in
19 noneconomic damage awards allowing insurers to set insurance premiums that
20 better reflect their financial risk as recognized by a 2003 U.S. federal department of
21 health and human services study, a 2003 government accounting office study, and a
22 2005 office of the commissioner of insurance report.

23 5. Help contain health care costs by providing more predictability in
24 noneconomic damage awards in order to protect the financial integrity of the fund
25 and allow the fund's board of governors to approve reasonable assessments for health

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1 care providers as recognized by a 2005 legislative fiscal bureau memo, a 2001
2 legislative audit bureau report, and a 2005 office of commissioner of insurance
3 report.

4 **SECTION 4.** 893.55 (2) of the statutes is amended to read:

5 893.55 (2) If a health care provider conceals from a patient a prior act or
6 omission of the provider which has resulted in injury to the patient, an action shall
7 be commenced within one year from the date the patient discovers the concealment
8 or, in the exercise of reasonable diligence, should have discovered the concealment
9 or within the time limitation provided by sub. (1) (1m), whichever is later.

10 **SECTION 5.** 893.55 (3) of the statutes is amended to read:

11 893.55 (3) When a foreign object which has no therapeutic or diagnostic
12 purpose or effect has been left in a patient's body, an action shall be commenced
13 within one year after the patient is aware or, in the exercise of reasonable care,
14 should have been aware of the presence of the object or within the time limitation
15 provided by sub. (1) (1m), whichever is later.

16 **SECTION 6.** 893.55 (4) (b) of the statutes is renumbered 893.55 (4) (b) 2. and
17 amended to read:

18 893.55 (4) (b) 2. The total noneconomic damages recoverable for bodily injury
19 ~~or death~~, including any action or proceeding based on contribution or
20 indemnification and any action for a claim by a person other than the injured person
21 for noneconomic damages resulting in bodily injury, may not exceed the limit under
22 par. (d) for each occurrence on or after ~~May 25, 1995~~ the effective date of this
23 paragraph [revisor inserts date], from all health care providers and all employees
24 of health care providers acting within the scope of their employment and providing

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1 health care services who are found negligent and from the injured patients and
2 families compensation fund.

3 **SECTION 7.** 893.55 (4) (d) of the statutes is renumbered 893.55 (4) (d) 1. and
4 amended to read:

5 893.55 (4) (d) 1. The limit on total noneconomic damages for each occurrence
6 under par. (b) on or after ~~May 25, 1995~~ the effective date of this paragraph ... [revisor
7 inserts date], shall be \$350,000 ~~and shall be adjusted by the director of state courts~~
8 ~~to reflect changes in the consumer price index for all urban consumers, U.S. city~~
9 ~~average, as determined by the U.S. department of labor, at least annually thereafter,~~
10 ~~with the adjusted limit to apply to awards subsequent to such adjustments~~ \$550,000
11 for a person who is under the age of 18 at the time of the injury. and shall be \$450,000
12 for a person who is age 18 or over at the time of the injury.

13 **SECTION 8.** 893.55 (4) (d) 2. of the statutes is created to read:

14 893.55 (4) (d) 2. The board of governors created under s. 619.04 (3) shall submit
15 a report to the legislature as provided under s. 13.172 (2) by January 1 of every odd
16 numbered year of any recommended changes to the limits on noneconomic damages
17 established in subd. 1. The report shall include the reasons why the changes are
18 necessary to meet the intent of the legislative findings under sub. (1d).

19 (END)