

2005 ASSEMBLY BILL 1073

February 27, 2006 – Introduced by Representatives GIELOW, J. FITZGERALD, WASSERMAN, AINSWORTH, ALBERS, BALLWEG, BENEDICT, DAVIS, FIELDS, F. LASEE, FREESE, GOTTLIEB, GRONEMUS, GUNDERSON, HAHN, HONADEL, HUBLER, HUNDERTMARK, KERKMAN, KRAWCZYK, KREIBICH, LEMAHIEU, LOEFFELHOLZ, LOTHIAN, MCCORMICK, MEYER, MONTGOMERY, MUSSER, NERISON, NEWCOMER, NISCHKE, OTT, PETTIS, PRIDEMORE, SHILLING, SEIDEL, SHERIDAN, STONE, STRACHOTA, SUDER, TOWNS, UNDERHEIM, VAN ROY, VOS, VRUWINK, VUKMIR, WARD and ZIEGELBAUER, cosponsored by Senators S. FITZGERALD, BROWN, COWLES, DARLING, GROTHMAN, HARS DORF, KAPANKE, KEDZIE, A. LASEE, LEIBHAM, OLSEN, ROESSLER and ZIEN. Referred to Committee on Insurance.

1 **AN ACT to renumber** 893.55 (1); **to renumber and amend** 893.55 (4) (d); **to**
 2 **amend** 655.017, 893.55 (2), 893.55 (3) and 893.55 (4) (b); and **to create** 893.55
 3 (1d) and 893.55 (4) (d) 2. of the statutes; **relating to:** recovery of noneconomic
 4 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 \$750,000. 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 every two years any suggested changes to these noneconomic damage

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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) The objective of the treatment of this section is to ensure
13 affordable and accessible health care for all of the citizens of Wisconsin while
14 providing adequate compensation to the victims of medical malpractice. Achieving
15 this objective requires a balancing of many interests. Based upon documentary
16 evidence, testimony received at legislative hearings, and other relevant information,
17 the legislature finds that a limitation on the amount of noneconomic damages
18 recoverable by a claimant or plaintiff for acts or omissions of a health care provider,
19 together with mandatory liability coverage for health care providers and mandatory
20 participation in the injured patients and families compensation fund by health care
21 providers, while compensating victims of medical malpractice in appropriate

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1 circumstances by the availability of unlimited economic damages, ensures that these
2 objectives are achieved. Establishing a limitation on noneconomic damage awards
3 accomplishes the objective by doing all of the following:

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

11 2. Helping contain health care costs by limiting the incentive to practice
12 defensive medicine, which increases the cost of patient care, as recognized by a 2002
13 federal department of health and human services study, a 2003 U.S. congress joint
14 economic committee report, a 2003 federal government accounting office study, and
15 a 2005 office of the commissioner of insurance report.

16 3. Helping contain health care costs by providing more predictability in
17 noneconomic damage awards, allowing insurers to set insurance premiums that
18 better reflect such insurers' financial risk, as recognized by a 2003 federal
19 department of health and human services.

20 4. Helping contain health care costs by providing more predictability in
21 noneconomic damage awards in order to protect the financial integrity of the fund
22 and allow the fund's board of governors to approve reasonable assessments for health
23 care providers, as recognized by a 2005 legislative fiscal bureau memo, a 2001
24 legislative audit bureau report, and a 2005 office of commissioner of insurance
25 report.

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1 (b) The legislature further finds that the limitation of \$750,000 represents an
2 appropriate balance between providing reasonable compensation for noneconomic
3 damages associated with medical malpractice and ensuring affordable and
4 accessible health care. This finding is based on actuarial studies provided to the
5 legislature, the experiences of other states with and without limitations on
6 noneconomic damages associated with medical malpractice, the testimony of
7 experts, and other documentary evidence presented to the legislature.

8 (c) Based on actuarial studies, documentary evidence, testimony, and the
9 experiences of other states, the legislature concludes there is a dollar figure so low
10 as to deprive the injured victim of reasonable noneconomic damages, and there is a
11 dollar figure at which the cap number is so high that it fails to accomplish the goals
12 of affordable and accessible health care. The legislature concludes that the number
13 chosen is neither too high nor too low to accomplish the goals of affordable and
14 accessible health care, is a reasonable and rationale response to the current medical
15 liability situation, and is reasonably and rationally supported by the legislative
16 record.

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

18 893.55 **(2)** If a health care provider conceals from a patient a prior act or
19 omission of the provider which has resulted in injury to the patient, an action shall
20 be commenced within one year from the date the patient discovers the concealment
21 or, in the exercise of reasonable diligence, should have discovered the concealment
22 or within the time limitation provided by sub. ~~(1)~~ (1m), whichever is later.

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

24 893.55 **(3)** When a foreign object which has no therapeutic or diagnostic
25 purpose or effect has been left in a patient's body, an action shall be commenced

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1 within one year after the patient is aware or, in the exercise of reasonable care,
2 should have been aware of the presence of the object or within the time limitation
3 provided by sub. (1) (1m), whichever is later.

4 **SECTION 6.** 893.55 (4) (b) of the statutes is amended to read:

5 893.55 **(4)** (b) The total noneconomic damages recoverable for bodily injury or
6 death, including any action or proceeding based on contribution or indemnification
7 and any action for a claim by a person other than the injured person for noneconomic
8 damages recoverable for bodily injury, may not exceed the limit under par. (d) for
9 each occurrence on or after ~~May 25, 1995~~ the effective date of this paragraph
10 [revisor inserts date], from all health care providers and all employees of health care
11 providers acting within the scope of their employment and providing health care
12 services who are found negligent and from the injured patients and families
13 compensation fund.

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

16 893.55 **(4)** (d) 1. The limit on total noneconomic damages for each occurrence
17 under par. (b) on or after ~~May 25, 1995~~ the effective date of this paragraph [revisor
18 inserts date], shall be \$350,000 ~~and shall be adjusted by the director of state courts~~
19 ~~to reflect changes in the consumer price index for all urban consumers, U.S. city~~
20 ~~average, as determined by the U.S. department of labor, at least annually thereafter,~~
21 ~~with the adjusted limit to apply to awards subsequent to such adjustments~~ \$750,000.

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

23 893.55 **(4)** (d) 2. The board of governors created under s. 619.04 (3) shall submit
24 a report to the legislature as provided under s. 13.172 (2) by January 1 of every odd
25 numbered year of any recommended changes to the limits on noneconomic damages

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1 established in subd. 1. The report shall include the reasons why the changes are
2 necessary to meet the intent of the legislative findings under sub. (1d).

3 (END)