

Senate Bill 283

Sponsored by Senator FERRIOLI (Pre-session filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Requires entry of judgment with installment payments in medical liability actions in which \$100,000 or more is awarded for losses that will be incurred by plaintiff after entry of judgment.

Modifies law governing liability of individual tortfeasors when more than one tortfeasor is liable for injury, death or property damage. Eliminates reallocation of liability between tortfeasors when court determines that all or part of tortfeasor's share of obligation is uncollectible.

Imposes qualifications for expert witnesses in civil actions for medical liability actions.

Provides that if offer of compromise in civil action is not accepted, and party asserting claim in action fails to obtain judgment more favorable than offer of compromise, court must award prevailing party fees and attorney fees incurred after service of offer.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to liability; creating new provisions; amending ORS 18.150, 31.610 and 40.410 and ORCP 54
3 E; and declaring an emergency.

4 **Be It Enacted by the People of the State of Oregon:**

PERIODIC PAYMENT OF DAMAGES

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8 **SECTION 1.** (1) **If an award of damages is made in a medical liability action, and the**
9 **award includes \$100,000 or more for losses that will be incurred by the plaintiff after the**
10 **entry of the judgment, upon motion of any party in the action, the court shall enter judg-**
11 **ment on the award in the following manner:**

12 (a) **The judgment shall require that all economic damages that are attributable to losses**
13 **incurred by the plaintiff before the entry of the judgment be immediately due and payable;**

14 (b) **The judgment shall require that all noneconomic damages be paid in installments; and**

15 (c) **The judgment shall require that all economic damages that are attributable to losses**
16 **that will be incurred by the plaintiff after the entry of the judgment be paid in installments.**

17 (2) **A party moving for entry of a judgment under subsection (1) of this section must**
18 **submit a proposal to the court for the manner in which installments will be paid, including**
19 **actuarial and annuity information supporting the proposal. The court shall allow all of the**
20 **parties in the action to submit such other information as may be helpful to the court in de-**
21 **termining the manner in which installments will be paid under the judgment. The dollar**
22 **amount of each installment shall be based on the gross amount of future damages awarded**
23 **by the trier of fact, and may not be based on the present value of future damages at the time**
24 **of the award.**

25 (3) **As a condition to entering a judgment under subsection (1) of this section, a court**
26 **may require that the installments be paid through a trust fund, an annuity or other form**
27 **of security acceptable to the court.**

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 **(4) A judgment entered under subsection (1) of this section must include:**

2 **(a) The name and address of each person that will receive installment payments under**
3 **the judgment;**

4 **(b) The dollar amount of each installment payment;**

5 **(c) The schedule for installment payments; and**

6 **(d) The number of installment payments or the period of time during which installment**
7 **payments must be made under the judgment.**

8 **(5) All amounts in a judgment entered under subsection (1) of this section that are not**
9 **immediately paid upon entry of the judgment, including all amounts paid by installment, do**
10 **not bear interest.**

11 **(6) If a judgment entered under subsection (1) of this section requires that installments**
12 **be paid through a trust fund, an annuity or other form of security, and any amounts remain**
13 **in the trust fund, annuity or other form of security after the final installment is paid, the**
14 **remaining amounts shall be paid to the judgment debtor or the judgment debtor's successors**
15 **or assigns.**

16 **(7) If the judgment debtor under a judgment entered under subsection (1) of this section**
17 **fails to make payments on the dates established by the judgment three or more times during**
18 **a calendar year, upon motion of the judgment creditor the court shall enter a supplemental**
19 **judgment against the judgment debtor requiring that, within 30 days after the entry of the**
20 **supplemental judgment, the judgment debtor pay the entire balance then remaining due un-**
21 **der the judgment, along with all reasonable attorney fees incurred by the judgment creditor**
22 **in the proceeding. Subsection (9) of this section does not apply to a supplemental judgment**
23 **entered under this subsection.**

24 **(8) A judgment entered under subsection (1) of this section may not increase the amount**
25 **awarded by the trier of fact, and any installment payments attributable to future damages**
26 **shall cease upon the death of the judgment creditor. A judgment entered under subsection**
27 **(1) of this section is not subject to modification after entry of the judgment, except for:**

28 **(a) Modification pursuant to subsection (7) of this section;**

29 **(b) Modification pursuant to ORCP 71; and**

30 **(c) Modification to terminate installment payments based on the death of the judgment**
31 **creditor.**

32 **(9) The title of any judgment entered under subsection (1) of this section must indicate**
33 **that the judgment is entered under this section. Notwithstanding any other provision of law,**
34 **a judgment entered under subsection (1) of this section does not become a lien on real**
35 **property of the judgment debtor.**

36 **(10) As used in this section:**

37 **(a) "Economic damages" and "noneconomic damages" have the meanings given those**
38 **terms in ORS 31.710.**

39 **(b) "Medical liability action" means an action in which a plaintiff claims damages for**
40 **personal injury or wrongful death, including emotional injury or distress, loss of consortium,**
41 **property damage or loss of use of property, arising out of the alleged negligence of a health**
42 **care facility, as defined in ORS 442.015, an emergency medical technician certified by the**
43 **Oregon Health Authority or any person who is licensed or certified by the:**

44 **(A) State Board of Examiners for Speech-Language Pathology and Audiology;**

45 **(B) State Board of Chiropractic Examiners;**

- 1 **(C) State Board of Licensed Social Workers;**
- 2 **(D) Oregon Board of Licensed Professional Counselors and Therapists;**
- 3 **(E) Oregon Board of Dentistry;**
- 4 **(F) Board of Examiners of Licensed Dietitians;**
- 5 **(G) State Board of Massage Therapists;**
- 6 **(H) Oregon Board of Naturopathic Medicine;**
- 7 **(I) Oregon State Board of Nursing;**
- 8 **(J) Nursing Home Administrators Board;**
- 9 **(K) Oregon Board of Optometry;**
- 10 **(L) State Board of Pharmacy;**
- 11 **(M) Oregon Medical Board;**
- 12 **(N) Occupational Therapy Licensing Board;**
- 13 **(O) Physical Therapist Licensing Board;**
- 14 **(P) State Board of Psychologist Examiners;**
- 15 **(Q) Board of Medical Imaging; or**
- 16 **(R) Oregon Health Licensing Agency.**

17 **SECTION 2.** ORS 18.150 is amended to read:

18 18.150. (1) If a judgment document filed with a court administrator under ORS 18.075 (2) includes
 19 a money award and complies with ORS 18.042 (1) or 18.048 (1), the court administrator shall note
 20 in the register of a circuit court that the judgment creates a judgment lien unless:

- 21 (a) The judgment is entered in the small claims department of a circuit court in an amount of
 22 less than \$3,000, exclusive of costs, and the judgment creditor has not created a judgment lien for
 23 the judgment as provided in ORS 46.488;
- 24 (b) The judgment is entered in a criminal action for conviction of a violation, and the court does
 25 not order under ORS 18.048 (4) that the judgment creates a judgment lien;
- 26 (c) The judgment is entered under ORS 153.820;
- 27 **(d) The judgment is entered under section 1 of this 2011 Act; or**
- 28 [(d)] (e) The judgment does not create a lien by operation of other law.

29 (2) Except as provided in this section, if the court administrator notes in the register that a
 30 judgment creates a judgment lien, the judgment has the following effect in the county in which the
 31 judgment is entered:

- 32 (a) When the judgment is entered, the judgment lien attaches to all real property of the judg-
 33 ment debtor in the county at that time; and
- 34 (b) The judgment lien attaches to all real property that the judgment debtor acquires in the
 35 county at any time after the judgment is entered and before the judgment lien expires.
- 36 (3) Except as provided in this section, if the court administrator notes in the register that a
 37 judgment creates a judgment lien and the judgment contains a support award, the support award
 38 portion of the judgment has the following effect in the county in which the judgment is entered:
- 39 (a) Any lump sum support award existing when the judgment is entered creates a support
 40 arrearage lien and has the effect specified by subsection (2) of this section;
- 41 (b) When an installment becomes due under the terms of the support award and is not paid, a
 42 support arrearage lien for the unpaid installment attaches to all real property of the judgment
 43 debtor in the county at that time; and
- 44 (c) When an installment becomes due under the terms of the support award and is not paid, a
 45 support arrearage lien attaches to all real property that the judgment debtor thereafter acquires in

1 the county for the purpose of enforcing the unpaid installment, and remains attached to that prop-
 2 erty until satisfaction is made for the installment or the judgment lien arising from support award
 3 portion of the judgment expires.

4 (4) Real property may be conveyed or encumbered free of a judgment lien created by the support
 5 award portion of a judgment, but the conveyance or encumbrance is subject to any support
 6 arrearage lien that attached to the real property under this section or ORS 18.152.

7 (5) A judgment lien does not attach to any real property of a judgment debtor acquired after the
 8 debt giving rise to the judgment is discharged under federal bankruptcy laws. Debts are presumed
 9 to have not been discharged in bankruptcy until the judgment debtor establishes that the debt has
 10 been discharged.

11 (6) A court administrator may rely on the judgment document to determine whether a judgment
 12 creates a judgment lien.

13 (7) This section does not apply to justice courts, municipal courts or county courts performing
 14 judicial functions.

15 **SECTION 3. Section 1 of this 2011 Act and the amendments to ORS 18.150 by section 2**
 16 **of this 2011 Act apply only to actions commenced as described in ORS 12.020 on or after the**
 17 **effective date of this 2011 Act.**

18 JOINT AND SEVERAL LIABILITY

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 21 **SECTION 4.** ORS 31.610 is amended to read:

22 31.610. (1) *[Except as otherwise provided in this section,]* In any civil action arising out of bodily
 23 injury, death or property damage, including claims for emotional injury or distress, loss of care,
 24 comfort, companionship and society, and loss of consortium, the liability of each defendant for
 25 damages awarded to plaintiff shall be several only and shall not be joint.

26 *[(2) In any action described in subsection (1) of this section, the court shall determine the award*
 27 *of damages to each claimant in accordance with the percentages of fault determined by the trier of fact*
 28 *under ORS 31.605 and shall enter judgment against each party determined to be liable. The court shall*
 29 *enter a judgment in favor of the plaintiff against any third party defendant who is found to be liable*
 30 *in any degree, even if the plaintiff did not make a direct claim against the third party defendant. The*
 31 *several liability of each defendant and third party defendant shall be set out separately in the judgment,*
 32 *based on the percentages of fault determined by the trier of fact under ORS 31.605. The court shall*
 33 *calculate and state in the judgment a monetary amount reflecting the share of the obligation of each*
 34 *person specified in ORS 31.600 (2). Each person's share of the obligation shall be equal to the total*
 35 *amount of the damages found by the trier of fact, with no reduction for amounts paid in settlement of*
 36 *the claim or by way of contribution, multiplied by the percentage of fault determined for the person by*
 37 *the trier of fact under ORS 31.605.]*

38 *[(3) Upon motion made not later than one year after judgment has become final by lapse of time*
 39 *for appeal or after appellate review, the court shall determine whether all or part of a party's share*
 40 *of the obligation determined under subsection (2) of this section is uncollectible. If the court determines*
 41 *that all or part of any party's share of the obligation is uncollectible, the court shall reallocate any*
 42 *uncollectible share among the other parties. The reallocation shall be made on the basis of each party's*
 43 *respective percentage of fault determined by the trier of fact under ORS 31.605. The claimant's share*
 44 *of the reallocation shall be based on any percentage of fault determined to be attributable to the*
 45 *claimant by the trier of fact under ORS 31.605, plus any percentage of fault attributable to a person*

1 *who has settled with the claimant. Reallocation of obligations under this subsection does not affect any*
 2 *right to contribution from the party whose share of the obligation is determined to be uncollectible.*
 3 *Unless the party has entered into a covenant not to sue or not to enforce a judgment with the claimant,*
 4 *reallocation under this subsection does not affect continuing liability on the judgment to the claimant*
 5 *by the party whose share of the obligation is determined to be uncollectible.]*

6 *[(4) Notwithstanding subsection (3) of this section, a party's share of the obligation to a claimant*
 7 *may not be increased by reason of reallocation under subsection (3) of this section if:]*

8 *[(a) The percentage of fault of the claimant is equal to or greater than the percentage of fault of*
 9 *the party as determined by the trier of fact under ORS 31.605; or]*

10 *[(b) The percentage of fault of the party is 25 percent or less as determined by the trier of fact*
 11 *under ORS 31.605.]*

12 *[(5) If any party's share of the obligation to a claimant is not increased by reason of the application*
 13 *of subsection (4) of this section, the amount of that party's share of the reallocation shall be considered*
 14 *uncollectible and shall be reallocated among all other parties who are not subject to subsection (4) of*
 15 *this section, including the claimant, in the same manner as otherwise provided for reallocation under*
 16 *subsection (3) of this section.]*

17 *[(6)] (2) This section does not apply to:*

18 (a) A civil action resulting from the violation of a standard established by Oregon or federal
 19 statute, rule or regulation for the spill, release or disposal of any hazardous waste, as defined in
 20 ORS 466.005, hazardous substance, as defined in ORS 453.005 or radioactive waste, as defined in ORS
 21 469.300.

22 (b) A civil action resulting from the violation of Oregon or federal standards for air pollution,
 23 as defined in ORS 468A.005 or water pollution, as defined in ORS 468B.005.

24 **SECTION 5. The amendments to ORS 31.610 by section 4 of this 2011 Act apply only to**
 25 **causes of action that arise on or after the effective date of this 2011 Act.**

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 27 **EXPERT WITNESSES**

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 29 **SECTION 6.** ORS 40.410 is amended to read:

30 **40.410. (1) Except as provided in subsection (2) of this section,** if scientific, technical or
 31 other specialized knowledge will assist the trier of fact to understand the evidence or to determine
 32 a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or educa-
 33 tion may testify thereto in the form of an opinion or otherwise.

34 **(2) In a medical liability action as defined in section 1 of this 2011 Act, a person must**
 35 **qualify as an expert witness for the purpose of testifying on the appropriate medical standard**
 36 **of care as follows:**

37 **(a) A person seeking to testify as an expert witness under this subsection must hold an**
 38 **active and unrestricted license or certificate in Oregon or another state in the same pro-**
 39 **fession as the defendant.**

40 **(b) A person seeking to testify as an expert witness under this subsection must be able**
 41 **to demonstrate by competent evidence that, as a result of training, education, knowledge and**
 42 **experience in the evaluation, diagnosis and treatment of the disease or injury that is the**
 43 **subject matter of the medical liability action, the person is substantially familiar with the**
 44 **applicable standards of care and practice as the standards relate to the acts or omissions**
 45 **that are the subject of the health care claim.**

1 (c) If the defendant in the civil action is certified by a board recognized by the American
 2 Board of Medical Specialties, a person seeking to testify as an expert witness under this
 3 subsection must be certified in the same specialty by a board recognized by the American
 4 Board of Medical Specialties and must have expertise and training directly related to the
 5 particular health care or matter at issue.

6 (d) Within five years before the date of the acts or omissions on which the medical li-
 7 ability action is based, a person seeking to testify as an expert witness under this subsection
 8 must have been in active medical practice in the same discipline or school of practice as the
 9 defendant, have devoted a substantial portion of the person's time teaching at an accredited
 10 medical school or have devoted a substantial portion of the person's time in university-based
 11 research relating to the medical care and type of treatment at issue.

12 (3) If a person licensed or certified in another state testifies as an expert witness under
 13 subsection (2) of this section, the person is deemed to have a temporary license to practice
 14 medicine in this state for the purpose of providing the testimony and is subject to the au-
 15 thority of the Oregon Medical Board and the provisions of ORS chapters 676 and 677.

16 **SECTION 7.** The amendments to ORS 40.410 by section 6 of this 2011 Act apply only to
 17 medical liability actions that are commenced as described in ORS 12.020 on or after the ef-
 18 fective date of this 2011 Act.

19 OFFERS OF SETTLEMENT

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 22 **SECTION 8.** ORCP 54 E, as amended by the Council on Court Procedures on December 11,
 23 2010, is amended to read:

24 E Offer to allow judgment; effect of acceptance or rejection.

25 E(1) Except as provided in ORS 17.065 through 17.085, any party against whom a claim is as-
 26 serted may, at any time up to 14 days prior to trial, serve upon any other party asserting the claim
 27 an offer to allow judgment to be entered against the party making the offer for the sum, or the
 28 property, or to the effect therein specified. The offer shall not be filed with the court clerk or pro-
 29 vided to any assigned judge, except as set forth in subsections E(2) and E(3) below.

30 E(2) If the party asserting the claim accepts the offer, the party asserting the claim or such
 31 party's attorney shall endorse such acceptance thereon and file the same with the clerk before trial,
 32 and within seven days from the time the offer was served upon such party asserting the claim; and
 33 thereupon judgment shall be given accordingly as a stipulated judgment. If the offer does not state
 34 that it includes costs and disbursements or attorney fees, the party asserting the claim shall submit
 35 any claim for costs and disbursements or attorney fees to the court as provided in Rule 68.

36 E(3) If the offer is not accepted and filed within the time prescribed, it shall be deemed with-
 37 drawn, and shall not be given in evidence at trial and may be filed with the court only after the case
 38 has been adjudicated on the merits and only if the party asserting the claim fails to obtain a judg-
 39 ment more favorable than the offer to allow judgment. In such a case, the party asserting the claim
 40 shall not recover costs, prevailing party fees, disbursements, or attorney fees incurred after the date
 41 of the offer, but the party against whom the claim was asserted shall recover of the party asserting
 42 the claim **prevailing party fees and all attorney fees**, costs and disbursements[, *not including*
 43 *prevailing party fees, from the time of*] **incurred after** the service of the offer.

44 **SECTION 9.** The amendments to ORCP 54 E by section 8 of this 2011 Act apply only to
 45 actions commenced as described in ORS 12.020 on or after the effective date of this 2011 Act.

CAPTIONS

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SECTION 10. The unit captions used in this 2011 Act are provided only for the convenience of the reader and do not become part of the statutory law of this state or express any legislative intent in the enactment of this 2011 Act.

EMERGENCY CLAUSE

SECTION 11. This 2011 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2011 Act takes effect on its passage.
