# OHIO LEGISLATIVE SERVICE COMMISSION

**Final Analysis**

Aida S. Montano

## Am. Sub. H.B. 7

132nd General Assembly
(As Passed by the General Assembly)

**Reps.** Cupp, Becker, Hambley, R. Smith, Huffman, Schaffer, Stein, Anielski, Ginter, Green, Lang, Pelanda, Reineke, Roegner, Romanchuk, Scherer, Schuring, Seitz, Wiggam, Young

**Sens.** Bacon, Burke, Eklund, Gardner, Hackett, Kunze, Terhar, Uecker, Wilson

**Effective date:** March 20, 2019

## ACT SUMMARY

### Qualified immunity for health care providers and EMTs in a disaster

- Generally grants qualified civil immunity to specific types of health care providers and to emergency medical technicians (EMTs) that provide only emergency medical services, first-aid treatment, or other emergency professional care as a result of a disaster and through the disaster's duration.

- Provides that the act does not create a new cause of action or substantive right against a health care provider or EMT and does not affect any civil immunities or defenses to which a provider or EMT may be entitled in providing those services or that treatment or care.

- Provides that the act does not grant immunity from civil liability to a health care provider or EMT for actions that are outside the provider's or EMT's authority and does not affect a provider's or EMT's legal responsibility to comply with Ohio law or agency rule.

- Specifies that the immunity does not apply to a tort action alleging wrongful death against a health care provider or EMT who provides emergency medical services, first-aid treatment, or other emergency professional care as a result of a disaster.

## Immunity for behavior of mental health patients

- Grants immunity to certain health care professionals or hospitals for failing to discharge from a facility a patient whom the professional or hospital believes in good faith professional judgment, according to appropriate standards of professional practice, has a mental health condition threatening the patient's or others' safety.

- Grants immunity to certain health care professionals or hospitals for discharging a patient whom the professional or hospital believes in good faith professional judgment, according to appropriate standards of professional practice, not to have a mental health condition that threatens the patient's or others' safety.

## Medical Malpractice Law

- Clarifies the definition of "medical claim" and applies the provisions described in the following dot points to civil actions based on a medical claim.

### Complaint asserting a medical claim

- Specifies the manner of sending, prior to the expiration of the limitation period for the claim, to a person who is the subject of a medical claim the written notice of the claimant's intent to bring that claim.

- Specifically requires the plaintiff to file with the complaint, pursuant to Civil Rule 10(D), an affidavit of merit as to each defendant or a motion to extend the period to file the affidavit.

- Permits the parties, within the period described in the second succeeding dot point, to seek to discover potential medical claims not included in the complaint.

- Permits the plaintiff, within the period described in the succeeding dot point, to join any additional claim if the one-year limitation period for that claim had not expired prior to filing the original claim.

- Provides that if a complaint is filed prior to the one-year limitation period, the parties may conduct discovery and the plaintiff may join additional claims during the balance of any days remaining from the filing of the complaint to the expiration of that limitation period, plus 180 days from the filing of the complaint.

- Specifies that the provisions allowing for additional claims do not modify or affect any Revised Code provision, common law rule, or Rule of Civil Procedure that applies to the commencement of the limitation period for medical claims asserted after the 180-day period specified in the preceding dot point.

### Unanticipated outcome of medical care

- Renders inadmissible as evidence of an admission of liability a health care provider's, employee's, or representative's statements expressing error or fault that relate to the victim's injury or death made to the victim of an unanticipated outcome of medical care or the victim's relative or representative.

- Provides that if any statements described above or any statements of apology in continuing law are included in the victim's medical record, only the portions of the record that include those statements are inadmissible as evidence of an admission of liability.

- Generally renders inadmissible as evidence any communications between a health care provider, employee, or representative and a victim, victim's relative, acquaintance, or representative following an unanticipated outcome of medical care and made as part of a good faith review into the cause of the unanticipated outcome.

### Standards in federal laws not admissible

- Provides that any guideline or standard under the "Patient Protection and Affordable Care Act" or the "Social Security Act" dealing with Medicare and Medicaid cannot be construed to establish a health care provider's standard or duty of care owed to a patient and is not admissible as evidence in a medical claim.

### Insurer's reimbursement policies not admissible

- Provides that any insurer's reimbursement policies or determinations or regulations of the U.S. Centers for Medicare and Medicaid Services or the Ohio Department of Medicaid regarding the health care services provided to a patient are not admissible as evidence and may not be used to establish a standard of care.

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# CONTENT AND OPERATION

## HEALTH CARE IMMUNITIES

### Qualified immunity for health care providers and EMTs in a disaster

The act generally provides that a "health care provider" or an "emergency medical technician" (EMT) who provides "emergency medical services, first-aid treatment, or other emergency professional care, including the provision of any medication or medical product" (hereafter referred to as emergency medical services, treatment, or care), as a result of a "disaster" is not liable in damages to any person in a "tort action" for injury, death, or loss to person or property allegedly arising from the health care provider's or EMT's act or omission in providing the emergency medical services, treatment, or care, if the act or omission does not constitute "reckless disregard" for the consequences so as to affect the life or health of the patient.[1]

"**Disaster**" is defined as any occurrence of widespread personal injury or loss of life that results from any natural or technological phenomenon or act of a human, or an epidemic and is declared to be a disaster by the federal or state government or an Ohio political subdivision.[2]

"**Health care provider**" is defined as a "physician," "physician assistant," "dentist," "optometrist," "advanced practice registered nurse," "registered nurse," "pharmacist" (persons who are licensed or authorized to practice their respective professions under their respective regulatory statutes[3]), or "hospital" (defined as in the Medical Malpractice Law[4]).[5]

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[1] R.C. 2305.2311(B).

[2] R.C. 2305.2311(A)(3).

[3] R.C. 2305.2311(A)(1) and (15) by reference to R.C. Chapter 4723., not in the act, (A)(2) by reference to R.C. 2305.231, not in the act, and (A)(9), (11), (12), and (13) by reference to R.C. Chapters 4725., 4729., 4731., and 4730., respectively, not in the act.

[4] R.C. 2305.2311(A)(8), by reference to R.C. 2305.113.

[5] R.C. 2305.2311(A)(7).

"**Emergency medical technician**" is an EMT-basic, EMT-intermediate, or paramedic who holds a current, valid certificate issued under their respective regulatory statutes.[6]

"**Tort action**" includes an action on a "medical claim," but does not include a civil action for damages for a breach of an agreement between persons or governmental entities.[7]

"**Reckless disregard**" as it applies to a health care provider or EMT rendering the emergency medical services, treatment, or care, means conduct that such a provider or EMT knew or should have known, at the time the services, treatment, or care was rendered, created an unreasonable risk of injury, death, or loss to person or property so as to affect another's life or health and that risk was substantially greater than that necessary to make the conduct negligent.[8]

### Conditions

The following conditions and exceptions apply regarding the immunity of health care providers and EMTs:[9]

- It does not create a new cause of action or substantive legal right against a health care provider or EMT.
- It does not affect any immunities from civil liability or defenses established by another Revised Code section or available at common law to which a health care provider or EMT may be entitled in providing emergency medical services, treatment, or care.
- It does not grant immunity from civil liability to a health care provider or EMT for actions that are outside the provider's or EMT's scope of authority.
- It does not affect any legal responsibility of a health care provider or EMT to comply with applicable Ohio law or agency rule.

[6] R.C. 2305.2311(A)(4), (5), (6), and (10), by reference to R.C. 4765.30, not in the act.

[7] R.C. 2305.2311(A)(16).

[8] R.C. 2305.2311(A)(14).

[9] R.C. 2305.2311(C).

- It applies only to the provision of emergency medical services, treatment, or care by a health care provider or EMT as a result of a disaster and through the disaster's duration.

### Exception for wrongful death actions

The above immunity does not apply to a tort action alleging wrongful death against a health care provider or EMT who provides emergency medical services, treatment, or care, that allegedly arises from the provider's or EMT's act or omission in providing those services, treatment, or care as a result of a disaster.[10]

## Immunity for behavior of mental health patients

The act provides that, notwithstanding any other Revised Code provision, a "physician," "physician assistant," "advanced practice registered nurse," (persons who are licensed or authorized to practice their professions under their respective licensing or regulatory statutes,[11] hereafter referred to as health care professional), or a "hospital" (defined as in the Peer Review Committee Law[12]) is not liable in damages in a civil action, and cannot be subject to disciplinary action by any entity with licensing or regulatory authority, for doing either of the following:[13]

- Failing to discharge or to allow a patient to leave the facility if the health care professional or hospital believes in the good faith exercise of professional medical, advanced practice registered nursing, or physician assistant judgment according to appropriate standards of professional practice that the patient has a mental health condition threatening the patient's or others' safety;

- Discharging a patient whom the health care professional or hospital believes in the good faith exercise of professional medical, advanced practice registered nursing, or physician assistant judgment according to appropriate standards of professional practice not to have a mental health condition threatening the patient's or others' safety.

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[10] R.C. 2305.2311(D).

[11] R.C. 2305.51(A)(1)(g), (i), and (j), by reference to R.C. 4723.01, 4730.01, and R.C. Chapter 4731., not in the act.

[12] R.C. 2305.51(A)(1)(h), by reference to R.C. 2305.25, not in the act.

[13] R.C. 2305.51(D).

These immunities are in addition to and not in limitation of any immunity conferred on the health care professional or hospital by another Revised Code section or by judicial precedent.[14]

## MEDICAL MALPRACTICE LAW

### Application of act's provisions to medical claims

The act's provisions modifying the Medical Malpractice Law primarily pertain to civil actions based upon a "medical claim." Continuing law defines "medical claim" as any claim asserted in any civil action against a physician, podiatrist, hospital, home, or residential facility or an employee or agent of such person or facility, or against a licensed practical nurse, registered nurse, advanced practice registered nurse, physical therapist, physician assistant, EMT-basic, EMT-intermediate, or paramedic, and that arises out of the medical diagnosis, care, or treatment of any person. "Medical claim" includes the following, as modified by the act:[15]

- Derivative claims for relief that arise from the medical diagnosis, care (instead of plan of care in former law), or treatment of a person;
- Derivative claims for relief that arise from the plan of care prepared for a nursing home resident (added by the act);
- Claims that arise out of the medical diagnosis, care (instead of plan of care), or treatment of any person or "claims that arise out of the plan of care prepared for a resident of a home" (clarified by the act) and to which both types of claims either of the following applies: the claim results from acts or omissions in providing medical care; or the claim results from the hiring, training, supervision, retention, or termination of caregivers providing medical diagnosis, care, or treatment;
- Claims that arise out of the plan of care, medical diagnosis, or treatment of any person and are brought under the grievance procedure for violation of a nursing home resident's rights;
- Claims that arise out of skilled nursing care or personal care services provided in a nursing home pursuant to the plan of care, medical diagnosis, or treatment.

The last two dot points are continuing law not modified by the act.

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[14] R.C. 2305.51(E).

[15] R.C. 2305.113(E)(3).

## Notice of intent to bring an action on a medical claim

Continuing law provides that, if prior to the expiration of the one-year period of limitations for filing an action upon a medical, dental, optometric, or chiropractic claim, a claimant who allegedly possesses such a claim gives to the person who is the subject of that claim written notice that the claimant is considering bringing an action, that action may be commenced against the person notified at any time within 180 days after the notice is given.[16] The act requires a claimant who allegedly possesses a medical claim and intends to give to the person who is the subject of that claim that written notice, to send the notice by certified mail, return receipt requested, addressed to any of the following: the person's residence, professional practice, employer, or address on file with the State Medical Board or other appropriate agency that issued the person's professional license.[17]

## Complaint asserting a medical claim

The act specifies that at the time of filing a complaint asserting a medical claim, the plaintiff must file with the complaint, pursuant to Civil Rule 10(D), an affidavit of merit relative to each defendant named in the complaint or a motion to extend the period of time to file the affidavit.[18]

### Affidavit of merit

Under Civil Rule 10(D), a complaint that contains a medical, dental, optometric, or chiropractic claim generally must include one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. Such affidavits must be provided by an expert witness, and must include all of the following:

- A statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations in the complaint;
- A statement that the affiant is familiar with the applicable standard of care;
- The affiant's opinion that the standard of care was breached by one or more of the defendants to the action and the breach caused injury to the plaintiff.

[16] R.C. 2305.113(B)(1).

[17] R.C. 2305.113(B)(2).

[18] R.C. 2323.451(B).

### Discovery and joinder of additional medical claims or defendants

The act provides that the parties may conduct discovery as permitted by the Rules of Civil Procedure. Additionally, for the period described in the following paragraph, the parties may seek to discover the existence or identity of other potential medical claims or defendants that are not included in the complaint. All parties must provide such discovery in accordance with the Rules of Civil Procedure.[19] Within the period described in the following paragraph, the plaintiff, in an amendment to the complaint pursuant to Civil Rule 15, may join in the action any additional medical claim or defendant if the original one-year period of limitation applicable to that additional medical claim or defendant had not expired prior to the date the original complaint was filed. The plaintiff must file with the amendment to the complaint an affidavit of merit supporting such joinder or a motion to extend the period for such filing.[20]

If a complaint is filed prior to the expiration of the one-year period of limitation for medical claims, the period in which the parties may conduct discovery and in which the plaintiff may join any such additional medical claim or defendant must be equal to the balance of any days remaining from the filing of the complaint to the expiration of that one-year period of limitation, plus 180 days from the filing of the complaint.[21]

### Nonjoinder of additional medical claim or defendant; other laws and rules not affected

After the 180-day period described above in "**Discovery and joinder of additional medical claims or defendants**," expires, the act generally prohibits the plaintiff from joining any additional medical claim or defendant to the action unless the medical claim is for wrongful death and the period of limitation for the claim under the Wrongful Death Law (generally within two years after the decedent's death) has not expired. However, the act provides that R.C. 2323.451 (all the provisions discussed under "**Complaint asserting a medical claim**" and its subheadings above) does not modify or affect and is not to be construed as modifying or affecting any Revised Code provision, rule of common law, or Ohio Rule of Civil Procedure that applies to the commencement of the period of limitation for medical claims that are asserted or defendants that are joined after the expiration of the 180-day period described in the last paragraph under "**Discovery and joinder of additional medical claims or defendants**" above.[22]

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[19] R.C. 2323.451(C).

[20] R.C. 2323.451(D)(1).

[21] R.C. 2323.451(D)(2).

[22] R.C. 2323.451(E) and (F).

### Separate proceedings

The act provides that R.C. 2323.451 (provisions pertaining to the filing of additional claims *after* filing the original complaint) may be used in lieu of, and not in addition to, R.C. 2305.113(B)(1), which provides in relevant part that if prior to the expiration of the one-year period of limitation for filing an action upon a medical claim, a claimant gives to the person subject to that claim written notice that the claimant is *considering* bringing an action, that action may be brought against the person notified at any time within 180 days after the notice is given.[23]

### Applicability

The act provides that its provisions pertaining to the procedures on discovery and joinder of additional claims upon filing a medical claim apply to a civil action based on a medical claim that is filed on or after the act's effective date.[24]

## Unanticipated outcome of medical care

### Defendant's expressions of error or fault

The act expands former law by providing that in any civil action brought by an alleged victim of an "unanticipated outcome" of medical care or in any arbitration proceeding related to such civil action, any and all statements, affirmations, gestures, or conduct expressing *error or fault* that are made by a "health care provider" (defined in continuing law as a hospital, ambulatory care facility, long-term care facility, pharmacy, emergency facility, or health care practitioner[25]), that provider's employee, or a "representative of a health care provider" to the alleged victim, the victim's relative, or a "representative of the alleged victim," and that relate to the victim's discomfort, pain, suffering, injury, or death as the result of the unanticipated outcome of medical care, are inadmissible as evidence of an admission of liability or of an admission against interest.[26]

Under former law, only statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence made by a health care provider or provider's employee to the alleged victim or the victim's relative or representative, and that relate to the victim's discomfort, pain, suffering, injury, or death as the result of the unanticipated outcome

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[23] R.C. 2323.451(A)(2).

[24] Section 3.

[25] R.C. 2317.43(C)(1), by reference to R.C. 2317.02(B)(5), not in the act.

[26] R.C. 2317.43(A)(1).

of medical care are inadmissible as evidence of an admission of liability or of an admission against interest.[27] Former law defined "unanticipated outcome" as the outcome of a medical treatment or procedure that differs from an expected result. The act expands that definition to include any outcome that is adverse or not satisfactory to the patient.[28]

The act provides that if any such statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, error, fault, or a general sense of benevolence or any reference to them are included in the medical record pertaining to the victim, only the portions of the medical record that include those statements, affirmations, gestures, or conduct or any reference to them are inadmissible as evidence of an admission of liability or an admission against interest.[29]

### Communications made in a review

The act provides that when made as part of a "review" conducted in good faith by the health care provider or the provider's employee or representative into the cause of or reasons for an unanticipated outcome of medical care, the following communications are inadmissible as evidence in any civil action brought by an alleged victim of such unanticipated outcome, any related arbitration proceeding, or any other civil proceeding, unless the communications are recorded in the victim's medical record:[30]

- Any communications made by a health care provider or the provider's employee or representative to the alleged victim or the victim's relative, acquaintance, or representative;
- Any communications made by an alleged victim, relative, acquaintance, or representative to the health care provider, employee, or representative.

The above provisions do not require a review to be conducted.[31]

"**Review**" is defined as the policy, procedures, and activities undertaken by or at the direction of a health care provider, the provider's employee, or person designated by the provider or employee with the purpose of determining the cause of or reasons

[27] Former R.C. 2317.43(A).

[28] R.C. 2317.43(C)(6).

[29] R.C. 2317.43(A)(2).

[30] R.C. 2317.43(B)(1).

[31] R.C. 2317.43(B)(2).

for an unanticipated outcome, and initiated and completed during the first 45 days following the unanticipated outcome's occurrence or discovery. A review must be initiated by verbal communication to the patient or the patient's relative or representative by that health care provider, employee, or designated person. The verbal communication must be followed by a written document explaining the review process. A review may be extended for a longer period if necessary upon written notice to the patient or the patient's relative or representative.[32]

The act retains the definition of "representative" and clarifies that the defined term is "**representative of an alleged victim**" to distinguish it from the new defined term "**representative of a health care provider**," which means an attorney, health care provider, a provider's employee, or other person designated by a provider or employee to participate in a review conducted by a provider or employee.[33]

## Standards in federal laws not admissible

The act provides that any guideline, regulation, or other standard under any provision of the "Patient Protection and Affordable Care Act," or Title XVIII or XIX of the "Social Security Act" (Medicare and Medicaid) cannot be construed to establish the standard or duty of care owed by a "**health care provider**" (defined as any person or entity against whom a medical claim may be asserted in a civil action) to a patient in a medical claim, and is not admissible as evidence for or against any party in any civil action based on the medical claim or in any civil or administrative action involving the licensing or licensure status of the health care provider.[34]

## Insurer's reimbursement policies not admissible

The act provides that any "insurer's" "reimbursement policies" or "reimbursement determination" or regulations issued by the U.S. Centers for Medicare and Medicaid Services or the Ohio Department of Medicaid regarding the health care services provided to the patient in any civil action based on a medical claim are not admissible as evidence for or against any party in the action, and may not be used to establish a standard of care or breach of that standard of care in the action.[35]

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[32] R.C. 2317.43(C)(5).

[33] R.C. 2317.43(C)(3) and (4).

[34] R.C. 2317.44.

[35] R.C. 2317.45(B).

"**Insurer**" means any public or private entity doing or authorized to do any insurance business in Ohio, and includes a self-insuring employer and the U.S. Centers for Medicare and Medicaid Services.[36]

"**Reimbursement policies**" means an insurer's policies and procedures governing its decisions on the reimbursement of a "health care provider" (defined as any person or entity against whom a medical claim may be asserted in a civil action) for health care services and the method of reimbursement.[37]

"**Reimbursement determination**" means an insurer's determination of whether the insurer will reimburse a health care provider for health care services and the amount of that reimbursement.[38]

## HISTORY

| ACTION | DATE |
| --- | --- |
| Introduced | 02-01-17 |
| Reported, H. Civil Justice | 05-29-18 |
| Passed House (76-18) | 06-27-18 |
| Reported, S. Judiciary | 12-03-18 |
| Passed Senate (31-0) | 12-05-18 |
| House concurred in Senate amendments (74-7) | 12-06-18 |

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[36] R.C. 2317.45(A)(2).

[37] R.C. 2317.45(A)(1) and (5).

[38] R.C. 2317.45(A)(4).