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4th House District

SPONSOR TESTIMONY – H.B. 7

Good afternoon Chair Butler and committee members. Thank you for the opportunity to offer sponsor testimony today in support of House Bill 7 – the Medical Malpractice Litigation Improvements Act.

For my sponsor testimony, I will provide a general overview of the bill and what is intended to be accomplished. More specific testimony will follow from proponents of the bill.

The purpose of our state's tort – or liability – laws are designed to compensate persons who are injured by the wrongful conduct of another. These laws have developed from the common law, that is the law derived from judicial decisions in individual cases over a long period of time, as modified by the state legislature when it enacts statutes which take precedence over the common law.

When experience demonstrates that the existing tort liability law needs adjustment, it falls on the legislature to make those policy choices by statute to modify existing liability laws and substitute different rules intended to be a fairer, more balanced, less expensive, and less litigious. This process of civil justice reform has been underway in Ohio for more than twenty years.

One area that has been affected by these systemic changes liability for medical negligence and the litigation which accompanies it. When a patient is injured by the negligent conduct of a medical professional, the medical professional is liable to the patient for the injury that the patient suffers as a result.

An unfavorable medical liability climate can lead to expansive and expensive litigation, expensive and sometimes hard to obtain liability insurance, and a diminished supply of medical professionals to meet the needs of patients. Although the medical malpractice climate in Ohio has significantly improved in the past decade or so as a result of enactments by the General Assembly, there are several things which can further improve medical tort liability law and practice.

This bill seeks to fill in some of the gaps or makes other adjustments to round out existing law. To that end, the bill makes changes to Ohio's tort law in ten key areas.

1. First, the bill amends the "apology statute" enacted in 2004, and which encourages early communication between a patient and the physician when there is an unanticipated adverse outcome in medical care. However, that statute was limited and has limited the intended effect. Currently, to encourage prompt communication between the physician and the affected patient, evidence of statements by the health care provider that communicate apology, sympathy, commiseration, condolence, or compassion cannot be admitted in evidence. The bill will add the words "error" and "fault" to those communications which are inadmissible. Patients want answers in those unanticipated situations, but physicians are often stymied from conversing more freely because of fear that they will be sued. This change will allow patients to get those answers. This will create a more positive result for both the patient and the physician in those situations.

2. Secondly, the bill seeks to reduce the need to sweep into the lawsuit unnecessary defendants when litigation is commenced. When a lawsuit is filed within the statute of limitations, a plaintiff will be granted a period of time (180 days) after the initial filing of a medical claim to name additional defendants where there is evidence to believe they may have liability. As a result, the less than desirable practice under current law of initially joining numerous defendants in a lawsuit who are subsequently dismissed from the case after discovery gets underway (and it becomes evident they are not implicated), can be minimized.

3. Third. Under current law, unchanged by the bill, a "notice of intent to file a medical claim," if served prior to the expiration of the statute of limitations upon an intended defendant, will extend the deadline for filing a lawsuit by 6 months. However, the bill would permit the Notice of Intent to File a Medical Claim to be served by certified mail rather than the current requirement of service only by personal service. Personal service can sometimes be awkward and embarrassing, and it is often not necessary.

4. Fourth, the bill abrogates the Loss of Chance Theory of tort liability. A **judicially-created,** speculative theory of tort liability called "loss of less than even chance of survival" from a pre-existing, underlying condition effectively shifts the burden of proof as to causation for the injury to the defendant, invites the jury to indulge in speculation and conjecture, and permits a verdict based on "possibility" as opposed to the law's traditional requirement of "probability." The bill will restore Ohio law to the *traditional* concept of causation by abolishing the judicially-created loss of less than even chance of recovery theory of liability.

5. Fifth, the bill expressly prevents insurer reimbursement policies from being used to establish a legal standard of care for medical tort liability. There is no relationship between insurer payment guidelines and policies (or government ones) and the legal standard of care medical providers must meet. Reimbursement policies are for determining payment for services rendered, and the legal standard of care is the standard of skill to which a medical provider must adhere in providing care.

6. Sixth, the bill corrects language in existing law regarding a Nursing Home Plan of Care. The existing provision applies the term "plan of care" to both nursing homes and hospitals. While it is proper as to nursing homes, it is not properly applied to hospitals and other providers.

7. Seventh, the bill generally maintains confidentiality of peer review records under current law. However, it clarifies that such records may be provided to regulators, e.g. licensing boards, the Department of Health, law enforcement, etc., without losing their confidential status. Peer Review is the process by which healthcare professionals evaluate each other's clinical performance to eliminate future errors. The bill's provision permits peer review information to be shared with regulators but provides that disclosing the peer review information to a regulator does not otherwise affect the confidentiality of the information and obligates the regulator to maintain its confidentiality. This allows for the free flow of information when a peer review is conducted so all the facts can be ascertained, which is less likely to occur if individuals' communications are subject to general disclosure.

8. Eighth, the bill prohibits the introduction of "phantom damages" into evidence. Medical services are often billed at one amount but are discounted before payment to a lesser amount because of contractual arrangements. Currently, a jury can receive evidence of both amounts, which can be confusing. The bill's damages provision will permit evidence of the amount that is **actually paid for** services, not the amount *billed* for those services without expectation of payment to be admitted into evidence. Thus, it clarifies that the measure of economic damages for medical expenses is the amount that was actually paid or will be paid.

9. Ninth, Existing law does not fully address the duty of a health care provider when a patient, whose medical condition has been sufficiently treated so that the patient can be medically discharged but who still has a mental health condition that may threaten the safety of the patient or others if the patient is discharged.

   If a health care provider or a hospital makes a decision to retain such a patient in the interest of the safety of the patient or others, the provider/hospital risks having to defend a wrongful imprisonment claim. The bill provides limited immunity for certain healthcare providers/hospitals caught in this conundrum when they act in in the good faith exercise of professional judgment according to appropriate standards of professional practice.

10. Finally, the bill establishes a different liability standard for medical care in the event of a widespread disaster event. "Disaster" is defined as "an 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." When a natural or man-made disaster or an epidemic overwhelm our emergency and other care providers who are needed to assist, it is reasonable to achieve a higher threshold before liability may attach. Such disasters are not improbable. Under this alternative standard of care for disaster situations, a medical provider would be liable only if they knew - or should have known at the time their services were rendered – that their conduct created an unreasonable risk of injury, death, or loss to person so as to affect the person's life or health was substantially greater than that which would be negligence. Providing an alternative the standard of care in such an event will also help ensure that the professional assistance that is needed will be fully available.

That's a brief overview. This bill has been worked and re-worked over many months. I thank the Ohio State Medical Association and the Ohio Hospital Association for bringing forward the need

and ideas for the bill. Although the Ohio Association for Justice is not on board with all of the provisions of the bill, I would also like to ask their representatives for their conversation and thoughts and those of the Ohio State Bar Association. Additionally, I also welcome suggestions from anyone on the committee on improving the bill.

And, I would ask for your support. At this time, I would be pleased to respond to any questions you may have.