State of Wisconsin
2011 - 2012 LEGISLATURE
January 2011 Special Session

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LRB-0388/1
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SENATE BILL 1

January 5, 2011 – Introduced by COMMITTEE ON SENATE ORGANIZATION, by request of Governor Scott Walker, Senator Zipperer, and Representative J. Ott. Referred to Committee on Judiciary, Utilities, Commerce, and Government Operations.

AN ACT ***to repeal*** 146.38 (3) (d) and 146.38 (3) (e); ***to renumber and amend*** 146.38 (1) (b), 895.043 (3), 907.01 and 907.02; ***to amend*** 146.38 (1m), 146.38 (2), 146.38 (3) (intro.), 146.38 (3) (a), (b) and (c), 230.85 (3) (b), 802.10 (7), 809.103 (2) (a), 814.04 (intro.), 814.29 (3) (a), 907.03, 940.08 (1), 940.24 (1) and 940.295 (3) (a) 3.; and ***to create*** 146.38 (1) (b) 1., 146.38 (1) (b) 2., 146.38 (1) (b) 3., 146.38 (1) (b) 4., 146.38 (1) (bm), 146.38 (2m), 146.38 (3m), 146.38 (3t), 146.38 (6), 153.05 (3m), 893.555, 895.043 (3) (a), 895.043 (3) (b), 895.043 (6), 895.044, 895.045 (3), 895.046, 895.047, 904.16, 907.01 (3), 907.02 (1) (a), (b) and (c), 907.02 (2), 940.08 (3), 940.24 (3) and 940.295 (3) (am) of the statutes; **relating to:** limiting noneconomic damages awarded in actions against long–term care providers; actions against manufacturers, distributors, sellers, and promoters of certain products; confidentiality of health care services reviews; use as evidence of information regarding health care providers; reporting of quality indicators identifying individual hospitals; homicide or injury by negligent

handling of a dangerous weapon, explosives, or fire; criminal abuse of individuals at risk; criminal abuse and neglect of patients and residents; evidence of lay and expert witnesses; damages for frivolous claims; and punitive damage awards.

Analysis by the Legislative Reference Bureau

This bill makes several changes to current law regarding civil actions for negligence in long–term care facilities product liability, actions in strict liability, punitive damage awards, and awards for defending a frivolous lawsuit. The bill also makes changes regarding the confidentially and use of reviews and evaluations of health care providers and regarding criminal liability for certain acts or omissions by health care providers.

ACTIONS AGAINST MANUFACTURERS, DISTRIBUTORS, SELLERS, AND PROMOTERS OF A PRODUCT

In *Thomas v. Mallett*, 2005 WI 129, the Wisconsin Supreme Court held that a manufacturer of white lead carbonate, which was used as a pigment in paint, could be held liable for the injuries caused to a child who had ingested paint that contained the white lead carbonate and who could prove certain elements, even if the child could not prove that a particular manufacturer produced the white lead carbonate that he ingested. The court applied the risk–contribution theory, established in *Collins v. Eli Lilly*, 116 Wis. 2d 166 (1984), saying that all of the manufacturers' white lead carbonate were basically the same, the manufacturers created the risk of injury, and the manufacturers were in a better position than the child to absorb the cost of the injury.

This bill provides that a manufacturer, distributor, seller, or promoter of a product generally may be held liable for damages only if the injured party proves, in addition to the causation, damages, and other elements of the claim, that the specific product that caused the injury was manufactured, distributed, sold, or promoted by the defendant. The bill also provides that if an injured party cannot prove that the defendant manufactured, distributed, sold, or promoted the specific product that caused the injury, the defendant may be held liable if, in addition to proving the other elements of the claim, the injured party names as defendants in the action those manufacturers of a product who, collectively, during the relevant production period, manufactured at least 80 percent of all products sold in this state that are chemically identical to the specific product that allegedly caused the claimant's injury or harm and proves all of the following:

1. That no other lawful process exists for the injured party to seek redress for the injury or harm.

2. That the injury could only be caused by a product that is chemically identical to the specific product that allegedly caused the injury.

3. That the defendant manufactured, distributed, sold, or promoted a product that was chemically identical to the specific product that allegedly caused the injury during the time period in which that specific product was manufactured, distributed, sold, or promoted.

The bill limits liability to products that were manufactured, distributed, sold, or promoted within 25 years before the date the injured party's cause of action accrues.

STRICT LIABILITY

This bill establishes the criteria to determine if a product manufacturer, distributor, or seller is liable to a person injured by the manufactured product based on a claim of strict liability. Currently, a person injured by a manufactured product has three avenues to determine if the manufacturer, distributor, or seller is liable for the person's injury. The claimant may sue under a breach–of–warranty theory, under the common law negligence theory, and under the theory of strict liability. The doctrine of strict liability, as adopted in this state, applies to manufacturers, distributors, and sellers. That doctrine relieves the injured person from proving specific acts of negligence and protects that person from contractual defenses. However, the person must prove that the product was in a defective condition and unreasonably dangerous, the defective condition existed when it left the seller, the defect caused the injury, the seller was in the business of selling the product, and the product was one that the seller expected to and did reach the consumer without substantial change.

Under this bill, a manufacturer is liable for damages caused by the manufacturer's product based on a claim of strict liability if the injured claimant proves that the product was defective, the defective condition made the product unreasonably dangerous, the defective condition existed at the time the product left the control of the manufacturer, the product reached the user or consumer without substantial change, and the defective condition caused the claimant's injuries. The bill specifies when a manufactured product is defective.

Under the bill, a distributor or seller is not liable for the claimant's damages based on a claim of strict liability unless the manufacturer would be liable for the damages and any of the following applies:

1. The distributor or seller contractually assumed one of the manufacturer's duties to manufacture, design, or provide warnings or instructions regarding the product.

2. Neither the manufacturer nor its insurer is subject to service of process within this state.

3. A court determines that the claimant would not be able to enforce a judgment against the manufacturer or its insurer.

The bill requires the dismissal of the distributor or seller as a defendant in an action if the manufacturer or its insurer submits itself to the jurisdiction of the court in which the suit is pending.

Under the bill, if a defendant proves that the injured person, at the time of his or her injury from a manufactured product, had a blood alcohol concentration of 0.08 or more or was under the influence of any controlled substance or controlled

substance analog to the extent that he or she could not operate a motor vehicle safely, that proof creates a rebuttable presumption that the intoxication or drug use was the cause of the person's injury. The bill also creates a rebuttable presumption that the manufactured product is not defective if the product complied with relevant standards, conditions, or specifications under federal or state law. In addition, the bill reduces the manufacturer's, seller's, or distributor's liability by the percentage of causal responsibility for the claimant's damages caused by the claimant's misuse, alteration, or modification of the product.

The bill requires the court to dismiss a claimant's action if the damage was caused by an inherent characteristic of the manufactured product that would be recognized by an ordinary person who uses or consumes the product. The bill relieves a distributor or seller of liability if the distributor or seller receives the product in a sealed container and has no opportunity to test or inspect the product, unless the distributor or seller is liable under another theory.

Under the bill, evidence of remedial measures taken after the sale of the manufactured product is not admissible in an action for damages caused by the product based on a claim of strict liability for the purpose of showing a manufacturing defect, a design defect, or the need for a warning or instruction, but may be admitted to show that a reasonable alternative design existed at the time of the sale of the product. The bill limits a defendant's liability for damage caused by a manufactured product to those products manufactured within 15 years before the claim accrues unless the manufacturer specifies that the product will last longer or unless the action is based on a claim for damages caused by a latent disease.

Under the bill, in product liability cases, to determine the causal responsibility for the injury, the fact finder must determine what percentage of that causal responsibility is the result of the contributory negligence of the injured party, the defective condition of the product, and the contributory negligence of any third person. The bill provides that, if the injured party's percentage of total causal responsibility for the injury is greater than the percentage resulting from the defective condition of the product, the injured party may not recover from the manufacturer or any other person responsible for placing the product in the stream of commerce. If the injured party does have the right to recover, the injured party's damages are diminished by the injured party's percentage of causal responsibility for the injury. Under the bill, after determining the percentage of causal responsibility for the injury that is the result of the defective condition of the product, the fact finder must determine the percentage of causal responsibility of each product defendant for the defective condition of the product. The judge, under the bill, multiplies this percentage by the percentage of causal responsibility for the injury that is the result of the defective condition of the product to determine an individual product defendant's percentage of responsibility for the damages to the injured party.

Under the bill, a product defendant whose responsibility for the damages to the injured party is 51 percent or more is jointly and severally liable for all of those damages. The liability of a product defendant whose responsibility for the damages to the injured party is less than 51 percent is limited to that product defendant's percentage of responsibility for the damages. The bill also allows the injured party

to recovery from the product defendants even when the injured party's causal responsibility for the injury is greater than an individual product defendant's responsibility for the damages to the injured party.

LIMITS ON NONECONOMIC DAMAGES

Under current law, a person, or certain people related to the person, who is injured by the medical malpractice of a health care provider may sue for economic damages and for noneconomic damages. Noneconomic damages are intended to compensate for pain and suffering, loss of companionship, mental distress, and loss of enjoyment of life.

Current law limits noneconomic damages to $750,000 per occurrence of medical malpractice. Current law also limits damages for loss of society and companionship to certain relatives recoverable in a wrongful death action against a health care provider to $500,000 in the case of a deceased minor and $350,000 in the case of a deceased adult.

Under current law, a person, or certain people related to the person, who is injured by the medical malpractice of a health care provider may bring an action against a health care provider no later than three years from the date the injury occurred, or within one year that the injury was discovered or should have been discovered, except that if a health care provider conceals an act or omission that results in an injury, within one year from the date the concealment was discovered or should have been discovered. If the injury or concealment is discovered after the three–year limit has expired, the person may still bring suit for up to five years after the health care provider's act or omission.

This bill applies the same limit to noneconomic damages that are awarded for an injury or a wrongful death that is caused by the negligence of a long–term care provider, such as a nursing home, hospice, or assisted living facility. The bill applies the same statute of limitations to actions against a long–term care provider.

PUNITIVE DAMAGES

Under current law, a person injured by a negligent person can recover the damages resulting from the injury. Damages include economic damages, such as the injured person's medical costs, and noneconomic damages, such as compensation or pain and suffering. In addition, under current law, as interpreted by the Wisconsin Supreme Court, in *Wischer v. Mitsubishi*, 2005 WI 26, 279 Wis. 2d 4 (2005), the plaintiff may recover punitive damages if he or she can prove that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.

This bill changes the proof that the plaintiff must provide to recover punitive damages. Under the bill, the plaintiff must prove that the defendant either acted with intent to cause injury to a particular person or persons or that the defendant knew that the action of the defendant that resulted in injury to one or more persons was practically certain to result in injury to one or more persons. The bill also provides that a voluntarily produced intoxicated or drugged condition is not a defense to liability for punitive damages if, but for the intoxicated or drugged state of the actor, the actor would have known that his or her action was practically certain to result in injury to one or more persons.

DAMAGES FOR FRIVOLOUS CLAIMS

Under current law, every document submitted to a court in a civil case must be signed by a party or, if the party has an attorney, by the attorney. Current law provides that the person, by signing the document, is certifying that the document is not presented for any improper purpose, such as to harass or cause unnecessary delay, that the claims made in the document are warranted by existing law or a nonfrivolous argument for the extension, modification, or reversal of the law, that the allegations presented in the document are likely to have evidentiary support, and that any factual denials in the document are warranted by evidence or, if so identified, are reasonably based on a lack of information or belief. Currently, if the court determines that any of these certifications are not true, the court may impose an appropriate sanction on the responsible attorney or party. Under current law, the sanction must be limited to what is sufficient to deter repetition of the conduct, and may include payment of the reasonable attorney fees or other expenses resulting from the improper conduct. A court may not impose monetary sanctions upon a represented party for making a claim that is not based on existing law or a nonfrivolous argument for the extension, modification, or reversal of the law, and before the court imposes any monetary sanctions, the court must issue an order to show cause regarding the dismissal or settlement of the claim.

Under this bill, in civil actions, a party or his or her attorney may be liable for costs and fees for beginning, using, or continuing an action if that is done solely for the purpose of harassing or maliciously injuring another and the party or attorney knew that there was no reasonable basis in law for the conduct or no good faith argument for an extension, modification, or reversal of the law. The bill allows a party to an action to ask the court by motion to determine if another party has violated these provisions, and if, by clear and convincing evidence, the court so finds, the court must do one of the following:

1. If the offending party withdraws or corrects the improper conduct within 21 days or a time set by the court, decide whether to award the moving party the actual costs incurred as a result of the conduct, including reasonable attorney fees, taking into consideration the offending party's mitigating conduct.

2. If the offending party does not timely withdraw or correct the improper conduct, award the moving party the actual costs incurred as a result of the conduct, including reasonable attorney fees.

Under the bill, if an award of costs for violating these provisions is affirmed on appeal, the appellate court is required to send the action to the lower court to award the damages necessary to compensate the successful party for the actual reasonable attorney fees incurred in the appeal. In addition, if the appellate court finds that a party has committed a violation of one of these provisions in an appeal, the appellate court must, after completion of the appeal, send the action back to the lower court to award the damages necessary to compensate the offended party for the actual reasonable attorney fees incurred in the appeal.

CONFIDENTIALITY OF HEALTH CARE SERVICES REVIEWS

Current law provides that a person who participates in a review or evaluation of services provided by a health care provider or facility, or of charges for such

services (a review), generally may not disclose information acquired in connection with the review. Further, the records that a reviewer or evaluator creates of investigations, inquiries, proceedings, and conclusions conducted for the review (review records) generally may not be released. Under current law, review records may not be used in a civil action for personal injuries against the health care provider or health care facility.

Current law contains several exceptions to confidentiality of review records and information acquired in connection with a review, which require disclosure of such records and information under the following circumstances: to a health care provider or facility whose services are reviewed, or to any person with the consent of that provider or facility; to the person who requested the review, for use only for the purpose of improving the quality of health care, avoiding improper utilization of health care services, and determining reasonable charges for services; to a court upon issuance of a subpoena in a criminal action; to an examining or licensing board or agency, when the organization or evaluator conducting the review determines that such action is advisable; and in a report in statistical format.

This bill makes the following changes to confidentiality provisions for health care service reviews:

1. The bill repeals the exception to confidentiality that requires release of review records and information acquired in connection with a review upon issuance of a subpoena in a criminal action.

2. The bill provides that review records may not be used in any civil or criminal action against any health care provider.

3. The bill provides that a person who participates in a review may not disclose any incident or occurrence report that is made to notify a reviewer of an incident, practice, or other situation that becomes the subject of a review. Further the bill prohibits using such an incident or occurrence report in any civil or criminal action against a health care provider.

4. The bill specifies that the confidentiality provisions related to review records apply regardless of whether the review is conducted by representatives from one or more organizations.

5. The bill provides that the confidentially provisions for review records apply only if the review for which the records were created was conducted for one of the following purposes: to help improve the quality of health care, to avoid improper utilization of the services of health care providers, or to determine reasonable charges for such services.

6. Instead of requiring that review records and information acquired in connection with a review be disclosed in statistical form, the bill allows that such information and review records may be disclosed in statistical form. The bill also allows information acquired in connection with a review to be disclosed to a health care provider's employer or parent, subsidiary or affiliated organization or to the parent, subsidiary, or affiliated organization of a health care provider's employer.

7. The bill requires that any record or incident or occurrence report that is disclosed to another, properly or improperly, remains confidential and may not be used in a civil or criminal action against any health care provider.

8. The bill includes as health care providers, for purposes of the confidentiality provisions, all of the following: individual health care providers; facilities, organizations, and business entities that are health care providers; persons working under the supervision of or in collaboration with an individual health care provider; and parents, subsidiaries, or affiliate organizations of facilities, organizations, and business entities that are health care providers.

USE OF HEALTH CARE REPORTS OR EMPLOYEE STATEMENTS

This bill prohibits the use as evidence in a civil or criminal action of any health care provider reports that are required by the Department of Regulation and Licensing (DRL) or by the division within the Department of Health Services (DHS) that conducts health care provider quality assurance reviews. The bill also prohibits the use as evidence in a civil or criminal action of any statements of, or records of interviews with, employees of a health care provider related to the regulation of a health care provider and obtained by DRL or by the division within DHS that conducts health care provider quality assurance reviews. The bill makes an exception from these prohibitions for the use of the records, statements, or interviews in an administrative proceeding conducted by DRL or by the division within DHS that conducts health care provider quality assurance reviews.

REPORTING OF HOSPITAL QUALITY INDICATORS

Current law requires the Department of Administration to contract with a certain entity to collect health care information from hospitals and ambulatory surgery centers. This entity analyzes and disseminates that health care information in a language understandable to laypersons. Among other health care information, the entity must report hospital quality indicators, but the report cannot identify the individual hospital with the quality indicators. This bill allows the entity to report quality indicators identifying individual hospitals.

CRIMES

Under current law, a person who causes the death of, or bodily harm to, an individual by negligent operation or handling of a dangerous weapon, explosives, or fire is guilty of a crime. A dangerous weapon includes any device or instrumentality, which in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm. The bill provides that a health care provider is not guilty of the crimes of causing the death of, or bodily harm to, an individual by negligent operation or handling of a dangerous weapon, explosives, or fire, if the health care provider is acting within the scope of his or her practice or employment.

Also under current law, a person who is in charge of or employed by a residential care facility, an inpatient health care facility, a treatment facility, or a home health agency, who intentionally, recklessly, or negligently abuses or neglects a patient or a resident in one of those facilities or agencies is guilty of a crime. The penalties for the crime depend upon the degree of harm suffered by the patient or resident. Under the bill, a person who negligently abuses or neglects a patient or a resident is not guilty of a crime if the person is a health care provider acting in the scope of his or her practice or employment, and he or she commits an act or omission of mere inefficiency, unsatisfactory conduct, or failure in good performance as the result of

inability, incapacity, inadvertency, ordinary negligence, or good faith error in judgment or discretion.

EXPERT AND LAY WITNESS TESTIMONY

Under current law, if a witness is not testifying as an expert, the witness's testimony is limited to those opinions that are rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or of a fact at issue in the case. This bill adds the additional limit that a nonexpert's testimony may not be based on scientific, technical, or other specialized knowledge of the witness.

Current law allows the testimony of an expert witness if that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue in the case. This bill limits the testimony of an expert witness to testimony that is based on sufficient facts or data, that is the product of reliable principles and methods, and that is based on the witness applying those principles and methods to the facts of the case. The bill also prohibits the testimony of an expert witness who is entitled to receive any compensation contingent on the outcome of the case.

Currently, the facts or data in a particular case on which an expert witness bases his or her opinion may be made known to the expert at or before the case hearing, but if those facts or data are reasonably relied upon by experts in the field in forming opinions about the subject, they do not need to be admissible into evidence in the case. This bill adds that facts or data that are otherwise inadmissible may not be disclosed to the jury unless the court determines that their value in assisting the jury to evaluate the expert's testimony outweighs their prejudicial effect.

For further information see the ***state and local*** fiscal estimate, which will be printed as an appendix to this bill.

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

SECTION 1. 146.38 (1) (b) of the statutes is renumbered 146.38 (1) (b) (intro.) and amended to read:

146.38 **(1)** (b) (intro.) "Health care provider" ~~includes an ambulance service provider, as defined in s. 256.01 (3), an emergency medical technician, as defined in s. 256.01 (5), and a first responder, as defined in s. 256.01 (9).~~ means any of the following:

SECTION 2. 146.38 (1) (b) 1. of the statutes is created to read:

146.38 **(1)** (b) 1. A person specified in s. 146.81 (1) (a) to (hp), (r), or (s).

SECTION 3. 146.38 (1) (b) 2. of the statutes is created to read:

146.38 **(1)** (b) 2. A facility, association, or business entity, as specified in s. 146.81 (1) (i) to (q).

SECTION 4. 146.38 (1) (b) 3. of the statutes is created to read:

146.38 **(1)** (b) 3. A person working under the supervision of or in collaboration with a person specified in subd. 1.

SECTION 5. 146.38 (1) (b) 4. of the statutes is created to read:

146.38 **(1)** (b) 4. A parent, subsidiary, or affiliate organization of a facility, association, or business entity, as specified in subd. 2.

SECTION 6. 146.38 (1) (bm) of the statutes is created to read:

146.38 **(1)** (bm) "Incident or occurrence report" means a written or oral statement that is made to notify a person, organization, or an evaluator who reviews or evaluates the services of health care providers or charges for such services of an incident, practice, or other situation that becomes the subject of such a review or evaluation.

SECTION 7. 146.38 (1m) of the statutes is amended to read:

146.38 **(1m)** No person who participates in the review or evaluation of the services of health care providers ~~or facilities~~ or charges for such services may disclose an incident or occurrence report or any information acquired in connection with such review or evaluation except as provided in sub. (3) or (3m).

SECTION 8. 146.38 (2) of the statutes is amended to read:

146.38 **(2)** All persons, organizations, or evaluators ~~reviewing or evaluating,~~ whether from one or more entities, who review or evaluate the services of health care providers in order to help improve the quality of health care, to avoid improper utilization of the services of health care providers, or to determine the reasonable

charges for such services shall keep a record of their investigations, inquiries, proceedings and conclusions. No such record may be released to any person under s. 804.10 (4) or otherwise except as provided in sub. (3) or (3m). No such record may be used in any civil or criminal action ~~for personal injuries~~ against the health care provider ~~or facility~~ or any other health care provider; however, except for incident or occurrence reports or records from other persons, organizations, or evaluators reviewing or evaluating health care providers, information, documents or records presented during the review or evaluation may not be construed as immune from discovery under s. 804.10 (4) or use in any civil or criminal action merely because they were so presented. Any person who testifies during or participates in the review or evaluation may testify in any civil or criminal action as to matters within his or her knowledge, but may not testify as to information obtained through his or her participation in the review or evaluation, nor as to any conclusion of such review or evaluation.

SECTION 9. 146.38 (2m) of the statutes is created to read:

146.38 **(2m)** An incident or occurrence report may not be used in any civil or criminal action against a health care provider.

SECTION 10. 146.38 (3) (intro.) of the statutes is amended to read:

146.38 **(3)** (intro.) Information acquired in connection with the review and evaluation of health care services shall be disclosed and records of such review and evaluation shall be released, with the identity of any patient whose treatment is reviewed being withheld ~~unless the patient has granted permission to disclose identity~~ except as permitted under s. 146.82, in the following circumstances:

SECTION 11. 146.38 (3) (a), (b) and (c) of the statutes are amended to read:

146.38 **(3)** (a) To the health care provider ~~or facility~~ whose services are being reviewed or evaluated, upon the request of such provider ~~or facility~~;

(b) To any person with the consent of the health care provider ~~or facility~~ whose services are being reviewed or evaluated;

(c) To the person requesting the review or evaluation, for use solely for the purpose of improving the quality of health care, avoiding the improper utilization of the services of health care providers ~~and facilities~~, and determining the reasonable charges for such services;

SECTION 12. 146.38 (3) (d) of the statutes is repealed.

SECTION 13. 146.38 (3) (e) of the statutes is repealed.

SECTION 14. 146.38 (3m) of the statutes is created to read:

146.38 **(3m)** (a) Information acquired in connection with the review and evaluation of health care services may be disclosed, and records of such review and evaluation may be released, in statistical form with the consent of the person authorizing or with the authority to authorize the review or evaluation. Information disclosed or records released under this subsection shall not reveal the identity of any patient except as permitted under s. 146.82.

(b) Information acquired in connection with the review or evaluation of health care services may be disclosed, and the records of such a review or evaluation released, to any of the following persons, with the consent of the person authorizing or with the authority to authorize the review or evaluation:

1. The employer of a health care provider, as defined in sub. (1) (b) 1. and 3.

2. The parent, subsidiary, or affiliate organization of a health care provider, as defined in sub. (1) (b) 2.

3. The parent, subsidiary, or affiliate organization of the employer of a health care provider, as defined in sub. (1) (b) 1. and 3.

SECTION 15. 146.38 (3t) of the statutes is created to read:

146.38 **(3t)** A record described under sub. (2) or an incident or occurrence report disclosed either under sub. (3) or (3m) or in violation of this section remains confidential and may not be used in any civil or criminal action against the health care provider or any other health care provider.

SECTION 16. 146.38 (6) of the statutes is created to read:

146.38 **(6)** Health care provider specific information acquired by an administrative agency in order to help improve the quality of health care, to avoid the improper utilization of services of health care providers, or to determine the reasonable charges for health care services is exempt from inspection, copying, or receipt under s. 19.35 (1).

SECTION 17. 153.05 (3m) of the statutes is created to read:

153.05 **(3m)** The entity under contract under sub. (2m) (a) may report quality indicators identifying individual hospitals based on data the entity collects under this subchapter.

SECTION 18. 230.85 (3) (b) of the statutes is amended to read:

230.85 **(3)** (b) If, after hearing, the division of equal rights finds that the respondent did not engage in or threaten a retaliatory action it shall order the complaint dismissed. The division of equal rights shall order the employee's appointing authority to insert a copy of the findings and orders into the employee's personnel file and, if the respondent is a natural person, order the respondent's appointing authority to insert such a copy into the respondent's personnel file. If the division of equal rights finds by unanimous vote that the employee filed a frivolous

complaint it may order payment of the respondent's reasonable actual attorney fees and actual costs. Payment may be assessed against either the employee or the employee's attorney, or assessed so that the employee and the employee's attorney each pay a portion. To find a complaint frivolous the division of equal rights must find that s. 802.05 (2) or 895.044 has been violated.

SECTION 19. 802.10 (7) of the statutes is amended to read:

802.10 **(7)** SANCTIONS. Violations of a scheduling or pretrial order are subject to ss. 802.05, 804.12 ~~and,~~ 805.03, and 895.044.

SECTION 20. 809.103 (2) (a) of the statutes is amended to read:

809.103 **(2)** (a) Is frivolous, as determined under s. 802.05 (2) or 895.044.

SECTION 21. 814.04 (intro.) of the statutes is amended to read:

814.04 Items of costs. (intro.) Except as provided in ss. 93.20, 100.195 (5m) (b), 100.30 (5m), 106.50 (6) (i) and (6m) (a), 111.397 (2) (a), 115.80 (9), 281.36 (2) (b) 1., 767.553 (4) (d), 769.313, 802.05, 814.245, 895.035 (4), 895.044, 895.443 (3), 895.444 (2), 895.445 (3), 895.446 (3), 895.506, 943.212 (2) (b), 943.245 (2) (d), 943.51 (2) (b), and 995.10 (3), when allowed costs shall be as follows:

SECTION 22. 814.29 (3) (a) of the statutes is amended to read:

814.29 **(3)** (a) A request for leave to commence or defend an action, proceeding, writ of error or appeal without being required to pay fees or costs or to give security for costs constitutes consent of the affiant and counsel for the affiant that if the judgment is in favor of the affiant the court may order the opposing party to first pay the amount of unpaid fees and costs, including attorney fees under ss. 802.05 ~~and,~~ 804.12 (1) (c), and 895.044 and under 42 USC 1988 and to pay the balance to the plaintiff.

SECTION 23. 893.555 of the statutes is created to read:

893.555 Limitation of damages; long–term care providers. (1) In this section:

(a) "Long–term care provider" means any of the following:

1. An adult family home, as defined in s. 50.01 (1).

2. A residential care apartment complex, as defined in s. 50.01 (1d).

3. A community–based residential facility, as defined in s. 50.01 (1g).

4. A home health agency, as defined in s. 50.01 (1r).

5. A nursing home, as defined in s. 50.01 (3).

6. A hospice, as defined in s. 50.90 (1).

(b) "Noneconomic damages" has the meaning given in s. 893.55 (4) (a).

(2) Except as provided in sub. (3), an action to recover damages for injury arising from any treatment or operation performed by, or from any omission by, a long–term care provider, regardless of the theory on which the action is based, shall be commenced within the later of:

(a) Three years from the date of the injury.

(b) One year from the date the injury was discovered or, in the exercise of reasonable diligence should have been discovered, except that an action may not be commenced under this paragraph more than 5 years from the date of the act or omission.

(3) If a long–term care provider conceals from a patient a prior act or omission of the provider that has resulted in injury to the patient, an action shall be commenced within one year from the date the patient discovers the concealment or, in the exercise of reasonable diligence, should have discovered the concealment or within the time limitation provided by sub. (2), whichever is later.

(4) The total noneconomic damages recoverable for bodily injury arising from care or treatment performed, or from any omission, by a long–term care provider, including any action or proceeding based on contribution or indemnification and any action for a claim by a person other than the injured person for noneconomic damages recoverable for bodily injury, may not exceed the limit under s. 893.55 (4) (d) for each occurrence on or after the effective date of this subsection .... [LRB inserts date], from all long–term care providers and all employees of long–term care providers acting within the scope of their employment and providing long–term care services who are found negligent.

(5) A court in an action tried without a jury shall make a finding as to noneconomic damages without regard to the limit under s. 893.55 (4) (d). If noneconomic damages in excess of the limit are found, the court shall make any reduction required under s. 895.045 and shall award as noneconomic damages the lesser of the reduced amount or the limit. If an action is before a jury, the jury shall make a finding as to noneconomic damages without regard to the limit under s. 893.55 (4) (d). If the jury finds that noneconomic damages exceed the limit, the jury shall make any reduction required under s. 895.045 and the court shall award as noneconomic damages the lesser of the reduced amount or the limit.

(6) Notwithstanding the limits on noneconomic damages under this section, damages recoverable against a long–term care provider, and an employee of a long–term care provider acting within the scope of his or her employment and providing long–term care services, for wrongful death are subject to the limit under s. 895.04 (4). If damages in excess of the limit under s. 895.04 (4) are found, the court shall make any reduction required under s. 895.045 and shall award the lesser of the reduced amount or the limit under s. 895.04 (4).

(7) Damages recoverable under this section against a long–term care provider, and an employee of a long–term care provider acting within the scope of his or her employment and providing long–term care services, are subject to the provisions of s. 895.045.

(8) Evidence of any compensation for bodily injury received from sources other than the defendant to compensate the claimant for the injury is admissible in an action to recover damages for negligence by a long–term care provider. This section does not limit the substantive or procedural rights of persons who have claims based upon subrogation.

SECTION 24. 895.043 (3) of the statutes is renumbered 895.043 (3) (intro.) and amended to read:

895.043 **(3)** STANDARD OF CONDUCT. (intro.) The plaintiff may receive punitive damages if evidence is submitted showing that the defendant ~~acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.~~ did any of the following:

SECTION 25. 895.043 (3) (a) of the statutes is created to read:

895.043 **(3)** (a) Acted with the intent to cause injury to a particular person or persons.

SECTION 26. 895.043 (3) (b) of the statutes is created to read:

895.043 **(3)** (b) Knew that the defendant's action that resulted in injury to one or more persons was practically certain to result in injury to one or more persons.

SECTION 27. 895.043 (6) of the statutes is created to read:

895.043 **(6)** UNAVAILABLE DEFENSE. A voluntarily produced intoxicated or drugged condition is not a defense to liability for punitive damages if, had the actor not been in that intoxicated or drugged condition, he or she would have known that

his or her action that resulted in injury to one or more persons, done while in the intoxicated or drugged condition, was practically certain to result in injury to one or more persons.

SECTION 28. 895.044 of the statutes is created to read:

895.044 Damages for maintaining certain claims and counterclaims. **(1)** A party or a party's attorney may be liable for costs and fees under this section for commencing, using, or continuing an action, special proceeding, counterclaim, defense, cross complaint, or appeal to which any of the following applies:

(a) The action, special proceeding, counterclaim, defense, cross complaint, or appeal was commenced, used, or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

(b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense, cross complaint, or appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.

(2) Upon either party's motion made at any time during the proceeding or upon judgment, if a court finds, upon clear and convincing evidence, that sub. (1) (a) or (b) applies to an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense, or cross complaint commenced, used, or continued by a defendant, the court:

(a) May, if the party served with the motion withdraws, or appropriately corrects, the action, special proceeding, counterclaim, defense, or cross complaint within 21 days after service of the motion, or within such other period as the court may prescribe, award to the party making the motion, as damages, the actual costs incurred by the party as a result of the action, special proceeding, counterclaim,

defense, or cross complaint, including the actual reasonable attorney fees the party incurred, including fees incurred in any dispute over the application of this section. In determining whether to award, and the appropriate amount of, damages under this paragraph, the court shall take into consideration the timely withdrawal or correction made by the party served with the motion.

(b) Shall, if a withdrawal or correction under par. (a) is not timely made, award to the party making the motion, as damages, the actual costs incurred by the party as a result of the action, special proceeding, counterclaim, defense, or cross complaint, including the actual reasonable attorney fees the party incurred, including fees incurred in any dispute over the application of this section.

(3) If a party makes a motion under sub. (2), a copy of that motion and a notice of the date of the hearing on that motion shall be served on any party who is not represented by counsel only by personal service or by sending the motion to the party by registered mail.

(4) If an award under this section is affirmed upon appeal, the appellate court shall, upon completion of the appeal, remand the action to the trial court to award damages to compensate the successful party for the actual reasonable attorney fees the party incurred in the appeal.

(5) If the appellate court finds that sub. (1) (a) or (b) applies to an appeal, the appellate court shall, upon completion of the appeal, remand the action to the trial court to award damages to compensate the successful party for all the actual reasonable attorney fees the party incurred in the appeal. An appeal is subject to this subsection in its entirety if any element necessary to succeed on the appeal is supported solely by an argument that is described under sub. (1) (a) or (b).

(6) The costs and fees awarded under subs. (2), (4), and (5) may be assessed fully against the party bringing the action, special proceeding, cross complaint, defense, counterclaim, or appeal or the attorney representing the party, or both, jointly and severally, or may be assessed so that the party and the attorney each pay a portion of the costs and fees.

(7) This section does not apply to criminal actions or civil forfeiture actions. Subsection (5) does not apply to appeals under s. 809.107, 809.30, or 974.05 or to appeals of criminal or civil forfeiture actions.

SECTION 29. 895.045 (3) of the statutes is created to read:

895.045 **(3)** PRODUCT LIABILITY. (a) In an action by any person to recover damages for injuries caused by a defective product based on a claim of strict liability, the fact finder shall first determine if the injured party has the right to recover damages. To do so, the fact finder shall determine what percentage of the total causal responsibility for the injury resulted from the contributory negligence of the injured person, what percentage resulted from the defective condition of the product, and what percentage resulted from the contributory negligence of any other person.

(b) If the injured party's percentage of total causal responsibility for the injury is greater than the percentage resulting from the defective condition of the product, the injured party may not, based on the defect in the product, recover damages from the manufacturer, distributor, seller, or any other person responsible for placing the product in the stream of commerce.

(c) If the injured party's percentage of total causal responsibility for the injury is equal to or less than the percentage resulting from the defective condition of the product, the injured party may recover but the damages recovered by the injured party shall be diminished by the percentage attributed to that injured party.

(d) If multiple defendants are alleged to be responsible for the defective condition of the product, and the injured party is not barred from recovery under par. (b), the fact finder shall determine the percentage of causal responsibility of each product defendant for the defective condition of the product. The judge shall then multiply that percentage of causal responsibility of each product defendant for the defective condition of the product by the percentage of causal responsibility for the injury to the person attributed to the defective product. The result of that multiplication is the individual product defendant's percentage of responsibility for the damages to the injured party. A product defendant whose responsibility for the damages to the injured party is 51 percent or more of the total responsibility for the damages to the injured party is jointly and severally liable for all of the damages to the injured party. The responsibility of a product defendant whose responsibility for the damages to the injured party is less than 51 percent of the total responsibility for the damages to the injured party is limited to that product defendant's percentage of responsibility for the damages to the injured party.

(e) If the injured party is not barred from recovery under par. (b), the fact that the injured party's causal responsibility for the injury is greater than an individual product defendant's responsibility for the damages to the injured party does not bar the injured party from recovering from that individual product defendant.

(f) This subsection does not apply to actions based on negligence or a breach of warranty.

SECTION 30. 895.046 of the statutes is created to read:

895.046 Remedies against manufacturers, distributors, sellers, and promoters of products. (1) DEFINITIONS. In this section:

(a) "Claimant" means a person seeking damages or other relief for injury or harm to a person or property caused by or arising from a product.

(b) "Relevant production period" means the time period during which the specific product that allegedly caused a claimant's injury or harm was manufactured, distributed, sold, or promoted.

(2) APPLICABILITY. This section applies to all actions in which a claimant alleges that the manufacturer, distributor, seller, or promoter of a product is liable for an injury or harm to a person or property, including actions based on allegations that the design, manufacture, distribution, sale, or promotion of, or instructions or warnings about, a product caused or contributed to a personal injury or harm to a person or property, a private nuisance, or a public nuisance, and to all related or independent claims, including unjust enrichment, restitution, or indemnification.

(3) REMEDY WITH SPECIFIC PRODUCT IDENTIFICATION. Except as provided in sub. (4), the manufacturer, distributor, seller, or promoter of a product may be held liable in an action under sub. (2) only if the claimant proves, in addition to any other elements required to prove his or her claim, that the manufacturer, distributor, seller, or promoter of a product manufactured, distributed, sold, or promoted the specific product alleged to have caused the claimant's injury or harm.

(4) REMEDY WITHOUT SPECIFIC PRODUCT IDENTIFICATION. Subject to sub. (5), if a claimant cannot meet the burden of proof under sub. (3), the manufacturer, distributor, seller, or promoter of a product may be held liable for an action under sub. (2) only if all of the following apply:

(a) The claimant proves all of the following:

1. That no other lawful process exists for the claimant to seek redress from another person for the injury or harm.

2. That the claimant has suffered an injury or harm that can be caused only by a product chemically identical to the specific product that allegedly caused the claimant's injury or harm.

3. That the manufacturer, distributor, seller, or promoter of a product manufactured, distributed, sold, or promoted a product that meets all of the following criteria:

a. Is chemically identical to the specific product that allegedly caused the claimant's injury or harm.

b. Was manufactured, distributed, sold, or promoted in this state during the time period in which the specific product that allegedly caused the claimant's injury or harm was manufactured, distributed, sold, or promoted.

(b) The action names, as defendants, those manufacturers of a product who collectively, during the relevant production period, manufactured at least 80 percent of all products sold in this state that are chemically identical to the specific product that allegedly caused the claimant's injury or harm.

(5) LIMITATION ON LIABILITY. No manufacturer, distributor, seller, or promoter of a product is liable under sub. (4) if more than 25 years have passed between the date that the manufacturer, distributor, seller, or promoter of a product last manufactured, distributed, sold, or promoted a product chemically identical to the specific product that allegedly caused the claimant's injury and the date that the claimant's cause of action accrued.

(6) APPORTIONMENT OF LIABILITY. If more than one manufacturer, distributor, seller, or promoter of a product is found liable for the claimant's injury or harm under subs. (4) and (5), the court shall apportion liability among those manufacturers, distributors, sellers, and promoters, but that liability shall be several and not joint.

SECTION 31. 895.047 of the statutes is created to read:

895.047 Product liability. (1) LIABILITY OF MANUFACTURER. In an action for damages caused by a manufactured product based on a claim of strict liability, a manufacturer is liable to a claimant if the claimant establishes all of the following by a preponderance of the evidence:

(a) That the product is defective because it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product contains a manufacturing defect if the product departs from its intended design even though all possible care was exercised in the manufacture of the product. A product is defective in design if the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the manufacturer and the omission of the alternative design renders the product not reasonably safe. A product is defective because of inadequate instructions or warnings only if the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the manufacturer and the omission of the instructions or warnings renders the product not reasonably safe.

(b) That the defective condition rendered the product unreasonably dangerous to persons or property.

(c) That the defective condition existed at the time the product left the control of the manufacturer.

(d) That the product reached the user or consumer without substantial change in the condition in which it was sold.

(e) That the defective condition was a cause of the claimant's damages.

(2) LIABILITY OF SELLER OR DISTRIBUTOR. (a) A seller or distributor of a product is not liable based on a claim of strict liability to a claimant unless the manufacturer would be liable under sub. (1) and any of the following applies:

1. The claimant proves by a preponderance of the evidence that the seller or distributor has contractually assumed one of the manufacturer's duties to manufacture, design, or provide warnings or instructions with respect to the product.

2. The claimant proves by a preponderance of the evidence that neither the manufacturer nor its insurer is subject to service of process within this state.

3. A court determines that the claimant would be unable to enforce a judgment against the manufacturer or its insurer.

(b) The court shall dismiss a product seller or distributor as a defendant based on par. (a) 2. if the manufacturer or its insurer submits itself to the jurisdiction of the court in which the suit is pending.

(3) DEFENSES. (a) If the defendant proves by clear and convincing evidence that at the time of the injury the claimant was under the influence of any controlled substance or controlled substance analog to the extent prohibited under s. 346.63 (1) (a), or had an alcohol concentration, as defined in s. 340.01 (1v), of 0.08 or more, there shall be a rebuttable presumption that the claimant's intoxication or drug use was the cause of his or her injury.

(b) Evidence that the product, at the time of sale, complied in material respects with relevant standards, conditions, or specifications adopted or approved by a federal or state law or agency shall create a rebuttable presumption that the product is not defective.

(c) The damages for which a manufacturer, seller, or distributor would otherwise be liable shall be reduced by the percentage of causal responsibility for the claimant's harm attributable to the claimant's misuse, alteration, or modification of the product.

(d) The court shall dismiss the claimant's action under this section if the damage was caused by an inherent characteristic of the product that would be recognized by an ordinary person with ordinary knowledge common to the community that uses or consumes the product.

(e) A seller or distributor of a product is not liable to a claimant for damages if the seller or distributor receives the product in a sealed container and has no reasonable opportunity to test or inspect the product. This paragraph does not apply if the seller or distributor may be liable under sub. (2) (a) 2. or 3.

(4) SUBSEQUENT REMEDIAL MEASURES. In an action for damages caused by a manufactured product based on a claim of strict liability, evidence of remedial measures taken subsequent to the sale of the product is not admissible for the purpose of showing a manufacturing defect in the product, a defect in the design of the product, or a need for a warning or instruction. This subsection does not prohibit the admission of such evidence to show a reasonable alternative design that existed at the time when the product was sold.

(5) TIME LIMIT. In any action under this section, a defendant is not liable to a claimant for damages if the product alleged to have caused the damage was manufactured 15 years or more before the claim accrues, unless the manufacturer makes a specific representation that the product will last for a period beyond 15 years. This subsection does not apply to an action based on a claim for damages caused by a latent disease.

(6) INAPPLICABILITY. This section does not apply to actions based on a claim of negligence or breach of warranty.

SECTION 32. 904.16 of the statutes is created to read:

904.16 Health care reports. (1) In this section:

(a) "Health care provider" has the meaning given in s. 146.38 (1) (b).

(b) "Regulatory agency" means the department of regulation and licensing or the division within the department of health services that conducts quality assurance activities related to health care providers.

(2) Except as provided in sub. (3), the following may not be used as evidence in a civil or criminal action brought against a health care provider.

(a) Reports that a regulatory agency requires a health care provider to give or disclose to that regulatory agency.

(b) Statements of, or records of interviews with, employees of a health care provider related to the regulation of the health care provider obtained by a regulatory agency.

(3) This section does not prohibit the use of the reports, statements, and records described in sub. (2) in any administrative proceeding conducted by a regulatory agency. This section does not apply to reports protected under s. 146.997.

SECTION 33. 907.01 of the statutes is renumbered 907.01 (intro.) and amended to read:

907.01 Opinion testimony by lay witnesses. (intro.) If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are ~~rationally~~ all of the following:

(1) Rationally based on the perception of the witness ~~and helpful.~~

(2) Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

SECTION 34. 907.01 (3) of the statutes is created to read:

907.01 **(3)** Not based on scientific, technical, or other specialized knowledge within the scope of a witness under s. 907.02 (1).

SECTION 35. 907.02 of the statutes is renumbered 907.02 (1) (intro.) and amended to read:

907.02 **(1)** (intro.) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. if all of the following are true:

SECTION 36. 907.02 (1) (a), (b) and (c) of the statutes are created to read:

907.02 **(1)** (a) The testimony is based upon sufficient facts or data.

(b) The testimony is the product of reliable principles and methods.

(c) The witness has applied the principles and methods reliably to the facts of the case.

SECTION 37. 907.02 (2) of the statutes is created to read:

907.02 **(2)** Notwithstanding sub. (1), the testimony of an expert witness may not be admitted if the expert witness is entitled to receive any compensation contingent on the outcome of any claim or case with respect to which the testimony is being offered.

SECTION 38. 907.03 of the statutes is amended to read:

907.03 Bases of opinion testimony by experts. The facts or data in the particular case upon which an expert bases an opinion or inference may be those

perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion or inference substantially outweighs their prejudicial effect.

SECTION 39. 940.08 (1) of the statutes is amended to read:

940.08 **(1)** ~~Whoever~~ Except as provided in sub. (3), whoever causes the death of another human being by the negligent operation or handling of a dangerous weapon, explosives or fire is guilty of a Class G felony.

SECTION 40. 940.08 (3) of the statutes is created to read:

940.08 **(3)** Subsection (1) does not apply to a health care provider acting within the scope of his or her practice or employment.

SECTION 41. 940.24 (1) of the statutes is amended to read:

940.24 **(1)** ~~Whoever~~ Except as provided in sub. (3), whoever causes bodily harm to another by the negligent operation or handling of a dangerous weapon, explosives or fire is guilty of a Class I felony.

SECTION 42. 940.24 (3) of the statutes is created to read:

940.24 **(3)** Subsection (1) does not apply to a health care provider acting within the scope of his or her practice or employment.

SECTION 43. 940.295 (3) (a) 3. of the statutes is amended to read:

940.295 **(3)** (a) 3. ~~Abuses~~ Except as provided in par. (am), abuses, with negligence, or neglects a patient or a resident.

SECTION 44. 940.295 (3) (am) of the statutes is created to read:

940.295 **(3)** (am) Paragraph (a) 3. does not apply to a health care provider acting in the scope of his or her practice or employment who commits an act or omission of mere inefficiency, unsatisfactory conduct, or failure in good performance as the result of inability, incapacity, inadvertency, ordinary negligence, or good faith error in judgment or discretion.

SECTION 45. Initial applicability.

(1) CRIMES. The treatment of sections 940.08 (1) and (3), 940.24 (1) and (3), and 940.295 (3) (a) 3. and (am) of the statutes first applies to acts or omissions committed on the effective date of this subsection.

(2) DISCLOSURE AND RELEASE OF RECORDS OR INFORMATION. The treatment of section 146.38 (1m), (2), (3) (d) and (e), and (3m) of the statutes first applies to disclosures or releases occurring on the effective date of this subsection.

(3) USE OF RECORDS OR INFORMATION. The treatment of section 146.38 (2) and (2m) of the statutes first applies to use of records or information on the effective date of this subsection.

(4) EVIDENCE. The treatment of section 904.16 of the statutes first applies to health care provider reports received, and statements of, or records of interviews with, employees of a health care provider obtained, on the effective date of this subsection.

(5) CIVIL ACTIONS. The treatment of sections 230.85 (3) (b), 802.10 (7), 809.103 (2) (a), 814.04 (intro.), 814.29 (3) (a), 895.043 (6), 895.044, 895.045 (3), 895.046, 895.047, and 907.03 of the statutes, the renumbering and amendment of sections 895.043 (3), 907.01, and 907.02 of the statutes, and the creation of sections 895.043 (3) (a) and (b), 907.01 (3), and 907.02 (1) (a), (b), and (c) and (2) of the statutes first

apply to actions or special proceedings that are commenced or continued on the effective date of this subsection.

SECTION 46. Effective date.

(1) This act takes effect on the first day of the 2nd month beginning after publication.

(END)