

Sixty-first
Legislative Assembly
of North Dakota

HOUSE BILL NO. 1390

Introduced by

Representatives Belter, Schneider

Senator Grindberg

1 A BILL for an Act to amend and reenact sections 28-01-46 and 32-42-01 of the North Dakota
2 Century Code, relating to expert opinion requirements in an action alleging negligence by a
3 health care provider and to the definition of noneconomic damages; to repeal section 32-42-02
4 of the North Dakota Century Code, relating to noneconomic damages in health care malpractice
5 actions; and to provide a penalty.

6 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

7 **SECTION 1. AMENDMENT.** Section 28-01-46 of the North Dakota Century Code is
8 amended and reenacted as follows:

9 **28-01-46. Expert ~~opinion~~ review certification required to maintain an action based**
10 **upon alleged medical negligence except in obvious cases - Affidavit - Penalty for failure**
11 **to comply.** ~~Any action for injury or death alleging professional negligence by a physician,~~
12 ~~nurse, hospital, or nursing, basic, or assisted living facility licensed by this state or by any other~~
13 ~~health care organization, including an ambulatory surgery center or group of physicians~~
14 ~~operating a clinic or outpatient care facility, must be dismissed without prejudice on motion~~
15 ~~unless the plaintiff serves upon the defendant an affidavit containing an admissible expert~~
16 ~~opinion to support a prima facie case of professional negligence within three months of the~~
17 ~~commencement of the action. The court may set a later date for serving the affidavit for good~~
18 ~~cause shown by the plaintiff. The expert's affidavit must identify the name and business~~
19 ~~address of the expert, indicate the expert's field of expertise, and contain a brief summary of the~~
20 ~~basis for the expert's opinion. This section does not apply to unintentional failure to remove a~~
21 ~~foreign substance from within the body of a patient, or performance of a medical procedure~~
22 ~~upon the wrong patient, organ, limb, or other part of the patient's body, or other obvious~~
23 ~~occurrence.~~

- 1 1. For purposes of this section, "health care provider" means a person who is
2 licensed, certified, or otherwise authorized by the law of this state to administer
3 health care in the ordinary course of business or practice of a profession.
- 4 2. In an action alleging malpractice, negligence, error, mistake, or failure to cure,
5 whether based on contract or tort, against a health care provider which includes a
6 cause of action for which expert testimony is necessary to establish a prima facie
7 case, the plaintiff must:
 - 8 a. Unless otherwise provided in subdivision b of subsection 3, serve upon the
9 defendant with the summons and complaint an affidavit as provided in
10 subsection 3; and
 - 11 b. Serve upon the defendant within one hundred eighty days after
12 commencement of the suit an affidavit as provided in subsection 4.
- 13 3. The affidavit required by subdivision a of subsection 2 must be completed by the
14 plaintiff's attorney and must state that:
 - 15 a. The facts of the case have been reviewed by the plaintiff's attorney with an
16 expert whose qualifications provide a reasonable expectation that the expert's
17 opinions could be admissible at trial and that, in the opinion of this expert, one
18 or more defendants deviated from the applicable standard of care and by that
19 action caused injury to the plaintiff; or
 - 20 b. The expert review required by subdivision a could not reasonably be obtained
21 before the action was commenced because of the applicable statute of
22 limitations. If an affidavit is executed pursuant to this subdivision, the affidavit
23 in subdivision a must be served on the defendant or the defendant's counsel
24 within ninety days after service of the summons and complaint.
- 25 4. a. The affidavit required by subdivision b of subsection 2 must be signed by
26 each expert listed in the affidavit and by the plaintiff's attorney and must state
27 the identity of each person the plaintiff expects to call as an expert witness at
28 trial to testify with respect to the issues of malpractice or causation, the
29 substance of the facts and opinions to which the expert is expected to testify,
30 and a summary of the grounds for each opinion. Answers to interrogatories
31 which state the information required by this subdivision satisfy the

1 requirements of this subdivision if the interrogatories are signed by the
2 plaintiff's attorney and by each expert listed in the answers to interrogatories
3 and are served upon the defendant within one hundred eighty days after
4 commencement of the suit against the defendant.

5 b. The parties or the court for good cause shown may provide, by agreement, for
6 extensions of the time limits specified in subsection 2, 3, or this subsection.
7 This subsection does not prevent either party from calling additional expert
8 witnesses or substituting other expert witnesses.

9 c. In any action alleging medical malpractice, all expert interrogatory answers
10 must be signed by the attorney for the party responding to the interrogatory
11 and by each expert listed in the answers. The court shall include in a
12 scheduling order a deadline before the close of discovery for all parties to
13 answer expert interrogatories for all experts to be called at trial. Additional
14 experts may not be called by any party without agreement of the parties or by
15 leave of the court for good cause shown.

16 5. If the plaintiff is acting pro se, the plaintiff shall sign the affidavit or answers to
17 interrogatories referred to in this section and is bound by those provisions as if
18 represented by an attorney.

19 6. a. Upon failure to comply with subdivision a of subsection 2 within sixty days
20 after demand for the affidavit, the court, upon motion, shall dismiss with
21 prejudice each cause of action for which expert testimony is necessary to
22 establish a prima facie case.

23 b. Upon failure to comply with subdivision b of subsection 2, the court, upon
24 motion, shall dismiss with prejudice each cause of action for which expert
25 testimony is necessary to establish a prima facie case.

26 c. Upon failure to comply with subsection 4 because of deficiencies in the
27 affidavit or answers to interrogatories, the court, upon motion, shall dismiss
28 with prejudice each action for which expert testimony is necessary to establish
29 a prima facie case, provided that:

30 (1) The motion to dismiss the action identifies the claimed deficiencies in
31 the affidavit or answers to interrogatories;

(2) The time for hearing the motion is at least forty-five days from the date of service of the motion; and

(3) Before the hearing on the motion, the plaintiff does not serve upon the defendant an amended affidavit or answers to interrogatories which correct the claimed deficiencies.

7. The signature of the plaintiff or the plaintiff's attorney constitutes a certification that the individual has read the affidavit or answers to interrogatories, and that to the best of the individual's knowledge, information, and belief formed after a reasonable inquiry, it is true, accurate, and made in good faith. A certification made in violation of this subsection subjects the attorney or plaintiff responsible for such conduct to reasonable attorney's fees, costs, and disbursements.

SECTION 2. AMENDMENT. Section 32-42-01 of the North Dakota Century Code is amended and reenacted as follows:

32-42-01. Definitions. In this chapter:

1. "Alternative dispute resolution" means the resolution of a health care malpractice claim in a manner other than through a health care malpractice action.
2. "Claimant" means any person who alleges a health care malpractice claim, and any person on whose behalf the claim is alleged, including the decedent in the case of an action brought through or on behalf of an estate.
3. "Health care malpractice action" means a claim for relief brought against a health care provider, or other defendant joined in the action, regardless of the theory of liability on which the claim is based, in which the claimant alleges a health care malpractice claim.
4. "Health care malpractice claim" means a claim brought against a health care provider or other defendant joined in a claim alleging that an injury was suffered by the claimant as a result of health care negligence or gross negligence, breach of express or implied warranty or contract, failure to discharge a duty to warn, or failure to obtain consent arising from the provision of or failure to provide health care services.
5. "Health care negligence" means an act or omission by a health care provider which deviates from the applicable standard of care and causes an injury.

6. "Health care provider" means a person who is licensed, certified, or otherwise authorized by the law of this state to administer health care in the ordinary course of business or practice of a profession.

7. "Injury" means an injury, illness, disease, or other harm suffered by an individual as a result of the provision of health care services by a health care provider.

~~8. "Noneconomic damage" means damage arising from pain; suffering; inconvenience; physical impairment; disfigurement; mental anguish; emotional distress; fear of injury, loss, or illness; loss of society and companionship; loss of consortium; injury to reputation; humiliation; and other nonpecuniary damage incurred by an individual with respect to which a health care malpractice action or claim is pursued.~~

SECTION 3. REPEAL. Section 32-42-02 of the North Dakota Century Code is repealed.