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January 31, 2025

House Judiciary Committee

Re: HB 1349

I write today to demonstrate why the amendments to section 32-42-02 of the North Dakota Century Code embodied in House Bill 1349 are bad policy for the State of North Dakota and the bill should be defeated.

I am an attorney in the State of North Dakota and have practiced in the area of professional negligence since I began my career in 1991 with a significant majority of my practice defending hospitals and physicians against medical malpractice cases. I practice both in North Dakota and in Minnesota and have experience with medical malpractice cases in both states. Minnesota is one of the very few states in the Country which does not have a cap on non-economic damages. As a result, there is a vast difference in defending cases in Minnesota and those in North Dakota. There is a vast difference in trying to resolve cases in North Dakota and Minnesota. This bill would reshape North Dakota professional liability law and insurance requirements to make us look like Minnesota and the New England states.

Other than Minnesota, all states around us and most states across the country have a non-economic cap at or less than the $500,000 cap which we presently have in North Dakota. This bill would make North Dakota one of the most liberal states relative to medical malpractice claims in the country. We will have out of state attorneys clamoring to bring claims here due to the fact that it would be one of a minority of states that do not limit the potential for runaway verdicts. That is not a change you want to make. The states that do not have caps are predominantly the New England states, along with Minnesota, Kentucky, Arizona, Alabama, Arkansas, and Wyoming. Many or most of those states had caps that were struck down based on their own state Constitution, but those legislatures that put them in place initially certainly felt that caps were appropriate and those caps were predominantly in the range of what North Dakota has before they were struck down. Our Supreme Court has already addressed the issue and found that the cap on non-economic damages is in fact appropriate under the North Dakota Constitution and therefore not at issue here. The remainder of the Country all have caps in place of some variety, even including California that caps non-economic damages at $750,000. The vast majority of states with non-economic caps place those caps between $250,000 and $500,000. There are some states that are at $750,000 and a few even have total caps including economic losses to completely cap potential losses to health care providers. Other than those that have no caps, no states have anything that looks like what House Bill 1349 would do to the litigation landscape in North Dakota. North Dakota has never been a state that has chosen to set itself apart to be the

choice for forum shopping to bring more lawsuits into the state. That is the unequivocal unintended consequence of this bill. While more litigation may be advantageous for those in my position, who are paid to defend those claims, it is not good for the State and certainly not good for our health care system.

It must also be remembered that the attempt to raise the cap by 500 percent is only one portion of this bill. It also eliminates the language that the cap applies collectively to all medical Defendants. The effect of this language operates to essentially eviscerate the cap altogether and encourage naming not only the hospital or health care institution, but also naming each and every physician, nurse, or other health care provider in the litigation. This would be done to take advantage of the fact that each individual provider under this proposed bill would have their own multi-million dollar cap. Every lawsuit would result in naming numerous providers in an effort to circumvent the cap altogether. At a bare minimum, the hospital or clinic and the provider would be named individually to double the cap on non-economic damages. This scheme virtually guarantees that numerous care providers, including multiple nurses and physicians, will be directly named in every lawsuit. It would be hard to imagine a greater disincentive for doctors and nurses to move to North Dakota as a medical provider than that. This bill will result in a severe chilling effect for recruitment of health care providers – and, in spite of claiming to be a cap, the multitudinal aspect of the cap, will essentially eliminate having a cap altogether. That is how the bill will operate in real terms.

For those not trained in the law, it must be remembered that compensation for non-economic damages is not an age old concept. Historically, there was no ability to recover for these kinds of damages. That is a recent addition in terms of historical jurisprudence. Part of the reason for that is that there is no good way of quantifying non-economic losses. We provide juries with instructions from the Court that generally describe their obligation and what to consider. The pattern jury instruction given by most Court to juries is civil Jury Instruction 70.35:

> The term "non-economic damages" includes damages arising from pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, fear of injury, fear of loss, fear of illness, loss of society and companionship, loss of consortium, and humiliation.
>
> Compensation for non-economic damages such as pain, suffering, physical impairment, disfigurement, mental anguish, emotional distress, fear of injury, fear of loss, fear of illness, and inconvenience is measured by the reasonableness of the award in the light of all the circumstances of the case. In considering the reasonableness of an award, you may consider whether the element of damage is temporary or permanent and whether in the future it can or will be averted or relieved.

That is the entire sum and substance of guidance that we give to the jury and then charge them with coming up with a number. With economic damages, there are concrete objectively verifiable numbers that can be used, including costs of medical care, loss of wages, and finite costs that can be demonstrated and are predictable. As shown by the guidance given to juries listed above, there is virtually no guidance and no predictability. There is no method of insuring consistency in any respect. A prime example is in the State of Minnesota less than two years ago, where a Federal District Court verdict came back on a case of medical malpractice against a medical provider in St. Cloud, Minnesota for over $110 million – on an orthopedic injury that did not involve the loss of a limb. A recent case in North Dakota occurred in Williston where the cap was utilized to reduce a

$2.36 million non-economic award on a toe case. Those aberrant results lead other claimants to believe that they are automatically entitled to whatever the cap is in every case – because there is no consistent, verifiable method of discussing what should be awarded. That is precisely the reason that states across the country have utilized a non-economic cap in medical cases that is at or below what we have in this state at the present time – and nowhere near the levels that are proposed in HB 1349.

It is not easy to attract medical providers into the State of North Dakota. We have a shortage of physicians, nurses, midlevel providers, and others. One of the best incentives we have to attract specialty physicians is that, unlike being in Minneapolis, New York, or Philadelphia, we have a less litigious society here with laws that are either favorable to physicians practicing in this state or, at a minimum, not worse than any other states. This bill ends that. It would place North Dakota at risk of being one of the worst states to practice medicine in as it relates to risk and insurance requirements. Add that to the fact that we already struggle to attract specialty physicians due to geographical, cultural, and weather issues, and hospitals will find it very difficult to obtain staffing necessary to care for the people in our state. It is a problem now, but will be demonstrably worse with the passage of this bill, making the legal climate for practicing medicine worse than in only a few other states across the country.

Historic trends over the years have shown the results of these various tort reform methods, including non-economic caps. When the cap in existence was considered, it was put in place because many medical malpractice insurance companies were either going bankrupt or leaving the industry. PHICO, which insured many of the hospitals in the state in the 1980's and 1990's, ended up in receivership. The St. Paul Companies, which was once the largest medical malpractice insurance carrier in the country, abandoned its medical malpractice insurance lines altogether, leaving many hospitals and providers in the State of North Dakota scrambling for coverage in the late 1990's. Several additional carriers have stepped in to fill that gap, but one of the considerations for whoever is willing to write insurance in this state, is the legal environment that exists. For medical malpractice insurance, the existence of a reasonable cap on non-economic damages is precisely the type of consideration that is evaluated by insurers entering the market in this state. As an example, Montana has a unique legal construction that relates to how insurance companies are found in bad faith. It is my understanding that some companies choose not to write in Montana for that reason. That same risk applies to this proposed bill.

Unlike automobile insurance, there is a limited number of companies that provide medical malpractice insurance. The fewer companies that elect to write policies in a state, the higher the premiums become for our health care institutions. Studies have shown a direct correlation between the kinds of laws existing in a state and the corresponding insurance payouts – and resulting increase in premiums – that can be expected. There are numerous studies showing the trends over time in medical malpractice related to when tort reform efforts were put in place. In Florida, before they enacted tort reform, there were stories that the malpractice premiums for OB/Gyn physicians were higher than their salaries - and OB's were leaving the state as a result. That changed dramatically when they changed their litigation structure.

Many hospitals, especially in rural North Dakota, are having a very difficult time staying afloat financially the way it is. Many of those facilities and small town practitioners have $1,000,000 and $2,000,000 professional liability policies. Changing this law as demonstrated in HB 1349 would virtually require the addition of insurance policies for every hospital, no matter what their size, to at

least a $5,000,000 policy. Realistically, that is even light, given that the multitudinal multiplier for individual providers increases the cap risk exponentially. That comes at a significant cost – a cost our medical providers and institutions simply cannot afford

Insurance companies base their entire portfolio on the risks inherent with any provider or institution based on the litigation climate and the litigation structure within any particular state. Passage of this bill will increase the costs of medical malpractice insurance dramatically.

Very few cases of medical malpractice actually go to trial. Most are either dismissed without merit or are resolved by voluntary settlement between the parties. The difference in achieving settlement in cases brought in North Dakota and Minnesota is very different. In North Dakota, given our present non-economic cap, there is at least some certainty to what is at risk. When negotiating settlements in North Dakota, we know what the economic losses at issue are as they are far more finite in nature. While most cases will never reach the non-economic cap in the event of an adverse verdict, it gives us a finite universe from which to work to get cases resolved. HB 1349 will result in attorneys arguing that every case is worth $2 million to $3 million, pointing to aberrant cases like the St. Cloud case or the Williston case I referenced earlier. We see it all the time in Minnesota. This results in more cases going to trial and clogging up the Court system and the costs of settlements and litigation go up accordingly. The effect is not simply those rare few cases that go to trial and even rarer cases that result in a verdict against a medical provider. It is the overall effect on the system that will cause values collectively to skyrocket. It will potentially lead to a doubling, if not more, of the cost of medical malpractice insurance for health care providers and institutions. Those costs are ultimately borne by all of us who need health care.

The question of significant cost to the medical system is unequivocal. Balance that with what is ultimately being sought. Medical malpractice cases are typically brought on a 40% to 50% contingency fee, plus costs, meaning half of what this bill provides will go to the trial attorneys representing the patient. It is no surprise that the largest push for this bill is the trial attorneys association, who stand to double or triple their fees.

The only allure that could possibly be seen from this is giving the jury of peers autonomy to make decisions. While that is true in some respects, we already place all kinds of limits on what a jury can and cannot do and do so for good common sense policy reasons. We legislatively place limits on punitive damages. We do so because, much like non-economic damages, there is no quantifiable measure to ensure consistency or predictability and a jury has no real measure or ability to quantify those awards. As a result, we limit the jury to $250,000 or two times the compensatory damages to provide that consistency and predictability. We limit the amount of interest that can be awarded by a jury to a finite range, again to promote consistency and predictability of results. We provide limits to how old a case may be through statutes of limitations, regardless of whether a jury might find the claim meritorious – again all through efforts to promote good public policy and predictable and consistent results. While the statute of limitations for medical malpractice cases is an open ended time frame based on discovery, we put limitations on the number of years we will extend that discovery time to 6 years (other than infancy). We do so for public policy and to provide consistent and predictable results. Is pain in the toe worth $300,000 to one person and a chronic headache worth $2.2 million to another? There is simply no way to provide any measure of consistency or predictability to these kinds of damages, which is precisely why a reasonable limit is appropriate. Millions of dollars (or $10 million to $20 million with multiple named medical providers) is not reasonable. It does nothing to “put the injured party back

in the position they would have been in", like economic damages do. $500,000 tax free is more money than nearly all residents of the State of North Dakota will ever encounter at one time in their lifetime. In the example above, is it unreasonable to limit the award of $2.36 million to $500,000 for a problem with their toe – a tax free amount far greater than most people ever see in a lifetime? Doesn't common sense dictate that it is more than reasonable to cap non-economic damages (which are by definition unquantifiable in any respect) at that level and avoid the significant increased costs and uncertainty to the health care providers in this system – costs that will ultimately be passed on and borne by the residents of the State of North Dakota.

Thank you for your consideration and I would strongly urge a Do Not Pass for HB 1349 from this Committee and the House and Senate at large.

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