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Re: Written Testimony in Opposition to House Bill No. 1349

House Judiciary Committee:

My name is Tracy Kolb. I am a North Dakota lawyer licensed to practice since 1995. For nearly 30 years, a primary emphasis of my practice has been defending and trying medical malpractice lawsuits in North Dakota brought against physicians, physician assistants, nurse practitioners, nurses, clinics, and hospitals. I offer this written testimony in opposition to House Bill No. 1349, which, among other things, proposes to increase the cap on non-economic damages in medical malpractice actions from $500,000 to $3,000,000 and eliminate the cap altogether in malpractice actions involving an unborn fetus. There is no reason to change what has worked, and worked well, since the statute was first enacted in 1995.

N.D.C.C. § 32-42-02

In its current form, section 32-42-02 caps noneconomic damage in health care malpractice injury and death actions at $500,000. Noneconomic damage consists of 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, injury to reputation, and humiliation. These damages have been described by courts, including the North Dakota Supreme Court, as more abstract, inherently arbitrary and unquantifiable, and not susceptible to arithmetic calculation. The cap applies regardless of the number of health care providers and other defendants who are sued in a malpractice action and regardless of the number of actions or claims brought against those defendants. For example, if there is one physician defendant who has been sued based on a claim alleging medical negligence, the cap would apply to that action. If there were multiple health care provider defendants and multiple claims against those defendants, the cap would apply to that action. If a malpractice action is tried, the jury is not told about the cap. If the jury finds liability and awards noneconomic damages more than the cap, the trial court must reduce those damages to $500,000. To my knowledge, there have been three malpractice trials in 30 years in which a jury awarded more than $500,000 noneconomic damages and, in each of those actions, the award was reduced to the cap. One of those cases, of which I have direct knowledge, *Condon v. St. Alexius Medical Center*, 2019 ND 113, 926 N.W.2d 136,

was appealed to the North Dakota Supreme Court based on a constitutional challenge to the cap. The court rejected the challenge, holding the statute was not unconstitutional.

There is no cap on economic damage. These damages consist of more quantifiable, calculable expenses, such as medical care, rehabilitation services, custodial care, loss of earnings, loss of earning capacity, loss of income, loss of support, cost of substitute domestic services, loss of employment, loss of business, and loss of employment opportunities. Under section 32-42-02, there is no limit on the amount of damages a jury may award for economic damages.

House Bill No. 1349

Under House Bill No. 1349, the noneconomic damage cap would be increased from $500,000 to $3,000,000 over the next five years and this cap would apply to each defendant and each claim. A lone defendant would be subject to a $3,000,000 cap whereas multiple defendants would each be subject to a $3,000,000 cap. The lone and multiple defendants would also be subject to a $3,000,000 cap per claim if more than one claim was alleged. If, for example, there were four defendants with one claim alleged against each defendant, the cap would be $12,000,000. If there were multiple claims against the defendants, the cap would multiply for each claim. Most malpractice actions involve multiple defendants and often multiple claims. As I read the amendment, what is proposed is not a singular cap on noneconomic damage.

It is also proposed that the cap would not apply to a malpractice action or claim "brought on behalf of an unborn fetus." It is not understood at all what is meant by this. Does it pertain to termination of pregnancy by abortion? Or a wrongful death malpractice action arising out of the labor and delivery and death of the baby or injury or death of the mother? Or something else? As written, it is confusing.

Procedural History of N.D.C.C. § 32-42-02

In 1995, the legislature enacted section 32-42-02 as part of a comprehensive Health Care Reform Bill that was the culmination of a five-year study by a task force created to review the healthcare system in North Dakota and to make recommendations for improvement.[1] In conjunction with the task force, the legislature also directed the Legislative Council "to study the feasibility of all sources of funding for health care benefits" in an effort to control costs and improve healthcare access.[2] The task force brought together a diverse group of individuals representing "a broad cross Section of organizations in the state, including business, farm, labor, education, a number of healthcare organizations, and senior citizen groups." The end product was the result of "thousands of hours of study, analysis, debate, input, and sweat" and resulted in a "compromise piece of

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[1] North Dakota Health Task Force et al., Final Recommendations on Health Care Reform: Report to the State Health Officer, the State Health Council, and the Governor (Task Force) (1994) ("Final Recommendations") https://statehistoricalsocietyofnd.on.worldcat.org/oclc/31001350

[2] 1993 SCR 4061

legislation." In short, the Health Care Reform Act was the end result of thoughtful, thorough, and negotiated consideration.

Section 32-42-02 in particular is indicative of that compromise. For example, that section originally included provisions establishing limits on contingent fees paid to attorneys representing malpractice claimants, authorizing healthcare-professional-licensing boards to establish practice parameters, and creating a presumption that services in accordance with the parameters met the standard of care.[3] All of those proposed reforms were deleted from the final version. Moreover, the provision limiting recovery of noneconomic damages increased from the original proposed cap of $250,000 to the current $500,000 limit.

The legislature heard testimony that the cap on noneconomic damages was intended to provide malpractice carriers with the ability to better project reserves and, thus, premium structures. The legislature was advised that being able to better predict noneconomic damages, which are inherently arbitrary and which can lead to verdicts that are disproportionate to the economic damages sustained, would in turn stabilize malpractice premiums and ultimately lead to overall stability of healthcare costs.

This same rationale played a prominent role in 2009 when, twelve years after the legislature enacted section 32-42-02, it considered whether to repeal the cap altogether or to increase it to $1-million.[4] During debate on the proposed amendments, the legislature held hearings and heard a variety of opposing opinions. Those speaking against repeal or amendment provided the legislature with the following rationale for keeping the statute as is. Some of those record comments are as follows:

- Limitations are the single most effective means of reducing the cost of the malpractice-tort system, while ensuring that patients are fully compensated for their economic damages. Several studies demonstrate the link between caps on noneconomic damages and lower premium rates. The repeal of section 32-42-02 would result in increased professional-liability insurance rates for North Dakota physicians.

- That a cap on noneconomic damages can eliminate the incentive to litigate weak or meritless malpractice claims.

- Caps recognize the direct cause of instability in the medical-liability insurance market: exploding liability premiums due to a national environment of

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[3] Final Recommendations at 16-18.

[4] The entire legislative history of H.B. 1309 is available online at: http://www.legis.nd.gov/research-center/history/2009.

escalating jury awards and settlements. Several studies demonstrate a link between caps on noneconomic damages and lower premium rates.

- Caps on damages increase physician supply, particularly in rural states and on high-risk specialties. This is particularly the case for the rural areas of North Dakota.

- North Dakota struggles to recruit and retain qualified healthcare professionals and faces challenges deploying resources to serve geographically dispersed communities due to its geographic and resource disadvantages. The proposed changes to section 32-42-02 would remove one of the key advantages the state has in encouraging healthcare professionals to locate and remain in North Dakota.

- North Dakota has been able to avert the medical-liability crisis affecting other areas of the nation by its proactive reforms, including section 32-42-02.

- Caps help to prevent the practice of defensive medicine, which ultimately increases the cost of providing care to North Dakota citizens.

- Noneconomic damages are unquantifiable, and because they are arbitrary, they have the potential to be limitless, injecting an unknown into any evaluation of a case's value. Setting a limit on this type of indeterminate damage fosters productive settlement discussions.

The 2009 legislature ultimately rejected attempts to repeal or amend section 32-42-02 and there have been no further efforts until now.

N.D.C.C. § 32-42-02 should not be amended

The rationale supporting section 32-42-02, when initially enacted in 1995 and when considered again in 2009, holds true today. As a lawyer who defends and tries medical malpractice cases, I can speak directly to some of the impacts on litigation if House Bill No. 1349 was passed.

- Many health care professionals would need to increase the limits of their insurance coverage to protect themselves from the increased liability exposure. Medical negligence cases are expensive to prosecute and defend, along with the potential liability of an adverse verdict. It often takes 18 to 24 months to conduct fact and expert discovery and prepare these cases for trial. Expert witnesses are required in these cases and medical experts are expensive. The cost of defense is paid under the health care professionals' insurance policy or in some cases their employers through self-insured retentions. That cost impacts insurance coverage and insurance premiums.

- The number of medical negligence actions commenced against healthcare professionals in North Dakota has remained relatively constant over my 30 years, but there has been an increased number of these cases in the last seven years. Some cases are dismissed, some are settled, and some are tried to a jury. There is an occasional plaintiff verdict, but most often the cases are successfully defended at trial. House Bill No. 1349 would have an immediate effect on litigation, increasing the "value" of a medical negligence case from the plaintiff's perspective ultimately by six times or a more than 500% increase. That percentage would be higher if it is not a singular cap. It would also significantly impede efforts to settle these cases because it would inject instability, uncertainty, and unpredictability without the singular $500,000 noneconomic damage cap. And to suggest that increasing the cap would ensure injured malpractice plaintiffs are better compensated for wildly speculative noneconomic damages ignores that a significant percentage is not recovered by the plaintiff but their attorney. It further ignores that there is no limit on economic damages and the vehicles used by plaintiffs to inflate economic damage awards—for example life care plans and for which there is no corresponding requirement that a plaintiff apply the award to the care in the plan.

- North Dakota is not an outlier with a cap on noneconomic damage in medical negligence actions. Most states have caps at amounts well below $1 million and certainly below the excessive amounts proposed under House Bill No. 1349.

Any cap on damages, by its very nature, limits the amount that some plaintiffs will be able to recover. It is worth emphasizing again, though, that there is no limit on economic damages and with respect to noneconomic damages, the cap in its current form under section 32-42-02 should remain because it protects North Dakota health care professionals from inherently arbitrary noneconomic damages that can lead to large and unpredictable verdicts wholly divorced from the actual economic loss sustained, which create the need for unnecessarily large reserves, causing instability in the malpractice-insurance premiums, and in turn impacts health care costs.

Thank you for the opportunity to address House Bill No. 1349. Respectfully, it is requested that the House Judiciary Committee reject this proposed bill with a Do Not Pass recommendation.

Very truly yours,

Tracy Kolb

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