

2009 HOUSE JUDICIARY

HB 1302

## 2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1302

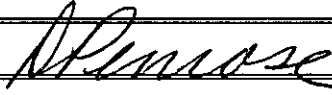
House Judiciary Committee

Check here for Conference Committee

Hearing Date: 1/27/09

Recorder Job Number: 7928

Committee Clerk Signature



Minutes:

**Chairman DeKrey:** We will open the hearing on HB 1302.

**Rep. Larry Klemin:** Sponsor, support.

**Rep. Delmore:** Why the three month period.

**Rep. Klemin:** I will defer to Dean Haas, who is coming next.

**Chairman DeKrey:** Thank you. Further testimony in support.

**Dean Haas, General Counsel, ND Medical Association:** Support (attachment).

**Rep. Delmore:** Why did you choose the three month period?

**Dean Haas:** The statute currently requires an affidavit in support of the medical malpractice claim, within three months of commencing the action, after serving the Summons and Complaint, so it has to be served on the other side within three months. There is no ND Supreme Court case that said that this would be standard beyond the three month period. This amendment will hold to that and require that the plaintiff ask the court if they need an extension during the three month period, rather than after the three month period has expired.

**Rep. Griffin:** Has this been introduced because you feel the court is allowing extensions when there isn't good cause, or do you think that the plaintiff shouldn't be able to bring an extension with good cause.

**Dean Haas:** There was an 8<sup>th</sup> circuit case that interpreted the statute that the affidavit would have to be served in a three month period, and that it couldn't be extended except upon showing good cause.

**Rep. Hatlestad:** Wouldn't the individual that can't get it done in the three months, wouldn't he normally ask for an extension before that three month period is up.

**Dean Haas:** That's what should occur, what should happen.

**Rep. Hatlestad:** Would the court allow the extension after the three month period expired. The current law says three months, you can ask for an extension. So if I read this right, all you're asking for the change here, is that they need to make the request before the time limit expires, is that correct. Isn't that normally what you would do anyhow?

**Dean Haas:** The amendment would allow the extension if the plaintiff filed for an extension with the court before the expiration of the three month period. The court may set a later date before the three months expires.

**Rep. Hatlestad:** The normal process is that you would wait until it expires and then you file for an extension.

**Dean Haas:** That is not the normal process, no. There is three month period from the commencement of the action.

**Rep. Hatlestad:** So if you don't ask for an extension before the three months is up, which is what you're saying here.

**Dean Haas:** Yes.

**Rep. Hatlestad:** So basically you're just going along with what is normally done anyway.

**Dean Haas:** Correct. Ms. Kolb can answer the ins and outs of how the court will rule.

**Chairman DeKrey:** Thank you. Further testimony in support.

**Tracy Kolb, Defense Attorney:** Support. I will give you a little history of how the statute operates. Usually in medical malpractice you need an expert witness to support your case. This is statutorily recognized in 28-01-46. It's a statute that has been on the books for probably 15 years, I don't know the exact date of the first enacted legislation. HB 1302 is a proposed amendment to the statute in response to the 2007 ND Supreme Court case. 28-01-46 is a statute that provides for a preliminary screening of medical malpractice cases. It's intended to dispose of frivolous cases that cannot be supported by an expert affidavit or an expert witness at the earliest stages of litigation. To avoid protracted litigation of cases that cannot be substantiated, the statute requires that a plaintiff, in medical negligence cases, disclose an expert affidavit within three months of commencing the lawsuit. If that disclosure is not made, the lawsuit must be dismissed on motion by the defendant physician or other healthcare provider who's been sued. Now, there is an exception to this statute, and it is the exception that is the subject of this proposed amendment. If the plaintiff cannot meet the three month disclosure deadline, they have the ability to make a motion to the court to ask for an extension of time. They must assert that motion with good cause. It's been crafted and a general understanding of plaintiff's and their lawyers who crafted medical malpractice in the state, that the motion must be made by the plaintiff before the three month expires and certainly before the defendant makes a motion to dismiss, which is usually going to be on the 91<sup>st</sup> day, if that affidavit has not been disclosed. It was a practice that was confirmed by an 8<sup>th</sup> circuit court of appeals case. It was a case that was decided in 2000; in that case, the 8<sup>th</sup> circuit said, that the plaintiff, if you need an extension of time to disclose your expert affidavit, you need to do so before the three month expires and certainly before the defendant makes their motion to dismiss. In 2007, our ND Supreme Court, it decided in a 3-1-1 decision. There was a 3 justice majority, there was 1 justice dissenting, and one 1 justice that concurred (can't

hear the name or citation of case). In the case, the three month period went by and no expert affidavit was disclosed as required under the statute. The defendant, therefore, made a motion to dismiss. The same day, the plaintiff served a letter containing the opinion of a physician and also asked the court for more time to respond to the defendant's motion. About a month later, the plaintiff served an affidavit containing that expert's opinion. When the district court ruled on the motion, it granted the defendant's motion: it said, plaintiff you did not comply with the statute, if you needed more time to disclose an expert affidavit, you should have done so before the three months expired, not after the three months had expired. A majority of our Supreme Court reversed that decision. According to the majority in the Scherr opinion, the statute does not state when or how a plaintiff can show good cause for an extension of the expert affidavit disclosure deadline. The majority agreed, however, that if a defendant had moved to dismiss the statute after the three months had expired, and the plaintiff had not obtained an extension of time for that good showing, the plaintiff's case must be dismissed. The majority interpreted the exception to the statute to allow a plaintiff to make a showing of good cause, even after the 3 months had expired; and said that the latest a plaintiff could show good cause, would be when it responds to a defendant's motion to dismiss. That is an interpretation that defeats the purpose of this statute. The purpose of this statute is early screening of medical negligence cases that cannot be supported by an expert and avoid unnecessary protracted litigation of a lawsuit that cannot be substantiated by an expert witness. Most plaintiffs' attorneys are able to meet this deadline. If they can't, they have the right to apply for an extension before the three months expired. The attorney for the plaintiff often has this case long before the action commences, so they have plenty of time to obtain a review of the case, obtain a supporting expert witness, and disclose the affidavit timely and that affidavit then serves to frame the issues in the lawsuit, and then the docket proceeds and

the case gets ready for trial. The wait in early disclosure prolongs the case unnecessarily. Often, that further extends the time and it is usually a case that cannot be supported the proposed amendment plainly states, what everybody understood it to mean. If a plaintiff does not disclose an expert witness within three months of commencing the lawsuit, and has not shown good cause for an extension of the time, then the lawsuit has to be dismissed upon motion by the defendant.

**Rep. Delmore:** What is your definition of frivolous? We aren't a frivolous state.

**Tracy Kolb:** Well, in medical negligence context, a case that is not supported by an expert witness.

**Rep. Delmore:** I understand what the bill is saying, but what makes a case frivolous.

**Tracy Kolb:** Medical negligence cases involve a professional standard of care. Since we don't necessarily understand the medical procedures and ramifications, we need to secure the opinion of an expert witness who does understand what is supposed to happen, and compare that to what actually happened, and provide an opinion on whether there was negligence.

They need to be able to explain what happened to the jury, if the standard of care was met or not. So, by definition, in ND, in statute it states that a frivolous medical negligence case is one that is not supported by medical expert testimony. Having said that, there is an exception under ND law, that is also contained in that statute; if there is an obvious occurrence you don't need an expert. An obvious occurrence is something like, a physician operating on the right foot and should have operated on the left foot. You don't need an expert to tell that, that's not the standard of care, so the layperson on the jury, doesn't need an expert.

**Rep. Zaiser:** Is there anybody, a plaintiff ever fail to meet that threshold, that 90 day threshold and a legitimate case.

**Tracy Kolb:** Yes, there have been plaintiffs that failed to disclose the affidavit within 90 days of commencing the lawsuit. As to whether it was a legitimate case or a frivolous case, there probably have been some. By the time a plaintiff sues on a medical negligence case, as I've said, they've had the case for a long time.

**Rep. Wolf:** Were you the attorney in the Scherr case.

**Tracy Kolb:** No I was not.

**Chairman DeKrey:** Thank you. Further testimony in support. Testimony in opposition. We will close the hearing.

## 2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1302

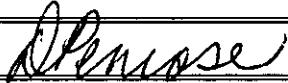
House Judiciary Committee

Check here for Conference Committee

Hearing Date: 1/27/09

Recorder Job Number: 7935

Committee Clerk Signature



Minutes:

**Chairman DeKrey:** We will take a look at HB 1302. What are the committee's wishes?

**Rep. Dahl:** I move a Do Pass.

**Rep. Kretschmar:** Second.

**Chairman DeKrey:** Discussion.

**Rep. Griffin:** I looked up the case that Ms. Kolb was referring to (gave more information on the case). This case being used as the example, doesn't justify the change.

**Rep. Klemin:** First of all, changing this is not going to affect that case, that case has already been decided by the ND Supreme Court. But it is going to clarify what exactly the rule is, so hopefully that won't arise again; or there will be an attorney malpractice case instead of the medical malpractice. In the future, after August 1, 2009, all the attorneys are going to know that they have to file a request for an extension of time before the three month period is up, or they're on the hook. We didn't have the Trial Lawyers Bar in here opposing this, and they were here today on other bills, and they knew about this. I think this is making clear that what they thought was the rule, which the ND Supreme Court said was not in that particular case that everybody is going to know in the future this is going to be the rule. It doesn't affect that particular case, because that's over with. I think it's a clarification that the parties are sure to



follow, just like any other timed statute of limitation on any other case, if you don't get it done by the deadline; the attorney is on the hook.

**Rep. Griffin:** I know it won't affect that case, because the case is over. But a case just like this, the plaintiff will be left without recourse. If they go through a little bit of legislative history of this provision, we have in there originally that there is a 2 year statute of limitations that was put in first then they put in that if you don't file an affidavit; it used to say that the court may dismiss. Now in 1997, it said the court must dismiss without prejudice, but because you have the case that created this bill, they were so close to the 2 year statute of limitation time period, that if the court dismissed without prejudice, for missing that deadline, the plaintiff cannot file the case again. I don't think there is a problem out there, and we are creating an extreme punishment to a plaintiff, who through no fault of their own, it was an attorney's fault in Grand Forks that forgot to submit that. I don't know why it is necessary. Right now the law, the ND Supreme Court would rule, for good cause, he can file that action.

**Rep. Klemin:** I disagree that the plaintiff was left without recourse, because it is an attorney malpractice case if they miss a deadline. That's the kind of situation all the time in all of these limitation periods. The attorney screws up, they get malpractice insurance.

**Rep. Hatlestad:** If they had done it within that 2 year timeframe, and the court dismissed the case, can you still refile within that 2 year period.

**Rep. Griffin:** If it's still within that time period.

**Rep. Hatlestad:** If it's dismissed and still within the time period, you still can.

**Rep. Griffin:** Yes, but if it's dismissed, and you are right up against the two year time period or right after the two year period, as would have been in this case, the plaintiff wouldn't have been able to file.

**Rep. Zaiser:** My understanding of attorney malpractice is pretty difficult to be victorious just like determining medical malpractice.

**Rep. Klemin:** You don't need an expert witness in the attorney malpractice case.

**Rep. Wolf:** Are attorneys, by law, required to have malpractice insurance. If you have a law firm that does not carry malpractice insurance, and this happens to you, you're recourse is to go after the attorney personally; however there may not be funds.

**Rep. Klemin:** I can't imagine an attorney not having insurance.

**Rep. Griffin:** In this case, once the plaintiff realized that they missed the deadline because the defendant filed a motion to dismiss. Within two weeks of filing that, an expert witness was disclosed; I just don't see the prejudice that was created for the defendant in that case. It didn't affect their case at all, other than the fact that they ended up in the ND Supreme Court.

**Rep. Klemin:** That issue's only been resolved as far as saying you can ask for good cause anytime; so that's happen in the future if we don't do this. Good cause will always be an issue, and it will be going to the Supreme Court to say if there was good cause in this case.

**Rep. Griffin:** Most likely the plaintiff will rather not incur all the expense since it is most likely on a contingency basis, and they probably will file it within the 3 months. Just in the rare cases where it can't, the court will have the discretion to, if there is good cause, allow it more time.

**Chairman DeKrey:** The clerk will call the roll.

**9 YES 4 NO 0 ABSENT**

**DO PASS**

**CARRIER: Rep. Dahl**

Date: 1/27/09  
Roll Call Vote #: 1

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1302

**HOUSE JUDICIARY COMMITTEE**

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken  DP  DNP  DP AS AMEND  DNP AS AMEND

Motion Made By Rep. Dahl Seconded By Rep. Kretschmar

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Griffin		✓
Rep. Boehning	✓		Rep. Vig		✓
Rep. Dahl	✓		Rep. Wolf		✓
Rep. Hatlestad	✓		Rep. Zaiser		✓
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				

Total (Yes) 9 No 4

Absent —

Floor Carrier: Rep. Dahl

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1302: Judiciary Committee (Rep. DeKrey, Chairman) recommends DO PASS (9 YEAS, 4 NAYS, 0 ABSENT AND NOT VOTING). HB 1302 was placed on the Eleventh order on the calendar.**

2009 SENATE JUDICIARY

HB 1302

# 2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB1302

Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: 3/10/09

Recorder Job Number: 10580

Committee Clerk Signature

*Diana Davis*

Minutes: **Senator Nething, Chairman**

**Relating to extension of time for serving an expert opinion affidavit in medical liability actions.**

**Representative Klemin** – Introduces the bill for the ND Medical Association – Relates to medical malpractice cases. The plaintiff must come forward with an expert witness upfront to show this is a case involving medical malpractice. The law sets a time limit for the expert opinion to be furnished to the defendant side of the case. Typically they would have the expert beforehand. The law says 3 months after they start the law suit. The law also allows the court to set a later date for serving that affidavit for good cause shown by the plaintiff. He explains all this bill does is say that you must ask for an extension of time before the 3 month period runs out.

**Senator Nething** – Asks what triggers the beginning of the time.

**Klemin** – States, it is the commencement of the action which is when the case is served.

**Senator Fiebiger** – Asks what happens if it isn't done in that time. What if the attorney doesn't do what he is supposed to do on time? How does the client get relief?

**Rep. Klemin** – Replies, attorney malpractice. It can be dismissed; a dismissal without prejudice which means they could start over again.

**Senator Fiebiger** – Asks if we can't leave this in the court's discretion to decide this.

**Rep. Klemin** – Said he would like Ms. Kolb to answer that.

**Senator Olafson** – Asks, how often is this a problem.

**Rep. Klemin** – Responds, most cases the expert opinions are done before they file for the case. It happens but probably not often.

**Senator Fiebiger** – Notes that the attorney would have the specifics of the case prepared already.

**Senator Nething** – Asks, this doesn't affect discovery does it?

**Rep. Klemin** – Replies, no.

**Tracy Kolb** – Medical Malpractice Attorney – Urges a do pass – She hands out written testimony by Dean Haas. This is a proposal in response to a Supreme Court Case. Medical cases must be supported by expert medical testimony. This bill is intended to dispose of frivolous medical negligence cases at an early state of litigation to avoid protracted litigation of a lawsuit that is without merit. She explains the practice of medical complaints.

**Senator Schneider** – States, statutes of medical malpractice is 2 years for a minor 12 years. How does that compare with other states?

**Kolb** – Says shorter statute of limitations for medical malpractice for memory purposes. It is very rare that the 3 months get extended.

**Senator Fiebiger** – Asks, what if the attorney drops the ball.

**Kolb** – Said courts will go with the plaintiff.

**Senator Fiebiger** – Asks if this restricts the courts flexibility.

**Kolb** – Says, no 3 month deadline has always been there. It is rarely a problem.

**Senator Olafson** – Would like to know what excusable neglect is.

**Kolb** – Says, that is the excuse the attorney used when he missed the deadline in the Sheer case.

**Dean Haas** – General Counsel to the ND Medical Association. – See written testimony.

**Senator Fiebiger** – Says in a real world practice you may come in at the last minute, wouldn't that be a different set of facts?

**Haas** – He agrees, when the plaintiff has sat on their case until the statute of limitations runs out. That is a problem.

**Senator Nething** – Asks why the Medical Association is involved in this when it seems to be a matter between the individual doctors.

**Haas** - Said a few of their members who have followed this brought it to the attention of the Medical Association.

**Senator Schneider** – Had a question for Ms. Kolb. Asked her what the result was of the Sheer.

**Kolb** – Replies, it was reversed, still going forward.

Close the hearing 1302



## 2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB1302

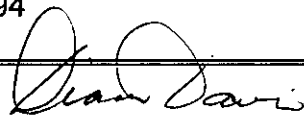
Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: 3/18/09

Recorder Job Number: 11194

Committee Clerk Signature



Minutes: **Senator Nething, Chairman**

Committee work

The committee thinks that passing this bill would not benefit the plaintiff. Senator Schneider said he is comfortable leaving it the way it is. That way good cause can be decided by the judge. The committee discusses attorney's that may not do a good job for the client.

Senator Schneider moves for a do not pass

Senator Fiebiger seconds

Vote – 3 no, 3 yes

Motion fails

Senator Lyson motions to move without committee recommendation

Senator Schneider seconds

Vote – 6-0 yes

Senator Schneider will carry

Date: 3/18  
Roll Call Vote #: 1

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES 1302  
BILL/RESOLUTION NO.

Senate JUDICIARY Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken  Do Pass  Do Not Pass  Amended

Motion Made By Sen. Schneider Seconded By Sen. Flebiger

Senators	Yes	No	Senators	Yes	No
Sen. Dave Nething – Chairman		X	Sen. Tom Flebiger	X	
Sen. Curtis Olafson – V. Chair.		X	Sen. Carolyn Nelson	X	
Sen. Stanley W. Lyson		X	Sen. Mac Schneider	X	

Total (Yes) 3 (N) 3

Absent \_\_\_\_\_

Floor Assignment Sen

If the vote is on an amendment, briefly indicate intent:

Date: 3/18  
Roll Call Vote #: 2

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1302

Senate JUDICIARY Committee

Check here for Conference Committee

*Move without  
committee  
Recommend*

Legislative Council Amendment Number \_\_\_\_\_

Action Taken  Do Pass  Do Not Pass  Amended

Motion Made By Sen Lyson Seconded By Sen Scheider

Senators	Yes	No	Senators	Yes	No
Sen. Dave Nething - Chairman	X		Sen. Tom Flebiger	X	
Sen. Curtis Olafson - V. Chair.	X		Sen. Carolyn Nelson	X	
Sen. Stanley W. Lyson	X		Sen. Mac Schneider	X	

Total (Yes) 6 (N) 0

Absent \_\_\_\_\_

Floor Assignment Sen Schneider

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)  
March 18, 2009 1:00 p.m.

Module No: SR-49-5224  
Carrier: Schneider  
Insert LC: . Title: .

**REPORT OF STANDING COMMITTEE**

**HB 1302: Judiciary Committee (Sen. Nething, Chairman) recommends BE PLACED ON THE CALENDAR WITHOUT RECOMMENDATION (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1302 was placed on the Fourteenth order on the calendar.**

2009 TESTIMONY

HB 1302

**Testimony on House Bill No. 1302**  
**House Judiciary Committee**  
**January 27, 2009**



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**Annette Weigel**  
Administrative Assistant

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Good morning Chairman DeKrey and members of the House Judiciary Committee. I'm Dean Haas, General Counsel to the North Dakota Medical Association. NDMA supports HB 1302, which amends Section 28-01-46, in response to a North Dakota Supreme Court opinion, *Scheer v. Altru Health System*, 2007 ND 104, 734 N.W.2d 778.

Section 28-01-46 requires a plaintiff filing a claim alleging medical negligence to serve an expert affidavit within three months of commencement of the action. The purpose of the statute is to screen out unsupported professional negligence claims at the earliest stage of litigation. The statute provides an exception to dismissal if the affidavit is not served during this three month period, but only for good cause shown by the plaintiff. The Court said that the statute does not explicitly provide when or how a plaintiff can show good cause, and held that a plaintiff may show good cause even after expiration of the three month period.

HB 1302 amends the statute, to require that a request for an extension of time to serve the expert affidavit be made before the expiration of the three month period. The amendment reflects and furthers the goals of Section 28-01-46—to discourage filing of frivolous law suits—and merely requires timely presentation of expert witness opinions. The amendment does not disadvantage serious plaintiffs with sound claims, who are able to present an affidavit of their expert opinion within three months of commencement of the action.

Thank you chairman DeKrey and members of the committee. We urge a "Do Pass" on HB 1302. Tracy Kolb, an attorney who represents physicians in medical malpractice cases, is also here to provide testimony regarding the practical applications of this statute in malpractice litigation.



**Testimony in support of House Bill No. 1302**  
**Senate Judiciary Committee**  
**March 10, 2009**

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In *Scheer*, the plaintiff didn't submit the affidavit within three months of filing of the complaint. The defendants moved to dismiss the complaint, which the trial court granted, citing an opinion of the Eighth Circuit which had previously interpreted this statute. In *Weasel v. St. Alexius Medical Center*, 230 F.3d 348, 350 (8th Cir. 2000), the Eighth Circuit noted that North Dakota law requires a plaintiff to submit an expert affidavit within three months of commencement of the action, unless good cause is shown for the failure to do so, in which case the court may grant an extension.

*Weasel* said that the trial court may grant a motion for a good cause extension of the deadline only if the defendant had not first filed a motion to dismiss for failure to obtain the expert affidavit. However, if three months have elapsed since the commencement of the lawsuit without the plaintiff's obtaining either the required expert opinion, or a later date for compliance, the statute expressly provides that the court must dismiss the case without prejudice.

The federal court in *Weasel* said that the statute is designed to minimize frivolous claims against physicians by avoiding the necessity of a trial or action based upon professional negligence unless the plaintiff obtains an expert opinion to substantiate the allegations of negligence. 230 F.3d 348, 351. A three month window to submit the affidavit after the plaintiff commences the action serves this purpose.

The North Dakota Supreme Court in the *Sheer* case, refused to follow *Weasel*, noting that the statute does not explicitly provide when or how a plaintiff can show good cause, and held that a plaintiff may show good cause even after expiration of the three month period, whether or not the defendants had moved to dismiss the complaint. In other words, despite the plaintiff's ability to control the timing of filing of the action, this did not bind them to submit an affidavit within the three month period.

HB 1302 amends the statute, reinstating the *Weasel* interpretation, requiring that a request for an extension of time to serve the expert affidavit be made before the expiration of the three month period, or risk dismissal if the defendant files a motion to dismiss. The amendment reflects and furthers the goals of Section 28-01-46—to discourage filing of frivolous law suits—and merely requires timely presentation of expert witness opinions. The amendment does not disadvantage serious plaintiffs with sound claims, who are able to present an affidavit of their expert opinion within three months of the time that they elect to commence the action.

Thank you chairman Nething and members of the committee. We urge a "Do Pass" on HB 1302. Tracy Kolb, an attorney who represents physicians in medical malpractice cases, is also here to provide testimony regarding the practical applications of this statute in malpractice litigation.