

2009 SENATE JUDICIARY

SB 2326

# 2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2326

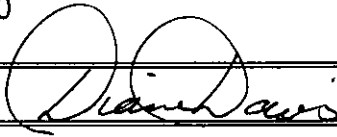
Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: 2/2/09

Recorder Job Number: 8350

Committee Clerk Signature



Minutes: **Senator D. Nething, Chairman**

**Representative Tracy Potter** – Introduces the bill

**Matt Schwarz** – See written testimony.

**Senator Fiebiger** – Asks about the judgment and how this worked out is a little confusing.

**Schwarz** –Relates his understanding is even though the physician was found at fault since

there was no autopsy to prove what the cause of death was there could be no financial award.

**John Kapsner** – ND Healthcare Association – He did not bring written testimony because he does not understand the proposal. He can't say for sure what happened here. Another problem with this is the use of negligent and proximate cause in the same sentence doesn't work because negligence is a four part test, one part of it is approximate cause. So proximate cause is an element of negligence not something separate and apart. There are almost never autopsies in malpractice cases. The statute as drafted is so confusing that it invites too many interpretations and he does not understand it.

**Tracy Cole** – Defense Attorney for Zuger, Kermis & Smith – She opposes this bill. She was one of the defense attorneys involved in the case with Mr. Schwarz. This bill is not a correct statement of the law, it's unworkable, and there is already a procedure under the law to deal

with the concerns that Mr. Schwarz wants addressed. If you're negligent proximate cause has already been established or it's not. An autopsy does not establish proximate cause of death. An autopsy can establish a cause of death. Proximate cause is a term under law is one of the elements that have to be established in a medical negligence case. In this case an autopsy was refused by the family. Mr. Schwarz chose to sue as a result of his daughter's death. She talks more of Mr. Schwarz case and who was being sued and of medical experts that had come in to testify. She relates how his case played out in court and how it came to be. Under ND law her firm was entitled to obtain their costs from Mr. Schwarz. The doctors and the hospital gave up or compromised their cost judgments. There is a mechanism in place for the party to object, no objection was made to the costs in this case.

Close the hearing on 2326

## 2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2326

Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: 2/4/09

Recorder Job Number: 8637 forward to 32:45

Committee Clerk Signature

*Diane Davis*

Minutes: **Senator D. Nething, Chairman**

Relates to medical malpractice with no autopsy.

Committee discusses testimony that was heard.

**Senator Schneider** – discusses the way the law is written right now, if a medical provider is found negligent there is no right to disbursement, tax, and judgment. Senator Schneider relayed information to the committee from Mr. Schwarz. He said it is a total tragedy but he doesn't know how to fix what Mr. Schwarz has proposed.

**Senator Fiebiger** – Doesn't think there is a good solution.

**Senator Lyson** moves a do not pass

**Senator Fiebiger** seconds

Discussion

This bill has come before other committees. For us to deal with the autopsy part or the damages part, there really is no connection. The connection comes with the probable cause of death. Generally an autopsy is done when there is a mysterious death. It would still be a battle of the experts.

Vote – 6-0

**Senator Schneider** will carry.

Date: 2/4/09  
Roll Call Vote #: 1

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2326

Senate JUDICIARY Committee

Check here for Conference Committee

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

Action Taken  Do Pass  Do Not Pass  Amended

Motion Made By Sen Lyson Seconded By Sen Fiebigger

Senators	Yes	No	Senators	Yes	No
Sen. Dave Nething - Chairman	X		Sen. Tom Fiebigger	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**

**SB 2326: Judiciary Committee (Sen. Nething, Chairman) recommends DO NOT PASS**  
(6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2326 was placed on the  
Eleventh order on the calendar.

2009 TESTIMONY

SB 2326

**SENATE BILL 2326**  
Judiciary Committee

Testimony by Mathew C. Schwarz  
February 2, 2009

Good Morning Chairman Nething and Members of the Judiciary Committee.

My name is Matt Schwarz. I am here to speak in support of Senate Bill 2326 regarding disbursements taxed in judgment.

This bill is in direct response to my family's experience in a recent trial involving medical malpractice resulting from the death of our 29 year old daughter, Stephanie. I am passing around a couple of photos.

My wife Marcia and our daughter Jessica live in District 47, Bismarck. They both have Myotonic Muscular Dystrophy. Jessica is on life support and Marcia's health has also deteriorated where she has serious physical limitations and uses a wheelchair. Stephanie was the healthiest of all, was our helper, and most important of all, mentor and best friend to her sister, Jessica. Stephanie died unexpectedly on Valentines Day, 2004, three hours after we (Marcia, Jessica, and I) left her hospital room to have a Valentines dinner.

In a blur I arrived at the hospital room in total shock having seen my daughter happy and smiling only 3 hours prior. She was a mess including an intubation tube sticking out of her mouth, all sticky with the conductive



grease applied for the shocks that had been performed, and her face was smeared up.

After my wife arrived we tried contacting family and clergy. It was very frustrating because we had difficulty reaching them on a Saturday night. Furthermore, and most importantly, we were trying to decide whether Jessica, who also has a trache, should come up and say good bye to her sister with whom she had spent the afternoon reading books and doing puzzles. To complicate matters Jessica has mental retardation and Stephanie was the most important peer in her life.

I asked the nursing staff whether they had anyone who could give us guidance and they said no. Finally, my wife and I made the decision to have the nurses remove the intubation tube from Stephanie's mouth and clean up her face so Jessica could come up and say a final good bye.

Subsequent to that action no autopsy could be performed according to the nurses. We were in no condition that sad night to argue or even think of calling an attorney. We proceeded to let the Lions and Red Cross harvest her eyes, tissue, etc.

A trial was held in 2007 in which the physician (hospitalist) was found negligent by a jury. A second trial was scheduled the following week involving the same physician. That case quickly settled upon our jury verdict against him.

Even though the physician was found negligent by a jury, no financial award was allowed because an autopsy had not been performed, which would have identified positive proof for the cause of death. The judge, erroneously according to our attorneys, would not allow us to discuss why there was no autopsy. This issue and other judicial errors, again according to our attorneys, were appealable. Our attorneys were, in fact, ready and willing to proceed with an appeal. However, after the trial, the defendants filed a judgment (for fees and expenses) against our family for \$50,119.43 with an interest rate of 11.5%.

I understand it is typical protocol for attorneys to waive these fees if no appeal of the verdict is made. Our attorneys, even though they felt we had a good chance of prevailing in an appeal, advised us they could not guarantee, however, a retrial and subsequent victory. In case we didn't prevail, it was estimated the judgment could reach \$80,000-\$100,000. For obvious reasons, I could not put our family at such financial risk. In essence, we were blackmailed into not appealing the case. To make matters worse, we were forced to write a check for \$10,000 to the defendants before they would agree to end the case....I guess to punish our family for bringing the lawsuit. Our attorneys actually negotiated this down to \$10,000 after a higher amount was requested.

A couple of weeks ago I attempted to refinance our home because of the lower interest rates now available. After our bank ran a credit check they informed me my credit score, which had been excellent (over 800) was dramatically affected due to derogatory public records resulting from the civil judgments in our trial. Even though the judgments were satisfied this

derogatory record will continue until at least August, 2014, in our credit record.

Had there been an autopsy, we are confident this case would have had a much different outcome. More importantly, the hospitalist physician was found negligent and gets off scot-free. It turns out the verdict doesn't even go on the physicians' national registry.

Our family, particularly Jessica, will never recover from this loss. This bill, obviously, will not help our family, but hopefully someone else, experiencing a horrific time in their life. In addition to unbelievable personal loss, our family endured major financial impacts due to the death of our daughter including a \$11,872 funeral bill, \$4,833 for a cemetery monument, and, of course, the \$10,000 judgment. With all the issues our family has and will continue to face, this seems extremely unfair!

I ask you to support SB 2326.

I will be happy to answer any questions.