

**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;

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

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

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

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

14           **32-42-01. Definitions.** In this chapter:

15           1. "Alternative dispute resolution" means the resolution of a health care malpractice  
16    claim in a manner other than through a health care malpractice action.

17           2. "Claimant" means any person who alleges a health care malpractice claim, and  
18    any person on whose behalf the claim is alleged, including the decedent in the  
19    case of an action brought through or on behalf of an estate.

20           3. "Health care malpractice action" means a claim for relief brought against a health  
21    care provider, or other defendant joined in the action, regardless of the theory of  
22    liability on which the claim is based, in which the claimant alleges a health care  
23    malpractice claim.

24           4. "Health care malpractice claim" means a claim brought against a health care  
25    provider or other defendant joined in a claim alleging that an injury was suffered by  
26    the claimant as a result of health care negligence or gross negligence, breach of  
27    express or implied warranty or contract, failure to discharge a duty to warn, or  
28    failure to obtain consent arising from the provision of or failure to provide health  
29    care services.

30           5. "Health care negligence" means an act or omission by a health care provider which  
31    deviates from the applicable standard of care and causes an injury.

- 1           6. "Health care provider" means a person who is licensed, certified, or otherwise  
2           authorized by the law of this state to administer health care in the ordinary course  
3           of business or practice of a profession.
- 4           7. "Injury" means an injury, illness, disease, or other harm suffered by an individual as  
5           a result of the provision of health care services by a health care provider.
- 6           8. ~~"Noneconomic damage" means damage arising from pain; suffering;  
7           inconvenience; physical impairment; disfigurement; mental anguish; emotional  
8           distress; fear of injury, loss, or illness; loss of society and companionship; loss of  
9           consortium; injury to reputation; humiliation; and other nonpecuniary damage  
10          incurred by an individual with respect to which a health care malpractice action or  
11          claim is pursued.~~

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