

1 **UTAH HEALTH CARE MALPRACTICE ACT AMENDMENTS**

2 2018 GENERAL SESSION

3 STATE OF UTAH

4 **Chief Sponsor: Daniel Hemmert**

5 House Sponsor: _____

7 **LONG TITLE**

8 **General Description:**

9 This bill amends provisions of the Utah Health Care Malpractice Act.

10 **Highlighted Provisions:**

11 This bill:

12 ▶ requires a health care provider that signs an affidavit of merit to provide an
13 explanation of the health care provider's qualifications to provide the information in
14 the affidavit of merit;

15 ▶ requires the Division of Occupational and Professional Licensing to request and
16 compile certain information related to a request for a medical liability pre-litigation
17 panel review;

18 ▶ amends the elements of a nonplaintiff cause of action; and

19 ▶ makes technical changes.

20 **Money Appropriated in this Bill:**

21 None

22 **Other Special Clauses:**

23 None

24 **Utah Code Sections Affected:**

25 AMENDS:

26 **78B-3-423**, as enacted by Laws of Utah 2010, Chapter 97

27 **78B-3-426**, as enacted by Laws of Utah 2016, Chapter 257



28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **78B-3-423** is amended to read:

78B-3-423. Affidavit of merit.

(1) (a) ~~[Before]~~ For a cause of action that arises on or after July 1, 2010, before a claimant may receive a certificate of compliance under Sections **78B-3-416** and **78B-3-418**, a claimant shall file an affidavit of merit under this section~~[:]~~.

(b) The claimant shall file an affidavit of merit:

(i) within 60 days ~~[of the date of the panel's]~~ after the day on which the pre-litigation panel issues an opinion, if the claimant receives a finding from the pre-litigation panel in accordance with Section **78B-3-418** of non-meritorious for either:

(A) the claim of breach of applicable standard of care; or

(B) that the breach of care was the proximate cause of injury;

(ii) within 60 days ~~[of the expiration of]~~ after the day on which the time limit in Subsection **78B-3-416(3)(b)(ii)** expires, if a pre-litigation hearing is not held within the time limits under Subsection **78B-3-416(3)(b)(ii)**; or

(iii) within 30 days ~~[of the division's]~~ after the day on which the division makes a determination under Subsection **78B-3-416(3)(d)(ii)(B)**, if the division makes a determination under Subsection **78B-3-416(3)(d)(ii)(B)**.

~~[(b)]~~ (c) A claimant who is required to file an affidavit of merit under Subsection (1)(a) shall:

(i) file the affidavit of merit with the division; and

(ii) serve each defendant with the affidavit of merit in accordance with Subsection **78B-3-412(3)**.

(2) The affidavit of merit shall:

(a) be executed by the claimant's attorney or the claimant if the claimant is proceeding pro se, stating that the affiant has consulted with and reviewed the facts of the case with a health care provider who has determined after a review of the medical record and other relevant material involved in the particular action that there is a reasonable and meritorious cause for the filing of a medical liability action; and

(b) include an affidavit signed by a health care provider who meets the requirements of

59 Subsection ~~[(3), which states that in the health care provider's opinion]~~ (4):

60 (i) stating that in the health care provider's opinion, there are reasonable grounds to
61 believe that the applicable standard of care was breached;

62 (ii) stating that in the health care provider's opinion, the breach was a proximate cause
63 of the injury claimed in the notice of intent to commence action; ~~[and]~~

64 (iii) stating the reasons for the health care provider's opinion~~[-]; and~~

65 (iv) including a detailed explanation of the health care provider's qualifications to make
66 the statements described in Subsections (2)(b)(i) through (iii).

67 ~~[(c)]~~ (3) The statement required in Subsection (2)(b)(i) shall be waived if the claimant
68 received an opinion that there was a breach of the applicable standard of care under Subsection
69 78B-3-418(2)(a)(i).

70 ~~[(3)]~~ (4) A health care provider who signs ~~[the]~~ an affidavit ~~[of merit]~~ under Subsection
71 (2)(b) shall:

72 (a) if none of the respondents is a physician ~~[licensed under Title 58, Chapter 67, Utah~~
73 ~~Medical Practice Act,]~~ or an osteopathic physician ~~[licensed under Title 58, Chapter 68, Utah~~
74 ~~Osteopathic Medical Practice Act,]~~ hold a current unrestricted license issued by the appropriate
75 licensing authority of Utah or another state in the same ~~[specialty]:~~

76 (i) (A) health care profession as the respondents; or ~~[of the same]~~

77 (B) class of license as the respondents; [or] and

78 (ii) specialty as the respondents; or

79 (b) if at least one of the respondents is a physician ~~[licensed under Title 58, Chapter 67,~~
80 ~~Utah Medical Practice Act,]~~ or an osteopathic physician ~~[licensed under Title 58, Chapter 68,~~
81 ~~Utah Osteopathic Medical Practice Act,]~~ hold a current unrestricted license issued by the
82 appropriate licensing authority of Utah or another state to practice medicine in all its branches.

83 ~~[(4)]~~ (5) A claimant's attorney or claimant may obtain up to a 60-day extension to file
84 the affidavit of merit if:

85 (a) the claimant or the claimant's attorney submits a signed affidavit for extension with
86 notice to the division attesting to the fact that the claimant is unable to submit an affidavit of
87 merit as required by this section because:

88 (i) a statute of limitations would impair the action; and

89 (ii) the affidavit of merit could not be obtained before the expiration of the statute of

90 limitations; and

91 (b) the claimant or claimant's attorney submits the affidavit for extension to each
92 named respondent in accordance with Subsection 78B-3-412(3) no later than 60 days after the
93 date specified in Subsection ~~[(1)(a)(i)]~~ (1)(b)(i).

94 ~~[(5)]~~ (6) (a) A claimant or claimant's attorney who submits allegations in an affidavit of
95 merit that are found to be without reasonable cause and untrue, based on information available
96 to the plaintiff at the time the affidavit was submitted to the division, is liable to the defendant
97 for the payment of reasonable expenses and reasonable attorney fees actually incurred by the
98 defendant or the defendant's insurer.

99 (b) An affidavit of merit is not admissible, and cannot be used for any purpose, in a
100 subsequent lawsuit based on the claim that is the subject of the affidavit, except for the purpose
101 of establishing the right to recovery under Subsection ~~[(5)]~~ (6)(c).

102 (c) A court, or arbitrator under Section 78B-3-421, may award costs and attorney fees
103 under Subsection ~~[(5)]~~ (6)(a) if the defendant files a motion for costs and attorney fees within
104 60 days of the judgment or dismissal of the action in favor of the defendant. The person
105 making a motion for attorney fees and costs may depose and examine the health care provider
106 who prepared the affidavit of merit under Subsection (2)(b).

107 ~~[(6)]~~ (7) If a claimant or the claimant's attorney does not file an affidavit of merit as
108 required by this section, the division may not issue a certificate of compliance for the claimant
109 and the malpractice action shall be dismissed by the court.

110 ~~[(7)]~~ (8) ~~[This section applies to a cause of action that arises on or after July 1, 2010.]~~
111 For each request for pre-litigation panel review under Subsection 78B-3-416(2)(b), the division
112 shall compile the following information:

113 (a) whether the cause of action arose on or after July 1, 2010;

114 (b) the number of respondents named in the request; and

115 (c) for each respondent named in the request:

116 (i) the respondent's license class;

117 (ii) if the respondent has a professional specialty, the respondent's professional
118 specialty;

119 (iii) if the division does not issue a certificate of compliance, the reason a certificate
120 was not issued, including whether:

- 121 (A) the request was denied due to lack of jurisdiction by the division;
- 122 (B) as provided in Subsection 78B-3-416(3)(e)(i), the claimant and the respondent
- 123 stipulated that no useful purpose would be served by convening a pre-litigation panel;
- 124 (C) the claimant and the respondent agreed to arbitration;
- 125 (D) the panel found, as provided in Subsection 78B-3-418(2), that the claim against the
- 126 respondent has merit; and
- 127 (E) the panel found, as provided in Subsection 78B-3-418(2), that the claim against the
- 128 respondent has merit, but the conduct complained of did not result in harm to the claimant;
- 129 (iv) if an affidavit of merit was filed by the claimant, for each health care provider who
- 130 submitted an affidavit under Subsection (2)(b):
- 131 (A) the health care provider's license class and professional specialty; and
- 132 (B) whether the health care provider meets the requirements of Subsection
- 133 78B-3-423(3); and
- 134 (v) whether the claimant filed an action in court against the respondent.
- 135 (9) The division may require the following persons to submit the information to the
- 136 division necessary for the division to comply with Subsection (8):
- 137 (a) a claimant;
- 138 (b) a respondent;
- 139 (c) a health care provider who submits an affidavit under Subsection (2)(b); and
- 140 (d) a medical liability pre-litigation panel.
- 141 Section 2. Section **78B-3-426** is amended to read:
- 142 **78B-3-426. Nonpatient cause of action.**
- 143 (1) For purposes of this section, a nonpatient plaintiff does not include a patient, as
- 144 defined in Subsection 78B-3-403(23).
- 145 (2) This section does not apply to a healthcare malpractice action brought or seeking
- 146 recovery under Section 30-2-11, 78B-3-106, 78B-3-107, or 78B-3-502.
- 147 (3) To establish a malpractice action against a health care provider, a nonpatient
- 148 plaintiff shall be required to show that:
- 149 (a) the health care provider owes a duty to the nonpatient plaintiff;
- 150 ~~[(a)]~~ (b) the nonpatient plaintiff suffered [an] a foreseeable, physical injury;
- 151 ~~[(b)]~~ (c) the nonpatient plaintiff's injury was proximately caused by an act or omission

152 of the health care provider; and
153 [~~(e)~~] (d) the health care provider's act or omission was conduct that manifests a
154 knowing and reckless indifference toward, and a disregard of, the injury suffered by the
155 nonpatient plaintiff.

Legislative Review Note
Office of Legislative Research and General Counsel