

Senator Daniel Hemmert proposes the following substitute bill:

UTAH HEALTH CARE MALPRACTICE ACT AMENDMENTS

2018 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Daniel Hemmert

House Sponsor: Michael S. Kennedy

LONG TITLE

General Description:

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

Highlighted Provisions:

This bill:

- ▶ requires a health care provider that signs an affidavit of merit to provide certain information to the Division of Occupational and Professional Licensing;
- ▶ requires the Division of Occupational and Professional Licensing to request and compile certain information related to a request for a medical liability pre-litigation panel review;
- ▶ amends the elements of a nonplaintiff cause of action; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

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



26 **78B-3-426**, as enacted by Laws of Utah 2016, Chapter 257

27

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

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

30 **78B-3-423. Affidavit of merit.**

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

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

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

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

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

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

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

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

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

49 (ii) serve each defendant with the affidavit of merit in accordance with Subsection
50 **78B-3-412(3)**.

51 (2) The affidavit of merit shall:

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

57 (b) include an affidavit signed by a health care provider who meets the requirements of
58 Subsection ~~[(3), which states that in the health care provider's opinion]~~ (4):

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

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

63 (iii) stating the reasons for the health care provider's opinion.

64 ~~[(c)]~~ (3) The statement required in Subsection (2)(b)(i) shall be waived if the claimant
65 received an opinion that there was a breach of the applicable standard of care under Subsection
66 78B-3-418(2)(a)(i).

67 ~~[(3)]~~ (4) A health care provider who signs ~~[the]~~ an affidavit ~~[of merit]~~ under Subsection
68 (2)(b) shall:

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

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

78 ~~[(4)]~~ (5) A claimant's attorney or claimant may obtain up to a 60-day extension to file
79 the affidavit of merit if:

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

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

84 (ii) the affidavit of merit could not be obtained before the expiration of the statute of
85 limitations; and

86 (b) the claimant or claimant's attorney submits the affidavit for extension to each
87 named respondent in accordance with Subsection 78B-3-412(3) no later than 60 days after the

88 date specified in Subsection ~~[(1)(a)(i)]~~ (1)(b)(i).

89 ~~[(5)]~~ (6) (a) A claimant or claimant's attorney who submits allegations in an affidavit of
90 merit that are found to be without reasonable cause and untrue, based on information available
91 to the plaintiff at the time the affidavit was submitted to the division, is liable to the defendant
92 for the payment of reasonable expenses and reasonable attorney fees actually incurred by the
93 defendant or the defendant's insurer.

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

97 (c) A court, or arbitrator under Section [78B-3-421](#), may award costs and attorney fees
98 under Subsection ~~[(5)]~~ (6)(a) if the defendant files a motion for costs and attorney fees within
99 60 days of the judgment or dismissal of the action in favor of the defendant. The person
100 making a motion for attorney fees and costs may depose and examine the health care provider
101 who prepared the affidavit of merit under Subsection (2)(b).

102 ~~[(6)]~~ (7) If a claimant or the claimant's attorney does not file an affidavit of merit as
103 required by this section, the division may not issue a certificate of compliance for the claimant
104 and the malpractice action shall be dismissed by the court.

105 ~~[(7)]~~ (8) ~~[This section applies to a cause of action that arises on or after July 1, 2010.]~~
106 For each request for prelitigation panel review under Subsection [78B-3-416](#)(2)(b), the division
107 shall compile the following information:

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

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

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

111 (i) the respondent's license class;

112 (ii) if the respondent has a professional specialty, the respondent's professional
113 specialty;

114 (iii) if the division does not issue a certificate of compliance at the conclusion of the
115 prelitigation process, the reason a certificate was not issued;

116 (iv) if the division issues a certificate of compliance, the reason the certificate of
117 compliance was issued;

118 (v) if an affidavit of merit was filed by the claimant, for each health care provider who

119 submitted an affidavit under Subsection (2)(b):

120 (A) the health care provider's license class and professional specialty; and

121 (B) whether the health care provider meets the requirements of Subsection

122 78B-3-416(4)(b); and

123 (vi) whether the claimant filed an action in court against the respondent.

124 (9) The division may require the following persons to submit the information to the
125 division necessary for the division to comply with Subsection (8):

126 (a) a claimant;

127 (b) a respondent;

128 (c) a health care provider who submits an affidavit under Subsection (2)(b); and

129 (d) a medical liability pre-litigation panel.

130 Section 2. Section **78B-3-426** is amended to read:

131 **78B-3-426. Nonpatient plaintiffs.**

132 (1) For purposes of this section, a nonpatient plaintiff does not include a patient, as
133 defined in Subsection **78B-3-403**(23).

134 (2) This section does not apply to a [~~healthcare~~] health care malpractice action brought
135 or seeking recovery under Section **30-2-11**, **78B-3-106**, **78B-3-107**, or **78B-3-502**.

136 (3) To establish a malpractice action against a health care provider, a nonpatient
137 plaintiff shall be required to show that:

138 (a) the health care provider owes a duty to the nonpatient plaintiff;

139 [~~(a)~~] (b) the nonpatient plaintiff suffered [~~an~~] a foreseeable injury;

140 [~~(b)~~] (c) the nonpatient plaintiff's injury was proximately caused by an act or omission
141 of the health care provider; and

142 [~~(c)~~] (d) the health care provider's act or omission was conduct that manifests a
143 knowing and reckless indifference toward, and a disregard of, the injury suffered by the
144 nonpatient plaintiff.