

## SB0223S01 compared with SB0223

~~text~~ shows text that was in SB0223 but was deleted in SB0223S01.

Inserted text shows text that was not in SB0223 but was inserted into SB0223S01.

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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: \_\_\_\_\_

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#### 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 ~~an explanation of the health care provider's qualifications to provide the information in the affidavit of merit~~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

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- ▶ 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

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

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*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

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

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

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

(iii) ~~stating the reasons for the health care provider's opinion { }, { }, and { }~~

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

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

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

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

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

~~——— (B) } specialty or of the same~~ class of license as the respondents; ~~{ } or { } and~~

~~——— (ii) specialty as the respondents; or }~~

(b) if at least one of the respondents is a physician ~~[licensed under Title 58, Chapter 67, Utah Medical Practice Act,]~~ or an osteopathic physician ~~[licensed under Title 58, Chapter 68,~~

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~~Utah Osteopathic Medical Practice Act~~], hold a current unrestricted license issued by the appropriate licensing authority of Utah or another state to practice medicine in all its branches.

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

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

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

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

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

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

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

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

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

~~[(7)]~~ (8) ~~[This section applies to a cause of action that arises on or after July 1, 2010.]~~  
For each request for ~~{pre-litigation}~~prelitigation panel review under Subsection

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78B-3-416(2)(b), the division shall compile the following information:

- (a) whether the cause of action arose on or after July 1, 2010;
- (b) the number of respondents named in the request; and
- (c) for each respondent named in the request:
  - (i) the respondent's license class;
  - (ii) if the respondent has a professional specialty, the respondent's professional

specialty;

(iii) if the division does not issue a certificate of compliance at the conclusion of the prelitigation process, the reason a certificate was not issued ~~{, including whether:~~

~~—— (A) the request was denied due to lack of jurisdiction by the division;~~

~~—— (B) as provided in Subsection 78B-3-416(3)(c)(i), the claimant and the respondent stipulated that no useful purpose would be served by convening a pre-litigation panel;~~

~~—— (C) the claimant and the respondent agreed to arbitration;~~

~~—— (D) the panel found, as provided in Subsection 78B-3-418(2), that the claim against the respondent has merit; and~~

~~—— (E) the panel found, as provided in Subsection 78B-3-418(2), that the claim against the respondent has merit, but the conduct complained of did not result in harm to the claimant;~~

~~—— (iv);~~

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

(v) if an affidavit of merit was filed by the claimant, for each health care provider who submitted an affidavit under Subsection (2)(b):

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

(B) whether the health care provider meets the requirements of Subsection ~~{78B-3-423}~~78B-3-416(~~{3}~~4)(b); and

(~~{v}~~vi) whether the claimant filed an action in court against the respondent.

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

(a) a claimant;

(b) a respondent;

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

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(d) a medical liability pre-litigation panel.

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

**78B-3-426. Nonpatient ~~{cause of action}~~ plaintiffs.**

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

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

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

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

~~[(a)]~~ (b) the nonpatient plaintiff suffered ~~[an]~~ a foreseeable ~~{, physical}~~ injury;

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

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

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**Legislative Review Note**

**Office of Legislative Research and General Counsel**