

ASSEMBLY BILL NO. 495—COMMITTEE ON JUDICIARY

MARCH 23, 2009

Referred to Committee on Judiciary

SUMMARY—Makes various changes to provisions governing professional negligence. (BDR 3-978)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

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EXPLANATION – Matter in *bolded italics* is new; matter between brackets ~~omitted material~~ is material to be omitted.

AN ACT relating to professional negligence; revising the damages that may be awarded in certain actions based on professional negligence; revising various provisions relating to the statute of limitations in such actions; establishing certain evidentiary standards in such actions; repealing certain provisions related to such actions; and providing other matters properly relating thereto.

Legislative Counsel’s Digest:

1 Existing law provides for a limitation of \$350,000 in noneconomic damages in
2 actions based on professional negligence. (NRS 41A.035) **Section 1** of this bill
3 eliminates the limitation on noneconomic damages and provides explicitly that
4 economic damages may be awarded in such actions. **Section 2** of this bill increases
5 the period in which to bring an action to trial for professional negligence to 5 years
6 after the date on which the action is filed. (NRS 41A.061)

7 The Nevada Supreme Court has ruled that the mandatory dismissal of an action
8 filed without an affidavit of medical expert does not apply to a res ipsa loquitur
9 case, because an expert affidavit is unnecessary in factual situations where medical
10 negligence is presumed. (*Szydel v. Markman*, 121 Nev. 453 (2005)) **Section 3** of
11 this bill codifies the holding in the *Szydel* decision and provides that the medical
12 expert may be a person whose practice includes the type of practice engaged in at
13 the time of the alleged negligence such that he can testify, under oath, that he is
14 familiar with the accepted standard of care. (NRS 41A.071)

15 **Section 4** of this bill increases the limit on fees payable for an opinion letter
16 from independent counsel from \$1,500 to \$5,000 in professional negligence cases
17 where a settlement judge recommends settlement for limits of the insurance policy.
18 (NRS 41A.085) **Section 5** of this bill provides that limitations of actions for injury
19 or death against a provider of health care may not be commenced more than 4 years
20 after the date of injury or 2 years after the plaintiff discovers or should have
21 discovered the injury. (NRS 41A.097) **Section 5** also provides for certain tolling of
22 the limitations where the provider of health care fails or refuses to provide medical



23 records to the patient and for certain claims where the injury was not discoverable
24 except by certain medical methods.

25 Existing law provides that there is a conclusive presumption that a patient has
26 consented to a medical, surgical or dental procedure under certain circumstances.
27 (NRS 41A.110) **Section 7** of this bill provides that such circumstances create a
28 rebuttable presumption, rather than a conclusive presumption, that the patient has
29 consented to the procedure. **Section 8** of this bill repeals certain provisions relating
30 to actions against providers of health care based upon professional negligence,
31 including: (1) limitations on contingent fee contracts in such actions; (2) several
32 liability of a provider of health care; and (3) the introduction of certain evidence
33 relating to collateral benefits and payment of future damages by periodic payments.
34 (NRS 7.095, 41A.045, 42.021)

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 **Section 1.** NRS 41A.035 is hereby amended to read as
2 follows:

3 41A.035 In an action for injury or death against a provider of
4 health care based upon professional negligence, the injured plaintiff
5 may recover *economic damages and* noneconomic damages . ~~[-, but~~
6 ~~the amount of noneconomic damages awarded in such an action~~
7 ~~must not exceed \$350,000.]~~

8 **Sec. 2.** NRS 41A.061 is hereby amended to read as follows:

9 41A.061 1. Upon the motion of any party or upon its own
10 motion, unless good cause is shown for the delay, the court shall,
11 after due notice to the parties, dismiss an action involving medical
12 malpractice or dental malpractice if the action is not brought to trial
13 within ~~[-~~

14 ~~—(a) Three years after the date on which the action is filed, if the~~
15 ~~action is filed on or after October 1, 2002, but before October 1,~~
16 ~~2005.~~

17 ~~—(b) Two] 5~~ years after the date on which the action is filed . ~~[-, if~~
18 ~~the action is filed on or after October 1, 2005.]~~

19 2. Dismissal of an action pursuant to subsection 1 is a bar to
20 the filing of another action upon the same claim for relief against the
21 same defendants.

22 3. Each district court shall adopt court rules to expedite the
23 resolution of an action involving medical malpractice or dental
24 malpractice.

25 **Sec. 3.** NRS 41A.071 is hereby amended to read as follows:

26 41A.071 ~~[-]~~ *Except as otherwise provided in NRS 41A.100, if*
27 an action for medical malpractice or dental malpractice is filed in
28 the district court, the district court shall dismiss the action, without
29 prejudice, if the action is filed without an affidavit, supporting the



1 allegations contained in the action, submitted by a medical expert
2 who practices or has practiced in an area that ~~is~~ :

3 *1. Is substantially similar to the type of practice engaged in at*
4 *the time of the alleged malpractice ~~is~~; or*

5 *2. Includes the type of practice engaged in at the time of the*
6 *alleged negligence such that the medical expert can testify, under*
7 *oath, that he is familiar with the accepted standard of care.*

8 **Sec. 4.** NRS 41A.085 is hereby amended to read as follows:

9 41A.085 1. In an action for damages for medical malpractice
10 or dental malpractice in which the defendant is insured pursuant to a
11 policy of insurance covering the liability of the defendant for a
12 breach of his professional duty toward a patient:

13 (a) At any settlement conference, the judge may recommend that
14 the action be settled for the limits of the policy of insurance.

15 (b) If the judge makes the recommendation described in
16 paragraph (a), the defendant is entitled to obtain from independent
17 counsel an opinion letter explaining the rights of, obligations of and
18 potential consequences to the defendant with regard to the
19 recommendation. The insurer shall pay the independent counsel to
20 provide the opinion letter described in this paragraph, except that the
21 insurer is not required to pay more than ~~[\$1,500]~~ **\$5,000** to the
22 independent counsel to provide the opinion letter.

23 2. ~~the~~ **This** section does not:

24 (a) Prohibit the plaintiff from making any offer of settlement.

25 (b) Require an insurer to provide or pay for independent counsel
26 for a defendant except as expressly provided in this section.

27 **Sec. 5.** NRS 41A.097 is hereby amended to read as follows:

28 41A.097 1. Except as otherwise provided in ~~subsection~~
29 **subsections 2 and 3**, an action for injury or death against a provider
30 of health care may not be commenced more than 4 years after the
31 date of injury or 2 years after the plaintiff discovers or through the
32 use of reasonable diligence should have discovered the injury,
33 whichever occurs first, for ~~is~~:

34 ~~—(a) Injury~~ **injury** to or the wrongful death of a person ~~occurring~~
35 ~~before October 1, 2002, based~~ :

36 (a) **Based** upon alleged professional negligence of the provider
37 of health care;

38 (b) ~~Injury to or the wrongful death of a person occurring before~~
39 ~~October 1, 2002, from~~ **From** professional services rendered without
40 consent; or

41 (c) ~~Injury to or the wrongful death of a person occurring before~~
42 ~~October 1, 2002, from~~ **From** error or omission in practice by the
43 provider of health care.

44 2. ~~Except as otherwise provided in subsection 3, an action for~~
45 ~~injury or death against a provider of health care may not be~~



1 ~~commenced more than 3 years after the date of injury or 1 year after~~
2 ~~the plaintiff discovers or through the use of reasonable diligence~~
3 ~~should have discovered the injury, whichever occurs first, for:~~

4 ~~—(a) Injury to or the wrongful death of a person occurring on or~~
5 ~~after October 1, 2002, based upon alleged professional negligence of~~
6 ~~the provider of health care;~~

7 ~~—(b) Injury to or the wrongful death of a person occurring on or~~
8 ~~after October 1, 2002, from professional services rendered without~~
9 ~~consent; or~~

10 ~~—(c) Injury to or the wrongful death of a person occurring on or~~
11 ~~after October 1, 2002, from error or omission in practice by the~~
12 ~~provider of health care.~~

13 ~~—3.] This time limitation is tolled for any period during which~~
14 ~~the provider of health care [has] :~~

15 ~~(a) Has concealed any act, error or omission upon which the~~
16 ~~action is based and which is known or through the use of reasonable~~
17 ~~diligence should have been known to him [.] ; or~~

18 ~~(b) Fails or refuses to provide the person's medical records, or~~
19 ~~during which such medical records are unavailable.~~

20 ~~3. This time limitation is tolled for any period during which~~
21 ~~the injury of the person is not discoverable except by means of~~
22 ~~diagnostic testing through the use of radiography, computerized~~
23 ~~tomography, magnetic resonance imaging, positron emission~~
24 ~~tomography or similar methods.~~

25 ~~4. For the purposes of this section [, the parent, guardian or~~
26 ~~legal custodian of any minor child is responsible for exercising~~
27 ~~reasonable judgment in determining whether to prosecute any cause~~
28 ~~of action limited by subsection 1 or 2. If the parent, guardian or~~
29 ~~custodian fails to commence an action on behalf of that child within~~
30 ~~the prescribed period of limitations, the child may not bring an~~
31 ~~action based on the same alleged injury against any provider of~~
32 ~~health care upon the removal of his disability, except that in the case~~
33 ~~of:~~

34 ~~—(a) Brain damage or birth defect, the period of limitation is~~
35 ~~extended until the child attains 10 years of age.~~

36 ~~—(b) Sterility, the period of limitation is extended until 2 years~~
37 ~~after the child discovers the injury.] :~~

38 ~~(a) The "injury" of a person shall be deemed to occur when all~~
39 ~~elements of the cause of action have accrued.~~

40 ~~(b) The "wrongful death" of a person shall be deemed to occur~~
41 ~~on the date of that person's death.~~

42 **Sec. 6.** NRS 41A.100 is hereby amended to read as follows:

43 41A.100 1. Liability for personal injury or death is not
44 imposed upon any provider of medical care based on alleged
45 negligence in the performance of that care unless evidence



1 consisting of expert medical testimony, material from recognized
2 medical texts or treatises or the regulations of the licensed medical
3 facility wherein the alleged negligence occurred is presented to
4 demonstrate the alleged deviation from the accepted standard of care
5 in the specific circumstances of the case and to prove causation of
6 the alleged personal injury or death, except that such evidence is not
7 required and a rebuttable presumption that the personal injury or
8 death was caused by negligence arises where evidence is presented
9 that the personal injury or death occurred in any one or more of the
10 following circumstances:

11 (a) A foreign substance other than medication or a prosthetic
12 device was unintentionally left within the body of a patient
13 following surgery;

14 (b) An explosion or fire originating in a substance used in
15 treatment occurred in the course of treatment;

16 (c) An unintended burn caused by heat, radiation or chemicals
17 was suffered in the course of medical care;

18 (d) An injury was suffered during the course of treatment to a
19 part of the body not directly involved in the treatment or proximate
20 thereto; or

21 (e) A surgical procedure was performed on the wrong patient or
22 the wrong organ, limb or part of a patient's body.

23 2. Expert medical testimony provided pursuant to subsection 1
24 may only be given by a provider of medical care who practices or
25 has practiced in an area that ~~is~~:

26 (a) *Is* substantially similar to the type of practice engaged in at
27 the time of the alleged negligence ~~is~~; or

28 (b) *Includes the type of practice engaged in at the time of the*
29 *alleged negligence such that the provider of medical care can*
30 *testify, under oath, that he is familiar with the accepted standard*
31 *of care.*

32 3. As used in this section, "provider of medical care" means a
33 physician, dentist, registered nurse or a licensed hospital as the
34 employer of any such person.

35 **Sec. 7.** NRS 41A.110 is hereby amended to read as follows:

36 41A.110 ~~is~~ There is a rebuttable presumption that a physician
37 licensed to practice medicine under the provisions of chapter 630 or
38 633 of NRS, or a dentist licensed to practice dentistry under the
39 provisions of chapter 631 of NRS, has ~~conclusively~~ obtained the
40 consent of a patient for a medical, surgical or dental procedure, as
41 appropriate, if he has done the following:

42 1. Explained to the patient in general terms, without specific
43 details, the procedure to be undertaken;

44 2. Explained to the patient alternative methods of treatment, if
45 any, and their general nature;



1 3. Explained to the patient that there may be risks, together
2 with the general nature and extent of the risks involved, without
3 enumerating such risks; and

4 4. Obtained the signature of the patient to a statement
5 containing an explanation of the procedure, alternative methods of
6 treatment and risks involved, as provided in this section.

7 **Sec. 8.** NRS 7.095, 41A.045 and 42.021 are hereby repealed.

TEXT OF REPEALED SECTIONS

7.095 Limitations on contingent fees for representation of persons in certain actions against providers of health care. [This section was proposed by an initiative petition and approved by the voters at the 2004 General Election and therefore is not subject to legislative amendment or repeal until after November 23, 2007.]

1. An attorney shall not contract for or collect a fee contingent on the amount of recovery for representing a person seeking damages in connection with an action for injury or death against a provider of health care based upon professional negligence in excess of:

(a) Forty percent of the first \$50,000 recovered;

(b) Thirty-three and one-third percent of the next \$50,000 recovered;

(c) Twenty-five percent of the next \$500,000 recovered; and

(d) Fifteen percent of the amount of recovery that exceeds \$600,000.

2. The limitations set forth in subsection 1 apply to all forms of recovery, including, without limitation, settlement, arbitration and judgment.

3. For the purposes of this section, "recovered" means the net sum recovered by the plaintiff after deducting any disbursements or costs incurred in connection with the prosecution or settlement of the claim. Costs of medical care incurred by the plaintiff and general and administrative expenses incurred by the office of the attorney are not deductible disbursements or costs.

4. As used in this section:

(a) "Professional negligence" means a negligent act or omission to act by a provider of health care in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death. The term does not include services that are outside the scope of services for which the provider of health care is



licensed or services for which any restriction has been imposed by the applicable regulatory board or health care facility.

(b) "Provider of health care" means a physician licensed under chapter 630 or 633 of NRS, dentist, registered nurse, dispensing optician, optometrist, registered physical therapist, podiatric physician, licensed psychologist, chiropractor, doctor of Oriental medicine, medical laboratory director or technician, or a licensed hospital and its employees.

41A.045 Several liability of defendants for damages; abrogation of joint and several liability. [This section was proposed by an initiative petition and approved by the voters at the 2004 General Election and therefore is not subject to legislative amendment or repeal until after November 23, 2007.]

1. In an action for injury or death against a provider of health care based upon professional negligence, each defendant is liable to the plaintiff for economic damages and noneconomic damages severally only, and not jointly, for that portion of the judgment which represents the percentage of negligence attributable to the defendant.

2. This section is intended to abrogate joint and several liability of a provider of health care in an action for injury or death against the provider of health care based upon professional negligence.

42.021 Actions based on professional negligence of providers of health care: Introduction of certain evidence relating to collateral benefits; restrictions on source of collateral benefits; payment of future damages by periodic payments. [This section was proposed by an initiative petition and approved by the voters at the 2004 General Election and therefore is not subject to legislative amendment or repeal until after November 23, 2007.]

1. In an action for injury or death against a provider of health care based upon professional negligence, if the defendant so elects, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the injury or death pursuant to the United States Social Security Act, any state or federal income disability or worker's compensation act, any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, and any contract or agreement of any group, organization, partnership or corporation to provide, pay for or reimburse the cost of medical, hospital, dental or other health care services. If the defendant elects to introduce such evidence, the plaintiff may introduce evidence of any amount that the plaintiff has paid or contributed to secure his right to any insurance benefits concerning which the defendant has introduced evidence.



2. A source of collateral benefits introduced pursuant to subsection 1 may not:

(a) Recover any amount against the plaintiff; or

(b) Be subrogated to the rights of the plaintiff against a defendant.

3. In an action for injury or death against a provider of health care based upon professional negligence, a district court shall, at the request of either party, enter a judgment ordering that money damages or its equivalent for future damages of the judgment creditor be paid in whole or in part by periodic payments rather than by a lump-sum payment if the award equals or exceeds \$50,000 in future damages.

4. In entering a judgment ordering the payment of future damages by periodic payments pursuant to subsection 3, the court shall make a specific finding as to the dollar amount of periodic payments that will compensate the judgment creditor for such future damages. As a condition to authorizing periodic payments of future damages, the court shall require a judgment debtor who is not adequately insured to post security adequate to assure full payment of such damages awarded by the judgment. Upon termination of periodic payments of future damages, the court shall order the return of this security, or so much as remains, to the judgment debtor.

5. A judgment ordering the payment of future damages by periodic payments entered pursuant to subsection 3 must specify the recipient or recipients of the payments, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments will be made. Such payments must only be subject to modification in the event of the death of the judgment creditor. Money damages awarded for loss of future earnings must not be reduced or payments terminated by reason of the death of the judgment creditor, but must be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately before his death. In such cases, the court that rendered the original judgment may, upon petition of any party in interest, modify the judgment to award and apportion the unpaid future damages in accordance with this subsection.

6. If the court finds that the judgment debtor has exhibited a continuing pattern of failing to make the periodic payments as specified pursuant to subsection 5, the court shall find the judgment debtor in contempt of court and, in addition to the required periodic payments, shall order the judgment debtor to pay the judgment creditor all damages caused by the failure to make such periodic payments, including, but not limited to, court costs and attorney's fees.



7. Following the occurrence or expiration of all obligations specified in the periodic payment judgment, any obligation of the judgment debtor to make further payments ceases and any security given pursuant to subsection 4 reverts to the judgment debtor.

8. As used in this section:

(a) "Future damages" includes damages for future medical treatment, care or custody, loss of future earnings, loss of bodily function, or future pain and suffering of the judgment creditor.

(b) "Periodic payments" means the payment of money or delivery of other property to the judgment creditor at regular intervals.

(c) "Professional negligence" means a negligent act or omission to act by a provider of health care in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death. The term does not include services that are outside the scope of services for which the provider of health care is licensed or services for which any restriction has been imposed by the applicable regulatory board or health care facility.

(d) "Provider of health care" means a physician licensed under chapter 630 or 633 of NRS, dentist, licensed nurse, dispensing optician, optometrist, registered physical therapist, podiatric physician, licensed psychologist, chiropractor, doctor of Oriental medicine, medical laboratory director or technician, or a licensed hospital and its employees.



