

SENATE BILL NO. 292—SENATOR ROBERSON

MARCH 16, 2015

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to certain civil actions involving negligence. (BDR 3-954)

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 civil actions; revising the applicability of certain provisions of existing law pertaining to certain civil actions involving negligence; revising provisions governing the limitation on the amount of noneconomic damages that may be awarded in certain civil actions; requiring a trier of fact to determine the percentage of responsibility for a plaintiff's harm assigned to various parties in certain civil actions; making various other changes relating to certain actions involving negligence; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law defines "medical malpractice," "dental malpractice" and "professional negligence" and contains various provisions relating to civil actions involving claims of medical malpractice, dental malpractice and professional negligence. (Chapter 41A of NRS) This bill removes references in existing law to medical malpractice and dental malpractice and replaces those references with references to professional negligence.

Existing law defines the term "provider of healthcare" for the purposes of certain civil actions involving professional negligence. (NRS 41A.017) **Section 2** of this bill revises that definition to include certain other professionals who provide health care and to include clinics, surgery centers and other entities that employ physicians and other such persons.

Existing law limits the amount of noneconomic damages that may be awarded in an action for injury or death against a provider of health care based upon professional negligence. (NRS 41A.035) **Section 3** of this bill limits the total noneconomic damages that may be awarded in such an action to \$350,000, regardless of the number of plaintiffs, defendants or theories of liability.

Existing law provides that in an action for injury or death against a provider of health care based upon professional negligence, each defendant is liable to the



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plaintiff for certain damages severally only, and not jointly. (NRS 41A.045) **Section 4** of this bill: (1) requires the trier of fact in an action for professional negligence to determine the percentage of responsibility assigned to each person; and (2) authorizes a defendant to present certain evidence to establish the percentage of responsibility of any party or nonparty to such an action.

Existing law establishes a rebuttable presumption in actions for negligence against providers of medical care that the personal injury or death was caused by negligence when certain injuries are sustained. (NRS 41A.100) **Section 9** of this bill provides that the rebuttable presumption does not apply in an action in which: (1) a plaintiff submits an affidavit or designates an expert witness to establish that a provider of health care deviated from the accepted standard of care; or (2) expert medical testimony is used to establish a claim of professional negligence.

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

Section 1. NRS 41A.003 is hereby amended to read as follows:

41A.003 As used in this chapter, unless the context otherwise requires, the words and terms defined in NRS ~~41A.004~~ **41A.007** to 41A.017, inclusive, have the meanings ascribed to them in those sections.

Sec. 2. NRS 41A.017 is hereby amended to read as follows:

41A.017 "Provider of health care" means a physician licensed ~~under~~ **pursuant to** chapter 630 , **630A** or 633 of NRS, **physician assistant**, dentist, licensed nurse, dispensing optician, optometrist, **practitioner of respiratory care**, registered physical therapist, **occupational therapist**, podiatric physician, licensed psychologist, **licensed marriage and family therapist**, **licensed clinical professional counselor**, **music therapist**, chiropractor, **athletic trainer**, **perfusionist**, doctor of Oriental medicine ~~in any form~~, medical laboratory director or technician, **pharmacist or** licensed dietitian or a licensed hospital , **clinic**, **surgery center or other entity that employs any such person** and its employees.

Sec. 3. NRS 41A.035 is hereby amended to read as follows:

41A.035 In an action for injury or death against a provider of health care based upon professional negligence, the injured plaintiff may recover noneconomic damages, but the amount of noneconomic damages awarded in such an action must not exceed \$350,000 ~~in~~ **, regardless of the number of plaintiffs, defendants or theories upon which liability may be based.**

Sec. 4. NRS 41A.045 is hereby amended to read as follows:

41A.045 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~~ fault attributable to the defendant.

2. *In an action described in subsection 1, the trier of fact shall determine the percentage of responsibility assigned to all persons relating to the harm caused for which recovery is being sought. The trier of fact shall consider the percentage of responsibility of any person who could have contributed to the alleged injury or death, regardless of whether the person was, or could have been, named as a party to the action. A determination of the percentage of responsibility for any nonparty:*

(a) May only be used as a vehicle for accurately determining the fault of the named parties;

(b) Does not subject the nonparty to liability in the action or in any other action; and

(c) May be introduced as evidence of liability in any action.

3. *To establish the percentage of responsibility of any party or nonparty, a defendant may present to the trier of fact:*

(a) An affidavit produced pursuant to NRS 41A.071;

(b) A report prepared by an expert pursuant to the Nevada Rules of Civil Procedure; and

(c) Testimony of an expert designated by any party, at any time, pursuant to the Nevada Rules of Civil Procedure.

4. 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.

Sec. 5. NRS 41A.061 is hereby amended to read as follows:

41A.061 1. Upon the motion of any party or upon its own motion, unless good cause is shown for the delay, the court shall, after due notice to the parties, dismiss an action involving ~~medical malpractice or dental malpractice~~ **professional negligence** if the action is not brought to trial within ~~1~~:

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

~~—(b) Two~~ 2 years after the date on which the action is filed . ~~1, if the action is filed on or after October 1, 2005.]~~

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

3. Each district court shall adopt court rules to expedite the resolution of an action involving ~~medical malpractice or dental malpractice.~~ **professional negligence.**

Sec. 6. NRS 41A.071 is hereby amended to read as follows:

41A.071 If an action for ~~medical malpractice or dental malpractice~~ **professional negligence** is filed in the district court,



the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit ~~[-supporting]~~ **that:**

1. Supports the allegations contained in the action ~~[-]~~;

2. Is submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged ~~[-malpractice-]~~ **professional negligence;**

3. Identifies by name, or describes by conduct, each alleged provider of health care; and

4. Complies with any written report required pursuant to Rule 16.1 of the Nevada Rules of Civil Procedure.

Sec. 7. NRS 41A.081 is hereby amended to read as follows:

41A.081 1. In an action for ~~[-medical-malpractice-or-dental-malpractice-]~~ **professional negligence**, all the parties to the action, the insurers of the respective parties and the attorneys of the respective parties shall attend and participate in a settlement conference before a district judge, other than the judge assigned to the action, to ascertain whether the action may be settled by the parties before trial.

2. The judge before whom the settlement conference is held:

(a) May, for good cause shown, waive the attendance of any party.

(b) Shall decide what information the parties may submit at the settlement conference.

3. The judge shall notify the parties of the time and place of the settlement conference.

4. The failure of any party, the party's insurer or the party's attorney to participate in good faith in the settlement conference is grounds for sanctions, including, without limitation, monetary sanctions, against the party or the party's attorney, or both. The judges of the district courts shall liberally construe the provisions of this subsection in favor of imposing sanctions in all appropriate situations. It is the intent of the Legislature that the judges of the district courts impose sanctions pursuant to this subsection in all appropriate situations to punish for and deter conduct which is not undertaken in good faith because such conduct overburdens limited judicial resources, hinders the timely resolution of meritorious claims and increases the costs of engaging in business and providing professional services to the public.

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

41A.085 1. In an action for damages for ~~[-medical-malpractice-or-dental-malpractice-]~~ **professional negligence** in which the defendant is insured pursuant to a policy of insurance covering the liability of the defendant for a breach of the defendant's professional duty toward a patient:



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

(b) If the judge makes the recommendation described in paragraph (a), the defendant is entitled to obtain from independent counsel an opinion letter explaining the rights of, obligations of and potential consequences to the defendant with regard to the recommendation. The insurer shall pay the independent counsel to provide the opinion letter described in this paragraph, except that the insurer is not required to pay more than \$1,500 to the independent counsel to provide the opinion letter.

2. The section does not:

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

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

Sec. 9. NRS 41A.100 is hereby amended to read as follows:

41A.100 1. Liability for personal injury or death is not imposed upon any provider of ~~medical~~ health care based on alleged negligence in the performance of that care unless evidence consisting of expert medical testimony, material from recognized medical texts or treatises or the regulations of the licensed medical facility wherein the alleged negligence occurred is presented to demonstrate the alleged deviation from the accepted standard of care in the specific circumstances of the case and to prove causation of the alleged personal injury or death, except that such evidence is not required and a rebuttable presumption that the personal injury or death was caused by negligence arises where evidence is presented that the **provider of health care caused the** personal injury or death occurred in any one or more of the following circumstances:

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

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

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

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

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

2. Expert medical testimony provided pursuant to subsection 1 may only be given by a provider of ~~medical~~ health care who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged negligence.



3. ~~{As used in this section, “provider of medical care” means a physician, dentist, registered nurse or a licensed hospital as the employer of any such person.}~~ *The rebuttable presumption pursuant to subsection 1 does not apply in an action in which:*

(a) *A plaintiff submits an affidavit pursuant to NRS 41A.071, or otherwise designates an expert witness pursuant to the Nevada Rules of Civil Procedure, to establish that a provider of health care deviated from the accepted standard of care or caused the alleged personal injury or death.*

(b) *Expert medical testimony is used to establish a claim of negligence.*

Sec. 10. NRS 3.029 is hereby amended to read as follows:

3.029 1. The Supreme Court shall provide by court rule for mandatory appropriate training concerning the complex issues of ~~{medical malpractice}~~ litigation *alleging professional negligence* for each district judge to whom actions involving ~~{medical malpractice}~~ *professional negligence* are assigned.

2. *As used in this section, “professional negligence” has the meaning ascribed to it in NRS 41A.015.*

Sec. 11. The amendatory provisions of this act apply to a cause of action that accrues on or after the effective date of this act.

Sec. 12. NRS 41A.004, 41A.009 and 41A.013 are hereby repealed.

Sec. 13. This act becomes effective upon passage and approval.

TEXT OF REPEALED SECTIONS

41A.004 “Dental malpractice” defined. “Dental malpractice” has the meaning ascribed to the term “malpractice” in NRS 631.075.

41A.009 “Medical malpractice” defined. “Medical malpractice” means the failure of a physician, hospital or employee of a hospital, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances.

41A.013 “Physician” defined. “Physician” means a person licensed pursuant to chapter 630 or 633 of NRS.

