

Senate File 465 - Introduced

SENATE FILE 465
BY COMMITTEE ON JUDICIARY

(SUCCESSOR TO SSB 1087)

A BILL FOR

1 An Act relating to medical malpractice claims, including
2 noneconomic damage awards, contingency fees, expert
3 witnesses, and defenses.

4 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

1 Section 1. Section 135P.1, subsection 2, Code 2017, is
2 amended to read as follows:

3 2. "*Health care provider*" means a physician or osteopathic
4 physician licensed under chapter 148, a physician assistant
5 licensed under and practicing under a supervising physician
6 pursuant to chapter 148C, a podiatrist licensed under chapter
7 149, or a chiropractor licensed under chapter 151, a licensed
8 practical nurse, a registered nurse, or an advanced registered
9 nurse practitioner licensed pursuant to under chapter 152 or
10 152E, a dentist licensed under chapter 153, an optometrist
11 licensed under chapter 154, a pharmacist licensed under chapter
12 155A, or any other person who is licensed, certified, or
13 otherwise authorized or permitted by the law of this state to
14 administer health care in the ordinary course of business or in
15 the practice of a profession.

16 Sec. 2. **NEW SECTION. 147.136A Noneconomic damage awards**
17 **against health care providers.**

18 1. For purposes of this section:

19 a. "*Health care provider*" means a physician or an
20 osteopathic physician licensed under chapter 148, a
21 chiropractor licensed under chapter 151, a podiatrist
22 licensed under chapter 149, a physician assistant licensed and
23 practicing under a supervising physician under chapter 148C, a
24 licensed practical nurse, a registered nurse, or an advanced
25 registered nurse practitioner licensed under chapter 152 or
26 152E, a dentist licensed under chapter 153, an optometrist
27 licensed under chapter 154, a pharmacist licensed under chapter
28 155A, a hospital as defined in section 135B.1, or a health care
29 facility as defined in section 135C.1.

30 b. "*Health care services*" means medical diagnosis,
31 treatment, evaluation, advice, or acts that are permitted under
32 chapter 148, 148C, 149, 152, 152E, 153, 154, or 155A, or any
33 other health care licensing statutes of this state.

34 c. "*Noneconomic damages*" means damages arising from
35 pain, suffering, inconvenience, physical impairment, mental

1 anguish, emotional pain and suffering, loss of chance, loss of
2 consortium, or any other nonpecuniary damages.

3 2. The total amount of noneconomic damages recoverable from
4 all defendants in all civil actions, whether in tort, contract,
5 or otherwise and including derivate actions, that arise out of
6 an act or omission in connection with the provision of health
7 care services shall not exceed two hundred fifty thousand
8 dollars.

9 3. The limitation on damages contained in this section
10 shall not apply as to a defendant if that defendant's actions
11 constituted actual malice.

12 Sec. 3. Section 147.138, Code 2017, is amended to read as
13 follows:

14 **147.138 Contingent fee of attorney reviewed by court.**

15 1. In any action for personal injury or wrongful death
16 against ~~any physician and surgeon, osteopathic physician~~
17 ~~and surgeon, dentist, podiatric physician, optometrist,~~
18 ~~pharmacist, chiropractor or nurse licensed under this chapter~~
19 ~~or against any hospital licensed under [chapter 135B](#) a health~~
20 care provider, as defined in section 147.136A, based upon the
21 alleged negligence of the licensee health care provider in the
22 practice of that profession or occupation or in patient care,
23 ~~or upon the alleged negligence of the hospital in patient care,~~
24 the court shall determine the reasonableness of any contingent
25 fee arrangement between the plaintiff and the plaintiff's
26 attorney, which, subject to subsection 2, shall not exceed
27 thirty-five percent of the total settlement or award.

28 2. Upon petition by the plaintiff or the plaintiff's
29 attorney, the court may permit an attorney fee in an amount
30 greater than the amount allowed under subsection 1 if the court
31 determines that the additional amount is fair and reasonable.

32 Sec. 4. Section 147.139, Code 2017, is amended to read as
33 follows:

34 **147.139 Expert witness standards.**

35 1. If the standard of care given by a ~~physician and surgeon~~

1 ~~or an osteopathic physician and surgeon licensed pursuant~~
2 ~~to chapter 148, or a dentist licensed pursuant to chapter~~
3 ~~153 health care provider, as defined in section 147.136A,~~
4 is at issue, the court shall only allow a person to qualify
5 as an expert witness and to testify on the issue of the
6 appropriate standard of care ~~if the person's medical or dental~~
7 ~~qualifications relate directly to the medical problem or~~
8 ~~problems at issue and the type of treatment administered in the~~
9 ~~case.~~ breach of the standard of care, or proximate cause if
10 all of the following are true:

11 a. The person is licensed to practice in the same field as
12 the defendant, is in good standing in each state of licensure,
13 and in the five years preceding the act or omission alleged to
14 be negligent, has not had a license in any state revoked or
15 suspended.

16 b. In the five years preceding the act or omission alleged
17 to be negligent, the person actively practiced in the same
18 field as the defendant or was a qualified instructor at an
19 accredited university in the same field as the defendant.

20 c. The person practiced or provided university instruction
21 in the same or substantially similar specialty as the
22 defendant.

23 d. The person is trained and experienced in the same
24 discipline or school of practice as the defendant or has
25 specialty expertise in the disease process or procedure
26 performed in the case.

27 e. If the defendant is board-certified in a specialty, the
28 person is certified in the same specialty by a board recognized
29 by the American board of medical specialties or the American
30 osteopathic association.

31 2. A person not licensed in this state but licensed in
32 another state who testifies on the issue of the appropriate
33 standard of care, breach of the standard of care, or proximate
34 cause as an expert witness shall be deemed to hold a temporary
35 license to practice in this state solely for the purpose of

1 and while providing such testimony and shall be subject to
2 the authority of the applicable licensing board in this state
3 including but not limited to the provisions of section 147.55.

4 Sec. 5. NEW SECTION. 147.140 **Expert witness — certificate**
5 **of merit affidavit.**

6 1. *a.* In any action for personal injury or wrongful
7 death against a health care provider based upon the alleged
8 negligence in the practice of that profession or occupation or
9 in patient care, including a cause of action for which expert
10 testimony is necessary to establish a prima facie case, the
11 plaintiff shall, within ninety days of the defendant's answer,
12 serve upon the defendant a certificate of merit affidavit for
13 each expert witness listed pursuant to section 668.11 who will
14 testify with respect to the issues of standard of care, breach
15 of standard of care, or causation. All expert witnesses must
16 meet the qualifying standards of section 147.139.

17 *b.* A certificate of merit affidavit must be signed by the
18 expert witness and certify the purpose for calling the expert
19 witness by providing under the oath of the expert witness all
20 of the following:

21 (1) The expert witness's statement of familiarity with the
22 applicable standard of care.

23 (2) The expert witness's statement that the standard of care
24 was breached by the health care provider named in the petition.

25 (3) The expert witness's statement of the actions that the
26 health care provider failed to take or should have taken to
27 comply with the standard of care.

28 (4) The expert witness's statement of the manner by which
29 the breach of the standard of care was the cause of the injury
30 alleged in the petition.

31 *c.* A plaintiff shall serve a separate certificate of merit
32 affidavit on each defendant named in the petition.

33 *d.* Answers to interrogatories may serve as an expert
34 witness's certificate of merit affidavit in lieu of a
35 separately executed affidavit if the interrogatories satisfy

1 the requirements of this subsection and are signed by the
2 plaintiff's attorney and by each expert witness listed in the
3 answers to interrogatories and served upon the defendant within
4 ninety days of the defendant's answer.

5 2. An expert witness's certificate of merit affidavit does
6 not preclude additional discovery and supplementation of the
7 expert witness's opinions in accordance with the rules of civil
8 procedure.

9 3. The parties by agreement or the court for good cause
10 shown and in response to a motion filed prior to the expiration
11 of the time limits specified in subsection 1 may provide for
12 extensions of the time limits. Good cause shall include
13 but not be limited to the inability to timely obtain the
14 plaintiff's medical records from health care providers when
15 requested prior to filing the petition.

16 4. If the plaintiff is acting pro se, the plaintiff
17 shall sign the certificate of merit affidavit or answers to
18 interrogatories referred to in this section and shall be bound
19 by those provisions as if represented by an attorney.

20 5. a. Failure to substantially comply with subsection
21 1 shall result, upon motion, in dismissal with prejudice of
22 each cause of action as to which expert witness testimony is
23 necessary to establish a prima facie case.

24 b. A written notice of deficiency may be served upon the
25 plaintiff for failure to comply with subsection 1 because of
26 deficiencies in the certificate of merit affidavit or answers
27 to interrogatories. The notice shall state with particularity
28 each deficiency of the affidavit or answers to interrogatories.
29 The plaintiff shall have twenty days to cure the deficiency.
30 Failure to comply within the twenty days shall result, upon
31 motion, in mandatory dismissal with prejudice of each action
32 as to which expert witness testimony is necessary to establish
33 a prima facie case. A party resisting a motion for mandatory
34 dismissal pursuant to this section shall have the right to
35 request a hearing on the motion.

1 6. For purposes of this section, "*health care provider*"
2 means the same as defined in section 147.136A.

3 Sec. 6. NEW SECTION. **622.31A Evidence-based medical**
4 **practice guidelines — affirmative defense.**

5 1. For purposes of this section:

6 a. "*Evidence-based medical practice guidelines*" means
7 voluntary medical practice parameters or protocols established
8 and released through a recognized physician consensus-building
9 organization approved by the United States department of
10 health and human services, the American medical association's
11 physician consortium for performance improvement or similar
12 activity, or a recognized national medical specialty society.

13 b. "*Health care provider*" means the same as defined in
14 section 147.136A.

15 2. In an action for personal injury or wrongful death
16 against a health care provider based upon the alleged
17 negligence in the practice of that profession or occupation or
18 in patient care, the health care provider may establish as an
19 affirmative defense that the health care provider complied with
20 evidence-based medical practice guidelines in the diagnosis and
21 treatment of the patient.

22 3. The court shall admit evidence-based medical practice
23 guidelines into evidence if introduced by a health care
24 provider or the health care provider's employer and if the
25 health care provider or the health care provider's employer
26 submits evidence that the evidence-based medical practice
27 guidelines were appropriate for the patient and that the
28 health care provider complied with such evidence-based
29 medical practice guidelines. Evidence of departure from an
30 evidence-based medical practice guideline is admissible only on
31 the issue of whether the health care provider is entitled to
32 establish an affirmative defense under this section.

33 4. This section shall not apply to any of the following:

34 a. The health care provider's mistaken determination that
35 an evidence-based medical practice guideline applied to a

1 particular patient where such mistake was caused by the health
2 care provider's negligence or intentional misconduct.

3 *b.* The health care provider's failure to properly follow
4 an evidence-based medical practice guideline where such
5 failure was caused by the health care provider's negligence or
6 intentional misconduct.

7 5. There shall be no presumption of negligence if a health
8 care provider did not adhere to an evidence-based medical
9 practice guideline.

10

EXPLANATION

11

The inclusion of this explanation does not constitute agreement with

12

the explanation's substance by the members of the general assembly.

13

This bill relates to medical malpractice claims, including
14 noneconomic damage awards, contingency fees, expert witnesses,
15 and defenses.

16

ADVERSE HEALTH CARE INCIDENTS. Under Code chapter 135P, if
17 an adverse health care incident occurs, a health care provider
18 may offer to engage in an open discussion with the patient. If
19 the patient agrees, the health care provider may investigate
20 the incident, disclose the results to the patient, and discuss
21 steps the health care provider will take to prevent similar
22 incidents. The health care provider may also communicate to
23 the patient whether the health care provider believes that
24 an offer of compensation is warranted. All communications
25 made related to the open discussion are privileged and
26 confidential, are not subject to discovery or subpoena, and
27 are not admissible in evidence in a judicial, administrative,
28 or arbitration proceeding. Under current Code chapter 135P,
29 "health care provider" is defined as a physician licensed under
30 Code chapter 148, a physician assistant licensed under Code
31 chapter 148C, a podiatrist licensed under Code chapter 149, or
32 an advanced registered nurse practitioner licensed pursuant
33 to Code chapter 152 or 152E. The bill redefines "health
34 care provider" to mean a physician or osteopathic physician
35 licensed under chapter 148, a physician assistant licensed and

1 practicing under a supervising physician pursuant to chapter
2 148C, a podiatrist licensed under chapter 149, a chiropractor
3 licensed under chapter 151, a licensed practical nurse, a
4 registered nurse, or an advanced registered nurse practitioner
5 licensed under chapter 152 or 152E, a dentist licensed under
6 chapter 153, an optometrist licensed under chapter 154, a
7 pharmacist licensed under chapter 155A, or any other person who
8 is licensed, certified, or otherwise authorized or permitted by
9 the law of this state to administer health care in the ordinary
10 course of business or in the practice of a profession.

11 NONECONOMIC DAMAGES IN MEDICAL MALPRACTICE CASES. The
12 bill defines "noneconomic damages" as damages arising from
13 pain, suffering, inconvenience, physical impairment, mental
14 anguish, emotional pain and suffering, loss of chance,
15 loss of consortium, or any other nonpecuniary damages. The
16 bill provides that the total amount of noneconomic damages
17 recoverable from all defendants in all civil actions, whether
18 in tort, contract, or otherwise and including derivate actions,
19 that arise out of an act or omission in connection with the
20 provision of health care services shall not exceed two hundred
21 fifty thousand dollars. However, the limitation does not apply
22 as to a defendant if that defendant's actions constituted
23 actual malice.

24 CONTINGENCY FEES. Under current law, in any action for
25 personal injury or wrongful death against any physician and
26 surgeon, osteopathic physician and surgeon, dentist, podiatric
27 physician, optometrist, pharmacist, chiropractor, nurse, or
28 hospital, based upon the alleged negligence of the licensee
29 in the practice of that profession or occupation, or upon the
30 alleged negligence of the hospital in patient care, the court
31 determines the reasonableness of any contingent fee arrangement
32 between the plaintiff and the plaintiff's attorney. The bill
33 provides that a court shall also review the reasonableness of
34 a contingent fee in a negligence case involving an advanced
35 registered nurse practitioner, physician assistant, or a

1 residential care facility, a nursing facility, an intermediate
2 care facility for persons with mental illness, or an
3 intermediate care facility for persons with an intellectual
4 disability. The bill also provides that the contingent fee
5 shall not exceed 35 percent of the total settlement or award
6 unless the plaintiff or the plaintiff's attorney petitions the
7 court for a greater amount and the court determines that the
8 additional amount is fair and reasonable.

9 EXPERT WITNESSES IN MEDICAL MALPRACTICE CASES. The
10 bill provides standards for an expert witness in a medical
11 malpractice case. The bill provides that a person is
12 only qualified to serve as an expert witness in a medical
13 malpractice case if the person is a licensed health care
14 provider, is in good standing in each state of licensure, and
15 in the five years preceding the act or omission alleged to
16 be negligent, has not had a license in any state revoked or
17 suspended; in the five years preceding the act or omission
18 alleged to be negligent, actively practiced in the same field
19 as the defendant or was a qualified instructor at an accredited
20 university in the same field as the defendant; practiced or
21 provided instruction in the same or substantially similar
22 specialty as the defendant; is trained and experienced in the
23 same discipline or school of practice as the defendant or
24 has specialty expertise in the disease process or procedure
25 performed in the case; and, if the defendant is board-certified
26 in a specialty, the person is certified in the same specialty.

27 The bill provides that a person who is not licensed in Iowa
28 but is licensed in another state and who testifies as an expert
29 witness in a medical malpractice case shall be deemed to hold
30 a temporary license to practice in Iowa and shall be subject
31 to the authority of the applicable licensing board in Iowa
32 including but not limited to Code section 147.55.

33 The bill establishes a requirement for a certificate of
34 merit affidavit for expert witnesses in medical malpractice
35 cases. In an action for personal injury or wrongful death

1 against a health care provider based upon alleged negligence
2 in the practice of that profession or in patient care, the
3 bill requires the plaintiff, within 90 days of the defendant's
4 answer, to serve upon the defendant a certificate of merit
5 affidavit for each expert witness who will testify with respect
6 to the issues of standard of care, breach of standard of care,
7 or causation. A certificate of merit affidavit must be signed
8 by the expert witness and certify the purpose for calling
9 the expert witness by providing under the oath of the expert
10 witness the expert witness's statement of familiarity with the
11 applicable standard of care; statement that the standard of
12 care was breached by the health care provider; statement of the
13 actions that the health care provider failed to take or should
14 have taken; and statement of the manner by which the breach of
15 the standard of care was the cause of the injury.

16 The bill provides that answers to interrogatories may
17 serve as an expert witness's certificate of merit affidavit
18 if the interrogatories satisfy the requirements of the bill.
19 The bill provides that the expert witness's certificate of
20 merit affidavit does not preclude additional discovery and
21 supplementation of the expert witness's opinions.

22 The bill provides that failure to substantially comply with
23 the new requirements shall result, upon motion, in dismissal
24 with prejudice of each cause of action as to which expert
25 witness testimony is necessary to establish a prima facie
26 case. A written notice of deficiency may be served upon the
27 plaintiff for failure to comply with the bill requirements
28 because of deficiencies in the certificate of merit affidavit
29 or answers to interrogatories, and the plaintiff shall have 20
30 days to cure the deficiency. Failure to comply within the 20
31 days shall result, upon motion, in mandatory dismissal with
32 prejudice of each action as to which expert witness testimony
33 is necessary to establish a prima facie case.

34 EVIDENCE-BASED MEDICAL PRACTICE GUIDELINES. The bill
35 defines "evidence-based medical practice guidelines" as

1 voluntary medical practice parameters or protocols established
2 and released through a recognized physician consensus-building
3 organization.

4 The bill provides that in any action for personal injury
5 or wrongful death against a health care provider based
6 upon the alleged negligence of the health care provider in
7 patient care, the health care provider may establish as an
8 affirmative defense that the health care provider complied with
9 evidence-based medical practice guidelines in the diagnosis and
10 treatment of the patient.

11 The bill provides that the court shall admit evidence-based
12 medical practice guidelines into evidence if introduced by a
13 health care provider or the health care provider's employer
14 and if the health care provider or the health care provider's
15 employer submits evidence that the evidence-based medical
16 practice guideline was appropriate for the patient and that
17 the health care provider complied with such evidence-based
18 medical practice guidelines. Evidence of departure from a
19 guideline is admissible only on the issue of whether the health
20 care provider is entitled to establish an affirmative defense
21 under the bill. There shall be no presumption of negligence
22 if a health care provider did not adhere to an evidence-based
23 medical practice guideline.