

NORTH DAKOTA MEDICAL MALPRACTICE LAW SUMMARY

Prepared by: Donna M. Smith, Esq.
Camrud, Maddock, Olson & Larson, Ltd., Grand Forks, ND

Statutes of Limitation

An action for medical malpractice has a two-year statute of limitations. N.D. Cent. Code, § 28-01-18(3) (West 2006). The statute of limitations period commences upon the occurrence of an injury or at the time the injury is discovered. *Hoffner v. Johnson*, 2003 ND 79, at ¶9, 660 N.W.2d 909, 914 (N.D. 2003). Under the discovery rule, the two years begins to run when a person knows, or with reasonable diligence should have known, of an injury, its cause, and another's possible negligence. *Id.* The statute of limitations period cannot extend beyond six years of the act or omission of the alleged malpractice due to non-discovery of the malpractice. N.D. Cent. Code, § 28-01-18(3) (West 2005). Wrongful death actions have a two-year statute of limitations; there is no discovery provision. *Krueger v. St. Joseph's Hosp.*, 305 N.W.2d 18, 21 (N.D. 1981).

If discovery of the injury was prevented by fraudulent conduct by a physician or a licensed hospital then the statute of limitations and the statute of repose will not bar one's cause of action. N.D. Cent. Code § 28-01-18(3) (West 2005). If the claimant is a minor, insane, or imprisoned the statute will be tolled during the time of the disability. N.D. Cent. Code § 28-01-25(3) (West 2005). However, the tolling of the statute will not extend for more than five years for the insane or imprisoned, or for more than twelve years for minors who have medical malpractice claims. *Id.* If time is extended, an action must be brought within one year after the disability ceases. *Id.*

Contributory or Comparative Negligence

North Dakota has adopted a modified comparative fault statute, which compares fault rather than negligence. N.D. Cent. Code § 32-03.2-02; *Rodenburg v. Fargo-Moorhead Y.M.C.A.*, 2001 ND 139 ¶25, 632 N.W.2d 407, 417 (citing *McLean v. Kirby Co.*, N.W.2d 229, 244 (N.D. 1992)). A plaintiff is barred from recovery if that plaintiff is found to be 50% or more at fault. N.D. Cent. Code § 32-03.2-02 (West 2005). Fault includes "negligence, malpractice, absolute liability, dram shop liability, failure to warn, reckless or willful conduct, assumption of risk, misuse of product, failure to avoid injury, and product liability, including product liability involving negligence or strict liability or breach of warranty for product defect." *Id.* The fault of any intentional tortfeasor is included when apportioning fault. *Rodenburg*, at ¶26.

Joint and Several Liability

North Dakota does not recognize joint and several liability unless the tortfeasors are acting in concert or encouraging or aiding the act, or ratifying or adopting the act for their benefit. N.D. Cent. Code § 32-03.2-02 (West 2005). In all other situations the tortfeasor is only responsible for the damages equal to his portion of fault. *Id.*

Contribution

A tortfeasor has a right of contribution when two or more persons are jointly or severally liable for the same injury and one tortfeasor has paid more than his tortfeasor's pro rata share of common liability. N.D. Cent. Code § 32-38-01(2) (West 2005). That tortfeasor has a right to recover from the other tortfeasors the amount paid in excess of his pro rata share. *Id.* There is no right of contribution in favor of any tortfeasor who has intentionally (willfully or wantonly) caused or contributed to the injury or wrongful death. N.D. Cent. Code § 32-38-01(3) (West 2005).

The right to contribution can be enforced in a separate action for up to one year after the judgment has become final, including the lapse of appeal time. N.D. Cent. Code § 32-38-03(1), (3) (West 2005). The right to contribution exists even if no judgment has been recovered against any or all of the tortfeasors. N.D. Cent. Code § 32-38-03(1) (West 2005).

If a tortfeasor enters into a settlement with an injured party, that tortfeasor is not entitled to recover contribution from other tortfeasors whose liability is not extinguished by settlement nor with respect to any settlement amount that is in excess of what was reasonable. N.D. Cent. Code § 32-38-01(4) (West

2005). A liability insurer may have subrogation rights for any amount that it had paid in excess of the tortfeasors' pro rata share of the common liability. N.D. Cent. Code § 32-38-01(5) (West 2005). This provision does not limit any right of subrogation that arises from other relationships. *Id.*

Vicarious Liability

Hospitals are liable to patients for torts committed by employees under the doctrine of respondeat superior. *Granger v. Deaconess Hosp.*, 138 N.W.2d 443, 445 (N.D. 1965). In North Dakota, "an employer's vicarious liability extends only to those acts done on the employer's behalf and within the scope of the employee's duties." *Zimprich v. Broekel*, 519 N.W.2d 588, 591 (N.D. 1994). As long as an individual is not an independent contractor, agency principles provide that an employer is vicariously liable to third parties "for the negligence of the employer's agent in the transaction of the business of the agency." *Doan v. City of Bismarck*, 2001 ND 152, 632 N.W.2d 815 (2001).

Hospitals will be liable for its nurses' negligence in performing clerical acts or mere administrative acts, which may constitute a part of a patient's medical treatment but do not require any specialized technique or a skilled physician's or surgeon's understanding. *Nelson v. Trinity Medical Ctr.*, 419 N.W.2d 886, 891 (N.D. 1988). Under the captain-of-the-ship doctrine, a doctor's liability "should attach only where a nurse is under a doctor's direct control, such as in the operating room, or where a nurse is carrying out a doctor's orders which are technical in nature and require the doctor's supervision. *Id.* at 890. Routine medical tasks performed by a nurse according to a doctor's orders do not allow the doctor "to control the manner of performance to such an extent as to subject him to liability for the nurse's actions." *Id.*

The duty to obtain informed consent is solely the responsibility of the physician, not the hospital where the procedure is performed. *Long v. Jaszczak*, 2004 ND 194, ¶ 29, 688 N.W.2d 173 (2004).

Expert Testimony

A plaintiff must serve upon a defendant an affidavit containing an admissible expert opinion to support a prima facie case of professional negligence within three months of the commencement of the action. N.D. Cent. Code § 28-01-46 (West 2005). The expert opinion is not necessary in cases of unintentional failure to remove a foreign substance from within the body of a patient, or performance of a medical procedure upon the wrong patient, organ, limb, or other part of the patient's body, or other obvious occurrence. *Id.*

North Dakota has not adopted the Daubert gatekeeping standards. *Howe v. Microsoft Corp.*, 2003 ND 12 n.1, 656 N.W.2d 285, 296 n.1 (2003). The North Dakota Supreme Court has generously allowed using expert testimony if the witnesses were shown to have some degree of expertise in the field in which they were testifying. *Langness v. Fencil Urethane Sys.*, 2003 ND 132, ¶8, 667 N.W.2d 596, 601 (2003). North Dakota Rule of Evidence 702 defines testimony by experts as follows: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." N.D.R. Ev., Rule 702 (2005).

Damage Caps

The total compensation awarded to a claimant or members of the claimant's family for noneconomic damage resulting from an injury alleged under the action or claim cannot exceed \$500,000 for health care malpractice claims. N.D. Cent. Code § 32-42-02 (West 2005). This \$500,000 cap applies regardless of the number of health care providers and other defendants against whom the action or claim is brought or the number of actions or claims brought with respect to the injury. *Id.* Juries may award economic damages in an unlimited amount under North Dakota Century Code § 32-03.2-04, but economic damages that are in excess of \$250,000 before reduction for contributory fault and collateral source payments are subject to review for reasonableness by the request of any party responsible for any part of the payment. N.D. Cent. Code § 32-03.2-08(1) (West 2005). The moving party has the burden to prove that the economic damages award was not reasonable in that it does not bear a reasonable relation to the economic damage incurred and to be incurred as proven by the party recovering the award. N.D. Cent. Code § 32-03.2-08(2) (West 2005).

Exemplary or punitive damages will be limited to two times the amount of compensatory damages or \$250,000, whichever one is greater; however, no award for exemplary or punitive damages can be made if the claimant is not entitled to compensatory damages. N.D. Cent. Code § 32-03.2-11(4) (West 2005).

Statutory Cap on Attorney's Fees

There is no cap placed on attorney's fees in civil actions, instead attorney's fees must be left to the parties to agree upon either expressly or implicitly. N.D. Cent. Code § 28-26-01 (West 2005). Contingent fees agreements do not have to be approved by the court. *Id.*; see also *Rohan v. Johnson*, 33 N.D. 179, 186 (N.D. 1916).

Periodic Payments

When there is a damages award that includes future economic damages for continuing institutional or custodial care that will last beyond two years, a party can request a court to order periodic payments. N.D. Cent. Code § 32-03.2-09 (West 2005). The periodic payments will be reviewed by the court from time to time. *Id.* The obligation to pay for further continuing care shall end upon the death of the injured person. *Id.*

Collateral Source Rule

A liable party can apply to the court to for a reduction of economic damages to the extent economic losses are covered by a collateral source. N.D. Cent. Code § 32-03.2-06 (West 2005). A collateral source payment is any sum from any other source paid or to be paid to cover an economic loss which need not be repaid by the party recovering economic damages, but does not include life insurance, other death or retirement benefits, or any insurance or benefit purchased by the party recovering economic damages. *Id.*

Pre-Judgment Interest

A jury has discretion to grant pre-judgment interest on damages in tort actions. N.D. Cent. Code § 32-03-05 (West 2005); *Patch v. Sebelius*, 349 N.W.2d 637, 643 (N.D. 1984).

Patient Compensation Funds and Physicians Insurance

North Dakota authorized creation of the North Dakota medical malpractice mutual insurance company to provide for the payment of indemnities to persons suffering injury arising out of the rendering of or the failure to render professional services by physicians and to provide means whereby physicians may obtain insurance against liability therefore, subject to statutory limitations and immunities. N.D. Cent. Code §§ 26.1-14-01; 26.1-14-02 (West 2006). If physicians in North Dakota find it difficult to obtain medical malpractice insurance, the state board of medical examiners, by a majority vote of its membership, may elect to initiate and implement the chapter, making the insurance company operational. N.D. Cent. Code § 26.1-14-05 (West 2006).

North Dakota Immunities

I. State

A state is liable for an employee's negligence while an employee is acting within the employee's scope of employment under circumstances in which the employee would be personally liable or for an injury caused from some condition or use of tangible property under circumstances in which the state, if a private person, would be liable. N.D. Cent. Code, § 32-12.2-02(1) (West 2005).

Written notice of the claim must be provided to the state within 180 days of discovery of the injury. N.D. Cent. Code, § 32-12.2-04 (West 2005). The time for giving the notice does not include the time during which an individual is incapacitated by the injury. *Id.* If death should occur, the time for notice is one year. *Id.*

The State's liability is \$250,000 per person and \$1,000,000 per single occurrence. N.D. Cent. Code, § 32-12.2-02(2) (West 2005). The State is not liable or does not have to indemnify an employee held to be liable for exemplary or punitive damages. *Id.*

Claims must be commenced within three years after the claims for relief have accrued. N.D. Cent. Code, § 28-01-22.1 (West 2005).

II. Political Subdivisions

Governmental immunity in North Dakota was abolished as to political subdivisions, but not to the state government in *Kitto v. Minot Park Dist.*, 224 N.W.2d 795 (N.D. 1974) (overruled on other grounds). See also, N.D. Cent. Code § 32-12.1-01 (West 2005).

Political subdivisions include counties, townships, park districts, school districts, cities, public nonprofit corporations, and any other units of local government that are created by the Constitution of North Dakota for public purposes or local government or by statute. N.D. Cent. Code § 32-12.1-02(6)(a) (West 2005). Political subdivision does not include the state or its agencies, institutions, etc. N.D. Cent. Code § 32-12.1-02(6)(b) (West 2005).

Injuries that are caused by the negligence of a political subdivision's employee occurring within the scope of employment must be brought against the political subdivision. N.D. Cent. Code § 32-12.1-04(1) (West 2005). As long as an employee was acting within the scope of his employment or office the employee shall not be personally liable. N.D. Cent. Code § 32-12.1-04(2) (West 2005).

A political subdivision's liability is \$250,000 per person and \$500,000 for injury to three or more persons during any single occurrence regardless of the number of political subdivisions, or employees of such political subdivisions, which are involved in that occurrence. N.D. Cent. Code § 32-12.1-03 (West 2005). Political subdivisions are not liable for or required to indemnify an employee held to be liable for exemplary or punitive damages. *Id.*

The statute of limitations is three years after the claims for relief have accrued. N.D. Cent. Code § 32-12.1-10 (West 2005).

Arbitration

Attorneys for all parties must advise their clients of all reasonably available alternative dispute resolution options available. N.D. Cent. Code § 32-42-03(1-2) (West 2005). All parties must make a good-faith effort to try to resolve part or the entire malpractice claim by alternative dispute resolution before any action by the claimant is initiated for malpractice. N.D. Cent. Code § 32-42-03(3) (West 2005). If an attorney fails to advise his client or clients about all reasonably available ADR options, that attorney may be sanctioned by the court. N.D. Cent. Code § 32-42-03(3) (West 2005).