

Legislative Analysis



AFFIDAVIT OF MERIT IN MALPRACTICE ACTION AGAINST ARCHITECT, ENGINEER, OR SURVEYOR

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House Bill 5169 as introduced
Sponsor: Rep. Shane Hernandez
Committee: Judiciary
Complete to 1-20-20

Analysis available at
<http://www.legislature.mi.gov>

SUMMARY:

House Bill 5169 would add new section 2912i to the Revised Judicature Act to require the plaintiff in a malpractice action against an *architect, engineer, or surveyor* to file an affidavit of merit from an applicable licensed professional if requested by a *defendant*.

Architect, engineer, or surveyor would mean an individual who is licensed under Article 20 of the Occupational Code as an architect, professional engineer, or professional surveyor, as applicable, and who is actively engaged in Michigan in the practice of architecture, engineering, or surveying. Architect, engineer, or surveyor would include a corporation, partnership, limited liability company, joint venture, or other business entity in which an architect, engineer, or surveyor practices.

Defendant would include a cross, counter, or third-party defendant or respondent.

Currently under the act, a civil action for malpractice may be brought against any person who is or claims to be a member of a state licensed profession. Additionally, under section 2912d of the act, a plaintiff alleging *medical* malpractice must file an affidavit of merit from a health professional certifying specific conditions that, when taken together, would amount to a credible medical malpractice suit.

The bill would require a similar affidavit in a malpractice action against an architect, engineer, or surveyor. Specifically, a defendant in an action or arbitration proceeding alleging malpractice or negligence against an architect, engineer, or surveyor could request that the plaintiff file an affidavit of merit. (However, an affidavit of merit would not be required in an action for breach of contract against an architect, engineer, or surveyor that did not involve the standard of care for the profession.) The request would have to be made within 56 days after the complaint or notice requesting arbitration was served on the defendant. A defendant who did not request an affidavit within that time frame would waive his or her right to do so.

The plaintiff would have to file the affidavit of merit within 56 days after the defendant's request was filed. The court or arbitrator could grant one extension of this deadline, for up to 56 days, upon motion filed within the original 56-day period and a showing of good cause.

If the plaintiff failed to file an extension and failed to file an affidavit of merit, the court or arbitrator would have to dismiss the action or proceeding *with prejudice*, which would prohibit the plaintiff from bringing the same action or proceeding against the same defendant in the future. However, if the plaintiff voluntarily dismissed the action or arbitration within the 56 days allotted to file the affidavit, it would be dismissed *without prejudice*. Any action or arbitration refiled after a voluntary dismissal by the plaintiff would have to be filed with an affidavit of merit or be subject to dismissal *with prejudice*.

A defendant could raise an objection to a filed affidavit of merit in a motion filed within 90 days after the affidavit was served. An objection filed after that time period would be waived.

The affidavit of merit would have to be signed by an individual whom the plaintiff or the plaintiff's attorney reasonably believed to be licensed in Michigan as an architect, engineer, or surveyor and to be engaged in the practice of the same discipline as the defendant in the action or proceeding. The individual would have to state in the affidavit all of the following:

- That he or she has reviewed all records supplied by the plaintiff or plaintiff's attorney concerning the conduct that is the subject of the action or arbitration.
- That he or she has reviewed the applicable standard of care.
- That it is his or her opinion that the applicable standard of care was breached by the defendant.
- The actions that should have been taken or omitted by the defendant to comply with the applicable standard of care.
- That the breach of the standard of care was a proximate cause of the alleged injury or damage to the plaintiff.

If the court determined that a filed affidavit did not fully comply with the new section, the court would have to allow the plaintiff 56 days to file one or more affidavits correcting the deficiencies identified by the court. The filing of an affidavit to correct a deficiency would relate back to the date of filing the original complaint or notice requesting arbitration. If one or more affidavits to correct a deficiency were filed, the defendant could renew its objections by filing a motion within 14 days after service of the affidavits.

Finally, a defendant in an action or arbitration proceeding alleging malpractice or negligence would have to participate in good faith in the discovery process as required by the court rules.

The bill would take effect 90 days after its enactment.

Proposed MCL 600.2912i

BACKGROUND INFORMATION:

The following table highlights the timeline that would apply under the bill to an affidavit of merit in a malpractice action against an architect, engineer, or surveyor:

Timeline	Action
Filing date of initial complaint or arbitration notice	Initial complaint or notice requesting arbitration
Within 56 days of the complaint or notice	Defendant may request affidavit of merit
Within 56 days of the defendant’s request	<ul style="list-style-type: none">• Plaintiff must file the affidavit• Plaintiff may request one extension of up to an additional 56 days• If no affidavit or extension is filed, the court or arbitrator must dismiss the case with prejudice
Within 90 days after the affidavit of merit is served	Defendant must raise any objections to the affidavit; otherwise, objections are waived
Within 56 days of a court’s determination that an affidavit does not fully comply with these rules	If a court makes this determination, the plaintiff may file one or more affidavits to correct the deficiencies identified by the court
Within 14 days of any corrected affidavits	Defendant may renew its objections to the affidavit

FISCAL IMPACT:

House Bill 5169 could result in costs for local court systems. The fiscal impact is indeterminate and would depend on how provisions of the bill affected court caseloads and related administrative costs.

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