

By Senator Sebesta

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A bill to be entitled

An act relating to expert witnesses in medical negligence actions; amending s. 766.102, F.S.; providing requirements for expert witness testimony in actions based on medical negligence; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 766.102, Florida Statutes, 1998 Supplement, is amended to read:

766.102 Medical negligence; standards of recovery.--

(1) In any action for recovery of damages based on the death or personal injury of any person in which it is alleged that such death or injury resulted from the negligence of a health care provider as defined in s. 408.701(13)~~s.~~ ~~768.50(2)(b)~~, the claimant shall have the burden of proving by the greater weight of evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider. The prevailing professional standard of care for a given health care provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.

(2) A person may not give expert testimony concerning the prevailing professional standard of care unless that person is a licensed health care provider and meets the following criteria:

(a) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:

1 1. Specialize in the same specialty as the party
2 against whom or on whose behalf the testimony is offered; or

3 2. Specialize in a similar specialty that includes the
4 performance of the procedure that is the subject of the
5 complaint and have prior experience treating similar patients.

6 (b) During the year immediately preceding the date of
7 the occurrence that is the basis for the action, the expert
8 witness must have devoted at least 40 percent of his or her
9 professional time to:

10 1. The active clinical practice of the same health
11 profession as the health care provider against whom or on
12 whose behalf the testimony is offered and, if that health care
13 provider is a specialist, the active clinical practice of the
14 same specialty or a similar specialty that includes the
15 performance of the procedure that is the subject of the action
16 and have prior experience treating similar patients;

17 2. The instruction of students in an accredited health
18 professional school or accredited residency program in the
19 same health profession in which the health care provider
20 against whom or on whose behalf the testimony is offered, and
21 if that health care provider is a specialist, an accredited
22 health professional school or accredited residency or clinical
23 research program in the same specialty; or

24 3. A clinical research program that is affiliated with
25 an accredited medical school or teaching hospital and that is
26 in the same health profession as the health care provider
27 against whom or on whose behalf the testimony is offered and,
28 if that health care provider is a specialist, a clinical
29 research program that is affiliated with an accredited health
30 professional school or accredited residency or clinical
31 research program in the same specialty.

1 (3) Notwithstanding subsection (2), if the health care
2 provider against whom or on whose behalf the testimony is
3 offered is a general practitioner, the expert witness, during
4 the year immediately preceding the date of the occurrence that
5 is the basis for the action, must have devoted a majority of
6 his or her professional time to:

7 (a) Active clinical practice as a general
8 practitioner;

9 (b) Instruction of students in an accredited health
10 professional school or accredited residency program in the
11 general practice of medicine; or

12 (c) A clinical research program that is affiliated
13 with an accredited medical school or teaching hospital and
14 that is in the general practice of medicine.

15 (4) Notwithstanding subsection (2), a physician
16 licensed under chapter 458 or chapter 459 who qualifies as an
17 expert under the section and who by reason of active clinical
18 practice or instruction of students has knowledge of the
19 applicable standard of care for nurses, nurse practitioners,
20 certified registered nurse anesthetists, certified registered
21 nurse midwives, physician assistants, or other medical support
22 staff may give expert testimony in a medical malpractice
23 action with respect to the standard of care of such medical
24 support staff.

25 (5) In an action alleging medical malpractice, an
26 expert witness may not testify on a contingency fee basis.

27 (6) This section does not limit the power of the trial
28 court to disqualify an expert witness on grounds other than
29 the qualifications in this section.

30 (7) Notwithstanding subsection (2), in a medical
31 malpractice action against a hospital or other health care or

1 medical facility, a person may give expert testimony on the
2 appropriate standard of care as to administrative and other
3 nonclinical issues if the person has substantial knowledge, by
4 virtue of his or her training and experience, concerning the
5 standard of care among hospitals, or health care or medical
6 facilities of the same type as the hospital, health facility,
7 or medical facility whose actions or inactions are the subject
8 of this testimony and which are located in the same or similar
9 communities at the time of the alleged act giving rise to the
10 cause of action.

11 ~~(2)(a) If the health care provider whose negligence is~~
12 ~~claimed to have created the cause of action is not certified~~
13 ~~by the appropriate American board as being a specialist, is~~
14 ~~not trained and experienced in a medical specialty, or does~~
15 ~~not hold himself or herself out as a specialist, a "similar~~
16 ~~health care provider" is one who:~~

17 ~~1. Is licensed by the appropriate regulatory agency of~~
18 ~~this state;~~

19 ~~2. Is trained and experienced in the same discipline~~
20 ~~or school of practice; and~~

21 ~~3. Practices in the same or similar medical community.~~

22 ~~(b) If the health care provider whose negligence is~~
23 ~~claimed to have created the cause of action is certified by~~
24 ~~the appropriate American board as a specialist, is trained and~~
25 ~~experienced in a medical specialty, or holds himself or~~
26 ~~herself out as a specialist, a "similar health care provider"~~
27 ~~is one who:~~

28 ~~1. Is trained and experienced in the same specialty;~~
29 ~~and~~

30 ~~2. Is certified by the appropriate American board in~~
31 ~~the same specialty.~~

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2 ~~However, if any health care provider described in this~~
3 ~~paragraph is providing treatment or diagnosis for a condition~~
4 ~~which is not within his or her specialty, a specialist trained~~
5 ~~in the treatment or diagnosis for that condition shall be~~
6 ~~considered a "similar health care provider."~~

7 ~~(c) The purpose of this subsection is to establish a~~
8 ~~relative standard of care for various categories and~~
9 ~~classifications of health care providers. Any health care~~
10 ~~provider may testify as an expert in any action if he or she:~~

11 ~~1. Is a similar health care provider pursuant to~~
12 ~~paragraph (a) or paragraph (b); or~~

13 ~~2. Is not a similar health care provider pursuant to~~
14 ~~paragraph (a) or paragraph (b) but, to the satisfaction of the~~
15 ~~court, possesses sufficient training, experience, and~~
16 ~~knowledge as a result of practice or teaching in the specialty~~
17 ~~of the defendant or practice or teaching in a related field of~~
18 ~~medicine, so as to be able to provide such expert testimony as~~
19 ~~to the prevailing professional standard of care in a given~~
20 ~~field of medicine. Such training, experience, or knowledge~~
21 ~~must be as a result of the active involvement in the practice~~
22 ~~or teaching of medicine within the 5-year period before the~~
23 ~~incident giving rise to the claim.~~

24 (8)(3)(a) If the injury is claimed to have resulted
25 from the negligent affirmative medical intervention of the
26 health care provider, the claimant must, in order to prove a
27 breach of the prevailing professional standard of care, show
28 that the injury was not within the necessary or reasonably
29 foreseeable results of the surgical, medicinal, or diagnostic
30 procedure constituting the medical intervention, if the
31 intervention from which the injury is alleged to have resulted

1 was carried out in accordance with the prevailing professional
2 standard of care by a reasonably prudent similar health care
3 provider.

4 (b) The provisions of this subsection shall apply only
5 when the medical intervention was undertaken with the informed
6 consent of the patient in compliance with the provisions of s.
7 766.103.

8 (9)~~(4)~~ The existence of a medical injury shall not
9 create any inference or presumption of negligence against a
10 health care provider, and the claimant must maintain the
11 burden of proving that an injury was proximately caused by a
12 breach of the prevailing professional standard of care by the
13 health care provider. However, the discovery of the presence
14 of a foreign body, such as a sponge, clamp, forceps, surgical
15 needle, or other paraphernalia commonly used in surgical,
16 examination, or diagnostic procedures, shall be prima facie
17 evidence of negligence on the part of the health care
18 provider.

19 (10)~~(5)~~ The Legislature is cognizant of the changing
20 trends and techniques for the delivery of health care in this
21 state and the discretion that is inherent in the diagnosis,
22 care, and treatment of patients by different health care
23 providers. The failure of a health care provider to order,
24 perform, or administer supplemental diagnostic tests shall not
25 be actionable if the health care provider acted in good faith
26 and with due regard for the prevailing professional standard
27 of care.

28 (11)(a)~~(6)(a)~~ In any action for damages involving a
29 claim of negligence against a physician licensed under chapter
30 458, osteopathic physician licensed under chapter 459,
31 podiatric physician licensed under chapter 461, or

1 chiropractic physician licensed under chapter 460 providing
2 emergency medical services in a hospital emergency department,
3 the court shall admit expert medical testimony only from
4 physicians, osteopathic physicians, podiatric physicians, and
5 chiropractic physicians who have had substantial professional
6 experience within the preceding 5 years while assigned to
7 provide emergency medical services in a hospital emergency
8 department.

9 (b) For the purposes of this subsection:

10 1. The term "emergency medical services" means those
11 medical services required for the immediate diagnosis and
12 treatment of medical conditions which, if not immediately
13 diagnosed and treated, could lead to serious physical or
14 mental disability or death.

15 2. "Substantial professional experience" shall be
16 determined by the custom and practice of the manner in which
17 emergency medical coverage is provided in hospital emergency
18 departments in the same or similar localities where the
19 alleged negligence occurred.

20 Section 2. This act shall take effect upon becoming a
21 law.

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24 SENATE SUMMARY

25 Establishes qualification requirements for persons who
26 testify as expert witnesses in actions based on medical
negligence. (See bill for details.)

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