By the Committee on Judiciary and Senator Sebesta

308-1898-99

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; amending s. 766.106, F.S.; requiring claimants to provide a list of treating physicians; providing for presuit unsworn statements of physicians; providing for unsworn statements after service of a complaint upon a defendant physician; amending s. 455.667, F.S.; allowing unsworn statements for good cause shown; amending s. 766.207, F.S.; revising provisions relating to voluntary binding arbitration of medical malpractice claims; providing for the effect of an offer to submit to voluntary binding arbitration with respect to allegations contained in the claimant's notice of intent letter; providing for the application of this section; 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. 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. Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or

2. Specialize in a similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the complaint and have prior experience treating similar patients.

(b) During the 3 years immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted professional time to:

1. The active clinical practice of, or consulting with respect to, the same or similar health profession as the health care provider against whom or on whose behalf the testimony is offered and, if that health care provider is a specialist, the active clinical practice of, or consulting with respect to, the same specialty or a similar specialty that includes the evaluation, diagnosis, or treatment of the

medical condition that is the subject of the action and have prior experience treating similar patients;

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

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

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

(a) Active clinical practice or consultation as a general practitioner;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(8)~~(3)~~(a) If the injury is claimed to have resulted from the negligent affirmative medical intervention of the health care provider, the claimant must, in order to prove a breach of the prevailing professional standard of care, show that the injury was not within the necessary or reasonably foreseeable results of the surgical, medicinal, or diagnostic procedure constituting the medical intervention, if the intervention from which the injury is alleged to have resulted was carried out in accordance with the prevailing professional standard of care by a reasonably prudent similar health care provider.

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

(9)~~(4)~~ The existence of a medical injury shall not create any inference or presumption of negligence against a health care provider, and the claimant must maintain the

burden of proving that an injury was proximately caused by a breach of the prevailing professional standard of care by the health care provider. However, the discovery of the presence of a foreign body, such as a sponge, clamp, forceps, surgical needle, or other paraphernalia commonly used in surgical, examination, or diagnostic procedures, shall be prima facie evidence of negligence on the part of the health care provider.

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

(11)(a)~~(6)(a)~~ In any action for damages involving a claim of negligence against a physician licensed under chapter 458, osteopathic physician licensed under chapter 459, podiatric physician licensed under chapter 461, or chiropractic physician licensed under chapter 460 providing emergency medical services in a hospital emergency department, the court shall admit expert medical testimony only from physicians, osteopathic physicians, podiatric physicians, and chiropractic physicians who have had substantial professional experience within the preceding 5 years while assigned to provide emergency medical services in a hospital emergency department.

(b) For the purposes of this subsection:

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

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

(12) However, if any health care providers described in subsection (2), subsection (3), or subsection (4) are providing treatment or diagnosis for a condition that is not within his or her specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a "similar health care provider."

Section 2. Effective October 1, 1999, and applicable to notices of intent to litigate sent on or after that date, subsection (2) and paragraph (a) of subsection (7) of section 766.106, Florida Statutes, 1998 Supplement, are amended to read:

766.106 Notice before filing action for medical malpractice; presuit screening period; offers for admission of liability and for arbitration; informal discovery; review.--

(2) After completion of presuit investigation pursuant to s. 766.203 and prior to filing a claim for medical malpractice, a claimant shall notify each prospective defendant and, if any prospective defendant is a health care provider licensed under chapter 458, chapter 459, chapter 460, chapter 461, or chapter 466, the Department of Health by certified mail, return receipt requested, of intent to

initiate litigation for medical malpractice. Notice to each prospective defendant must include a list of all known health care providers seen by the claimant subsequent to the alleged act of malpractice for the injuries complained of and those known health care providers seen by the claimant for related conditions during the 5-year period prior to the alleged act of malpractice.Notice to the Department of Health must include the full name and address of the claimant; the full names and any known addresses of any health care providers licensed under chapter 458, chapter 459, chapter 460, chapter 461, or chapter 466 who are prospective defendants identified at the time; the date and a summary of the occurrence giving rise to the claim; and a description of the injury to the claimant. The requirement for notice to the Department of Health does not impair the claimant's legal rights or ability to seek relief for his or her claim, and the notice provided to the department is not discoverable or admissible in any civil or administrative action. The Department of Health shall review each incident and determine whether it involved conduct by a licensee which is potentially subject to disciplinary action, in which case the provisions of s. 455.621 apply.

(7) Informal discovery may be used by a party to obtain unsworn statements, the production of documents or things, and physical and mental examinations, as follows:

(a) Unsworn statements.--Any party may require other parties and the claimant's treating physicians listed in the claimant's notice to initiate litigation for medical malpractice to appear for the taking of an unsworn statement. Such statements may be used only for the purpose of presuit screening and are not discoverable or admissible in any civil action for any purpose by any party. A party desiring to take

the unsworn statement of any party must give reasonable notice in writing to all parties. The notice must state the time and place for taking the statement and the name and address of the party to be examined. Unless otherwise impractical, the examination of any party must be done at the same time by all other parties. Any party may be represented by counsel at the taking of an unsworn statement. An unsworn statement may be recorded electronically, stenographically, or on videotape. The taking of unsworn statements is subject to the provisions of the Florida Rules of Civil Procedure and may be terminated for abuses. Further, as to the taking of unsworn statements of the claimant's treating physicians, the scope of such inquiry shall be limited to opinions formulated by the treating physicians with respect to the issues of liability and damages set forth in the claimant's notice of intent letter. If a prospective defendant did not take an unsworn statement of a claimant's treating medical physicians as set forth in the claimant's notice to initiate a claim for medical malpractice, an unsworn statement may be taken after suit has been filed, but no later than 90 days from the date of service of the complaint on the defendant. However, in no event may a prospective defendant take more than one unsworn statement of a treating physician. Unsworn statements taken after suit has been filed are inadmissible in the civil action for any purpose by any party. This section does not prohibit the taking of an unsworn statement of a treating physician subsequent to the filing of the civil action upon good cause being shown that the name of any treating physician was not provided in the claimant's notice to initiate a claim for medical malpractice.

Section 3. Effective October 1, 1999, and applicable to notices of intent to litigate sent on or after that date, subsection (5) of section 455.667, Florida Statutes, 1998 Supplement, is amended to read:

455.667 Ownership and control of patient records; report or copies of records to be furnished.--

(5) Except as otherwise provided in this section and in s. 440.13(4)(c), such records may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care or treatment of the patient, except upon written authorization of the patient. However, such records may be furnished without written authorization under the following circumstances:

(a) To any person, firm, or corporation that has procured or furnished such examination or treatment with the patient's consent.

(b) When compulsory physical examination is made pursuant to Rule 1.360, Florida Rules of Civil Procedure, in which case copies of the medical records shall be furnished to both the defendant and the plaintiff.

(c) In any civil or criminal action, unless otherwise prohibited by law, upon the issuance of a subpoena from a court of competent jurisdiction and proper notice to the patient or the patient's legal representative by the party seeking such records.

(d) For statistical and scientific research, provided the information is abstracted in such a way as to protect the identity of the patient or provided written permission is

received from the patient or the patient's legal representative.

(e) For purposes of taking an unsworn statement pursuant to s. 766.106(7)(a).

Section 4. Effective upon this act's becoming a law, subsections (2) and (3) of section 766.207, Florida Statutes, are amended to read:

766.207 Voluntary binding arbitration of medical negligence claims.--

(2) Upon the completion of presuit investigation with preliminary reasonable grounds for a medical negligence claim intact, the parties may elect to have damages determined by an arbitration panel. Defendants offering to submit to arbitration pursuant to this section and in conjunction with s. 766.106 shall be deemed to have admitted both liability and causation with respect to the allegations contained in the claimant's notice of intent letter.Such election may be initiated by either party by serving a request for voluntary binding arbitration of damages within 90 days after receipt ~~service~~ of the claimant's notice of intent to initiate litigation upon the defendant. The evidentiary standards for voluntary binding arbitration of medical negligence claims shall be as provided in ss. 120.569(2)(e) and 120.57(1)(c).

(3) Upon receipt of a party's request for such arbitration, the opposing party may accept the offer of voluntary binding arbitration within 30 days. However, in no event shall the defendant be required to respond to the request for arbitration sooner than 90 days after service of the notice of intent to initiate litigation under s. 766.106. Such acceptance within the time period provided by this subsection shall be a binding commitment to comply with the

decision of the arbitration panel. The liability of any insurer shall be subject to any applicable insurance policy limits. A claimant's acceptance of an offer to arbitrate shall not bar the claimant from pursuing an action against defendants who do not offer or agree to arbitration under this section.

Section 5. The amendments made by this act to section 766.207(2) and (3), Florida Statutes, are remedial in nature and shall apply to all civil actions pending on October 1, 1999, in which the trial or retrial of the action has not commenced.

Section 6. This act shall take effect October 1, 1999, and shall apply to causes of action accruing on or after that date.

STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN COMMITTEE SUBSTITUTE FOR SB 1258

Deletes from subsection (1) of s. 766.102, F.S., the definitional reference of health care provider contained in s. 408.701(13), F.S., and inserts the existing reference to s. 768.50(2)(b), F.S.

Changes the requirement for a similar specialist to testify as an expert so that the similar specialist must specialize in a similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the complaint.

Changes the time period within which the expert who is a specialist or similar specialist must have devoted professional time to the active clinical practice, instruction of students or clinical research to 3 years immediately preceding the date of the occurrence that is the basis for the action and deletes the requirement that the amount of such professional time spent in such activity be at least 40%.

Adds consulting to the activity the expert specialist, similar specialist or general practitioner could have engaged in during the 3 years immediately preceding the date of the occurrence that is the basis for the action.

Changes the time period within which the expert who is a general practitioner must have devoted professional time to the active clinical practice, instruction of students or clinical research to 3 years immediately preceding the date of the occurrence that is the basis for the action and deletes the requirement that the amount of such professional time spent in such activity be a majority of the time.

Clarifies that this section does not limit the power of the trial court to qualify or disqualify an expert on grounds other than the qualifications of this section.

Adds a subsection which states that a health care provider who provides treatment or diagnosis for a condition which is not within his or her speciality will be subject to having a specialist who is trained in the treatment or diagnosis for that condition considered as a similar health care provider for expert witness purposes.

Revises the effective date so that it becomes effective on October 1, 1999, and applies to causes of action accruing on or after that date.

Amends subsection (2) of s. 766.106, F.S., to require a claimant in a medical malpractice claim to include in the notice of intent to initiate litigation a list of all known health care providers seen by the claimant subsequent to alleged act of malpractice and those known health care providers seen by the claimant for related conditions during the five year period prior to the alleged act of malpractice. The effective date is October 1, 1999, and applies to notices of intent to litigate sent on or after that date.

Amends subsection (7)(a) of s. 766.106, F.S., to include the claimant's treating physicians listed in the claimant's notice of intent to initiate litigation as persons who may be required to have their unsworn statements taken for the purposes of presuit screening. The scope of the inquiry is limited to opinions formulated by the treating physicians about the issues of liability and damages stated in the claimant's notice of intent. Provides conditions and limitations for such unsworn statements. The effective date is October 1, 1999, and applies to notices of intent to litigate sent on or after that date.

Amends subsection (5)(e) of s. 455.667, F.S., to allow furnishing of a patient's medical records without written authorization from the patient or the patient's legal representative for purposes of taking an unsworn statement pursuant to the presuit screening provisions of s. 766.106(7)(a), F.S. The effective date is October 1, 1999, and applies to notices of intent to litigate sent on or after that date.

Amends subsections (2) and (3) of s. 766.207, F.S. Subsection (2) is amended to clarify that defendants offering to submit to arbitration pursuant to this section and in conjunction with s. 766.106, F.S., shall be deemed to have admitted both liability and causation with respect to the allegations contained in the claimant's notice of intent letter. Changes the triggering event for either party to request arbitration to the receipt of the claimant's notice of intent to initiate litigation. Subsection (3) is amended to specify that a claimant's acceptance of an offer to arbitrate shall not bar the claimant from pursuing a cause of action against non-arbitrating defendants. Provides an effective date of October 1, 1999, and applies to all civil actions pending on that date in which the trial or retrial of the action has not commenced.