

By Senator Sebesta

20-197-00

1 A bill to be entitled
2 An act relating to expert witness testimony;
3 amending s. 766.102, F.S.; mandating certain
4 qualifications for certain witnesses in medical
5 negligence cases; providing exceptions;
6 prohibiting certain contingency fees for
7 certain expert witnesses; providing for a
8 similar health care provider with regard to
9 expert witness qualifications; amending s.
10 766.202, F.S.; redefining the term "medical
11 expert"; providing for application; providing
12 an effective date.

13

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

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16 Section 1. Section 766.102, Florida Statutes, is
17 amended to read:

18 766.102 Medical negligence; standards of recovery.--

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

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

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

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

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

13 (b) During the 5 years immediately preceding the date
14 of the occurrence that is the basis for the action, the expert
15 witness must have devoted professional time to:

16 1. The active clinical practice of the same health
17 profession as the health care provider against whom or on
18 whose behalf the testimony is offered and, if that health care
19 provider is a specialist, the active clinical practice of the
20 same specialty or a similar specialty that includes the
21 evaluation, diagnosis, or treatment of the medical condition
22 or procedure that is the subject of the action and must have
23 prior experience treating similar patients;

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

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

9
10 The number of years devoted to professional time may be spent
11 exclusively in any one of the above three areas or
12 cumulatively in any combination of the three areas.

13 (3) Notwithstanding subsection (2), if the health care
14 provider against whom or on whose behalf the testimony is
15 offered is a general practitioner, the expert witness, during
16 the 5 years immediately preceding the date of the occurrence
17 that is the basis for the action, must have devoted his or her
18 professional time to:

19 (a) Active clinical practice as a general
20 practitioner;

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

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

27 (4) Notwithstanding subsection (2), a physician
28 licensed under chapter 458 or chapter 459 who qualifies as an
29 expert under the section and who by reason of active clinical
30 practice or instruction of students has knowledge of the
31 applicable standard of care for nurses, nurse practitioners,

1 certified registered nurse anesthetists, certified registered
2 nurse midwives, physician assistants, or other medical support
3 staff may give expert testimony in a medical negligence action
4 with respect to the standard of care of such medical support
5 staff.

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

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

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

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

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

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

31

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

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

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

11
12 ~~However, if any health care provider described in this~~
13 ~~paragraph is providing treatment or diagnosis for a condition~~
14 ~~which is not within his or her specialty, a specialist trained~~
15 ~~in the treatment or diagnosis for that condition shall be~~
16 ~~considered a "similar health care provider."~~

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

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

23 ~~2. Is not a similar health care provider pursuant to~~
24 ~~paragraph (a) or paragraph (b) but, to the satisfaction of the~~
25 ~~court, possesses sufficient training, experience, and~~
26 ~~knowledge as a result of practice or teaching in the specialty~~
27 ~~of the defendant or practice or teaching in a related field of~~
28 ~~medicine, so as to be able to provide such expert testimony as~~
29 ~~to the prevailing professional standard of care in a given~~
30 ~~field of medicine. Such training, experience, or knowledge~~
31 ~~must be as a result of the active involvement in the practice~~

1 ~~or teaching of medicine within the 5-year period before the~~
2 ~~incident giving rise to the claim.~~

3 (7)~~(3)~~(a) If the injury is claimed to have resulted
4 from the negligent affirmative medical intervention of the
5 health care provider, the claimant must, in order to prove a
6 breach of the prevailing professional standard of care, show
7 that the injury was not within the necessary or reasonably
8 foreseeable results of the surgical, medicinal, or diagnostic
9 procedure constituting the medical intervention, if the
10 intervention from which the injury is alleged to have resulted
11 was carried out in accordance with the prevailing professional
12 standard of care by a reasonably prudent similar health care
13 provider.

14 (b) The provisions of this subsection shall apply only
15 when the medical intervention was undertaken with the informed
16 consent of the patient in compliance with the provisions of s.
17 766.103.

18 (8)~~(4)~~ The existence of a medical injury shall not
19 create any inference or presumption of negligence against a
20 health care provider, and the claimant must maintain the
21 burden of proving that an injury was proximately caused by a
22 breach of the prevailing professional standard of care by the
23 health care provider. However, the discovery of the presence
24 of a foreign body, such as a sponge, clamp, forceps, surgical
25 needle, or other paraphernalia commonly used in surgical,
26 examination, or diagnostic procedures, shall be prima facie
27 evidence of negligence on the part of the health care
28 provider.

29 (9)~~(5)~~ The Legislature is cognizant of the changing
30 trends and techniques for the delivery of health care in this
31 state and the discretion that is inherent in the diagnosis,

1 care, and treatment of patients by different health care
2 providers. The failure of a health care provider to order,
3 perform, or administer supplemental diagnostic tests shall not
4 be actionable if the health care provider acted in good faith
5 and with due regard for the prevailing professional standard
6 of care.

7 (10)~~(6)~~(a) In any action for damages involving a claim
8 of negligence against a physician licensed under chapter 458,
9 osteopathic physician licensed under chapter 459, podiatric
10 physician licensed under chapter 461, or chiropractic
11 physician licensed under chapter 460 providing emergency
12 medical services in a hospital emergency department, the court
13 shall admit expert medical testimony only from physicians,
14 osteopathic physicians, podiatric physicians, and chiropractic
15 physicians who have had substantial professional experience
16 within the preceding 5 years while assigned to provide
17 emergency medical services in a hospital emergency department.

18 (b) For the purposes of this subsection:

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

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

29 (11) However, if any health care provider described in
30 subsection (2), subsection (3), or subsection (4) is providing
31 treatment or diagnosis for a condition that is not within his

1 or her specialty, a specialist trained in the treatment or
2 diagnosis for that condition shall be considered a "similar
3 health care provider."

4 Section 2. Subsection (5) of section 766.602, Florida
5 Statutes, is amended to read:

6 766.202 Definitions.--As used in ss. 766.201-766.212,
7 the term:

8 (5) "Medical expert" means a person duly and regularly
9 engaged in the practice of his or her profession who holds a
10 health care professional degree from a university or college
11 and who meets the requirements of an expert witness under s.
12 766.102 and has had special professional training and
13 ~~experience or one possessed of special health care knowledge~~
14 ~~or skill about the subject upon which he or she is called to~~
15 ~~testify or provide an opinion.~~

16 Section 3. This act shall take effect July 1, 2000,
17 and shall apply to any action filed on or after that date.

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20 SENATE SUMMARY

21 Mandates specified qualifications for a person who gives
22 expert testimony relating to the prevailing professional
23 standard of care in medical negligence cases. Provides an
24 exception for a person who has substantial knowledge
25 because of experience or training under certain
26 circumstances. Specifies who is a similar health care
27 provider with regard to expert witness qualifications.
28 Defines the term "medical expert."
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