

By Senator Burt

16-784B-01

1                                   A bill to be entitled  
2           An act relating to expert witnesses in medical  
3           negligence actions; amending s. 766.102, F.S.;  
4           providing requirements for expert witness  
5           testimony in actions based on medical  
6           negligence; amending s. 766.106, F.S.;  
7           requiring claimants to provide a list of  
8           treating physicians; providing for presuit  
9           unsworn statements of physicians; providing for  
10          unsworn statements after service of a complaint  
11          upon a defendant physician; amending s.  
12          455.667, F.S.; allowing unsworn statements for  
13          good cause shown; providing an effective date.

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

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17           Section 1. Section 766.102, Florida Statutes, is  
18          amended to read:  
19           766.102 Medical negligence; standards of recovery.--  
20           (1) In any action for recovery of damages based on the  
21          death or personal injury of any person in which it is alleged  
22          that such death or injury resulted from the negligence of a  
23          health care provider as defined in s. 768.50(2)(b), the  
24          claimant shall have the burden of proving by the greater  
25          weight of evidence that the alleged actions of the health care  
26          provider represented a breach of the prevailing professional  
27          standard of care for that health care provider. The  
28          prevailing professional standard of care for a given health  
29          care provider shall be that level of care, skill, and  
30          treatment which, in light of all relevant surrounding

1 circumstances, is recognized as acceptable and appropriate by  
2 reasonably prudent similar health care providers.

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

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

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

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

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

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

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

1 accredited health professional school or accredited residency  
2 or clinical research program in the same or similar specialty;  
3 or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 ~~must be as a result of the active involvement in the practice~~  
2 ~~or teaching of medicine within the 5-year period before the~~  
3 ~~incident giving rise to the claim.~~

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

15 (b) The provisions of this subsection shall apply only  
16 when the medical intervention was undertaken with the informed  
17 consent of the patient in compliance with the provisions of s.  
18 766.103.

19 (9)~~(4)~~ The existence of a medical injury shall not  
20 create any inference or presumption of negligence against a  
21 health care provider, and the claimant must maintain the  
22 burden of proving that an injury was proximately caused by a  
23 breach of the prevailing professional standard of care by the  
24 health care provider. However, the discovery of the presence  
25 of a foreign body, such as a sponge, clamp, forceps, surgical  
26 needle, or other paraphernalia commonly used in surgical,  
27 examination, or diagnostic procedures, shall be prima facie  
28 evidence of negligence on the part of the health care  
29 provider.

30 (10)~~(5)~~ The Legislature is cognizant of the changing  
31 trends and techniques for the delivery of health care in this

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

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

20 (b) For the purposes of this subsection:

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

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

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

7           Section 2. Effective October 1, 2001, and applicable  
8 to notices of intent to litigate sent on or after that date,  
9 subsection (2) and paragraph (a) of subsection (7) of section  
10 766.106, Florida Statutes, are amended to read:

11           766.106 Notice before filing action for medical  
12 malpractice; presuit screening period; offers for admission of  
13 liability and for arbitration; informal discovery; review.--

14           (2) After completion of presuit investigation pursuant  
15 to s. 766.203 and prior to filing a claim for medical  
16 malpractice, a claimant shall notify each prospective  
17 defendant and, if any prospective defendant is a health care  
18 provider licensed under chapter 458, chapter 459, chapter 460,  
19 chapter 461, or chapter 466, the Department of Health by  
20 certified mail, return receipt requested, of intent to  
21 initiate litigation for medical malpractice. Notice to each  
22 prospective defendant must include a list of all known health  
23 care providers seen by the claimant subsequent to the alleged  
24 act of malpractice for the injuries complained of and those  
25 known health care providers seen by the claimant for related  
26 conditions during the 5-year period prior to the alleged act  
27 of malpractice. Notice to the Department of Health must  
28 include the full name and address of the claimant; the full  
29 names and any known addresses of any health care providers  
30 licensed under chapter 458, chapter 459, chapter 460, chapter  
31 461, or chapter 466 who are prospective defendants identified



1 at the time; the date and a summary of the occurrence giving  
2 rise to the claim; and a description of the injury to the  
3 claimant. The requirement for notice to the Department of  
4 Health does not impair the claimant's legal rights or ability  
5 to seek relief for his or her claim, and the notice provided  
6 to the department is not discoverable or admissible in any  
7 civil or administrative action. The Department of Health shall  
8 review each incident and determine whether it involved conduct  
9 by a licensee which is potentially subject to disciplinary  
10 action, in which case the provisions of s. 455.621 apply.

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

14 (a) Unsworn statements.--Any party may require other  
15 parties and the claimant's treating physicians listed in the  
16 claimant's notice to initiate litigation for medical  
17 malpractice to appear for the taking of an unsworn statement.  
18 Such statements may be used only for the purpose of presuit  
19 screening and are not discoverable or admissible in any civil  
20 action for any purpose by any party. A party desiring to take  
21 the unsworn statement of any party or treating physician must  
22 give reasonable notice in writing to all parties. The notice  
23 must state the time and place for taking the statement and the  
24 name and address of the party or treating physician to be  
25 examined. Unless otherwise impractical, the examination of  
26 any party or treating physician must be done at the same time  
27 by all other parties. Any party or treating physician may be  
28 represented by counsel at the taking of an unsworn statement.  
29 An unsworn statement may be recorded electronically,  
30 stenographically, or on videotape. The taking of unsworn  
31 statements is subject to the provisions of the Florida Rules

1 of Civil Procedure and may be terminated for abuses. Further,  
2 as to the taking of unsworn statements of the claimant's  
3 treating physicians, the scope of such inquiry shall be  
4 limited to opinions formulated by the treating physicians with  
5 respect to the issues of liability and damages set forth in  
6 the claimant's notice of intent letter. If a prospective  
7 defendant did not take an unsworn statement of a claimant's  
8 treating medical physicians as set forth in the claimant's  
9 notice to initiate a claim for medical malpractice, an unsworn  
10 statement may be taken after suit has been filed, but no later  
11 than 90 days from the date of service of the complaint on the  
12 defendant. However, in no event may a prospective defendant  
13 take more than one unsworn statement of a treating physician.  
14 Unsworn statements taken after suit has been filed are  
15 inadmissible in the civil action for any purpose by any party.  
16 This section does not prohibit the taking of an unsworn  
17 statement of a treating physician subsequent to the filing of  
18 the civil action upon good cause being shown that the name of  
19 any treating physician was not provided in the claimant's  
20 notice to initiate a claim for medical malpractice.

21 Section 3. Effective October 1, 2001, and applicable  
22 to notices of intent to litigate sent on or after that date,  
23 subsection (5) of section 455.667, Florida Statutes, is  
24 amended to read:

25 455.667 Ownership and control of patient records;  
26 report or copies of records to be furnished.--

27 (5) Except as otherwise provided in this section and  
28 in s. 440.13(4)(c), such records may not be furnished to, and  
29 the medical condition of a patient may not be discussed with,  
30 any person other than the patient or the patient's legal  
31 representative or other health care practitioners and

1 providers involved in the care or treatment of the patient,  
2 except upon written authorization of the patient. However,  
3 such records may be furnished without written authorization  
4 under the following circumstances:

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

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

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

17 (d) For statistical and scientific research, provided  
18 the information is abstracted in such a way as to protect the  
19 identity of the patient or provided written permission is  
20 received from the patient or the patient's legal  
21 representative.

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

24 Section 4. This act shall take effect October 1, 2001,  
25 and shall apply to causes of action accruing on or after that  
26 date.

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SENATE SUMMARY

Provides requirements for expert witness testimony in actions based on medical negligence. Requires claimants to provide a list of treating physicians. Provides for unsworn statements of physicians. Provides for unsworn statements after service of a complaint upon a defendant physician. Allows unsworn statements for good cause.