

By Senator Latvala

19-1686-02

1 A bill to be entitled
2 An act relating to medical negligence; creating
3 s. 458.355, F.S.; requiring that the Board of
4 Medicine issue an expert-witness certificate to
5 certain physicians for purposes of providing
6 expert medical testimony in connection with
7 pending litigation; amending s. 766.102, F.S.;
8 redefining the term "similar health care
9 provider" for purposes of determining the
10 standard of care in an action claiming medical
11 negligence; revising requirements for health
12 care providers testifying as an expert to
13 require that an expert witness hold an
14 expert-witness certificate if the expert
15 witness offers testimony against or on behalf
16 of a physician licensed in this state; creating
17 s. 766.115, F.S.; authorizing a plaintiff to
18 make an offer of judgment in a civil action for
19 medical negligence or wrongful death resulting
20 from medical negligence; creating s. 766.116,
21 F.S.; providing for the establishment of
22 medical review panels to review malpractice
23 complaints against licensed physicians;
24 providing for appointing members to a medical
25 review panel; requiring that the panel give its
26 expert opinion to the trial court within a
27 specified period; providing that the report of
28 the medical review panel is admissible as
29 evidence in any action in a court of law;
30 providing that panel members are immune from
31 civil liability for actions taken in the course

1 of their duties; providing for payment of the
2 expenses of panel members; amending s. 766.202,
3 F.S.; redefining the term "medical expert" for
4 purposes of medical negligence claims; amending
5 s. 768.13, F.S.; providing immunity from civil
6 damages under the Good Samaritan Act for
7 actions taken in response to a biological or
8 chemical terrorist attack; amending s. 768.76,
9 F.S.; authorizing the court to consider certain
10 payments made to the claimant regardless of
11 whether the payment is a collateral source or
12 reduces an award of damages; amending s.
13 768.78, F.S.; revising requirements for
14 determining damages in an action in malpractice
15 to remove provisions providing for payment for
16 future economic losses; providing for
17 severability; providing an effective date.

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

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21 Section 1. Section 458.355, Florida Statutes, is
22 created to read:

23 458.355 Expert-witness certificate.--

24 (1) A physician who holds a valid active license to
25 practice medicine in any other state, who pays an application
26 fee of \$25, and who has not had a previous expert-witness
27 certificate revoked by the board shall receive from the board
28 a certificate to provide expert medical testimony in
29 connection with any litigation pending in this state.

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1 (2) This section does not authorize a physician who is
2 not licensed to practice medicine in this state to qualify for
3 or otherwise engage in the practice of medicine in this state.

4 Section 2. Subsection (2) of section 766.102, Florida
5 Statutes, is amended to read:

6 766.102 Medical negligence; standards of recovery.--

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

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

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

17 3. Practices in the same or similar medical community;
18 and-

19 4. Has, during the 5 years immediately preceding the
20 date of the occurrence that is the basis for the action,
21 engaged in any combination of the following:

22 a. Active clinical practice;

23 b. Instruction of students in an accredited health
24 professional school or accredited residency program in the
25 same health profession as the health care provider against
26 whom or on whose behalf the testimony is offered; or

27 c. A clinical research program that is affiliated with
28 an accredited medical school or teaching hospital in the same
29 health profession as the health care provider against whom or
30 on whose behalf the testimony is offered.

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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; ~~and-~~

11 3. Has, during the 5 years immediately preceding the
12 date of the occurrence that is the basis for the action,
13 engaged in any combination of the following:

14 a. Active clinical practice in the same specialty or a
15 similar specialty that includes the evaluation, diagnosis, or
16 treatment of the medical condition or procedure that is the
17 subject of the action;

18 b. Instruction of students in an accredited health
19 professional school or accredited residency program in the
20 same health profession and the same or similar specialty as
21 the health care provider against whom or on whose behalf the
22 testimony is offered; or

23 c. A clinical research program that is affiliated with
24 an accredited medical school or teaching hospital in the same
25 health profession and the same or similar specialty as the
26 health care provider against whom or on whose behalf the
27 testimony is offered and is in the general practice of
28 medicine.

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30 However, if any health care provider described in this
31 paragraph is providing treatment or diagnosis for a condition

1 which is not within his or her specialty, a specialist trained
2 in the treatment or diagnosis for that condition shall be
3 considered a "similar health care provider."

4 (c) If the party against whom or on whose behalf the
5 testimony is offered is a physician licensed under chapter 458
6 or chapter 459, the expert witness must be licensed in this
7 state under chapter 458 or chapter 459 or hold an
8 expert-witness certificate as provided in s. 458.355.~~The~~
9 ~~purpose of this subsection is to establish a relative standard~~
10 ~~of care for various categories and classifications of health~~
11 ~~care providers. Any health care provider may testify as an~~
12 ~~expert in any action if he or she:~~

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

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

26 Section 3. Section 766.115, Florida Statutes, is
27 created to read:

28 766.115 Offer of judgment.--In any civil action for
29 medical negligence or wrongful death resulting from medical
30 negligence, a plaintiff may employ the provisions of s.
31 768.79, if the demand for judgment is not served upon the

1 defendant until 180 days after the actual service of the
2 complaint on the defendant. The defendant has 90 days to
3 consider the demand and accept or reject the demand. If the
4 demand is not accepted or rejected and the plaintiff recovers
5 a judgment in an amount at least 25 percent greater than the
6 demand, the plaintiff is entitled to recoverable costs and
7 attorney's fees incurred from the date of the filing of the
8 demand. All other provisions of s. 768.79 shall be applied if
9 such provisions are not inconsistent with this section.

10 Section 4. Section 766.116, Florida Statutes, is
11 created to read:

12 766.116 Medical review panels.--

13 (1) This section provides for establishing medical
14 review panels to review malpractice complaints against
15 physicians licensed under chapter 458 or chapter 459.

16 (2) Not sooner than 20 days after the filing of a
17 complaint, either party may request the formation of a medical
18 review panel by serving a request by registered or certified
19 mail upon all parties and the trial court.

20 (3)(a) A medical review panel shall consist of one
21 attorney and three physicians licensed under chapter 458 or
22 chapter 459.

23 (b) The attorney member of the medical review panel
24 shall act as chairperson of the panel and in an advisory
25 capacity, but may not vote.

26 (c) The chairperson of the medical review panel shall
27 expedite the selection of the other panel members, convene the
28 panel, and expedite the panel's review of the proposed
29 complaint. The chairperson may establish a reasonable schedule
30 for submitting evidence to the medical review panel, but must
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1 allow sufficient time for the parties to make full and
2 adequate presentation of related facts and authorities.

3 (4) Within 15 days after the filing of a request for
4 formation of a medical review panel under subsection (2), the
5 parties shall select a panel chairperson by agreement. If the
6 parties cannot agree on a panel chairperson, either party may
7 request the clerk of the court to draw at random a list of
8 five names of attorneys who:

9 (a) Are qualified to practice;

10 (b) Are members of The Florida Bar; and

11 (c) Maintain offices in the county of venue designated
12 in the complaint or in a contiguous county.

13 (5) Before selecting the random list, the clerk shall
14 collect a selection fee of \$25 from the party making the
15 request for the random list.

16 (6) The clerk shall notify the parties, and the
17 parties shall strike names alternately with the plaintiff
18 striking first until one name remains. The remaining attorney
19 shall be the chairperson of the panel.

20 (7) The plaintiff shall notify the chairperson and all
21 other parties of the name of the chairperson.

22 (8) If a party does not strike a name within 5 days
23 after receiving notice from the clerk:

24 (a) The opposing party shall, in writing, request the
25 clerk to strike for the party; and

26 (b) The clerk shall strike for that party.

27 (9) When one name remains, the clerk shall within 5
28 days notify the chairperson and all other parties of the name
29 of the chairperson.

30 (10) Within 15 days after being notified by the clerk
31 of being selected as chairperson, the chairperson shall:

1 (a) Send a written acknowledgment of appointment to
2 the clerk; or

3 (b) Show good cause for relief from serving as
4 provided in subsection (17).

5 (11) All physicians who hold an active license to
6 practice medicine in this state under chapter 458 or chapter
7 459, whether in the teaching profession or otherwise, shall be
8 available for selection as members of the medical review
9 panel.

10 (12) Each party to the action may select one physician
11 who meets the definition of an expert witness as defined in s.
12 766.102, and upon selection, the two physicians thus selected
13 shall select the third panelist who must meet the same
14 qualifications.

15 (13) If there are multiple plaintiffs or defendants,
16 only one health care provider shall be selected per side. The
17 plaintiff, whether single or multiple, may select one health
18 care provider and the defendant, whether single or multiple,
19 may select one health care provider.

20 (14) Within 15 days after the chairperson is selected,
21 both parties shall select a health care provider and the
22 parties shall notify the other party and the chairperson of
23 their selection. If a party fails to make a selection within
24 the time provided, the chairman shall make the selection and
25 notify both parties. Within 15 days after their selection, the
26 health care provider members shall select the third member
27 within the time provided and notify the chairperson and the
28 parties. If the providers fail to make a selection, the
29 chairperson shall make the selection and notify both parties.

30 (15) Within 10 days after the selection of a panel
31 member, written challenge without cause may be made to the

1 panel member. Upon challenge or excuse, the party whose
2 appointee was challenged or dismissed shall select another
3 panelist. If the challenged or dismissed panel member was
4 selected by the other two panel members, the panel members
5 shall make a new selection. If two such challenges are made
6 and submitted, the chairperson shall within 10 days appoint a
7 panel consisting of three qualified panelists and each side
8 shall, within 10 days after the appointment, strike one
9 panelist. The party whose appointment was challenged shall
10 strike last, and the remaining member shall serve.

11 (16) When a medical review panel is formed, the
12 chairperson shall within 5 days notify the court and the
13 parties by registered or certified mail of:

- 14 (a) The names and addresses of the panel members.
15 (b) The date on which the last member was selected.

16 (17)(a) A member of a medical review panel who is
17 selected under this chapter shall serve unless:

- 18 1. The parties by agreement excuse the panelist; or
19 2. The panelist is excused as provided in this
20 subsection for good cause shown.

21 (b) To show good cause for relief from serving, the
22 attorney selected as chairperson of a medical review panel
23 must serve an affidavit upon the clerk of the court. The
24 affidavit must set out the facts showing that service would
25 constitute an unreasonable burden or undue hardship. The clerk
26 may excuse the attorney from serving. The attorney shall
27 notify all parties, who shall then select a new chairperson as
28 provided in subsection (4).

29 (c) To show good cause for relief from serving, a
30 physician member of a medical review panel must serve an
31 affidavit upon the panel chairperson. The affidavit must set

1 out the facts showing that service would constitute an
2 unreasonable burden or undue hardship. The chairperson may
3 excuse the member from serving and notify all parties.

4 (18)(a) The panel shall give its expert opinion within
5 180 days after the selection of the last member of the initial
6 panel. However, if:

7 1. The chairperson of the panel is removed under
8 subsection (15), another member of the panel is removed under
9 subsection (16), or any member of the panel, including the
10 chairperson, is removed by a court order; and

11 2. A new member is selected to replace the removed
12 member more than 90 days after the last member of the initial
13 panel is selected,

14
15 the panel has 90 days after the selection of the new member to
16 give an expert opinion.

17 (b) If the panel has not given an opinion within the
18 time allowed under paragraph (a), the panel shall submit a
19 report to the trial court, stating the reasons for the delay.

20 (19) A party, attorney, or panelist who fails to act
21 as required by this section without good cause shown is
22 subject to mandate or appropriate sanctions upon application
23 to the court designated in the complaint as having
24 jurisdiction.

25 (20)(a) The trial court judge may remove the
26 chairperson of the panel if the judge determines that the
27 chairperson is not fulfilling the duties imposed upon the
28 chairperson by this section.

29 (b) If the chairperson is removed under this
30 subsection, a new chairperson shall be selected under this
31 section.

1 (21)(a) The chairperson may remove a member of the
2 panel if the chairperson determines that the member is not
3 fulfilling the duties imposed upon the panel members by this
4 section.

5 (b) If a member is removed under this subsection, a
6 new member shall be selected.

7 (22)(a) The evidence in written form to be considered
8 by the medical review panel shall be promptly submitted by the
9 respective parties.

10 (b) The evidence may consist of medical charts, X
11 rays, lab tests, excerpts of treatises, depositions of
12 witnesses, including parties, and any other form of evidence
13 allowable by the medical review panel.

14 (c) Depositions of parties and witnesses may be taken
15 before the convening of the panel.

16 (d) The chairperson shall ensure that before the panel
17 gives its expert opinion under subsection (27), each panel
18 member has the opportunity to review every item of evidence
19 submitted by the parties.

20 (e) Before considering any evidence or deliberating
21 with other panel members, each member of the medical review
22 panel shall take an oath in writing on a form provided by the
23 panel chairperson, as follows:

24 "I (swear) (affirm) under penalties of perjury that I
25 will well and truly consider the evidence submitted by the
26 parties; that I will render my opinion without bias, based
27 upon the evidence submitted by the parties; and that I have
28 not and will not communicate with any party or representative
29 of a party before rendering my opinion, except as authorized
30 by law."

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1 (23) A party, a party's agent, a party's attorney, or
2 a party's insurance carrier may not communicate with any
3 member of the panel, except as authorized by law, before the
4 giving of the panel's expert opinion under subsection (27).

5 (24) The chairperson of the panel shall advise the
6 panel relative to any legal question involved in the review
7 proceeding and shall prepare the opinion of the panel as
8 provided in subsection (27).

9 (25)(a) Either party, after submission of all evidence
10 and upon 10 days notice to the other side, may convene the
11 panel at a time and place agreeable to the members of the
12 panel. Either party may question the panel concerning any
13 matters relevant to issues to be decided by the panel before
14 the issuance of the panel's report.

15 (b) The chairperson of the panel shall preside at all
16 meetings and meetings shall be informal.

17 (26)(a) The panel has the right and duty to request
18 all necessary information.

19 (b) The panel may consult with medical authorities.

20 (c) The panel may examine reports of other health care
21 providers necessary to fully inform the panel regarding the
22 issue to be decided.

23 (d) Both parties shall have full access to any
24 material submitted to the panel.

25 (27)(a) The panel has the sole duty to express the
26 panel's expert opinion as to whether or not the evidence
27 supports the conclusion that the defendant or defendants acted
28 or failed to act within the appropriate standards of care as
29 charged in the complaint.

30 (b) After reviewing all evidence and after any
31 examination of the panel by counsel representing either party,

1 the panel shall, within 30 days, give one or more of the
2 following expert opinions, which must be in writing and signed
3 by the panelists:

4 1. The evidence supports the conclusion that the
5 defendant or defendants failed to comply with the appropriate
6 standard of care as charged in the complaint.

7 2. The evidence does not support the conclusion that
8 the defendant or defendants failed to meet the applicable
9 standard of care as charged in the complaint.

10 3. There is a material issue of fact, not requiring
11 expert opinion, bearing on liability for consideration by the
12 court or jury.

13 4. The conduct complained of was or was not a factor
14 of the resultant damages. If so, whether the plaintiff
15 suffered:

16 a. Any disability and the extent and duration of the
17 disability; and

18 b. Any permanent impairment and the percentage of the
19 impairment.

20 (28) A report of the expert opinion reached by the
21 medical review panel is admissible as evidence in any action
22 subsequently brought by the claimant in a court of law.
23 However, the expert opinion is not conclusive, and either
24 party, at the party's cost, has the right to call any member
25 of the medical review panel as a witness. If called, a witness
26 shall appear and testify.

27 (29) A panelist is immune from civil liability for all
28 communications, findings, opinions, and conclusions made in
29 the course and scope of duties prescribed by this section.

30 (30)(a) Each health care provider member of the
31 medical review panel is entitled to be paid:

1 1. Up to \$350 for all work performed as a member of
2 the panel, exclusive of time involved if called as a witness
3 to testify in court; and

4 2. Reasonable travel expense.

5 (b) The chairperson of the panel is entitled to be
6 paid:

7 1. At the rate of \$250 per diem, not to exceed \$2,000;
8 and

9 2. Reasonable travel expenses.

10 (c) The chairperson shall keep an accurate record of
11 the time and expenses of all the members of the panel. The
12 record shall be submitted to the parties for payment with the
13 panel's report.

14 (d) Fees of the panel, including travel expenses and
15 other expenses of the review, shall be paid by the side in
16 whose favor the majority opinion is written. If there is no
17 majority opinion, each side shall pay 50 percent of the cost.

18 (31) The chairperson shall submit a copy of the
19 panel's report to:

20 (a) The trial court; and

21 (b) All parties and attorneys

22
23 by registered or certified mail within 5 days after the panel
24 gives its opinion.

25 Section 5. Subsection (5) of section 766.202, Florida
26 Statutes, is amended to read:

27 766.202 Definitions; ss. 766.201-766.212.--As used in
28 ss. 766.201-766.212, the term:

29 (5) "Medical expert" means a person duly and regularly
30 engaged in the practice of his or her profession who holds a
31 health care professional degree from a university or college

1 and who meets the requirements of an expert witness in s.
2 766.102 and has had special professional training and
3 ~~experience or one possessed of special health care knowledge~~
4 ~~or skill about the subject upon which he or she is called to~~
5 ~~testify or provide an opinion.~~

6 Section 6. Subsection (4) is added to section 768.13,
7 Florida Statutes, to read:

8 768.13 Good Samaritan Act; immunity from civil
9 liability.--

10 (4) Any person, including a person licensed to
11 practice medicine, who gratuitously and in good faith renders
12 care or treatment in direct response to a biological or
13 chemical terrorist attack, is not liable for any civil damages
14 as a result of such care or treatment or as a result of any
15 act or failure to act in providing or arranging further
16 medical treatment unless such damages result from providing,
17 or failing to provide, medical care or treatment under
18 circumstances demonstrating a reckless disregard for the
19 consequences so as to affect the life or health of another.

20 Section 7. Subsection (10) is added to section 768.76,
21 Florida Statutes, to read:

22 768.76 Collateral sources of indemnity.--

23 (10) The existence and amount of any payment made to
24 the claimant, or made on the claimant's behalf, which is not a
25 collateral source or any collateral source that the trial
26 court determines does not reduce an award of damages may be
27 submitted to and shall be taken into account by the trier of
28 fact.

29 Section 8. Subsection (2) of section 768.78, Florida
30 Statutes, is amended to read:

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1 768.78 Alternative methods of payment of damage
2 awards.--

3 (2)(a) In any action for damages based on personal
4 injury or wrongful death arising out of medical malpractice,
5 whether in tort or contract, in which the trier of fact makes
6 an award to compensate the claimant ~~for future economic~~
7 ~~losses~~, payment of amounts intended to compensate the claimant
8 ~~for these losses~~ shall be made by one of the following means:

9 1. The defendant may make a lump-sum payment for all
10 damages so assessed, with future economic losses and expenses
11 reduced to present value; or

12 2. The court shall, at the request of either party,
13 enter a judgment ordering all ~~future economic~~ damages, ~~as~~
14 ~~itemized pursuant to s. 768.77~~, to be paid by periodic
15 payments rather than lump sum.

16 (b) For purposes of this subsection, "periodic
17 payment" means provision for the spreading of future economic
18 damage payments, in whole or in part, over a period of time,
19 as follows:

20 1. A specific finding of the dollar amount of periodic
21 payments that ~~which~~ will compensate the claimant for all ~~these~~
22 ~~future~~ damages after offset for collateral sources shall be
23 made. The total dollar amount of the periodic payments shall
24 equal the dollar amount of all ~~such future~~ damages before any
25 reduction to present value.

26 2. The defendant shall be required to post a bond or
27 security or otherwise to assure full payment of these damages
28 awarded. A bond is not adequate unless it is written by a
29 company authorized to do business in this state and is rated
30 A+ by Best's. If the defendant is unable to adequately assure
31 full payment of the damages, all damages, reduced to present

1 value, shall be paid to the claimant in a lump sum. No bond
2 may be canceled or be subject to cancellation unless at least
3 60 days' advance written notice is filed with the court and
4 the claimant. Upon termination of periodic payments, the
5 security, or so much as remains, shall be returned to the
6 defendant.

7 3. The provision for payment of ~~future~~ damages by
8 periodic payments shall specify the recipient or recipients of
9 the payments, the dollar amounts of the payments, the interval
10 between payments, and the number of payments or the period of
11 time over which payments shall be made.

12 Section 9. If any provision of this act or its
13 application to any person or circumstance is held invalid, the
14 invalidity does not affect other provisions or applications of
15 the act which can be given effect without the invalid
16 provision or application, and to this end the provisions of
17 this act are severable.

18 Section 10. This act shall take effect July 1, 2002,
19 and applies to any cause of action filed on or after that
20 date.

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23 SENATE SUMMARY

24 Provides for the Board of Medicine to issue
25 expert-witness certificates to out-of-state physicians
26 upon payment of a fee of \$25. Revises qualifications
27 under which a health care provider may be considered to
28 be a "similar health care provider" for purposes of
29 determining the standard of care in medical negligence
30 cases. Requires that certain expert witnesses hold an
31 expert-witness certificate. Provides a procedure for
establishing medical review panels to review malpractice
complaints and report to the trial court. Deletes a
requirement for paying future economic losses in certain
malpractice claims. (See bill for details.)