

# HOUSE BILL REPORT

## HB 2840

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### As Reported By House Committee On:

Law & Justice

**Title:** An act relating to establishing a certificate of merit procedure in law suits.

**Brief Description:** Establishing a certificate of merit procedure in law suits.

**Sponsors:** Representatives Foreman, Scott, Sheahan, McMahan, Backlund, Thompson, Clements, Goldsmith, Dyer, Huff, Carlson and Johnson.

### Brief History:

#### Committee Activity:

Law & Justice: 1/31/96, 2/1/96 [DPS].

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### HOUSE COMMITTEE ON LAW & JUSTICE

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Sheahan, Chairman; Delvin, Vice Chairman; Hickel, Vice Chairman; Carrell; Lambert; McMahan; Robertson; Smith and Sterk.

**Minority Report:** Do not pass. Signed by 8 members: Representatives Dellwo, Ranking Minority Member; Costa, Assistant Ranking Minority Member; Campbell; Chappell; Cody; Morris; Murray and Veloria.

**Staff:** Bill Perry (786-7123).

**Background:** Concern over the number of lawsuits that are filed apparently without merit has led to suggestions that before a suit may be tried, it should be certified in some manner as having a reasonable basis.

Generally, under current Washington law, bringing a "frivolous" lawsuit subjects a person to possible sanctions. Sanctions may apply to parties to such an action and to the attorneys who represent them.

With respect to a party to an action, a statute provides that

"In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense

was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense . . ." (RCW 4.84.185)

These sanctions against a party may be imposed after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party.

With respect to attorneys, a court rule provides that

"A lawyer shall not bring or defend . . . an issue . . . unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." (RPC 3.1)

Courts have awarded attorneys' fees and other costs under these provisions. The duties imposed on an attorney by these provisions have been described as

- the duty to conduct a reasonable inquiry into the facts supporting an action;
- the duty to conduct a reasonable inquiry into the law, such that an action embodies existing legal principles or a good faith argument for the extension, modification, or reversal of existing law; and
- the duty not to use an action for purposes of delay, harassment, or increasing the costs of litigation. (*Watson v. Maier*, 64 Wn. App. 889 (1992))

The reasonableness of conduct by an attorney under these provisions is judged on an objective basis. It is not enough that the person taking the frivolous action personally believed, even after exhaustive research, that a claim or other action was meritorious. (*Harrington v. Pailthorp*, 67 Wn. App. 901 (1992)) On the other hand, a prevailing party cannot recover attorneys' fees or costs under the statute unless the action of the non-prevailing party is frivolous as a whole. A court may not award fees and costs for parts of an action or defense that are frivolous. (*Rettkowski v. Ecology*, 76 Wn. App. 384 (1994))

It has been argued that these after-the-fact sanctions are an inefficient way to prevent frivolous lawsuits. Some states have instituted procedures for evaluating the merits of a lawsuit before it is tried.

**Summary of Substitute Bill:** A certificate of merit is required in certain civil actions. The claimant in these actions must file a certificate indicating that

- the claimant's attorney has reviewed the facts of the case;
- the attorney has consulted with an expert in the particular kind of lawsuit;
- the expert is willing and able to testify in the case; and

- the attorney has concluded the claim is reasonable and meritorious.

The certificate of merit must be filed within 90 days of the filing of the action. This 90-day period may be extended by the court upon a showing of good cause. Failure to file such a certificate is grounds for dismissal of the action or for sanctions against the claimant's attorney at the discretion of the court.

The certificate is required in actions for damages based on the negligence of a licensed, registered, or certified business person or professional, or of a health care facility, and in actions for damages based on a product liability claim. There are many state-licensed, registered, or certified businesses and professions, including accountants, architects, building contractors, cosmetologists, health care professionals, real estate brokers, plumbers, art dealers, security guards, and athlete agents.

The requirement for a certificate applies to actions filed on or after July 1, 1996.

**Substitute Bill Compared to Original Bill:** The substitute bill adds the provision allowing extension of the 90-day filing period.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Effective Date of Substitute Bill:** Ninety days after adjournment of session in which bill is passed.

**Testimony For:** The bill will help streamline cases. Most good plaintiffs' attorneys already perform the equivalent of this procedure. The bill will help weed out frivolous claims.

**Testimony Against:** Experience in other states shows these certificates just add cost and paperwork. Courts already have authority to handle frivolous claims early in a case.

**Testified:** Representative Foreman, prime sponsor; Cliff Webster, Washington State Medical Association and Architects and Engineers Legislative Council (pro); Clif Finch, Association of Washington Business (pro); and Larry Shannon, Washington State Trial Lawyers Association (con).