

HOUSE BILL REPORT

2EHB 1926

As Passed House:

February 16, 2004

Title: An act relating to expert witnesses in actions under chapter 7.70 RCW.

Brief Description: Limiting the use of expert witnesses.

Sponsors: By Representatives Lantz, Clibborn, Moeller, Schual-Berke, Cody, Morrell, Rockefeller, Kirby, Lovick, Kenney, Linville, Veloria, Conway, G. Simpson, Sommers and Haigh.

Brief History:

Committee Activity:

Judiciary: 2/6/04 [DP].

Floor Activity:

Passed House: 2/16/04, 56-42.

Brief Summary of Second Engrossed Bill

- Establishes qualifications for experts in medical malpractice actions.
- Limits the number of expert witnesses in a medical malpractice action to two per side on each issue, unless there is good cause for additional experts.
- Requires pre-trial expert reports and prohibits expert depositions in medical malpractice actions.
- Requires a plaintiff to file a certificate of merit when commencing a medical malpractice action.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass. Signed by 5 members: Representatives Lantz, Chair; Moeller, Vice Chair; Flannigan, Kirby and Lovick.

Minority Report: Do not pass. Signed by 4 members: Representatives Carrell, Ranking Minority Member; McMahan, Assistant Ranking Minority Member; Campbell and Newhouse.

Staff: Edie Adams (786-7180).

Background:

A health care provider may be held civilly liable for injuries to patients resulting from health care services. A patient's claim must allege one of the following:

- (1) the patient's injury resulted from a health care provider's failure to follow accepted standards of care, as measured against reasonably prudent, similarly situated health care providers within the state;
- (2) the health care provider promised the patient the injury would not occur; or
- (3) the patient did not consent to the procedure causing the injury or was not properly informed about the facts of the procedure.

In a medical malpractice action, the plaintiff has the burden of proof to establish all necessary elements. Expert witnesses are generally required in a medical malpractice action to establish the standard of care of a reasonably prudent health care provider and to prove that the failure to exercise that standard of care was the proximate cause of the patient's injury. Expert witnesses are not required to establish the standard of care if the conduct in question is within the common knowledge of the jury. For example, unintentionally leaving a foreign object in a patient after surgery or amputating the wrong limb may not require expert testimony.

Statutory law dealing with medical malpractice actions does not establish qualifications for expert witnesses. However, court rule provides requirements for the use of expert witnesses in any trial, including medical malpractice cases. Under Evidence Rule 702, a person may be an expert if qualified by "knowledge, skill, experience, training, or education."

Under the rules of Civil Procedure, courts have some discretion to limit the number of expert witnesses and can reject witnesses if they do not meet the standards of an expert. Prior to trial, the opposing party is entitled to depose any experts and other witnesses expected to testify.

Summary of Second Engrossed Bill:

A number of requirements and qualifications relating to expert witnesses in medical malpractice actions are adopted.

Expert Qualifications: An expert in a medical malpractice action must meet the following qualifications in order to testify at trial or execute a certificate of merit:

- Has expertise in the medical condition at issue in the action; and
- At the time of the incident, was either: (1) engaged in active practice in the same or similar area of practice or specialty as the defendant; or (2) teaching in the

same or similar area of practice or specialty as the defendant, including instruction regarding the particular condition at issue in the action.

The court may waive the expert qualifications if the court finds that: (1) extensive efforts were made to locate an expert meeting the qualifications, but none was willing and able to testify; and (2) the proposed expert is qualified to be an expert by virtue of his or her training, experience, and knowledge.

An expert opinion provided during the course of a medical malpractice action must be corroborated by admissible evidence. Examples of admissible evidence are provided, including treatment or practice protocols or guidelines, objective academic research, or clinical trials.

Number of Expert Witnesses: The number of expert witnesses allowed per side in a medical malpractice action is limited to two per issue, except upon a showing of good cause. In the event that multiple parties on the same side of an action cannot agree on the experts to be called, the court must allow additional experts upon a showing of good cause.

Pre-trial Expert Report: All parties to a medical malpractice action must file a pretrial expert report that discloses the identity of all expert witnesses and states the nature of the testimony the experts will present at trial. Further depositions of the experts are prohibited. The testimony presented by an expert at trial is limited in nature to the opinions presented in the pre-trial report.

Certificate of Merit: In medical malpractice actions involving a claim of a breach of the standard of care, the plaintiff must file a certificate of merit at the time of commencing the action. The certificate of merit must state that, based on the information known at the time, there is a reasonable probability that the defendant's conduct did not meet the required standard of care. The certificate of merit must be executed by a health care provider who meets the expert witness qualifications established in the act. The court may grant up to a 90-day extension of time for filing the certificate if the court finds there is good cause to grant the extension.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: None.

Testimony Against: None.

Persons Testifying: None.

Persons Signed In To Testify But Not Testifying: None.