

SENATE BILL REPORT

2EHB 1926

As Reported By Senate Committee On:
Judiciary, February 26, 2004

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

Brief Description: Limiting the use of expert witnesses.

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

Brief History:

Committee Activity: Judiciary: 4/2/03, 4/4/03 [DP]; 2/25/04, 2/26/04 [DP].

SENATE COMMITTEE ON JUDICIARY

Majority Report: Do pass.

Signed by Senators McCaslin, Chair; Esser, Vice Chair; Hargrove, Haugen, Johnson, Kline, Roach and Thibaudeau.

Staff: Jinnah Rose-McFadden (786-7421)

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.

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 whether the failure to exercise that standard of care was the proximate cause of the patient's injury. Expert witnesses are not required to establish a 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.

Courts have some discretion to limit the number of expert witnesses and, under Washington's Rules of Civil Procedure, courts can reject witnesses who do not meet the standards of an expert.

Summary of 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: (1) have expertise in the

medical condition at issue in the action; and (2) at the time of the incident, was either (a) engaged in active practice in the same or similar area of practice or specialty as the defendant; or (b) teaching in the same or similar area of practice or specialty as the defendant.

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 include 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. However, 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. Upon a showing of good cause, the court may grant up to a 90-day extension for filing the certificate.

Appropriation: None.

Fiscal Note: Available.

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

Testimony For: This bill will present immediate and significant cost savings to both plaintiffs and defendants. The greatest single cost in civil litigation is the cost of expert witnesses and depositions associated with expert witnesses. On average, each expert witness costs approximately \$15,000. We know this bill will reduce costs because a similar scheme used in federal courts is working and has reduced costs.

Testimony Against: (Concerns): This bill is technically flawed. The title of the bill does not include the universe of medical malpractice claims. The title should include reference to wrongful death claims. This bill places burdens on defendants. Generally, in medical malpractice claims, there are several defending parties. By requiring defendants to make a good cause

showing before they can hire more than two experts per issue, defendants are required to pay additional attorneys' fees and court costs.

Testified: PRO: Larry Shannon, WA State Trial Lawyers Association; CONCERNS: Cliff Webster, WA State Medical Association.