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HOUSE BILL NO. 1051

Offered January 9, 2008

Prefiled January 9, 2008

A BILL to amend and reenact §§ 8.01-20.1, 8.01-50.1, 8.01-581.1, 8.01-581.20, and 16.1-83.1 of the Code of Virginia, relating to medical malpractice; professional services.

Patron—Watts

Referred to Committee for Courts of Justice**Be it enacted by the General Assembly of Virginia:**

1. That §§ 8.01-20.1, 8.01-50.1, 8.01-581.1, 8.01-581.20, and 16.1-83.1 of the Code of Virginia are amended and reenacted as follows:

§ 8.01-20.1. Certification of expert witness opinion at time of service of process.

Every motion for judgment, counter claim, or third party claim in a medical malpractice action, at the time the plaintiff requests service of process upon a defendant, or requests a defendant to accept service of process, shall be deemed a certification that the plaintiff has obtained from an expert witness whom the plaintiff reasonably believes would qualify as an expert witness pursuant to subsection A of § 8.01-581.20 a written opinion signed by the expert witness that, based upon a reasonable understanding of the facts, the defendant for whom service of process has been requested deviated from the applicable standard of care *or from the provision of required professional services* and the deviation was a proximate cause of the injuries claimed. This certification is not necessary if the plaintiff, in good faith, alleges a medical malpractice action that asserts a theory of liability where expert testimony is unnecessary because the alleged act of negligence clearly lies within the range of the jury's common knowledge and experience.

The certifying expert shall not be required to be an expert witness expected to testify at trial nor shall any defendant be entitled to discover the identity or qualifications of the certifying expert or the nature of the certifying expert's opinions. Should the certifying expert be identified as an expert expected to testify at trial, the opinions and bases therefor shall be discoverable pursuant to Rule 4:1 of the Rules of Supreme Court of Virginia with the exception of the expert's status as a certifying expert.

Upon written request of any defendant, the plaintiff shall, within 10 business days after receipt of such request, provide the defendant with a certification form that affirms that the plaintiff had obtained the necessary certifying expert opinion at the time service was requested or affirms that the plaintiff did not need to obtain a certifying expert witness opinion. If the plaintiff did not obtain a necessary certifying expert opinion at the time the plaintiff requested service of process on a defendant as required under this section, the court shall impose sanctions according to the provisions of § 8.01-271.1 and may dismiss the case with prejudice.

§ 8.01-50.1. Certification of expert witness opinion at time of service of process.

Every motion for judgment, counter claim, or third party claim in any action pursuant to § 8.01-50 for wrongful death against a health care provider, at the time the plaintiff requests service of process upon a defendant, or requests a defendant to accept service of process, shall be deemed a certification that the plaintiff has obtained from an expert witness whom the plaintiff reasonably believes would qualify as an expert witness pursuant to subsection A of § 8.01-581.20 a written opinion signed by the expert witness that, based upon a reasonable understanding of the facts, the defendant for whom service of process has been requested deviated from the applicable standard of care *or from the provision of required professional services* and the deviation was a proximate cause of the injuries claimed. This certification is not necessary if the plaintiff, in good faith, alleges in his wrongful death action a medical malpractice theory of liability where expert testimony is unnecessary because the alleged act of negligence clearly lies within the range of the jury's common knowledge and experience.

The certifying expert shall not be required to be an expert expected to testify at trial nor shall any defendant be entitled to discover the identity or qualifications of the certifying expert or the nature of the certifying expert's opinions. Should the certifying expert be identified as an expert expected to testify at trial, the opinions and bases therefor shall be discoverable pursuant to Rule 4:1 of the Rules of Supreme Court of Virginia with the exception of the expert's status as a certifying expert.

Upon written request of any defendant, the plaintiff shall, within 10 business days after receipt of such request, provide the defendant with a certification form which affirms that the plaintiff had obtained the necessary certifying expert opinion at the time service was requested or affirms that the plaintiff did not need to obtain a certifying expert opinion. If the plaintiff did not obtain a necessary certifying expert opinion at the time the plaintiff requested service of process on a defendant, the court

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59 shall impose sanctions according to the provisions of § 8.01-271.1 and may dismiss the case with
60 prejudice.

61 § 8.01-581.1. Definitions.

62 As used in this chapter:

63 "Health care" means any act, *professional services*, or treatment performed or furnished, or which
64 should have been performed or furnished, by any health care provider for, to, or on behalf of a patient
65 during the patient's medical diagnosis, care, treatment ~~or~~, confinement, *or residency at a nursing home*.

66 "Health care provider" means (i) a person, corporation, facility or institution licensed by this
67 Commonwealth to provide health care or professional services as a physician or hospital, dentist,
68 pharmacist, registered nurse or licensed practical nurse or a person who holds a multistate privilege to
69 practice such nursing under the Nurse Licensure Compact, optometrist, podiatrist, chiropractor, physical
70 therapist, physical therapy assistant, clinical psychologist, clinical social worker, professional counselor,
71 licensed marriage and family therapist, licensed dental hygienist, health maintenance organization, or
72 emergency medical care attendant or technician who provides services on a fee basis; (ii) a professional
73 corporation, all of whose shareholders or members are so licensed; (iii) a partnership, all of whose
74 partners are so licensed; (iv) a nursing home as defined in § 54.1-3100 except those nursing institutions
75 conducted by and for those who rely upon treatment by spiritual means alone through prayer in
76 accordance with a recognized church or religious denomination; (v) a professional limited liability
77 company comprised of members as described in subdivision A 2 of § 13.1-1102; (vi) a corporation,
78 partnership, limited liability company or any other entity, except a state-operated facility, which employs
79 or engages a licensed health care provider and which primarily renders health care services; or (vii) a
80 director, officer, employee, independent contractor, or agent of the persons or entities referenced herein,
81 acting within the course and scope of his employment or engagement as related to health care or
82 professional services.

83 "Health maintenance organization" means any person licensed pursuant to Chapter 43 (§ 38.2-4300 et
84 seq.) of Title 38.2 who undertakes to provide or arrange for one or more health care plans.

85 "Hospital" means a public or private institution licensed pursuant to Chapter 5 (§ 32.1-123 et seq.) of
86 Title 32.1 or Article 2 (§ 37.2-403 et seq.) of Chapter 4 of Title 37.2.

87 "Impartial attorney" means an attorney who has not represented (i) the claimant, his family, his
88 partners, co-proprietors or his other business interests; or (ii) the health care provider, his family, his
89 partners, co-proprietors or his other business interests.

90 "Impartial health care provider" means a health care provider who (i) has not examined, treated or
91 been consulted regarding the claimant or his family; (ii) does not anticipate examining, treating, or being
92 consulted regarding the claimant or his family; or (iii) has not been an employee, partner or
93 co-proprietor of the health care provider against whom the claim is asserted.

94 "Malpractice" means any tort action or breach of contract action for personal injuries or wrongful
95 death, based on health care or professional services rendered, or which should have been rendered, by a
96 health care provider, to a patient.

97 "Patient" means any natural person who receives or should have received health care *or professional*
98 *services* from a licensed health care provider except those persons who are given health care in an
99 emergency situation which exempts the health care provider from liability for his emergency services in
100 accordance with § 8.01-225.

101 "Physician" means a person licensed to practice medicine or osteopathy in this Commonwealth
102 pursuant to Chapter 29 (§ 54.1-2900 et seq.) of Title 54.1.

103 "*Professional services*" means *services provided to a patient by a health care provider pursuant to*
104 *federal or state statutes or regulations*.

105 § 8.01-581.20. Standard of care in proceeding before medical malpractice review panel; expert
106 testimony; determination of standard in action for damages.

107 A. In any proceeding before a medical malpractice review panel or in any action against a physician,
108 clinical psychologist, podiatrist, dentist, nurse, hospital or other health care provider to recover damages
109 alleged to have been caused by medical malpractice where the acts or omissions so complained of are
110 alleged to have occurred in this Commonwealth, the standard of care by which the acts or omissions are
111 to be judged shall be that degree of skill and diligence practiced by a reasonably prudent practitioner in
112 the field of practice or specialty in this Commonwealth and the testimony of an expert witness,
113 otherwise qualified, as to such standard of care, shall be admitted; provided, however, that the standard
114 of care in the locality or in similar localities in which the alleged act or omission occurred shall be
115 applied if any party shall prove by a preponderance of the evidence that the health care services and
116 health care facilities available in the locality and the customary practices in such locality or similar
117 localities give rise to a standard of care which is more appropriate than a statewide standard. Any
118 physician who is licensed to practice in Virginia shall be presumed to know the statewide standard of
119 care in the specialty or field of medicine in which he is qualified and certified. This presumption shall
120 also apply to any physician who is licensed in some other state of the United States and meets the

educational and examination requirements for licensure in Virginia. An expert witness who is familiar with the statewide standard of care shall not have his testimony excluded on the ground that he does not practice in this Commonwealth. A witness shall be qualified to testify as an expert on the standard of care *or the professional services required* if he demonstrates expert knowledge of the standards of the defendant's specialty and of what conduct conforms or fails to conform to those standards and if he has had active clinical practice in either the defendant's specialty or a related field of medicine within one year of the date of the alleged act or omission forming the basis of the action *or he is actively engaged in providing the professional services at the type of or related facility at issue.*

B. In any action for damages resulting from medical malpractice, any issue as to the standard of care to be applied shall be determined by the jury, or the court trying the case without a jury.

C. In any action described in this section, each party may designate, identify or call to testify at trial no more than two expert witnesses per medical discipline on any issue presented. The court may permit a party, for good cause shown, to designate, identify, or call to testify at trial additional expert witnesses. The number of treating health care providers who may serve as expert witnesses pursuant to § 8.01-399 shall not be limited pursuant to this subsection, except for good cause shown. If the court permits a party to designate, identify, or call additional experts, the court may order that party to pay all costs incurred in the discovery of such additional experts. For good cause shown, pursuant to the Rules of Supreme Court of Virginia, the court may limit the number of expert witnesses other than those identified in this subsection whom a party may designate, identify, or call to testify at trial.

§ 16.1-83.1. Certification of expert witness opinion at time of service of process.

Every warrant in debt, counter claim, or third party claim in a medical malpractice action, at the time the plaintiff requests service of process upon a defendant, or requests a defendant to accept service of process, shall be deemed a certification that the plaintiff has obtained from an expert whom the plaintiff reasonably believes would qualify as an expert witness pursuant to subsection A of § 8.01-581.20 a written opinion signed by the expert witness that, based upon a reasonable understanding of the facts, the defendant for whom service of process has been requested deviated from the applicable standard of care *or from the provision of required professional services* and the deviation was a proximate cause of the injuries claimed. This certification is not necessary if the plaintiff, in good faith, alleges a medical malpractice action that asserts a theory of liability where expert testimony is unnecessary because the alleged act of negligence clearly lies within the range of the jury's common knowledge and experience.

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