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SENATE BILL NO. 699

AMENDMENT IN THE NATURE OF A SUBSTITUTE (Proposed by the Senate Committee for Courts of Justice

on February 1, 2013)

(Patrons Prior to Substitute—Senators Alexander and Northam [SB 1255])

A BILL to amend and reenact §§ 8.01-20.1, 8.01-50.1, and 16.1-83.1 of the Code of Virginia, relating to medical malpractice; expert witness certification; court review.

Be it enacted by the General Assembly of Virginia:

9 1. That §§ 8.01-20.1, 8.01-50.1, and 16.1-83.1 of the Code of Virginia are amended and reenacted 10 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 12 13 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 14 15 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 16 17 understanding of the facts, the defendant for whom service of process has been requested deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed. This 18 certification is not necessary if the plaintiff, in good faith, alleges a medical malpractice action that 19 20 asserts a theory of liability where expert testimony is unnecessary because the alleged act of negligence 21 clearly lies within the range of the jury's common knowledge and experience.

22 The certifying expert shall not be required to be an expert witness expected to testify at trial nor 23 shall any defendant be entitled to discover the identity or qualifications of the certifying expert or the 24 nature of the certifying expert's opinions. Should the certifying expert be identified as an expert expected 25 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. 26

27 Upon written request of any defendant, the plaintiff shall, within 10 business days after receipt of 28 such request, provide the defendant with a certification form that affirms that the plaintiff had obtained 29 the necessary certifying expert opinion at the time service was requested or affirms that the plaintiff did 30 not need to obtain a certifying expert witness opinion. The court, upon good cause shown, may conduct an in camera review of the certifying expert opinion obtained by the plaintiff as the court may deem 31 32 appropriate. If the plaintiff did not obtain a necessary certifying expert opinion at the time the plaintiff 33 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. 34 35

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

36 Every motion for judgment, counter claim, or third party claim in any action pursuant to § 8.01-50 37 for wrongful death against a health care provider, at the time the plaintiff requests service of process 38 upon a defendant, or requests a defendant to accept service of process, shall be deemed a certification 39 that the plaintiff has obtained from an expert witness whom the plaintiff reasonably believes would 40 qualify as an expert witness pursuant to subsection A of § 8.01-581.20 a written opinion signed by the 41 expert witness that, based upon a reasonable understanding of the facts, the defendant for whom service 42 of process has been requested deviated from the applicable standard of care and the deviation was a 43 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 44 unnecessary because the alleged act of negligence clearly lies within the range of the jury's common 45 46 knowledge and experience.

47 The certifying expert shall not be required to be an expert expected to testify at trial nor shall any **48** defendant be entitled to discover the identity or qualifications of the certifying expert or the nature of 49 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 50 51 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 52 53 such request, provide the defendant with a certification form which affirms that the plaintiff had 54 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. The court, upon good cause shown, may 55 conduct an in camera review of the certifying expert opinion obtained by the plaintiff as the court may 56 57 *deem appropriate.* 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 shall impose sanctions according to the 58 59 provisions of § 8.01-271.1 and may dismiss the case with prejudice.

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§ 16.1-83.1. Certification of expert witness opinion at time of service of process. 60

Every warrant in debt, counter claim, or third party claim in a medical malpractice action, at the time 61 62 the plaintiff requests service of process upon a defendant, or requests a defendant to accept service of 63 process, shall be deemed a certification that the plaintiff has obtained from an expert whom the plaintiff 64 reasonably believes would qualify as an expert witness pursuant to subsection A of § 8.01-581.20 a 65 written opinion signed by the expert witness that, based upon a reasonable understanding of the facts, 66 the defendant for whom service of process has been requested deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed. This certification is not necessary 67 68 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 69 70 jury's common knowledge and experience.

The certifying expert shall not be required to be an expert witness expected to testify at trial nor 71 72 shall any defendant be entitled to discover the identity or qualifications of the certifying expert or the nature of the certifying expert opinions. Should the certifying expert be identified as an expert expected 73 to testify at trial, the opinions and bases therefor shall be discoverable pursuant to Rule 4:1 of the Rules 74 75 of Supreme Court of Virginia with the exception of the expert's status as a certifying expert.

76 Upon written request of any defendant, the plaintiff shall, within 10 business days after receipt of 77 such request, provide the defendant with a certification form which affirms that the plaintiff had 78 obtained the necessary certifying expert opinion at the time service was requested or affirms that the 79 plaintiff did not need to obtain a certifying expert opinion. The court, upon good cause shown, may 80 conduct an in camera review of the certifying expert opinion obtained by the plaintiff as the court may deem appropriate. If the plaintiff did not obtain a necessary certifying expert opinion at the time the 81 plaintiff requested service of process on a defendant, the court shall impose sanctions according to the 82 83 provisions of § 8.01-271.1 and may dismiss the case with prejudice.