



# House of Representatives

General Assembly

**File No. 570**

February Session, 2010

House Bill No. 5537

*House of Representatives, April 15, 2010*

The Committee on Judiciary reported through REP. LAWLOR of the 99th Dist., Chairperson of the Committee on the part of the House, that the bill ought to pass.

## **AN ACT CONCERNING CERTIFICATES OF MERIT.**

Be it enacted by the Senate and House of Representatives in General Assembly convened:

1 Section 1. Section 52-184c of the general statutes is repealed and the  
2 following is substituted in lieu thereof (*Effective October 1, 2010, and*  
3 *applicable to actions filed on or after said date*):

4 (a) In any civil action to recover damages resulting from personal  
5 injury or wrongful death occurring on or after October 1, 1987, in  
6 which it is alleged that such injury or death resulted from the  
7 negligence of a health care provider, as defined in section 52-184b, the  
8 claimant shall have the burden of proving by the preponderance of the  
9 evidence that the alleged actions of the health care provider  
10 represented a breach of the prevailing professional standard of care for  
11 that health care provider. The prevailing professional standard of care  
12 for a given health care provider shall be that level of care, skill and  
13 treatment which, in light of all relevant surrounding circumstances, is  
14 recognized as acceptable and appropriate by reasonably prudent  
15 similar health care providers.

16 (b) If the defendant health care provider is not certified by the  
17 appropriate American board as being a specialist, is not trained and  
18 experienced in a medical specialty, or does not hold himself out as a  
19 specialist, a "similar health care provider" is one who: (1) Is licensed by  
20 the appropriate regulatory agency of this state or another state  
21 requiring the same or greater qualifications; and (2) is trained and  
22 experienced in the same discipline or school of practice and such  
23 training and experience shall be as a result of the active involvement in  
24 the practice or teaching of medicine within the five-year period before  
25 the incident giving rise to the claim.

26 (c) If the defendant health care provider is certified by the  
27 appropriate American board as a specialist, is trained and experienced  
28 in a medical specialty, or holds himself out as a specialist, a "similar  
29 health care provider" is one who: (1) Is trained and experienced in the  
30 same specialty; and (2) is certified by the appropriate American board  
31 in the same specialty; provided if the defendant health care provider is  
32 providing treatment or diagnosis for a condition which is not within  
33 his specialty, a specialist trained in the treatment or diagnosis for that  
34 condition shall be considered a "similar health care provider".

35 (d) [Any health care provider may testify as an expert in any action  
36 if he: (1) Is a "similar health care provider" pursuant to subsection (b)  
37 or (c) of this section; or (2) is not a similar health care provider  
38 pursuant to subsection (b) or (c) of this section but,] In addition to a  
39 similar health care provider described in subsection (b) or (c) of this  
40 section, a "similar health care provider" is one who, to the satisfaction  
41 of the court, possesses sufficient training, experience and knowledge as  
42 a result of practice or teaching in a related field of medicine, so as to be  
43 able to provide [such] expert testimony as to the prevailing  
44 professional standard of care in a given field of medicine. Such  
45 training, experience or knowledge shall be as a result of the active  
46 involvement in the practice or teaching of medicine within the five-  
47 year period before the incident giving rise to the claim.

48 (e) Any health care provider who qualifies as a similar health care

49 provider pursuant to subsection (b), (c) or (d) of this section may  
50 testify as an expert in any action.

51 Sec. 2. Section 52-190a of the general statutes is repealed and the  
52 following is substituted in lieu thereof (*Effective October 1, 2010, and*  
53 *applicable to actions filed on or after said date*):

54 (a) No civil action or apportionment complaint shall be filed to  
55 recover damages resulting from personal injury or wrongful death  
56 occurring on or after October 1, 1987, whether in tort or in contract, in  
57 which it is alleged that such injury or death resulted from the  
58 negligence of a health care provider, unless the attorney or party filing  
59 the action or apportionment complaint has made a reasonable inquiry  
60 as permitted by the circumstances to determine that there are grounds  
61 for a good faith belief that there has been negligence in the care or  
62 treatment of the claimant. The complaint, initial pleading or  
63 apportionment complaint shall contain a certificate of the attorney or  
64 party filing the action or apportionment complaint that such  
65 reasonable inquiry gave rise to a good faith belief that grounds exist  
66 for an action against each named defendant or for an apportionment  
67 complaint against each named apportionment defendant. To show the  
68 existence of such good faith, the claimant or the claimant's attorney,  
69 and any apportionment complainant or the apportionment  
70 complainant's attorney, shall obtain a written and signed opinion of a  
71 similar health care provider, as defined in [section 52-184c, which  
72 similar health care provider shall be selected pursuant to the  
73 provisions of said section] subsection (f) of this section, that there  
74 appears to be evidence of medical negligence and [includes a detailed  
75 basis for the formation of such opinion] which states one or more  
76 specific breaches of the prevailing professional standard of care. Such  
77 written opinion shall not be subject to discovery by any party except  
78 for questioning the validity of the certificate. Such written opinion  
79 shall not be required in any action against a health care provider for  
80 assault, lack of informed consent or ordinary negligence unrelated to  
81 the rendering of care or treatment. The claimant or the claimant's  
82 attorney, and any apportionment complainant or apportionment

83 complainant's attorney, shall retain the original written opinion and  
84 shall attach a copy of such written opinion, with the name and  
85 signature of the similar health care provider expunged, to such  
86 certificate. The similar health care provider who provides such written  
87 opinion shall not, without a showing of malice, be personally liable for  
88 any damages to the defendant health care provider by reason of  
89 having provided such written opinion. Any challenge to the  
90 qualifications of the similar health care provider who provides such  
91 written opinion shall be made only after the completion of discovery,  
92 and shall only be made as part of a challenge to the validity of the  
93 certificate. In addition to such written opinion, the court may consider  
94 other factors with regard to the existence of good faith. If the court  
95 determines, after the completion of discovery, that such certificate was  
96 not made in good faith and that no justiciable issue was presented  
97 against a health care provider that fully cooperated in providing  
98 informal discovery, the court upon motion or upon its own initiative  
99 shall impose upon the person who signed such certificate or a  
100 represented party, or both, an appropriate sanction which may include  
101 an order to pay to the other party or parties the amount of the  
102 reasonable expenses incurred because of the filing of the pleading,  
103 motion or other paper, including a reasonable attorney's fee. The court  
104 may also submit the matter to the appropriate authority for  
105 disciplinary review of the attorney if the claimant's attorney or the  
106 apportionment complainant's attorney submitted the certificate.

107 (b) Upon petition to the clerk of the court where the civil action will  
108 be filed to recover damages resulting from personal injury or wrongful  
109 death, an automatic ninety-day extension of the statute of limitations  
110 shall be granted to allow the reasonable inquiry required by subsection  
111 (a) of this section. This period shall be in addition to other tolling  
112 periods.

113 (c) The failure to obtain and file the written opinion required by  
114 subsection (a) of this section [shall] may be grounds for the dismissal  
115 of the action, except that no such action may be dismissed for failure to  
116 obtain and file such written opinion unless the plaintiff has failed to

117 remedy such failure within thirty days after being ordered to do so by  
 118 the court.

119 (d) A defendant's motion to dismiss an action based on the failure to  
 120 obtain or file the written opinion required by subsection (a) of this  
 121 section shall not be granted unless it is filed within thirty days after the  
 122 return date of the action brought against the defendant.

123 (e) The written opinion required by subsection (a) of this section  
 124 shall (1) be used for the sole purpose of demonstrating that the  
 125 claimant has made a reasonable inquiry as permitted by the  
 126 circumstances to determine that there are grounds for a good faith  
 127 belief that there has been negligence in the care or treatment of the  
 128 claimant with respect to each named defendant, and (2) not limit the  
 129 allegations in the complaint against any named defendant or limit the  
 130 testimony of expert witnesses.

131 (f) For the purposes of this section, "similar health care provider"  
 132 means: (1) A similar health care provider, as defined in subsection (b),  
 133 (c) or (d) of section 52-184c, as amended by this act, who is selected  
 134 pursuant to the provisions of said subsections, or (2) a health care  
 135 provider who would be qualified to testify regarding the prevailing  
 136 professional standard of care with respect to any defendant that is a  
 137 corporation or business entity, including, but not limited to, a hospital,  
 138 as defined in section 19a-490, nursing home, as defined in section 19a-  
 139 490, or health care center, as defined in section 38a-175, or any other  
 140 corporation or business entity that employs multiple types of  
 141 specialties of health care providers.

This act shall take effect as follows and shall amend the following sections:		
Section 1	<i>October 1, 2010, and applicable to actions filed on or after said date</i>	52-184c
Sec. 2	<i>October 1, 2010, and applicable to actions filed on or after said date</i>	52-190a

***JUD***      *Joint Favorable*

The following Fiscal Impact Statement and Bill Analysis are prepared for the benefit of the members of the General Assembly, solely for purposes of information, summarization and explanation and do not represent the intent of the General Assembly or either chamber thereof for any purpose. In general, fiscal impacts are based upon a variety of informational sources, including the analyst's professional knowledge. Whenever applicable, agency data is consulted as part of the analysis, however final products do not necessarily reflect an assessment from any specific department.

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***OFA Fiscal Note******State Impact:*** None***Municipal Impact:*** None***Explanation***

The bill makes changes to the treatment of testimony submitted pursuant to certain civil actions, which has no fiscal impact.

***The Out Years******State Impact:*** None***Municipal Impact:*** None

**OLR Bill Analysis****HB 5537*****AN ACT CONCERNING CERTIFICATES OF MERIT.*****SUMMARY:**

By law, an attorney or claimant cannot file a medical malpractice lawsuit or apportionment complaint (see BACKGROUND) unless he or she has made a reasonable inquiry as permitted by the circumstances to determine that grounds exist for a good faith belief that the claimant received negligent medical care or treatment. The complaint or initial pleading must contain a certificate to this effect. To show such good faith, the claimant or attorney must obtain a written, signed opinion from a similar health care provider that there appears to be evidence of medical negligence.

This bill modifies these requirements in several respects. Specifically, it:

1. eliminates the requirement that the opinion letter include a detailed basis for the formation of the opinion, instead requiring that it state one or more specific breaches of the prevailing professional standard of care;
2. makes dismissal of the case for failure to obtain the opinion letter discretionary instead of mandatory, provides claimants an opportunity to remedy a failure to file an opinion letter, and establishes a deadline for bringing such a motion to dismiss;
3. broadens the definition of "similar health care provider" for purposes of identifying those qualified to submit an opinion letter;
4. limits the opportunity to raise challenges to the similar health

care provider's qualifications by allowing them only after discovery is complete and only as part of a challenge to the validity of the good faith certificate;

5. eliminates use of the opinion letter in actions against health care providers for assault, lack of informed consent, or ordinary negligence unrelated to the rendering of care or treatment; and
6. specifies that the opinion letter must be used for the sole purpose of demonstrating the claimant's reasonable inquiry under the circumstances to determine grounds for a good faith belief that the defendant committed malpractice, and is not to be used to limit allegations in the complaint against any defendant or to limit expert witness testimony.

EFFECTIVE DATE: October 1, 2010, and applicable to actions filed on or after that date.

#### **SIMILAR HEALTH CARE PROVIDER**

By law, a similar health care provider for purposes of submitting an opinion letter must be:

1. if the defendant is a specialist, a provider (a) trained and experienced in the same specialty as the defendant and (b) certified by the appropriate American board in that specialty, provided that if the defendant is providing treatment or diagnosis for a condition not within his or her specialty, a specialist trained in that condition is also considered a similar health care provider; or
2. if the defendant is not board certified, trained, or experienced as a specialist, or does not hold himself or herself out as a specialist, a provider (a) licensed by the appropriate Connecticut agency or another state requiring the same or greater qualifications and (b) trained and experienced in the same discipline or school of practice as the defendant as a result of active involvement in practice or teaching within the five

years before the incident giving rise to the claim.

The bill broadens the definition of “similar health care provider” for purposes of the opinion letter to also include:

1. a provider who, to the court’s satisfaction, has sufficient training, experience, and knowledge, as a result of the active involvement in practice or teaching in a related field within the five years before the incident giving rise to the claim, to be able to provide expert testimony as to the prevailing professional standard of care in a given field of medicine, and
2. a provider qualified to testify on the prevailing professional standard of care with respect to any defendant that is a corporation or business entity, including hospitals, nursing homes, health care centers, or other corporations or business entities employing multiple types of specialties of health care providers.

The bill also classifies providers in category 1 above as “similar health care providers” for purposes of testifying as an expert at trial. Current law does not classify such providers as similar health care providers but does allow them to testify.

#### **DISMISSAL FOR FAILURE TO FILE OPINION LETTER; OPPORTUNITY TO REMEDY FAILURE**

The bill makes dismissal due to failure to obtain and file the opinion letter discretionary, instead of mandatory, and only allows dismissal if the plaintiff fails to remedy the failure within 30 days of the court’s order to remedy. The bill further provides that a motion to dismiss based on such a failure can only be granted if filed within 30 days of the action’s return date.

#### **BACKGROUND**

##### ***Apportionment Complaints***

The requirement for a good faith certificate and opinion letter applies as well to apportionment complaints against another health

care provider. An apportionment complaint is a defendant's claim in a medical malpractice lawsuit that another health care provider, who the plaintiff did not make a defendant, committed malpractice and partially or totally caused the plaintiff's damages.

**COMMITTEE ACTION**

Judiciary Committee

Joint Favorable

Yea 39 Nay 0 (03/29/2010)