

HOUSE BILL No. 5699

December 15, 2009, Introduced by Reps. Kennedy, Liss, Spade, Switalski, Valentine, Haugh, Barnett, Cushingberry, Haase, Womack and Slavens and referred to the Committee on Judiciary.

A bill to amend 1961 PA 236, entitled
"Revised judiciary act of 1961,"
by amending sections 5838a and 5851 (MCL 600.5838a and 600.5851),
section 5838a as amended by 1993 PA 78 and section 5851 as amended
by 1993 PA 283.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 5838a. (1) For purposes of this act, a claim based on the
2 medical malpractice of a person or entity who is or who holds
3 himself or herself out to be a licensed health care professional,
4 licensed health facility or agency, or an employee or agent of a
5 licensed health facility or agency who is engaging in or otherwise
6 assisting in medical care and treatment, whether or not the
7 licensed health care professional, licensed health facility or
8 agency, ~~or their~~ employee, or agent is engaged in the practice of

1 the health profession in a sole proprietorship, partnership,
2 professional corporation, or other business entity, accrues at the
3 time of the act or omission that is the basis for the claim of
4 medical malpractice, regardless of the time the plaintiff discovers
5 or otherwise has knowledge of the claim. As used in this
6 subsection:

7 (a) "Licensed health facility or agency" means a health
8 facility or agency licensed under article 17 of the public health
9 code, ~~Act No. 368 of the Public Acts of 1978, being sections~~
10 ~~333.20101 to 333.22260 of the Michigan Compiled Laws 1978 PA 368,~~
11 **MCL 333.20101 TO 333.22260.**

12 (b) "Licensed health care professional" means an individual
13 licensed or registered under article 15 of the public health code,
14 ~~Act No. 368 of the Public Acts of 1978, being sections 333.16101 to~~
15 ~~333.18838 of the Michigan Compiled Laws 1978 PA 368, MCL 333.16101~~
16 **TO 333.18838,** and engaged in the practice of his or her health
17 profession in a sole proprietorship, partnership, professional
18 corporation, or other business entity. However, licensed health
19 care professional does not include a sanitarian or a veterinarian.

20 (2) Except as otherwise provided in this subsection, an action
21 involving a claim based on medical malpractice may be commenced at
22 any time within the applicable period prescribed in section 5805 or
23 sections 5851 to 5856, or within 6 months after the plaintiff
24 discovers or should have discovered the existence of the claim,
25 whichever is later. However, except as otherwise provided in
26 section ~~5851(7) or (8)~~ **5851(6) OR (7)**, the claim shall not be
27 commenced later than 6 years after the date of the act or omission

1 that is the basis for the claim. The burden of proving that the
2 plaintiff, as a result of physical discomfort, appearance,
3 condition, or otherwise, neither discovered nor should have
4 discovered the existence of the claim at least 6 months before the
5 expiration of the period otherwise applicable to the claim is on
6 the plaintiff. A medical malpractice action that is not commenced
7 within the time prescribed by this subsection is barred. This
8 subsection does not apply, and the plaintiff is subject to the
9 period of limitations set forth in subsection (3), under 1 of the
10 following circumstances:

11 (a) ~~If discovery~~ **DISCOVERY** of the existence of the claim was
12 prevented by the fraudulent conduct of the health care professional
13 against whom the claim is made or a named employee or agent of the
14 health **CARE** professional against whom the claim is made, or of the
15 health facility against whom the claim is made or a named employee
16 or agent of a health facility against whom the claim is made.

17 (b) There has been permanent loss of or damage to a
18 reproductive organ resulting in the inability to procreate.

19 (3) An action involving a claim based on medical malpractice
20 under circumstances described in subsection (2) (a) or (b) may be
21 commenced at any time within the applicable period prescribed in
22 section 5805 or sections 5851 to 5856, or within 6 months after the
23 plaintiff discovers or should have discovered the existence of the
24 claim, whichever is later. The burden of proving that the
25 plaintiff, as a result of physical discomfort, appearance,
26 condition or otherwise, neither discovered nor should have
27 discovered the existence of the claim at least 6 months before the

1 expiration of the period otherwise applicable to the claim is on
2 the plaintiff. A medical malpractice action that is not commenced
3 within the time prescribed by this subsection is barred.

4 Sec. 5851. (1) Except as otherwise provided in ~~subsections (7)~~
5 ~~and (8)~~ **SUBSECTION (2), (6), OR (7)**, if the person first entitled
6 to make an entry or bring an action under this act is ~~under~~ **LESS**
7 **THAN** 18 years of age or insane at the time the claim accrues, the
8 person or those claiming under the person ~~shall~~ have 1 year after
9 the disability is removed, through death or otherwise, to make the
10 entry or bring the action although the period of limitations has
11 run. This section does not ~~lessen~~ **SHORTEN** the time ~~provided for in~~
12 **WITHIN WHICH AN ACTION MAY BE COMMENCED UNDER** section 5852.

13 ~~———— (2) The term insane as employed in this chapter means a~~
14 ~~condition of mental derangement such as to prevent the sufferer~~
15 ~~from comprehending rights he or she is otherwise bound to know and~~
16 ~~is not dependent on whether or not the person has been judicially~~
17 ~~declared to be insane.~~

18 (2) **SUBJECT TO SUBSECTION (10), IF A CLAIM THAT ARISES FROM**
19 **SEXUAL CONDUCT WITH AN INDIVIDUAL ACCRUES WHEN THE INDIVIDUAL IS**
20 **LESS THAN 18 YEARS OF AGE, THE INDIVIDUAL OR A PERSON ENTITLED TO**
21 **BRING AN ACTION BASED ON THE CLAIM HAS 2 YEARS AFTER THE EFFECTIVE**
22 **DATE OF THE AMENDATORY ACT THAT ADDED THIS SUBSECTION OR 30 YEARS**
23 **AFTER THE DISABILITY IS REMOVED, WHICHEVER IS LATER, TO BRING THE**
24 **ACTION, REGARDLESS OF WHETHER THE PERIOD OF LIMITATIONS HAS RUN.**

25 (3) ~~To be considered a disability~~ **UNDER THIS SECTION**, the
26 infancy or insanity must exist at the time the claim accrues. If
27 the disability comes into existence after the claim ~~has accrued,~~ a

1 ~~court shall not recognize the disability under this section for the~~
2 ~~purpose of modifying ACCRUES, the period of limitations IS NOT~~
3 ~~MODIFIED BY THIS SECTION.~~

4 (4) ~~A person shall not tack successive disabilities. A court~~
5 ~~shall recognize only SUCCESSIVE DISABILITIES MAY NOT BE TACKED.~~
6 ~~ONLY~~ those disabilities that exist at the time the claim first
7 accrues and that disable the person to whom the claim first accrues
8 ~~for the purpose of modifying MODIFY the period of limitations UNDER~~
9 ~~THIS SECTION.~~

10 (5) ~~A court shall recognize IF both of the disabilities of~~
11 ~~infancy or AND insanity that disable the person to whom the A claim~~
12 ~~first accrues at the time the claim first accrues, BOTH~~
13 ~~DISABILITIES APPLY UNDER THIS SECTION. A court shall count the year~~
14 ~~A PERIOD~~ of grace provided in this section ~~from~~ **BEGINS ON** the
15 termination of the last disability to the person to whom the claim
16 originally accrued that has continued from the time the claim
17 accrued, whether this disability terminates because of the death of
18 the person disabled or for some other reason.

19 ~~———— (6) With respect to a claim accruing before the effective~~
20 ~~date of the age of majority act of 1971, Act No. 79 of the Public~~
21 ~~Acts of 1971, being sections 722.51 to 722.55 of the Michigan~~
22 ~~Compiled Laws, the disability of infancy is removed as of the~~
23 ~~effective date of Act No. 79 of the Public Acts of 1971, as to~~
24 ~~persons who were at least 18 years of age but less than 21 years of~~
25 ~~age on January 1, 1972, and is removed as of the eighteenth~~
26 ~~birthday of a person who was under 18 years of age on January 1,~~
27 ~~1972.~~

1 (6) ~~(7)~~—Except as otherwise provided in subsection ~~(8)~~—(7),
2 if, at the time a claim alleging medical malpractice accrues to a
3 person under section 5838a the person has not reached his or her
4 eighth birthday, a person shall not bring an action based on the
5 claim unless the action is commenced on or before the person's
6 tenth birthday or within the period of limitations set forth in
7 section 5838a, whichever is later. If, at the time a claim alleging
8 medical malpractice accrues to a person under section 5838a, the
9 person has reached his or her eighth birthday, he or she is subject
10 to the period of limitations set forth in section 5838a.

11 (7) ~~(8)~~—If, at the time a claim alleging medical malpractice
12 accrues to a person under section 5838a, the person has not reached
13 his or her thirteenth birthday and if the claim involves an injury
14 to the person's reproductive system, a person shall not bring an
15 action based on the claim unless the action is commenced on or
16 before the person's fifteenth birthday or within the period of
17 limitations set forth in section 5838a, whichever is later. If, at
18 the time a claim alleging medical malpractice accrues to a person
19 under section 5838a, the person has reached his or her thirteenth
20 birthday and the claim involves an injury to the person's
21 reproductive system, he or she is subject to the period of
22 limitations set forth in section 5838a.

23 (8) ~~(9)~~—If a person was serving a term of imprisonment on ~~the~~
24 ~~effective date of the 1993 amendatory act that added this~~
25 ~~subsection~~ **APRIL 1, 1994**, and that person has a cause of action to
26 which the disability of imprisonment would have been applicable
27 under the former provisions of this section, an entry may be made

1 or an action may be brought under this act for that cause of action
2 within 1 year after ~~the effective date of the 1993 amendatory act~~
3 ~~that added this subsection~~ **APRIL 1, 1994**, or within any other
4 applicable period of limitation provided by law.

5 (9) ~~(10)~~—If a person died or was released from imprisonment at
6 any time within the period of 1 year preceding ~~the effective date~~
7 ~~of the 1993 amendatory act that added this subsection~~ **APRIL 1,**
8 **1994**, and that person had a cause of action to which the disability
9 of imprisonment would have been applicable under the former
10 provisions of this section on the date of his or her death or
11 release from imprisonment, an entry may be made or an action may be
12 brought under this act for that cause of action within 1 year after
13 the date of his or her death or release from imprisonment, or
14 within any other applicable period of limitation provided by law.

15 (10) **SUBSECTION (2) APPLIES TO A PERSON AGAINST WHOM AN ACTION**
16 **IS BROUGHT WHO IS NOT THE INDIVIDUAL WHO COMMITTED THE SEXUAL**
17 **CONDUCT IF THE INDIVIDUAL WHO COMMITTED THE SEXUAL CONDUCT WAS AT**
18 **THE TIME AN EMPLOYEE, VOLUNTEER, REPRESENTATIVE, OR AGENT OF THE**
19 **PERSON, IF THE PERSON KNEW, HAD REASON TO KNOW, OR HAD NOTICE OF**
20 **PREVIOUS SEXUAL CONDUCT BY THE INDIVIDUAL, AND IF THE PERSON FAILED**
21 **TO TAKE REASONABLE STEPS TO AVOID FUTURE ACTS OF SEXUAL CONDUCT BY**
22 **THE EMPLOYEE, VOLUNTEER, REPRESENTATIVE, OR AGENT. REASONABLE STEPS**
23 **TO AVOID FUTURE ACTS OF SEXUAL CONDUCT INCLUDE PREVENTING OR**
24 **AVOIDING PLACEMENT OF THE EMPLOYEE, VOLUNTEER, REPRESENTATIVE, OR**
25 **AGENT IN A FUNCTION OR ENVIRONMENT IN WHICH CONTACT WITH CHILDREN**
26 **IS AN INHERENT PART.**

27 (11) As used in this section: ~~—~~"release

1 (A) "INSANE" MEANS SUFFERING UNDER A CONDITION OF MENTAL
2 DERANGEMENT THAT PREVENTS THE SUFFERER FROM COMPREHENDING RIGHTS HE
3 OR SHE IS OTHERWISE BOUND TO KNOW, REGARDLESS OF WHETHER THE
4 INDIVIDUAL HAS BEEN JUDICIALLY DECLARED TO BE INSANE.

5 (B) "PERSON" MEANS AN INDIVIDUAL, PARTNERSHIP, CORPORATION,
6 ASSOCIATION, GOVERNMENTAL ENTITY, OR OTHER LEGAL ENTITY.

7 (C) "RELEASE from imprisonment" means either of the following:

8 (i) ~~(a)~~—A final release or discharge from imprisonment in a
9 county jail.

10 (ii) ~~(b)~~—Release on parole or a final release or discharge from
11 imprisonment in a state or federal correctional facility.

12 (D) "SEXUAL CONDUCT" MEANS CONDUCT PROSCRIBED BY SECTION 520B,
13 520C, 520D, 520E, OR 520G OF THE MICHIGAN PENAL CODE, 1931 PA 328,
14 MCL 750.520B, 750.520C, 750.520D, 750.520E, AND 750.520G,
15 REGARDLESS OF WHETHER THE CONDUCT WAS THE SUBJECT OF A CRIMINAL
16 PROSECUTION OR WHETHER THE CONDUCT CAN BE PROVED BEYOND A
17 REASONABLE DOUBT.