

HOUSE BILL No. 5399

February 14, 2012, Introduced by Reps. Meadows, Liss, Slavens, Brown, Hovey-Wright, Rutledge, LeBlanc, Switalski and Segal and referred to the Committee on Judiciary.

A bill to amend 1961 PA 236, entitled
"Revised judicature 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(3) OR (4),~~ 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), (3), OR (4)**, 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~~ **MENTALLY ILL** at the time the claim
 8 accrues, the person or those claiming ~~under~~ **THROUGH** the person
 9 ~~shall have~~ 1 year after the disability is removed, through death or
 10 otherwise, to make the entry or bring the action although the
 11 period of limitations has run. This section does not ~~lessen~~ **SHORTEN**
 12 the time ~~provided for in~~ **WITHIN WHICH AN ACTION MAY BE COMMENCED**
 13 **UNDER** section 5852.

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

19 ~~—— (3) To be considered a disability, the infancy or insanity~~
 20 ~~must exist at the time the claim accrues. If the disability comes~~
 21 ~~into existence after the claim has accrued, a court shall not~~
 22 ~~recognize the disability under this section for the purpose of~~
 23 ~~modifying the period of limitations.~~

24 ~~—— (4) A person shall not tack successive disabilities. A court~~
 25 ~~shall recognize only those disabilities that exist at the time the~~
 26 ~~claim first accrues and that disable the person to whom the claim~~
 27 ~~first accrues for the purpose of modifying the period of~~

1 ~~limitations.~~

2 ~~—— (5) A court shall recognize both of the disabilities of~~
3 ~~infancy or insanity that disable the person to whom the claim first~~
4 ~~accrues at the time the claim first accrues. A court shall count~~
5 ~~the year of grace provided in this section from the termination of~~
6 ~~the last disability to the person to whom the claim originally~~
7 ~~accrued that has continued from the time the claim accrued, whether~~
8 ~~this disability terminates because of the death of the person~~
9 ~~disabled or for some other reason.~~

10 ~~—— (6) With respect to a claim accruing before the effective date~~
11 ~~of the age of majority act of 1971, Act No. 79 of the Public Acts~~
12 ~~of 1971, being sections 722.51 to 722.55 of the Michigan Compiled~~
13 ~~Laws, the disability of infancy is removed as of the effective date~~
14 ~~of Act No. 79 of the Public Acts of 1971, as to persons who were at~~
15 ~~least 18 years of age but less than 21 years of age on January 1,~~
16 ~~1972, and is removed as of the eighteenth birthday of a person who~~
17 ~~was under 18 years of age on January 1, 1972.~~

18 (2) SUBJECT TO SUBSECTION (7), 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 10 YEARS AFTER THE
22 DISABILITY IS REMOVED TO BRING THE ACTION, REGARDLESS OF WHETHER
23 THE PERIOD OF LIMITATIONS HAS RUN.

24 (3) ~~(7)~~—Except as otherwise provided in subsection ~~(8)~~—(4),
25 if, at the time a claim alleging medical malpractice accrues to a
26 person under section 5838a the person has not reached his or her
27 eighth birthday, a person shall not bring an action based on the

1 claim unless the action is commenced on or before the person's
2 tenth birthday or within the period of limitations set forth in
3 section 5838a, whichever is later. If, at the time a claim alleging
4 medical malpractice accrues to a person under section 5838a, the
5 person has reached his or her eighth birthday, he or she is subject
6 to the period of limitations set forth in section 5838a.

7 (4) ~~(8)~~—If, at the time a claim alleging medical malpractice
8 accrues to a person under section 5838a, the person has not reached
9 his or her thirteenth birthday and if the claim involves an injury
10 to the person's reproductive system, a person shall not bring an
11 action based on the claim unless the action is commenced on or
12 before the person's fifteenth birthday or within the period of
13 limitations set forth in section 5838a, whichever is later. If, at
14 the time a claim alleging medical malpractice accrues to a person
15 under section 5838a, the person has reached his or her thirteenth
16 birthday and the claim involves an injury to the person's
17 reproductive system, he or she is subject to the period of
18 limitations set forth in section 5838a.

19 (5) ~~(9)~~—If a person was serving a term of imprisonment on the
20 ~~effective date of the 1993 amendatory act that added this~~
21 ~~subsection~~ **APRIL 1, 1994**, and that person has a cause of action to
22 which the disability of imprisonment would have been applicable
23 under the former provisions of this section, an entry may be made
24 or an action may be brought under this act for that cause of action
25 within 1 year after ~~the effective date of the 1993 amendatory act~~
26 ~~that added this subsection~~ **APRIL 1, 1994**, or within any other
27 applicable period of limitation provided by law.

1 (6) ~~(10)~~ If a person died or was released from imprisonment at
2 any time within the period of 1 year preceding ~~the effective date~~
3 ~~of the 1993 amendatory act that added this subsection~~ **APRIL 1,**
4 **1994,** and that person had a cause of action to which the disability
5 of imprisonment would have been applicable under the former
6 provisions of this section on the date of his or her death or
7 release from imprisonment, an entry may be made or an action may be
8 brought under this act for that cause of action within 1 year after
9 the date of his or her death or release from imprisonment, or
10 within any other applicable period of limitation provided by law.

11 **(7) SUBSECTION (2) APPLIES TO A CLAIM BASED ON RESPONDEAT**
12 **SUPERIOR ONLY IF THE DEFENDANT EMPLOYER KNEW, HAD REASON TO KNOW,**
13 **OR HAD NOTICE OF PREVIOUS SEXUAL CONDUCT BY THE EMPLOYEE,**
14 **VOLUNTEER, REPRESENTATIVE, OR AGENT, AND IF THE DEFENDANT FAILED TO**
15 **TAKE REASONABLE STEPS TO AVOID FUTURE ACTS OF SEXUAL CONDUCT BY THE**
16 **EMPLOYEE, VOLUNTEER, REPRESENTATIVE, OR AGENT. REASONABLE STEPS TO**
17 **AVOID FUTURE ACTS OF SEXUAL CONDUCT INCLUDE TERMINATING THE**
18 **EMPLOYEE AND PREVENTING OR AVOIDING PLACEMENT OF THE EMPLOYEE,**
19 **VOLUNTEER, REPRESENTATIVE, OR AGENT IN A POSITION IN WHICH CONTACT**
20 **WITH INDIVIDUALS LESS THAN 18 YEARS OF AGE OCCURS WHILE THE**
21 **EMPLOYEE, VOLUNTEER, REPRESENTATIVE, OR AGENT IS ACTING AS**
22 **EMPLOYEE, VOLUNTEER, REPRESENTATIVE, OR AGENT FOR THE DEFENDANT, IF**
23 **THE EMPLOYER REPORTS THE SEXUAL CONDUCT TO THE APPROPRIATE LAW**
24 **ENFORCEMENT AUTHORITIES.**

25 (8) ~~(11)~~ As used in this section: ~~"release~~

26 **(A) "MENTALLY ILL" MEANS SUFFERING UNDER A CONDITION OF MENTAL**
27 **ILLNESS THAT PREVENTS THE SUFFERER FROM COMPREHENDING OR EXERCISING**

1 RIGHTS HE OR SHE POSSESSES. MENTAL ILLNESS DOES NOT DEPEND ON
2 WHETHER THE INDIVIDUAL HAS BEEN JUDICIALLY DETERMINED TO BE
3 SUFFERING FROM A MENTAL ILLNESS.

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

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

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

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

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