

HOUSE BILL No. 5435

January 8, 1992, Introduced by Reps. Hickner, Keith, Griffin, Niederstadt, Hoffman, Rocca, Bartnik, DeMars, Weeks, Alley, Joe Young, Sr., Porreca, Wozniak, Trim, Nye, Bankes, DeLange, Shugars, Jamian, Dalman, Oxender, Munsell, Martin, Van Singel, Ostling, Hillegonds, Joe Young, Jr., Sparks, Stallworth, Hunter, Sikkema, Middaugh, Bodem, Gnodtke, Bryant, Fitzgerald, London, Gilmer, Brackenridge, McBryde, Middleton, Robertson, Bandstra, Harrison, Randall, McNutt, Dolan, Horton, Bobier, Varga, Dobb, Trim, Jaye, Hoekman, Johnson, Strand, Bender, Allen, Muxlow, Gernaat, Knight, O'Connor and Power and referred to the Committee on Judiciary.

A bill to amend sections 1483, 2169, 2912a, 2912d, 2912e, 5838a, 5851, 5856, and 6013 of Act No. 236 of the Public Acts of 1961, entitled as amended

"Revised judicature act of 1961,"

sections 1483, 2169, 2912d, 2912e, and 5838a as added and section 5851 as amended by Act No. 178 of the Public Acts of 1986 and section 6013 as amended by Act No. 50 of the Public Acts of 1987, being sections 600.1483, 600.2169, 600.2912a, 600.2912d, 600.2912e, 600.5838a, 600.5851, 600.5856, and 600.6013 of the Michigan Compiled Laws; to add sections 955, 2912f, and 2912g; and to repeal certain parts of the act.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Section 1. Sections 1483, 2169, 2912a, 2912d, 2912e, 5838a,
2 5851, 5856, and 6013 of Act No. 236 of the Public Acts of 1961,
3 sections 1483, 2169, 2912d, 2912e, and 5838a as added and section

1 5851 as amended by Act No. 178 of the Public Acts of 1986 and
2 section 6013 as amended by Act No. 50 of the Public Acts of 1987,
3 being sections 600.1483, 600.2169, 600.2912a, 600.2912d,
4 600.2912e, 600.5838a, 600.5851, 600.5856, and 600.6013 of the
5 Michigan Compiled Laws, are amended and sections 955, 2912f, and
6 2912g are added to read as follows:

7 SEC. 955. (1) AS USED IN THIS SECTION:

8 (A) "CONTINGENCY FEE AGREEMENT" MEANS AN AGREEMENT THAT AN
9 ATTORNEY'S FEE IS DEPENDENT OR CONTINGENT, IN WHOLE OR IN PART,
10 UPON SUCCESSFUL PROSECUTION OR SETTLEMENT OF A CLAIM OR ACTION,
11 OR UPON THE AMOUNT OF RECOVERY.

12 (B) "PROPERLY CHARGEABLE DISBURSEMENTS" MEANS REASONABLE
13 EXPENSES INCURRED AND PAID BY AN ATTORNEY ON A CLIENT'S BEHALF IN
14 PROSECUTING OR SETTLING A CLAIM OR ACTION.

15 (C) "RECOVERY" MEANS THE AMOUNT TO BE PAID TO AN ATTORNEY'S
16 CLIENT AS A RESULT OF A SETTLEMENT OR MONEY JUDGMENT.

17 (2) IN A CLAIM OR ACTION FILED UNDER THIS ACT FOR PERSONAL
18 INJURY OR WRONGFUL DEATH BASED UPON THE ALLEGED CONDUCT OF ANOTH-
19 ER, IF AN ATTORNEY ENTERS INTO A CONTINGENCY FEE AGREEMENT WITH
20 HIS OR HER CLIENT AND IF A MONEY JUDGMENT IS AWARDED TO THE
21 ATTORNEY'S CLIENT OR THE CLAIM OR ACTION IS SETTLED, THE
22 ATTORNEY'S FEE SHALL NOT EXCEED THE AMOUNTS SET FORTH IN SUBDIVI-
23 SIONS (A) AND (B):

24 (A) NOT MORE THAN 40% OF THE FIRST \$5,000.00 RECOVERED; NOT
25 MORE THAN 35% OF AN AMOUNT MORE THAN \$5,000.00 BUT LESS THAN
26 \$25,000.00; NOT MORE THAN 25% OF AN AMOUNT OF \$25,000.00 OR MORE
27 BUT LESS THAN \$250,000.00; NOT MORE THAN 20% OF AN AMOUNT OF

1 \$250,000.00 OR MORE BUT LESS THAN \$500,000.00; AND NOT MORE THAN
2 10% OF AN AMOUNT OF \$500,000.00 OR MORE.

3 (B) AS AN ALTERNATIVE TO SUBDIVISION (A), NOT MORE THAN
4 33-1/3% OF THE FIRST \$250,000.00 RECOVERED; NOT MORE THAN 20% OF
5 AN AMOUNT MORE THAN \$250,000.00 BUT LESS THAN \$500,000.00; AND
6 NOT MORE THAN 10% OF AN AMOUNT MORE THAN \$500,000.00.

7 (3) THE FEES ALLOWED IN SUBSECTION (2) SHALL BE COMPUTED ON
8 THE NET SUM OF THE RECOVERY AFTER DEDUCTING FROM THE RECOVERY THE
9 PROPERLY CHARGEABLE DISBURSEMENTS. IN COMPUTING THE FEE, THE
10 COSTS AS TAXED BY THE COURT ARE PART OF THE AMOUNT OF THE MONEY
11 JUDGMENT. IN THE CASE OF A RECOVERY PAYABLE IN INSTALLMENTS, THE
12 FEE IS COMPUTED USING THE PRESENT VALUE OF THE FUTURE PAYMENTS.

13 (4) A CONTINGENCY FEE AGREEMENT MADE BY AN ATTORNEY WITH A
14 CLIENT SHALL BE IN WRITING AND SHALL BE EXECUTED AT THE TIME THE
15 CLIENT RETAINS THE ATTORNEY FOR THE CLAIM OR ACTION THAT IS THE
16 BASIS FOR THE CONTINGENCY FEE AGREEMENT. AN ATTORNEY WHO FAILS
17 TO COMPLY WITH THIS SUBSECTION IS BARRED FROM RECOVERING A FEE IN
18 EXCESS OF THE LOWEST FEE AVAILABLE UNDER SUBSECTION (2), BUT THE
19 OTHER PROVISIONS OF THE CONTINGENCY FEE AGREEMENT REMAIN
20 ENFORCEABLE.

21 (5) AN ATTORNEY SHALL PROVIDE A COPY OF A CONTINGENCY FEE
22 AGREEMENT TO A CLIENT AT THE TIME THE CONTINGENCY FEE AGREEMENT
23 IS EXECUTED. AN ATTORNEY SHALL DISCLOSE HIS OR HER USUAL AND
24 CUSTOMARY HOURLY RATE OF COMPENSATION IN A CONTINGENCY FEE
25 AGREEMENT.

26 (6) AN ATTORNEY WHO ENTERS INTO A CONTINGENCY FEE AGREEMENT
27 THAT VIOLATES SUBSECTION (2) IS BARRED FROM RECOVERING A FEE IN

1 EXCESS OF THE ATTORNEY'S REASONABLE ACTUAL ATTORNEY FEES BASED ON
2 HIS OR HER USUAL AND CUSTOMARY HOURLY RATE OF COMPENSATION, UP TO
3 THE LOWEST AMOUNT ALLOWED UNDER SUBSECTION (2), BUT THE OTHER
4 PROVISIONS OF THE CONTINGENCY FEE AGREEMENT REMAIN ENFORCEABLE.

5 Sec. 1483. (1) In an action for damages alleging medical
6 malpractice against a person or party specified in section 5838a,
7 damages for noneconomic loss ~~which exceeds \$225,000.00~~ THAT
8 EXCEED \$250,000.00 shall not be awarded. ~~unless 1 or more of~~
9 ~~the following circumstances exist:~~

10 ~~(a) There has been a death.~~

11 ~~(b) There has been an intentional tort.~~

12 ~~(c) A foreign object was wrongfully left in the body of the~~
13 ~~patient.~~

14 ~~(d) The injury involves the reproductive system of the~~
15 ~~patient.~~

16 ~~(e) The discovery of the existence of the claim was pre-~~
17 ~~vented by the fraudulent conduct of a health care provider.~~

18 ~~(f) A limb or organ of the patient was wrongfully removed.~~

19 ~~(g) The patient has lost a vital bodily function.~~

20 (2) In awarding damages in an action alleging medical mal-
21 practice, the trier of fact shall itemize damages into DAMAGES
22 FOR economic LOSS and ~~noneconomic~~ damages FOR NONECONOMIC
23 LOSS. IN ENTERING A JUDGMENT AWARDING DAMAGES IN AN ACTION
24 ALLEGING MEDICAL MALPRACTICE, THE COURT SHALL ITEMIZE THAT PART
25 OF THE AWARD THAT CONSISTS OF ATTORNEY FEES.

26 (3) IF DAMAGES FOR ECONOMIC LOSS CANNOT READILY BE
27 ASCERTAINED BY THE TRIER OF FACT, THE TRIER OF FACT SHALL

1 CALCULATE DAMAGES FOR ECONOMIC LOSS BASED ON AN AMOUNT THAT IS
 2 EQUAL TO THE STATE AVERAGE MEDIAN FAMILY INCOME AS REPORTED IN
 3 THE IMMEDIATELY PRECEDING FEDERAL DECENNIAL CENSUS AND ADJUSTED
 4 AND CERTIFIED BY THE STATE TREASURER.

5 (4) ~~-(3)-Noneconomic~~ AS USED IN THIS SECTION, "NONECONOMIC
 6 loss" means damages or loss due to pain, suffering, inconve-
 7 nience, physical impairment, physical disfigurement, or other
 8 noneconomic loss.

9 (5) ~~-(4)-~~ The STATE TREASURER SHALL ADJUST THE limitation on
 10 ~~noneconomic~~ damages FOR NONECONOMIC LOSS set forth in subsec-
 11 tion (1) ~~shall be increased~~ AND THE AMOUNT UPON WHICH THE CAL-
 12 CULATION OF DAMAGES FOR ECONOMIC LOSS IS BASED UNDER
 13 SUBSECTION (3) by an amount determined by the state treasurer at
 14 the end of each calendar year to reflect the cumulative annual
 15 percentage ~~increase~~ CHANGE in the consumer price index. As
 16 used in this subsection, "consumer price index" means the most
 17 comprehensive index of consumer prices available for this state
 18 from the bureau of labor statistics of the United States depart-
 19 ment of labor.

20 Sec. 2169. (1) In an action alleging medical malpractice,
 21 ~~if the defendant is a specialist,~~ a person shall not give
 22 expert testimony on the appropriate standard of care unless the
 23 person is ~~or was a physician licensed to practice medicine or~~
 24 ~~osteopathic medicine and surgery or a dentist licensed to prac-~~
 25 ~~tice dentistry~~ AS A HEALTH PROFESSIONAL in this STATE or another
 26 state and meets ~~both of~~ the following criteria:

1 (a) ~~Specializes, or specialized~~ IF THE DEFENDANT IS A
 2 SPECIALIST, SPECIALIZES at the time of the occurrence ~~which~~
 3 THAT is the basis for the action ~~,~~ in the same specialty or a
 4 related, relevant area of ~~medicine or osteopathic medicine and~~
 5 ~~surgery or dentistry~~ PRACTICE as the specialist who is the
 6 defendant in the medical malpractice action.

7 (b) ~~Devotes, or devoted at the time~~ DURING THE YEAR IMME-
 8 DIATELY PRECEDING THE DATE of the occurrence ~~which~~ THAT is the
 9 basis for the action, ~~a substantial portion~~ DEVOTED NOT LESS
 10 THAN 80% of his or her professional time to EITHER OR BOTH OF the
 11 FOLLOWING:

12 (i) THE active clinical practice of ~~medicine or osteopathic~~
 13 ~~medicine and surgery or the active clinical practice of dentis-~~
 14 ~~try, or to~~ the SAME HEALTH PROFESSION IN WHICH THE DEFENDANT IS
 15 LICENSED OR, IF THE DEFENDANT IS A SPECIALIST, THE ACTIVE CLINI-
 16 CAL PRACTICE OF THAT SPECIALTY OR A RELATED, RELEVANT AREA OF
 17 PRACTICE.

18 (ii) THE instruction of students in an accredited ~~medical~~
 19 ~~school, osteopathic medical school, or dental~~ HEALTH
 20 PROFESSIONAL school OR ACCREDITED RESIDENCY PROGRAM IN THE SAME
 21 HEALTH PROFESSION IN WHICH THE DEFENDANT IS LICENSED OR, IF THE
 22 DEFENDANT IS A SPECIALIST, AN ACCREDITED HEALTH PROFESSIONAL
 23 SCHOOL OR ACCREDITED RESIDENCY PROGRAM in the same specialty or a
 24 related, relevant area of ~~health care as the specialist who is~~
 25 ~~the defendant in the medical malpractice action~~ PRACTICE.

1 (2) In determining the qualifications of an expert witness
 2 in an action alleging medical malpractice, the court shall, at a
 3 minimum, evaluate all of the following:

4 (a) The educational and professional training of the expert
 5 witness.

6 (b) The area of specialization of the expert witness.

7 (c) The length of time the expert witness has been engaged
 8 in the active clinical practice or instruction of ~~medicine,~~
 9 ~~osteopathic medicine and surgery, or dentistry~~ THE HEALTH PRO-
 10 FESSIOIN OR A RELATED, RELEVANT AREA OF PRACTICE.

11 (d) The relevancy of the expert witness's testimony.

12 (3) This section does not limit the power of the trial court
 13 to disqualify an expert witness on grounds other than the quali-
 14 fications set forth in this section.

15 (4) In an action alleging medical malpractice, an expert
 16 witness shall not testify on a contingency fee basis. A person
 17 who violates this subsection is guilty of a misdemeanor.

18 ~~(5) As used in this section:~~

19 ~~(a) "Practice of dentistry" means the practice of dentistry~~
 20 ~~as defined in section 16601 of the public health code, Act~~
 21 ~~No. 368 of the Public Acts of 1978, being section 333.16601 of~~
 22 ~~the Michigan Compiled Laws.~~

23 ~~(b) "Practice of medicine" means the practice of medicine as~~
 24 ~~defined in section 17001 of the public health code, Act No. 368~~
 25 ~~of the Public Acts of 1978, being section 333.17001 of the~~
 26 ~~Michigan Compiled Laws.~~

1 ~~(c) "Practice of osteopathic medicine and surgery" means the~~
2 ~~practice of osteopathic medicine and surgery as defined in~~
3 ~~section 17501 of the public health code, being section 333.17501~~
4 ~~of the Michigan Compiled Laws.~~

5 Sec. 2912a. (1) ~~In~~ SUBJECT TO SUBSECTION (2), IN an
6 action alleging malpractice, the plaintiff ~~shall have~~ HAS the
7 burden of proving that in light of the state of the art existing
8 at the time of the alleged malpractice:

9 (a) The defendant, if a general practitioner, failed to pro-
10 vide the plaintiff the recognized standard of acceptable profes-
11 sional practice in the community in which the defendant practices
12 or in a similar community, and that as a proximate result of the
13 defendant failing to provide that standard, the plaintiff suf-
14 fered an injury.

15 (b) The defendant, if a specialist, failed to provide the
16 recognized standard of care within that specialty as reasonably
17 applied in light of the facilities available in the community or
18 other facilities reasonably available under the circumstances,
19 and as a proximate result of the defendant failing to provide
20 that standard, the plaintiff suffered an injury.

21 (2) IN AN ACTION ALLEGING MEDICAL MALPRACTICE, WHETHER THE
22 PLAINTIFF SEEKS TO RECOVER DAMAGES FOR PERSONAL INJURY OR FOR
23 WRONGFUL DEATH, IN PROVING THAT HE OR SHE SUFFERED AN INJURY AS A
24 PROXIMATE RESULT OF THE DEFENDANT'S FAILURE TO PROVIDE THE STAN-
25 DARD DESCRIBED IN SUBSECTION (1)(A) OR (B), THE PLAINTIFF HAS THE
26 BURDEN OF PROVING THAT THE INJURY WAS MORE PROBABLY THAN NOT
27 CAUSED BY THE DEFENDANT'S NEGLIGENCE AND WOULD NOT HAVE OCCURRED

1 BUT FOR THE NEGLIGENCE OF THE DEFENDANT OR NEGLIGENCE OF THE
2 DEFENDANTS IF THE NEGLIGENCE OF MORE THAN 1 DEFENDANT WAS THE
3 PROXIMATE CAUSE OF THE INJURY. IF THE PLAINTIFF FAILS TO MEET
4 THE BURDEN OF PROOF REQUIRED UNDER THIS SUBSECTION, THE PLAINTIFF
5 CANNOT RECOVER FOR LOSS OF AN OPPORTUNITY TO SURVIVE.

6 Sec. 2912d. (1) In an action alleging medical malpractice,
7 the complaint shall be accompanied ~~either by security for costs~~
8 ~~or~~ by an affidavit OF MERIT, ~~as required by~~ THAT MEETS THE
9 REQUIREMENTS OF this section.

10 ~~(2) Subject to subsection (4), the plaintiff in an action~~
11 ~~alleging medical malpractice shall be in compliance with~~
12 ~~subsection (1) if the plaintiff posts a bond with surety or any~~
13 ~~other equivalent security approved by the court, including cash~~
14 ~~in an escrow account, for costs in an amount of \$2,000.00 within~~
15 ~~91 days after the filing of the complaint.~~

16 (2) ~~(3) The plaintiff in an action alleging medical mal-~~
17 ~~practice shall be in compliance with subsection (1) if the~~
18 ~~plaintiff's attorney or, if the plaintiff is not represented by~~
19 ~~an attorney, the plaintiff files an affidavit attesting that the~~
20 ~~attorney signing the complaint, or the plaintiff if not repre-~~
21 ~~sented by an attorney, has obtained a written opinion from a~~
22 ~~licensed physician, dentist, or other appropriate licensed health~~
23 ~~care provider that the claim alleged is meritorious within 91~~
24 ~~days after the filing of the complaint.~~ AN AFFIDAVIT OF MERIT
25 REQUIRED UNDER THIS SECTION SHALL BE SIGNED BY A HEALTH PROFES-
26 SIONAL WHO MEETS THE REQUIREMENTS FOR AN EXPERT WITNESS SET FORTH
27 IN SECTION 2169. THE AFFIDAVIT OF MERIT SHALL CERTIFY THAT THE

1 HEALTH PROFESSIONAL HAS REVIEWED ALL MEDICAL RECORDS RELEVANT TO
2 THE COMPLAINT AND SHALL CONTAIN A STATEMENT OF EACH OF THE
3 FOLLOWING:

4 (A) THE APPLICABLE STANDARD OF CARE.

5 (B) THE HEALTH PROFESSIONAL'S OPINION THAT THE APPLICABLE
6 STANDARD OF CARE WAS BREACHED BY THE HEALTH PROFESSIONAL OR
7 HEALTH FACILITY NAMED AS A DEFENDANT IN THE COMPLAINT.

8 (C) THE ACTIONS THAT SHOULD HAVE BEEN TAKEN OR OMITTED BY
9 THE HEALTH PROFESSIONAL OR HEALTH FACILITY NAMED AS A DEFENDANT
10 IN THE COMPLAINT IN ORDER TO HAVE COMPLIED WITH THE APPLICABLE
11 STANDARD OF CARE.

12 ~~(4) If upon expiration of the ninety first day after the~~
13 ~~complaint is filed, or the expiration of the extension period~~
14 ~~described in subsection (5), whichever is later, the plaintiff~~
15 ~~has failed to post security as described in subsection (2) or has~~
16 ~~failed to file an affidavit as described in subsection (3), then~~
17 ~~the court, upon motion of any party or upon the court's own~~
18 ~~motion, shall increase the amount of security required by subsec-~~
19 ~~tion (2). If the plaintiff fails to post the increased security,~~
20 ~~the court may, upon motion and for good cause shown, dismiss the~~
21 ~~complaint without prejudice.~~

22 ~~(5) The court, upon motion of any party and for good cause~~
23 ~~shown, may extend the time for the plaintiff to comply with sub-~~
24 ~~section (2) or (3) for a period not to exceed 91 days.~~

25 ~~(6) Discovery concerning the affidavit, including the writ-~~
26 ~~ten opinion and the identity of the health care provider who~~
27 ~~supplied the opinion, shall be allowed only upon application~~

1 ~~under section 2591 by a prevailing party for costs or attorney~~
2 ~~fees after judgment is entered.~~

3 Sec. 2912e. (1) In an action alleging medical malpractice,
4 within 21 days after the plaintiff has ~~furnished security or~~
5 filed A COMPLAINT ACCOMPANIED BY an affidavit OF MERIT in compli-
6 ance with section 2912d, the defendant shall file an answer to
7 the complaint ~~. Within 91 days after filing an answer, the~~
8 ~~defendant shall furnish security for costs or~~ ACCOMPANIED BY an
9 affidavit ~~as required by~~ OF MERITORIOUS DEFENSE THAT MEETS THE
10 REQUIREMENTS OF this section.

11 (2) ~~Subject to subsections (4) and (5), the defendant in an~~
12 ~~action alleging medical malpractice shall be in compliance with~~
13 ~~subsection (1) if the defendant posts a bond with surety or any~~
14 ~~other equivalent security approved by the court, including cash~~
15 ~~in an escrow account, for costs in an amount of \$2,000.00 within~~
16 ~~91 days after the filing of the answer.~~ AN AFFIDAVIT OF MERITO-
17 RIOUS DEFENSE REQUIRED UNDER THIS SECTION SHALL BE SIGNED BY A
18 HEALTH PROFESSIONAL WHO MEETS THE REQUIREMENTS FOR AN EXPERT WIT-
19 NESS UNDER SECTION 2169. THE AFFIDAVIT SHALL CERTIFY THAT THE
20 HEALTH PROFESSIONAL HAS REVIEWED ALL MEDICAL RECORDS RELEVANT TO
21 THE COMPLAINT AND SHALL CONTAIN A STATEMENT OF EACH OF THE
22 FOLLOWING:

23 (A) THE APPLICABLE STANDARD OF CARE.

24 (B) THE HEALTH PROFESSIONAL'S OPINION THAT THE APPLICABLE
25 STANDARD OF CARE WAS NOT BREACHED BY THE HEALTH PROFESSIONAL OR
26 HEALTH FACILITY NAMED AS A DEFENDANT IN THE COMPLAINT OR THAT

1 THERE ARE 1 OR MORE OTHER MERITORIOUS DEFENSES TO THE CLAIMS IN
2 THE COMPLAINT, OR BOTH.

3 ~~(3) The defendant in an action alleging medical malpractice~~
4 ~~shall be in compliance with subsection (1) if the defendant's~~
5 ~~attorney or, if the defendant is not represented by an attorney,~~
6 ~~the defendant files an affidavit attesting that the attorney~~
7 ~~signing the answer, or the defendant if not represented by an~~
8 ~~attorney has obtained a written opinion from a licensed physi-~~
9 ~~cian, dentist, or other appropriate licensed health care provider~~
10 ~~other than the defendant that there is a meritorious defense to~~
11 ~~the claims in the complaint made against the defendant within 91~~
12 ~~days after the filing of the answer.~~

13 ~~(4) If upon expiration of the ninety first day after the~~
14 ~~answer has been filed, or the expiration of the extension period~~
15 ~~described in subsection (5), whichever is later, the defendant~~
16 ~~has failed to comply with subsection (2) or (3), then the court,~~
17 ~~upon motion of any party or upon the court's own motion, shall~~
18 ~~increase the amount of security required by subsection (2). If~~
19 ~~the defendant fails to post the increased security, the court,~~
20 ~~upon motion and for good cause shown, may strike the answer and~~
21 ~~enter a default judgment against that defendant.~~

22 ~~(5) The court, upon motion of any party and for good cause~~
23 ~~shown, may extend the time for the defendant to comply with sub-~~
24 ~~section (2) or (3) for a period not to exceed 91 days.~~

25 ~~(6) Discovery concerning the affidavit, including the writ-~~
26 ~~ten opinion and the identity of the health care provider who~~
27 ~~supplied the opinion shall be allowed only upon application under~~

~~1 section 2591 by a prevailing party for costs and attorney fees~~
~~2 after judgment is entered.~~

3 SEC. 2912F. (1) A PERSON SHALL NOT COMMENCE AN ACTION UNDER
4 SECTION 2912 AGAINST A HEALTH PROFESSIONAL OR HEALTH FACILITY
5 UNLESS THE PERSON HAS GIVEN THE HEALTH PROFESSIONAL OR HEALTH
6 FACILITY NOTICE UNDER THIS SECTION NOT LESS THAN 180 DAYS BEFORE
7 THE ACTION IS COMMENCED AND, SUBJECT TO SECTION 5856(2), NOT LESS
8 THAN 180 DAYS BEFORE THE CLAIM WOULD BE BARRED UNDER SECTION
9 5838A. A PERSON WHO GIVES NOTICE UNDER THIS SUBSECTION ALSO
10 SHALL FILE THE NOTICE WITH THE COMMISSIONER OF THE MEDICAL
11 LIABILITY DETERMINATION PROGRAM CREATED UNDER THE MICHIGAN MEDI-
12 CAL LIABILITY DETERMINATION ACT AT THE SAME TIME NOTICE IS GIVEN
13 TO THE HEALTH PROFESSIONAL OR HEALTH FACILITY.

14 (2) THE NOTICE REQUIRED UNDER SUBSECTION (1) DOES NOT HAVE
15 TO BE IN A PARTICULAR FORM, BUT SHALL NOTIFY THE HEALTH PROFES-
16 SIONAL OR HEALTH FACILITY OF THE LEGAL BASIS FOR THE CLAIM, THE
17 TYPE OF LOSS SUSTAINED, AND THE SPECIFIC NATURE OF THE INJURIES
18 SUFFERED. A PERSON MAY SERVE THE NOTICE IN THE SAME MANNER IN
19 WHICH PROCESS IS SERVED UNDER CHAPTER 19.

20 (3) THE NOTICE REQUIRED UNDER SUBSECTION (1) SHALL BE ACCOM-
21 PANIED BY SECURITY FOR COSTS OR AN AFFIDAVIT OF MERIT. SECURITY
22 FOR COSTS SHALL CONSIST OF A CASH BOND OR OTHER EQUIVALENT SECUR-
23 ITY, INCLUDING CASH IN AN ESCROW ACCOUNT, IN THE AMOUNT OF
24 \$2,000.00 FILED WITH THE COMMISSIONER OF THE MEDICAL LIABILITY
25 DETERMINATION PROGRAM. AN AFFIDAVIT REQUIRED UNDER THIS SUBSEC-
26 TION SHALL BE SIGNED BY THE CLAIMANT OR, IF THE CLAIMANT IS
27 REPRESENTED BY AN ATTORNEY, THE CLAIMANT'S ATTORNEY. THE

1 AFFIDAVIT SHALL ATTEST THAT THE CLAIMANT OR CLAIMANT'S ATTORNEY
2 HAS OBTAINED A WRITTEN OPINION FROM AN APPROPRIATE HEALTH PROFES-
3 SIONAL THAT THE CLAIM ALLEGED IS MERITORIOUS.

4 (4) WITHIN 90 DAYS AFTER RECEIPT OF NOTICE UNDER SUBSECTION
5 (1), THE HEALTH PROFESSIONAL OR HEALTH FACILITY AGAINST WHOM THE
6 CLAIM IS MADE SHALL FURNISH TO THE CLAIMANT SECURITY FOR COSTS OR
7 AN AFFIDAVIT OF MERIT. SECURITY FOR COSTS IS THE SAME AS
8 REQUIRED UNDER SUBSECTION (3) FOR THE CLAIMANT. AN AFFIDAVIT
9 REQUIRED UNDER THIS SUBSECTION SHALL BE SIGNED BY THE HEALTH PRO-
10 FESSIONAL OR A REPRESENTATIVE OF THE HEALTH FACILITY OR, IF THE
11 HEALTH PROFESSIONAL OR HEALTH FACILITY IS REPRESENTED BY AN
12 ATTORNEY, BY THE ATTORNEY. THE AFFIDAVIT SHALL ATTEST THAT THE
13 HEALTH PROFESSIONAL OR HEALTH FACILITY OR THEIR ATTORNEY HAS
14 OBTAINED A WRITTEN OPINION FROM AN APPROPRIATE HEALTH PROFESSION-
15 AL, NOT THE HEALTH PROFESSIONAL WHO IS THE SUBJECT OF THE CLAIM,
16 THAT THERE IS A MERITORIOUS DEFENSE TO THE CLAIM.

17 SEC. 2912G. (1) A PERSON WHO COMMENCES AN ACTION ALLEGING
18 MEDICAL MALPRACTICE AGAINST A PERSON SPECIFIED IN SECTION 5838A
19 WAIVES FOR PURPOSES OF THAT ACTION THE PRIVILEGE CREATED BY
20 SECTION 2157 AND ANY OTHER SIMILAR PRIVILEGE CREATED BY LAW WITH
21 RESPECT TO A PERSON SPECIFIED IN SECTION 5838A WHO WAS INVOLVED
22 IN THE ACTS, TRANSACTIONS, EVENTS, OR OCCURRENCES THAT ARE THE
23 BASIS FOR THE ACTION OR WHO PROVIDED CARE OR TREATMENT TO THE
24 PLAINTIFF IN THE ACTION EITHER BEFORE OR AFTER THOSE ACTS, TRANS-
25 ACTIONS, EVENTS, OR OCCURRENCES.

26 (2) PURSUANT TO SUBSECTION (1), A PERSON NAMED AS A
27 DEFENDANT IN AN ACTION ALLEGING MEDICAL MALPRACTICE OR THAT

1 PERSON'S ATTORNEY OF RECORD MAY COMMUNICATE WITH A PERSON
 2 SPECIFIED IN SECTION 5838A IN ORDER TO OBTAIN ALL INFORMATION
 3 RELEVANT TO THE SUBJECT MATTER OF THE ACTION OR TO PREPARE THE
 4 DEFENDANT'S DEFENSE TO THE ACTION.

5 (3) A PERSON WHO DISCLOSES INFORMATION UNDER SUBSECTION (2)
 6 TO A DEFENDANT OR THE DEFENDANT'S ATTORNEY OF RECORD DOES NOT
 7 VIOLATE SECTION 2157 OR ANY OTHER SIMILAR DUTY OR OBLIGATION CRE-
 8 ATED BY LAW AND OWED TO THE PLAINTIFF.

9 Sec. 5838a. (1) ~~A~~ FOR PURPOSES OF THIS ACT, A claim based
 10 on the medical malpractice of a person who is ~~—~~ or who holds
 11 himself or herself out to be ~~—~~ a licensed health care profes-
 12 sional, licensed health facility or agency, employee or agent of
 13 a licensed health facility or agency who is engaging in or other-
 14 wise assisting in medical care and treatment, or any other health
 15 care professional, whether or not THE HEALTH CARE PROFESSIONAL IS
 16 licensed by the state AND WHETHER OR NOT THE HEALTH CARE PROFES-
 17 SIONAL IS ENGAGED IN THE PRACTICE OF HIS OR HER HEALTH PROFESSION
 18 IN A SOLE PROPRIETORSHIP, PARTNERSHIP, PROFESSIONAL CORPORATION,
 19 OR OTHER BUSINESS ENTITY, accrues at the time of the act or omis-
 20 sion ~~which~~ THAT is the basis for the claim of medical malprac-
 21 tice, regardless of the time the plaintiff discovers or otherwise
 22 has knowledge of the claim. As used in this subsection:

23 (a) "Licensed health facility or agency" means a health
 24 facility or agency licensed under article 17 of the ~~Public~~
 25 PUBLIC health code, Act No. 368 of the Public Acts of 1978, being
 26 sections 333.20101 to ~~333.22481~~ 333.22260 of the Michigan
 27 Compiled Laws.

1 (b) "Licensed health care professional" means an individual
 2 licensed under article 15 of the public health code, Act No. 368
 3 of the Public Acts of 1978, being sections 333.16101 to 333.18838
 4 of the Michigan Compiled Laws, AND ENGAGED IN THE PRACTICE OF HIS
 5 OR HER HEALTH PROFESSION IN A SOLE PROPRIETORSHIP, PARTNERSHIP,
 6 PROFESSIONAL CORPORATION, OR OTHER BUSINESS ENTITY. Licensed
 7 health care professional does not include a sanitarian or a
 8 veterinarian.

9 (2) Except as otherwise provided in this subsection, an
 10 action involving a claim based on medical malpractice may be com-
 11 menced at any time within the applicable period prescribed in
 12 ~~sections~~ SECTION 5805 or SECTIONS 5851 to 5856, or within
 13 6 months after the plaintiff discovers or should have discovered
 14 the existence of the claim, whichever is later. However, the
 15 claim shall not be commenced later than 6 years after the date of
 16 the act or omission ~~which~~ THAT is the basis for the claim. The
 17 burden of proving that the plaintiff, as a result of physical
 18 discomfort, appearance, condition, or otherwise, neither discov-
 19 ered nor should have discovered the existence of the claim at
 20 least 6 months before the expiration of the period otherwise
 21 applicable to the claim ~~shall be~~ IS on the plaintiff. A medi-
 22 cal malpractice action ~~which~~ THAT is not commenced within the
 23 time prescribed by this subsection is barred. This subsection
 24 ~~shall~~ DOES not apply, and the plaintiff ~~shall be~~ IS subject
 25 to the period of limitations set forth in subsection (3), ~~under~~
 26 ~~1 or more of the following circumstances: (a) If~~ IF discovery

1 of the existence of the claim was prevented by the fraudulent
2 conduct of a health care provider.

3 ~~(b) If a foreign object was wrongfully left in the body of~~
4 ~~the patient.~~

5 ~~(c) If the injury involves the reproductive system of the~~
6 ~~plaintiff.~~

7 (3) An action involving a claim based on medical malpractice
8 under ~~the~~ circumstances ~~described in subsection (2)(a) to (c)~~
9 THAT THE DISCOVERY OF THE CLAIM WAS PREVENTED BY THE FRAUDULENT
10 CONDUCT OF A HEALTH CARE PROVIDER may be commenced at any time
11 within the applicable period prescribed in ~~sections~~
12 SECTION 5805 or SECTIONS 5851 to 5856, or within 6 months after
13 the plaintiff discovers or should have discovered the existence
14 of the claim, whichever is later. The burden of proving that the
15 plaintiff, as a result of physical discomfort, appearance, condi-
16 tion or otherwise, neither discovered nor should have discovered
17 the existence of the claim at least 6 months before the expira-
18 tion of the period otherwise applicable to the claim ~~shall be~~
19 IS on the plaintiff. A medical malpractice action ~~which~~ THAT
20 is not commenced within the time prescribed by this subsection is
21 barred.

22 Sec. 5851. (1) Except as otherwise provided in ~~subsection~~
23 SUBSECTIONS (7) AND (8), if the person first entitled to make an
24 entry or bring an action UNDER THIS ACT is under 18 years of age,
25 insane, or imprisoned at the time the claim accrues, the person
26 or those claiming under the person ~~shall have~~ HAS 1 year after
27 the disability is removed through death or otherwise, to make the

1 entry or bring the action although the period of limitations has
2 run. This section does not lessen the time provided for in
3 section 5852.

4 (2) The term insane as employed in this chapter means a con-
5 dition of mental derangement such as to prevent the sufferer from
6 comprehending rights he or she is otherwise bound to know and is
7 not dependent on whether or not the person has been judicially
8 declared to be insane.

9 (3) To be ~~deemed~~ CONSIDERED a disability, the infancy,
10 insanity, or imprisonment must exist at the time the claim
11 accrues. If the disability comes into existence after the claim
12 has accrued, A COURT SHALL NOT RECOGNIZE the disability ~~shall~~
13 ~~not be recognized~~ under this section for the purpose of modify-
14 ing the period of limitations.

15 (4) ~~Successive disabilities shall not be tacked. That is,~~
16 A PERSON SHALL NOT TACK SUCCESSIVE DISABILITIES. A COURT SHALL
17 RECOGNIZE only those disabilities ~~which~~ THAT exist at the time
18 the claim first accrues and ~~which~~ THAT disable the person to
19 whom the claim first accrues ~~shall be recognized under this~~
20 ~~section~~ for the purpose of modifying the period of limitations.

21 (5) ~~All~~ A COURT SHALL RECOGNIZE ALL of the disabilities of
22 infancy, insanity, and imprisonment ~~which~~ THAT disable the
23 person to whom the claim first accrues at the time the claim
24 first accrues. ~~shall be recognized. That is,~~ A COURT SHALL
25 COUNT the year of grace provided in this section ~~shall be~~
26 ~~counted~~ from the termination of the last disability to the
27 person to whom the claim originally accrued ~~which~~ THAT has

1 continued from the time the claim accrued, whether this
2 disability terminates because of the death of the person disabled
3 or for some other reason.

4 (6) With respect to a claim accruing before the effective
5 date of the age of majority act of 1971, Act No. 79 of the Public
6 Acts of 1971, being sections 722.51 to 722.55 of the Michigan
7 Compiled Laws, THE disability of infancy ~~shall be considered~~ IS
8 removed as of the effective date of Act No. 79 of the Public Acts
9 of 1971, as to persons who were at least 18 years of age but less
10 than 21 years of age on January 1, 1972, and ~~shall be~~
11 ~~considered~~ IS removed as of the eighteenth birthday of a person
12 who was under 18 years of age on January 1, 1972.

13 (7) If ~~—~~ at the time a claim alleging medical malpractice
14 accrues to a person under section 5838a ~~—~~ the person is ~~+3-~~ 8
15 years of age or less, A PERSON SHALL NOT BRING an action based on
16 the claim ~~shall not be brought~~ unless the action is commenced
17 OR THE COMPLAINT FILED on or before the person's ~~fifteenth-~~
18 TENTH birthday. If ~~—~~ at the time a claim alleging medical mal-
19 practice accrues to a person under section 5838a ~~—~~ the person
20 is more than ~~+3-~~ 8 years of age, he or she ~~shall be~~ IS subject
21 to the period of limitations set forth in section 5838a.

22 (8) IF AT THE TIME A CLAIM ALLEGING MEDICAL MALPRACTICE
23 ACCRUES TO A PERSON UNDER SECTION 5838A THE PERSON IS UNDER THE
24 DISABILITY OF INSANITY, THE GRACE PERIOD UNDER SUBSECTION (1)
25 DOES NOT APPLY IF A LEGAL GUARDIAN IS APPOINTED FOR THE PERSON
26 WITH SUFFICIENT AUTHORITY TO BRING AN ACTION UNDER THIS ACT. THE
27 GRACE PERIOD UNDER SUBSECTION (1) DOES NOT APPLY TO A PERSON

1 UNDER THE DISABILITY OF INSANITY OR IMPRISONMENT AFTER THE
 2 EXPIRATION OF THE MAXIMUM 6-YEAR TIME PERIOD SET FORTH IN
 3 SECTION 5838A(2), UNLESS DISCOVERY OF THE EXISTENCE OF THE CLAIM
 4 WAS PREVENTED BY THE FRAUDULENT CONDUCT OF A HEALTH CARE PROVID-
 5 ER, AS PROVIDED IN SECTION 5838A(3).

6 Sec. 5856. (1) The statutes of limitations are tolled
 7 ~~when~~ IF:

8 (A) ~~(1) the~~ THE complaint is filed and a copy of the sum-
 9 mons and complaint are served on the defendant. ~~, or when~~

10 (B) ~~(2) jurisdiction~~ JURISDICTION over the defendant is
 11 otherwise acquired. ~~, or when~~

12 (C) ~~(3) the~~ THE complaint is filed and a copy of the sum-
 13 mons and complaint in good faith ~~, are~~ are placed in the hands of
 14 an officer for immediate service, but in this case the statute
 15 ~~shall~~ IS not ~~be~~ tolled longer than 90 days ~~thereafter~~ AFTER
 16 THE COPY OF THE SUMMONS AND COMPLAINT IS RECEIVED BY THE
 17 OFFICER.

18 (2) IF A PERSON WHO COMMENCES AN ACTION ALLEGING MEDICAL
 19 MALPRACTICE AGAINST A PERSON SPECIFIED IN SECTION 5838A FAILS TO
 20 GIVE NOTICE UNDER SECTION 2912F WITHIN 180 DAYS BEFORE THE CLAIM
 21 WOULD BE BARRED UNDER SECTION 5838A, AS REQUIRED UNDER SECTION
 22 2912F, THE COURT IN WHICH THE ACTION IS FILED MAY TOLL THE PERIOD
 23 OF LIMITATIONS UNDER SECTION 5838A FOR A PERIOD OF NOT MORE THAN
 24 180 DAYS UPON MOTION OF A PARTY FOR GOOD CAUSE SHOWN DUE TO
 25 UNFORESEEN CIRCUMSTANCES.

26 Sec. 6013. (1) Interest shall be allowed on a money judgment
 27 recovered in a civil action, as provided in this section. ~~7~~

1 ~~except that~~ HOWEVER, for complaints filed UNDER THIS ACT on or
2 after October 1, 1986, interest shall not be allowed on future
3 damages from the date of filing the complaint to the date of
4 entry of the judgment OR FINAL DECISION. As used in this subsec-
5 tion, "future damages" means that term as defined in section
6 6301.

7 (2) For complaints filed before June 1, 1980, in an action
8 involving other than a written instrument having a rate of inter-
9 est exceeding 6% per year, the interest on the judgment shall be
10 calculated from the date of filing the complaint to June 1, 1980,
11 at the rate of 6% per year and on and after June 1, 1980, to the
12 date of satisfaction of the judgment at the rate of 12% per year
13 compounded annually.

14 (3) For complaints filed before June 1, 1980, in an action
15 involving a written instrument having a rate of interest exceed-
16 ing 6% per year, the interest on the judgment shall be calculated
17 from the date of filing the complaint to the date of satisfaction
18 of the judgment at the rate specified in the instrument if the
19 rate was legal at the time the instrument was executed. However,
20 the rate after the date judgment is entered shall not exceed the
21 following:

22 (a) Seven percent per year compounded annually for any
23 period of time between the date judgment is entered and the date
24 of satisfaction of the judgment ~~which~~ THAT elapses before June
25 1, 1980.

26 (b) Thirteen percent per year compounded annually for any
27 period of time between the date judgment is entered and the date

1 of satisfaction of the judgment ~~which~~ THAT elapses after May
2 31, 1980.

3 (4) For complaints filed on or after June 1, 1980, but
4 before January 1, 1987, interest shall be calculated from the
5 date of filing the complaint to the date of satisfaction of the
6 judgment at the rate of 12% per year compounded annually unless
7 the judgment is rendered on a written instrument having a higher
8 rate of interest. In that case interest shall be calculated at
9 the rate specified in the instrument if the rate was legal at the
10 time the instrument was executed. The rate shall not exceed 13%
11 per year compounded annually after the date judgment is entered.

12 (5) For complaints filed on or after January 1, 1987, if a
13 judgment is rendered on a written instrument, interest shall be
14 calculated from the date of filing the complaint to the date of
15 satisfaction of the judgment at the rate of 12% per year com-
16 pounded annually, unless the instrument has a higher rate of
17 interest. In that case interest shall be calculated at the rate
18 specified in the instrument if the rate was legal at the time the
19 instrument was executed. The rate shall not exceed 13% per year
20 compounded annually after the date judgment is entered.

21 (6) Except as otherwise provided in subsection (5) AND
22 SUBJECT TO SUBSECTION (9), for complaints filed on or after
23 January 1, 1987, interest on a money judgment recovered in a
24 civil action UNDER THIS ACT shall be calculated at 6-month inter-
25 vals from the date of filing the complaint at a rate of interest
26 ~~which~~ THAT is equal to 1% plus the average interest rate paid
27 at auctions of 5-year United States treasury notes during the 6

1 months immediately preceding July 1 and January 1, as certified
2 by the state treasurer, and compounded annually, pursuant to this
3 section. INTEREST UNDER THIS SUBSECTION SHALL BE CALCULATED ONLY
4 ON THE AMOUNT OF THE MONEY JUDGMENT ACTUALLY TO BE RECEIVED BY
5 THE PLAINTIFF, EXCLUDING ATTORNEY FEES AND OTHER COSTS.

6 (7) If a bona fide, reasonable written offer of settlement
7 in a civil action based on tort is made by the party against whom
8 the judgment is subsequently rendered AND REJECTED BY THE
9 PLAINTIFF, the court shall order that interest ~~shall~~ not be
10 allowed beyond the date the BONA FIDE, REASONABLE written offer
11 of settlement ~~which is made and rejected by the plaintiff, and~~
12 is filed with the court.

13 (8) Except as otherwise provided in subsection (1), if a
14 bona fide, reasonable written offer of settlement in a civil
15 action based on tort is not made by the party against whom the
16 judgment is subsequently rendered, or is made and ~~that offer~~ is
17 not filed with the court, the court shall order that interest be
18 calculated from the date of filing the complaint to the date of
19 satisfaction of the judgment.

20 (9) Except as otherwise provided in subsection (1), if a
21 bona fide, reasonable written offer of settlement in a civil
22 action based on tort is made by a plaintiff for whom the judgment
23 is subsequently rendered and that offer is rejected and the offer
24 is filed with the court, the court shall order that interest be
25 calculated from the date of the rejection of the offer to the
26 date of satisfaction of the judgment at a rate of interest equal
27 to 2% plus the rate of interest computed under subsection (6).

1 (10) ~~An~~ A BONA FIDE, REASONABLE WRITTEN offer OF
2 SETTLEMENT made pursuant to this section ~~which~~ THAT is not
3 accepted within 21 days after the offer is made ~~shall be~~
4 ~~considered~~ IS rejected. A rejection ~~—~~ under this subsection
5 or otherwise ~~—~~ does not preclude a later offer by either
6 party.

7 (11) As used in this section:

8 (a) "Bona fide, reasonable written offer of settlement"
9 means:

10 (i) With respect to an offer of settlement made by a
11 defendant against whom judgment is subsequently rendered, ~~an~~ A
12 WRITTEN offer of settlement that is not less than 90% of the
13 amount actually received by the plaintiff in the action through
14 judgment.

15 (ii) With respect to an offer of settlement made by a plain-
16 tiff, ~~an~~ A WRITTEN offer of settlement that is not more than
17 110% of the amount actually received by the plaintiff in the
18 action through judgment.

19 (b) "Defendant" means a defendant, a counter-defendant, or a
20 cross-defendant.

21 (c) "Party" means a plaintiff or a defendant.

22 (d) "Plaintiff" means a plaintiff, a counter-plaintiff, or a
23 cross-plaintiff.

24 Section 2. Chapter 49 of Act No. 236 of the Public Acts of
25 1961, being sections 600.4901 to 600.4923 of the Michigan
26 Compiled Laws, is repealed.

1 Section 3. This amendatory act shall not take effect unless
2 all of the following bills of the 86th Legislature are enacted
3 into law:

4 (a) Senate Bill No. 248.

5 (b) Senate Bill No. 413.

6 (c) Senate Bill No. 414.

7 (d) Senate Bill No. 418.

8 (e) Senate Bill No. 419.