

# MICHIGAN MEDICAL MALPRACTICE LAW SUMMARY

Prepared by: Susan H. Zitterman, Esq.  
Kitch Drutchas Wagner Valitutti & Sherbrook, Detroit, MI

## **Statutes of Limitation**

Subject to tolling by a notice of intent, a medical malpractice claim must be brought within two years after the act or omission of malpractice, or within six months after the plaintiff discovers or should have discovered a possible claim, whichever is later. A six-year cap/statute of repose applies to bar actions more than six years after the act or omission. The six-year cap does not apply if the defendant's fraud prevented discovery or the injury involves the plaintiff's reproductive system. MCL 600.5838a.

Special rules apply to minors. If at the time the claim accrued, the plaintiff has not yet reached his or her eighth birthday, the action must be commenced before the person's tenth birthday or within the general two year/six month period set forth in MCL 600.5838a. MCL 600.5851(7). If at the time of the malpractice the minor has not reached his or his thirteenth birthday, and if the claim involves an injury to the person's reproductive system, the claim may be brought before the minor's fifteenth birthday, or within the general two year/six month period. MCL 600.5851(8).

A medical malpractice wrongful death action is governed by the underlying medical malpractice statute of limitations. The death savings statute, MCL 600.5852, allows the personal representative to bring a claim within two years after appointment, but not more than three years after the underlying statute of limitations has expired.

The medical malpractice statute of limitations (but not the death savings period) is tolled under some circumstances by the written notice of intent that must be mailed by the claimant to the health care provider, in most circumstances at least 182 days before the action is commenced. Tolling only applies if the statute of limitations would have expired during the notice of intent period. MCL 600.5856. Further, the notice of intent will suffice to toll only where it fully meets the statutory requirements, including at least the facts, standard of care, action that should have been, breach, proximate cause, and the names of those being notified. *Roberts v Mecosta County General Hospital*, 466 Mich 57; 642 NW2d 663 (2002).

The filing of a complaint will not stop the running of the statute of limitations unless a notice of intent was sent and the presuit notice period observed before the complaint is filed. *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005).

The filing of a complaint will not be sufficient to stop the running of the statute of limitations unless the complaint is accompanied by an affidavit of merit that is both prepared by an expert whom the plaintiff reasonably believes meets the expert witness requirements of MCL 600.2169, and contains the detailed information (similar to that required in the notice of intent) that is outlined in the affidavit of merit statute. MCL 600.2912d. Certain exceptions exist to this requirement, including an extension based on good cause, and an extension where the defendant has failed to allow access to medical records as required in MCL 600.2912b.

## **Comparative Fault**

Comparative fault applies to reduce the plaintiff's recovery in all actions based on tort. By statute, MCL 600.2959, plaintiff is not allowed to recover noneconomic damages if plaintiff's percentage of fault is greater than 50%. The economic damages will be reduced by the plaintiff's percentage of fault. Comparative fault in a medical malpractice action can include pre-treatment negligence by the plaintiff that contributes to the underlying condition, the treatment of which is claimed to be malpractice. *Shinholster v Annapolis Hospital*, 471 Mich 540; 685 NW2d 275 (2004).

## **Joint and Several Liability**

Liability in non-medical malpractice tort actions is generally purely several, with each defendant only being responsible for damages in accordance with their percentage of fault. MCL 600.2956, MCL 600.2957. In a medical malpractice action, however, joint and several liability is retained except where the plaintiff is determined to have fault. In such a case, liability is several, subject to an exception where

all or part of a parties' share of the obligation is uncollectible from that party, in which case that uncollectible amount is reallocated among the other parties, according to their respective percentages of fault. MCL 600.6304(6)(a)-(b).

In an action in which liability is or may be several, fault will be allocated by the jury to nonparties only if the requirements for notice of nonparty fault set forth in the court rules and statutes are followed. MCR 2.112(K).

### **Contribution**

Contribution in Michigan is governed entirely by statute, MCL 600.2925a-MCL 600.2925d. In the case of a settlement, to preserve a right to contribution, the settling tortfeasor must ensure that the contributee's liability was extinguished by a good faith settlement, that a reasonable effort was made to notify the contributee of the pendency of the settlement negotiations, and that the contributee was given a reasonable opportunity to participate in settlement negotiations. To proceed on a contribution claim following a judgment, the tortfeasor must have either made the contributee a party to the action, or made a reasonable effort to notify him of the commencement of the action. Contribution is only available in case of joint and several liability, and is not available in a non-malpractice or ordinary negligence case in which liability is several.

### **Vicarious Liability**

The doctrine of ostensible agency has been applied by Michigan courts to impose liability on a hospital for the acts of an independent, non-employed staff physician where there is proof that the patient reasonably looked to the hospital for treatment rather merely viewing the hospital as a site for treatment by his physician. The most typical situation where this applies is in an emergency room setting. Ostensible agency liability does not exist where there is a preexisting relationship between the plaintiff and the allegedly negligent physician. *Wilson v Stilwill*, 411 Mich 587; 309 NW2d 898 (1981).

### **Expert Testimony**

The qualifications of expert witnesses in medical malpractice actions is strictly governed by MCL 600.2169. An expert may not testify to the standard of practice of a specialist unless the expert, during the year prior to the alleged malpractice, devoted a majority of his professional time to the active clinical practice of that specialty, or the teaching of residents in that specialty. If the defendant is board certified, the expert may not testify unless the expert is also board certified in the same specialty. In the case of a defendant who has more than one specialty or subspecialty, or board certification, the expert witness must match the one most relevant standard of practice or care - the specialty engaged in by the defendant physician during the course of the alleged malpractice. *Woodard v Custer*, 476 Mich 545; 719 NW2d 842 (2005). Where the defendant is a general practitioner, the expert must have devoted a majority of his professional time to the active clinical practice of general practice, or teaching of students in the same health profession. Michigan applies the locality rule to nonspecialists (same or similar community).

The plaintiff must file with the complaint an affidavit of merit signed by an expert meeting the requirements of the expert witness statute, MCL 600.2169. The defendant must also file an affidavit of meritorious defense by a qualified expert within 91 days after the plaintiff filed the affidavit of merit. MCL 600.2912e.

Since the amendment of Michigan Rule of Evidence, MRE 702, in 2003, Michigan now requires that trial courts conduct a gate-keeping inquiry to determine the reliability of expert testimony before it is admitted, *Gilbert v Daimler Chrysler Corp*, 470 Mich 749; 685 NW2d 391 (2004). Michigan now applies the same test employed by the federal courts under *Daubert v Merrell Dow Pharmaceutical, Inc*, 509 US 579 (1993) and progeny.

### **Damage Caps**

In medical malpractice actions, a two-tiered cap on noneconomic damages applies. The lower cap applies unless one of three exceptions exists, including (1) hemiplegia or paraplegia caused by injury to brain or the spinal cord, (2) permanently impaired cognitive capacity rendering the plaintiff of incapable of making life decisions and performing the activities of normal daily living, or (3) permanent damage to a

reproductive organ resulting in the inability to procreate. MCL 600.1483. The cap amounts are adjusted annually in accordance with the consumer price index. As of 2007, the lower tier of the cap was \$394,200, while the upper tier cap was \$704,000. The amount of the cap applicable is determined by the date of entry of the judgment.

The cap on noneconomic damages has been held to be constitutional, and to apply in wrongful death actions. *Jenkins v Patel*, 471 Mich 158; 684 NW2d 346 (2004).

### **Statutory Cap On Attorney Fees**

There is no statutory cap on attorney fees. Per court rule, the maximum allowable contingent fee is one-third of the amount recovered. MCR 8.121.

### **Periodic Payment**

If the amount of future damages awarded by the jury exceeds \$250,000 present cash value, the court is required to enter an order providing that that amount of the judgment, less costs and attorney fees the plaintiff is obligated to pay, be satisfied by the purchase of an annuity contract. MCL 600.307.

While juries are required to make a finding of the amount of future damages for each year in which they are found to occur, those figures are then reduced by the trial court to present cash value by 5% annually (not compounded). MCL 600.6305, *Nation v WDE Electric Company*, 454 Mich 489; 563 NW2d 233 (1997).

### **Collateral Source**

Michigan has a partially modified collateral source rule. Pursuant to MCL 600.6303, where a plaintiff's medical expenses or wages have been paid by another person or entity, they are to be deducted from the verdict by the trial court and not included in the judgment in favor of plaintiff only if there is no entity (such as an insurer, Medicaid, Medicare) which is entitled by law to a lien on the proceeds. Where there is a person or legal entity which is entitled to a lien by contract against the proceeds, that entity must be notified in accordance with the statute, and then is entitled to assert the lien (in which case the medical expenses or wages paid by that person or entity will not be deducted from the verdict).

### **Prejudgment Interest**

By statute, interest runs on past damages from the filing of the complaint, and on future damages from the date of entry of the judgment. MCL 600.6013. Interest in civil actions is calculated at six month intervals from the date of the filing of the complaint at a rate of interest equal to 1% plus the average interest rate paid at auction of 5-year United States Treasury notes during the six months immediately preceding July 1 and January 1, as certified by the State Treasurer, and compounded annually. Interest is calculated on the entire amount of the money judgment including attorney fees and other costs. MCL 600.6013(8). Prejudgment interest is not allowed on future damages. MCL 600.6013(1). The interest rate can be increased where a bona fide, reasonable written offer of settlement is not accepted, under some circumstances. MCL 600.6013(9)-(10).

### **Patient Compensation Funds And Physician Insurance**

Michigan does not have such provisions.

### **Immunities**

Michigan no longer recognizes charitable immunity, and the Legislature has severely limited statutory governmental immunity to hospitals owned or operated by the Department of Community Health or Department of Corrections. MCL 691.1407(4).

Michigan does have a "good samaritan" immunity statute, which applies only to individual health care providers under certain, limited circumstances. MCL 691.1502, *Hamburger v Henry Ford Hospital*, 91 Mich App 580; 284 NW2d 155 (1979).

## **Arbitration**

For several years until 1994, Michigan had an extensive and detailed statutory arbitration scheme specific to medical malpractice actions, the validity and applicability of which was the subject of much litigation. *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167; 405 NW2d 88 (1987). In 1994, that statutory scheme was repealed and a statute for small claims arbitration, MCL 600.2912g, for claims of \$75,000 or less, was enacted. This provision is rarely used.

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