

HOUSE BILL No. 4571

March 12, 2009, Introduced by Reps. Meadows, Lipton and Constan and referred to the Committee on Judiciary.

A bill to amend 1961 PA 236, entitled
"Revised judicature act of 1961,"
by amending sections 2169, 2912b, 2912d, 2912e, and 5856 (MCL
600.2169, 600.2912b, 600.2912d, 600.2912e, and 600.5856), sections
2169, 2912d, and 2912e as amended and section 2912b as added by
1993 PA 78 and section 5856 as amended by 2004 PA 87.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

- 1 Sec. 2169. (1) In an action alleging medical malpractice, a
2 person shall not give expert testimony on the appropriate standard
3 of practice or care unless the person is licensed as a health
4 professional in this state or another state and, ~~meets the~~
5 ~~following criteria:~~
6 ~~(a) If the party against whom or on whose behalf the testimony~~
7 ~~is offered is a specialist, specializes at the time of the~~

~~occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.~~

~~—— (b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim, or action,~~ **THE PROPOSED EXPERT WITNESS** devoted a majority of his or her professional time to ~~either or both~~ **1 OR MORE** of the following:

(A) ~~(i)~~ The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed. ~~and, if that party is a specialist, the active clinical practice of that specialty.~~

(B) **IF THE PARTY AGAINST WHOM OR ON WHOSE BEHALF THE TESTIMONY IS OFFERED IS A GENERAL PRACTITIONER, ACTIVE CLINICAL PRACTICE AS A GENERAL PRACTITIONER WITH MORE THAN DE MINIMIS EXPERIENCE IN THE AREA RELEVANT TO THE CLAIM.**

(C) **IF THE PARTY AGAINST WHOM OR ON WHOSE BEHALF THE TESTIMONY IS OFFERED IS A SPECIALIST, REGARDLESS OF WHETHER THE PARTY IS BOARD-CERTIFIED, THE ACTIVE CLINICAL PRACTICE OF THAT SPECIALTY OR THE SPECIALTY THE PARTY WAS PRACTICING AT THE TIME OF THE OCCURRENCE.**

(D) ~~(ii)~~ The instruction of students in an accredited health professional school or accredited residency or clinical research program in ~~the same health profession in which the party against~~

~~whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty~~ **A RELEVANT SPECIALTY.**

~~—— (c) If the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:~~

~~—— (i) Active clinical practice as a general practitioner.~~

~~—— (ii) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed.~~

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

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

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

(c) The length of time the expert witness has been engaged in the active clinical practice or instruction of the health profession or the specialty.

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

(E) THE CERTIFICATION, IF ANY, OF THE EXPERT WITNESS.

(3) This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the

1 qualifications set forth in this section.

2 (4) In an action alleging medical malpractice, an expert
3 witness shall not testify on a contingency fee basis. A person who
4 violates this subsection is guilty of a misdemeanor **PUNISHABLE BY**
5 **IMPRISONMENT FOR NOT MORE THAN 1 YEAR OR A FINE OF NOT MORE THAN**
6 **\$10,000.00, OR BOTH.**

7 (5) In an action alleging medical malpractice, all of the
8 following limitations apply: ~~to discovery conducted by opposing~~
9 ~~counsel to determine whether or not an expert witness is qualified:~~

10 (a) ~~Tax returns~~ **FINANCIAL RECORDS** of the ~~AN~~ expert witness are
11 ~~not~~ **THAT RELATE TO THE EXPERT'S INCOME FROM ACTING AS AN EXPERT**
12 **WITNESS ARE** discoverable **ONLY BY LEAVE OF COURT.**

13 (b) ~~Family members~~ **INFORMATION POSSESSED BY A FAMILY MEMBER** of
14 the ~~AN~~ expert witness ~~shall not be deposed~~ concerning the amount of
15 time the expert witness spends engaged in the practice of his or
16 her health profession **IS NOT DISCOVERABLE UNLESS THE FAMILY MEMBER**
17 **IS OR WAS EMPLOYED BY THE EXPERT WITNESS OR AN ENTITY THAT EMPLOYS**
18 **THE EXPERT WITNESS.**

19 (c) A personal diary or calendar belonging to the ~~AN~~ expert
20 witness is not discoverable. As used in this subdivision, "personal
21 diary or calendar" means a diary or calendar that does not include
22 listings or records of professional activities.

23 Sec. 2912b. (1) Except as otherwise provided in this section,
24 a person shall not ~~commence~~ **FILE** an action alleging medical
25 malpractice against a health professional or health facility unless
26 ~~the person has given~~ the health professional or health facility **HAS**
27 **BEEN PROVIDED** written notice **OF INTENT TO FILE A CLAIM** under this

1 section not less than 182 days before the action is commenced.

2 (2) The notice of intent to file a claim required under
3 subsection (1) shall be mailed to the last known professional
4 business address or residential address of the health professional
5 or health facility ~~who~~**THAT** is the subject of the claim. Proof of
6 the mailing constitutes prima facie evidence of compliance with
7 this section. If no last known professional business or residential
8 address can reasonably be ascertained, notice may be mailed to the
9 health facility where the care that is the basis for the claim was
10 rendered.

11 (3) The 182-day notice period required in subsection (1) is
12 shortened to 91 days if all of the following conditions exist:

13 (a) The claimant has previously filed the 182-day notice
14 required in subsection (1) against other health professionals or
15 health facilities involved in the claim.

16 (b) The 182-day notice period has expired as to the health
17 professionals or health facilities described in subdivision (a).

18 (c) The claimant has filed a complaint and commenced an action
19 alleging medical malpractice against 1 or more of the health
20 professionals or health facilities described in subdivision (a).

21 (d) The claimant did not identify ~~, and could not reasonably~~
22 ~~have identified~~ a health professional or health facility to which
23 notice must be sent under subsection (1) as a potential party to
24 the action before filing the complaint.

25 (4) The notice given to a health professional or health
26 facility under this section shall contain a statement of ~~at least~~
27 ~~all of the~~ following:

1 (a) The factual basis for the claim.

2 (b) The applicable standard of practice or care alleged by the
3 claimant.

4 (c) The manner in which it is claimed that the applicable
5 standard of practice or care was breached by the health
6 professional or health facility.

7 (d) The alleged action that should have been taken to achieve
8 compliance with the alleged standard of practice or care.

9 ~~— (e) The manner in which it is alleged the breach of the~~
10 ~~standard of practice or care was the proximate cause of the injury~~
11 ~~claimed in the notice.~~

12 (E) IF THE HEALTH PROFESSIONAL IS NOT EMPLOYED BY, OR THE
13 HEALTH FACILITY IS NOT OPERATED BY, A GOVERNMENTAL ENTITY, A
14 DESCRIPTION OF THE INJURY THAT THE CLAIMANT CONTENTS WAS A
15 PROXIMATE RESULT OF THE CLAIMED BREACH OF THE STANDARD OF PRACTICE
16 OR CARE BY THE HEALTH PROFESSIONAL OR HEALTH FACILITY.

17 (F) IF THE HEALTH PROFESSIONAL IS EMPLOYED BY, OR THE HEALTH
18 FACILITY IS OPERATED BY, A GOVERNMENTAL ENTITY, A DESCRIPTION OF
19 THE INJURY THAT THE CLAIMANT CONTENTS WAS THE PROXIMATE RESULT OF
20 THE CLAIMED BREACH OF THE STANDARD OF PRACTICE OR CARE BY THE
21 HEALTH PROFESSIONAL OR HEALTH FACILITY.

22 (G) ~~(f)~~ The names of all health professionals and health
23 facilities the claimant is notifying under this section in relation
24 to the claim.

25 (5) Within 56 days after ~~giving~~ **RECEIVING A WRITTEN REQUEST**
26 **FROM A HEALTH PROFESSIONAL OR HEALTH FACILITY THAT HAS RECEIVED A**
27 notice under this section, the claimant shall allow the health

1 professional or health facility ~~receiving the notice~~ access to all
2 of the medical records related to the claim that are in the
3 claimant's control ~~, —OR POSSESSION~~ and shall furnish releases for
4 any medical records related to the claim that are not in the
5 claimant's control ~~, —but —OR POSSESSION~~ of which the claimant has
6 knowledge. Subject to section 6013(9), within 56 days after receipt
7 of notice under this section, the health professional or health
8 facility shall allow the claimant access to all medical records
9 related to the claim that are in the control **OR POSSESSION** of the
10 health professional or health facility. This subsection does not
11 restrict a health professional or health facility receiving notice
12 under this section from communicating with other health
13 professionals or health facilities and acquiring medical records as
14 permitted in section 2912f. This subsection does not restrict a
15 patient's right of access to his or her medical records under any
16 other provision of law.

17 (6) After the initial notice is given to a health professional
18 or health facility under this section, the tacking or addition of
19 successive 182-day periods is not allowed, irrespective of how many
20 additional notices are subsequently filed for that claim and
21 irrespective of the number of health professionals or health
22 facilities notified.

23 (7) Within 154 days after receipt of notice under this
24 section, the health professional or health facility against whom
25 the claim is made shall furnish to the claimant or his or her
26 authorized representative a written response that contains a
27 statement of ~~each of~~ the following:

1 (a) The factual basis for the defense to the claim.

2 (b) The standard of practice or care that the health
3 professional or health facility claims to be applicable to the
4 action, **IDENTIFYING ANY SPECIALTY AND BOARD CERTIFICATION THE**
5 **HEALTH PROFESSIONAL OR HEALTH FACILITY CLAIMS TO BE APPLICABLE TO**
6 **THE ACTION**, and that the health professional or health facility
7 complied with that standard.

8 (c) The manner in which it is claimed by the health
9 professional or health facility that there was compliance with the
10 applicable standard of practice or care.

11 (d) The manner in which the health professional or health
12 facility contends that the alleged ~~negligence~~ **MALPRACTICE** of the
13 health professional or health facility was not ~~the~~ **A** proximate
14 cause of the claimant's alleged injury or alleged damage.

15 (8) If the claimant does not receive the written response
16 required under subsection (7) within the required 154-day time
17 period, the claimant may commence an action alleging medical
18 malpractice upon the expiration of the 154-day period **AND ALL**
19 **OBJECTIONS TO THE NOTICE OR ITS CONTENTS ARE WAIVED.**

20 (9) If at any time during the applicable notice period under
21 this section a health professional or health facility receiving
22 notice under this section informs the claimant in writing that the
23 health professional or health facility does not intend to settle
24 the claim within the applicable notice period, the claimant may
25 commence an action alleging medical malpractice against the health
26 professional or health facility, ~~so long as~~ **IF** the claim is not
27 barred by the statute of limitations.

1 (10) AN OBJECTION TO THE FORM OR CONTENT OF A NOTICE OF INTENT
2 GIVEN UNDER SUBSECTION (1) OR TO A WRITTEN RESPONSE FURNISHED UNDER
3 SUBSECTION (7) SHALL BE MADE BY MOTION FILED WITHIN 28 DAYS AFTER
4 SERVICE OF THE COMPLAINT ON ALL DEFENDANTS.

5 (11) IF AN OBJECTION IS NOT FILED UNDER SUBSECTION (10) WITHIN
6 THE 28-DAY PERIOD, ALL OBJECTIONS TO THE NOTICE OF INTENT OR
7 RESPONSE ARE WAIVED. A MOTION OBJECTING TO A NOTICE OF INTENT OR
8 RESPONSE SHALL ASSERT EACH SPECIFIC DEFECT BEING CLAIMED.

9 (12) IF THE TRIAL COURT DETERMINES THAT A NOTICE OF INTENT OR
10 RESPONSE DOES NOT COMPLY WITH THIS SECTION, THE SPECIFIC BASIS FOR
11 THAT DETERMINATION SHALL BE SET FORTH BY THE COURT AND THE COURT
12 SHALL ALLOW THE CLAIMANT, HEALTH PROFESSIONAL, OR HEALTH FACILITY
13 14 DAYS TO AMEND THE NOTICE OF INTENT OR RESPONSE TO CORRECT THE
14 ALLEGED DEFECT. AN AMENDED NOTICE OF INTENT OR RESPONSE UNDER THIS
15 SUBSECTION RELATES BACK TO THE DATE THE ORIGINAL NOTICE OF INTENT
16 OR RESPONSE WAS MAILED.

17 Sec. 2912d. (1) Subject to ~~subsection~~ SUBSECTIONS (2) AND (3),
18 TO COMPLY WITH SECTION 2912B(1) OR (3), AS APPLICABLE, the
19 plaintiff in an action alleging medical malpractice ~~or, if the~~
20 ~~plaintiff is represented by an attorney, the plaintiff's attorney~~
21 ~~shall file with the complaint an affidavit of merit signed by a~~
22 ~~health professional who the plaintiff's attorney reasonably~~
23 ~~believes meets the requirements for an expert witness under section~~
24 ~~2169. The affidavit of merit shall certify that the health~~
25 ~~professional has reviewed the notice and all medical records~~
26 ~~supplied to him or her by the plaintiff's attorney concerning the~~
27 ~~allegations contained in the notice and shall contain a statement~~

~~of each~~ 1 OR MORE AFFIDAVITS OF MERIT THAT DO ALL of the following:

(a) ~~The applicable~~ **DESCRIBE THE** standard of practice or care
THAT THE PLAINTIFF CLAIMS WAS APPLICABLE.

(b) ~~The health professional's~~ **CONTAIN AN EXPERT** opinion that
 the applicable standard of practice or care was breached by the
 health professional or health facility. ~~receiving the notice.~~

(c) ~~The~~ **STATE THE** actions that should have been taken or
 omitted by the health professional or health facility in order to
 have complied with the applicable standard of practice or care.

(d) ~~The manner in which~~ **STATE THE EXPERT'S OPINION THAT THE**
INJURY WAS PROXIMATELY CAUSED BY the breach of the standard of
 practice or care. ~~was the proximate cause of the injury alleged in~~
~~the notice.~~

(E) **ARE SIGNED BY A HEALTH PROFESSIONAL WHO IS REASONABLY**
BELIEVED TO MEET THE REQUIREMENTS FOR AN EXPERT WITNESS UNDER
SECTION 2169.

(2) Upon motion of a party for good cause shown, the court in
 which the complaint is filed ~~may~~ **SHALL** grant ~~the plaintiff or, if~~
~~the plaintiff is represented by an attorney, the plaintiff's~~
~~attorney~~ an additional ~~28~~ **56** days in which to file the affidavit **OF**
MERIT required ~~under~~ **BY** subsection (1).

(3) If the defendant in an action alleging medical malpractice
~~fails~~ **HAS FAILED** to allow access to medical records **OR TO FURNISH A**
RESPONSE TO THE PLAINTIFF'S NOTICE OF INTENT within the **APPLICABLE**
 time period set forth in section ~~2912b(6)~~ **2912B**, the affidavit
~~required under subsection (1)~~ **PLAINTIFF HAS** 91
 days after the ~~filing of the complaint~~ **IS FILED TO FILE THE**

1 AFFIDAVIT OF MERIT REQUIRED BY SUBSECTION (1) .

2 (4) IF THE PLAINTIFF FILES AN AMENDED COMPLAINT THAT SETS
3 FORTH CLAIMS ARISING OUT OF THE SAME CONDUCT, TRANSACTION, OR
4 OCCURRENCE SET FORTH, OR ATTEMPTED TO BE SET FORTH, IN THE ORIGINAL
5 COMPLAINT, AN ADDITIONAL AFFIDAVIT OF MERIT UNDER THIS SECTION NEED
6 NOT BE FILED UNLESS ORDERED BY THE COURT.

7 (5) AN OBJECTION TO AN AFFIDAVIT OF MERIT SHALL BE RAISED IN A
8 MOTION FILED WITHIN 28 DAYS AFTER THE PLAINTIFF'S COMPLAINT AND
9 AFFIDAVIT OF MERIT ARE SERVED. AN OBJECTION TO AN AFFIDAVIT OF
10 MERIT THAT IS NOT INCLUDED IN A TIMELY FILED MOTION IS WAIVED. AN
11 OBJECTION THAT THE HEALTH CARE PROFESSIONAL WHO SIGNED THE
12 AFFIDAVIT DOES NOT MEET THE SPECIALTY REQUIREMENTS OF SECTION 2169
13 IS WAIVED IF THE DEFENDANT DID NOT IDENTIFY THE RELEVANT SPECIALTY
14 OR BOARD CERTIFICATION AS REQUIRED BY SECTION 2912B(7) (B) .

15 (6) IF THE COURT DETERMINES THAT THE PLAINTIFF HAS NOT FULLY
16 COMPLIED WITH THIS SECTION, THE PLAINTIFF SHALL BE GIVEN 56 DAYS TO
17 FILE 1 OR MORE AFFIDAVITS THAT CORRECT THE DEFICIENCIES IDENTIFIED
18 BY THE COURT. THE FILING OF THE AFFIDAVITS RELATES BACK TO THE DATE
19 OF FILING THE ORIGINAL COMPLAINT.

20 (7) IF 1 OR MORE AFFIDAVITS ARE FILED UNDER SUBSECTION (6) ,
21 THE DEFENDANT MAY RENEW ITS OBJECTIONS BY FILING A MOTION WITHIN 14
22 DAYS AFTER SERVICE OF THE AFFIDAVITS.

23 Sec. 2912e. (1) ~~In an action alleging medical malpractice,~~
24 ~~within 21 days after the plaintiff has filed an affidavit in~~
25 ~~compliance with section 2912d, the defendant shall file an answer~~
26 ~~to the complaint. Subject to subsection~~ SUBSECTIONS (2) AND (3) ,
27 the defendant ~~or, if the defendant is represented by an attorney,~~

~~the defendant's attorney shall file , not later than 91 days after~~
~~the plaintiff or the plaintiff's attorney files the affidavit~~
~~required under section 2912d, an affidavit~~ **WITH THE ANSWER TO THE**
COMPLAINT 1 OR MORE AFFIDAVITS of meritorious defense signed by a
~~health professional~~ **AN EXPERT** who ~~the defendant's attorney~~ **IS**
~~reasonably believes meets~~ **BELIEVED TO MEET** the requirements for an
 expert witness under section 2169. **AN AFFIDAVIT OF MERITORIOUS**
DEFENSE SHALL NOT BE SIGNED BY THE DEFENDANT AGAINST WHOM THE
ALLEGATIONS ARE MADE. ~~The~~ **AN** affidavit of meritorious defense shall
~~certify~~ **DO ALL OF THE FOLLOWING:**

(A) CERTIFY that the ~~health professional~~ **EXPERT** has reviewed
 the complaint and all medical records supplied to him or her ~~by the~~
~~defendant's attorney~~ concerning the allegations contained in the
 complaint. ~~and shall contain a statement of each of the following:~~

(B) IDENTIFY THE RECORDS REVIEWED.

(C) (a) The STATE THE factual basis for each defense to the
 claims made against the defendant in the complaint.

(D) (b) The STATE THE standard of practice or care that the
 health professional or health facility named as a defendant in the
 complaint claims to be applicable to the action. ~~and that the~~
~~health professional or health facility complied with that standard.~~

(E) IDENTIFY EACH SPECIALTY AND BOARD CERTIFICATION THE HEALTH
PROFESSIONAL OR HEALTH FACILITY CLAIMS TO BE APPLICABLE TO THE
ACTION.

(F) (c) The STATE THE manner in which it is claimed by the
 health professional or health facility named as a defendant in the
 complaint that there was compliance with the applicable standard of

1 practice or care.

2 (G) ~~(d) The~~ **STATE THE** manner in which the health professional
3 or health facility named as a defendant in the complaint contends
4 that the alleged injury or alleged damage to the plaintiff ~~is not~~
5 ~~related to~~ **WAS NOT PROXIMATELY CAUSED BY** the care and treatment
6 rendered.

7 (2) If the plaintiff in an action alleging medical malpractice
8 fails to allow access to medical records as required under section
9 ~~2912b(6)~~ **2912B**, the affidavit required under subsection (1) may be
10 ~~filed within~~ **DEFENDANT HAS** 91 days after ~~filing an~~ **THE** answer to
11 the complaint **IS FILED TO FILE THE AFFIDAVIT OF MERITORIOUS DEFENSE**
12 **REQUIRED BY SUBSECTION (1).**

13 (3) **ON MOTION OF A PARTY FOR GOOD CAUSE SHOWN, THE COURT SHALL**
14 **GRANT THE DEFENDANT AN ADDITIONAL 56 DAYS IN WHICH TO FILE THE**
15 **AFFIDAVIT OF MERITORIOUS DEFENSE REQUIRED BY SUBSECTION (1).**

16 (4) **IF A DEFENDANT FILES AN AMENDED ANSWER THAT SETS FORTH**
17 **DEFENSES ARISING OUT OF THE SAME CONDUCT, TRANSACTION, OR**
18 **OCCURRENCE SET FORTH, OR ATTEMPTED TO BE SET FORTH, IN THE ORIGINAL**
19 **ANSWER, AN ADDITIONAL AFFIDAVIT OF MERITORIOUS DEFENSE NEED NOT BE**
20 **FILED UNLESS ORDERED BY THE COURT.**

21 (5) **AN OBJECTION TO AN AFFIDAVIT OF MERITORIOUS DEFENSE SHALL**
22 **BE RAISED IN A MOTION FILED WITHIN 8 DAYS AFTER THE DEFENDANT'S**
23 **AFFIDAVIT OF MERITORIOUS DEFENSE IS FILED. AN OBJECTION TO AN**
24 **AFFIDAVIT OF MERITORIOUS DEFENSE THAT IS NOT INCLUDED IN A TIMELY**
25 **FILED MOTION IS WAIVED.**

26 (6) **IF THE COURT DETERMINES BASED ON A TIMELY FILED MOTION**
27 **THAT THE DEFENDANT HAS NOT FULLY COMPLIED WITH THIS SECTION, THE**

1 DEFENDANT SHALL BE GIVEN 56 DAYS TO FILE 1 OR MORE AFFIDAVITS OF
2 MERITORIOUS DEFENSE THAT CORRECT THE DEFICIENCIES IDENTIFIED BY THE
3 COURT. THE FILING OF THE AFFIDAVITS RELATES BACK TO THE DATE OF
4 FILING THE ORIGINAL ANSWER.

5 Sec. 5856. The statutes of limitations or repose **OR ANY TIME**
6 **PERIODS FOR FILING AN ACTION** are tolled in any of the following
7 circumstances:

8 (a) ~~At~~ **NOTWITHSTANDING SECTION 2912B OR 2912D, AT** the time the
9 complaint is filed, if a copy of the summons and complaint are
10 served on the defendant within the time set forth in the ~~supreme~~
11 **MICHIGAN** court rules.

12 (b) At the time jurisdiction over the defendant is otherwise
13 acquired.

14 (c) At the time notice is given ~~in compliance with the~~
15 ~~applicable notice period under section 2912b, if during that~~ **THE**
16 **APPLICABLE NOTICE** period a claim would be barred ~~by the statute of~~
17 ~~limitations or repose; but in this case, the statute is tolled not~~
18 ~~longer than the number of days equal to the number of days~~
19 ~~remaining in the applicable notice period after the date notice is~~
20 ~~given~~ **AS UNTIMELY. IF THIS SUBDIVISION APPLIES, THE TIME TO BRING**
21 **THE ACTION IS TOLLED FOR 182 DAYS BEGINNING THE DAY THE NOTICE IS**
22 **GIVEN UNDER SECTION 2912B.**