focus

Solving the statute of limitations puzzle for minors in medical malpractice cases

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Medical-malpractice cases involving babies and minors have statutes of limitations that present certain landmines and pitfalls for attorneys handling these cases. Case law over the last several years has clarified some of the questions that commonly arise.

Here, we'll touch upon some of the most common issues involved.

What statute of limitations applies to minors in malpractice cases?

Medical-malpractice cases involving minors are subject to a different statute of limitations than adults or for other causes of action involving children.

MCL 600.5851(7) governs medical-malpractice cases for minors under the age of 8. The statute allows a claim to be filed on behalf of a minor by the 10th birthday where the claim accrued before the minor's 8th birthday.

In certain instances, MCL 600.5851(7) does not apply and a two-year medical-malpractice statute of limitations, or a savings provision, allows for a different applicable statutory time period.

Generally, if a minor's claim accrues before age 8, the minor has until his or her 10th birthday to file suit. However, if a claim accrues after age 8, then the minor is subject to the two-year statute of limitations in MCL 600.5805, et seq.

How does the insanity provision affect the statute of limitations in the medical-malpractice case of a minor?

Where a minor is "insane," different rules apply to the statute of limitations. MCL 600.5851(1) contains an "insanity" provision that provides the statute of limitations will be tolled if the injured party is "insane."

Insanity is defined by MCL 600.5851(2) as "a condition of mental derangement such as to prevent the sufferer from comprehending rights he or she is otherwise bound to know and is not dependent on whether or not the person has been judicially declared to be insane."

The Michigan Supreme Court has held the insanity provision applies in medical-malpractice cases involving minors (*Vega v. Lakeland Hosps.*, 479 Mich. 243, 736 NW2d 561 (2007)).

The Court explained that MCL 600.5851(7) did not address the period of limitations for an insane claimant, and therefore did not preclude application of that savings provision to medical malpractice claims. The Court ruled that, because the claimant was 11 years old at the time of the malpractice and was "insane," the savings provision of 5851(1) tolled the statute of limitations.

Therefore, a minor claim is governed by 600.5851(7). If a minor is insane at the time the claim accrues, then the claimant has the ability to claim the insanity savings provision which tolls the minor's statute allowing the case to be filed one year after that disability is removed.

"no longer continues to age" and can never arrive at a 10th birthday.

Therefore, the wrongful-death savings statute of MCL 600.5852, not the period provided in MCL 600.5851(7), was the applicable statute and the plaintiff was required to file within two years from issuance of letters of authority to the personal representative.

How does the notice of intent affect the statute of limitations in the case of a minor?

A notice of intent will toll the statute of limitations for a minor beyond the 10th birthday.

In *Vanslembrouck v. Halperin, et al.*, 277 Mich App 558, 747 NW2d 311 (2008), the Court of Appeals addressed whether MCL 600.5851(7) was a savings provision or a true statute of limitations for which a notice of intent would toll the time period.

In *Vanslembrouck*, plaintiff-minor suffered injuries during the birthing process that resulted in permanent brain damage. Plaintiff mailed a notice of intent 21 days before the child's 10th birthday. After complying with the mandatory waiting period called for by MCL 600.2912b, plaintiff filed suit approximately five months after the child's 10th birthday.

Plaintiff contended that her complaint was timely under the 182-day tolling period applicable to medical-malpractice claims under MCL 600.5856(c). Defendants argued that 600.5851(7) was a savings provision and not subject to tolling by the notice of intent.

However, the Court ruled that MCL 600.5851(7) is a true statute of limitations and it requires a cause of action to be brought within a specific time period. The Supreme Court granted leave to appeal in *Vanslembrouck*, but that order was vacated after briefs and oral arguments of the parties were considered.

Therefore, the statute of limitations of 5851(7) is tolled for a period of 182 days when the notice of intent is served.

How does the six-year statute of repose affect the statute of limitations in the case of a minor?

Michigan courts have ruled that the statute of limitations set forth in 600.5851(7) takes precedence over the six-year statute of repose set out in 5838a(2) (*Casey v. Henry Ford Health System*, 235 Mich. App. 449, 597 NW2d 840 (1999)). Therefore, a minor plaintiff has until the 10th birth to commence a medical-malpractice action, even though there is a six-year statute of repose.

What happens if a minor dies as a result of malpractice before the 8th birthday?

A separate situation arises where a minor is injured and dies as a result of malpractice before age 8. Michigan has a death-savings statute, MCL 600.5852, which generally holds that a wrongful death action may be brought within two years of the appointment of a personal representative.

In *Vance v. Henry Ford Health System, et al.*, 272 Mich App. 426, 726 NW2d 78 (2006), a 7-year-old claimant died as the result of an alleged overdose of medication. The plaintiff filed the action prior to what would have been the deceased minor's 10th birthday, but after the two-year savings period provided in MCL 600.5852 expired.

Defendants argued that, because the minor was deceased at the time the claim accrued, this action fell within the two-year period provided in the death-savings statute, rather than the child's 10th birthday as allowed in MCL 600.5851(7).

The Court of Appeals held that MCL 600.5851(7) was inapplicable to this situation as a minor who dies before the 8th birthday

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