



2013 ASSEMBLY BILL 160

April 17, 2013 - Introduced by Representatives JACQUE, BIES, BROOKS, CRAIG, KLEEFISCH, LEMAHIEU, A. OTT, PRIDEMORE, SCHRAA, THIESFELDT and TITTL, cosponsored by Senators GROTHMAN and LEIBHAM. Referred to Committee on Health.

1 **AN ACT** *to renumber* 895.04 (1); *to amend* 655.001 (10), 655.016, 655.27 (5) (a)
2 1., 655.27 (5) (a) 2., 895.04 (2), 895.04 (4), 895.04 (6) and 895.04 (7); and *to*
3 **create** 655.27 (5m) and 895.04 (1g) of the statutes; **relating to:** wrongful death
4 of an unborn child.

Analysis by the Legislative Reference Bureau

Under current law, if a minor child dies as a result of another person's wrongful act or omission, the deceased minor's relative or other representative may bring a wrongful death action to recover damages from the wrongdoer. This bill defines "deceased minor" to include an unborn child who has died, and defines "unborn child" as a human being from the time of fertilization to the time of live birth.

Under current law, if a minor child dies as a result of medical malpractice, his or her parents, minor siblings, or representative may bring a claim for compensation from the injured patients and families compensation fund. This bill, for purposes of a medical malpractice claim, defines "patient" to include an unborn child and defines "unborn child" as a human being from the time of fertilization to the time of live birth.

Under the bill, no one may bring a medical malpractice claim against a health care provider who did not know, and who had no reason to know, that the mother of the deceased patient was pregnant.

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For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 655.001 (10) of the statutes is amended to read:

2 655.001 (10) "Patient" means an individual who received or should have
3 received health care services from a health care provider or from an employee of a
4 health care provider acting within the scope of his or her employment, and includes
5 an unborn child, as defined in s. 895.04 (1g) (c).

6 **SECTION 2.** 655.016 of the statutes is amended to read:

7 **655.016 Claim by minor sibling for loss of society and companionship.**

8 Subject to s. 655.017, a sibling of a ~~person~~ patient who dies as a result of malpractice
9 has a cause of action for damages for loss of society and companionship if the sibling
10 was a minor at the time of the deceased sibling's death. This section does not affect
11 any other claim available under this chapter.

12 **SECTION 3.** 655.27 (5) (a) 1. of the statutes is amended to read:

13 655.27 (5) (a) 1. Any Except as provided in sub. (5m), any person may file a
14 claim for damages arising out of the rendering of medical care or services or
15 participation in peer review activities under s. 146.37 within this state against a
16 health care provider or an employee of a health care provider. A person filing a claim
17 may recover from the fund only if the health care provider or the employee of the
18 health care provider has coverage under the fund, the fund is named as a party in
19 the action, and the action against the fund is commenced within the same time
20 limitation within which the action against the health care provider or employee of
21 the health care provider must be commenced.

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1 **SECTION 4.** 655.27 (5) (a) 2. of the statutes is amended to read:

2 655.27 (5) (a) 2. Any Except as provided in sub. (5m), any person may file an
3 action for damages arising out of the rendering of medical care or services or
4 participation in peer review activities under s. 146.37 outside this state against a
5 health care provider or an employee of a health care provider. A person filing an
6 action may recover from the fund only if the health care provider or the employee of
7 the health care provider has coverage under the fund, the fund is named as a party
8 in the action, and the action against the fund is commenced within the same time
9 limitation within which the action against the health care provider or employee of
10 the health care provider must be commenced. If the rules of procedure of the
11 jurisdiction in which the action is brought do not permit naming the fund as a party,
12 the person filing the action may recover from the fund only if the health care provider
13 or the employee of the health care provider has coverage under the fund and the fund
14 is notified of the action within 60 days of service of process on the health care provider
15 or the employee of the health care provider. The board of governors may extend this
16 time limit if it finds that enforcement of the time limit would be prejudicial to the
17 purposes of the fund and would benefit neither insureds nor claimants.

18 **SECTION 5.** 655.27 (5m) of the statutes is created to read:

19 655.27 (5m) EXCEPTION. No person may file an action for damages for the death
20 of a patient who is an unborn child arising out of the rendering of medical care or
21 services if the person rendering the medical care or services did not know, and under
22 the applicable medical standard care, had no reason to know, that the mother of the
23 patient was pregnant.

24 **SECTION 6.** 895.04 (1) of the statutes is renumbered 895.04 (1m).

25 **SECTION 7.** 895.04 (1g) of the statutes is created to read:

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1 895.04 (1g) In this section:

2 (a) "Deceased person" means a human being who is deceased, and includes an
3 unborn child who is deceased.

4 (b) "Live birth" means the substantial expulsion or extraction from his or her
5 mother, of a human being, at any stage of development, who, after the expulsion or
6 extraction, breathes or has a beating heart, pulsation of the umbilical cord, or
7 definite movement of voluntary muscles, regardless of whether the umbilical cord
8 has been cut, and regardless of whether the expulsion or extraction occurs as a result
9 of natural or induced labor, a cesarean section, or an abortion, as defined in s. 253.10
10 (2) (a).

11 (c) "Unborn child" means a human being from the time of fertilization to the
12 time of live birth.

13 **SECTION 8.** 895.04 (2) of the statutes is amended to read:

14 895.04 (2) If the deceased person leaves surviving a spouse or domestic partner
15 under ch. 770 and minor children under 18 years of age with whose support the
16 deceased person was legally charged, the court before whom the action is pending,
17 or if no action is pending, any court of record, in recognition of the duty and
18 responsibility of a parent to support minor children, shall determine the amount, if
19 any, to be set aside for the protection of such children after considering the age of such
20 children, the amount involved, the capacity and integrity of the surviving spouse or
21 surviving domestic partner, and any other facts or information it may have or
22 receive, and such amount may be impressed by creation of an appropriate lien in
23 favor of such children or otherwise protected as circumstances may warrant, but
24 such amount shall not be in excess of 50% of the net amount received after deduction
25 of costs of collection. If there are no such surviving minor children, the amount

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1 recovered shall belong and be paid to the spouse or domestic partner of the deceased
2 person; if no spouse or domestic partner survives, to the ~~deceased's~~ deceased person's
3 lineal heirs as determined by s. 852.01; if no lineal heirs survive, to the ~~deceased's~~
4 deceased person's brothers and sisters. If any such relative dies before judgment in
5 the action, the relative next in order shall be entitled to recover for the wrongful
6 death. A surviving nonresident alien spouse or a nonresident alien domestic partner
7 under ch. 770 and minor children shall be entitled to the benefits of this section. In
8 cases subject to s. 102.29 this subsection shall apply only to the surviving spouse's
9 or surviving domestic partner's interest in the amount recovered. If the amount
10 allocated to any child under this subsection is less than \$10,000, s. 807.10 may be
11 applied. Every settlement in wrongful death cases in which the deceased person
12 leaves minor children under 18 years of age shall be void unless approved by a court
13 of record authorized to act hereunder.

14 **SECTION 9.** 895.04 (4) of the statutes is amended to read:

15 895.04 (4) Judgment for damages for pecuniary injury from wrongful death
16 may be awarded to any person entitled to bring a wrongful death action. Additional
17 damages not to exceed \$500,000 per occurrence in the case of a deceased minor, or
18 \$350,000 per occurrence in the case of a deceased adult, for loss of society and
19 companionship may be awarded to the spouse, children or parents of the deceased
20 person, or to the siblings of the deceased person, if the siblings were minors at the
21 time of the death. For purposes of this subsection, "deceased minor" includes an
22 unborn child who is deceased.

23 **SECTION 10.** 895.04 (6) of the statutes is amended to read:

24 895.04 (6) Where the wrongful death of a deceased person creates a cause of
25 action in favor of the decedent's estate and also a cause of action in favor of a spouse,

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1 domestic partner under ch. 770, or relatives as provided in this section, such spouse,
2 domestic partner, or relatives may waive and satisfy the estate's cause of action in
3 connection with or as part of a settlement and discharge of the cause of action of the
4 spouse, domestic partner, or relatives.

5 **SECTION 11.** 895.04 (7) of the statutes is amended to read:

6 895.04 (7) Damages found by a jury in excess of the maximum amount specified
7 in sub. (4) shall be reduced by the court to such maximum. The aggregate of the
8 damages covered by subs. (4) and (5) shall be diminished under s. 895.045 if the
9 deceased person or person entitled to recover is found negligent.

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(END)