Medical Malpractice

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Background

MEDICAL MALPRACTICE is NEGLIGENCE committed by medical professionals. For negligence to be "actionable" (having all the components necessary to constitute a viable cause of action), there must be a duty owed to someone, a breach of that duty, and resulting harm or damage that is proximately caused by that breach. The simplest way to apply the concept of proximate cause to medical malpractice is to ask whether, "but for" the alleged negligence, the harm or injury would have occurred.

When determining whether the conduct of a member of the general public is negligent, the conduct is judged against a standard of how a "reasonably prudent person" might act in the same or similar circumstance. Conversely, when determining whether a medical professional has been negligent, his or her practice or conduct is judged at a level of competency and professionalism consistent with the specialized training, experience, and care of a "reasonably prudent" physician in the same or similar circumstances. This constitutes the "standard of care" or professional "duty" that a physician owes to his or her patient. If the physician breaches the standard of care and his patient suffers accordingly, there is actionable medical MALPRACTICE.

The term "patient" generally refers to a person who is receiving medical treatment and/or who is under medical care. In many states, other licensed medical professionals such as chiropractors, nurses, therapists, and psychologists, may also be sued for malpractice, i.e., negligently breaching their respective professional duties owed to the patient. The following sections refer generally to medical malpractice as it relates to medical doctors/physicians.

Actionable Malpractice

State laws govern the viability of causes of action for medical malpractice. The laws vary in terms of time limits to bring suit, qualifications of "expert" witnesses, cognizable theories of liability, and proper party defendants/proper party plaintiffs. Notwithstanding these differences, there are common requisites for all cases.

First and foremost, a physician must owe a duty to patients before his or her competency in performing that duty can be judged. In U. S. JURISPRUDENCE, a person has no affirmative duty to assist injured individuals, -in the absence of a special relationship with them (such as doctor-patient, attorney-client, guardian-ward, etc.) A doctor dining in a restaurant has no duty to come forward and assist injured others if they suffer a heart attacks while dining in the same restaurant. If the doctor merely continues with his meal

and does nothing to help, the ailing others would not have an action for malpractice against him, notwithstanding their harm. However, once a doctor voluntarily decides to assist others or come to their aid, he or she becomes liable for any injury that results from any negligence during that assistance.

Once the requisite doctor-patient relationship is established, the doctor owes to the patient the duty to render care and treatment with that degree of skill, care, and diligence as possessed by or expected of a reasonably competent physician under the same or similar circumstances. The "circumstances" include the area of medicine in which the physician practices, the customary or accepted practices of other physicians in the area (the "locality rule"), the level of equipment and facilities available at the time and in that locality, and the exigent circumstances, if any, surrounding the treatment or medical service rendered. The requisite degree of skill and expertise under the circumstances is established by "expert testimony" from other practicing physicians who share the same or similar skill, training, certification, and experience as the allegedly negligent physician.

Failure to Diagnose or Erroneous Diagnosis

Generally, a delay or failure to diagnose a disease is actionable, if it has resulted in injury or disease progression above and beyond that which would have resulted from a timely diagnosis. This situation may be difficult to prove. For example, a patient may ALLEGE that a doctor failed to timely diagnose a certain cancer, resulting in "metastasis" (spread of the cancer to other organs or tissues). But experts may TESTIFY that "micrometastasis" (spreading of the disease at the cellular level) may occur as much as ten years before a first tumor has been diagnosed, and cancerous cells may have already traveled in the bloodstream and lodged elsewhere, eventually to grow into new tumors. Therefore, it may be difficult in some cases to establish that a patient has suffered a worse prognosis because of the failure or delay in diagnosis.

If a patient is treated for a disease or condition that he or she does not have, the treatment or medication itself may cause harm to the patient. This is in addition to the harm caused by the true condition continuing untreated.

Most doctors are trained to think and act by establishing a "differential diagnosis." Doing so calls for a doctor to list, in descending order of probability, his or her impressions or "differing" diagnoses of possible causes for a patient's presenting symptoms. The key question in assessing a misdiagnosis for malpractice is to ask what diagnoses a reasonably prudent doctor, under similar circumstances, would have considered as potential causes for the patient's symptoms. If a doctor failed to consider the patient's true diagnosis on his/her differential diagnosis list or listed it but failed to rule it out with additional tests or criteria, then the doctor is most likely negligent.

Failure to Treat or Erroneous Treatment

The most common way in which doctors are negligent by failing to treat a medical condition is when they "dismiss" the presenting symptoms as temporary, minor, or otherwise not worthy of treatment. This situation may result in an exacerbation of the underlying condition or injury, causing further harm or injury. For example only, an undiagnosed splinter or chip in a broken bone may result in the lodging of a piece of bone in soft tissue or internal bleeding caused by the sharp edge of the splintered bone.

Erroneous treatment is most likely to occur as a result of a misdiagnosis. However, a doctor who has correctly diagnosed a disease or condition may nonetheless fail to properly treat it. Other times, negligence is the result of a doctor attempting a "novel" treatment that fails, when in fact a more conventional treatment would have been successful.

Substandard Care, Treatment, or Surgery

The standard of care which is owed to people as a patients is that which represents that level of skill, expertise, and care possessed and practiced by physicians found in the same or similar community as the relevant one, and under similar circumstances. However, the advent of "national board" exams for new doctors and "board certifications" for doctor-specialists has resulted in a more uniform and standard practice of medicine not dependent upon geographic locality.

All licensed physicians should possess a basic level of skill and expertise in diagnosing and treating general or recurring types of illnesses and injuries. Thus, a general practitioner who has administered substandard cardio-pulmonary resuscitation (CPR) to a heart attack victim (who subsequently dies as a result of the substandard care) cannot defend that he or she was not a "cardio-pulmonary specialist." A general practitioner from virtually any other area in the United States could most likely testify as to the level of care and expertise that is to be expected under the circumstances. Conversely, a board-certified cardiopulmonary specialist could not testify that the general practitioner should have done everything that the specialist might have done with his advanced skill and training. Nor, under the locality rule, could an oncology specialist in private practice in Smalltown, U. S. A., be held to the same standard of care as an oncology specialist in a large urban university teaching hospital that has state-of-the-art equipment and facilities.

Because doctors are often reluctant to testify against their colleagues (referred to by lawyers as the "conspiracy of silence"), it may be difficult to find an unbiased expert willing to testify against a negligent doctor or label the care as substandard. This is resistance applies even when they practice on opposite sides of the country: they may know one another from the national board certifications or fellowship programs established for specialists. Moreover, truly competent doctors usually communicate with one another for professional "brainstorming" on diagnosing or treating some conditions or may collaborate in research or academic publications.

Gross Negligence

Within the context of medical malpractice, the term "gross negligence" refers to conduct so reckless or mistaken as to render itself virtually obvious to a layman without medical training. Examples include a surgeon amputating the wrong limb or leaving a surgical instrument inside a body cavity of the patient. Some states will permit a person to establish a cause of action for medical malpractice grounded in GROSS NEGLIGENCE without the need for expert TESTIMONY. A minority of states still permit an action for "res ipsa loquitur" ("the thing speaks for itself"), meaning that such an accident or injury to the patient could not have occurred unless there was negligence by the doctor's having control over the patient.

Unauthorized Treatment or Lack of Informed Consent

Virtually all states have recognized, either by express STATUTE or COMMON LAW, the right to receive information about one's medical condition, the treatment choices, risks associated with the treatments, and prognosis. The information must be in plain language terms that can readily be understood and in sufficient amounts such that a patient is able to make an "informed" decision about his or her health care. If the patient has received this information, any consent to treatment that is given will be presumed to be an "informed consent." A doctor who fails to obtain INFORMED CONSENT for non-emergency treatment may be charged with a civil and/or criminal offense such as a "battery" or an unauthorized touching of the plaintiff's person.

In order to prevail on a charge that a doctor performed a treatment or procedure without "informed consent," the patient must usually show that, had the patient known of the risk or outcome allegedly not disclosed, the patient would not have opted for the treatment or procedure and thus avoided the risk. In other words, the patient must show a harmful consequence to the unauthorized treatment.

Guaranteed Results or Guaranteed Prognosis

Virtually all states prohibit or disallow claims that a doctor promised a certain prognosis of success or guaranteed a certain result if a patient agreed to undergo the suggested treatment, procedure, or therapy. Some states permit such claims for cosmetic surgery only if the guaranteed result is in writing and contained in the form of an enforceable contract.

Breaches of Doctor-Patient Confidentiality

Doctor-patient confidentiality is based upon the general principle that a person seeking medical help or advice should not be hindered or inhibited by fear that his or her medical concerns or conditions will be disclosed to others. There is generally an expectation that the physician will hold that special knowledge in confidence and use it exclusively for the benefit of the patient.

The professional duty of confidentiality covers not only what a patient may reveal to the doctor, but also what a doctor may independently conclude or form an opinion about, based on his or her examination or ASSESSMENT of the patient. Confidentiality covers all medical records (including x-rays, lab-reports, etc.) as well as communications between patient and doctor and generally includes communications between the patient and other professional staff working with the doctor.

The duty of confidentiality continues even after a patient has stopped seeing or being treated by the doctor. Once a doctor is under a duty of confidentiality, he or she cannot divulge any medical information about patients to third persons without patients' consent. There are limited exceptions to this, including disclosures to state health officials. However, unauthorized disclosure to unauthorized parties may create a cause of action against the doctor.

Vicarious Liability

Finally, a doctor who has been negligent may not be the only DEFENDANT in a subsequent lawsuit. A hospital that has retained the doctor on its staff may be vicariously liable for the doctor's negligence under a theory of "respondeat superior" ("let the master answer") that often holds an employer liable for the negligence of its employees. More often, the doctor has "staff privileges" at the hospital, and the hospital will attempt to prove the limited role it plays in directing or supervising the doctor's work. Importantly, many doctors belong to private medical practices, such as limited partnerships or limited liability companies, that also may be vicariously liable for the negligence of their member doctors.

However, a doctor is generally liable for any negligence on the part of his assistants and staff in carrying out his orders or caring for his patients. Likewise, an attending physician is generally liable for any negligence on the part of interns and medical students under the physician's guidance.

Patient's Contributory or Comparative Negligence

As malpractice is a form of negligence, defenses that are generally allowed against general claims of negligence are also viable against claims of malpractice. These might include the following defenses:

- The patient was also negligent and caused much of his or her own harm
- The patient failed to mitigate his or her own harm or damage or made them worse
- The patient gave an informed consent and therefore assumed the risk of any [complication or untoward effect]

- The alleged harm or damage was an unavoidable "known risk" that occurs without negligence
- The patient failed to disclose important information to the doctor
- The patient's prognosis or condition was not worsened by the alleged negligence
- The patient engaged in some intervening or superceding conduct following the alleged malpractice that broke the chain of events linking the malpractice to the patient's damages or harm

State Statutes of Limitations Provisions for Malpractice Actions

State law governs the applicable STATUTE OF LIMITATIONS (time within which individuals must file a lawsuit) for medical malpractice suits, as well as the minimum qualifications of expert witnesses (e.g., whether a non-board-certified general practitioner may testify against a specialist, or vice-versa, etc.). Many states have passed legislation imposing limitations or "caps" on monetary damages recoverable in malpractice suits, but the courts in some of these states have declared the laws unconstitutional.

Each state also has its own laws regarding "wrongful death" claims alleging malpractice as the cause of death. Virtually all states allow longer limitations periods for DISABILITY, INCOMPETENCY, minority, foreign objects left in the body, or FRAUDULENT concealment preventing DISCOVERY.

ALABAMA: Under Alabama law, actions against health care providers must be commenced within two years after the act or omission giving rise to the claim or within six months from the date of such discovery or the date of learning of facts that would reasonably lead to such discovery, whichever is earlier. Ala. Code 6-5-482. A WRONGFUL DEATH action, including those grounded in medical malpractice, must be brought within two years after the decedent's death. Ala. Code 6-2-38 and 6-5-410.

ALASKA: Action must be brought within two years of injury or death. Alaska Stat. 09.10.070. An action for wrongful death must be brought within two years after death, but a reasonable failure to discover essential elements may toll the statute. Alaska Stat. 09.55.580.

ARIZONA: Action must be brought within two years after the cause of action accrues. Ariz. Rev. Stat. Ann. 12-542. Limitations period does not begin to run until the manifestation of the injury. *DeBoer v. Brown,* 138 Ariz. 168, 673 P.2d 912 (1983). Wrongful death claims accrue at the date of death and must be brought within two years. Ariz. Rev. Stat. Ann. 12-542.

ARKANSAS: Action must be brought within two years after the date of the wrongful act complained of. Ark. Code Ann. 16-114-203, with exceptions for foreign objects, for which the action may be brought within one year from the date of discovery or the date when the object should have been discovered, whichever is earlier. There is a three-year statute of limitations for wrongful death actions. Ark. Code Ann. 16-62-102 except for malpractice claims, then two-year statute controls.

CALIFORNIA: California law requires under one year limitation period for medical malpractice actions involving injury or death. However, the time starts to run from the date the claimant discovered the negligent act (statute is tolled until foreign bodies are discovered), but no more than three years from the date of injury. Cal. Civ. Proc. Code 340.5..

COLORADO: Action must initiate within two years after the date the injury and its cause are known or should have been known with the exercise of reasonable diligence. Colo. Rev. Stat. Ann. 13-80-102.5 and 13-80-108. Statute extended for concealment, foreign bodies, or undiscoverable nexus between cause and injury exercising reasonable diligence 13-80-102.5. The limitations period for a wrongful death action is two years. Colo. Rev. Stat. Ann. 13-80-102. A wrongful death cause of action accrues on the date of death. Colo.

13-80-108.

DELAWARE: Medical malpractice actions, whether for injury or death, must be brought within two years after the date of the injury. Del. Code Ann, Title 18 6856. The time is extended for discovery delays.

DISTRICT OF COLUMBIA: Action must initiate within three-year statute of limitations for medical malpractice actions. D.C. Code Ann.12-301, accruing from time plaintiff knows or with the exercise of due diligence should know of the injury. A wrongful death action must be brought within one year of the date of death. D.C. Code Ann. 16-2702.

FLORIDA: Action must initiate within two years from the date of the incident or from the date when the incident was or should have been discovered, including those cases involving death, alleged fraud, concealment, or intentional misrepresentation preventing discovery. Fla. Stat. Ann. 9.11(4)(b)

GEORGIA: Georgia has a two-year statute of limitations running from the date of injury or death.

Ga.Code Ann. 9-3-71. Foreign object cases, however, may be brought any time within one year of discovering the object. Ga. Code Ann. 9-3-72.

HAWAII: Hawaii Rev. Stat. 657-7.3 requires filing within two years of the time the claimant discovers or reasonably should have discovered the injury. "Discovery" has been interpreted by case law to mean the discovery of harm or damage, the violation of duty, and the causal connection between them. *Hays v. City and County of Honolulu,* 81 Haw. 391, 917 P.2d 718 (1996).

IDAHO: Idaho Code 5-219(4) requires action to begin within Two years for injury or death, which runs from the time the cause of action accrued. Cause of action accrues at the time of the occurrence, act, or omission. Foreign objects cases accrue when the injured party knows or should have known of the injury, extending limitation by one year following the date of accrual, whichever is later. Two-year period begins to run at the time of death.

ILLINOIS: Action must initiate within two years from the date the claimant knew or reasonably should have known of the injury. 735 Ill. Comp. Stat. Ann. 5/13-212. No action for wrongful death can be maintained if the malpractice statute of limitations, 5/13-212, had expired on the decedent's personal injury action prior to death. *Wolf v. Bueser,* 279 Ill. App. 3d 217, 664 N.E.2d 197, cert. denied, 168 Ill.2d 629, 671 N.E.2d 745 (1996).

INDIANA: Action must initiate within two years from the date of the alleged act, omission, or neglect including wrongful death malpractice actions. Ind. Code Ann. 34-18-7-1. The Indiana Supreme Court has held that the statute cannot be constitutionally applied in cases where the long latency period of a medical condition prevents the injured party from discovering the malpractice within two years, thus creating a "discovery" exception. *Martin v. Richey,* 711 N.E.2d 1273, 1279 (Ind. 1999)

IOWA: Action must initiate within two years after the date upon which the claimant knew or reasonably should have known of the injury or death, with the exception of retained foreign objects. Iowa Code Ann. 614.1(9).

KANSAS: Action must initiate within two years from either the date of the injury or the date when the injury becomes reasonably ascertainable to the injured person. Kan. Stat. Ann. 60-513(7)(c). I, death actions, the two years still begins to run from the date of injury or discovery, which in some cases may be prior to the date of death. *Kelley v. Barnett,* 23 Kan. App. 2d 564, 932 P.2d 471 (1997).

KENTUCKY: Action is required within one year limitations period forafter injury or death, or from the time the injury was or reasonably should have been discovered. KRS 413.140.

LOUISIANA: Action must initiate within one year period from of the date of the alleged act, omission, or neglect, or within one year from the date of discovery. La. Rev. Stat. Ann. 9:5628. There is conflict among the APPELLATE courts over whether 9:5628 applies to wrongful death cases involving medical malpractice.

MAINE: Three years is the limit for medical malpractice actions, including death cases. Me. Rev. Stat. Ann. tit. 24, 2902. The statute does not contain a discovery provision. In foreign object cases, the time accrues beginning when the injury is discovered or reasonably should have been discovered.

MARYLAND: Action is required within five years from the date when the injury was committed or three years from the date when the injury was discovered, whichever is earlier. Md. Code Ann., Cts. & Jud. Proc. 5-109. A wrongful death action brought by the decedent's dependents must be filed within three years after death, including actions for medical malpractice Md. Code Ann., Cts. & Jud. Proc. 3-904.

MASSACHUSETTS: Action is required within three years after the cause of action accrued, including death cases, excepting foreign object actions. Mass. Ann. Laws ch. 260-4. Accrues when a plaintiff learns, or reasonably should have learned, that he has been harmed as a result of the defendant's conduct.

MICHIGAN: Action is required within two years from the date of the act or omission or six months from the date the claimant discovers or should have discovered the existence of the claim, whichever is longer. MCL 600.5805(4) and 600.5838a. Applies to death actions, which accrue on the date of the wrongful act, not the date of death. However, MCL 600.5852 may extend the two-year statute by up to three years, whether death is delayed or instantaneous. Under 600.5852, the personal representative of the decedent has the longest of three periods in which to sue: either of the above or, if the injured person dies before the two-year statute has run (or within a thirty-day grace period thereafter), within two years after being appointed so long as the suit is commenced within three years after the expiration of the two-year malpractice period of limitation.

MINNESOTA: Minn. Stat. Ann. 541.07 requires filing within two years from the date the cause of action accrued, including wrongful death actions based on medical malpractice. Minn. Stat. Ann. 573.02 Minnesota courts look to the last date of treatment as the date upon which action accrues.

MISSISSIPPI: Under Miss. Code Ann. 5-1-36, medical malpractice actions must be brought within two years from the date the alleged act, omission, or neglect with reasonable diligence might have been first known or discovered, including actions alleging wrongful death.

MISSOURI: Action is required within two years from the date of the occurrence. Mo. Ann. Stat. 516.105. In foreign object cases, two years from the date of discovering the alleged negligence. An action for wrongful death premised on medical malpractice is governed by the three-year wrongful death limitations period and not the two-year medical malpractice limitations period. *Caldwell v. Lester E. Cox Medical Centers-South, Inc.,* 943 S.W.2d 5 (Mo. Ct. App. 1997).

MONTANA: Action is required within three years from the date of injury or death, accruing from the date injury was discovered or with reasonable diligence should have been discovered. Mont. Code Ann. 27-2-205(1) (1997).

NEBRASKA: Action is required within two years from the date of occurrence or one year after of discovery or discovery of facts that should reasonably have led to such discovery. Neb. Rev. Stat.25-222 and 44-2828. Same statute applies to wrongful death actions based on medical malpractice.

NEVADA: Action is required within four years from the date of injury, or two years from the date the injury was or should have been discovered, whichever is earlier. Nev. Rev. Stat. Ann. 41A.097.

NEW HAMPSHIRE. In 1980, New Hampshire's Supreme Court held that the two-year statute of limitations specific to medical malpractice, N.H. Rev. Stat. Ann. 507-C:4 (1997), was unconstitutional. *Carson v. Maurer,* 120 N.H. 925, 424 A.2d 825. The general statute of limitations for PERSONAL INJURY or wrongful death is three years from the date the act was discovered or should have been discovered. N.H. Rev. Stat. Ann. 508:4.

NEW JERSEY: Action is required within two years from the date the cause of action accrued. N.J. Stat. Ann. 2A:14-2. Action does not begin to accrue when party reasonably is unaware of injury or causal relationship with an identifiable person. Wrongful death actions must be brought within two years from the date of death. N.J. Stat. Ann. 2A:31-3.

NEW MEXICO: Action is required within three years from the date when the alleged malpractice occurred. N.M. Stat. Ann. 41-5-13. The New Mexico Supreme Court has ruled, in *Garcia v. La Farge,* 119 N.M. 532, 893 P.2d 428 (1995), that where a child suffered a cardiac arrest two years and 280 days after the last day of treatment, the remaining 85 days (of the three year statute) was an unfairly short period of time. In addition, this statute does not apply to those who have not become "qualified health care providers" by participating in the state-sponsored excess insurance program, in which case they are governed by the three-year general personal injury statute of limitations, N.M. Stat. Ann. 37-1-8.

NEW YORK: Action is required within two and a half years from the act or omission complained of or from the end of a continuous treatment during which the act or omission took place. N.Y. C.P.L.R. 214a. Foreign object cases may be brought within one year of discovery. Death cases must be brought within two years from the date of death. N.Y. Est. Powers & Trusts Law 5-4.1.

NORTH CAROLINA: Action is required within three years from the date of the last act of the defendant giving rise to the cause of action or one year from the date when the injury was or should have been discovered. N.C. Gen. Stat. 1-15 and 1-52(16). Foreign object cases have a discovery exception. Death actions based on alleged medical malpractice must be brought within the above periods or within two years from death, whichever is shorter. N.C. Gen. Stat.1-53.

NORTH DAKOTA: Action is required within two years from the date the cause of action accrued. N.D. Cent. Code 28-01-18, with exceptions for latent discovery. In death actions, courts presume that the occurrence is discovered or should have been discovered at the time of death, so the same two year limitation applies.

OHIO: Action is required within one year after the cause of action accrues. ORC.2305.11(B)(1) (Sub. S.B. 108). Time begins to accrue when the claimant discovers or, in the exercise of reasonable care and diligence, should have discovered the resulting injury, or when the physician-patient relationship for that condition terminates, whichever occurs later. If a malpractice claimant gives written notice to the prospective defendant within the one-year limitation period, the claimant may bring an action at any time within 180 days of that notice. ORC 2305.11(B)(1) (Sub. S.B. 108). Malpractice death actions may be brought within two years after the decedent's death., ORC 2125.02(D) (Sub. S.B. 108), even if decedent's malpractice claim was already time-barred when he died. *Brosse v. Cumming,* 20 Ohio App. 3d 260, 485 N.E.2d 803 (1984).

OKLAHOMA: Action is required within two years from the date upon which the claimant knew or should have known of the alleged injury. Okla. Stat. Ann. Title 76-18. Wrongful death actions must be brought within two years from the time of death, including those for medical malpractice. Okla. Stat. Ann. Title 12-1053.

OREGON: Action is required within two years the date the injury is first discovered or in the exercise of reasonable care should have been discovered. Or. Rev. Stat. 12.110(4). Oregon's wrongful death statute includes malpractice actions, requires filing within three years after the injury causing the death is discovered (or reasonably should have been discovered) by the decedent. Or. Rev. Stat. 30.020(1)

PENNSYLVANIA: Action is required within two years, including death actions., 42 Pa. Cons. Stat. Ann. 5524, with latent discovery exceptions. The discovery rule is not applicable in death cases, however. *Pastierik v. Duquesne Light Co.,* 514 Pa. 517, 526 A.2d 323 (1987).

RHODE ISLAND: Action is required within three years of the date of the incident, the date of death, or the date when the claimant knew or should have known of the wrongful act. R.I. Gen. Laws 9-1-14.1 and 10-7-2 (1997).

SOUTH CAROLINA: Action is required within three years from the date of the occurrence or the date when the occurrence should have been discovered. S.C. Code Ann. 15-3-545. Foreign object cases have two years from the date of discovery. Death cases involving medical malpractice are governed by the above rather than S.C. Code Ann. 5-3-530 (the wrongful death statute of limitations). *Garner v. Houck,* 312 S.C. 481, 435 S.E.2d 847 (1993).

SOUTH DAKOTA: Action is required within two years from the date the alleged malpractice occurred. S.D. Codified Laws Ann. 15-2-14.1. The discovery rule is not applicable to medical malpractice actions. However, foreign object cases constitute "continuing torts" for which the limitations period cannot begin until the end of treatment and the statute may be tolled by other forms of continuing treatment or by fraudulent concealment. *Bruske v. Hille,* 567 N.W.2d 872 (S.D. 1997). Death actions have three years from the decedent's death, S.D. Codified Laws Ann. 21-5-3, but there is no law stating whether this period applies to medical malpractice death cases.

TENNESSEE: Action is required within one year after the date upon which the claimant discovered the injury, including death actions. Tenn. Code Ann. 29-26-116.

TEXAS: Action is required within two years from the date of the breach or tort or from the completion of treatment. Tex. Rev. Civ. Stat. Ann. art. 4590i- 10.01. If an injury results from a negligent course of treatment, rather than a specific instance of negligence, the limitations period begins on the last date of treatment, but if the precise date of the breach or tort is ascertainable, the limitations period begins on that date. *Bala v. Maxwell,* 909 S.W.2d 889 (Tex. 1995) The same case held that the medical malpractice statute of limitations, not the wrongful death statute of limitations, (, Tex. Civ. Prac. & Rem. Code Ann. 16.003(b), applies to claims brought for malpractice resulting in death.

UTAH: Action is required within two years from the date the injury was or should have been discovered. Utah Code Ann. 78-14-4. Foreign object cases have one year of the date when the object was or should have been discovered. The medical malpractice statute of limitations applies to malpractice death actions. *Jensen v. IHC Hospitals, Inc.,* 944 P.2d 327, 332 (Utah 1997).

VERMONT: Action is required within three years from the date of the alleged malpractice or within two years from the date upon which the claimant knew or should have known of the alleged injury, whichever is later, Vt. Stat. Ann., Title 12-521. Exceptions exist for fraudulent, foreign objects, for which the limitations period is two years from the date of the discovery of such object.

VIRGINIA: Action is required within two years from the date the cause of action accrued. Va. Code Ann. 8.01-243. Exceptions exist for foreign objects, FRAUD, concealment, extended to one year from the date the object or injury is discovered or reasonably should have been discovered. The tolling provision of the Virginia

Medical Malpractice Act applies to the two-year limitations contained in the Virginia Wrongful Death Act. *Wertz v. Grubbs,* 245 Va. 67, 425 S.E.2d 500 (1993).

WASHINGTON: Action is required within three years from the act or omission alleged to have caused the injury or one year after the discovery of the alleged negligent act or omission, whichever period expires later. Wash. Rev. Code Ann. 4.16.350. Exceptions exist for fraud, intentional concealment, foreign objects. Wash. Rev. Code Ann. 4.16.080(2) requires that actions for wrongful death, including for malpractice, must be brought within three years after the decedent's death.

WEST VIRGINIA: Under W. Va. Code 55-7B-4, action is required within two years of either the date when the injury occurred or the date when the claimant discovered or reasonably should have discovered the injury. Wrongful death actions, including for malpractice, must be brought within two years from the date of death. W. Va. Code 55-7-6(d).

WISCONSIN: Action is required with three years from the date of injury, or one year from the date of discovery. Wis. Stat. Ann. 893.55(1).

WYOMING: Action is required within two years from the alleged act, error, or omission, or within two years of discovery if the act, error, or omission was not reasonably discoverable despite due diligence. Wyo. Stat. Ann.1-3-107. If the act or error is discovered during the second year of the two-year limitations period, it is extended by six months. Wrongful death actions must be brought within two years after the decedent's death. Wyo. Stat. Ann. 1-38-102(d).

Additional Resources

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