



Alerts

Illinois Plaintiffs May Have More Time to File Medical Malpractice Wrongful Death Cases

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Medical Litigation Alert

Summary of the Decision

The Illinois Supreme Court recently entered a decision captioned *Moon v. Rhode* that holds the more liberal discovery rule applies to trigger the time to file medical malpractice wrongful death and Survival Act cases. The ruling may serve to expand the potential time limits plaintiffs have to file these types of suits.

Two-Year Time Limit to File Suit

Generally, medical malpractice claims in Illinois must be brought within two years from the date when a plaintiff knows of his injury and its wrongful cause. In the context of a wrongful death case premised on medical negligence, the triggering event that begins the two-year period was often understood to be the death of the patient. Thus, a wrongful death lawsuit premised on medical negligence filed more than two years after the patient's date of death was considered suspect and subject to dismissal, potentially at the outset of the case.

The discovery rule is a legislatively created device meant to lessen the harsh effects of the statute of limitations in circumstances where the plaintiff could not discover an injury and its wrongful cause until some later point in time. Thus, when the discovery rule is applied, a plaintiff's statute of limitations period is not triggered until he "knows or reasonably should know" of the injury and that it was wrongfully caused.

In the recent *Moon v. Rhode* decision, the Illinois Supreme Court clarified the date of death is not an unequivocal trigger of the limitations period in wrongful death and Survival Act suits based on medical malpractice. Instead, the plaintiff in such an action is required to file suit within two years of the date when he not only knows of the patient's death but also "knows or reasonably should have known that the death was wrongfully caused." This application of the discovery rule in *Moon* effectively breathed new life into a dismissed suit.

Case Specifics

In *Moon v. Rhode*, the plaintiff, an attorney with some experience in medical malpractice, knew of his 90-year old mother's death when it occurred (May 29, 2009). However, he claimed he did not know the death was wrongfully caused until he received a written report from a medical consulting firm which specifically pinpointed examples of alleged negligence. That written report was not received until nearly two years after the patient's death (May 2, 2011).

Thus, with the application of the discovery rule, plaintiff claimed he should have an additional two years from the date he received the written report to file his wrongful death claim against a radiologist. Plaintiff used this theory to argue that his March 18, 2013 lawsuit against the radiologist—filed almost four years after his mother's death—was timely.

The Court pointed out that acquiring knowledge of the wrongful cause of a death occurs at "the point in time when the injured person becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved." And, the Court reminded us that the moment when the Plaintiff "knew or should have known" is usually a question of fact reserved for the jury. Consistent with this concept, the Court remanded the case to the trial court for the trier of fact to determine when the statute of limitations was



triggered.

Practical Impact

The *Moon* decision arguably allows potentially time-barred wrongful death and Survival Act claims to continue past early motion practice so long as a plausible theory is offered to show the plaintiff did not know or have reason to know of the wrongful cause of the patient's death.

Thus, even if a case ultimately should be time-barred pursuant to the more liberal discovery rule, the determination that it is untimely may not come until the case makes its way to the jury. Application of the discovery rule in wrongful death and Survival Act cases premised on medical malpractice may effectively require health care providers to defend questionably timely suits through the entire course of discovery and then to make what could be an unpopular and unappealing technical argument to a jury of lay persons that the suit was filed too late.

Developing an appropriate strategy to pin down the facts of when plaintiff knew or should have known of the alleged wrongful cause of death is key to ferreting out and dismissing untimely claims. Health care defendants who are the subject of medical malpractice allegations should seek out skilled litigators to examine these issues.

For more information, contact [Jennifer L. Johnson](#) or your [Hinshaw attorney](#).

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