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Newsletters

Medical Litigation Newsletter - July 2012

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Statute of Limitations for Minors in Medical Malpractice Actions

Illinois

The statue of limitations for the filing of a wrongful death action in Illinois is two years. However, if there are minor children involved in the recovery of damages based on the wrongful death of a parent, the statute is tolled in certain circumstances.

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Wisconsin

Wisconsin has a unique statutory scheme governing medical negligence lawsuits. The seminal case that discusses the medical negligence statutes of limitations and statutes of repose for minors is *Aicher v. WI Patients Compensation Fund,* 2000 WI 98, 237 Wis. 2d 99, 613 N.W.2d 849. The *Aicher* Court cautioned legal practitioners about the complex interrelation between the limitations established to govern minor victims of medical malpractice and the general scheme of limitations governing medical negligence actions.

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Arizona

In Arizona, the statute of limitation for medical malpractice actions with respect to minors is governed by Ariz. Rev. Stat. § 12-502 which provides that the period of time the person is under the age 18 shall not be deemed a portion of the period of time limited for the commencement of the action. Such a person shall have the same time or limitation after reaching the age of majority allowed to others.

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Indiana

According to the Indiana Medical Malpractice Act (MMA), a claim, whether in contract or tort, must be brought against a health care provider within two years after the date of the alleged act, omission or neglect. An exception in the MMA for minor children provides that a minor who is under six years of age has until his or her eighth birthday to file a medical malpractice claim. Minors who bring

Attorneys

Patrick P. Devine

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Service Areas

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claims for medical malpractice that occurred after their sixth birthday must file their claim within two years.

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Wisconsin Supreme Court Expands Scope of Informed Consent Law

In *Jandre v. Physician's Insurance Company of Wisconsin,* 2012 WI 39, 340 Wis. 2d 31, the Wisconsin Supreme Court addressed the question of whether a physician who issues a non-negligent diagnosis may nonetheless be held liable for failure to provide a patient information about available tests to diagnose other conditions originally within the physician's "differential diagnosis." The Court split in its response to this issue. Chief Justice Shirley S. Abrahamson authored the lead opinion and concluded that the law of informed consent imposes such a duty as a matter of well-established law in circumstances when a reasonable patient would require such information to make an informed decision regarding his care. Justice David Prosser, Jr. concurred, affirming a $2 million judgment against defendants. But Justice Prosser noted that he shared the concern of three dissenting justices that "the law of informed consent is being expanded beyond its original scope and purpose, with profound consequences for the practice of medicine." The dissent, authored by Justice Patience Drake Roggensack, decried the lead opinion as creating a basis for strict liability for missed diagnoses.

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Hinshaw Representative Matters

We are pleased to report the following:

James M. Lydon and Thomas L. O'Carroll represented an emergency room physician and a hospital in a medical malpractice wrongful death case of a woman who died from an aortic dissection. The jury rejected a request by plaintiff's counsel during closing arguments for $2.1 and awarded plaintiff $100,000. Plaintiff's counsel had four experts from all over the country and expended much time and money in the case, so this was an outstanding win for defendants. The case was tried before a jury in Cook County, Illinois.

Michael F. Henrick represented a hospital in a medical malpractice action involving the death of a twin who was born in distress. Plaintiff alleged negligence as it related to the staffing of personnel at the delivery, as well as the resuscitative efforts that were done by the co-defendant pediatrician, who arrived approximately 7 - 11 minutes after the delivery and the neonatologist who became involved shortly thereafter. The child died approximately five hours after her birth. On the hospital's behalf, Hinshaw disputed liability and causation. Plaintiff asked for $7.1 million from the jury. After deliberating for approximately one hour, the jury returned a not guilty verdict for defendants.

Patrick P. Devine represented a pain-management physician accused of having negligently performed a cervical epidural steroid injection. In Indiana, a medical malpractice claim must be submitted to a medical review panel composed of three physicians before it can be filed in court. The physician prevailed before the panel, and plaintiff refiled the case in Indiana state court. The physician moved for summary judgment, based upon the favorable panel opinion. Plaintiff filed an affidavit by a New York physician, asserting that defendant physician had breached the standard of care in his procedure. Following the expert's deposition, the court struck his affidavit, finding that the affiant's deposition testimony demonstrated that his opinions were based upon inferential speculation. The court then granted summary judgment for defendant physician.

Jerrod L. Barenbaum represented defendant, an OB/GYN physician in a case in which plaintiff patient alleged a six-month delay in the diagnosis of her cervical cancer. The patient died of cervical cancer in April 2002. On June 23, 2000, the physician saw the patient, who complained of abdominal pain, spotting, and pain with intercourse. She also reported that she had not seen any physician in the previous 12 years. The physician noted a large, firm cervix following an exam. A Pap smear was performed and reported to him as normal. The pap spear was later found to have been misread by a cytotechnologist and pathologist; it should have been reported as "squamous cell carcinoma." The patient was instructed to return for a follow-up Pap smear in three months, but did not return to the physician. Her cancer was diagnosed at stage IIIB in December 2000 when her kidneys failed as a result of the tumor blocking her ureters. A directed verdict was granted for the physician based on the patient's expert conceding at trial that although she knew the general survival rates for the different stages of cervical cancer, and that the patient's cancer was at a lower stage in June when she saw the physician than the stage IIIB it was at diagnosis six months later, and stating that she could not opine to a reasonable degree of medical certainty as to this specific patient's survival rate at any particular point in time considering all of the

variables that impact an individual's chance of survival. Daniel E. Wiesch assisted with the preparation of the successful directed verdict motion.

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