

OHIO MEDICAL MALPRACTICE LAW SUMMARY

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Statues of Limitation

Ohio Revised Code §2305.113, effective April 11, 2003, holds that a medical malpractice action “shall be *commenced within one year* after the cause of action has accrued.” However, if before expiration of the one-year period of time, plaintiff provides each defendant with written notice that plaintiff is considering bringing an action against said defendant, plaintiff may bring an action within one hundred eighty days of the notice.

Plaintiff cannot file an action more than four years after the occurrence of the act or omission constituting the alleged basis of the claim, unless one of the following apply:

- (1) If, plaintiff can prove by clear and convincing evidence that he or she could not have discovered the injury resulting from the act or omission within three years after the occurrence, but discovers the injury before the end of the fourth year, plaintiff can file the claim one year from discovery of the injury resulting from the act or omission;
- (2) If the alleged basis of the claim involves a foreign object left in plaintiff’s body, plaintiff can file a claim within one year after plaintiff discovered the foreign object unless, with reasonable care and diligence, plaintiff should have discovered it earlier. Plaintiff has the affirmative burden of proving by clear and convincing evidence that the foreign object could not have been discovered earlier;
- (3) O.R.C. §2305.16 provides that, if at the time the cause of action accrues, the person is within the age of minority (less than 18 years old) or is of unsound mind, the person may bring the action within one year after the disability is removed. When the interests of two or more parties are joint and inseparable, the disability of one shall inure to the benefit of all;

After the cause of action accrues, if the person entitled to bring the action becomes of unsound mind as determined by a court, or is hospitalized with a diagnosis of unsound mind, the period of time the person is adjudicated to be of unsound mind or hospitalized shall not be computed as any part of the period within which the action must be brought.

The appointment of a Guardian for a person within the age of minority or for a person of unsound mind neither removes the disability nor commences the running of the statute of limitations. Weaver v. Edwin Shaw Hosp., 104 Ohio St.3d 390, 398;

- (4) If the patient is still treating with the physician or hospital for the condition or injuries giving rise to the claim, the physician-patient relationship has not terminated and the statute of limitations has not begun to run until the physician-patient relationship for that injury ends. Dobrovich v. Kaiser Permanente, 2005-Ohio-244.

Medical malpractice and wrongful death claims are considered two separate causes of action. “Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died (survival action), while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong, but a single recovery for a double wrong.” Klema v. St. Elizabeth’s Hosp. (1960), 170 Ohio St. 519, 521 citing St. Louis, Iron Mountain & Southern Ry. Co. v. Craft, 237 U.S., 648, 658.

Wrongful Death

Ohio Revised Code §2125.02 holds that a claim for *wrongful death is subject to a two-year statute of limitations*. An action for wrongful death shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, children, and parents of decedent, all of

whom are rebuttably presumed to have suffered damages by reason of the wrongful death. The trier of fact may award the reasonable funeral and burial expenses incurred as a result of the wrongful death.

Compensatory damages may include:

- (1) Loss of support from the reasonably expected earning capacity of decedent;
- (2) Loss of decedent's services;
- (3) Loss of companionship, consortium, protection, advice, education, etc. suffered by the surviving spouse, children, parents and next of kin of decedent;
- (4) Loss of prospective inheritance to the decedent's heirs; and
- (5) Mental anguish suffered by the surviving spouse, children, parents or next of kin.

Contributory/Comparative Negligence

Ohio Revised Code §2315.33 holds that plaintiff's contributory fault does not bar plaintiff from recovering damages that have directly or proximately resulted from the tortious conduct of one or more other persons, if the contributory fault of the plaintiff was not greater than the combined tortious conduct of all other persons. The court shall diminish any compensatory damages recoverable by plaintiff by an amount that is proportionately equal to the percentage of tortious conduct of the plaintiff as determined by Ohio Revised Code §2315.34.

Ohio Revised Code §2315.34 requires that, in cases where contributory fault is asserted as an affirmative defense, the trier of fact shall specify:

- (1) The total amount of compensatory damages that would have been recoverable but for the tortious conduct of plaintiff;
- (2) The portion of the compensatory damages that represent economic loss;
- (3) The portion of the damages that represent non-economic loss;
- (4) The percentage of tortious conduct attributable to all persons as determined pursuant to Ohio Revised Code §2307.23

Ohio Revised Code §2307.23 requires that the sum of the percentages of tortious conduct shall equal one hundred percent.

Joint and Several Liability

Ohio Revised Code §2307.22, effective April 8, 2003, holds that where two or more persons are found to have proximately caused the same injury or the same wrongful death, and one defendant was found more than fifty percent liable, that defendant shall be jointly and severally liable for all *economic compensatory damages*. However, if a defendant is found to be fifty percent or less liable for plaintiff's injury, that defendant shall be liable to plaintiff only for that defendant's proportionate share of the economic compensatory damages. The proportionate share of a defendant shall be calculated by multiplying the total amount of economic damages awarded to plaintiff by the percentage of tortious conduct that is attributable to that defendant.

Where two or more persons are found to have proximately caused the same injury or the same wrongful death, each defendant shall be liable to plaintiff *only for that defendant's proportionate share of the non-economic compensatory damages*. The proportionate share of each defendant shall be calculated by multiplying the total amount of the non-economic damages awarded to plaintiff by the percentage of tortious conduct attributable to that defendant.

Contribution

Ohio Revised Code §2307.25 provides that if one or more persons are jointly and severally liable for the same injury or for the same wrongful death, there may be a right of contribution even though judgment has not been recovered against all or any of them. The right of contribution exists only in favor of a defendant who has paid more than his proportionate share of the common liability, and that defendant's total recovery is limited to the amount paid by that defendant in excess of that defendant's proportionate

share. There is no right of contribution in favor of any defendant against whom an intentional tort claim has been alleged and established.

Furthermore, a defendant who enters into a settlement with plaintiff is not entitled to contribution from another defendant whose liability for the injury or the wrongful death is not extinguished by the settlement, or in respect to any amount paid in a settlement that is in excess of what is reasonable. ORC §2307.25

Additionally, a liability insurer that by payment has discharged in full or in part the liability of defendant, and by the payment has discharged in full its obligation as insurer, is subrogated to the defendant's right of contribution to the extent of the amount it has paid in excess of defendant's proportionate share of the common liability. ORC §2307.25

The proportionate shares of defendants in the common liability shall be based upon their relative degrees of legal responsibility. If equity requires the collective liability of some as a group, the group shall constitute a single share, and principles of equity applicable to contribution generally shall apply. ORC §2307.25

Ohio Revised Code §2307.26 provides that where judgment imposing joint and several liability has been entered in an action against one or more defendants for the same injury or the same wrongful death, contribution may be enforced in that action by judgment in favor of one against other judgment debtors, by motion, upon notice to all parties. If there is judgment for the injury or wrongful death against the defendant seeking contribution, that defendant shall commence any separate action to enforce contribution within one year after the judgment has become final.

If there is no judgment for the injury or wrongful death against the defendant seeking contribution, that defendant's right of contribution is barred unless:

- (1) That defendant has discharged by payment the common liability within the statute of limitations period applicable to the claimant's right of action against that defendant, and has commenced that defendant's action for contribution within one year after payment.
- (2) That defendant has agreed while an action is pending against that defendant to discharge the common liability, and has paid within one year after the agreement the common liability and commenced action for contribution.

Vicarious Liability

Under the doctrine of *respondeat superior*, a hospital or physician practice group, as principal, is liable for the negligent acts of its employees. Berdyck v. Shinde (1973), 66 Ohio St.3d 573. "To establish the negligence of a hospital employee, an injured party must demonstrate that a duty of care was owed to the injured party by the employee, that the employee breached that duty, and that the injuries concerned were the proximate result of the breach." Id. at 578

However, if no liability is attributed to the employee, there can be no vicarious liability imposed on the hospital or physician practice group as the employer. Werden v. Children's Hosp. Med. Ctr., 2006-Ohio-4600.

Under the doctrine of ostensible agency/agency by estoppel, a hospital can be held liable for the negligent acts of independent medical practitioners working in the hospital. Clark v Southview Hosp. & Family Health Ctr. (1994), 68 Ohio St.3d 435, 444. If the patient looks to the hospital for medical care, and not a particular physician, the hospital would be held liable under the doctrine of ostensible agency for care and treatment provided by said physician. Id. at 444. "Unless the patient merely viewed the hospital as the situs where her physician would treat her, she had a right to assume and expect that the treatment was being rendered through hospital employees and that any negligence associated therewith would render the hospital liable." Id. at 445.

Ostensible agency is a derivative claim of vicarious liability whereby the liability of the hospital must flow through the independent contractor physician. Comer v. Risko (2005), 106 Ohio St.3d 185. There cannot be a viable ostensible agency claim against a hospital if the statute of limitations against the independent contractor physician has expired. Id. at 185.

Expert Testimony

“In order to establish medical malpractice, it must be shown by a preponderance of the evidence that the injury complained of was caused by the doing of some particular thing or things that a physician or surgeon of ordinary skill, care and diligence would not have done under like or similar conditions, or circumstances, or by the failure or omission to do some particular thing or things that such a physician or surgeon would have done under like or similar conditions or circumstances, and that the injury complained of was the direct and proximate result of such doing or failing to do some one or more such particular things.” *Bruni v Tatsumi* (1976), 46 Ohio St.2d 127. Whether the physician has treated the patient with the requisite standard of care and skill must be determined from the testimony of medical experts. *Id.* at 130.

In order to be deemed competent to give expert testimony on liability issues in a medical claim the following criteria must be met:

- (1) The physician must be licensed to practice medicine and surgery by the state medical board.
- (2) The physician must devote three-fourth of his or her professional time in the active clinical practice of medicine or surgery or instruction in an accredited university.
- (3) The physician practices in the same or a substantially similar specialty as the defendant physician.

Ohio Revised Code §2743.43, effective September 13, 2004.

Ohio Rule of Evidence 601(D) only requires that the physician devote at least fifty percent of his or her professional time in the active clinical practice of medicine or surgery or instruction in an accredited university.

While the “modern Courts” amendment to the Ohio Constitution provides that the Ohio Supreme Court has primary authority over court procedure, and thus an Evidence Rule should supersede any statutory provision to the contrary, no final resolution of the conflict has been pronounced.

Expert Affidavit of Merit

Civil Rule 10(D)(2), effective July 1, 2005, requires that all complaints alleging a medical claim must include an affidavit of merit concerning the alleged breach of the standard of care by each defendant named in the complaint for whom expert testimony is necessary to establish liability. The affidavit establishes the adequacy of the complaint. The affidavit of merit shall include the following:

- (1) A statement that the expert has reviewed the medical records concerning the allegations contained in the complaint;
- (2) A statement that the expert is familiar with the applicable standard of care; and
- (3) An opinion by the expert that the standard of care was breached and the breach caused injury to plaintiff.

Plaintiff may file a motion for extension of time to file an affidavit of merit. The motion must accompany the complaint at the time of filing. Under certain circumstances, and for good cause shown, the court must afford plaintiff a reasonable period of time to file an affidavit of merit. This is arguably a jurisdictional requirement, and while not yet fully developed by case law, dismissal without prejudice has been imposed as appropriate sanction.

Damage Caps

Ohio Revised Code §2323.43, effective April 11, 2003, *limits the non-economic damages* (pain and suffering) that may be awarded in a medical malpractice claim. Non-economic damages are limited to the

greater of \$250,000 or three times the plaintiff's economic loss to a maximum of \$350,000 for each plaintiff, or a maximum of \$500,000 for each occurrence.

If the non-economic losses are for a permanent and substantial physical deformity, such as the loss of an arm or leg or an organ system, or for permanent physical functional injury that permanently prevents the injured person from being able to independently care for him or herself and perform life sustaining activities, the damages are limited to \$500,000 for each plaintiff or \$1 million for each occurrence.

The non-economic damage caps set forth in ORC §2323.43 *do not apply to wrongful death claims*. There is no limit to economic damages.

Statutory Cap on Attorney's Fees

R.C. § 2323.43(F), effective April 11, 2003, addresses attorney's fees in medical malpractice cases. If attorney's fees in a contingency agreement would exceed the cap on non-economic damages set by statute, the attorney must apply to the probate court for those fees, and the probate judge must approve the fees. (Attorney fees are by definition not included in "Economic loss." R.C. § 2315.18(2)(c)). The statute states:

The application shall contain a statement of facts, including the amount to be allocated to the settlement of the claim, the amount of the settlement or judgment that represents the compensatory damages for economic loss and noneconomic loss, the relevant provision in the contingency fee agreement, and the dollar amount of the attorney's fees under the contingency fee agreement. The application shall include the proposed distribution of the amount of the judgment or settlement.

The Ohio Supreme Court has held that absent statutory authority granting attorney's fees, parties in civil actions are not entitled to them as part of any award, unless the party against whom fees are taxed acted in bad faith. *Kabateck v. Stackhouse* (1983), 6 Ohio St.3d 55.

Periodic Payments

R.C. § 2323.55, effective April 11, 2003, provides for periodic payments of future damages exceeding \$50,000.00. The court is required to hold a hearing on future damages and may order them awarded in a lump sum, or in periodic payments. The court will approve a periodic payment plan submitted by the parties, modifying, approving or rejecting portions as it deems appropriate, and shall include provisions for the payment of interest according to R.C. §1343.03, the same method of calculation for prejudgment interest payments in Ohio. The statutory interest rate for calendar year 2006 was 6%; 2007 has not been announced.

Collateral Source Rule

R.C. §§ 2323.41 and 2315.20, effective April 11, 2003, address collateral benefits in a medical malpractice action in Ohio. Defendants may introduce evidence of collateral benefits received by plaintiffs as a result of damages from injury "except if the source of collateral benefits has a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation." If a defendant introduces such evidence, a plaintiff may introduce evidence of any amounts paid or contributed in securing those benefits. Prior to April 11, 2003, the collateral source rule prevented admission of such information by defendants.

The Ohio Supreme Court has determined that defendants may submit to a jury evidence of the difference between the amount billed for medical care, and the amount actually paid by the plaintiff or insurer after any statutory or contractual "write off" by the provider or insurer. The written off amounts do not constitute a collateral source or benefit, and a jury may use both amounts to determine the "reasonable value" of the medical treatment. *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362.

Prejudgment Interest

R.C. § 1343.03, effective June 2, 2004, addresses pre-judgment interest in civil cases. A court may award pre-judgment interest to a prevailing party when that party attempted to settle the case in good faith, and the opposing party failed to do so. A party acted in good faith if it: (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) did not attempt to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party. *Moskovitz v. Mt. Sinai Med. Ctr.* (1994) 69 Ohio St.3d 638, 635 N.E.2d 331; *Kalain v. Smith* (1986), 25 Ohio St.3d 157, 495 N.E.2d 572. A defendant who has a good faith belief in his/her defense is under no obligation to offer any amount of monetary settlement. *Kalain supra*.

Interest is computed from the time the cause of action accrued if liability is admitted, or the tortious conduct was intentional. In all other cases interest is computed from the time of the filing of the complaint; or from the time the party entitled to payment notified the paying party of the claim, if simultaneously notice was also provided to any insurance company covering the tortious conduct.

The interest rate is calculated by statutory formula, and determined by the Ohio Tax Commissioner for each calendar year under R.C. § 5703.47; the rate was 6% for calendar year 2006; the 2007 rate has not been announced.

Patient Compensation Fund

Ohio currently does not have any form of a patient compensation fund. In 2003 with Senate Bill 281, the Ohio Legislature required that the Superintendent of Insurance study the feasibility of enacting such a fund and report to the Legislature the findings. No fund has since been established.

Immunities

R.C. §§ 2743.02 (effective 11/03/05), 2744.01 (10/12/06), and 2744.02 (4/09/03), address sovereign immunity in Ohio. Ohio has waived its immunity in medical malpractice cases against the state or any political subdivision, including cities and counties, that own or operate hospitals. Claims against the state or its political subdivisions must be brought in the Court of Claims, and different rules regarding damage caps, collateral sources, and punitive damages apply. The Court of Claims may be a better forum for defendants as the cases are heard by judges and not a jury.

The Ohio Supreme Court, in *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, addressed the immunity of a doctor who was teaching at a state hospital, who also may have been acting as a private practice physician, and therefore, arguably would not be protected by sovereign immunity in a malpractice action. The court held;

In an action to determine whether a physician or other health-care practitioner is entitled to personal immunity from liability pursuant to R.C. 9.86 and 2743.02(A)(2), the Court of Claims must initially determine whether the practitioner is a state employee. If there is no express contract of employment, the court may require other evidence to substantiate an employment relationship, such as financial and corporate documents, W-2 forms, invoices, and other billing practices. If the court determines that the practitioner is not a state employee, the analysis is completed and R.C. 9.86 does not apply.

If the court determines that the practitioner is a state employee, the court must next determine whether the practitioner was acting on behalf of the state when the patient was alleged to have been injured. If not, then the practitioner was acting "manifestly outside the scope of employment" for purposes of R.C. 9.86. If there is evidence that the practitioner's duties include the education of students and residents, the court must determine whether the practitioner was in fact educating a student or resident when the alleged negligence occurred.

R.C. § 2305.23, effective August 18, 1977, is Ohio's "Good Samaritan Statute," and provides that, "No person shall be liable in civil damages for administering emergency care or treatment at the scene of an emergency outside of a hospital, doctor's office, or other place having proper medical equipment, for acts performed at the scene of such emergency, unless such acts constitute willful or wanton misconduct." The Good Samaritan law protect doctors, nurses, and other health care professionals if the health care professional volunteers her/his services at the scene of an emergency that is outside a hospital, doctor's office or other medical facility. However, a professional who seeks payment for this volunteer emergency care or treatment loses the protection under the Good Samaritan law.

Arbitration

R.C. §§ 2711.21, 2711.22 and 2711.01, effective April 11, 2003, address arbitration of medical malpractice claims in Ohio. Doctors and hospitals may require arbitration of future medical disputes by contract if established before care is provided. Filed cases may be referred to nonbinding arbitration by the parties, and if unsuccessful the decision and opinions issued in arbitration are inadmissible as evidence at trial.

Ohio public policy favors arbitration of disputes, and courts will enforce arbitration agreements outside of any procedural or substantive unconscionability. *Hanson v. Valley View Nursing & Rehab. Ctr.*, 2006-Ohio-3815.

Apology Law

R.C. § 2317.43, effective September 13, 2004, addresses statements of apology by medical providers. The statute reads that in any civil action brought by an alleged victim of an unanticipated outcome of medical care or in any arbitration proceeding related to such a civil action, any and all statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence that are made by a health care provider or an employee of a health care provider to the alleged victim, a relative of the alleged victim, or a representative of the alleged victim, and that relate to the discomfort, pain, suffering, injury, or death of the alleged victim as the result of the unanticipated outcome of medical care are *inadmissible as evidence of an admission of liability* or as evidence of an admission against interest.

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