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“STATUTE OF LIMITATIONS UPDATE – MEDICAL MALPRACTICE”

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Statute of Limitations
Update- Medical Malpractice

I. INTRODUCTION

This paper provides an overview of the Texas statute of limitations in medical malpractice cases. When there is a known date of malpractice the statute of limitations is relatively easy to determine. However, often times the statute of limitations date is difficult to determine in medical malpractice cases due to the inherent complexities in the facts of a particular case (which may include multiple acts of negligence; multiple parties and/or a long course of treatment). Special care should be undertaken by Plaintiff's attorneys in determining the statute of limitations in their medical malpractice cases. Defense attorneys can utilize the statute of limitations to raise a successful defense against the plaintiff's case if the facts show that the statute of limitations has expired.

II. GENERAL 2 YEAR STATUTE OF LIMITATIONS FOR HEALTH CARE LIABILITY CLAIMS UNDER ARTICLE 4590i

Since August 1977, the statute of limitations for health care liability claims has been governed by The Medical Liability and Insurance Improvement Act of Texas, TEX. REV. CIV. STAT. ANN., art. 4590i. "Health care liability claim means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety which proximately results in injury to or death of the patient, whether the patient's

claim or cause of action sounds in tort or contract." *Id.* at Section 1.03(4). Under article 4590i, "[h]ealth care providers means any person, partnership, professional association, corporation, facility, or institution duly licensed or chartered by the State of Texas to provide health care as a registered nurse, hospital, dentist, podiatrist, pharmacist, nursing home, or an officer, employee or agent thereof acting in the course and scope of his employment. *Id.* at Section 1.03(3).¹

A. General Rule is Two Years

In Texas, we have a two (2) year statute of limitations for suits against covered health care providers. Section 10.01 of article 4590i provides in pertinent part: "Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed **within two years** from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed; provided that minors under the age of 12 years shall have until their 14th birthday in which to file, or have filed on their behalf, the claim. Except as herein provided, this subchapter applies to all persons regardless of minority or other disability." (emphasis added)

B. Statute of Limitations for Health Care Providers Not Defined in 4590i

In cases, involving health care providers that are not among the defined health

¹ See Tables Of Health Care Providers Covered and Not Covered by 4590i at page 14 of this paper.

care providers included in the Medical Liability and Insurance Improvement Act of Texas Section 1.03, the statute of limitations is two (2) years without any notice provisions or extensions of the statute of limitations applying. TEX. CIV. PRAC. & REM. CODE ANN. Section 16.003 (Vernon Supp. 2001).

C. Date on Which Art. 4590i Will Expire

The Medical Liability and Insurance Improvement Act of Texas is in effect until August 31, 2009 unless it is extended by the Texas legislature. *Id.* at Section 1.03 (a)(4).

III. 4590i NOTICE PROVISIONS THAT EXTEND STATUTE OF LIMITATIONS FOR 75 DAYS

A. Notice Provision of Section 4.01

The Texas legislature has extended the 2-year statute of limitations for 75 days by the Plaintiff's attorney sending a notice letter. Section 4.01 of The Medical Liability and Insurance Improvement Act of Texas, article 4590i, TEX. REV. CIV. STAT. ANN. (Hereafter MLIIA) contains the Notice letter provisions as follows:

- (a) Any person or his authorized agent asserting a health care liability claim shall give written notice of such claim by certified mail, return receipt requested, to each physician or health care provider against whom such claim is being made at least 60 days before the filing of a suit in any court of this state

based upon a health care liability claim.

- (b) In such pleadings as are subsequently filed in any court, each party shall state that it has fully complied with the provisions of this section and shall provide such evidence thereof as the judge of the court may require to determine if the provisions of this Act have been met.

- (c) **Notice given as provided in this Act shall toll the applicable statute of limitations to and including a period of 75 days following the giving of the notice, and this tolling shall apply to all parties and potential parties.**

(emphasis added)

B. Caselaw Regarding 4590i Notice Provisions:

1. Notice is effective when sent and not when received. *McClung v. Komorn*, 629 S.W.2d 813 (Tex. App. – Houston [14 Dist.] 1982, ref. n.r.e.)

2. Notice to one defendant, is notice to all defendants. If a defendant did not receive notice but another defendant did, then the tolling provision applies to the unnoticed defendant just as if he had received notice. The Supreme Court addressed this issue in *De Checa v. Diagnostic Center Hospital*, 852 S.W. 2d 935 (Tex., 1993). *See also Roberts v. Southwest Texas Methodist Hosp.*, 811 S.W.2d 141 (Tex. App. -- San Antonio 1991, writ denied).

3 Each health care provider sued pursuant to 4590i requirements is entitled to a separate 60-day pre-suit negotiation period. *De Checa v. Diagnostic Center Hosp., Inc.*, 852 S.W.2d 935 (Tex. 1993).

4. Failure to send notice to a health care provider outlined in 4590i abates the case for 60 days upon request by the affected Defendant. *Schepps v. Presbyterian Hosp. of Dallas*, 652 S.W.2d 934 (Tex. 1983), *Rhodes v. McCarron*, 763 S.W.2d 518 (Tex. App.—Amarillo 1988, writ denied), *Hutchinson v. Wood*, 657 S.W.2d 782 (Tex. 1983), *Sewell v. Adams*, 854 S.W.2d 257 (Tex. App.—Houston [14 Dist.] 1993, no writ).

5. Notice should be sent by certified mail as stated in article 4590i.

There is a case, however, that found that the Plaintiff “substantially complied” with the notice provisions by sending the letter via U.S. Postal Service Express mail rather than by certified mail, return receipt requested. *Butler v. Taylor*, 981 S.W.2d 742 (Tex. App. – Houston [1st Dist.] 1998, n.w.h.). In *Butler*, the defendant acknowledged receiving the plaintiff’s notice of claim sent by Express mail but argued that this notice was insufficient because the letter was not sent in strict compliance with the notice provision of Article 4590i. To avoid any allegations of improper compliance with the notice provisions, send the notice letter via certified mail, return receipt requested.

6. The statute of limitations is tolled for 75 days no matter when during the two-year limitations period the notice is given. *De Romo v. St. Mary of Plains*

Hospital, 843 S.W. 2d 72 (Tex. App. – Amarillo 1992, writ ref’d).

7. The statute of limitations is only tolled ONE time by notice(s). No matter how many notice letters a plaintiff sends, there is only one tolling period. If the statute of limitations is rapidly approaching, you may have to file suit without sending notice letters. In *Dechea v. Diagnostic Center Hospital*, 852 S.W.2d 935, 938 (Tex. 1993), the court stated “Consequently, under exigent circumstances a plaintiff may be required to file suit before the 60-day pre-suit notice period elapses or file suit without tendering any notice to avert the expiration of the limitations period.”

8. Notice provisions, and the corresponding tolling of limitations do **not** apply to those professionals not identified as a health care provider in article 4590i.²

² However, if the non-included health professional (example: physical therapist) is an agent of a health care provider included in MLIIA (example: hospital), then the MLIIA’s tolling provisions may be in effect. See, *Henry v. Premier Healthstaff*, 22 S.W.3d 124 (Tex. App. – Fort Worth 2000, n.w.h.). In *Henry*, Premier Healthstaff provided physical therapy services to Plaintiff at Fort Worth Osteopathic Hospital. Plaintiffs sued alleging that Lisa Henry received improper physical therapy. A notice letter was sent to defendant Premier Healthstaff which Plaintiffs believed would extend the statute of limitations by 75 days. Summary judgment was filed by defendant Premier Healthstaff asserting a statute of limitations defense and summary judgment was granted. On appeal, the appellate court reversed and remanded as the defendant Premier Healthstaff failed to conclusively establish that it was not an agent of the hospital (a covered health care provider under MLIIA).

- a. Physical therapists are not included in MLIIA. *Terry v. Barrinuevo*, 961 S.W.2d 528, 531 (Tex. App. – Houston [1st Dist.] 1997, no pet.) (op. on reh'g)
- b. Licensed counselors are not included in MLIIA. *Grace v. Colorito*, 4 S.W.3d 765, 769 (Tex. App. – Austin 1999, pet. denied).
- c. Ambulance companies are not included in MLIIA. *Townsend v. Catalina Ambulance Co., Inc.*, 857 S.W.2d 791, 796 (Tex. App. – Corpus Christi 1993, n.w.h.), *Shultz v. Rural/Metro Corp. of New Mexico-Texas*, 956 S.W.2d 757 (Tex. App. – Houston [1st Dist] 1997, n.w.h.).
- d. Psychologists are not included in MLIIA. *Lenhard v. Butler*, 745 S.W.2d 101, 105 (Tex. App.—Fort Worth 1988, writ denied).
- e. Chiropractors are not included in MLIIA. *Id.*
- f. Optometrists are not included in MLIIA. *Id.*
- g. Dialysis centers are not included in MLIIA. *Finley v. Steenkamp*, 19 S.W.3d 533, 542 (Tex. App. – Fort Worth 2000, n.w.h.).
- h. Veterinarians are not included in MLIIA. *Neasbitt v. Warren*, 22 S.W.3d 107 (Tex. App.—Fort Worth 2000, n.w.h.).

9. It is unclear from current Texas case law, whether respiratory therapists, occupational therapists, and home health care agencies would be included in the 4590i notice and tolling provisions. To be on the safe side, plaintiffs should send these health care providers notice letters and then not add 75 days onto the 2-year

statute of limitations that article 4590i would allow. Plaintiff should sue these providers within 2 years of the negligent act.

IV. WHAT DATE DO YOU USE TO DETERMINE WHEN THE STATUTE OF LIMITATIONS BEGINS TO RUN?

A. Section 10.01 of 4590i

Any practitioner who is requested to review a potential medical malpractice claim and/or defend a medical malpractice case should be aware that the Statute of Limitations can represent a troublesome area in determining when the statute of limitations begins to run. There are only three recognized time periods that trigger the start of the statute of limitations in Texas medical malpractice cases. **Section 10.01 of article 4590i measures the limitations date from one of three dates:**

- a. the date of the tort; or**
- b. the last date of the relevant course of treatment; or**
- c. the last date of relevant hospitalization.**

Many lawyers mistakenly assume that the last date of treatment or hospitalization can usually be viewed as the beginning of limitations period. As stated in *Husain v. Khabib*:

The statute does not permit a Plaintiff to simply choose the most favorable of the three dates that Section 10.01 specifies. (Citation omitted). The purpose of the provisions for measuring limitations from the last date of treatment or hospitalization is to aid a Plaintiff who was injured

during a period of hospitalization or a course of medical treatment but has difficulty ascertaining the precise date of injury. (Citation omitted.) In such a situation, the statute resolves doubts about the time of accrual in the Plaintiff's favor by using the last date of treatment of hospitalization as a proxy for the actual date of the tort. **But if the date of the negligence can be ascertained, then there are no doubts to resolve and limitations must be measured from the date of the tort.**

964 S.W.2d 918, 919 (Tex.1998). (emphasis added)

This result has also been reached by the following cases: *Earle v. Ratliffe*, 998 S.W.2d 882, 886 (Tex. 1999), *Bala v. Maxwell*, 909 S.W.2d 889, 891 (Tex. 1995), and *Karley v. Bell*, 24 S.W.3d 516, 519 (Tex. App. – Fort Worth 2000, n.w.h.).

B. The Date of the Tort is Known

If the specific date of the tort can be ascertained, then that is the date that should be used as the date that the cause of action accrued. *Kimball v. Brothers*, 741 S.W.2d 370, 372 (Tex. 1987). *Streetman v. Nguyen*, 943 S.W.2d 168 (Tex. App. – San Antonio 1997, writ denied.) Any subsequent course of treatment is immaterial in determining the statute of limitations if the date of the malpractice is readily ascertainable. *Clements v. Conrad*, 21 S.W.3d 514 (Tex. App. – Amarillo 2000, writ denied).

C. The Exact Date of the Tort is Unknown (i.e. Ongoing Medical Care).

In the Supreme Court case, *Chambers v. Conaway* 883 S.W.2d 156 (Tex. 1993) the court found that the date for accrual of the cause of action was the date of the tort (diagnostic testing), even though the plaintiff contended that the physician continued to treat the plaintiff for other ailments. The statute of limitations can be based on a “continuing course of treatment” i.e., the last date of the treatment or hospitalization, only if a specific date of the tort cannot be ascertained. A specific date may be difficult to ascertain if there are multiple acts of negligence with overlapping damages for physical pain, mental anguish, and medical expenses that are not susceptible to being differentiated.

In continuous course of treatment cases, it may be important to determine if continuing treatment over a period of time was requested or suggested by the health care provider, or whether the health care provider's negligent conduct over a period of time contributed to ongoing physical pain, mental anguish, medical expenses, or other damages. Whether a patient is receiving a course of treatment, and when the course of treatment ends, depends upon the specific facts of the case. Some factors to consider in this regard are whether a physician-patient relationship is established with respect to the condition that is the subject of the litigation, whether the physician continues to examine or attend the patient, and whether the condition requires further services from the physician. *Wilson v.*

Korthauer, 21 S.W.3d 573, 580 (Tex. App.—Houston [14 Dist.] 2000, n.w.h.). In a case involving a negligent act in a surgical procedure, the limitations period begins at the time of the negligent surgery, not at the time of follow-up appointments with the physician after the surgery. *Winkle v. Tullos*, 917 S.W.2d 304 (Tex. App.—Houston [14 Dist.] 1995 writ denied). Where the claim is based on the hospitalization itself, the statute of limitations period runs from the date that the relevant hospitalization was completed. *Id.*

A recent Texas appellate case, *Mata v. Simpson*, 27 S.W.3d 147 (Tex. App. – San Antonio, 2000, n.w.h.) found that the date of a patient’s seizure, and not the date of the physician’s last prescription was the date in which the physician’s treatment ended. In *Mata v. Simpson*, the patient was prescribed a medication from October 18, 1993 to April 4, 1994. On April 15, 1994 the patient had a seizure. Both the physician and patient testified that the patient would return for further treatment had the seizure not occurred. The patient filed suit against the doctor on April 11, 1996. The appellate court reversed and remanded the trial court’s summary judgment and stated that the patient’s cause of action began to accrue from April 15, 1994, which the court concluded was the date of the doctor’s last treatment.³

³ For further discussion of similar case facts involving prescription medication and the date of accrual of the cause of action see also, *Estate of Magness By and Through Magness v. Hauser*, 918 S.W.2d 5 (Tex. App. – Houston [1st Dist.] 1995, writ denied) in which the court also came to a similar result as *Mata v. Simpson* and *Gross v. Kahanek*, 3 S.W.3d 18 (Tex. 1999). In *Magness*, the court stated that the patient’s cause of action accrued on the date the patient hung

V. DISCOVERY RULE V. OPEN COURTS

A. Old Discovery Rule

Prior to the enactment of 4590i, Texas had a “Discovery Rule” which allowed for a tolling of the statute of limitations until the patient discovered or should have discovered the alleged malpractice. *Gaddis v. Smith*, 417 S.W.2d 577, 580 (Tex. 1967).

B. 4590i Abolished Discovery Rule

When art. 4590i was enacted, Section 10.01 of art. 4590i. ended the “discovery rule” in Texas. *Morrison v. Chan*, 699 S.W.2d 205, 208 (Tex. 1985), *Marchal v. Webb*, 859 S.W.2d 408, 412 (Tex. App. – Houston [1st Dist.] 1993, writ denied).

C. Current Challenge to 2 Year Statute of Limitations of 4590i is by Using Open Courts Violation

Now challenges to the fairness of the 2 year statute of limitations of 4590i for a health care claim are attacked by asserting a violation of the Texas Constitution’s open courts provision. A statute violates the open courts provision if it cuts off the injured person’s right to sue before the injured person has a reasonable opportunity to discover the wrong and bring suit. *Jennings v. Burgess*, 917 S.W.2d 790, 793 (Tex. 1996). The open courts provision provides:

herself and not on the date of the last prescription. In *Gross*, the court found that the cause of action for limitations purposes began on the date a different doctor began authorizing medication refills.

“All courts shall be open, and every person for an injury done him, and his lands, goods, person or reputation, shall have remedy by due course of law.” TEX. CONST. art. I Section. 13.

Prior to the enactment of Article 4590i, the Texas Supreme Court held that in certain medical malpractice cases it would be unconstitutional to hold the plaintiffs to a 2-year statute of limitations. *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1995). In *Nelson*, the plaintiffs had genetic testing done which incorrectly told them that Mrs. Nelson was not a carrier for muscular dystrophy. When the Nelsons’ second child was born with muscular dystrophy, the symptoms of muscular dystrophy did not show up until close to the child’s third birthday (after the two year statute of limitations). The Supreme Court found that the Nelsons had an open courts violation regarding the two year statute of limitations, which saved their medical malpractice cause of action.

In *Neagle v. Nelson*, 685 S.W.2d 11 (Tex. 1985), the Supreme Court first held that section 10.01 of Article 4590i was unconstitutional and violated the Texas Constitution’s Open Court’s provision. The plaintiff was allowed to bring suit for a surgical sponge that was discovered more than 2 years after the surgery. The court ruled that a person’s right to file their malpractice case should not be disallowed if the person could not have reasonably discovered the malpractice within the two-year limitation period of article 4590i, section 10.01.

Article 4590i’s statute of limitations provision is unconstitutional if it cuts off a cause of action before the litigant knew

or should have known the nature of the injury or the facts giving rise to a cause of action. *Hellman v Mateo*, 772 S.W.2d 64, 66 (Tex. 1989).

The key question becomes did the plaintiff have a reasonable opportunity to discover the wrong and bring suit in the two-year time period? If the answer is yes, then 4590i’s 2 year statute of limitations controls. If the answer is no, then an open court violation argument can be made. *DeLuna v. Rizkallah*, 754 S.W.2d 366, 368 (Tex. App. – Houston [1st Dist.] 1988, writ denied).

D. What Do You Have to Establish to Assert an Open Courts Violation?

To establish an open courts violation you must meet a 2-prong test:

(1) The plaintiff must have a well-recognized common-law cause of action that is being restricted.

(2) The plaintiff must show the restriction is unreasonable or arbitrary when balanced against the purpose of the statute.

Diaz v. Westphal, 941 S.W.2d 96, 100 (Tex., 1997), *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 355 (Tex. 1990), *Sax v. Votteler*, 648 S.W.2d 661, 665-666 (Tex. 1983), *Gagnier v. Wichelhaus*, 17 S.W.3d 739, 744 (Tex. App. – Houston [1st Dist.] 2000), *Univ. of Texas Medical Branch at Galveston v. Greenhouse*, 889 S.W.2d 427, 430 (Tex. App. – Houston [1st Dist.] 1994, writ denied).

The key question to ask is whether the plaintiff had a reasonable opportunity to discover the wrong and bring suit in the two-year time period.

In a recent case, *Gagnier v. Wichelhaus*, 17 S.W.3d 739 (Tex. App. – Houston [1st Dist.] 2000, n.w.h.) the open courts provision was utilized by the plaintiff to protect her right to file suit. The plaintiff in *Gagnier* filed suit 10 months after the statute of limitations had expired. The plaintiff was being treated for infertility. The court concluded that the date that the physician failed to discover the missed intra-uterine device (IUD) was the date the statute of limitations began to run, and was not on the date the patient discovered her injury. The patient did not have a reasonable opportunity to discover her injury during the two-year statute of limitation and thus the court concluded that 4590i Section 10.01 was unconstitutional as applied to the plaintiff as violating the open courts provision of the Texas Constitution. The plaintiff found out that the cause of her infertility was an intra-uterine device that the defendant doctor had failed to detect.

E. When Does a Plaintiff File Suit After Asserting the Open Courts Provision?

The plaintiff has a *reasonable time* after discovery of the injury to file suit. What is “reasonable?” Unfortunately, there are no bright line rules as the legislature and courts have not identified an exact time period for what is “reasonable.” Reasonableness is a fact question unless the evidence “construed most favorably for the claimant, admits no other conclusion.” *Neagle v. Nelson*, 685 S.W.2d 11,14 (Tex. 1985) (J. Kilgarin concurring); *DeRuy v. Garza*, 995 S.W.2d 748, 752-53 (Tex. App. – San Antonio 1999, pet. filed). It is important

to remember that what the court will determine is “reasonable” will be decided by looking at the unique facts of each case.

F. Where Court Found for Plaintiff and Found Delay After Discovery Reasonable:

1) 5.5 Months Delay in filing medical malpractice case reasonable. *Tsai v. Wells*, 725 S.W.2d 271, 272 (Tex. App. – Corpus Christi 1986, ref’d n.r.e.).

2) 7 Month Delay in filing medical malpractice case reasonable. *Hellman v. Mateo*, 772 S.W.2d 64, 65-66 (Tex. 1989).

3) 9-12 Months Delay in filing medical malpractice case reasonable. *Krueger v. Gol*, 787 S.W.2d 138, 140 (Tex. App. – Houston [14th Dist.] 1990, writ denied.)

4) 10 Month Delay in filing medical malpractice case reasonable. *Gagnier v. Wichelhaus*, 17 S.W.3d 739 (Tex. App. – Houston [1st Dist.] 2000).

5) 11 Month Delay in filing medical malpractice case reasonable. *Bradford v. Sullivan*, 683 S.W.2d 697, 697 (Tex. 1985) & *DeRuy, v. Garza*, 955 S.W.2d 748, 753 (Tex. App. – San Antonio 1999, pet. filed).

6) 15 Month Delay in filing medical malpractice case reasonable. *Melendez v. Beal*, 683 S.W.2d 869, 872 (Tex. App. – Houston [1st Dist.] 1984, n.w.h.).

G. Where Court Found for Defendant and Found Delay After Discovery NOT Reasonable:

1) 2 Weeks Shy of 1 Year in filing medical malpractice case not reasonable. *LaGessee v. PrimaCare, Inc.*, 899 S.W.2d 43, 47 (Tex. App. – Eastland 1995, writ denied).

2) 13 Month Delay in filing medical malpractice case not reasonable. *Fiore v. HCA Health Servs. of Texas, Inc.*, 915 S.W.2d 233, 238 (Tex. App.—Fort Worth 1996, writ denied).

3) 15 Month Delay in filing medical malpractice case not reasonable. *Hall v. Dow Corning Corp*, 114 F.3d 73, 77 (5th Cir. 1997).

H. When Does Open Courts Provision Not Apply?

If Plaintiff discovers his/her injury during 4590i's 2-year statute of limitations, case law suggests that the plaintiff must bring suit within the 2-year time period of Section 10.01 of Article 4590i. The Plaintiff cannot rely upon the open courts provision to extend the limitations period when the case is discovered within 2 years of the malpractice.

In the following cases, the Plaintiff's assertion of an open courts argument to extend the statute of limitations was unsuccessful:

1) 2 Months Prior to Expiration of Article 4590i Plaintiff Learned of Injury by a defendant and Plaintiff failed to file suit within article 4590i,

Section 10.01's limitations period. The **suit was time barred.** *LaGessee v. Primacare, Inc.*, 899 S.W.2d 43, 46-47 (Tex. App. – Eastland 1995, writ denied).

2) 1 Year Prior to Expiration of Article 4590i Plaintiff Learned of Injury by a defendant and Plaintiff failed to file suit within article 4590i, Section 10.01's limitations period. The **suit was time barred.** *Naugle v. Theard*, 917 S.W.2d 287, 290-291 (Tex. App. – El Paso 1995, writ denied).

3) 13 Months Prior to Expiration of Article 4590i Plaintiff Learned of Injury by a defendant and Plaintiff failed to file suit within article 4590i, Section 10.01's limitations period. The **suit was time barred.** *Shidaker v. Winsett*, 805 S.W.2d 941, 944 (Tex. App. – Amarillo 1991, writ denied).

4) 18 Months Prior to Expiration of Article 4590i Plaintiff Learned of Injury by a defendant and Plaintiff failed to file suit within article 4590i, Section 10.01's limitations period. The **suit was time barred.** *Adkins v. Tafel*, 871 S.W. 2d 289, 292-93 (Tex. App. – Fort Worth 1994, n.w.h.).

VI. WRONGFUL DEATH OF ADULT AND MINOR PLAINTIFFS

A. General Rule

A medical malpractice claim based on wrongful death must be filed within two years from the date of the alleged malpractice if that date is known, rather than the date of the patient's death. *Gross v. Kahanek*, 3 S.W.3d 518, 520 (Tex. 1999), *Bala v. Maxwell*, 909

S.W.2d 889, 892-93 (Tex. 1995)(per curiam), *Diaz v. Westphal*, 941 S.W.2d 96, 99-101 (Tex. 1997). If the patient's injury for medical malpractice occurs during a course of treatment and the only readily ascertainable date is the last date of treatment, then the limitations date begins to run on the last day of treatment. *Gross, supra* at 520.

B. Plaintiff Dies After Medical Malpractice Case is Filed.

A common occurrence in cancer and neurological malpractice cases involves a plaintiff dying after the suit is filed. In this situation, assuming that the medical malpractice suit was filed within the statute of limitations, the heirs of the injured plaintiff who passed away, will ordinarily file a Suggestion of Death. The later pleadings for wrongful death will be held to "relate back" to the date the original malpractice action was filed. TEX. REV. CIV. STAT. ANN. 5539(b) which is now TEX. CIV. PRAC. & REM. CODE, Section 16.068). See *Bradley v. Etessam*, 703 S.W.2d 237 (Tex. App. – Dallas 1985, writ ref'd n.r.e.).

Wrongful death and survival actions are statutory actions that abrogate the common law rules that a person's cause of action does not survive his death (the survival statute) and that no cause of action may be brought for the death of another (the wrongful death statute). See *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 345, 350 (Tex. 1992). Wrongful death and survivor claims are derivative in nature. Thus, the supreme court has held that when the decedent does not file suit prior to his death, the wrongful death beneficiaries instituting a wrongful death or survival suit outside

of 4590i's limitations period may never satisfy the first prong of the open courts provision and therefore will be precluded from seeking their wrongful death and survival claims. See *Bala, supra* at 893.

VII. MINORS

According to 4590i, "minors under the age of 12 years shall have until their 14th birthday in which to file, or have filed on their behalf, the claim." This provision has been held invalid by the courts for failing to adequately protect the rights of minor plaintiffs and has been judicially changed to toll the statute until the minor's eighteenth birthday.

A. Minor Child's Statute of Limitations is Tolloed Until the Minor's 18th Birthday.

In *Weiner v. Wasson* 900 S.W.2d 316 (Tex. 1995), rehearing overruled, the Supreme Court ruled that the minor's two-year (2) statute of limitations is tolled until the minor's eighteenth (18) birthday for bringing a medical malpractice case for negligent acts occurring while they were a minor.

In *Medina v. Lopez-Roman*, 2000 WL 1755093 (Tex. App. – Austin, Nov. 30, 2000) (No. 03-00-00096-CV), the court applied the *Weiner* decision and stated that Mr. Medina has two years from the date of his 18th birthday to file his suit for allegations of professional negligence that occurred when he was 15 years old.

B. Wrongful Death of Minor Child Does Not Extend/Toll Limitations.

Limitations on a wrongful death claim based on negligent health care is not extended or tolled because the decedent is a minor. *Gross v. Kahane*, 3 S.W.3d 518 (Tex. 1999)

VIII. MENTALLY INCOMPETENT PERSONS

Current Texas law is unclear as to what the statute of limitations are for a mentally incompetent person in a medical malpractice case. Some courts have held that a person with a mental incapacity that is continuous and uninterrupted from the time of the malpractice through the time suit is to be filed tolls the statute of limitations during the period of the incompetence. The argument is that article 4590i's statute of limitations would be unconstitutional for persons with unsound minds. *See, Tinkle v. Henderson*, 730 S.W.2d 163, 166-67 (Tex. App. – Tyler 1987, writ denied.), *Palla v. McDonald*, 877 S.W.2d 472, 475-78 (Tex. App. –Houston[1st Dist.] 1994, no writ), *Felan v. Ramos*, 857 S.W.2d 113, 118-19 (Tex. App. Corpus Christi 1993, writ denied).

Other cases, hold the exact opposite and refuse to apply an unsound mind tolling provision to medical malpractice cases involving article 4590i. *See, Liggett v. Blocher*, 849 S.W.2d 846, 850-51 (Tex. App. –Houston [1st Dist.] 1993, n.w.h.), *Waters ex rel. Walton v. Del-KY, Inc.*, 844 S.W.2d 250, 256 (Tex. App. – Dallas 1992, n.w.h.), *Desemo v. Gafford*, 692 S.W.2d 571, 574 (Tex. App. – Eastland 1985, writ ref'd n.r.e.).

When in doubt, do not rely upon tolling provisions to extend your statute of

limitations, and file suit within the general 2-year rule.

IX. FRAUDULENT CONCEALMENT

Fraudulent Concealment cases are difficult cases to prove. The equitable doctrine of fraudulent concealment keeps a defendant from relying on the statute of limitations as an affirmative defense in a medical malpractice claim when the facts of the case support the use of the doctrine. *Thames v. Dennison*, 821 S.W.2d 380 (Tex. App. -- Austin 1991, writ denied). *Casey v. Methodist Hosp.* 907 S.W.2d 898 (Tex. App. –Houston [1st Dist.]1995 no writ). To toll the statute of limitations under Texas law for fraudulent concealment, the plaintiff must show that the defendant had actual knowledge of fact that the wrong had occurred and the defendant must intend to conceal the wrong from the plaintiff. *Porter v. Charter Medical Corp.*, 957 F. Supp. 1427 (N.D. Tex. 1997)., *Porter v. Charter Medical Corp.*, 957 F. Supp. 1427 (N.D. Tex. 1997), *Earle v. Ratliff*, 998 S.W.2d 882 (Tex. 1999). Fraudulent concealment cases are near impossible to prove since the plaintiff must prove with evidence that the defendant had actual knowledge and intentions to conceal.

When the patient-physician relationship ends, the physician's duty to disclose (which is the basis of fraudulent concealment) also ends. *Thames, supra.* at 384-385.

When a health care provider conceals the cause of action and then the patient learns of the cause of action or the patient should have learned about the cause of action through the exercise of

reasonable diligence, the health care provider can then use the affirmative defense of the statute of limitations and the plaintiff's fraudulent concealment case will be lost. *Sanchez v. Memorial Medical Center Hosp.*, 769 S.W.2d 656 (Tex. App. – Corpus Christi 1989, n.w.h.).

In *Dougherty v. Gifford*, 826 S.W.2d 668 (Tex. App. - Texarkana 1992, no writ). A plaintiff was allowed to bring a pathologist into the lawsuit after the statute of limitations had expired on a theory of fraudulent concealment. The jury in the trial court found evidence to support fraudulent concealment.

In summary, an undetectable injury, along with knowing concealment and negligence are required before a plaintiff will be successful defeating a defendant's statute of limitations affirmative defense.

X. PERSONS IN MILITARY

There are no provisions for tolling/extension of the statute of limitations for active military personnel under 4590i.

XI. MISCELLANEOUS

A. Failure to Produce Medical Records Does Not Toll the Statute.

In *James v. Pesona Care of San Antonio*, 954 S.W.2d 113 (Tex. App. – San Antonio 1997, n.w.h.) the court stated that the Act does not provide for tolling when the physician fails to timely provide medical records. This result was also followed in *Rubalacba v. Kaestner*, 981 S.W. 2d 369, 372-373 (Tex. App. – Houston [1st Dist.] 1998,

pet. denied.) in which the defendant doctor and hospital failed to provide complete medical records in compliance with Section 4.01(d) and the plaintiff's attorney sought to toll the statute of limitations based upon the failure to obtain records. In a footnote in this case, the court reasoned that the plaintiff's attorney had other remedies available for obtaining the medical records including a motion to compel production, an injunction, subpoenaing the records, or obtaining an extension to file written expert reports on causation and standard of care issues. *Id.* at 377, n.4.

B. Breach of Contract and Warranty Claims for Negligent Medical Care is Controlled by 4590i's 2 Year Statute of Limitations.

In *MacGregor Medical Ass'n v. Campbell*, 985 S.W.2d 38 (Tex. 1998), the Supreme Court found that a patient's breach of contract and warranty claims predicated on the clinic's departure from accepted standards of care were governed by article 4590i's two (2) year statute of limitations.

XII. CONCLUSION

A plaintiff's attorney reviewing a medical malpractice case should file suit prior to the two (2) year anniversary of the earliest date that the malpractice may have occurred. In addition, if there is time the Plaintiff should provide notice under article 4590i prior to filing suit. Also, it is wise to file suit within 2 years of the date of the occurrence whether the plaintiff is a minor or an adult. Remember, in death cases the start of the statute of limitations is the date of the malpractice and not the death of the patient (unless the death happens to take

place on the date of the malpractice). The absolute safest course of action to protect a plaintiff's statute of limitations is to always file suit within 2 years of the earliest date of the alleged malpractice.

A defense attorney can use the statute of limitations to defeat a plaintiff's case without consideration to the merits of the case. The prudent defense attorney should be alert to a possible statute of limitations defense if the facts of the case indicate a delay in filing suit beyond 2 years of the occurrence. The defendant should raise the statute of limitations affirmative defense in their answer. In addition, the defense attorney should develop discovery in the case to prove that the case is time barred and then file a motion for summary judgment

on the ground of the statute of limitations.

Although the statute of limitations section of 4590i has not changed since its enactment in 1977, the number of cases and confusion generated by section 10.01 of 4590i has provided regular review by appellate courts and the Supreme Court. C.F. Jeb Wait, *The Statute of Limitations Governing Medical Malpractice Claims: Rules, Problems and Solutions*, 41 S.TEX. L. REV. 371, 374 (2000). The statute of limitations in medical malpractice cases continues to be a potential minefield for the ill-prepared and ill-advised. Special care should be taken by attorneys in reviewing statute of limitations issues in medical malpractice cases.

TABLE OF HEALTH CARE PROVIDERS COVERED BY 4590I
(NOTICE AND TOLLING APPLY)

PHYSICIAN
REGISTERED NURSE
HOSPITAL
DENTIST
PODIATRIST
PHARMACIST
NURSING HOME
PERSON, PARTNERSHIP, PROFESSIONAL ASSOCIATION, COPORATION, FACILITY, OR INSTITUTION DULY LICENSED OR CHARTERED BY THE STATE OF TEXAS TO PROVIDE HEALTH CARE OR AN OFFICER, EMPLOYEE OR AGENT THEREOF ACTING IN THE COURSE AND SCOPE OF HIS EMPLOYMENT OF A COVERED HEALTH CARE PROVIDER AS STATED IN SECTION 1.03.

TABLE OF HEALTH CARE PROVIDERS *NOT* COVERED BY 4590I
(NOTICE AND TOLLING DO *NOT* APPLY)

PHYSICAL THERAPIST
LICENSED COUNSELOR
AMBULANCE COMPANY
PSYCHOLOGIST
CHIROPRACTOR
OPTOMETRIST
DIALYSIS CENTER
VETERINARIAN