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NEGLIGENCE – MEDICAL AND LEGAL

[Washington State Court of Appeals overturns summary dismissal of legal malpractice case considering Washington's medical negligence statute of limitations relationship to wrongful death statutes](#)

The plaintiff's husband died in October 2009, and she believes it was a result of his dermatologist's prescribing of Enbrel (etanercept); the last prescription was issued in May 2009. The plaintiff avers that she first met with the defendant attorney in October 2011, and that he told her he thought she had a good case and would take it on. The defendant insists that he did not begin actual representation of the plaintiff until August 2012 when she signed an authorization to begin investigating the case. The defendant formally withdrew from representation of the plaintiff on April 5, 2013. She retained another attorney who filed a wrongful death suit on October 25, 2013 against the physician based on injuries resulting from health care. The plaintiff later stipulated to dismissal of the wrongful death action based on her belief that the applicable statute of limitations had lapsed. She then filed a legal malpractice action against the defendant, and the trial court granted summary judgment dismissal of her claims. She appealed to Division III of the Washington State Court of Appeals.

The Court found that a key element in the dispute is "purely legal and pertains to when [plaintiff's] claims against [the physician] would have accrued for statute of limitations purposes." Like many states, Washington has enacted medical tort reform legislation that establishes limitations on health care negligence cases that differ from limitations in other torts. The medical negligence statute of limitations (MNSOL) requires a case for medical negligence to be filed within 3 years of the negligent act or omission, or 1 year from when the negligence should have been discovered, whichever is later. A 2016 Washington Supreme Court decision in *Fast v. Kennewick Pub. Hosp. Dist.*, 384 P.3d 232, has established that "where a plaintiff's claim is for 'wrongful death resulting from negligent health care,' the MNSOL applies, not the general torts catchall limitations period set forth in RCW 4.16.080(2)." The MNSOL is tolled for up to 1 year by a timely request for mediation made prior to the required filing date. The catchall statute of limitations is 3 years from the date of occurrence. The plaintiff asserts that under the MNSOL, the statute of limitations expired in May 2012; the defendant asserts that the wrongful death statute should apply, and the statute of limitations expired on October 28, 2012. Because he did file a mediation request in September 2012, the statute of limitations for the plaintiff's wrongful death suit would have been October 28, 2013 and would have occurred after his period of representation of the plaintiff.

The Court found that the plaintiff, as a matter of law, “did not have a separate wrongful death claim against [the physician], governed by a different statute of limitations. *Fast* made clear that all medical negligence claims are governed by the MNSOL, even if the medical negligence results in death as opposed to some other sort of harm.” Further, the tolling of the MNSOL upon submission of a request for mediation applies “only in the medical negligence context,” not to causes of action subject to the catchall statute of limitations. Thus, even if a wrongful death claim could have been maintained, it required the defendant attorney to file an action prior to October 28, 2012, a time during which he was representing the plaintiff.

The Court then turned to the factual debate as to when the attorney’s representation of the plaintiff began. The plaintiff claims she first met with the attorney in October 2011; he claims she did not authorize the investigation until August 2012. Under the MNSOL, a request for mediation or a case would have had to been filed by May 2012 to comply with the statute of limitations. The Court found that under Washington jurisprudence, “Whether an attorney-client relationship exists is a question of fact that depends on the totality of the circumstances. The date of a written agreement or receipt of funds does not necessarily dictate the beginning of an attorney-client relationship ... Instead, the existence of the relationship turns on the reasonable beliefs of the client and may be implied from the parties’ conduct.” Because the plaintiff has “submitted competent evidence indicating she began working with [the defendant] during October 2011,” which includes her own testimony and that of another witness, the Court held that “the current record is sufficient to raise a material issue of fact as to when an attorney-client relationship arose between the parties. If [plaintiff] is able to prove that the attorney-client relationship was established prior to May 2012, then she will have a viable claim that [defendant] failed to take action on her case before the expiration of the applicable statute of limitations. Given these circumstances, [defendant] is not entitled to summary judgment. The Court reversed the summary judgment order and remanded for further proceedings. [Fechner v. Volyn et al., No. 35291-9-III, Wash. App. Div. III, May 22, 2018]