

**MEDICAL MALPRACTICE**  
**STATUTES OF LIMITATION AND REPOSE**

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## **Introduction**

There are two separate statutes that may operate to time bar a medical malpractice action. First, the statute of limitation in O.C.G.A. § 9-3-71(a) bars actions filed more than two years after the date of an injury or death. Second, the statute of repose in O.C.G.A. § 9-3-71(b) provides that a physician cannot be sued for a negligent act or omission that occurred more than five years prior to the date of filing.

There is a clear distinction between the statute of limitation and the statute of repose. A statute of limitation is a procedural rule that limits the time in which a party may bring an action for a right that has already accrued. A statute of ultimate repose delineates the time period in which a right may accrue. If the injury occurs outside that period, it is not actionable. Simmons v. Sonyiki, 279 Ga. 378, 379 (2005). The statute of repose destroys previously existing rights so that, on the expiration of the statutory period, the cause of action no longer exists. Simmons, 279 Ga. at 379.

The occurrence of an “injury” for purposes of O.C.G.A. § 9-3-71(a) is sometimes difficult to determine, and there are numerous appellate decisions interpreting the timing of an injury that would trigger the running of the statute of limitation or attempts to toll the statute altogether. In contrast, the plain terms of the statute of repose focus solely on the “negligent act or omission”, not the “injury”. See Christian v. Atha, 267 Ga. App. 186, 187 (2004). The application of the statute of repose should be and generally is straightforward. The Court must determine whether the plaintiff has alleged the occurrence of a negligent act or omission within the five years before suit. If so, the action is not barred. This paper will examine the requirements of both statutes and their application to malpractice cases.

## **Medical Malpractice Statute of Limitation**

### **O.C.G.A. § 9-3-71(a)**

O.C.G.A. § 9-3-71(a) is the statute of limitation applicable to most medical malpractice actions. It provides that “an action for medical malpractice shall be brought within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred.”<sup>1</sup> The General Assembly enacted this statute in 1985 after the Georgia Supreme Court ruled that the prior version of the statute, which provided that the two-year limitation period commenced to run from the date of the negligent act, was unconstitutional to the extent that the statute could bar a cause of action before it accrued. Young v. Williams, 274 Ga. 845, 846 (2002) (discussing Shessel v. Stroup, 253 Ga. 56 (1984)). The focus of O.C.G.A. § 9-3-71(a) is not on the negligent act, but on the consequences of the negligent act on the plaintiff. Staples v. Bhatti, 220 Ga. App. 404, 405 (1996).

The negligent act and consequent injury often occur on the same date so that the commencement of the statute of limitation is clear. However, the issue becomes more complicated in some misdiagnosis cases.

### **General rule for misdiagnosis cases**

In malpractice cases involving a misdiagnosis that resulted in a failure to properly treat a condition, the “injury” referred to in O.C.G.A. § 9-3-71(a) generally occurs at the time of the misdiagnosis. Ward v. Bergen, 277 Ga. App. 256, 258 (2006). This is because the patient usually continues to experience pain, suffering, or economic loss from the time of the misdiagnosis until the problem is properly diagnosed and treated. Under these circumstances,

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<sup>1</sup> A separate statute, O.C.G.A. § 9-3-72, governs cases where a foreign object is left in the patient’s body. In that situation, “an action shall be brought within one year after the negligent or wrongful act or omission is discovered.”

the misdiagnosis itself is the injury and not the subsequent discovery of the proper diagnosis. Burt v. James, 276 Ga. App. 370, 371 (2005) *citing* Frankel v. Clark, 213 Ga. App. 222, 223 (1994). Accordingly, the general rule in cases alleging failure to diagnose is that the limitation period runs from the date of the misdiagnosis. Amu v. Barnes, 286 Ga. App. 725, 650 S.E.2d 288, 292 (2007).

This rule has been applied in many cases to foreclose a plaintiff's misdiagnosis claim even where the plaintiff has no knowledge of his or her true medical condition during the limitation period. Kaminer v. Canas, 2007 WL 3129948 (Ga.); Amu, 650 S.E.2d at 292 *citing* Ford v. Dove, 218 Ga. App. 828, 830-31 (1995); Frankel v. Clark, 213 Ga. App. 222, 223-224 (1994); Jones v. Lamon, 206 Ga. App. 842, 844-846 (1992). In those cases, the Georgia Supreme Court has found it to be "an extremely harsh limitation in application". Kaminer v. Canas, 2007 WL 3129948 (Ga.)

#### **Subsequent injury exception in misdiagnosis cases**

In Whitaker v. Zirkle, 188 Ga. App. 706 (1988), the Court of Appeals created a limited exception to the general rule for cases in which a misdiagnosis and failure to provide proper treatment results in the development of a new and different injury than the injury that existed at the time of the misdiagnosis. Ward, 277 Ga. App. at 258. In those cases, because the new injury is often difficult or impossible to date precisely, "the statute of limitation commences from the date the [new] injury is discovered." Whitaker, 188 Ga. App. at 708. *See also* Walker v. Melton, 227 Ga. App. 149, 151 (1997) (statute of limitations runs from the date symptoms attributable to the new injury are manifest to the plaintiff).

In Whitaker, a case involving a misdiagnosis by a pathologist, a tissue sample taken from the patient's mole was erroneously read as benign in 1978. The patient sought no further

treatment and had no further symptoms of cancer until approximately seven years later, when a biopsy in 1985 revealed metastatic melanoma. The patient subsequently died.

The pathologist filed a motion for summary judgment contending that the statute of limitation barred the claim. The trial court denied the motion, and the Court of Appeals affirmed. The Court acknowledged the general rule in misdiagnosis cases, but emphasized that this patient suffered no further symptoms of cancer until shortly before it was properly diagnosed seven years later. The Court relied on the fact that the “injury” complained of was not the patient’s cancer that existed at the time of the misdiagnosis, but the subsequent metastasis of cancerous cells, which would not have occurred if the cancerous mole had been properly diagnosed and treated at the time of the original biopsy. Whitaker, 188 Ga. App. at 708-709. The plaintiff’s expert testimony created an issue as to whether the cancer at the time of misdiagnosis was localized. If so, the subsequent metastasis occurred at some later date and was first discovered in 1985, when the statute of limitation commenced. Id.

The subsequent injury exception has two strict requirements. First, there must be evidence that the plaintiff developed a new and distinct injury after the misdiagnosis. See Burt v. James, 276 Ga. App. 370, 373-374 (2005) (exception did not apply because plaintiff failed to prove a subsequent new injury; instead evidence showed original injury remained fairly constant over time); Kane v. Shoup, 260 Ga. App. 723, 724-725 (2003) (exception did not apply where misdiagnosis merely delayed treatment of plaintiff’s initial injury).

Second, the plaintiff must have remained asymptomatic for a period of time after the misdiagnosis. Burt, 276 Ga. App. at 374 *citing* Harrison v. Daly, 268 Ga. App. 280, 284 (2004). Additionally, the exception applies at the first point that the symptoms of the new injury manifest themselves even if the patient is not aware of either the cause of the symptoms or the connection

between the symptoms and the original negligent act or omission. Brown v. Coast Dental of Ga., 275 Ga. App. 761, 766 (2005).

The requirement that the patient be asymptomatic following the misdiagnosis cannot be overstated and has led to harsh results. For example, in Stone v. Radiology Services, P.A., 206 Ga. App. 851 (1992), a patient who had experienced severe headaches for many years underwent a CT scan of his brain at Radiology Services in September 1985. Radiologists interpreted the scan as showing dilatation most consistent with cerebellar atrophy, but no areas of abnormal density or intracranial calcifications. In December 1988, an MRI of the brain taken at the same practice revealed that the patient had a brain tumor, rather than changes consistent with cerebellar atrophy. The tumor was surgically removed later that month.

The patient filed suit in December 1990 alleging that the radiologists had misdiagnosed his condition by failing to recognize the brain tumor on the 1985 CT scan. The trial court granted the defense motion for summary judgment on the statute of limitation. On appeal, the patient relied on the subsequent injury exception to argue that his injury was the increased growth of the tumor occurring subsequent to the misdiagnosis. The Court rejected this argument and distinguished Whitaker on the ground that this patient was suffering from the effects of the brain tumor at the time of and after the 1985 scan. The misdiagnosis injured him at that time by allowing his existing pain and suffering to continue, and the statute of limitation barred his suit.

The Court of Appeals has stated that it is reluctant to invoke the exception except in the most extreme circumstances, but it has applied the exception in numerous cases. See, e.g., Walker v. Melton, 227 Ga. App. 149, 151 (1997) (fracture developed into severe vertebral compression, failure of spinal ligament, and destabilization of the spine); Ward v. Bergen, 277 Ga. App. 256, 258 (2006) (localized precancerous growths in breast developed into metastatic

cancer of the breast and lymph nodes); Zechmann v. Thigpen, 188 Ga. App. 706, 707-708 (1988) (optic nerve disease developed into neovascular glaucoma); Staples v. Bhatti, 220 Ga. App. 404, 405-06 (1996) (breast cancer grew and invaded the lymph nodes).

### **Supreme Court's Rejection of Attempts to Judicially Modify O.C.G.A. § 9-3-71(a)**

The Supreme Court has strictly interpreted O.C.G.A. § 9-3-71(a) since its enactment. This paper will discuss two situations where the Supreme Court has reversed attempts by the Court of Appeals to modify the limitation period in compelling factual situations involving misdiagnosis. In doing so, the Supreme Court has repeatedly stressed that prescribing periods of limitation is a legislative, not a judicial, function. See Young v. Williams, 274 Ga. 845, 847 (2002) citing Hunter, Maclean and C. v. Frame, 269 Ga. 844, 846 (1998).

#### 1. The Continuous Treatment Doctrine Does Not Extend O.C.G.A. § 9-3-71(a)

The continuous treatment doctrine operates to change the trigger date for the statute of limitation from the date of injury to the date that the patient's treatment for the relevant condition terminates. It provides that:

[i]f the treatment by the doctor is a continuing course and the patient's illness, injury, or condition is of such a nature as to impose on the doctor a duty of continuous treatment and care, the statute does not commence running until treatment by the doctor for the particular disease or condition involved has terminated-unless during treatment the patient learns or should learn of negligence, in which case the statute runs from the time of discovery, actual or otherwise.

Williams v. Young, 247 Ga. App. 337, 340 (2000), rev'd Young v. Williams, 274 Ga. 845, 846 (2002). In Young, the Supreme Court reversed the Court of Appeal's adoption of the continuous treatment doctrine in Georgia statute of limitation cases, noting that the doctrine, which "deems that the negligent act...continues as long as the patient remains under the physician's care" is more appropriately incorporated into a statute of limitation that commences upon the occurrence

of the negligent act as opposed to the patient's injury. Young, 274 Ga. at 846. O.C.G.A. § 9-3-71(a) does not provide for the commencement of the limitation period upon the termination of the health care provider's treatment, and the Supreme Court emphasized that it is not empowered to engraft such a provision on to the statute. Id. at 848.

2. Serial Acts of Negligence Without a New Injury Do Not Extend The Statute of Limitation – Kaminer v. Canas

The Court of Appeals next tried to modify O.C.G.A. § 9-3-71(a) in the case of Canas v. Al-Jabi, 282 Ga. App. 764 (2006). Derek Canas was born with a rare heart defect in 1984. When he was two months old, he underwent surgery at The Medical College of Georgia Hospital and received transfusions of blood and blood products. He later treated with Dr. Sharon Kaminer, a pediatric cardiologist, beginning in 1991 and Dr. Ayman Al-Jabi, a pediatrician, beginning in 1993. Although Canas displayed signs of pediatric AIDS that worsened over time, neither physician ever diagnosed that condition. Instead, they both attributed his symptoms to the congenital heart condition. In 2001, Canas was finally tested for HIV and diagnosed with AIDS. It was undisputed that his condition was the result of the blood transfusions he received in 1984.

In 2001, Canas brought suit against Dr. Kaminer and Dr. Al-Jabi. The physicians had initially misdiagnosed Canas' condition more than five years before he filed suit, but they had continued their failure to diagnose his worsening condition within two years of the action. The trial court granted summary judgment to the physicians on all claims for medical malpractice where the alleged negligent act or omission occurred more than five years before the date on which the action was brought. It denied summary judgment on all medical malpractice claims where the injury occurred within two years from the date of the action and the negligent act or omission that caused the injury occurred within five years of the date the action.



The Court of Appeals affirmed the denial of summary judgment, concluding that

where a patient continues to be treated by the doctor and presents the doctor with a significant change in manifestations of his condition – additional symptoms or significantly increased symptoms- such that the standard of care would require the doctor to reevaluate the first diagnosis, it can be a new negligent act or omission to fail to reconsider the original diagnosis and take appropriate action.

Canas v. Al-Jabi, 282 Ga. App. 764, 777 (2006). Further, if there is a new negligent act or omission, “then the injury from the new negligent act or omission cannot be deemed to have occurred any earlier than the date of the new misdiagnosis.” Canas, 282 Ga. App. at 785. Because there was evidence that Canas presented to the physicians with significant changes in the manifestations of his condition within two years of suit, there was evidence of new negligent acts or omissions, and consequent new injury, within the limitation period.

On October 29, 2007, the Supreme Court reversed the Court of Appeals. Kaminer v. Canas, 2007 WL 3129948 (Ga.). With regard to Canas’ claim for the misdiagnosis of his AIDS condition, the Court held that Canas was injured, and consequently the statute of limitations began to run, on the date that Dr. Kaminer and Dr. Al-Jabi first failed to diagnose the condition in 1991 and 1993 respectively. The injury at the time of the misdiagnosis was that Canas continued to suffer from an undiagnosed and untreated AIDS condition that continued to slowly progress and worsen.

The fact that Canas did not know the medical cause of these symptoms did not affect the applicability of O.C.G.A. § 9-3-71(a). In addition, the fact that the symptoms worsened did not lead to a different result because the subsequent worsened condition was directly related to the initial symptoms and misdiagnosis.

The Court rejected Canas’ contention that when he developed additional or significantly increased symptoms of his misdiagnosed condition, he was in effect re-injured, and the statute of

limitations recommenced. The Court determined that although the physicians' subsequent failures to recognize that Canas' additional or increased symptoms were indicative of AIDS may constitute new and separate negligent acts, they did not inflict any new injury on him to support a new cause of action. Rather, the symptoms of his original misdiagnosed and untreated condition simply worsened over time, as was the case in Burt v. James and Kane v. Shoup, *supra*. The Court reasoned that any holding that O.C.G.A. § 9-3-71(a) is satisfied when a doctor persists in a negligent misdiagnosis of the same medical condition would represent a judicial adoption of the continuing treatment doctrine previously rejected in Young v. Williams, *supra*.

Finally, the Court also rejected Canas' contention that the subsequent injury exception applied to his case because he did not meet the requirement that the patient be asymptomatic for a period of time following the misdiagnosis. The very essence of Canas' claim was that the physicians failed to diagnose an AIDS condition based on his presenting symptoms.

#### **Medical Malpractice Statute of Repose**

The medical malpractice statute of repose provides: "Notwithstanding subsection (a) of this Code section, [the two-year statute of limitation for medical malpractice claims], in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred." O.C.G.A. § 9-3-71(b). O.C.G.A. § 9-3-71(c) explains that subsection (b) "[i]s intended to create a five-year statute of ultimate repose and abrogation." Because the statute of repose is unrelated to the accrual of the cause of action, it runs from the date on which the negligent or wrongful act or omission occurred without regard to when the injury arising from the negligence occurred or was discovered. Christen v. Atha, 267 Ga. App. 186, 187 (2004).

The statute of repose is intended to insulate physicians from suit based upon alleged negligence that occurred more than five years prior to the lawsuit. See Abend v. Klaudt, 243 Ga. App. 271, 276 (2000). “The purpose for the statute of repose in medical malpractice cases is to reduce the uncertainties and costs related to malpractice litigation long after the medical services have been rendered.” Cochran v. Bowers, 274 Ga. App. 449, 451 (2005). The Supreme Court upheld the constitutionality of the statute of repose in Craven v. Lowndes County Hosp. Auth., 263 Ga. 657 (1993), finding that the classification it created, victims of medical malpractice who discover their injuries within five years of the negligent act or omission versus those who discover their injuries more than five years later, bears a rational relationship to a legitimate end of government, the elimination of stale claims.

As set forth above, the application of the statute of repose is generally straightforward. The Court must only determine whether the plaintiff has alleged a negligent act within five years prior to the date of filing. Because the statute of repose does not focus on the patient’s injury, misdiagnosis cases do not cause the same confusion as they do in the statute of limitation analysis. In most misdiagnosis cases, the two-year statute of limitation and the five-year statute of repose begin to run simultaneously on the date that the physician negligently fails to diagnose the condition and, thereby, injures the patient. Kaminer v. Canas, 2007 WL 3129948 (Ga.).

In other situations where physicians commit separate multiple acts of negligence over a period of several years (but the injury complained of occurs at a later date and within the two-year limitation period), negligence that occurred more than five years prior to suit is not actionable. Examples might include multiple inadequate pap smears being performed but the patient first developing symptoms of cervical cancer within two years of suit being filed, or multiple misreads of a mammogram without any symptoms until a later date. In those cases, the

court may grant partial summary judgment or grant a motion in limine to bar evidence of negligence that occurred more than five years before suit was filed.

### **Minors and Persons with Disabilities**

In most tort cases, minors and legally incompetent persons are protected under O.C.G.A. § 9-3-90, which tolls the statute of limitation until the disability is removed. However a different and more restrictive statute, O.C.G.A. § 9-3-73, controls the tolling and exceptions in medical malpractice actions. O.C.G.A. § 9-3-73(b) provides:

Notwithstanding Article 5 of this chapter, all persons who are legally incompetent because of mental retardation or mental illness and all minors who have attained the age of five years shall be subject to the periods of limitation for actions for medical malpractice provided in this article. A minor who has not attained the age of five years shall have two years from the date of the minor's fifth birthday within which to bring a medical malpractice action if the cause of action arose before such minor attained the age of five years.

O.C.G.A. § 9-3-73(c) further restricts the tolling of the statute of limitation in medical malpractice cases.

Although the statutes are confusing as written, the basic rules are that legally incompetent persons and children over the age of five at the time of an injury are subject to the regular medical malpractice limitation period. Children younger than five at the time of an injury have two years from their fifth birthday to bring an action. It is also important to remember that the claim for medical expenses incurred by a minor is held by the parents and is subject to the regular malpractice limitation period. See Rose v. Hamilton, 184 Ga. App. 182 (1987).

### **Fraud and the Statutes of Limitation and Repose**

Fraud can toll the statute of limitation in medical malpractice actions. "Actual fraud, through nondisclosure of a known injury, by the defendant and through acts to conceal the injury, which deters or debars the bringing of the action, tolls the statute of limitation and tolls

the running of the statute until the discovery of the fraud.” Pogue v. Goodman, 282 Ga. App. 385, 388 (2006) *citing* O.C.G.A. § 9-3-96; Miller v. Kitchens, 251 Ga. App. 225, 226 (2001). In order to illustrate fraud sufficient to toll the statute of limitation, a patient who alleges to be negligently injured by a physician must show that the physician knew that the patient was injured in the ways that the patient contends; knew that his or her violations of the standard of care caused the injuries; and intentionally concealed such facts. Pogue v. Goodman, 282 Ga. App. at 388-89.

By definition, a statute of ultimate repose cannot be tolled. Unlike statutes of limitation, statutes of repose may not be tolled for any reason, as tolling would deprive the defendant of the certainty of the repose deadline and thereby defeat the purpose of the statute of repose. “Whether by discovery, which delays the accrual of the action, or by infancy, incompetency or fraud, which may toll the statute of limitation, nothing stops the abrogation of the action by the statute of repose.” Simmons, 279 Ga. at 380. O.C.G.A. § 9-3-73(c)(2)(A) and (B) discuss the application of the statute of repose to the claims of a minor.

Although the statute of repose cannot be tolled, a defendant may be equitably estopped from asserting the defense of the statute of repose if the plaintiff shows fraud by offering evidence that the defendant actively concealed the negligence or, given the duty arising from the doctor-patient relationship to disclose the cause of any injury, knowingly failed to reveal the negligence to the plaintiff. Craven, 263 Ga. at 660; Esener v. Kinsey, 240 Ga. App. 21, 22-23 (1999); Bynum v. Gregory, 215 Ga. App. 431, 434 (1994).