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CHAPTER 10

SPECIAL PROBLEMS IN WRONGFUL DEATH CLAIMS DUE TO MEDICAL MALPRACTICE

In the event the death is caused by medical malpractice, there are a number of special considerations that need to be addressed.

First, there are important procedural requirements in Georgia in order to file suit for medical malpractice. One of the most challenging is the requirement under O.C.G.A. Section 9-11-9.1 that calls for the affidavit of a health care professional. The affidavit must specify at least one act of the medical defendant that falls below the standard of care and secondly, show that the failure to comply with the standard of care caused the death of the loved one. The affidavit must be made by a health care provider within the same field. For example, in the case of medical malpractice against a cardiologist, a cardiologist must make the affidavit. A medical doctor may make an affidavit against a nurse; however, a nurse may **not** make a medical malpractice affidavit against a doctor.

The requirement of a medical malpractice affidavit slows down the litigation process and vastly increases the cost of litigation. This is because the affidavit is based upon the medical records of the decedent. Often, it takes ninety days simply to obtain all the medical records (notwithstanding that Georgia law requires medical records be provided within thirty days). Then, it can take another sixty to ninety days to find a medical provider who will review the medical records and prepare an affidavit. Of course, the doctor doing the affidavit wishes to be paid premium hourly rates as well as a significant retainer.

The requirement for the affidavit is a strict one. If there is no affidavit, the case is dismissed automatically. This is the reason most good attorneys will not take a case without at least ninety-plus (90+) days before the statute of limitations.

Second, doctors and hospitals do not want to accept responsibility because such an admission can impact both the doctor and the hospital. Bad publicity inhibits the ability of both parties to earn money in the future. A doctor with multiple malpractice settlements could lose hospital privileges. The hospital administrators might lose their jobs and be replaced. As such, the health care providers vigorously defend cases.

The defendants will seek to take advantage of the jury's inexperience in the field of medicine. In medical malpractice cases, the plaintiff has the burden to show the doctor fell below the "standard of care." The *standard of care* refers to what is expected of a knowledgeable medical provider under similar circumstances. Unfortunately, the *standard of care* is not uniformly agreed upon,[17] rather identification of the standard of care is required to be explained by experts. Given that each side has

17 With the advent of the Internet and incredibly smart computers, there may be a day when the standard of care is well defined.

an expert; it can be difficult for the jury to determine if there was a breach of the *standard of care*. This complexity helps the defendant-doctor to hide behind medical terms that the jury cannot understand or follow.

Likewise, the doctor will attack the issue of causation. The medical provider will argue that even if they fell slightly below the standard of care, the patient would not have made it anyway. Many times the defendants will argue, either explicitly or implicitly, that even if they committed an error, the error did not harm a patient who was so seriously ill or injured.

Third, further complicating medical malpractice is the evolving nature of health care. At one point in time, it was only doctors or nurses who could commit malpractice. However, as health care costs have increased, so-called mid-level providers now play an important role in the health care system. These are generally known as physician assistants (PA); nurse practitioners (NP or APRN), nurses (RN or LPN), physical therapists (PT), and respiratory therapists (RT). It is confusing who is the person(s) providing care; is it just the mid-level provider who is responsible or is the doctor supervising the mid-level provider also responsible?

Fourth, under the Tort Reform Act of 2005, the Georgia legislature sought to reduce lawsuit liability. The new law now creates two different legal standards for medical malpractice actions. These two standards make it more difficult for the plaintiff to win the lawsuit, and differ depending on whether the patient was in a true emergency (meaning the patient was truly facing a life-or-death emergency), or if the patient was stable and able to receive non-urgent care in the emergency room. Under both standards, a plaintiff must work even harder to prove malpractice. The good news is that recent success has

demonstrated and proven that plaintiffs can still be successful, even in emergency room cases.

Fifth, more and more doctors are now government employees. All government employees enjoy a certain degree of immunity, because they are government actors. As such, a plaintiff is required to provide to all government actors notice of a claim before filing the lawsuit. The failure to provide notice results in the case being dismissed and forever lost. The problem is the difficulty in determining which doctors are government employees and which ones are private doctors or doctors employed by the hospital.

The general rule is that medical malpractice actions must be filed within two (2) years of the date of the malpractice. However, if the death occurred three (3) years after the malpractice, under the so-called statue of repose, the lawsuit could still be filed up to twelve (12) months after the death.

Finally, and perhaps, surprisingly, is the challenge of collecting on a judgment. In Georgia, doctors are not required to have insurance when practicing medicine. Those doctors who do not have insurance either have very few assets because they spend more than they make, or they may engage in a practice known as asset protection. Asset protection is the allocation of assets, before a claim is known, among the physician's spouse and family members. This is all done to shield one's assets from any and all liability. This is perfectly legal. Also, nothing prevents a physician from merely filing bankruptcy and getting the debt discharged. (Only special debts are considered to be non-dischargeable and, unfortunately, medical damages can be discharged by a bankruptcy court).