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Cell Phones and Motor Vehicle Accidents

By Sarah K. Gronemeyer

As technology evolves, so must the law. This is especially true when it comes to the issue of using a cell phone while driving. In recent years state legislatures have taken action, enacting statutes limiting or prohibiting the use of cell phones while driving. In Minnesota, all licensed drivers are prohibited from composing, reading, or sending an electronic message while operating a motor vehicle. Minn. Stat. § 169.475, subd. 2. Adult licensed drivers, however, may do so if the device is solely in voice activated or hands free mode. *Id.* at subd. 3. The term "electronic message" encompasses text messages, emails, instant messages, and commands to access a website. *Id.* at. subd. 1. Provisional license holders, those under age 18, are additionally prohibited from communicating over a cell phone, including making phone calls, even if the device is in voice activated or hands free mode. Minn. Stat. § 171.055, subd. 2(a). Exceptions to the cell phone usage prohibitions include obtaining emergency assistance or due to the reasonable belief that a person's life or safety is in imminent danger. Minn. Stat. §§ 169.475, subd. 3, 171.055, subd. 2(a). In Minnesota, use of a cell phone is a primary violation, which means that a person may be pulled over by law enforcement for violating cell phone usage laws.

While using a cell phone while driving may result in criminal sanctions, violation of cell phone usage laws can be seen as "aggravating circumstances" in civil matters. Under Minn. Stat. § 169.96(b), violation of a traffic statute establishes prima facie negligence. Civil Jury Instruction Guide 65.25 provides a way for the cell phone usage statute to be read into the jury instructions in negligence matters arising out of a motor vehicle accident in which a traffic statute was violated. This allows a violation of a traffic statute to be considered by the jury even though convictions for traffic offenses are not admissible in civil matters. Minn. Stat. § 169.94, subd. 1.

Alleging negligence through use of a cell phone while operating a motor vehicle becomes more difficult when a citation has not been issued. This is where discovery comes into play. If plaintiff's counsel is amenable, it may be possible to get plaintiff's cell phone records without a court order. However, this usually means that the defendant will have to give their cell phone records to plaintiff's counsel. Therefore, it becomes important to weigh the risks and benefits. If the defendant was not on their cell phone, there is not much risk. If there is a possibility that the defendant was on their cell phone, whether the risk is worth it will depend on how likely it is that the plaintiff was also on their cell phone and the likelihood of a successful contributory negligence argument. Regardless of whether a driver was on their cell phone during or immediately before a motor vehicle accident, there is a chance that the other side will want to have a drivers' cell phone forensically inspected. Therefore, it is important to remind drivers not to delete any cell phone content or records for risk of a spoliation sanction. Since many people routinely delete cell phone records or content out of habit, it is imperative that this be communicated to the driver as soon as possible.

Another issue that may arise when cell phone usage is at issue in a motor vehicle accident is that of punitive damages. Punitive damages are separate from compensatory damages, and their purpose is to punish and deter conduct. Traditionally in Minnesota punitive damages are limited to cases where the negligent party acts with "deliberate disregard for the rights and safety of others." Minn. Stat. § 549.20. However, there are specific statutes that allow for punitive damages to be brought in certain situations, such as when a driver was under the influence at the time of the accident. Minn. Stat. § 169A.76. While Minnesota has yet to allow punitive damages in cases where drivers are using cell phones, there is no law preventing a party from asserting such a claim. A current trend has seen plaintiff lawyers both in Minnesota and across the country attempt to recover punitive damages for distracted driving resulting from cell phone usage. This is an issue to watch as it develops, since punitive damages are usually not covered by insurance policies and Minnesota does not cap punitive damages.●

WHEN DOES A WISCONSIN MEDICAL MALPRACTICE CLAIM ACCRUE?

By Lawrence M. Rocheford

Stated differently, when does the Wisconsin medical malpractice statute begin to run?

A legal defense that a claim is time-barred by the applicable and controlling statute of limitation is the bane of every dilatory plaintiff attorney and, at the same time, a just reward for the patient defense attorney.

ACCRUAL

"Every beginning has an end and every end has a new beginning…"
– Santosh Kalwar
Poet born in Chitwan, Nepal.

Before one may assert that a claim is time-barred by a limitation statute, the date on which the limitation statute commenced must be determined. It has been said that "a person is not entitled to sue unless the person has a cause of action that has accrued or matured." *1 Wisconsin Pleading and Practice, 5th Edition, Grenig §5:5 (2016).* In Wisconsin, as in other jurisdictions, there are many causes of action. And, for each cause of action, there may be different limitation statutes. *II Wisconsin Judicial Benchbook Civil 5th Edition CV 7-17 to CV 7-18 (2016).* Wisconsin recognizes the continuum of negligent treatment doctrine. *Robinson by Robinson v. Mount Sinai Medical Center*, 137 Wis. 2d. 1, 402 N.W.2d 711 (1987).

In order for a legal defense that a limitation statute has run, barring the claim, one must first determine the precise cause of action and, in every instance, the accrual date.

Doe 56 vs. Mayo Clinic Health Systems

Accrual of a cause of action for medical malpractice was recently discussed by the Wisconsin Supreme Court. *Doe 56 v. Mayo Clinic Health Systems – Eau Claire Clinic, Inc.*, 369 Wis. 2d 351, 880 N.W.2d 681 (2016). While not everyone handles medical malpractice cases, all civil claims are subject to various limitation statutes. Hence, it is worth analyzing how the Wisconsin Supreme Court determined the beginning and the end of when medical malpractice claims could be brought.

The two male Plaintiffs in *Does* asserted a claim against Dr. Van de Loo. He was their primary care physician from ages ten to fifteen and eight to fourteen. During that time, both received their annual physical exams from Dr. Van de Loo. The doctor would not use gloves while performing the examinations. He manipulated each boy's penis during the exams and always asked the boys' parents to leave the examination room during his genital examinations.

Generally, the examinations took place between 2003 and 2009. In 2012 the media reported that multiple counts of sexual assault criminal charges were filed against Dr. Van de Loo for touching minor male patients' genitals during physical exams.

The Plaintiffs alleged the news of the charges against Dr. Van de Loo caused them to suffer great pain of mind and body, including but not limited to depression, anxiety, embarrassment, emotional distress, self-esteem issues and loss of enjoyment of life. In sum, the Plaintiffs claimed that the news caused them injury in 2012. It has been said that "statutes of limitations are intended to advance the public interest by promoting vigilance and punishing sloth in the assertion of rights." *1 Wisconsin Pleading and Practice 5th Edition §5:2 (2016).* To be sure, once a cause of action has accrued, the claimant has a finite right to prosecute that claim. Once the limitation statute has run, the allegedly at fault party has a right to assert that the claim is time-barred. "Statute of limitations are substantive statutes creating and destroying rights by limiting time in which action must be commenced." *1 Wisconsin Pleading and Practice 5th Edition §5:2 at 369 n.1* citing *Lins vs. Blau*, 220 Wis. 2d 855, 584 N.W.2d 183 (Ct. App. 1998).

The case was before the Wisconsin Supreme Court following the Trial Court's dismissal of the Plaintiffs' 2013 Complaint based on the medical malpractice statute of limitations and the Wisconsin Court of Appeals affirmance of the Trial Court's dismissal. So, on review by the Wisconsin Supreme Court, everything pled by the Does was assumed to be true. There was no evidence before the Wisconsin Supreme Court – just the pleadings.

The Wisconsin Supreme Court stated and restated the issue on appeal: when did the Plaintiffs' claims for medical malpractice accrue. *Doe 56 v. Mayo Clinic Health Sys. – Eau Claire Clinic, Inc.*, 369 Wis. 2d 351, 355, 880 N.W.2d 681, 683 (2016).

Medical malpractice is a claim for negligence. "Sexual assault is an intentional act and therefore should be pursued as an intentional tort in the civil arena or as a criminal matter, not under a claim of medical negligence." *Doe 56 v. Mayo Clinic*

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Health Sys. – Eau Claire Clinic, Inc., 369 Wis. 2d 351, 356, 880 N.W.2d 681, 684 (2016). At the outset, the Wisconsin Supreme Court needed to resolve whether an alleged sexual assault during a medical examination may be pursued as a medical negligence (malpractice) action. The Wisconsin Supreme Court went through a litany of cases where alleged assaults by health care professionals arguably had a "legitimate medical purpose", such that they were arguably not an assault but may have been necessary and proper treatment. Ultimately, the Wisconsin Supreme Court determined that it could not rule as a matter of law that the manipulation of the Plaintiffs' genitals during their annual physical exams did not present a claim under medical malpractice law.

To be sure, the appeal did not concern the Plaintiffs' sexual battery claim against Dr. Van de Loo. The only issue on appeal concerned the medical malpractice (i.e. negligence) claim. The battery claim against Dr. Van de Loo was preserved.

Physical Injurious Change

The Wisconsin Supreme Court noted that "Wisconsin case law has over time developed a consistent test for determining the date of injury in medical malpractice claims…it is the date of physical injurious change." This has been the test for when a malpractice claim accrues whether the claim is based on negligent misdiagnosis, blood vessel ruptures, failed tubal ligations, or foreign objects left in a patient after surgery or other medical malpractice claims. *Estate of Genrich v. OHIC Ins. Co.*, 318 Wis. 2d 553, 565, 769 N.W.2d 481, 487 (2009). The Wisconsin Supreme Court declared that "in a medical malpractice claim based on unnecessary and improper treatment of inappropriate touching, the physical injurious change occurs at the time of the touching." *Doe 56 v. Mayo Clinic Health Sys. – Eau Claire Clinic, Inc.*, 369 Wis. 2d 351, 365, 880 N.W.2d 681, 688 (2016). Here, it may have been that the Plaintiffs were too young to understand and appreciate that Dr. Van de Loo and his touching their genitals during their annual physical exams was criminal or otherwise improper. It may be true that they did not realize they had been sexually abused until years later, after the media publicized criminal charges brought against Dr. Van de Loo. With those acknowledgments, the Wisconsin Supreme Court stated "[e]xpiration of the medical malpractice statute of limitation before a patient knows about the injury is unfortunately a consequence of the legislature's policy reasons for enacting the medical malpractice statute of limitations." *Doe 56 v. Mayo Clinic Health Sys. – Eau Claire Clinic, Inc.*, 369 Wis. 2d 351, 366, 880 N.W.2d 681, 689 (2016). To adopt the Plaintiffs' position that their malpractice claims accrued when the criminal charges against Dr. Van de Loo were publicized and that such media release of information was "causal" would indefinitely extend the medical malpractice statute. *Doe 56 v. Mayo Clinic Health Sys. – Eau Claire Clinic, Inc.*, 369 Wis. 2d 351, 368, 880 N.W.2d 681, 690 (2016). The Wisconsin Supreme Court opted for the reasonable interpretation of the medical malpractice statute stating that the Plaintiffs' medical malpractice claims accrued on the date of the last genital examination.

There were arguments that the Plaintiffs "discovered" their abuse with the media publicity of the criminal charges brought against Dr. Van de Loo. The Plaintiffs argued, like the Milwaukee Archdiocese sex abuse cases, their claims against Dr. Van de Loo should be extended. Those arguments were quickly dispatched. "There are significant differences between clergy-abuse cases and alleged sexual abuse in a medical malpractice case. Namely, there are medical reasons for a physician to touch a patient's genitals in the course of a legitimate physical examination… a physician ... is in a very different position than a priest or clergy-person. A priest or clergy-person has no legitimate reason to touch another's genitals." *Doe 56 v. Mayo Clinic Health Sys.--Eau Claire Clinic, Inc.*, 369 Wis. 2d 351, 371, 880 N.W.2d 681, 691 n.13 (2016). The Plaintiffs' claims did not arise as a result of an omission but arose out of an affirmative action – touching. The last touching by Dr. Van de Loo was the accrual date and the medical malpractice claims were time-barred.

Best Practices

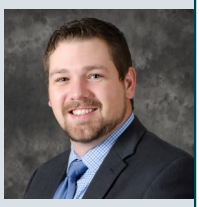
The concept of accrual date and how it applies to the legal defense of a statute of limitation has statewide impact. "A cause of action generally accrues for statute of limitation purposes where there exists a claim capable of present enforcement, a suitable party against whom it may be enforced, and a party who has a present right to enforce it." *1 Wisconsin Pleading and Practice 5th Edition §5:2 at 370.* Regardless of the jurisdiction, cause of action or alleged claim, the best practice, to determine when the cause of action accrues, is to get an admission from the claimant or otherwise prove when that claimant suffered "some damage", perhaps "physical injurious change," such that a claim could be brought against a known, responsible party. *II Wisconsin Judicial Benchbooks, Civil 5th Edition at CV 7-5 to CV7-7.*●

Firm News

Congratulations

JLO Partner **Lawrence M. Rocheford** has been appointed to the Rules of Evidence Advisory Committee by Minnesota Supreme Court Chief Justice Lorie S. Gildea.

JLO welcomes new associate Tal Bakke.



Tal received his J.D. from Mitchell Hamline School of Law in 2016. He joined the firm in 2014 as a law clerk and started as an associate in 2016. His primary practice areas include Government Liability, Employment Law, and Land Use and Zoning. While attending law school, he served on Mitchell Hamline Law Review's Editorial Board as a Managing Editor. He also worked as a student attorney for the Minnesota Innocence Project and Isanti County Attorney's Office.

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About the Firm

Jardine, Logan & O'Brien, P.L.L.P., is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa, our firm has the ability and expertise to manage cases of any size or complexity. We are trial lawyers dedicated to finding litigation solutions for our clients. View our website at www.jlolaw.com to obtain additional information. Please call us to discuss a specific topic.

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