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Defense Trial Counsel of Indiana
INDIANAPOLIS INDIANA

The administrative offices of the DEFENSE TRIAL COUNSEL OF INDIANA are located at
9505 Copley Dr., Indianapolis, Indiana 46260
Telephone (317)580-1233; Fax (317)580-1235;
E-mail: lmortier@dtci.org; http://www.dtci.org;

EXECUTIVE DIRECTOR: Lisa Mortier
SUBSCRIPTION RATES: $50 per year, payable to DTCI.

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THE TRIGGERING OF INDIANA'S MEDICAL MALPRACTICE STATUTE OF LIMITATIONS

Belinda R. Johnson-Hurtado*

The statute of limitations for Indiana medical malpractice claimants is found at Indiana Code section 34-18-7-1(b), which provides in relevant part:

> [A] claim, whether in contract or tort, may not be brought against a health care provider based upon professional services or health care that was provided or that should have been provided unless the claim is filed within two (2) years after the date of the alleged act, omission, or neglect, except that a minor less than six (6) years of age has until the minor's eighth birthday to file.

"This is an 'occurrence' statute as opposed to a 'discovery' statute. The time therefore begins to run on the date the alleged negligent act occurred, not on the date it was discovered."[1]

Pursuant to this statute, a medical malpractice claim must be filed within two years of the negligent act that the claimant either learns was malpractice and resulted in injury or about which the claimant possesses information that would have led a reasonably diligent person to such discovery during the two-year period after the alleged act or omission.[2] If such is the case, *and* the claimant has a reasonable amount of time within which to file a claim before the period expires, the purely occurrence-based limitations period is applicable and constitutional.[3] So long as the statute of limitations does not shorten the window of time between the discovery of the alleged malpractice and the expiration of the limitation period so unreasonably that it is impractical for a plaintiff to file a claim at all, it is constitutional as applied to that plaintiff.[4]

However, in situations where claimants cannot reasonably be expected to discover the alleged malpractice until after the limitation period has ex-

* Ms. Johnson-Hurtado is a 2002 ICLEO fellow and a 2005 graduate, cum laude, from the Mauer School of Law in Bloomington. She is an associate attorney at Clendening Johnson & Bohrer, P.C. in Bloomington, Indiana.

1 Brinkman v. Bueter, 879 N.E.2d 549, 553 (Ind. 2008).

2 *Id.*

3 Martin v. Richey, 711 N.E.2d 1273, 1284 (Ind. 1999).

4 *Id.*; Jacobs v. Manhart, 770 N.E.2d 344, 351 (Ind. Ct. App. 2002).

pired, the occurrence-based statute of limitation is unconstitutional as applied and is replaced with a judicially created discovery-based statute of limitation.[5] In such a case, the court must determine when a claimant possessed enough information that, in the exercise of reasonable diligence, should have led to the discovery of the alleged malpractice and resulting injury.[6] That date, the trigger date, is the date the two-year limitations period begins to run for such a claimant.[7] As straightforward as this sounds, application to particular factual situations can be rather complex.

I. KNOWN OR SHOULD HAVE KNOWN

The determination of when a claimant discovered or should have discovered malpractice and the resulting injury is key to deciding the constitutionality of the occurrence-based statute of limitation as applied to a particular plaintiff.[8] This determination is to be made by the court on a case-by-case basis, and the determination can be one of fact or one of law.[9] In some instances, the question will be subject to resolution on the basis of undisputed facts.[10] In other instances, the judge will be required to resolve disputed facts through pretrial motion practice in order to determine the date upon which the claimant possessed enough information that, in the exercise of reasonable diligence, should have led to the discovery of the alleged malpractice and resulting injury.[11]

II. TRIGGER DATE

As for when the medical malpractice statute of limitations is triggered, the Indiana Supreme Court has said:

> [T]he circumstances alerting the patient to the injury or to the potential of malpractice vary widely. A patient can learn of the fact of disease or injury either from personal knowledge of pain or symptoms or from a professional examination. In each of these contexts, where the constitutionality of the occurrence-based limitations period as applied to a given case is in issue, the ultimate question becomes the time at which a patient "either (1) knows of the malpractice and resulting injury or (2) learns of facts that, in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury." Although we have

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[5] *Martin*, 771 N.E.2d at 1284.

[6] *Id.*; Garneau v. Bush, 838 N.E.2d 1134, 1141 (Ind. Ct. App. 2005).

[7] *Garneau*, 838 N.E.2d at 1141.

[8] *Id.*

[9] *Jacobs*, 770 N.E.2d at 352.

[10] *Id.*

[11] *Id.*

> sometimes referred to the critical date as the "discovery date," we think a more accurate term is "trigger date," because actual or constructive discovery of the malpractice often postdates the time when these facts are known. Moreover, the trigger date, unlike a typical discovery date applicable to an accrual of a claim, in most circumstances does not start a fixed limitations period. Rather, it is the date on which a fixed deadline becomes activated.[12]

The length of time within which a claim must be filed after a trigger date in an occurrence-based statute varies with the circumstances.[13] A plaintiff whose trigger date is *after* the original limitations period has expired may institute a claim for relief within two years of the trigger date.[14] However, if the trigger date is *within* two years after the date of the alleged malpractice, the plaintiff *must* file before the statute of limitations has run *if* possible in the exercise of due diligence.[15] If the trigger date is within the two-year period, but in the exercise of due diligence a claim cannot be filed within the limitations period, the plaintiff must initiate the action within a reasonable time after the trigger date.[16]

The determination of the trigger date may often be resolved as a matter of law.[17] The trigger date becomes a matter of law when it is clear that the plaintiff knew, or should have known, of the alleged symptom or condition, and of the facts that in the exercise of reasonable diligence would lead to discovery of the potential malpractice.[18] For example, the trigger date is established as a matter of law when a patient is told by a doctor of a "reasonable possibility, if not a probability, that the specific injury was caused by a specific act at a specific time."[19] That being said, a claimant need not know with certainty that malpractice caused her injury.[20] These cases are to be decided by the court based upon the particular facts of each case. The date is also set as a matter of law when there is undisputed evidence that leads to the legal conclusion that the plaintiff should have learned of the alleged malpractice and there is no obstacle to initiating litigation.[21]

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[12] Herron v. Anigbo, 897 N.E.2d 444, 448-49 (Ind. 2008) (citing Booth v. Wiley, 839 N.E.2d 1168, 1172 (Ind. 2005)).

[13] *Id.* at 449.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] Van Dusen v. Stotts, 712 N.E.2d 491, 499 (Ind. 1999).

[20] *Id.*

[21] *Id.*

III. TRIGGER DATE WITHIN TWO-YEAR PERIOD AND, WITH REASONABLE DILIGENCE, A CLAIM CAN BE MADE WITHIN THAT PERIOD

If the trigger date falls within the two-year period, the court must examine whether the claimant had sufficient time, with the exercise of reasonable diligence, to file a claim within the two-year period. In many malpractice cases, the injury by its nature is known to the patient and suggests that there may have been malpractice.[22] If so, even under an occurrence- or discovery-based limitations period, reasonable diligence requires pursing the facts to determine whether there is a claim.[23] Reasonable diligence requires more than inaction by a patient who, before the statute has expired, does or should know of both the injury or disease and the treatment that either caused or failed to identify or improve it, even if there is no reason to suspect malpractice.[24] As a matter of law, the statute requires such a plaintiff to inquire into the possibility of a claim within the remaining limitations period and to institute a claim within that period or forego it.[25]

The Indiana Supreme Court, in *Brinkman v. Bueter*, found that plaintiffs who waited until 2000 to file their medical malpractice complaint, even though all underlying events occurred in 1995, were barred from bringing those claims because the applicable statute of limitations had passed.[26] In that case, a new mother was told that the late discovery of preeclampsia put her at high risk in the event of a future pregnancy.[27] The doctors encouraged her sterilization.[28] She did not undergo the procedure and accidentally became pregnant three years later. During the course of that pregnancy, she learned, for the first time, that her preeclampsia could have been avoided with proper medical treatment and that the advice that she was at risk from a future pregnancy and should undergo sterilization was wrong.[29] The Indiana Supreme Court held that the statute of limitations began to run when the plaintiff was informed of the preeclampsia and wrongly advised of her future risk, *not* when she was later told that such advice was wrong.[30] The court found that nothing prevented her from seeking a second opinion concerning the advice at that time, and a second opinion would have revealed the malpractice.[31] The court distinguished this

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[22] Herron v. Anigbo, 897 N.E.2d 444, 449 (Ind. 2008).

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] Brinkman v. Bueter, 879 N.E.2d 549 (Ind. 2008).

[27] *Id.* at 551.

[28] *Id.*

[29] *Id.* at 552.

[30] *Id.* at 554.

[31] *Id.* at 555.

type of situation from those in which there is a failure to diagnose a latent condition or a condition with a long incubation period, because in those situations there would be no reason to seek a second opinion, unlike in the case of an incorrect diagnosis of positive findings.[32] The court stated, "[a] plaintiff does not need to be told malpractice occurred to trigger the statute of limitations."[33]

Further, in *Coffer v. Arndt*, the plaintiff stopped treatment with the defendant in October 1995, when the defendant referred the plaintiff to a specialist.[34] The plaintiff was then informed, in December 1995, that he had glaucoma and had had it for several years.[35] However, the plaintiff did not sue the defendant until December 1997.[36] The court held that the twenty-two months that elapsed between the plaintiff's gaining sufficient information to reasonably inquire about possible medical malpractice (December 1995) and the end of the two-year statute of limitations (October 1997) was sufficient time to file a medical malpractice claim.[37] Therefore, the plaintiff's claim was barred as it was filed past the two-year statute of limitations (*i.e.*, after October 1997).

Likewise, in *Overton v. Grillo*, the plaintiff had a routine mammography on July 7, 1999, and was told by defendant that she had no malignancies.[38] On November 1, 2000, the plaintiff underwent a mastectomy during which adjacent lymph nodes were found to be cancerous.[39] However, it was not until October 11, 2001, that plaintiff claims she was first advised of the possibility of a potential claim of medical negligence.[40] The plaintiff then filed her claim on October 19, 2001.[41] The Indiana Supreme Court held that although the plaintiff was not told of the possibility of a malpractice claim until October 2001, a plaintiff need not be advised of the possibility of malpractice where it should be obvious that it might be present.[42] The court went on to hold that nothing prevented the plaintiff from filing in the nine months remaining in the limitations period, which began on July 7, 1999, and was triggered in November 2000 when the cancer was detected.[43]

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[32] *Id.*

[33] *Id.*

[34] Coffer v. Arndt, 732 N.E.2d 815, 819 (Ind. Ct. App. 2000).

[35] *Id.*

[36] *Id.*

[37] *Id.* at 821.

[38] Overton v. Grillo, 896 N.E.2d 499, 501 (Ind. 2008).

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at 503.

[43] *Id.* at 504.

In *Herron*, the plaintiff's claims were based on negligence relative to a May 6, 2002, surgery.[44] After the operation, the plaintiff had difficulty speaking and suffered from infection and pulmonary difficulties that required the use of a ventilator.[45] He was informed in November 2003, that his "condition [had] deteriorated since his [surgery], and that a likely cause of the deterioration was negligent follow-up care."[46] As of January 2004, the plaintiff was unable to be transported by car and required the use of oxygen.[47] The plaintiff filed his complaint on December 7, 2004.[48] The Indiana Supreme Court found that nothing prevented the plaintiff from investigating whether he may have had a claim before the running of the two-year statute of limitation.[49] Even though the plaintiff was physically incapacitated at times, he was not ignorant of his injury, its failure to improve, or that he had been treated by defendant.[50] The court found that

> claims based on negligence in the May 6, 2002 surgery are barred because Herron failed as a matter of law to pursue his claim with reasonable diligence within the period required by the statute. An occurrence-based limitations period can produce harsh results. If Herron's surgery was below the standard of care, this is such a case. Herron's condition was and is severe, and it is understandable that his focus was on medical outcomes, not legal remedies, in the more than two years following the surgery. But the legislature has prescribed an occurrence-based limitations period, and Herron and all other patients are charged with knowledge of the law, however unrealistic that assumption may be in a given case.[51]

IV. TRIGGER DATE WITHIN TWO-YEAR PERIOD, BUT NOTWITHSTANDING THE EXERCISE OF REASONABLE DILIGENCE, A CLAIM CANNOT BE FILED WITHIN THAT PERIOD

If the trigger date is within the two-year period, but in the exercise of due diligence, a claim cannot be filed within that time, the claimant must initiate the action within a reasonable time after the trigger date.[52] However, to date, such an "eve of midnight discovery" has not arisen.

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44 Herron v. Anigbo, 897 N.E.2d 444, 452 (Ind. 2008).

45 *Id.* at 447.

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.* at 453.

50 *Id.*

51 *Id.*

52 Booth v. Wiley, 839 N.E.2d 1168, 1172 (Ind. 2005); Overton v. Grillo, 896 N.E.2d 499, 502 (Ind. 2008).

> The Court of Appeals notes the possibility of discovery a very short time before the expiration of the limitations period. There may be situations where, like *Martin* and *Van Dusen,* discovering and presenting the claim within the time demanded by the statute is not reasonably possible. If so, the statute as applied under those circumstances may run afoul of the Indiana Constitution. But Boggs is not in that category. In the future, this Court may be presented with facts that support a claim such as the hypothetical eve of midnight discovery posited by the Court of Appeals. For the moment, however, it remains a hypothetical. Indeed, the problem of a last minute discovery is inherent in any statute of limitations that may be tolled by concealment or related doctrines. It can best be addressed on a case-by-case basis, and, at least in this state, has apparently never arisen.[53]

The fact is, the determination of whether a claim can be filed within the two-year period when the trigger date is close to the termination of that period is a fact-specific inquiry. In *Garneau*, plaintiff underwent prosthesis surgery on March 17, 1998.[54] Between that time and September 1999, Dr. Bush continued to treat Ms. Garneau for hip pain and several dislocations, and on September 30, Dr. Bush referred Ms. Garneau to Dr. Trout.[55] On November 8, 1999, Dr. Trout replaced Ms. Garneau's prosthesis with a new bipolar prosthesis.[56] Thereafter, Ms. Garneau and her husband filed their claim against Dr. Bush on August 28, 2000.[57] The court found that the date of Dr. Trout's replacement surgery, the Garneau's "possessed knowledge that should have led a reasonably diligent person to discovery Dr. Bush's alleged malpractice."[58] The court noted that by that date, Ms. Garneau "had experienced almost 20 months of pain and extreme difficulty abducting her hip, had spent some eight months in a nursing home, and had been advised by an orthopedic surgeon to have a new bipolar hip prosthesis installed."[59] Therefore, because Ms. Garneau's original hip replacement surgery took place on March 17, 1998, the two-year occurrence-based limitations period for her claim expired on March 16, 2000.[60] The court found that the four-month period between the trigger date (November 8, 1999) and the expira-

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[53] Hopster v. Burgeson, 750 N.E.2d 841, 849 (Ind. Ct. App. 2001), *overruled on other grounds* (citing Boggs v. Tri-State Radiology, Inc., 730 N.E.2d 692, 697-98 (Ind. 2000)).

[54] Garneau v. Bush, 838 N.E.2d 1134, 1138 (Ind. Ct. App. 2005).

[55] *Id.* at 1139.

[56] *Id.*

[57] *Id.*

[58] *Id.* at 1142.

[59] *Id.*

[60] *Id.*

tion of the two-year statutory period (March 16, 2000) was a reasonable time within which to file her claim.

V. TRIGGER DATE OCCURS AFTER TWO-YEAR PERIOD EXPIRES

When claimants are unable to discover the malpractice and the resulting injury within the two-year statutory period, they may "file their claims within two years of the date when they discover the malpractice and the resulting injury or facts that, in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury."[61]

In *Martin v. Richey*, Ms. Martin underwent a mammography and needle aspiration due to complaints of a lump in her right breast in March 1991.[62] At that time, it was believed that the lump was benign and most likely from fibrocystic breast disease.[63] In April 1994, Ms. Martin began experiencing increased pain in the lump and pain under her right arm.[64] On April 15, 1994, she was diagnosed with adenocarcinoma with extensive lymph node involvement.[65] Thereafter, Ms. Martin underwent chemotherapy from May 1994 through September 1994.[66] On October 14, 1994, more than two years after the relevant treatment with Dr. Richey, Ms. Martin filed her complaint against Dr. Richey for failure to diagnose and treat her breast cancer in a timely manner.[67] The Indiana Supreme Court held that the two-year statute of limitations violated the Indiana Constitution article I, sections 12 and 23 because it was not uniformly applicable to all medical malpractice victims and barred Ms. Martin's claim due to the long latency period of her disease. The court stated that the statutory limitations period would require Ms. Martin to file her claim before her claim existed. Therefore, her claim, filed more than three years after the malpractice, was timely filed.

In *Van Dusen v. Stotts*, decided by the Indiana Supreme Court the same day as *Martin v. Richey*, Mr. Stotts went to his family doctor in June 1992, and while there, his physician performed a prostate exam.[68] On July 24, 1992, a biopsy was then taken and read as benign.[69] On January 25, 1995, Mr. Van Dusen was diagnosed with metastatic disease resulting from cancer in his prostate, which had spread to his lymph nodes and bones.[70] In

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[61] Van Dusen v. Stotts, 712 N.E.2d 491, 497 (Ind. 1999); Martin v. Richey, 711 N.E.2d 1273, 1284-85 (Ind. 1999).

[62] *Martin*, 711 N.E.2d at 1274-75.

[63] *Id.* at 1276.

[64] *Id.* at 1277.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Van Dusen*, 712 N.E.2d at 494.

[69] *Id.*

[70] *Id.*

January 1996, Mr. Van Dusen's 1992 biopsy was reread and the results showed that there was a malignancy detectable in the 1992 study, which had been "badly misread."[71] The court found that the "general and overall purpose of the legislature [in enacting the two-year occurrence-based statute of limitations] [was] to maintain sufficient medical treatment and to control malpractice insurance costs by various means, including the encouragement of prompt presentation of claims."[72] Accordingly, the court held that plaintiffs who suffer from conditions with long latency periods and are "unable to discover the malpractice and their resulting injury within the two-year statutory period" would have two years from the date "when they discover the malpractice and the resulting injury or facts, that, in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury" to file their medical malpractice claim.[73]

VI. Other Statute of Limitation Defense Considerations

A defendant in a medical malpractice action who asserts the statute of limitations as an affirmative defense bears the burden of establishing that the action was commenced beyond that statutory period.[74] If this is done, however, the facts establishing any incapacity or the reasonableness of the plaintiff's diligence in filing a claim are uniquely within the plaintiff's knowledge. It is therefore appropriate that the burden shifts to the plaintiff to establish an issue of fact material to a theory that avoids the defense.[75] When considering the affirmative defense of the statute of limitations, though, it is important to consider whether claims of continuing wrong or fraudulent concealment could bar the defense.

VII. Continuing Wrong

The doctrine of continuing wrong is applied to determine when the date of alleged malpractice occurred. The doctrine of continuing wrong applies where an entire course of conduct combines to produce an injury.[76] The doctrine of continuing wrong is not an equitable doctrine; it is simply a legal concept used to define when an act, omission, or neglect took place.[77] When conduct is determined to constitute a continuing wrong, the statute of limitations is tolled "so that it does not commence running until the wrongful act ceases."[78] In order to apply the doctrine, a plaintiff must demonstrate

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[71] *Id.*

[72] *Id.* at 496.

[73] *Id.* at 497.

[74] Boggs v. Tri-State Radiology, Inc., 730 N.E.2d 692, 695 (Ind. 2000).

[75] *Id.*

[76] Palmer v. Gorecki, 844 N.E.2d 149, 156 (Ind. Ct. App. 2006).

[77] Havens v. Ritchey, 582 N.E.2d 792 795 (Ind. 1991).

[78] LeBrun v. Connor, 702 N.E.2d 754, 758 (Ind. Ct. App. 1998).

that the alleged injury-producing conduct was of a continuous nature.[79] Therefore, when the sole claim of medical malpractice is a failure to diagnose, the omission cannot, as a matter of law, extend beyond the time the physician last rendered a diagnosis.[80] Nevertheless, a plaintiff may not sit idly by if she discovers facts that alert her that there is a cause of action.[81] The doctrine of continuing wrong will not prevent the statute of limitations from running when the plaintiff learns of facts that should lead to the discovery of a cause of action even if the relationship with the tort-feasor continues beyond that point.[82]

VIII. FRAUDULENT CONCEALMENT

The doctrine of fraudulent concealment is an equitable remedy that operates to bar a defendant from asserting the statute of limitation as a defense.[83] Under this doctrine, a defendant who prevented a claimant from discovering an otherwise valid claim, by violation of duty or deception, is estopped from raising a statute-of-limitations defense.[84] There are two types of fraudulent concealment, active and passive, and each has its own applicable statute of limitation.

A. PASSIVE CONCEALMENT

Passive (also known as constructive) concealment may arise from mere negligence and occurs when the health care practitioner fails to disclose to the patient certain material information.[85] The doctrine of fraudulent concealment "operates to estop a defendant from asserting a statute of limitations defense when that person, by deception or violation of a duty, has concealed material information from the plaintiff *thereby preventing discovery of a wrong*."[86] Before the doctrine of estoppel may be used to bar the defendant's use of the statute of limitations, the fraud must be of such character as to prevent inquiry, to elude investigation, or to mislead the party who claims the cause of action.[87] Under this doctrine, the critical event for purposes of determining whether an action was timely filed is the claimants' discovery of facts that should have alerted her that she had a cause of action.[88] Therefore, when there is passive concealment, the duty to disclose

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79 *Palmer*, 844 N.E.2d at 156.

80 *Id.* at 156; *Havens*, 582 N.E.2d at 795.

81 *Palmer*, 844 N.E.2d at 156.

82 *Id.*

83 *Id.* at 155.

84 *Id.*

85 *Id.*

86 *LeBrun*, 702 N.E.2d at 757.

87 *Havens*, 582 N.E.2d at 795 n.2.

88 *Palmer*, 844 N.E.2d at 155.

ceases at the termination of the health care provider-patient relationship or at the time that the claimant actually discovers or has a reasonable opportunity to discover the malpractice, whichever occurs first.[89]

"Equity supplies what equity requires." Thus, a claimant must file suit within a reasonable time after learning of the possible malpractice or after discovery of information that should reasonably lead to the discovery of the possible malpractice.[90] The burden is on the plaintiff to establish that she has exercised reasonable diligence to discover the alleged malpractice.[91] A plaintiff learns, or should have learned, of information that would lead to discovery of malpractice when she is informed that she has the condition that she claims was brought on by the malpractice.[92]

B. ACTIVE CONCEALMENT

When concealment is active, the period of estoppel "is not affected by the date of termination of the relationship but continues for a reasonable time after the plaintiff discovers the alleged malpractice or discovers information which in the exercise of reasonable diligence would lead to discovery of the malpractice."[93]

The principal difference between active and passive fraudulent concealment "lies in the different points in time at which plaintiffs may commence their malpractice actions."[94] Therefore, whether the fraudulent concealment is active or passive, a plaintiff must initiate an action within a reasonable time after the patient learns of the malpractice "or discovers information which would lead to the discovery of malpractice if the patient exercised reasonable diligence."[95]

IX. PHYSICIAN-PATIENT RELATIONSHIP

Another issue that can affect a proper statute of limitations determination in medical malpractice actions is determining when the physician-patient relationship ended or when, even if, it began.

Where there is no claim of fraudulent concealment, continuing wrong, or other continuing professional relationship, the physician-patient relationship normally terminates on the last date the physician renders medical treatment and/or services to the patient.[96] A patient's bare assertion that

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[89] *Id.*

[90] Van Dusen v. Stotts, 712 N.E.2d 491, 497 (Ind. 1999).

[91] *LeBrun*, 702 N.E.2d at 757.

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *See generally* Babcock v. Carter, 587 N.E.2d 1320, 1324 (Ind. Ct. App. 1992).

she continued to rely upon a physician for medical treatment is insufficient as a matter of law to create a factual issue in this regard.[97]

In *Thayer v. OrRico*, Ms. Thayer was employed by Lafayette Clinic, Inc., where the defendant Dr. OrRico, a psychiatrist, worked.[98] During the course of her employment, Ms. Thayer sought advice from Dr. OrRico concerning her children and her marriage, received advice from Dr. OrRico on parenting and her marriage, and was advised by Dr. OrRico to discontinue the use of medications prescribed by another psychiatrist and undergo herbal treatments.[99] The court of appeals found that the following factors should be considered when determining whether a therapist-patient relationship existed: (1) whether the individual consulted with or was examined by a therapist for the purpose of receiving treatment, (2) whether the therapist made a recommendation to the individual regarding her condition or as to any course of treatment, and (3) whether the therapist performed some affirmative act that would support an inference that she consented to the establishment of the therapist-patient relationship.[100] As Indiana law was sparse relative to the creation of the physician-patient relationship, the court also examined Indiana's law regarding the existence of an attorney-client relationship. The court stated:

> In addition, the putative client's subjective belief that he is consulting a lawyer in his professional capacity and his intention to seek professional advice are important factors that are considered in addressing that issue. However, "the relationship is consensual, existing only after both attorney and client have consented to its formation."[101]

On this basis, the court found a physician-patient relationship existed between Thayer and OrRico as (1) Thayer sought advice from OrRico, (2) OrRico consulted with Thayer on "a frequent basis" and "gave her advice," (3) and "most importantly," that OrRico advised Thayer to discontinue the use of medications prescribed by another and to undergo herbal treatments.[102]

Further, if a person neither seeks nor expects to receive health care from a health care provider when she voluntarily sees said health care provider, there is no physician-patient relationship.[103] If a person neither seeks nor

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[97] *Id.*

[98] Thayer v. OrRico, 792 N.E.2d 919, 921 (Ind. Ct. App. 2003).

[99] *Id.* at 926.

[100] *Id.*

[101] *Id.* (citing Douglas v. Monroe, 743 N.E.2d 1181, 1184-85 (Ind. Ct. App. 2001)).

[102] *Id.*

[103] Weldon v. Universal Reagents, Inc., 714 N.E.2d 1104, 1109 (Ind. Ct. App. 1999) (citing Payette v. Rockefeller Univ., 220 A.D.2d 69 (N.Y. App. Div. 1996)) (holding plaintiff who did not consult a blood bank as a health care provider, even though the plaintiff underwent procedures traditionally associated

expects to receive health care from a health care provider in the future, the physician-patient relationship ends.[104]

X. Conclusion

The first step in analyzing a possible statute of limitations defense in a medical malpractice action is to determine when the plaintiff became aware of the malpractice and resulting injury, or when she became aware of such facts that would have led a reasonably diligent person to such discovery. This is the trigger date. This is a fact-sensitive determination and will most likely require a fair amount, if not extensive, discovery between the parties.

Once this date is determined, the date of occurrence will need to be ascertained. Consideration in this regard will need to be given to the case-specific facts as well as the doctrines of continuing wrong and fraudulent concealment and perhaps the physician-patient relationship itself.

Once these two dates are determined, a determination can be made as to when the deadline was triggered.

1) If the trigger date was within two years after the malpractice and a reasonable amount of time was left within the two-year period, the statute of limitations runs when the two-year period is over.

2) If the trigger date was within two years after the malpractice but a reasonable amount of time was not left within the two-year period, the statute of limitations runs within a reasonable amount of time after discovery.

3) If the trigger date is after two years following the malpractice, the claimant has two years after discovery within which to file a claim.

with a physician, was not consulting as a patient with a medical condition; therefore, no physician-patient relationship existed).

[104] *Id.*