

## **THE DISCOVERY RULE IN A MEDICAL MALPRACTICE WRONGFUL DEATH CASE – IS IT APPLICABLE?**

### Scenario

A widow comes into your office and seeks advice regarding the death of her seventy year old husband almost three years ago. The doctor told her that these types of tragedies just happen sometimes during surgery, so she always thought his was a natural death. But recently, she saw news that a medical device, like the one used in his surgery, was withdrawn from the market due to safety concerns. You immediately order records to see if this device was used and whether it played a role in his death. Your review of those records reveals that not only does she have a product liability claim, but a medical malpractice claim as well.

While the claims against the device manufacturer fall under the three-year statute of limitations contained in Miss. Code Ann. § 15-1-49, the claims against the doctor fall under Miss. Code Ann. § 15-1-36(2) which provides in pertinent part that the action must be “filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered.” You expect the doctor will argue that the two year statute of limitations has expired; therefore, you will need the discovery rule to toll the statute.

### Analysis

There are a few cases that, at first glance, seem to support the doctor’s anticipated position. For instance, in *Chamberlin v. City of Hernando*, 716 So.2d 596 (Miss. 1998), the plaintiff brought suit against an ambulance company for negligence in the fatal treatment of her husband. Plaintiff argued that the discovery rule should apply, but the court ruled it was

inapplicable because the plaintiff was present at all times when the negligent conduct allegedly occurred and because her former son-in-law was one of the paramedics present at the scene. *Id.* at 601. The Court found “...that the [plaintiff] knew or should have known the basis for [her] cause of action. Such knowledge, in conjunction with the fact that the decedent's death was not a latent injury, prohibits the use of the discovery rule.” *Id.* However, the “knowledge” to which the *Chamberlin* court was referring was a result of the plaintiff being “present during all of the events which form[ed] the basis of the Complaint.” *Id.* The fact that death is not a “latent” injury was not enough to prohibit the application of the discovery rule. Instead, the Court ruled that the discovery rule will not apply to a death case when the plaintiff has knowledge of the events surrounding the death.

Contrary to the doctor’s anticipated position, the Mississippi Supreme Court has stated that the discovery rule does apply to toll the statute of limitations for a wrongful death action. For instance, in *Sarris v. Smith*, 782 So.2d 721, 724 (Miss. 2001), a medical malpractice case, the court stated that “the statute of limitations can be tolled until a plaintiff gains actual knowledge of the defendant’s negligent conduct even if that knowledge is not gained until years after the death that is the basis for the suit.” Furthermore, the court stated that the operative time of the discovery rule is “when the patient can reasonably be held to have knowledge of the injury itself, the cause of the injury, and the causative relationship between the injury and the conduct of the medical practitioner.” *Id.* at 723 (quoting *Smith v. Sanders*, 485 So.2d 1051, 1052 (Miss. 1986)). The court then went on to discuss whether the discovery rule should be applied to wrongful death actions, and specifically stated that “We do not find the argument [that the Supreme Court of Mississippi has repeatedly held that the discovery rule only applies to latent injuries and that the

statute of limitations begins to run on the date of the death] of [defendants] persuasive.” *Id.* at 724.

In allowing the discovery rule to toll the statute of limitations, the *Sarris* court relied heavily on *Sweeney v. Preston*, 642 So.2d 332 (Miss. 1994), which allowed the tolling of the statute of limitations “where plaintiff actually discovered defendant doctor’s mistake more than twelve years after [the] doctor negligently mistyped plaintiff’s blood, resulting in [the] death of two of plaintiff’s children.” *Id.* While discussing whether a wrongful death action accrues before the death of a person, but after the negligent treatment, that court stated that the statute of limitations is not triggered until the death occurs. 642 So.2d 332, 335. However, that court further stated that under the wrongful death statute, “the limitations period does not begin to run until the heir knows or should reasonably know about the medical negligence which caused the death.” *Id.* (citing *Gentry v. Wallace*, 606 So.2d 1117, 1119 (Miss. 1992)).

### Conclusion

Given the fact your widow could not have known to even investigate for negligence until the recent news of the defective device became known to the public, you conclude that current Mississippi Law, as stated above, will support your position that the two year statute of limitations has not expired.