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# Limitation of Actions - Ignorance of Existence of the Cause of Action - Statute Barred Undiscovered Cause of Action for Malpractice

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basis for computing depreciation under both rules is the useful life of the property.[22] A tenable argument apparently not presented by the petitioner is that Congress in the Revenue Act of 1928, did not intend to change the law as to depreciation in the case of life tenants but only to introduce a simple and concise rule for computing depreciation, thereby eliminating the confusion produced by the rule of apportionment. Therefore, since improvements made by the life tenant were excepted under the Revenue Act of 1921,[23] they should also be excepted under the Revenue Act of 1928 and thus under the present provision, which is a carry-over of the 1928 legislation.

Clearly, the petitioner in this case was the victim of an unfortunate decision. The fact that the cost was recovered within the first five years of the building's use rebuts any presumption that a gift to the daughter was intended.[24] But on the death of the petitioner her estate will be unable to recover the undepreciated cost of the building from the remainderman because it is well settled that a life tenant cannot burden the estate of the remainderman with the cost of improvements even if they enhance the value of the property.[25] The result reached by the court may therefore be criticized on the ground that it discourages legitimate business enterprises and forces life tenants to allow valuable business property to fall into ruin because of natural wear and tear, obsolescence, and changing conditions. Appropriate legislation to allow life tenants to depreciate improvements financed by them over their life expectancies would appear to be distinctly desirable.

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LIMITATION OF ACTIONS — IGNORANCE OF EXISTENCE OF THE CAUSE OF ACTION — STATUTE BARRED UNDISCOVERED CAUSE OF ACTION FOR MALPRACTICE, — The defendant performed an operation upon the plaintiff on December 8, 1942, and negligently failed to remove a surgical sponge from

22. By applying the rule of apportionment used under the 1921 act to a hypothetical case where the life expectancy of the life tenant is 10 years, the useful life of the property is 20 years, and the present value of the property is $20,000, the following result is reached:

10/20 x $20,000 = $10,000 ÷ 10 = $1000 annual depreciation.

Applying the rule of the present act to the same case, the same result is reached: $20,000 ÷ 20 = $1000 annual depreciation.

The similarity in results illustrates the fact that the present act is merely a codification of the judicially-developed rule of apportionment applied to improved property under the Revenue Act of 1921.

23. See note 19 *supra*.

24. The building was erected in 1938 at a cost of approximately $17,000. The petitioner received from $4,000 to $5,000 per year rental from 1938 to 1943. From 1943 to 1950 she received $68,604. Considering the improvement from a business standpoint, it represented a prudent investment for her own account. *Cf.* Caroline T. Kissel, 15 B.T.A. 705, 706 (1929): "Since petitioner is deriving rentals from the building, it follows that she is using the building in her business."

25. *E.g.*, Dickey v. Stevens, 208 Ark. 111, 184 S.W.2d 955 (1945) (grantor who retained life estate not allowed to charge the remainderman for improvements); Belfield v. Findlay, 389 Ill. 526, 60 N.E.2d 403 (1945) (improvements are deemed to have been made for the benefit of the life tenant); Caldwell v. Jacob, 16 Ky. L. Rep. 21, 24, 22 S.W. 436, 437 (1893), *modified on rehearing*, 24 S.W. 86 (1894) (court gave two reasons why improvements cannot be made a charge upon the estate of the remainderman: 1) To prevent the life tenant's consuming the remainderman's interest by making improvements the remainderman does not desire or cannot pay for; 2) Improvements are made for the life tenant's benefit, and usually without reference to the remainderman's wishes.). *But cf. In re* Whitney, 75 Misc 610, 136 N.Y.S. 633 (1912) (life tenant allowed compensation for improvements).

Plaintiff's wound. There was no subsequent treatment by the defendant. On December 28, 1948, the plaintiff underwent another operation, at which time a sponge was discovered at the site of the previous operation by the defendant. The present action was not commenced until October 28, 1949. The plaintiff urged that the statute of limitations should not have run until her discovery of the malpractice, because she could not have known, by the exercise of reasonable diligence, that she had a cause of action for the injury until after the second operation. The statute provided that an action for malpractice should be brought within one year after the cause thereof accrues.[1] The Supreme Court of Ohio, with one dissent, *held* that the fact that Plaintiff did not know of her right of action did not prevent the statute from running, and since the present action was commenced more than one year after the termination of any professional relationship between Plaintiff and Defendant, it was barred by the statute of limitations. The dissenting opinion contended that the case fell within the peculiar and limited class of continuing tort; therefore, the cause of action could not have accrued until the plaintiff had a reasonable opportunity to discover the malpractice. *Delong v. Campbell*, 104 N.E.2d 177 (Ohio 1952).

The point under consideration in the instant case was whether the statutory period of limitation should have been measured from the time the physician-patient relationship ended,[2] or from the time the patient discovered the malpractice.[3] Basically, there are three conflicting concepts involving the application of the statute of limitations in actions for malpractice. The general rule is that the statute begins to run from the time of the injury.[4] Under this interpretation, the statute is not tolled even though the individual may have had further professional relations with his doctor. A later concept developed in which the statute of limitations is tolled until the relationship of physician and patient is terminated.[5] In recent years, a few courts have held that the statute begins to run when the malpractice is discovered.[6] Under the last interpretation, a cause of action does not accrue until the patient has had a reasonable time in which to discover the injury.

In a malpractice case, not only is there a tort committed upon the patient, but there is also a breach of contract. Since most states prescribe separate statutes of limitation for torts and contracts, the courts must decide which statute to apply. As a result of this dilemma, four solutions have been tendered by the courts. (1) If it is determined that there was a breach of a

1. Ohio Gen. Code §11225 (1910).

2. Thatcher v. De Tar, 351 Mo. 603, 173 S.W.2d 760 (1943) (Defendant negligently left surgical needle in Plaintiff's body); Bowers v. Santee, 99 Ohio St. 361, 124 N.E. 238 (1919) (negligent setting of Plaintiff's fractured leg); Gillette v. Tucker, 67 Ohio St. 106, 65 N.E. 865, 871 (1902) (leading case) "Her cause of action accrues when her injuries occurred; and if these injuries blended and extended during the entire period the surgeon was in charge of the case, her right of action became complete when the surgeon gave up the case without performing his duty."

3. Rosane v. Senger, 112 Colo. 363, 149 P.2d 372 (1944) (although Plaintiff did not discover gauze pad until ten years after operation, action brought within two years of discovery *held* not barred by two year statute).

4. *See* Ehlen v. Burrows, 51 Cal. App.2d 141, 124 P.2d 82, 84 (1942); Pellett v. Sontone Corp., 55 Cal. App.2d 158, 130 P.2d 181, 182 (1942); Petrucci v. Heidenreich, 43 Cal. App.2d 561, 111 P.2d 421, 422 (1941).

5. See note 2 *supra*.

6. Costa v. Regents of University of California, 247 P.2d 21 (1952); Greninger v. Fischer, 81 Cal. App.2d 549, 184 P.2d 694 (1947) (statute does not start to run until discovery, or the date when, by reasonable care, Plaintiff should have discovered wrongful act); Faith v. Erhart, 52 Cal. App.2d 228, 126 P.2d 151 (1942).

contractual relationship, then the courts may apply the statute of limitation applicable to contracts.[7] (2) The majority of the courts apply the statute of limitation applicable to injuries by negligence, whether the action is brought for breach of contract or for tort.[8] (3) In some jurisdictions, the patient is allowed to bring his action either on the contract or for the tort, and the courts will invoke the proper statute.[9] (4) Because the same delict may give rise to both a tort and a contract cause of action,[10] some states have obviated any difficulty by enacting a special limitation for malpractice actions.[11] As pointed out in the dissenting opinion in the instant case, the plaintiff is subjected to onerous hardship because she did not learn of the malpractice until long after her cause of action was barred.[12] One cannot overlook the contingency, however, that a great injustice may be done to the physician if a statute of limitation does not begin to run until the cause of action is discovered.

It has been held that ignorance of the injury or of the right to a cause of action will not postpone the running of the statute.[13] However, where the person guilty of malpractice fraudulently conceals the fact, thus preventing the injured party from obtaining knowledge thereof, the statute does not run until the cause of action is discovered, or could have been discovered by the reasonable diligence of the injured party.[14] In North Dakota, anyone who assumes a relation of personal confidence to another person renders himself a trustee as to all dealings with that person.[15] A physician is in a position of trust and confidence with his patient and therefore is duty bound to act with the utmost good faith toward the patient.[16] Under the general rule that a

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7. Sellers v. Noah, 209 Ala. 103, 95 So. 167, 168 (1923) "The counts declare upon the breach of the surgeon's contract, . . . the reference to negligence therein being but descriptive of the method . . . whereby the contract was breached"; Crawford v. Duncan, 61 Cal. App. 647, 215 Pac. 573 (1923) (physican warranted that no permanent scars would result, but treatment left scar); Finch v. Bursheim, 122 Minn. 152, 142 N.W. 143 (1913) (Defendant so negligently treated Plaintiff's broken hip, that Plaintiff became crippled).

8. Mirich v. Balsinger, 53 Cal. App.2d 103, 127 P.2d 639 (1942) (surgeon negligently performed plastic surgery on Plaintiff's nose); *accord,* Barnhoff v. Aldridge, 327 Mo. 767, 38 S.W.2d 1029 (1931) (Defendant, hired under oral contract, removed one of Plaintiff's kidneys instead of diseased gall bladder); Monahan v. Devinny, 223 App. Div. 547, 229 N.Y.S. 60 (1928) (action tortious in its nature, but partial relief available on contract).

9. Hickey v. Slattery, 103 Conn. 716, 131 Atl. 558, 559 (1926) (where two distinct causes of action arise, each is limited by the statute appropriate to it).

10. *See* Hickey v. Slattery, *supra* note 9.

11. *E.g.,* N.D. Rev. Code §28-0118 (3) (1943): "The following actions must be commenced within two years after the cause of action has accrued: . . . (3) An action for the recovery of damages resulting from malpractice."

12. See Becker v. Floersch, 153 Kan. 374, 110 P.2d 752 (1941) (Plaintiff contended courts should not permit doctors to escape consequences of negligent acts by simple expedient of statute of limitations).

13. Ogg v. Robb, 181 Iowa 145, 162 N.W. 217 (1917) (action for damages due to X-ray burn of which Plaintiff had knowledge).

14. N.D. Rev. Code §28-0116 (6) (1943): "The following actions must be commenced within six years after the cause of action has accrued; . . . (6) An action for relief on the ground of fraud in all cases both at law and in equity, the cause of action in such cases not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;" Schmucking v. Mayo, 183 Minn. 37, 235 N.W. 633 (1931) (Plaintiff submitted to goiter operation and claimed negligent cutting of laryngeal nerve resulting in loss of speech).

15. N.D. Rev. Code §59-0108 (1943): Everyone who voluntarily assumes a relation of personal confidence with another is deemed a trustee within the meaning of this chapter . . . ".

16. *See* Tvedt v. Haugen, 70 N.D. 338, 347, 294 N.W. 183, 187 (1940).

trustee may not obtain any advantage over the beneficiary by the slightest misrepresentation or concealment,[17] it would seem that a physician must make a full disclosure of any defects in his treatment or the patient may hold him liable on a fraud theory.

North Dakota is among the states that have provided a special statutory limitation for malpractice actions.[18] However, only two North Dakota malpractice cases have raised the statute as a defense.[19] One case was dismissed for lack of evidence,[20] and the other held that the statute of limitation was not a good defense.[21]

M. R. McINTEE

STATUTES — INTERPRETATION AND CONSTRUCTION — ELECTORS' AUTHORIZATION TO INCREASE TAX LEVY PAST "LEGAL LIMIT" WHERE "LEGAL LIMIT" SUBSEQUENTLY CHANGED BY LEGISLATURE. — In the year 1946 the governing board of the Osago School District decided that the amount of money which would be raised by a levy of taxes at the rate of 22 mills — the maximum amount then permitted [1] — would be insufficient to meet the needs of the district. Following statutory procedures, the question of increasing the tax levy fifty per cent above the 22 mill limit was submitted to the electors of the district at a special election.[2] The increase was approved by the voters and the maximum tax limit was thus raised an additional eleven mills, making the total limit thirty-three mills. In 1947 the legislature amended the statute to permit school districts to levy taxes not to exceed thirty-six mills. The school district officials thereupon took the position that the permission to make an excess levy which they had received at the election was still valid, and made a levy of 50.12 mills, which was 14.12 mills in excess of the thirty-six mill limitation. Plaintiff, a taxpayer, brought an action to recover taxes paid under protest, contending that a new excess levy could not be made without a further authorization from the voters of the school district. *Held,* judgment for plaintiff. The amended statute furnished no basis to which school district officers might apply the percentage of increase voted by school districts in elections held when the prior limit of 22 mills was in effect. *Great Northern Ry. Co. v. Severson,* 50 N.W.2d 889 (N.D. 1952).

It must be conceded that if the validity of the excess tax computed on the thirty-six mill base depended on a retrospective effect [3] being given to

17. N.D. Rev. Code §59-0109 (1943).
18. See note 11 *supra.*
19. Milde v. Leigh, 75 N.D. 418, 28 N.W.2d 530 (1947) (in husband's action against surgeon for loss of wife's consortium and expenses resulting from ineffective sterilization operation, whereupon she thereafter gave birth to a child, permanently impairing her health, *held* his cause of action arose after the wife became pregnant and was not barred by limitations); Scheid v. Cavanagh, 65 N.D. 596, 260 N.W. 619 (1935) (wooden applicator left in Plantiff's nostril without discovery for three years).
20. Scheid v. Cavanagh, 65 N.D. 596, 260 N.W. 619 (1935).
21. Milde v. Leigh, 75 N.D. 418, 28 N.W.2d 530 (1947).

1. The statute in force at the time was N.D. Rev. Code §57-1514 (1943).
2. The governing statutes may be found in Chapter 57-16, N.D. Rev. Code (1943).
3. "Retrospective or retroactive laws are generally defined, from a legal view point, as those which take away or impair vested rights acquired under existing laws or create a new obligation, impose a new duty, or attach a new disability, in respect to transactions or considerations already past." Harlan v. State, 31 Ala.App. 478, 18 So.2d 744 (1944).