PROVING PLASTIC SURGERY MEDICAL MALPRACTICE

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I. Proving Plastic Surgery Medical Malpractice

This paper discusses what is required to prove and recover damages in a medical malpractice case. It is divided into several sections progressing from the necessary elements to build a case based on plastic surgery malpractice to ensuring that your client is adequately compensated after the litigation is complete.

II. Overview of Elective Procedure Malpractice

Elective procedure malpractice is a subsection of general medical malpractice; therefore, while there are some aspects unique to malpractice arising from plastic surgery, many aspects overlap. For example, many states have codified medical malpractice liability. **Table 1** summarizes the medical malpractice statutes adopted by each state. These statutes incorporate what is required to prove elective procedure malpractice.

Similarly, there are various theories under which a patient can bring a medical malpractice case, and these will be discussed in further detail in the following section. In cases involving elective procedure medical malpractice, the patient must plead and prove whatever theory (s)he chooses by a preponderance of the evidence in order to prevail.

III. Building Your Case and Understanding the Causes of Action: What Constitutes Plastic Surgery Malpractice

Plaintiffs have several causes of action and theories of liability available to them against a plastic surgeon. These include negligence in the performance of surgery, failure to obtain informed consent, liability defined by consumer protection statutes, and breach of warranty.

A. Negligence

Under a negligence in the performance of surgery theory, the plaintiff must plead and prove (1) that the defendant-plastic surgeon had a duty to act according to a certain standard; (2) that the defendant-plastic surgeon breached the applicable standard of care in performing the cosmetic surgery; (3) injury; and (4) a proximate causal connection between the defendant's beach of the duty of care and the loss or injury suffered by the patient. *See e.g.*, *Cox v. Bd. of Hosp. Managers*, 651 N.W.2d 356, 360 (Mich. 2002); *Estate of French v. Statford House*, 333 S.W.3d 546, 554 (Tenn. 2011); *Nasser v. St. Vincent Hosp. & Health Servs.*, 926 N.E.2d 43, 48 (Ind. Ct. App. 2010); *Blan v. Ali*, 7 S.W.3d 741, 744 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Breland v. Rich*, 69 So.3d 803, 814 (Ala. 2011); *Simmons v. Covina Med. Clinic*, 212 Cal. App. 3d 696, 702 (1989); Breland v. Rich, 69 So. 3d 803, 814 (Ala. 2011); *Stowe v. McHugh*, 699 A.2d 279, 282 (Conn. 1997).

A more detailed description of how a plaintiff can prove the defendant-plastic surgeon was negligent is given in Section IV.

B. Express Warranty

In some jurisdictions, a physician and his/her patient may enter into a contractual arrangement that extends the physician's ordinary duty of care and holds the physician liable for the result of a particular medical treatment. *Scarzella v. Saxon*, 436 A.2d 358, 361 (D.C. Cir. 1981) (in order to find an express warranty, the fact-finder is required to find by a preponderance of the evidence that the physician clearly and unmistakably gave a positive assurance that he would produce or avoid a particular result); *Carroll v. Grabavoy*, 396 N.E.2d 836, 839 (Ill. App. 1979); *Haase v. Starnes*, 915 S.W.2d 675, 678 (Ark. 1996) (a plaintiff's claim for breach of warranty is included in the state's statutory definition of "action for medical injury"). In order for such a contract to be enforceable, the warranty must be expressly made by the physician and relied upon by the patient and the warranty must be supported by considerations. *Scarzella*, 436 A.2d at 361.

In *Mills v. Pate*, 225 S.W.3d 277 (Tex. App.—El Paso 2006, no pet.), a patient filed suit against a plastic surgeon who performed liposuction and a thigh lift on the patient. The patient alleged several theories of liability, including breach of express warranty based on the doctor's representation that after the surgery the patient "would look beautiful" and that "she would have smooth skin without ripples, bulges or bags." *Id.* at 289. The court of appeals reversed the summary judgment granted by the trial court, the patient provided some evidence that the doctor breached an express warranty. *Id.* at 290.

C. Consumer Protection Statutes

Consumer protection statutes may or may not be used in some jurisdictions as a basis for bringing a claim against a plastic surgeon for malpractice.

Some jurisdictions have statutorily barred the use of the DTPA in medical malpractice actions. See e.g. TEX. CIV. PRAC. & REM. CODE § 74.004 (West 2003); 15 U.S.C. § 45 (West 1994); N.C. GEN. STAT. ANN. § 75-1.1 (West 1977), *preempted on other grounds by Rutledge v. High Point Reg'l Health Sys.*, 558 F. Supp. 2d 611(M.D.N.C. 2008); OHIO REV. CODE ANN. § 1345.01 (West 2009); MD. CODE ANN. § 13-104 (West 2001).

The language of other states' consumer protection statutes appears to allow medical malpractice claims, but the case law significantly limits the consumer protection statutes' application. *See e.g. Barnett v Mercy Health Partners-Lourdes, Inc.*, 233 S.W.3d 723, 730 (Ky. Ct. App. 2007) (while Kentucky's consumer protection statute applies to the "entrepreneurial, commercial, or business aspect of a doctor's practice, it cannot be used to show medical malpractice during surgery); *Michael v. Mosquera-Lacy*, 200 P.3d 695 (Wash. 2009) (no claim under the Washington's consumer protection statute could be had where the claim relates to the doctor's judgment and treatment of a patient"); *Darviris v. Petros*, 812 N.E.2d 1188 (Mass. 2004) (a patient cannot recover under Massachusetts' consumer protection statute based on an alleged negligent provision of medical care); *Haynes v. Yale-New Haven Hosp.*, 699 A.2d 964 (Conn. 1997) (medical malpractice does not fall under the Connecticut consumer protection statute); *Henderson v. Gandy*, 623 S.E.2d 465 (Ga. 2005) (medical malpractice claims recast as claims under Georgia's consumer protection act cannot form the basis of a consumer protection act violation).

IV. Proving That the Plastic Surgeon Was Negligent

Plaintiffs may prove the plastic surgeon's negligence in one of two ways: (1) proving the four elements of negligence or (2) applying the doctrine of *res ipsa loqitur*.

A. Elements of Negligence

In a claim for ordinary negligence based on medical malpractice, the essential elements are (1) a duty by the physician to act according to a certain standard; (2) a breach of the applicable standard of care; (3) an injury; and (4) a causal connection between the breach of care and the injury. *See e.g.*, *Cox v. Bd. of Hosp. Managers*, 651, N.W.2d 356, 360 (Mich. 2002); *Estate of French v. Statford House*, 333 S.W.3d 546, 554 (Tenn. 2011); *Nasser v. St. Vincent Hosp. & Health Servs.*, 926 N.E.2d 43, 48 (Ind. Ct. App. 2010); *Blan v. Ali*, 7 S.W.3d 741, 744 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Breland v. Rich*, 69 So. 3d 803, 814 (Ala. 2011); *Simmons v. Covina Med. Clinic*, 212 Cal. App. 3d 696, 702 (1989); Breland v. Rich, 69 So. 3d 803, 814 (Ala. 2011); *Stowe v. McHugh*, 699 A.2d 279, 282 (Conn. 1997).

Plaintiffs asserting a claim against a plastic surgeon are required to prove their claim by a preponderance of the evidence.

1. Standard of Care

The standard of care applicable to a plastic surgeon may be defined in various ways, including failure to obtain informed consent, selection of an inappropriate procedure and/or improper performance of the procedure.

Regardless of the avenue used by the plaintiff to prove deviation from the standard of care, the plaintiff in a plastic surgery malpractice action is required to provide expert testimony. *See e.g.*, *Toogood v. Owen J. Rogal, D.D.S.*, P.C., 824 A.2d 1140, 1145 (Pa. 2003); *Shipley v. Williams*, 350 S.W.3d 527, (Tenn. 2011) *Woodard v. Custer*, 719 N.W.2d 842, *Buckley v. Lovallo*, 481 A.2d 1286 (Conn. 1984); *Anderson v. Johns Hopkins Hosp.*, 272 A.2d 372 (Md. 1971); *Becker v. Eisenstodt*, 158 A.2d 706 (N.J. Super 1960); *Bellier v. Bazan*, (N.Y. 1984); *Dixon v. Peters*, 306 S.E.2d 477 (N.C. 1983).

a. Failure to Obtain Informed Consent

Failure to obtain informed consent is a theory utilized by the patient to show that the plastic surgeon did not meet the applicable standard of care regarding informing the patient of the risks associated with the performance of the surgery when compared with the benefits. *Weiss v. Green*, 129 F. Supp. 2d 742, 745 (M.D. Pa. 2011).

The jurisdictions are split regarding what a plaintiff is required to show in order to successfully prove a plastic surgeon's failure to obtain informed consent from the patient. Some jurisdictions apply the prudent patient standard. *Canterbury v. Spence*, 464 F.2d 772, (D.C. Cir. 1972); *Herrara v. Atlantic City Surgical Group, P.A.*, 649 A.2d 637, 639 (N.J. 1994); *White v. Leimbach*, 959 N.E.2d 1033, 1039 (Ohio 2011); *McKinley v. Stripling*, 763 S.W.2d 407, 409-10 (Tex. 1989); *Bubb v. Brusky*, 768 N.W.2d 903, 916 (Wisc. 2009); *Lugenbuhl v. Dowling*, 701 So. 2d 447 (La. 1997).

In *Hayes v. Cha*, 338 F. Supp. 2d 470 (D.N.J. 2004), the court of appeals affirmed the jury finding that the plastic surgeon failed to obtain informed consent from the patient before performing a face-lift. *Id.* The doctor did not inform the patient of the risk

of infection associated with her procedure and the court found that such information would have been necessary in order for the patient to exercise the "right of self determination." *Id.* at 499.

Other jurisdictions apply the professional standard; i.e. a physician is required to disclose information that other reasonably prudent physicians with the same skills and practicing in the same or similar community could disclose under the circumstances. *Williamson v. Amrani*, 152 P.3d 60, 73 (Kan. 2007); *Wells v. Storey*, 792 So. 2d 1034, 1038, 1152 (Ala. 1999); *Weekly v. Solomon*, 510 N.E.2d 152, 156 (Ill. App. 1987); *Foster v. Oral Surgery Assocs., P.A.*, 940 A.2d 1102, 1106 (Me. 2008); *Robinson v. Beicher*, 559 N.W.2d 473 (Neb. 1997); *Shadrick v. Coker*, 963 S.W.2d 726 (Tenn. 1998).

In *Suria v. Shiffman*, 490 N.E.2d 832 (N.Y. App. 1986), the patient was a transsexual who sought to have his breasts augmented. *Id.* at 833. The court of appeals held that because the patient only consented to an "incision and drainage procedure" and not a mastectomy, the defendant-plastic surgeon was liable for failing to obtain the patient's informed consent. *Id.* at 837.

b. Selection of an Inappropriate Procedure

Another method a plaintiff can use to show failure to adhere to the appropriate standard of care is by proving the plastic surgeon used a procedure or treatment that was beyond acceptable medical standards. *See e.g., Short v. Downs*, 537 P.2d 754 (Colo. App. 1975); *Buckley v. Lovallo*, 481 A.2d 1286 (1984); *Wersteeg v. Mowery*, 435 P.2d 540 (Wash. 1967).

A patient may also show that the defendant-plastic surgeon advised in favor of and performed an operation even though the defendant knew or should have know the operation was unlikely and would likely result in injury. *See e.g., Waters v. Crites*, 166 S.W.2d 496 (Mo. 1942).

In *Wall v. Noble*, 705 S.W.2d 727 (Tex. App.—Texarkana 1986), the court of appeals upheld the jury's finding that a plastic surgeon deviated from the standard of care when the surgeon chose to perform a mastoplexy (breast lift) on a patient with large breasts without first reducing the size of the patients breasts. *Id.* at 729. The plaintiff's expert testified about the standard of care and stated that the surgery would (and did) fail because of the forces of nature and the defendant-doctor's choice to ignore this reality deviated from the standard of care. *Id.*

Gluckstein v. Lipsett, 209 P.2d 98 (Cal. Dist. Ct. App. 1949), involved a patient hiring a plastic surgeon to perform a tummy tuck as well as a mastoplexy. The plaintiff's expert testified that the plastic surgeon's made decision to cut away the fat in the patient's abdomen rather than tear the fat away was improper because there was too much fat to cut away. *Id.* at 101-02. Further, the expert testified that the doctor's decision to apply several hundred ties on the patient's breasts and over her breasts "achieved absolutely nothing" but instead cut off circulation and prevent lacteal fluid from the breasts from circulating. *Id.* at 102.

c. Improper Performance of Procedure

The plaintiff in a medical malpractice action may prove the defendant failed to adhere to the applicable standard of care by showing that the defendant performed the surgical

procedure improperly. *See e.g., Kellogg v. Gaynor*, 285 P.2d 288 (Cal. App. 1955) (a doctor's improper placement of a surgical incision); *Buckley v. Lovallo*, 481 A.2d 1286 (Conn. App. 1984) (a doctor's placement of incisions in improper directions and locations); *Hauser v. Bhatnager*, 537 A.2d 599 (Me. 1988) (incisions that resulted in the severance of the surpaorbital nerve); *Toppino v Herhahn*, 673 P.2d 1297 (N.M. 1983) (missized breast implants); *Steinberg v. Indemnity Ins. Co. of N. Am/*, 364 F.2d 266 (5th Cir. 1966) (necrosis resulting from the defendants' negligence in splinting the patient's legs after the operation); *Jacques v. New York*, 487 N.Y.S.2d 463 (1984) (a patient developing a post-operative nasal infection from the physician's negligent failure to use antibiotics in the post-operative treatment).

2. Lay Witness Testimony

Depending on the circumstances of the case, the most important lay witness is the patient. The patient will typically testify about the defendant's promises and representation regarding the treatment and procedure, the expected results, and potential side effects, including pain, discomfort, humiliation, and other injuries. *Small v. Gifford Mem'l Hosp.*, 349 A.2d 703 (Vt. 1975).

The patient's post-operative appearance may implicate aesthetics and subjectivity; however, the testimony of lay witnesses can buttress the plaintiff's contention that the results are not within acceptable bounds. See generally John F. Romano, Litigating Torts Cases: Direct Examination of Lay Witnesses (Roxanne Barton Conlin & Gregory S. Cusimano eds., 2011).

Remember that lay testimony cannot substitute for expert testimony. *Harris v. Buckspan*, 984 S.W.2d 944 (Tenn. Ct. App. 1998). In *Harris*, Mr. Harris, the patient-plaintiff testified regarding the plastic surgeon's oral representation and assurances about the likely extent of scarring from surgery to treat an enlarged breast condition. *Id.* at 946. The court found that such testimony could not establish a *prima facie* claim for lack of informed consent absent expert testimony establishing (1) what a reasonable medical practitioner of the same or a similar community would have disclosed to the patient about the attendant risks; and (2) that the defendant plastic surgeon departed from the norm. *Id.* at 948.

B. *Res Ipsa Loquitur*

Sometimes plaintiffs can establish the defendant's liability under the doctrine of *res ipsa loquitur*. The plaintiff must show that the injury in question: (1) does not ordinarily occur absent negligence; (2) was caused by an instrumentality within the exclusive control of the defendant; and (3) was not due to any voluntary act or neglect of the plaintiff. *Estate of Chin v. St. Barnabus Med. Ctr.*, 711 A.2d 352, 358 (N.J. Super. 1998); *Narducci v. Tedrow*, 736 N.E.2d 1288, 1292 (Ind. Ct. App. 2000); *Giles v. New Haven*, 636 A.2d 1335, 1338 (Conn. 1994).

Generally, the doctrine of *Res Ipsa Loquitur* is not applicable in malpractice actions for negligence in performing plastic surgery. In some jurisdictions, the plaintiff can invoke this doctrine only when a lay person could recognize, as a matter of common knowledge and observation, that the results of the defendant's conduct would not have occurred if the defendant had exercised due care. *See e.g., Anderson v. Gordon*, 334 So. 2d 107,109 (Fla. App 1976); *Orkin v. Holy Cross Hosp.*, 569 A.2d 207, 209 (Md. 1990); *Bowling v. Duke Univ.*, 423 S.E.2d 320, 323 (N.C. App. 1992); *Haddock v.*

Arnspinger, 793 S.W.2d 948, 951 (Tex. 1990); *Keller v. Anderson*, 554 P.2d 1253, 1260-61 (Wyo. 1976).

In *Magner v. Beth Israel Hosp.*, 295 A.2d 363 (N.J. Super. 1981), the patient underwent surgery for the purpose of removing scars and moles. The plastic surgeon burned the patient when the surgeon started a flash fire in the operating room due to the combination of a spark being emitted from the tool he used to remove the mole and the alcohol used to prep the patient. *Id.* at 364. The court of appeals found that where a patient is injured by flash fire while undergoing surgery at the hands of a surgeon, the uncontroverted facts made the *Res Ipsa Loquitur* doctrine not only applicable, but enabled the jury to conclude from common experience that the patient would not have been injured if proper care and skill had been used. *Id.* at 365.

Some jurisdictions allow (and sometimes even require) plaintiffs to offer medical expert opinion that the injury would not have occurred in the absence of negligence by the defendant. *Sides v. St. Anthony's Med. Ctr.*, 258 S.W.3d 811 (Mo. 2008). For instance, in *Side*, the plaintiff was unable to show which specific act of negligence by the defendant caused his or her injury, but was able to show (1) that all the potential causes were within the control or right to control of defendant, (2) that the defendant had greater access to knowledge about the cause of injury than the plaintiff, and (3) a medical expert testified that such injury does not occur in the absence of negligence of the defendant, to establish a *prima facie* case for medical malpractice. Additional examples include *McWain v. Tucson Gen. Hosp.*, 670 P.2d 1180, 1183-84 (Ariz. Ct. App. 1983); *Kerr v. Bock*, 486 P.2d 684, 686 (Cal. 1971). *Res Ipsa Loqitor* would apply only if there were supporting expert testimony); *Holmes v. Gamble*, 624 P.2d 905, 907 (Colo. App. 1980) (expert testimony is necessary before the doctrine of *Res Ipsa Loquitur* can be applied); *Jones v. Porretta*, 405 N.W.2d 863, 873 (Mich. 1987) (expert evidence must usually be presented in res ipsa cases); *Keys v. Guthmann*, 676 N.W.2d 354, 358-59 (Neb. 2004) (negligence in a medical malpractice case may be inferred when proof by experts creates an inference that negligence caused the injury); *Buckelew v. Grossbard*, 435 A.2d 1150, 1157-58 (N.J. 1981) (expert testimony to the effect that the medical community recognizes that an event does not ordinarily occur in the absence of negligence may afford a sufficient basis for the application of *res ipsa*); *Miles v. Broderick*, 872 P.2d 863,866 (N.M. 1994) (the foundation for an inference of negligence in a medical malpractice action may be formed by expert testimony that a certain occurrence indicates the probability of negligence); *States v. Lourdes Hosp.*, 792 N.E.2d 151, 152 (N.Y. 2003) (it is proper to allow the use of expert medical testimony to inform the jury's decision to establish *res ipsa*); *Morgan v. Children's Hosp.*, 480 N.E.2d 464, 467 (Ohio 1985) (the use of expert testimony does not foreclose application of *res ipsa*); *Brannon v. Wood*, 444 P.2d 349, 444 (Or. 1968) (en banc) (jurors are permitted to draw upon the testimony of experts in *res ipsa* cases); *Jones v. Harrisburg Polyclinic Hosp.*, 437 A.2d 1134, 1138 (the inference of negligence in a medical malpractice case where it can be established from expert testimony that such an event would not ordinarily occur absent negligence); *Wilkinson v. Vesey*, 295 A.2d 676, 691 (R.I. 1972) (*res ipsa* can be called upon if there is expert testimony that the injury complained of would not have occurred had the physician exercised ordinary due care); *Van Zee v. Sioux Valley Hosp.*, 315 N.W.2d 489, 492 (S.D. 1982) (under the *res ipsa* doctrine,

negligence must be established by the testimony of medical experts); *King v. Searle Pharm.*, 832 P.2d 858, 862 (Utah 1992) (expert evidence is usually necessary to establish a foundation for a legitimate *res ipsa* inference); *Connors v. Univ. Assoc. in Obstetrics & Gynecology, Inc.*, 4 F.3d 123 (2d Cir. 1993) (Vermont permits expert testimony to establish negligence in a medical malpractice action under *res ipsa*); *Pederson v. Dumouchel*, 431 P.2d 973, 979 (Wa. 1967) (definite expert testimony permits an inference of negligence under *res ipsa* theory); *Hoven v. Kelble*, 256 N.W.2d 379, 383 (Wis. 1977) (likelihood that negligence was the cause may be show by expert medical testimony); *Harris v. Cafritz Mem'l Hosp.*, 364 A.2d 135, 137 (D.C. 1976) (plaintiffs may present expert testimony in *res ispa* cases).

V. Proving that the Negligence Caused the Injury

The plaintiff who has proved that the defendant deviated from standard of medical care in performing plastic surgery must establish that the deviation was the proximate cause of the patient's injuries. *See e.g., Flannery v. President & Dir. Of Georgetown Coll*., 679 F.2d 960 (D.C. Cir. 1982); *Skripek v. Bergamo*, 491 A.2d 1336 (N.J. Super 1985); *Dixon v. Peters*, 306 S.E.2d 477 (N.C. 1983).

To establish proximate cause, the plaintiff must show that the doctor's actions, in a natural sequence, unbroken by any efficient intervening cause, produced the result complained of and without which, such result would not have occurred. *Skripek*, 491 A.2d 1336 (N.J. Super 1985); *Leitch v. Hornsby*, 935 S.W.2d 114, 118-19 (Tex. 1996).

Expert testimony regarding the causal connection between the defendant's negligence and the patient's injury may be sufficient for a *prima facie* showing of probable cause. *Hauser v. Bhatnager*, 537 A.2d 599 (Me. 1988); *Hayes v. Cha*, 338 F. Supp. 2d 470 (D.N.J. 2004).

In *Hayes*, the court of appeals affirmed the jury's finding of proximate cause on a patient's medical malpractice claim against a plastic surgeon after a facelift and eyebrow lift for three reasons: (1) the patient presented a coherent theory that she contracted a mycobacterial infection during surgery; (2) the surgeon presented various conflicting theories for the patient's condition; and (3) the surgeon's expert agreed with the patient that the surgeon failed to fulfill his duty to inform the patient of the risk of infection and failed to follow standard sterilization and surgical procedures. *Id.* at 498.

Ware v. Richey, 469 N.E.2d 899 (Oh. Ct. App. 1983) involved negligence in the performance of surgery on a patient's right hand causing the loss of movement of the patient's middle finger. The plaintiff used the defendant-doctor's own testimony as expert evidence of proximate cause, elicited through cross-examination. *Id.* at 904. The defendant testified that the risk of loss of movement was attendant to this type of surgery and the patient did in fact suffer the loss of movement of her finger after the surgery. *Id.* The court found that such testimony provided a sufficient causal link. *Id.*

VI. Damages (Getting Correctly Compensated)

Damages available to a prevailing plaintiff include economic and non-economic damages. Further, depending on the theory

of liability asserted by the prevailing patient, the plaintiff may recover damages flowing from the breach of contract, attorneys' fees, and/or punitive damages.

A. Noneconomic Damages

Examples of noneconomic damages include visible scarring and disfigurement (*see e.g., Hauser v Bhatnager*, 537 A.2d 599 (Me. 1988)); permanent impairment (*see e.g., Suria v. Shiffman*, 490 N.E.2d 832 (N.Y. 1986); and pain and suffering (*see e.g., Barr v. Plastic Surgery Consultants, Ltd.*, 760 S.W.2d 585 (Mo. Ct. App. 1988); *Otnott v. Morgan*, 636 So. 2d 957 (La. Ct. App. 1994), involved a patient who underwent an elective rhinoplasty. A few hours after the surgery when the patient regained consciousness, the patient's eyesight became worse until it was determined that the patient was totally blind in his right eye. *Id.* at 958. The patient recovered compensation for his loss, including the permanent loss of his eyesight. *Id.*

Some jurisdictions have statutory caps on the non-economic damages available. *See e.g.* WIS. STAT. § 893.55 (LexisNexis 2005) (the limit on total non-economic damages recoverable for bodily injury for each occurrence after April 6, 2006 shall be $750,000); MICH. COMP. LAWS. SERV. § 600.1483 (LexisNexis 1993) (the total amount of damages for non-economic losses recoverable as a result of the negligence of one or more defendant shall not exceed $280,000 unless an exception applies, in which case the damages for non-economic loss shall not exceed $500,000); LA. REV. STAT. ANN. § 40:1299.42 (2008) (the total amount recoverable for all malpractice claims for injuries or death of a patient, exclusive of future medical care and related benefits shall not exceed $500,000 plus interest and costs); W. VA. CODE § 55-7B-8 (2003) (the maximum amount recoverable as compensatory damages for non-economic loss shall not exceed $250,000 per occurrence, unless an exception applies, in which case the noneconomic damages shall not exceed $500,000); TEX. CIV. PRAC. & REM. CODE 74.301 (West 2003) (the limit on civil liability for non-economic damages of the physician shall be limited to an amount not to exceed $250,000 for each claimant); NEB. REV. STAT. ANN. § 44-2825 (LexisNexis 2004) (the total amount recoverable varies depending on the date of the occurrence resulting in injury or death).

Several other jurisdictions with statutorily defined medical malpractice claims have held that damages caps on non-economic damages are unconstitutional for various reasons. *See e.g., Mobile Infirmary Med. Ctr. v. Hodgen*, 884 So. 2d 801 (Ala. 2003) (a $400,000 limitation on non-economic damages was unconstitutional because it violated the right to jury trial and equal protection guarantees); *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010) (the state's $350,000 limitation on non-economic damages was unconstitutional because it violated the right to jury trial); *Wright v. Central Bu Page Hosp. Ass'n*, 347 N.E.2d 736 (Ill. 2003) (a $500,000 limitation on recovery in medical malpractice actions was arbitrary and capricious); *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980) (a $250,000 limitation on non-economic damages violated equal protection guarantees because the cap was arbitrary); *Lakin v. Senco Products, Inc.*, 987 P.2d 463 (Or. 1999) ($500,000 limitation on non-economic damages interferes with the resolution of factual issues by the jury); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989) (the statutory limitation on noneconomic damages violates the right to jury trial).

B. Economic Damages

Generally, states with damage limitations only apply to non-economic damages and do not limit recovery on economic damages. *See* Mark D. Clore, *Medical Malpractice Death Actions: Understanding Caps, Stowers and Credits*, 41 S. Tex. L. Rev. 467, 471 (2000). As such, the prevailing plaintiff may recover any and all economic losses that were proximately caused by the defendant-plastic surgeon. SUMNER H. LIPMAN & WILLIAM J. MILLIKEN, LITIGATING TORT CASES: MEDICAL EXPENSES AND RELATED SPECIAL DAMAGES (Roxanne Barton Conlin & Gregory S. Cusimano, eds., 2011).

Economic damages typically recovered include the following:

a. Reasonable and necessary medical expenses incurred in the past. *See e.g.*, *Wolfe v. Estate of Custer ex rel. Custer*, 867 N.E.2d 589 (Ind. Ct. App. 2007) (a summary of the medical expenses constituted prima facie evidence that the charges were reasonable when there is no issue that the expenses were reasonable and caused by the tort); *Guevara v. Ferrer*, 247 S.W.3d 662 (Tex. 2007) (expert medical evidence is required to prove causation and necessity of medical expenses unless competent evidence supports a finding that the conditions in question, the causal relationship between the conditions and the accident, and the necessity of the particular medical treatments for the conditions are within the common knowledge and experience of lay persons).

b. Future medical expenses. *See e.g. Columbia Med. Ctr. of Las Colinas v. Bush ex rel. Bush*, 122 S.W.3d 835 (Tex. App.—Fort Worth 2003) (although the preferred practice to establish future medical expense is though expert medical testimony, no rule exists that the plaintiff establish such expenses through expert testimony); *L.M.S. v. Atkinson*, 718 N.W.2d 118 (Wis. Ct. App. 2006) (in order to sustain an award for future healthcare expenses: (1) there must be expert testimony of permanent injuries, requiring future medical treatment and the incurring future medical expenses; and (2) an expert must establish cost of such medical expenses).

C. Breach of Contract Damages

In an action for breach of warranty, recovery may consist of damages flowing proximately from the breach of contract. In *Paciocco v. Acker*, 467 N.Y.S.2d 548 (1983), the patient sued the doctor based on an agreement in which the plastic surgeon promised to use a different "method than plastic surgeons" use and that the incisions would not go beyond the corner of her eyes and that the resultant scars, if any, would fall within the natural crease of the skin. *Id.* at 548. Because the plaintiff's compliant alleged contract damages, the patient-plaintiff was only allowed to recover the payments made and expenditures for nurses and medicine and other damages that flowed from the breach. *Id.* at 549. As such, the plaintiff was not allowed to recover damages for permanent scarring or emotional distress unless that damage item related to economic loss. *Id.* at 550.

D. Attorneys Fees and Costs

In appropriate circumstances, the plaintiff may also be entitled to an award of attorneys' fees and costs. *See e.g. Baker v. Sadick*, 208 Cal. App.3d 618, 622 (1984). **Table 2** outlines the states that place limits

on the amount of attorneys' fees a prevailing patient-plaintiff may recover in an action for medical malpractice.

In *Baker*, the patient hired the plastic surgeon to perform breast reduction surgery. After surgery, the patient began suffering a serious infection, which eventually resulted in tissue necrosis, requiring extensive corrective surgery. *Id.* at 621. The court of appeals upheld that arbitrator's panel award of $100, 163.40 in attorneys fees. *Id.* at 622.

E. Punitive Damages

In some jurisdictions, plaintiffs may also obtain punitive damages in appropriate circumstances. The court may award punitive damages if the defendant-surgeon's state of mind show such indifference to and disregard for the patient's welfare as to elevate the defendant's negligence to gross negligence or wanton and reckless disregard for the patients rights and feelings. *See e.g.*, *Short v. Downs*, 537 P.2d 754 (Colo. 1975) (plaintiff awarded punitive damages after doctor injected substance labeled "not for human use" into patient and did not find out what risks and complications might result). **Table 3** and **Table 4** outline the 43 states that allow a prevailing plaintiff to recover punitive damages as well as what the plaintiff must prove in order to recover punitive damages.

Wall v. Noble, 705 S.W.2d 727 (Tex. App.—Texarkana 1986, writ refused) involved a doctor who performed a mastectomy on a patient who believed her large breasts would hinder her career as a model. *Id*. at 730. After the surgery, the doctor gave the patient a leaflet that contained a list of activities the patient should refrain from doing within a set period. One prohibition was sexual activity; however, the doctor engaged in sexual activity with the patient with the explanation that he was her doctor so she could trust him. *Id.* at 732. The court of appeals found that the jury had sufficient facts to conclude that the doctor prescribed unnecessary and negligent treatment and, in conscious disregard and indifference to his patient welfare, performed an operation knowing the risks associated with such. *Id.* at 733.

APPENDIX
TABLE 1: State by State Medical Malpractice Statutes[1]

STATES:	MEDICAL LIABILITY PROVISION:	SUMMARY OF PROVISION:
Alabama	Damage Award Limit or Cap	No limitations. Limits on noneconomic damages (§6-5-547) declared unconstitutional by state Supreme Court (see *Mobile Infirmary Medical Center v. Hodgen*, 884 So.2d (Ala. 2003)).
	Statute of Limitation	**§6.5.482.**
	Expert Witness Standards	**§6-5-548.**
Alaska	Damage Award Limit or Cap	**§09.55.549.**
		§9.17.020.
	Statute of Limitation	**§09.10.070.** Two years from discovery of injury.
	Limits on Attorney Fees	**§09.60.080.**
	Expert Witness Standards	**§09.20.185.**
Arizona	Damage Award Limit or Cap	No limitations. Arizona Constitution Article 2, § 31.
	Statute of Limitation	**§12-542.** Two years after cause of action.
	Limits on Attorney Fees	**§12-568.**
	Expert Witness Standards	**§12-2604.**
Arkansas	Damage Award Limit or Cap	**§16-55-205 to 16-55-209.**
	Statute of Limitation	**§16-114-203.** Two years from date of injury.
	Expert Witness	**§16-114-206.**

[1] NATIONAL CONFERENCE OF STATE LEGISLATORS, MEDICAL LIABILITY/MEDICAL MALPRACTICE LAWS (2011), http://www.ncsl.org/issues-research/banking/medical-liability-medical-malpractice-laws.aspx.

	Standards	**§16-114-207.**
California	Damage Award Limit or Cap	**Civil Code §3333.2.**
	Statute of Limitation	**Civil Procedure §340.5.** Three years after injury or one year after discovery, whichever is first.
	Limits on Attorney Fees	**Business and Professions §6146.**
	Expert Witness Standards	**Health & Safety Code §1799.110.**
Colorado	Damage Award Limit or Cap	**§13-64-302.**
	Statute of Limitation	**§13-80-102.5.**
	Expert Witness Standards	**§13-64-401.**
Connecticut	Damage Award Limit or Cap	**§52-228c.**
	Statute of Limitation	**§52-584.** Two years from date of injury, but no later than three years of the act or omission.
	Limits on Attorney Fees	**§52-251c.**
	Expert Witness Standards	**§52-184c.**
Delaware	Damage Award Limit or Cap	**18 §6855.**
	Statute of Limitation	**18 §6856.** Two years from injury.
	Limits on Attorney Fees	**18 §6865.**
	Expert Witness Standards	**18 §6853.**
		18 §6854.
District of Columbia	Damage Award Limit or Cap	No applicable statute.
	Statute of Limitation	**§12-301(8).** Three years.
	Periodic Payments	No applicable statute.
	Affidavit or Certificate of Merit	No statute provided specific to medical liability/malpractice cases.

	Expert Witness Standards	No statute provided specific to medical liability/malpractice cases.
Florida	Damage Award Limit or Cap	**§766.118.**
		§768.73.
	Statute of Limitation	**§95.11.** Two years from injury or discovery.
	Limits on Attorney Fees	**Florida Constitution, Article I, Section 26.**
		Fla. Atty. Conduct Reg. §4-1.5.
	Expert Witness Standards	**§766.102.**
Georgia	Damage Award Limit or Cap	No limitations. Limits on noneconomic damages (§51-13-1) declared unconstitutional by state Supreme Court (see *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt et al.*, (Ga. March 22, 2010).
	Statute of Limitation	**§9-3-71.** Two years from injury or death.
	Expert Witness Standards	**§24-9-67.1.**
Guam	Damage Award Limit or Cap	**7 §12116.**
		5 §6301. (b); (d)(1)
	Statute of Limitation	**7 §11308.** One year from the date when the injury is first discovered.
	Limits on Attorney Fees	**7 §26601.**
	Expert Witness Standards	**10 §10119.**
Hawaii	Damage Award Limit or Cap	**§663-8.7.**
	Statute of Limitation	**§657-7.3.** Two years from discovery.
	Limits on Attorney Fees	**§607-15.5.** Attorneys' fees for both the plaintiff and the defendant shall be limited to a reasonable amount as approved by the court.
	Expert Witness Standards	No statute provided specific to medical liability/malpractice cases.
Idaho	Damage Award Limit or Cap	**§6-1603.**
		§6-1604.

	Statute of Limitation	**§5.219.** Two years from injury.
	Expert Witness Standards	**§6-1012.**
		§6-1013.
Illinois	Damage Award Limit or Cap	**735 §5/2-1115.**
		No limitations. Limits on non-economic damages (§6-5-547) declared unconstitutional by state Supreme Court (see *LeBron v. Gottlieb Memorial Hospital*, (Ill. February 4, 2010)).
	Statute of Limitation	**735 §5/13-212.** Two years from discovery.
		735 §5/13-215.
	Limits on Attorney Fees	**735 §5/2-1114.**
	Expert Witness Standards	**735 §5/8-2501.**
Indiana	Damage Award Limit or Cap	**§34-18-14-3.**
	Statute of Limitation	**§34-18-7-1.** Two years from act, omission, or neglect.
	Limits on Attorney Fees	**§34-18-18-1.**
	Expert Witness Standards	No statute provided specific to medical liability/malpractice cases.
Iowa	Damage Award Limit or Cap	**§147.136.**
	Statute of Limitation	**§614.1.** Two years from reasonable discovery.
	Limits on Attorney Fees	**§147.138.**
	Expert Witness Standards	**§147.139.**
Kansas	Damage Award Limit or Cap	**§60-19a02.**
		§16-1903.
		§60-3702.
	Statute of Limitation	**§60-513.** Two years from act, but can be up to four years after reasonable discovery.
	Limits on Attorney Fees	**§7-121b.**

	Expert Witness Standards	**§60-3412.**
Kentucky	Damage Award Limit or Cap	No limitations. Kentucky Constitution §54
	Statute of Limitation	**§413.140.** One year from act or reasonable discovery.
	Expert Witness Standards	No statute provided specific to medical liability/malpractice cases.
Louisiana	Damage Award Limit or Cap	**RS §40:1299.42.**
	Statute of Limitation	**RS §9.5628.** One year from act or date of discovery.
	Expert Witness Standards	**RS §9:2794.**
Maine	Damage Award Limit or Cap	No applicable statute.
	Statute of Limitation	**24 §2902.** Three years from when cause of action accrues.
	Limits on Attorney Fees	**24 §2961.**
	Expert Witness Standards	No statute provided specific to medical liability/malpractice cases.
Maryland	Damage Award Limit or Cap	**Courts & Judicial Proceedings Code §3-2A-09(A).**
	Statute of Limitation	**Courts & Judicial Proceedings §5-109.** Five years from act or three years from discovery.
	Limits on Attorney Fees	**Courts & Judicial Proceedings §3-2A-07.**
	Expert Witness Standards	**Courts & Judicial Proceedings §3-2A-02.**
Massachusetts	Damage Award Limit or Cap	**Ch. 231 §60H.**
	Statute of Limitation	**Ch. 260 §4.** Within three years after the cause of action accrues.
	Limits on Attorney Fees	**Ch. 231 §60I.**
	Expert Witness Standards	No statute provided specific to medical liability/malpractice cases.
	Medical or Peer Review Panels	**Ch. 111 §203 *et seq*.** Medical peer review committees

Michigan	Damage Award Limit or Cap	**§600.1483.**
		§600.6098.
	Statute of Limitation	**§600.5805.** Two years from injury.
		§600.5838a.
		§600.5851.
	Limits on Attorney Fees	**§600.919**
	Expert Witness Standards	**§600.2169.**
Minnesota	Damage Award Limit or Cap	**§549.20.**
	Statute of Limitation	**§541.076.** Four years from the date the cause of action accrues.
		§541.15.
	Limits on Attorney Fees	**§548.251.**
	Expert Witness Standards	No statute provided specific to medical liability/malpractice cases.
Mississippi	Damage Award Limit or Cap	**§11-1-60.**
		§11-1-65.
	Statute of Limitation	**§15-1-36.** Two years from act or reasonable discovery.
	Expert Witness Standards	**§11-1-61.**
Missouri	Damage Award Limit or Cap	**§538.210.**
		§510.265.
	Statute of Limitation	**§516.105.** Two years from act.
	Expert Witness Standards	No statute provided specific to medical liability/malpractice cases.
Montana	Damage Award Limit or Cap	**§25-9-411.**
		§27-1-220.
	Statute of Limitation	**§27-2-205.** Three years from injury or discovery.
	Expert Witness Standards	**§26-2-601.**
Nebraska	Damage Award Limit or Cap	**§44-2825.**

	Statute of Limitation	**§44-2828.** Two years from injury or one year from reasonable discovery.
		§21-213.
	Limits on Attorney Fees	**§44-2834.**
	Expert Witness Standards	No statute provided specific to medical liability/malpractice cases.
Nevada	Damage Award Limit or Cap	**§41A.035.**
		§42.005.
	Statute of Limitation	**§41A.097.** Three years from injury or one year from reasonable discovery.
	Limits on Attorney Fees	**§7.095.**
	Expert Witness Standards	**§41A.100.**
New Hampshire	Damage Award Limit or Cap	No limitations. Limits on non-economic damages (§507-C:7) declared unconstitutional by state Supreme Court (see *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980) and *Brannigan v. Usitalso*, 134 N.H. 50, 587 A.2d 1232 (1991)).
	Statute of Limitation	**§507-C:4.** Two years from injury.
	Limits on Attorney Fees	**§507-C:8.** Limits declared unconstitutional by state Supreme Court (see *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980)).
		§508:4-e.
	Expert Witness Standards	§507-C:3 declared unconstitutional by state supreme court (see *Carson v. Maurer*, 424 A.2d 825 (1980)).
New Jersey	Damage Award Limit or Cap	**§2A:15-5.14.**
	Statute of Limitation	**§2A:14-2.** Two years from when the cause of action accrues.
	Limits on Attorney Fees	**Court Rules §1:21-7.**
	Expert Witness Standards	**§2A:53A-41.**
New Mexico	Damage Award Limit or Cap	**§41-5-6.**
		§41-5-7.

	Statute of Limitation	**§41-5-13**. Three years from injury.
	Affidavit or Certificate of Merit	No statute provided specific to medical liability/malpractice cases.
	Expert Witness Standards	**§41-5-23.**
New York	Damage Award Limit or Cap	No applicable statute.
	Statute of Limitation	**Civil Practice Law and Rules §214.A.** Two years and six months from injury.
		Civil Practice Law and Rules §208.
	Limits on Attorney Fees	**Jud. 30 §474-a.**
	Expert Witness Standards	No statute provided specific to medical liability/malpractice cases.
North Carolina	Damage Award Limit or Cap	**§1D-25.**
		§90-21.19 (2011 Chapter 400).
	Statute of Limitation	**§1-15.** Two years from act or one year from reasonable discovery.
		§1-17 (2011 Chapter 400).
	Expert Witness Standards	**§8C-1, Rule 702 (2011 Chapter 400).**
North Dakota	Damage Award Limit or Cap	**§32-42-02.**
		§32-03.2-08.
	Statute of Limitation	**§28-01-18.** Within two years after claim for relief has accrued.
	Limits on Attorney Fees	**§28-26-01.**
	Expert Witness Standards	No statute provided specific to medical liability/malpractice cases.
Ohio	Damage Award Limit or Cap	**§2315.21.**
		§2323.43.
	Statute of Limitation	**§2305.113.** One year from act.

	Limits on Attorney Fees	**§2323.43 (F).**
	Expert Witness Standards	**§2743.43.**
Oklahoma	Damage Award Limit or Cap	**23 §9.1.**
		23 §61.2 (2011 Chapter 14).
	Statute of Limitation	**76 §18.** Two years from reasonable discovery.
	Limits on Attorney Fees	**5 §7.**
	Expert Witness Standards	**63 §1-1708.1I.**
Oregon	Damage Award Limit or Cap	No limitations. Limits on non-economic damages (§31.710) declared unconstitutional by State Supreme Court (see *Lakin v. Senco Products, Inc.*, 329 Or. 62, 987 P.2d 463 (Or. 1999)).
		§31.740.
	Statute of Limitation	**§12.110.** Two years from injury or reasonable discovery.
	Limits on Attorney Fees	**§31.735.**
	Expert Witness Standards	No statute provided specific to medical liability/malpractice cases.
Pennsylvania	Damage Award Limit or Cap	No limitations. Pennsylvania Constitution Article 3, §18
		40 §1303.505.
		40 §1303.509.
	Statute of Limitation	**40 §1303.513.**
		42 §5524. Two years from injury or discovery.
	Limits on Attorney Fees	Limits declared unconstitutional by state Supreme Court (see *Heller v. Frankston*, 475 A.2d 1291 (Pa. 1984)).
	Expert Witness Standards	**40 §1303.512.**
Puerto Rico	Damage Award Limit or Cap	**32 §3077.**

	Statute of Limitation	**32 §254.**
	Limits on Attorney Fees	**26 §4111.**
		4 §742.
	Expert Witness Standards	No statute provided specific to medical liability/malpractice cases.
Rhode Island	Damage Award Limit or Cap	No applicable statute.
	Statute of Limitation	**§9-1-14.1.** Three years from the time of the occurrence of the incident which gave rise to the action or reasonable discovery.
	Expert Witness Standards	**§9-19-41.**
South Carolina	Damage Award Limit or Cap	**§15-32-220.**
	Statute of Limitation	**§15-3-545.** Three years from act or omission, or reasonable discovery.
	Expert Witness Standards	No statute provided specific to medical liability/malpractice cases.
South Dakota	Damage Award Limit or Cap	**§21-3-11.** The total general damages which may be awarded may not exceed the sum of $500,000. No limitation on the amount of special damages which may be awarded.
		§21-3-2. Punitive damages in discretion of jury.
	Statute of Limitation	**§15-2-14.1.** Two years from act or omission.
	Expert Witness Standards	No statute provided specific to medical liability/malpractice cases.
Tennessee	Damage Award Limit or Cap	**§29-39-101 *et seq*. (2011 Public Chapter 510).**
		§29-39-104 (2011 Public Chapter 510).
	Statute of Limitation	**§29-26-116.** One year from injury or discovery.
	Limits on Attorney Fees	**§29.26.120.**
	Expert Witness Standards	**§29-26-115.**
Texas	Damage Award Limit or Cap	**Civil Practice & Remedies §74.301.**
		Civil Practice & Remedies §74.303.

	Statute of Limitation	**Civil Practice & Remedies §74.251.** Two years from occurrence.
	Expert Witness Standards	**Civil Practice & Remedies §74.401.**
		Civil Practice & Remedies §74.402.
		Civil Practice & Remedies §74.403.
	Medical or Peer Review Panels	**Health & Safety Code §161.031 *et seq*.** Medical committees
		Occupations Code §160.001 *et seq*. Medical peer review
Utah	Damage Award Limit or Cap	**§78B-3-410**
	Statute of Limitation	**§78B-3-404.** Two years from occurrence but not more than four years from act.
	Limits on Attorney Fees	**§78B-3-411.**
	Expert Witness Standards	No statute provided specific to medical liability/malpractice cases.
Vermont	Damage Award Limit or Cap	No applicable statute.
	Statute of Limitation	**12 §521.** Three years from incident or two years from reasonable discovery, whichever occurs later.
	Expert Witness Standards	No statute provided specific to medical liability/malpractice cases.
Virginia	Damage Award Limit or Cap	**§8.01-581.15.**
	Statute of Limitation	**§8.01-243.** Two years from occurrence, no more than 10 years unless under disability.
	Expert Witness Standards	**§8.01-581.20.**
Virgin Islands	Damage Award Limit or Cap	**27 §166b.**
	Statute of Limitation	**27 §166d.** Two years but within two years from the last treatment for continuous treatment for same illness/injury.
	Limits on Attorney Fees	**5 §541.**
	Expert Witness Standards	No statute provided specific to medical liability/malpractice cases.

Washington	Damage Award Limit or Cap	No limitations. Limits on non-economic damages (§4.56.250) declared unconstitutional by State Supreme Court (see *Sofie v. Fireboard Corp.*, 112 Wash. 2d 636, 771 P.2d 711 (1989)).
	Statute of Limitation	**§4.16.350.** Three years from injury or one year from reasonable discovery, whichever is later.
	Limits on Attorney Fees	**§7.70.070.**
	Expert Witness Standards	No statute provided specific to medical liability/malpractice cases.
West Virginia	Damage Award Limit or Cap	**§55-7B-8.**
	Statute of Limitation	**§55-7B-4.** Two years from injury or reasonable discovery, no longer than 10 years after injury.
	Expert Witness Standards	**§55-7B-7.**
Wisconsin	Damage Award Limit or Cap	**§893.55.**
		§895.043.
	Statute of Limitation	**§893.55.** Three years from injury or one year from reasonable discovery, not more than five years from act.
	Limits on Attorney Fees	**§655.013.**
	Expert Witness Standards	No statute provided specific to medical liability/malpractice cases.
Wyoming	Damage Award Limit or Cap	No limitations. Wyoming Constitution Article 10, § 4: (a)
	Statute of Limitation	**§1-3-107.** Two years from injury or reasonable discovery.
	Limits on Attorney Fees	**Ct. Rules, R. 1 *et seq*.**
	Expert Witness Standards	No statute provided specific to medical liability/malpractice cases.

TABLE 2: States Allowing Punitive Damages in Medical Malpractice Actions Without Limitation[2]

State	*Authority*	*Burden of Persuasion*	*Standard of Conduct*	*Constitutional Authority*
Arizona	Medasys Acquisituib Corp. v SDMS, P. C. , 55 P. 2d 763 (Ariz. 2002)	Clear and convincing evidence	"Reprehensible conduct" acting "with an evil mind. "	Ariz. Const. Art. 2, § 31, "No law shall be enacted limiting the amount of damages to be recovered for causing the death or injury to another. "
California *	Cal. Civ. Code § 3294(a)	Clear and convincing evidence	Oppressive conduct, fraud or malice towards the plaintiff.	
Delaware	Del. Code Ann. tit. 18, § 6855	Preponderance of the evidence	Malicious intent or willful or wanton misconduct by the health care provider	None
District of Columbia	Railan v. Katyal 766 A. 2d 998, 1012 (D. C. 2001); Croley v. Republican Nat'l Comm. , 759 A. 2d 682, 695 (D. C. 2000)	Clear and convincing evidence	"Egregious conduct"; "malice or its equivalent"	None
Hawaii	Dairy Road Partners v. Island Ins. Co. , 992 P. 2d 93 (Haw. 2000)	Clear and convincing evidence	Wanton, oppressive or malicious conduct, implying harmful or indifferent spirit, or willful misconduct raising presumption of conscious indifference.	None
Iowa	Iowa Code §	Preponderance	Willful and wanton	None

[2] Paul Shearer, *OLR Research Report: Punitive Damages Awards, Caps, and Standards, Connecticut General Assembly* (2003), http://www.cga.ct.gov/2003/olrdata/ins/rpt/2003-R-0743.htm

	668A. 1	of clear, convincing and satisfactory evidence"	disregard for the rights of another and whether specifically aimed the conduct at the injured.	
Kentucky	Ky. Rev. Stat. Ann. § 411. 184	Clear and convincing evidence	Oppression, fraud, or malice	Ky Const. § 54, "The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death or for injuries to person or property. "
Maryland	Owens-Illinois, Inc. v. Zenobia, 601 A. 2d 633 (Md. 1992)	Clear and convincing evidence	Evil motive, intent to injure or fraud.	None
Massachusetts **	Mass. Gen. Laws ch. 229, § 2; Caperci v. Hutoon, 397 F. 2d 799 (1st Cir. 1968)	Punitive damages prohibited, except in wrongful death cases.	Malicious, willful, wanton or reckless conduct… or gross negligence"	
Minnesota	Minn. Stat. § 549. 20	Clear and convincing evidence	Deliberate disregard for the rights of others. Knowledge or intentional disregard showing a high probability of injury and a conscious act or disregard of this probability or indifference.	None
Missouri	Altenhofen v. Fabricor, Inc. , 81 S. W. 3d 578,590 (Mo. App. 2002)	Clear and convincing evidence	Outrageous conduct demonstrating an "evil motive" or reckless indifference.	None
New Mexico	Unif. Jury Inst. - Civ. § 13-	Preponderance of the evidence	Malice, willful, wanton, fraudulent,	None

	1827; United Nuclear Corp. v. Allendales Mut. Ins. Co. , 709 P. 2d 649 (N. M. 1985)		reckless, or in bad faith.	
New York	Anderson v. Fortune Brands, Inc. , 723 N. Y. S. 2d 304 (2000); Pearlman v. Friedman, Alpern & Green, LLP, 750 N. Y. S. 2d 869 (2002)	Clear and convincing evidence	Intentional act, aggravating injuries, Outrageous conduct, fraud, "evil motive", and willful and wanton disregard for the rights of another.	None
Ohio	Ohio Rev. Code §2315. 21	Clear and convincing evidence	"malice, aggravated or egregious fraud, oppression or insult"	None
Rhode Island	DelPonte v. Puskya, 615 A. 2d 1018 (R. I. 1992)	Preponderance of the evidence	Willful, reckless or wicked manner that amounts to criminality.	None
South Carolina	S. C. Code § 15-33-135; King v. Allstate Ins. Co. , 251 S. E. 2d 194 (S. C. 1979)	Clear and convincing evidence	malice, ill will, or conscious indifference, or a reckless disregard.	None
South Dakota	S. D. Codified Laws § 21-1-4. 1, § 21-3-2	Clear and convincing evidence	Oppression, fraud, willful wanton or malicious conduct	None
Tennessee	Hodges v. V. S. C. Toof & Co. , 833 S. W. 2d 896 (Tenn. 1992)	Clear and convincing evidence	"intentional , fraudulent, malicious or reckless"	None
Utah	Utah Code Ann. § 78-18-1	Clear and convincing evidence	Willful, malicious or intentionally fraudulent or reckless indifference toward	None

			the rights of others.	
Vermont	McCormick v. McCormick, 621 A. 2d 238 (Vt. 1993)	Preponderance of the evidence	Ill will, evidencing insult or oppression or a reckless or wanton disregard of the rights of another.	None
West Virginia	TXO Prod. Corp. v. Alliance Resources Group, 419 S. E. 2d 870 (W. Va. 1992)	Preponderance of the evidence	Not only mean spirited conduct but also extremely negligent conduct that is likely to cause serious harm.	None
Wyoming	McCulloh v. Drake, 24 P. 3d 1162 (Wyo. 2001); Alexander v. Meduna, 47 P. 3d 206 (Wyo. 2002)	Preponderance of the evidence	Outrageous conduct, malice and willful and wanton misconduct.	Wyo. Const. Art. 10 § 4, "No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person. "

* California courts have held that the limits on non-economic malpractice damages do not prevent the awarding of punitive damages. Baker v. Sadick, 208 Cal. Rptr. 676, (App. 4. Dist. 1984).

** Mass. Gen. Laws ch. 229, § 2, Greater than $ 5,000 in wrongful death cases. No other punitive damages authorized.

TABLE 3: States Allowing Punitive Damages in Medical Malpractice Actions with Limits[3]

State	*Authority*	*Burden of Persuasion*	*Standard of Conduct*	*Limit: Authority*	*Structure of Limitation*
Alabama	Ala. Code § 6-11-20	Clear and convincing evidence	Conscious, or deliberate engagement in oppressive, fraudulent, wanton or malicious conduct.	Ala. Code § 6-11-21	Three times compensatory damages or $ 500,000, whichever is greater (1. 5 million for physical injury), except, if defendant is small business (net worth < $ 2 million) then cap is $ 50,000 or 10% of the business' net worth. No caps in wrongful death or intentional infliction of physical injury.
Alaska	Alaska Stat. § 09. 17. 020	Clear and convincing evidence	Outrageous conduct, including malice or bad motive, or reckless indifference to the interest of another.	Alaska Stat. § 09. 17. 020	Shall not exceed 3 times compensatory damages or $ 500,000. If financial motive and knew of this outcome prior to the conduct then may award the greater of up to 4 times compensatory damages, 4 times aggregate financial gain or $ 7,000,000.

[3] Paul Shearer, *OLR Research Report: Punitive Damages Awards, Caps, and Standards, Connecticut General Assembly* (2003), http://www.cga.ct.gov/2003/olrdata/ins/rpt/2003-R-0743.htm

Arkansas	Ark. Code § 16-55-206; 207	Clear and convincing evidence	Compensatory damages and know or ought to know the injury results; continuing with malice, reckless indifference or intent to injure.	Ark. Code § 16-55-208;	No more than the greater of $ 250,000 or three (3) times the amount of compensatory damages, capped at $ 1,000,000. Exception, if the fact finder determines that defendant meant to cause the harm and did cause the harm, then the cap is not applicable.
Colorado	Colo. Rev. Stat. § 13-64-302. 5; § 13-25-127(2)	Beyond a reasonable doubt	Colo. Rev. Stat. § 13-21-102, Fraud, malice or willful or wanton conduct.	Colo. Rev. Stat. § 13-21-102; --§ 13-64-302. 5 (4)(b); (5); (6)	No greater than actual damages, may increase punitive award if this conduct continued, or intentional aggravation during the pendancy of the action. Limitations by reference to 13-21-102 (1)(a); -- Not allowed for normally accepted or approved use of approved drugs or clinically justified non-standard uses, within prudent health care standards, and written informed consent.
Connecticut	*Freeman v. Alamo Management*	Preponderance of the evidence	Reckless indifference to the rights of	*Berry v. Loiseau*, 223 Conn.	Punitive damages are limited to the actual cost of the

	Co. , 607 A. 2d 370 (Conn. 1992);*Sorrentino v. All Seasons Servs.* , 717 A. 2d 150 (Conn. 1998)		other; intentional and wanton violation of those rights.	786 (1992)	litigation, including attorney's fees.
Florida	*Fla. Stat. § 768. 725; 768. 72*	Clear and convincing evidence for entitlement to award; preponderance for the amount	Intentional misconduct or gross negligence.	*Fla Stat. § 768. 73*	Greater of three times compensatory damages or $ 500,000. If supervisor ratified, then greater of four times compensatory damages or $ 2,000,000. If specific intent to harm, no cap.
Georgia	Ga. Code Ann. § 51-12-5. 1.	Clear and convincing evidence	Willful misconduct, malice, fraud, wantonness, oppression or conscious indifference.	Ga. Code Ann. § 51-12-5. 1	May not exceed $ 250,000; If acted or failed to act with intent to harm, or under the influence of drugs and alcohol not prescribed or intentionally consumed toxic vapors causing impairment, then no limitation to the amount.
Idaho	Idaho Code § 6-1604, as amended by 2003 Session Laws, Ch. 122.	Preponderance of the evidence; for actions accruing after 7/1/03, clear and convincing.	Oppression, fraud, malice or outrageous conduct; before, 7/1/03 included wanton conduct.	Idaho Code § 6-1604(3)	May not exceed the greater of $ 250,000 or three times the compensatory damages award.
Indiana	Ind. Code § 34-51-3-2;*USA Life*	Clear and convincing	Fraud, malice, gross	Ind. Code § 34-51-3-	May not exceed the greater of

	One Ins. Co. of Indiana v. Nuckolls, 682 N. E. 2d 534 (Ind. 1997)	evidence	negligence or oppressiveness	4; § 34-18-14-3	three times the compensatory award or $ 50,000. ; Total amount recoverable $ 500,000, $ 750,000, or $ 1,250,000 date act occurred.
Kansas	Kan. Stat. Ann. § 60-3701	Clear and convincing evidence	Wanton, willful, fraudulent or malicious conduct.	Kan. Stat. Ann. § 60-3702	May not exceed the lesser of defendants highest annual gross income from any of the prior 5 years unless the court deems inadequate, then may award up to 50% of net worth or $ 5,000,000. If court finds profits exceeds or should exceed these limits, then award may be up to 1. 5 times of the profit.
Maine	*St. Francis de Sales Federal Credit Union v. Sun Ins. Co. of New York*, 802 A. 2d 982 (Me. 2002)	Clear and convincing evidence	Either express (motivated by ill will) or implied (outrageous conduct implying ill will) malice. Implied malice is not a … "mere reckless disregard of the circumstances. "	Me. Rev. Stat. Ann. tit. 18-A, § 2-804(b)	$ 75,000 for wrongful death actions.
Michigan	*Jackson Printing*	Preponderance	A voluntary act	*Jackson*	"The purpose of

	Co. , Inc. v. Mitan, 425 N. W. 2d 791 (Mich. 1988)	of the evidence	which humiliates, outrages and indignifies the recipient.	*Printing Co, Inc. v. Mitan*, 425 N. W. 2d 791 (Mich. 1988)	exemplary damages is not to punish the defendant, but to render the plaintiff whole. When compensatory damages can make the injured party whole, exemplary damages must not be awarded. ”
Mississippi	Miss. Code Ann. § 11-1-65	Clear and convincing evidence	Actual malice; gross negligence evidencing willful; wanton or reckless disregard; fraud	Miss. Code Ann. § 11-1-65	$ 20 million if defendants net worth > $ 1 billion; $ 15 million if > $ 750 million but is not > $ 1 billion; $ 10 million if > $ 500 million but < $ 750 million; 7 1/2 million if > $ 100 million; $ 5 million if > $ 50 million. 4% of net worth if < $ 50 million or less.
Montana	Mont. Code Ann. § 27-1-220	Clear and convincing evidence	Knowledge of or disregard creating a high probability of injury and conscious or intent to disregard; or deliberate indifference to this probability.	Mont. Code Ann. § 27-1-220	Punitive damages may not exceed the lesser of $ 10,000,000 or 3% of the defendants net worth.
Nevada	Nev. Rev. Stat. § 42. 005	Clear and convincing evidence	“Oppression, fraud or malice, express or implied”	Nev. Rev. Stat. § 42. 005	3 times compensatory damages if $ 100,000 or more;

					$ 300,000 if less.
New Jersey	N. J. Rev. Stat. Ann. § 2A: 15-5. 12	Clear and convincing evidence	Malice or a wanton and willful disregard of persons possibly harmed.	N. J. Rev. Stat. Ann. § 2A: 15-5. 14	Greater of five times compensatory damages or $ 350,000.
North Carolina	N. C. Gen Stat. 1D-15	Clear and convincing evidence	Injury aggravated by fraud, malice or willful or wanton conduct	N. C. Gen Stat. 1D-25	May not exceed three times the compensatory award or $ 250,000 whichever is greater.
North Dakota	N. D. Cent. Code § 32-03. 2-11	Clear and convincing evidence	"oppression, fraud or malice, actual or presumed"	N. D. Cent. Code § 32-03. 2-11(4)	Greater of 2 times compensatory damages or $ 250,000.
Oklahoma	Okla. Stat. Tit. 23, § 9. 1	Preponderance of the evidence	"reckless disregard" (lower cap) or "intentionally and with malice toward others" (higher cap)	Okla. Stat. Tit. 23, § 9. 1	Reckless disregard -greater of $ 100,000 or actual damages. Intentional and with malice - greatest of $ 500,000 or twice actual damages, or financial benefit by defendant. Beyond a reasonable doubt conduct threatened a human life -no cap.
Pennsylvania	40 Pa. Cons. Stat. § 1301. 812-A	Preponderance of the evidence	Willful or wanton conduct; reckless indifference.	40 Pa. Cons. Stat. § 1301. 812-A (g)	Shall not exceed 200% of the compensatory damages unless intentional misconduct. In all

					cases, unless a lower verdict, not less than $ 100,000.
Texas	Civ. Prac. and. Rem. Code § 41. 003	Clear and convincing evidence	Fraud, malice, willful act or omission or gross negligence (wrongful death actions).	Civ. Prac. and Rem. Code § 41. 008	The cap is the greater of, $ 200,000 or the award for non-economic damages up to $ 750,000 plus twice the award for economic damages.
Virginia	*Owens-Corning Fiberglas Corp. v. Watson*, 413 S. E. 2d 630, 640 (Va. 1992)	Clear and convincing evidence	Willful and wanton negligence; conscious disregard; reckless indifference; or being aware, of the probability of physical injury	§ 8. 01-38. 1	Maximum cap of $ 350,000

TABLE 3: Malpractice Attorneys' Fees[4]

State	*Attorneys' Fees*
California	Sliding scale fees may not exceed 40% of the $ 50,000, 1/3 of the next $ 50,000, 25% of the next $ 500,000, and 15% of damages exceeding $ 600,000. (Bus. & Prof. §6146)
Connecticut	Sliding scale fees may not exceed: one third of first $ 300,00; 25% of next $ 300,000; 20% of next $ 300,000; 15% of next $ 300,000; and 10% of damages exceeding $ 1. 2 million. (CGS §52. 251c)
Delaware	Sliding scale fees may not exceed: 35% of first $ 100,000; 25% of next $ 100,000; and 10% of damages exceeding $ 200,000. (Del. Code Ann Tit . 18 §. 6865)
Florida	Separate sliding scales for cases settling before filing an answer or appointing an arbitrator, cases settling before or after going to trial, and cases in which liability is admitted and only damages contested; 5% extra for cases appealed (See note below.) * (Atty. Conduct Reg. 4-1. 5(f)(40(b))
Illinois	Sliding scale fees may not exceed one third of first $ 150,000; 25% of next $ 850,000, and 20% of damages exceeding $ 1 million. (Ill. Comp. Stat. Ann. §110. 2. 1114) Attorney may apply to the court for additional compensation under certain circumstances. (§735. 5/2. 111 4)
Indiana	Plaintiff's attorney fees may not exceed 15% of any award that is made from Patient's Compensation Fund (covers portion of an award that exceeds $ 100,000). (Ind Code Ann. §16. 9(5). 51)
Maine	Sliding scale fees may not exceed: one third of first $ 100,000; 25% of next $ 100,000, and 20% of damages that exceed $ 200,000; for purpose of rule, future damages are to be reduced to lump-sum value. (Me. Rev. Stat. Ann. §24. 2961)
Massachusetts	Sliding scale fees may not exceed: 40% of first $ 150,000, 33. 33% of next $ 150,000, 30% of next $ 200,000 and 25% of damages that exceed $ 500,000; further limits if claimants recovery insufficient to pay medical expenses. (Mass. Ann. Laws Chap. 231. § 601)
Michigan	Maximum contingency fee for a personal injury action is one third of the amount recovered. (Mich. Court Rules 8. 121(b))
New Jersey	Sliding scale fees may not exceed one third of first $ 500,000, 30% of second $ 500,000, 25% of third $ 500,000 and 20% of fourth $ 500,000; and amounts the court approves for damages that exceed $ 2,000,000; 25% cap for a minor or an incompetent plaintiff for a pretrial settlement. (Court Rules §1: 2107)
New York	Sliding scale fees may not exceed 30% of first $ 250,000, 25% of second $ 250,000, 20% of next $ 500,000, 15% of next $ 250,000 and 10% over $ 1. 25 million. (N. Y. Jud. §474a) The court may allow higher fees upon application of the claimant or his attorney.

[4] George Coppolo, OLR Research Report: Medical Malpractice—Attorneys' Fees (2003) http://www.cga.ct.gov/2003/olrdata/jud/rpt/2003-r-0664.htm

Oklahoma	Fee may not exceed 50% of net judgment. (§5. 7)
Tennessee	Fee may not exceed one third of recovery (Tenn. Code Ann. § 29-26-120)
Utah	Contingency fee may not exceed third of award. (§78. 14. 7(5))
Wisconsin	Sliding scale may not exceed: third of first $ 1 million or 25% or first $ 1 million recovered if liability is stipulated within 180 days, and not later than 60 days before the first day of trial, and 20% of any amount exceeding $ 1 million. But court may approve higher limit in exceptional circumstances. (§655. 013)
Wyoming	Where recover is $ 1 million or less: third if claim settled within 60 days after filing, or 40% if settled after 60 days or judgment is entered; 30% over $ 1 million. But parties may agree to pay more. (Ct. Rules, Contingent Fee R. 5)
Arizona	Court may determine reasonableness of either party's fees upon request (Ariz. Stat. 12-568)
Hawaii	Court must approve attorney fees. (§607. 15. 5)
Iowa	Court may review plaintiff's attorney's fees in any personal injury or wrongful death action against specified health care providers or hospitals. (§147. 138)
Maryland	Court or pretrial arbitration panel will review disputed fees in medical injury actions. (Cts. & Jud. Proc. §3. 2A. 07)
Nebraska	Court review for reasonableness of attorney fees in cases against health care providers for the party that requests it. (§44. 976)
New Hampshire	Fees for actions resulting in settlement or judgment of $ 200,000 or more shall be subject to court approval. (§508: 4. e)
Washington	In any medical injury the court may determine the reasonableness of each party's attorney fees if requested by the party. (§7. 70. 070)