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Statute of Limitations: Discovery Rule for Malpractice

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DISCOVERY RULE FOR MALPRACTICE

IN *OLIVER V. KAISER COMMUNITY HEALTH FOUNDATION*[1] the Ohio Supreme Court adopted the discovery standard for medical malpractice actions, which are subject to Ohio's one-year statute of limitations.[2] In *Oliver* the court held that a medical malpractice cause of action "accrues and the statute of limitations commences to run when the patient discovers, or in the exercise of reasonable care and diligence should have discovered, the resulting injury."[3] Shortly after *Oliver,* the court applied the discovery rule to legal malpractice cases in *Skidmore & Hall v. Rottman.*[4] The discovery standard replaces Ohio's previously judicially adopted rule of termination of the professional relationship as the accrual point for malpractice claims.[5]

The source of controversy over the accrual point of malpractice claims is Ohio Revised Code Section 2305.11(A), which provides that a malpractice action "shall be brought within one year after the cause thereof accrued."[6] This provision provides no clue for determining when the one-year limitation begins to run.[7] By contrast, the legislature did enact a discovery rule for determining when a cause of action arises for bodily injury caused by exposure to asbestos, chromium, or substances such as agent orange.[8]

Without legislative definition, determining the accrual of a malpractice

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[1] 5 Ohio St. 3d 111, 449 N.E.2d 438 (1983).

[2] OHIO REV. CODE ANN. § 2305.11(A)(Baldwin 1983). *See infra* note 6 and accompanying text.

[3] 5 Ohio St. 3d at 111, 449 N.E.2d at 439.

[4] 5 Ohio St. 3d 210, 450 N.E.2d 684 (1983).

[5] *Oliver* expressly overruled Wyler v. Tripi, 25 Ohio St. 2d 164, 267 N.E.2d 419 (1971); Lundberg v. Bay View Hospital, 175 Ohio St. 133, 191 N.E.2d 821 (1963); DeLong v. Campbell, 157 Ohio St. 22, 104 N.E.2d 177 (1952); Amstutz v. King, 103 Ohio St. 674, 135 N.E. 973 (1921); Bowers v. State, 99 Ohio St. 361, 124 N.E. 238 (1919); Gillette v. Tucker, 67 Ohio St. 106, 65 N.E. 865 (1902).

[6] OHIO REV. CODE ANN. § 2305.11(A)(Baldwin 1983). Although this provision was amended in 1975 and 1981, the legislature has never defined the "cause accrued" language.

[7] However, an argument can be made that a clue does exist in OHIO REV. CODE ANN. § 2305.11(B). *See infra* note 28 and accompanying text. The use of the word "act or omission" in this provision could be interpreted as a signal that "accrued" in Subsection (A) also means at the time of the act or omission.

[8] OHIO REV. CODE ANN. § 2305.10 (Baldwin 1983), as amended, provides:

> An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose. For purposes of this section, a cause of action for bodily injury caused by exposure to asbostos or to chromium in any of its chemical forms arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure, or upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had been injured by the exposure, whichever date occurs first.

See O'Stricker v. Jim Walter Corp., 4 Ohio St. 3d 84, 447 N.E.2d 727 (1983) where the court held that, by judicial application, this discovery rule applies to actions filed prior to the amendment.

action becomes a judicial function. The court has three choices; the statute can begin to run 1) when the negligent act occurs; 2) when the professional relationship terminates; or 3) when the claimant discovers, or reasonably should have discovered, the injury.[9] The court must balance the plaintiff's interests in recovery against the evidentiary problems of defendants responding to stale claims. In *Gillete v. Tucker,*[10] the Ohio Supreme Court held that the cause of action accrued at the termination of the physician-patient relationship, based on a theory of implied contract.[11] The court adhered to this approach as the general rule, although not always with enthusiasm.

In several opinions subsequent to *Oliver,* the court clearly, but unsucessfully, invited the legislature to define the "accrual" of a cause of action under Section 2305.11(A), preferably by enacting a uniform discovery rule.[12] In *Wyler v. Tripi,*[13] for example, the court expressed its preference for the discovery rule but hesitated to adopt it judicially because the legislature had failed to adopt amendments which would have extended the statute of limitation.[14] Since the effect of the discovery rule can be a tolling of the statute of limitations well beyond the termination of the doctor-patient relationship, the *Wyler* court felt constrained by a legislative policy to maintain the *status quo* and reaffirmed the termination rule against its own better judgment.[15]

Not long after *Wyler,* however, the court seized an opportunity to carve out an exception to the general rule. In *Melnyk v. Cleveland Clinic*[16] the plaintiff claimed that a surgeon left a metallic forceps and a nonabsorbent sponge in plaintiff's abdomen. These items were removed more than ten years later. The patient filed suit within one year of his "discovery" of the items but more than ten years following termination of the surgeon-patient relationship. The Ohio Supreme Court unanimously held that justice required adoption of the discovery rule for cases where foreign objects were left inside patients.[17] The

[9] *See generally* Note, *The Statute of Limitations in Actions For Undiscovered Malpractice,* 12 WYO. L.J. 30 (1957).

[10] 67 Ohio St. 106, 65 N.E. 865 (1902).

[11] *Id.* at 124, 65 N.E. at 869.

[12] *See, e.g.,* Wyler v. Tripi, 25 Ohio St. 2d 164, 267 N.E.2d 419 (1971)(a reluctant 4-3 vote against the discovery rule, based on the legislature's failure to adopt the discovery rule); Lundberg v. Bay View Hospital, 175 Ohio St. 133, 137, 191 N.E.2d 821, 824 (1963)(Gibson, J., concurring)(advocating either judicial or legislative adoption of discovery rule). *Oliver* overrules both of these cases. *See supra* note 5. The legislature's failure to respond to the court's message in these cases may be related to an effective defendants-malpractice insurers' lobby. *See* 16 AKRON L. REV. 302, 306 (1982); Note, *Ohio's Statute of Limitations For Medical Malpractice,* 38 OHIO ST. L.J. 125 (1977).

[13] 25 Ohio St. 2d 164, 267 N.E.2d 419 (1971), overruled by Oliver v. Kaiser Community Health Foundation, 5 Ohio St. 3d 111, 449 N.E.2d 438 (1983).

[14] The Ohio General Assembly declined to pass a bill that proposed to add the following to § 2305.11: "If the action is for malpractice, the cause thereof shall not accrue until the malpractice is discovered." 5 Ohio St. 3d at 115 n.4, 449 N.E.2d at 441 n.4. *See also,* Note, *supra* note 12, at 136 n.36.

[15] The court said that it was "unconscionable" that the plaintiff's recovery "can be barred by the statute of limitations before he is even aware of its existence." 25 Ohio St. 2d at 168, 267 N.E.2d at 421.

[16] 32 Ohio St.2d 198, 290 N.E.2d 916 (1972).

[17] *Id.* at 201, 290 N.E.2d at 917.

court noted that proof of a foreign item left behind in surgery was fairly indefensible, with none of the usual problems attendant to stale claims:[18]

> Hence, we base our reasoning not only upon an absence of the vexatious inequities usually associated with the entertaining of "stale" medical claims, but also upon matters of sound public policy, springing from the absolute and irrevocable dependence of patient upon surgeon during surgery and from the huge increase in societal or public medicine with its lamentable but concomitant lessening of the fiercely private surgeon-patient relationship of years past.[19]

It was this concern, arising from the dependence of patient upon doctor, that moved the *Wyler* court to severely criticize the termination rule.

> [The termination rule] affords little relief in cases where the injury is one which requires a long developmental period before becoming dangerous and discoverable. In those situations, the termination rule extends the period of time at which the statute of limitations commences to run, but does so by a factor which bears no logical relationship to the injury incurred. . . . The termination rule is further fallible in that it requires the patient to determine, at the time the relationship is terminated, that malpractice has taken place, when in fact he may have relied upon the very advice which constitutes malpractice.[20]

Given the court's favorable disposition towards the discovery rule, the *Oliver* ruling was a predictiable, if somewhat belated, decision. The case was originally filed by Louise Federicci, who underwent a biopsy of a nodule in her right breast on September 16, 1975. The procedure was performed in a hospital operated by the Kaiser Community Health Foundation.[21] The pathologist diagnosed the tissue specimen as nonmalignant. On July 27, 1979, Louise learned that she had cancer, and alleged that the pathological tissue evaluation in 1975 would have timely revealed the malignancy, but for the pathologist's negligence.[22] Louise filed suit against the pathologist and hospital on September 17, 1979, within one year of discovery of her condition, but four years and one day after the pathologist's diagnosis. The trial court granted defendants' motion for summary judgment based on the one-year statute of limitations in Ohio Revised Code Section 2305.11(A). Under the termination rule the statute had run. The court of appeals affirmed.[23]

The Ohio Supreme Court reversed, retreating from its previous position of deference to legislative policy, which the court had perceived from the

[18] *Id.* at 200, 290 N.E.2d at 917.

[19] *Id.* at 202, 290 N.E.2d at 918.

[20] 25 Ohio St. 2d at 168, 267 N.E.2d at 421. For an excellent discussion of *Wyler* and its precedents *see* Note, *supra* note 12, at 126-32.

[21] 5 Ohio St. 3d at 111, 449 N.E.2d at 439.

[22] *Id.*

[23] *Id.*

legislature's failure to act upon proposed amendments.[24] The court adopted the analysis of the Oregon Supreme Court as a basis for judicially enacting the discovery rule.[25] The Oregon court asserted that legislative silence is not the same as express legislative enactment. "The practicalities of the legislative process furnish many reasons for the lack of success of a measure other than legislative dislike for the principle involved in the legislation. Legislative inaction is a weak reed upon which to lean in determining legislative intent."[26] Succinctly stated, the court is not bound by what the legislature fails to do. Because the court invoked the termination rule the court is free to change it.[27]

Thus, the Ohio Supreme Court dismissed its earlier cautiousness and enacted the discovery rule to ease "the unconscionable result to innocent victims who by exercising even the highest degree of care could not have discovered the cited wrong."[28] The court regarded the potential danger of frivolous or stale claims to be comparatively minimal. "[I]n balancing the equities between doctor and patient, the burden placed on the doctor is much less than the greater injustice the patient would suffer."[29] The court was convinced that the discovery rule for malpractice actions was "more nearly consonant with the demands of justice and the dictates of ethics"[30] than any alternative method.

One issue which the majority opinion does not address is the apparent conflict between the court's newly pronounced discovery rule and Section 2305.11(B) of the Ohio Revised Code, which provides:

> *In no event shall* any *medical* claim against a physician, podiatrist, or a hospital or a dental claim against a dentist be brought more than *four years* after the *act or omission* constituting the alleged malpractice occurred. The limitations in this section for filing such a malpractice action against a physician, podiatrist, hospital, or dentist apply to all persons regardless of legal disability and not withstanding section 2305.16 of the Revised Code, provided that a minor who has not attained his tenth birthday shall have until his fourteenth birthday in which to file an action for malpractice against a physician or hospital.[31]

Except for children under ten, this section expressly states that it applies to all persons, and sets a ceiling of four years on medical malpractice actions. According to the statute, the four years is calculated from the time of the act

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[24] *See supra* note 14 and accompanying text.

[25] Berry v. Branner, 245 Ore. 307, 421 P.2d 996 (1966). *See also* 5 Ohio St. 3d at 115 n.5, 449 N.E.2d at 442 n.5.

[26] 5 Ohio St. 3d at 115, 449 N.E.2d at 441-42 (quoting *Berry*, 245 Ore. at 311, 421 P.2d at 998).

[27] 5 Ohio St. 3d at 116, 449 N.E.2d at 443.

[28] *Id.* at 114, 449 N.E.2d at 441.

[29] *Id.*

[30] *Id.* at 112, 449 N.E.2d at 439.

[31] OHIO REV. CODE ANN. § 2305.11(B) (Baldwin 1983) (emphasis added). The four-year limit was added to the statute in 1975. For discussion related to this provision *see* Note, *supra* note 12, at 142-50.

of malpractice.[32]

This four-year limit was the basis for Justice Holmes's dissent in *Oliver*. Justice Holmes noted that foreign body cases like *Melnyk*[33] were appropriate for the discovery rule because they may be brought under Ohio Revised Code Section 2305.10 which contains a legislatively enacted discovery rule, and were not subject to Section 2305.11(B).[34] In regard to actions under Section 2305.11 Justice Holmes said:

> I am willing to concede that in keeping with the announced "discovery rule" as being applicable to R.C. 2305.10, fundamental fairness would also reasonably extend such rule to toll the statute of limitations in R.C. 2305.11(A) for medical malpractice actions. However, the General Assembly has determined as a matter of law that such tolling shall not continue indefinitely. With the enactment of R.C. 2305.11(B), the General Assembly again declared a public policy of the state of Ohio which was to the effect that the increase of medical malpractice actions presented a public concern and, in keeping with such concern, enacted as an emergency measure the absolute four-year statute of limitations, regardless of when the action occurred.[35]

Justice Holmes concluded that the discovery standard may apply to medical malpractice actions "insofar as tolling the one-year limitations period until discovery of the injury," but only within the four-year limit provided by the legislature.[36]

According to the dissent, a patient whose illness was not discovered until four years after the alleged act of malpractice would have to show a continuing malpractice, the last act of which brings her within the four year period. Consequently, Justice Holmes would have held that the statute had run as to the defendant doctor, but not as to Kaiser Community Health Foundation, since the action "was apparently brought within the four-year period following the last date of the hospital-patient relationship."[37]

Since the majority opinion does not address Section 2301.11(B), one can only speculate as to how the court will rule on future defenses based on the four-year limit. The court has ruled that where the claimed malpractice predates Section 2301.11(B), the four-year limitation does not apply.[38] Given the court's

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[32] *But see infra* notes 37-39 and accompanying text.

[33] *See supra* note 14.

[34] 5 Ohio St. 3d at 118, 449 N.E.2d at 445.

[35] *Id.* at 118-19, 449 N.E.2d at 444.

[36] *Id.*

[37] *Id.* Louise Federicci's complaint was filed four years and one day after the doctor's diagnosis of no malignancy.

[38] Adams v. Sherk, 4 Ohio St. 3d 37, 38, 446 N.E.2d 165, 167 (1983). *Accord* Messina v. Gabriel, 573 F. Supp. 364, 365 (S.D. Ohio 1983).

strong stand on the discovery rule in *Melnyk,* and not in *Oliver,* the court would probably protect the discovery rule from the four-year bar. One suggestion is to use a continuing negligence theory[39] which means that for every day the injury goes undiscovered, added elements of injury occur.

Secondly, the four-year limitation does not address the dangers of fraudulent concealment. Where a patient's discovery of injury is delayed by the defendant's concealment or failure to warn of the condition, the court may rule that Section 2305.11(B) does not apply because the legislature did not intend for fraudulently concealed acts of malpractice to be included within the meaning of the statute. To hold otherwise would arguably go against public policy.

A third argument against the general application of Section 2305.11(B) is suggested by the context of the statute itself. The second sentence of subsection (B) refers to legal disability, which indicates that the legislature intended the four-year limitation to apply primarily to claims of persons of minority, unsound mind, or imprisonment.[40] Although the court has not done so,[41] it could construe Section 2305.11(B) narrowly and apply the limit only to claimants who are under a legal disability when the alleged malpractice occurs. Finally, the statute could be held unconstitutional as a violation of due process where it denies these persons, by virtue of their legal disabilities, a full and fair opportunity to litigate their claims.[42]

However the questions raised by the interplay of Section 2305.11(B) and the discovery standard may be resolved, they clearly relate only to medical malpractice claims. Other areas of malpractice are not constrained and the discovery standard applies without restriction. In *Skidmore & Hall v. Rottman*[43] the Ohio Supreme Court applied the discovery rule to legal malpractice actions. As in medical malpractice cases, the cause of action for legal malpractice formerly accrued at the latest at the termination of the attorney-client relationship.[44] Under *Skidmore & Hall,* the discovery standard now applies.

Skidmore and Hall, attorneys, filed an action to collect legal fees from Benjamin R. and Benjamin G. Rottman.[45] Defendants filed a counterclaim on November 13, 1981, alleging attorney malpractice. This allegation was based on Attorney Hall's failure to pursue a performance bond related to litigation

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[39]Note, *supra* note 12, at 145.

[40]*Id.* at 142.

[41]For example, the plaintiff in *Adams,* 4 Ohio St. 3d 37, 446 N.E.2d 165, was not under a legal disability. The court addresed only the retroactivity aspect of the statute, rather than the planitiff's status vis-a-vis legal disability.

[42]Note, *supra* note 12, at 143.

[43]5 Ohio St. 3d 210, 450 N.E.2d 684 (1983). *Skidmore & Hall* expressly overruled Keaton Co. v. Kolby, 27 Ohio St. 2d 234, 217 N.E.2d 772 (1971).

[44]5 Ohio St. 3d at 211, 450 N.E.2d at 685.

[45]*Id.* at 210, 450 N.E.2d at 684.

against a construction company. Beginning in 1975, Attorney Hall had represented the defendants in claims against Empire Construction Co., which resulted in a trial and appeal. Their attorney-client relationship ended on August 31, 1979. On November 20, 1980 the defendants lost in a second litigation regarding a performance bond with an insurance company, a claim related to the Empire Construction matter. The judge in this second case ruled that the issue was res judicata as it was not presented in the first litigation.[46]

The defendants claimed malpractice against Attorney Hall for not pursuing the performance bond in the initial suit, alleging that their first knowledge of this malpractice was at the adverse judgment on November 20, 1980.[47] The trial court dismissed the counterclaim because the one-year statute of limitations in Ohio Revised Code Section 2305.11(A) had run. The court of appeals affirmed.[48] In a brief opinion, the Ohio Supreme Court reversed and remanded, stating that the "policy considerations underlying the 'discovery rule' are no less compelling in *legal* malpractice actions" than in medical malpractice actions.[49] Thus the defendants' counterclaim was filed within the one-year statute of limitations, if the judgment of November 20, 1980, proves to be the discovery date.

Central to the discovery rule for professional malpractice is the special nature of the relationship between the professional and client or patient.[50] The professional is under a duty to exercise the skill and knowledge attributed to the practice of the profession. "Corollary to this expertise is the inability of the layman to detect its misapplication; . . . In the legal field, the injury may lie concealed within the obtuse terminology of a will or contract; in the medical field the injury may lie hidden within the patient's body; in the accounting field, the injury may lie buried in the figures of the ledger."[51] Given the fiduciary nature of the relationship between professional and client,[52] the courts advocate a pro-client attitude toward the running of a statute of limitations before the client (or patient) knows that he is injured. While the discovery standard increases the burden upon the professional because of the indefinite extension of liability into the future, the advocates of the discovery rule view the alternative injustice to clients (patients) to be a far greater burden. Accountability for misjudgment is inherent within the practice of the profession.

As a practical matter, the discovery standard adds an additional issue for the trier of fact in a malpractice case. Merely alleging a discovery date will

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[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] Neel v. Magan, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 188, 419 P.2d 421, 428, 98 Cal. Rptr, 837, 844 (1971), (applying discovery rule to legal malpractice cases).

[51] *Id.*

[52] *See id.* at 189, 491 P.2d at 428, 98 Cal. Rptr. at 845.

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not save a plaintiff from the statute of limitations. Under the discovery standard the trier of fact must inquire into when the plaintiff actually discovered or *in the exercise of reasonable care and diligence should have discovered* his injury. "The standard of reasonable care and diligence required by this test is that which is employed by an ordinary reasonably prudent person in like circumstances."[53] The trier of fact must ascertain facts from both parties to determine when the statute of limitations began to run.

There is no question that the discovery standard improves the position of potential plaintiffs. The court perceives that "stale claims" are defendants' main argument against the discovery standard. To advocates of the discovery standard, this is a relatively minor problem in light of the burden of proof carried by the plaintiff. The court noted in *Oliver*: "We realize that added burdens are placed on defendants by forcing them to defend claims with evidence that may be stale. We should not overlook the fact that the plaintiff must produce evidence sufficient to establish a prima facie case before the defendant is obliged to produce any evidence."[54]

Finally, the Ohio Supreme Court has ruled that the discovery standard set forth in *Oliver* applies to actions which were pending before the *Oliver* decision.[55] The Court has thus declared in no uncertain terms that the discovery standard will be applied to all malpractice cases in Ohio.

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[53]Clark v. Hawkes Hospital of Mt. Carmel, 9 Ohio St. 3d 182, 184, 459 N.E.2d 559, 561 (1984).

[54]5 Ohio St. 3d at 114 n.2, 449 N.E.2d at 441 n.3 (quoting Yoshizaki v. Hilo Hospital, 50 Hawaii 150, 154, 433 P.2d 220, 223 (1967)). The Hawaii court declared that construction of a statute so as to bar a claim before its very discovery, leads only to an absurd result, which is contrary to normal rules of construction and contrary to the dictates of justice. *Id.*

[55]Wagner v. McDaniels, 9 Ohio St. 3d 184, 459 N.E.2d 561 (1984)