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THE UNCONSTITUTIONALITY OF OHIO'S MEDICAL
MALPRACTICE STATUTE OF LIMITATIONS:
MINORS AND EQUAL PROTECTION

AS WITH ALL LAWS, statutes of limitations must apply equally to all persons unless reasonable grounds permit the legislating body to make distinctions between classes of persons affected by the law.¹ Laws that operate unequally, unfairly and unreasonably when applied to the public are unconstitutional. The Ohio Supreme Court addressed was the constitutionality of an Ohio medical malpractice statute of limitations in *Schwan v. Riverside Methodist Hospital*.²

The appellee in *Schwan* was fourteen years old when the appellant-hospital treated him on July 18, 1977. On November 21, 1979, Schwan filed a complaint alleging an injury resulting from negligent treatment by the hospital's employees. The hospital moved for summary judgement, claiming that the action was barred by the statute of limitations — Ohio Revised Code Section 2305.11.³ The court of common pleas granted the motion and Schwan appealed.⁴

The Court of Appeals for Franklin County reversed, holding that section 2305.11(B) was unconstitutional as applied to medical malpractice litigants who are minors.⁵ The Ohio Supreme Court, in reviewing the appellate court decision, centered its analysis on Ohio Revised Code Section 2305.11 (A) and (B).⁶

¹Porter v. Oberlin, 1 Ohio St. 2d 143, 205 N.E.2d 363 (1965).

²6 Ohio St. 3d 300, 452 N.E.2d 1337 (1983).

³OHIO REV. CODE ANN. § 2305.11 (Page Supp. 1982), reading in pertinent part:

(A) An action for. . . malpractice against a physician, podiatrist, hospital, or dentist, or upon a statute for a penalty or forfeiture, shall be brought within one year after the cause thereof accrued. . .

If a written notice, prior to the expiration of time contained in this division, is given to any person in a medical claim that an individual is presently considering bringing an action against that person relating to professional services provided to that individual, then an action by that individual against that person may be commenced at any time within one hundred eighty days after that notice is given.

(B) In no event shall any medical claim against a physician, podiatrist, or a hospital or 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 notwithstanding 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.

⁴*Id.* at 300, 452 N.E.2d at 1337-38.

⁵*Id.* at 300, 452 N.E.2d at 1338.

⁶*Id.*

Section 2305.11(A) allows one year for filing a malpractice action against a hospital; this period may be extended up to an additional 180 days if certain procedures are followed.⁷ Section 2305.11(B), the pivotal statute in this case, absolutely precludes the filing of any malpractice action against a hospital after four years following the alleged negligent act or omission. This Section applies to all persons regardless of any legal disability such as minority.⁸ However, Section 2305.11(B) also provides 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.”⁹ This language clearly creates two separate classes of litigants: minors above the age of ten and minors below the age of ten.

Despite a presumption that acts of the General Assembly are constitutional,¹⁰ the Ohio Supreme Court held that Ohio Revised Code Section 2305.11(B) violated the right of minor malpractice litigants to “equal protection” under the law; therefore the statutory section was unconstitutional.¹¹

Equal protection requires the state to have reasonable grounds for any distinctions between those within and without a particular class. To legitimately make a distinction between those within and without a particular class, the legislature must show reasonable grounds for creating such a distinction.¹² This can be accomplished by showing that the class differentiation rationally furthers the stated objective of the legislation:¹³ this is known as the “rational basis” test.¹⁴ Therefore, if it is conceivable that the statutory classification rationally furthers a legitimate objective, then the statute is constitutional.¹⁵

In *Denicola v. Providence Hospital*,¹⁶ the Ohio Supreme Court declared the malpractice statute of limitations to be “necessary for the immediate preservation of the public peace, health and safety. [Such] . . . immediate action is necessary to insure a continuance of health care delivery to the citizens of Ohio.”¹⁷ This is an enviable and certainly legitimate objective, but the question of whether the age classification created by the statute actually furthers this objective must still be answered.

⁷*Id.* at 310, 452 N.E.2d at 1338 (citing OHIO REV. CODE ANN. § 2305.11(A)(Page Supp. 1983)).

⁸*Id.* (citing OHIO REV. CODE ANN. § 2305.11(B)(Page Supp. 1983)).

⁹*Id.*

¹⁰*Id.* (citing *Beatty v. Akron City Hospital*, 67 Ohio St. 2d 483, 493, 424 N.E.2d 586, 592-93(1981)).

¹¹*Id.* See also OHIO CONST. art. I, § 2.

¹²*Id.* at 302, 452 N.E.2d at 1339 (citing *Porter*, 1 Ohio St. 2d 143, 205 N.E.2d 363; *State v. Buckley*, 16 Ohio St. 2d 128, 243 N.E.2d 66(1968)).

¹³*Id.* at 301-02, 452 N.E.2d at 1339 (citing *Denicola v. Providence Hospital*, 57 Ohio St. 2d 115, 119-20, 387 N.E.2d 231, 234 (1979)).

¹⁴*Id.* at 301, 452 N.E.2d at 1338.

¹⁵*Id.* (citing *Denicola*, 57 Ohio St. 2d at 119, 387 N.E.2d at 234).

¹⁶57 Ohio St. 2d 115, 387 N.E.2d 231 (1979).

¹⁷*Id.* at 301-02, 452 N.E.2d at 1339 (citing *Denicola*, 57 Ohio St. 2d at 120, 387 N.E.2d at 234).

The *Schwan* court adeptly answered this question by posing a realistic hypothetical fact situation. Judge Locher, writing for the majority,¹⁸ reasoned that under Ohio Revised Code Section 2305.11(B) a child one day short of being ten years old could file a malpractice action any time within the next four years and one day. Yet, had that same cause of action accrued on the day after the child's tenth birthday, his complaint would have to be filed within one year as required by Ohio Revised Code Section 2305.11(A).¹⁹

It is hard to contemplate how such a statutory construction could further any state interest. Although it is true that the General Assembly must often draw lines in legislation,²⁰ those lines must be determined rationally, not arbitrarily. A good argument, by contrast, can be made for creating a legal distinction between minors and adults. The *Schwan* court acknowledged this by saying:

Young people eagerly anticipate their legal "adulthood." At the age of majority, our society puts them on notice that they are assuming an array of rights and responsibilities which they never had before. Age ten, however, arrives with little fanfare. It is difficult to imagine that parents or guardians — much less the children themselves — would recognize that any change in status occurs on a child's tenth birthday.²¹

A distinction within a class of minors — especially one between minors under ten and those over ten — makes little if no sense²² and certainly does not rationally further any state interest.²³ Therefore, the Ohio Supreme Court determined Ohio Revised Code Section 2305.11(B) to be unconstitutional on its face with respect to medical malpractice litigants who are minors,²⁴ because it violated the equal protection clause of the Ohio Constitution.²⁵

Judge Locher's opinion leaves a significant issue unresolved: whether all minors should have to comply with Section 2305.11(A)'s one year filing requirement, or whether all minors should be given a longer period in which to file their complaints. Each alternative raises the same equal protection questions because each creates a distinction between minors and adults.

Judge Brown, in his separate concurring opinion, hinted at a viable solution. Judge Brown based most of his opinion on the rationale used by the Texas Supreme Court in *Sax v. Votteler*.²⁶ In *Sax*, the Texas court invalidated a pro-

¹⁸*Schwan*, 6 Ohio St. 3d 300, 452 N.E.2d 1337. Chief Justice Celebreeze and Justices Patton and Sweeney joined in Justice Locher's opinion; Justices Patton, C. Brown and Koehler concurred separately. Justice Holmes was the lone dissenter.

¹⁹*Id.* at 302, 452 N.E.2d at 1339.

²⁰*Id.*

²¹*Id.*

²²*Id.*

²³*Id.* at 303, 452 N.E.2d at 1339.

²⁴*Id.*

²⁵See OHIO CONST. art. I, § 2.

²⁶648 S.W.2d 661 (Tex. 1983)[hereinafter cited as *Sax*].

vision similar to that held unconstitutional in *Schwan*.²⁷ That court stressed that a provision similar to Ohio Revised Code Section 2305.11(B) restricted the right of minors over ten years of age to sue and consequently violated two due process clauses of the Texas Constitution.²⁸ The *Sax* court concluded that such an age distinction was arbitrary and unreasonable and therefore unconstitutional.²⁹

Judge Brown then went on to adopt the *Sax* court's reasoning that "[t]o argue that parents will adequately protect the rights of children is neither reasonable nor realistic, since the parents themselves may be minors, ignorant, lethargic, or lack concern to bring a malpractice action within the time provided by statute."³⁰ Thus, Judge Brown believed that a longer period for filing malpractice actions was necessary. Given the *Sax* logic that minors are inherently disadvantaged when it comes to suing, it is easy to see how a different statute of limitations for minors could rationally further the state's objective of protecting its citizens and their rights.

The *Schwan* Court, in reviewing a recent Ohio case, *Vance v. St. Vincent Hospital and Medical Center*,³¹ manifested its support for an extended statutory period of limitations for minor litigants in malpractice actions. In *Vance*, the Ohio Supreme Court held that, "[A] minor of 10 years of age or older must file a medical malpractice action within the time limitations set forth in R.C. 2305.11(A) and (B), notwithstanding R.C. 2305.16."³² This means that the action must be filed within one year of discovery of the ailment, or the time in which a reasonable person should discover the ailment, but no later than four years after the alleged malpractice occurred. If the victim is under ten years old, he may file any time before his fourteenth birthday.

The minor in *Vance* was seventeen when the alleged malpractice took place and was therefore subject to the one year limitations period of Ohio Revised Code Section 2305.11(A). The minor's failure to file within that period barred her action.³³ However, after finding Section 2305.11(B) unconstitutional, in that it irrationally discriminated against minors over the age of ten, the Supreme Court was compelled to overrule the *Vance* decision.³⁴

Judge Locher also attempted to distinguish the recent cases of *Baird v.*

²⁷*Schwan*, 6 Ohio St. 3d at 303-04, 452 N.E.2d at 1340 (citing *Sax*, 648 S.W.2d 661).

²⁸*Schwan*, 6 Ohio St. 3d at 304, 452 N.E.2d at 1340 (citing *Sax*, 648 S.W.2d at 664); OHIO CONST. art. I, § 16.

²⁹*Id.* at 304, 452 N.E.2d at 1341 (citing *Sax*, 648 S.W.2d at 666-67).

³⁰*Id.*

³¹64 Ohio St. 2d 36, 414 N.E.2d 406 (1980)

³²*Schwan*, 6 Ohio St. 3d at 301, 452 N.E.2d at 1338 (citing *Vance*, 64 Ohio St. 2d at 36, 414 N.E.2d at 406).

³³See generally *Vance*, 64 Ohio St. 2d 36, 414 N.E.2d 406.

³⁴*Schwan*, 6 Ohio St. 3d at 303, 452 N.E.2d at 1339.

*Loeffler*³⁵ and *Meros v. University Hospitals*,³⁶ which applied Ohio Revised Code Section 2305.11(B), although they did not deal with equal protection.³⁷ Judge Brown took the opposite stance in his concurring opinion. He stated that the *Schwan* majority overruled both *Baird* and *Meros* because the latter cares applied Ohio Revised Code Section 2305.11(B), determined to be unconstitutional by the *Schwan* majority.³⁸

In light of the *Schwan* opinion, it is highly probable the Ohio General Assembly and the Ohio Supreme Court will make a concerted effort to more clearly spell out their positions on an equitable statute of limitations period for minors in malpractice litigation. Such action is imperative to avoid confusion and conflict in the future.

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³⁵69 Ohio St. 2d 533, 433 N.E.2d 194 (1982).

³⁶70 Ohio St. 2d 143, 435 N.E.2d 1117 (1982).

³⁷*Schwan*, 6 Ohio St. 3d at 303, 452 N.E.2d at 1339-40.

³⁸*Id.* at 303-04, 452 N.E.2d at 1340.

