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# Ohio's Statute of Limitations, Baird v. Loeffler

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*Ohio's Statute of Limitations*

*Baird v. Loeffler*, 69 Ohio St. 2d 553, 433 N.E.2d 194 (1982)

**T**HE DECISION IN *Baird v. Loeffler*<sup>1</sup> is another victory for physicians and medical malpractice insurers. It will not be well accepted by plaintiff's attorneys or by others who advocate the rights of patients, especially minors, to be compensated for injuries sustained by them due to a physician's negligence.<sup>2</sup> The case focuses on an amendment to the Ohio Medical Malpractice Statute which became effective July 28, 1975.<sup>3</sup> The issue in *Baird* is the proper statutory construction that should be given to the statute where a minor's cause of action arose prior to the effective date of the statute.<sup>4</sup> In effect, the Ohio Supreme Court's decision in *Baird* totally bars a minor from bringing a medical malpractice action which accrued prior to the amendment of the statute, unless brought for him by another within a reasonable time.<sup>5</sup>

Joseph Baird was born on April 30, 1961. He was treated by R. Kenneth Loeffler, M.D. from April 1972, to June 1972, for malignant lymphoblastic lymphosarcoma. The treatment was terminated on September 19, 1972, when Joseph was eleven years of age.<sup>6</sup> Until the effective date of the amendment, July 27, 1975, Joseph had until age nineteen (April 30, 1980) to bring a

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<sup>1</sup>69 Ohio St. 2d 533, 433 N.E. 2d 194 (1982).

<sup>2</sup>Those who believe that a person's claim should be decided on the merits, not barred by a statute of limitations.

<sup>3</sup>OHIO REV. CODE ANN. § 2305.11 (Page 1981). Enacted as emergency legislation by the Ohio General Assembly in response to complaints by the medical profession and medical malpractice insurers. See generally, Comment, *Ohio's Statute of Limitations for Medical Malpractice*, 38 OHIO ST. L. J. 125, 139, 140 (1977); Comment, *Ohio's RX for the Medical Malpractice Crisis: The Patient Pays*, 45 U. OF CIN. L. REV. 90, 91, 96-99 (1976); Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, 1975 DUKE L. J. 1417, 1429-34 (1975).

<sup>4</sup>69 Ohio St. 2d at 534-35, 433 N.E. 2d at 195-96. OHIO REV. CODE ANN. §§ 2305.11(A) & (B) (Page 1971) states in pertinent part:

(A) An action for . . . malpractice, including an action for malpractice against a physician, podiatrist, or a hospital . . . shall be brought within one year after the cause thereof accrued. . . .

. . . .

(B) In no event shall any medical claim against a physician, podiatrist, or a hospital be brought more than four years after the act or omission constituting the alleged malpractice occurred. The limitations in this section . . . 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. *Id.*

<sup>5</sup>An action can be brought by a parent or guardian on behalf of the minor. However, the child cannot bring his own action until he or she reaches the age of majority prior to the end of the statutory period. OHIO RULE OF CIVIL PROCEDURE 17(B) (Page 1982).

<sup>6</sup>69 Ohio St. 2d at 533, 433 N.E. 2d at 195. In Ohio, a medical malpractice cause of action does not accrue until the physician-patient relationship terminates. *Gillette v. Tucker*, 67 Ohio St. 106, 65 N.E. 865 (1902).

malpractice action against Dr. Loeffler.<sup>7</sup> Joseph filed a malpractice complaint March 3, 1980, alleging that Dr. Loeffler's negligence caused him permanent kidney damage.<sup>8</sup>

During the interim period between the date of the alleged negligent act and the date that the action was brought, the Ohio General Assembly amended the pertinent statute of limitations for medical malpractice actions.<sup>9</sup> The amendment set forth an absolute four-year limitation on all malpractice actions, with a special provision allowing minors under the age of ten until age fourteen to bring their action.<sup>10</sup> The Ohio Supreme Court was faced with the question of whether to apply this amended statute retroactively to Joseph's situation.<sup>11</sup>

The Common Pleas Court of Stark County applied the amendment retroactively and held that Joseph's action was barred by the statute of limitations.<sup>12</sup> Upon appeal to the Ohio Fifth District Court of Appeals, the decision was reversed and remanded.<sup>13</sup> The court of appeals then certified the record of the case to the Ohio Supreme Court for review because their decision was in conflict with the First District Court of Appeals decision in *Rembold v. Christ Hospital*.<sup>14</sup>

This was a case of first impression for the Ohio Supreme Court on the issue of whether the medical malpractice amendment should be applied retroactively in a case involving a minor's cause of action. In a five to two per curiam decision, the court reversed the court of appeals' decision.<sup>15</sup> They ruled that Joseph Baird's cause of action accrued when the physician-patient relationship terminated, and that the cause of action was tolled only until the effective date of section 2305.11(B) (July 28, 1975).<sup>16</sup> Then, the statute of limitations outlined in sections 2305.11(A) and 2305.11(B) applied and provided Joseph Baird one year, or until July 28, 1976, to bring a malpractice action.

<sup>7</sup>The predecessor to OHIO REV. CODE ANN. § 2305.11 (Page 1981) did not except the tolling of the statute until a minor reached the age of majority, as the amended statute does. *Id.* The amended version expressly excepts the tolling provisions of OHIO REV. CODE ANN. § 2305.16 (Page 1981), which provides in pertinent part:

Unless otherwise specifically provided in sections 2305.04 to 2305.14 inclusive, . . . if a person entitled to bring any action mentioned in such sections . . . is, at the time the cause of action accrues, within the age of minority . . . such person may bring it within the respective times limited by such sections, after such disability is removed. . . . *Id.*

<sup>8</sup>69 Ohio St. 2d at 533, 433 N.E. 2d at 195.

<sup>9</sup>OHIO REV. CODE ANN. § 2305.11 (Page 1981), amended effective July 27, 1975.

<sup>10</sup>*Id.*

<sup>11</sup>69 Ohio St. 2d at 534-35, 433 N.E. 2d at 195-96. The statute was silent on this point, and Ohio has no legislative history to provide official insight on the issue.

<sup>12</sup>69 Ohio St. 2d at 533, 433 N.E. 2d at 195.

<sup>13</sup>*Id.* See also, Baird v. Loeffler, No. C.A. 5393 (Fifth Dist. Ct. App., Ohio, March 18, 1981).

<sup>14</sup>17 Ohio Op. 3d 350 (Hamilton Co. 1980). The *Rembold* court found that the statute applied retroactively reasoning that the legislature's intent was to cut off stale claims. They refused to be influenced by sympathy for the injured plaintiff. *Id.* at 354-57.

<sup>15</sup>69 Ohio St. 2d at 536, 433 N.E. 2d at 196. Justices W. Brown, Sweeney, Locher, Holmes, and Krupansky concurred to form the majority. Chief Justice Celebreeze and Justice C. Brown dissented.

<sup>16</sup>69 Ohio St. 2d at 535-36, 433 N.E. 2d at 195-96. See *supra* note 6.

His action was commenced after that date and therefore was barred.<sup>17</sup>

Because it was a case of first impression, the Ohio Supreme Court had to examine the rationale applied to related situations to reach a decision. First, the court analyzed an earlier interpretation of the effect of section 2305.11(B) on a minor's cause of action. In *Vance v. St. Vincent Hospital and Medical Center*,<sup>18</sup> a minor plaintiff over the age of ten brought an action against the defendant hospital, alleging that their agents' negligence caused him permanent injury. The Ohio Supreme Court ruled that a minor ten or older is restricted by sections 2305.11(A) and 2305.11(B) in bringing a cause of action and that section 2305.16, the general tolling provision for minors and incompetents, did not apply to toll the action until age eighteen.<sup>19</sup>

The *Vance* court's interpretation of section 2305.11(B) was important to the Ohio Supreme Court's decision in *Baird v. Loeffler*. The *Baird* court did note, however, that the *Vance* decision was distinguishable and therefore not dispositive of the question at hand because it dealt with a cause of action that accrued *after* the effective date of the amendment.<sup>20</sup> Joseph Baird's action, as previously noted, accrued prior to the enactment of the amendment.

After determining that the statute, if applicable, would bar the plaintiff's cause of action, the *Baird* court addressed the issue of whether its retroactive application would be violative of the Ohio Constitution.<sup>21</sup> Article II, Section 28 prohibits retroactive application of statutes which destroy an accrued substantive right.<sup>22</sup> This clause has been interpreted in numerous cases to allow the shortening of a statutory period so long as it "still leaves the claimant a *reasonable* time within which to enforce the right."<sup>23</sup> Joseph Baird had one year after the effective date of the amendment to bring his malpractice action. The Ohio Supreme Court concluded that one year after the effective date of the amendment was a reasonable time and therefore Article II, Section 28 had not been violated.<sup>24</sup>

The *Baird* court further supported its decision by reference to the prior Ohio Supreme Court decision of *Cook v. Matvejs*.<sup>25</sup> In *Cook*, the court made the distinction between an amended statute of limitations that totally

<sup>17</sup>69 Ohio St. 2d at 535-36, 433 N.E. 2d at 196.

<sup>18</sup>64 Ohio St. 2d 36, 414 N.E. 2d 406 (1980).

<sup>19</sup>*Id.* at 41, 42, 414 N.E. 2d at 409.

<sup>20</sup>69 Ohio St. 2d at 535, 433 N.E. 2d at 196.

<sup>21</sup>OHIO CONST. art. II, § 28 provides in pertinent part: "The general assembly shall have no power to pass retroactive laws. . . ." *Id.*

<sup>22</sup>*Id.*

<sup>23</sup>69 Ohio St. 2d at 535, 433 N.E. 2d at 196, *citing* *Smith v. New York Cent. R.R. Co.*, 122 Ohio St. 45, 49, 170 N.E. 637, 639 (1930); *see also* *Terry v. Anderson*, 95 U.S. 628 (1877) (dealing with parties to a contract).

<sup>24</sup>69 Ohio St. 2d at 535-36, 433 N.E. 2d at 196.

<sup>25</sup>56 Ohio St. 2d 234, 383 N.E. 2d 601 (1978).

“obliterates” an accrued cause of action and one that merely shortens the period of time, leaving a reasonable time in which to bring an action.<sup>26</sup> The *Cook* court further qualified the term “reasonable” by defining it as “a reasonable time after the effective date of the amendment, for the assertion of existing substantive or vested rights (Emphasis sic).”<sup>27</sup>

In applying this reasoning to Joseph Baird’s situation, the Ohio Supreme Court noted that Joseph had one year after the effective date of the amendment to bring a cause of action. They concluded that one year was a reasonable time and therefore any action brought after this date was barred.<sup>28</sup>

The dissent disagreed with this conclusion, contending that a “reasonable” time did not remain for Joseph to bring an action.<sup>29</sup> Because the statute of limitations would run out while Joseph was still a minor, he never actually had any time to bring an action. Therefore, section 2305.11(B) should not be applied retroactively.<sup>30</sup>

To understand better the situation that the Ohio Supreme Court was faced with in *Baird v. Loeffler*, the rationale behind the Ohio Medical Malpractice Statute as it existed prior to 1975 should be examined. Generally, a legislature has several conflicting interests to consider when enacting a medical malpractice statute of limitations: 1) to protect against stale claims;<sup>31</sup> 2) to provide stability to the medical profession and to society;<sup>32</sup> and 3) to protect the plaintiff’s right to have his or her claim determined on the merits.<sup>33</sup> The resulting statute of limitations is hopefully the result of a balancing of these interests.

As instituted in 1894 and prevailing until 1975, the Ohio malpractice statute of limitations provided in relevant part that “an action for . . . malpractice . . . shall be brought within one year after the cause thereof accrued . . . .”<sup>34</sup> As is evident from cases construing this provision, the courts viewed this statute as harsh to the wronged patient. Through the years, both the Ohio Supreme Court and the lower courts developed exceptions to the statute which resulted

<sup>26</sup>*Id.* at 236-37, 383 N.E. 2d at 603-04; see also *Gregory v. Flowers*, 32 Ohio St. 2d 48, 59-60, 290 N.E. 2d 181, 189 (1972) (Leach, J., concurring in judgment).

<sup>27</sup>56 Ohio St. 2d at 237, 383 N.E. 2d at 604; quoting Leach, J., concurring in *Gregory*, 32 Ohio St. 2d at 60, 290 N.E. 2d at 189.

<sup>28</sup>69 Ohio St. 2d at 535-36, 433 N.E. 2d at 196.

<sup>29</sup>*Id.* at 536-38, 433 N.E. 2d at 196-98. Justice C. Brown wrote the dissenting opinion in which Chief Justice Celebreeze concurred.

<sup>30</sup>*Id.* at 537, 433 N.E. 2d at 197. Joseph Baird was incompetent as a minor and would be barred as an adult. *Id.*

<sup>31</sup>*Melynk v. Cleveland Clinic*, 32 Ohio St. 2d 198, 290 N.E. 2d 916 (1972); see also Comment, *Ohio’s Statute of Limitations for Medical Malpractice*, 38 OHIO ST. L. J. 125, 125-26 (1977).

<sup>32</sup>*Wyler v. Tripi*, 25 Ohio St. 2d 164, 267 N.E. 2d 419 (1971); see also Comment, *Ohio’s Statute*, *supra* note 31, at 126, 139-40.

<sup>33</sup>*State ex rel. Moritz v. Troop*, 44 Ohio St. 2d 90, 338 N.E.2d 526 (1975); see also OHIO REV. CODE ANN. § 1.11 (Page 1981); Comment, *Ohio’s Statute*, *supra* note 31, at 126.

<sup>34</sup>The earliest codification was OHIO GEN. CODE § 11225 (1910). This codification was worded slightly differently, but was based on an earlier session law: Act of May 18, 1894, 91 Ohio Laws 299.

in the lengthening of the actual limitation period.<sup>35</sup> These exceptions developed as a result of an increasingly liberal interpretation of the term "accrued."<sup>36</sup>

The first such exception was outlined in *Gillette v. Tucker*.<sup>37</sup> There, the court rejected the traditional view that the cause of action accrued on the date of the physician's negligent act. Instead, it held that the cause of action accrued at the time that the physician-patient relationship ended.<sup>38</sup>

A second exception evolved from *Melnyk v. Cleveland Clinic*<sup>39</sup> and has been commonly termed the "discovery rule."<sup>40</sup> It was adopted because of the difficulty in some situations of immediately discovering a physician's negligence. The Ohio Supreme Court ruled that the statute of limitations could be tolled until the patient discovered, or should have discovered, a foreign object left in his body.<sup>41</sup>

The third exception, and the most important exception in Joseph Baird's situation, was the result of further legislative enactment. Ohio Revised Code section 2305.16<sup>42</sup> provided a tolling provision for minors and those people imprisoned or of unsound mind until the disability was removed. This provision protected the right of a person unable to bring an action at the time it accrued, by tolling the statute of limitations until the disability was removed.<sup>43</sup>

These exceptions greatly extended the period in which to bring a cause of action and presented the possibility that a cause of action for medical malpractice might *never* be precluded by the statute of limitations. This led, in part, to the medical malpractice crisis of the mid-1970's.<sup>44</sup> This crisis was characterized by a rise in malpractice insurance rates and an increased number of claims, both due to the extended period that patients had to bring an action.<sup>45</sup> Malpractice insurance became more difficult to obtain because of skyrocketing rates,

<sup>35</sup>See *infra* notes 36 to 43 and text accompanying.

<sup>36</sup>*Id.* See also Comment, *Medical Malpractice and the Statute of Limitations in Ohio*, 10 CAP. U. L. REV. 771, 775-76 (1981).

<sup>37</sup>67 Ohio St. 106, 65 N.E. 865 (1902).

<sup>38</sup>*Id.* at 133, 65 N.E. at 872. See, Comment, *Ohio's Statute*, *supra* note 31, at 127. This was for the benefit of both parties. It allowed the patient a chance to discover the doctor's negligence and also gave the doctor an extended period of time to correct his act of malpractice. *Id.*

<sup>39</sup>32 Ohio St. 2d 198, 290 N.E. 2d 916 (1972).

<sup>40</sup>*Id.* at 199, 290 N.E. 2d at 917.

<sup>41</sup>*Id.* at 202-03, 290 N.E. 2d at 918-19.

<sup>42</sup>OHIO REV. CODE ANN. § 2305.16 (Page 1981) provides in pertinent part:

Unless otherwise specially provided in sections 2305.04 to 2305.14, inclusive, . . . of the Revised Code, if a person entitled to bring any action mentioned in such section, . . . is, at the time the cause of action accrues, within the age of minority, of unsound mind, or imprisoned, such person may bring it within the respective times limited by such section, after such disability is removed. . . . *Id.*

OHIO GEN. CODE § 11229 (Anderson 1938) provided for basically the same tolling effect.

<sup>43</sup>*Id.*

<sup>44</sup>See Comment, *Ohio's RX*, *supra* note 3, at 90, 91, 96-99; Comment, *An Analysis*, *supra* note 3, at 1429-34.

<sup>45</sup>See Comment, *Ohio's Statute*, *supra* note 31, at 139-40.

insurance companies threatened to withdraw from certain states or specialties, and strikes or work slowdowns by doctors were even threatened.<sup>46</sup>

States took two basic approaches to alleviate the problem. Some established joint underwriting groups whereby medical malpractice insurance could be more readily obtained. Other states, such as Ohio, altered their procedural rules applicable to medical malpractice actions.<sup>47</sup> A common method used by state legislatures to limit the extended liability of the physician was the enactment of a maximum time limit for medical malpractice actions.<sup>48</sup>

The amendment to Ohio's medical malpractice statute did not alter the basic one-year time period for bringing a cause of action.<sup>49</sup> However, in response to pressure from the medical community and insurers, an absolute four-year limitation was placed on all medical malpractice claims.<sup>50</sup> The legislature also expressly excepted the tolling provision for minors and incompetents (section 2305.16) so that they too would fall under the stricter provisions of the amended statute.<sup>51</sup>

The Ohio Supreme Court first applied the amended statute to a minor's cause of action in *Vance v. St. Vincent Hospital and Medical Center*.<sup>52</sup> The *Vance* court unanimously rejected the plaintiff's interpretation of the statute that a minor of fifteen, sixteen, or seventeen would have until age nineteen to bring a cause of action.<sup>53</sup> Instead, the court interpreted section 2305.11(B) as totally negating the tolling effect of section 2305.16. The *Vance* court concluded that the only exception to this rule was for a minor under the age of ten.<sup>54</sup>

While *Vance* is illustrative of the application of the statute to minors, it does not reach the primary issue in *Baird v. Loeffler*. As previously noted, *Vance*

<sup>46</sup>See Comment, *Ohio's RX*, *supra* note 3, at 90, 91, 96-99.

<sup>47</sup>Compare TENN. CODE ANN. § 56-33-103 (Michie 1980) with OHIO REV. CODE ANN. § 2305.11 (Page 1981). See Miike, *State Legislatures Address the Medical Malpractice Situation*, 3 J. LEGAL MEDICINE 25 (Sept. 1975), which summarizes the approach each of the states took to alleviate the medical malpractice crisis. Included is a chart showing which states authorized Joint Underwriting Associations. *Id.* at 30. See also Comment, *An Analysis*, *supra* note 3, at 1417.

<sup>48</sup>New "absolute" limitations range in length from three to six years. Compare CAL. CIV. PRO. CODE § 340.5 (West 1982) (3 years), and LA. REV. STAT. ANN. § 9:5628(A) (West Supp. Vol. 4 1982) (3 years), with IOWA CODE ANN. § 614.1 (West Supp. 1982) (6 years), and OHIO REV. CODE ANN. § 2305.11(B) (Page 1981) (4 years).

<sup>49</sup>OHIO REV. CODE ANN. § 2305.11(A) (Page 1981).

<sup>50</sup>OHIO REV. CODE ANN. § 2305.11(B) (Page 1981).

<sup>51</sup>*Id.*

<sup>52</sup>64 Ohio St. 2d 36, 414 N.E. 2d 406 (1980).

<sup>53</sup>*Id.* at 38 n. 3, 414 N.E. 2d at 407 n. 3. The plaintiff was seventeen years old when the cause of action accrued. Suit was filed seventeen months later. Plaintiff-appellant contended that § 2305.11(B) applied to minors over fourteen, tolling the one year limitation period until he was eighteen. Then § 2305.11(A) would apply and allow him one year, or until age nineteen, to bring a malpractice action. *Id.* at 38, 414 N.E. 2d at 407.

<sup>54</sup>64 Ohio St. 2d at 42, 414 N.E. 2d at 409. Minors under the age of ten have until their fourteenth birthday to bring a medical malpractice cause of action. Minors ten and older have only one year. OHIO REV. CODE ANN. § 2305.11 (Page 1981).

involved an action that accrued in 1976, approximately one year after the effective date of the amended statute.<sup>55</sup> Therefore, the *Vance* court had merely to interpret the legislative intent and apply it to the facts at hand. In *Baird*, however, the alleged malpractice occurred in 1972, three years before the malpractice statute was amended.<sup>56</sup> Because Joseph Baird was a minor, the action was tolled under the pre-amendment statute until he reached majority.<sup>57</sup> As a result, the Ohio Supreme Court could not simply apply the *Vance* court's interpretation of the amended statute. Instead, the *Baird* court first had to address the more difficult issue of retroactivity.<sup>58</sup>

Several important considerations which must be taken into account when determining whether to apply a statute retroactively are: 1) constitutional prohibitions; 2) state statutory restrictions; and 3) legislative intent.<sup>59</sup> On the State level, Article II, Section 28 of the Ohio Constitution specifically prohibits retroactive application of laws.<sup>60</sup> It has been interpreted to apply only to substantive and not to procedural or remedial rights.<sup>61</sup> In *Denicola v. Providence Hospital*, the Ohio Supreme Court outlined procedural or remedial rights as those which provide "rules of practice, courses of procedure, or methods of review. . . ."<sup>62</sup> As determined in *Terry v. Anderson*,<sup>63</sup> statutes of limitation are remedial in nature and therefore may be applied retroactively to existing causes of action.<sup>64</sup> The *Terry* court did place a restriction on their application, though; they could affect existing rights provided that "a reasonable time is given for the commencement of an action before the bar takes effect."<sup>65</sup> This restriction, as outlined by the United States Supreme Court, has also been adopted by the Ohio Supreme Court in numerous cases.<sup>66</sup>

In reaching its decision in *Baird v. Loeffler*, the Ohio Supreme Court relied on the fact the statutes of limitation had previously been determined to be procedural.<sup>67</sup> Since Joseph Baird would not be barred from bringing an action

<sup>55</sup>64 Ohio St. 2d at 36, 414 N.E. 2d at 406.

<sup>56</sup>69 Ohio St. 2d at 533, 433 N.E. 2d at 195-96.

<sup>57</sup>*Id.* at 533-35, 433 N.E. 2d at 195-96.

<sup>58</sup>*Id.* at 534-35, 433 N.E. 2d at 195-96.

<sup>59</sup>See *Ohio's Statute*, *supra* note 31, at 148-49. See also Note, *The Retroactive Application of Ohio Statutes*, 30 OHIO ST. L. J. 401, 401-10 (1969).

<sup>60</sup>OHIO CONST. art. II, § 28 provides in pertinent part: "The general assembly shall have no power to pass retroactive laws, . . ." *Id.*

<sup>61</sup>*Denicola v. Providence Hosp.*, 57 Ohio St. 2d 115, 115, 387 N. E. 2d 231, 232 (1979); *Smith v. New York Cent. R.R. Co.*, 122 Ohio St. 45, 45, 170 N.E. 637, 637 (1930).

<sup>62</sup>57 Ohio St. 2d 115, 117, 387 N.E. 2d 231, 233 (1979), *citing State ex rel. Slaughter v. Indus. Comm'n.*, 132 Ohio St. 537, 9 N.E. 2d 505 (1937); *Kilbreath v. Rudy*, 16 Ohio St. 2d 70, 242 N.E. 2d 658 (1968).

<sup>63</sup>95 U.S. 628, 632-33 (1877).

<sup>64</sup>*Id.*

<sup>65</sup>*Id.* (citations omitted).

<sup>66</sup>*Cook v. Matvejs*, 56 Ohio St. 2d 234, 236-37, 383 N.E. 2d 601, 603-04 (1978); *Gregory v. Flowers*, 32 Ohio St. 2d 48, 52-54 290 N.E. 2d 181, 184-85 (1972); *Smith v. New York Cent. R.R. Co.*, 122 Ohio St. 45, 51, 170 N.E. 637, 639 (1930).

<sup>67</sup>69 Ohio St. 2d at 535, 433 N.E. 2d at 196.

until one year after the effective date of the amended statute, they concluded that this was a reasonable time, and that therefore, the amendment could apply retroactively.<sup>68</sup>

As the dissent pointed out, however, Joseph's right to bring a malpractice action expired when he was only fifteen years old.<sup>69</sup> Requiring a child to sue before he reached the age of majority did not provide him with a "reasonable time" within which to bring a cause of action;<sup>70</sup> "[t]he child has no standing to sue before he is eighteen years old and no right to sue thereafter."<sup>71</sup> The dissent provided a well reasoned, logical conclusion. They realized that the practical effect of applying section 2305.11(B) would be to bar totally Joseph Baird's cause of action.

By contrast, the majority failed to reach a fair and just conclusion because they relied on the conclusion that, under the circumstances, one year was a reasonable time in which to bring an action.<sup>72</sup> The retroactive application of a statute of limitations to cut off a vested right is harsh on a minor. By allowing Joseph only until the age of fifteen to bring a malpractice action, the majority precluded Joseph himself from ever bringing an action. As the dissent indicated, the majority emphasized the rights of the medical profession and the insurance companies over those of an injured child by so ruling.<sup>73</sup>

The *Baird* majority indiscriminately relied upon their finding of reasonableness in *Cook v. Matvejs*.<sup>74</sup> The *Cook* case involved a plaintiff, age seventeen, who was injured in a car accident. The applicable statutes provided that he could bring a personal injury action within two years of reaching the age of majority (which was twenty-one at the time).<sup>75</sup> After the plaintiff reached eighteen, the age of majority was reduced to eighteen.<sup>76</sup> He filed suit on his twenty-first birthday, but the Ohio Supreme Court ruled that the amended statute was applicable and barred his action.<sup>77</sup> They reasoned that having two years to bring an action after the effective date of the amendment was a reasonable time.<sup>78</sup>

In applying this reasoning to the *Baird* case, the majority failed to make

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<sup>68</sup>*Id.* at 534-36, 433 N.E. 2d at 195-96.

<sup>69</sup>*Id.* at 537, 433 N.E. 2d at 197 (Brown, J., dissenting).

<sup>70</sup>*Id.* (Brown, J., dissenting).

<sup>71</sup>*Id.* (Brown, J., dissenting).

<sup>72</sup>*Id.* at 535-36, 433 N.E. 2d at 196.

<sup>73</sup>*Id.* at 538, 433 N.E. 2d at 198 (Brown, J., dissenting).

<sup>74</sup>56 Ohio St. 2d 234, 383 N.E. 2d 601 (1978).

<sup>75</sup>OHIO REV. CODE ANN. § 2305.10 (Page 1981) provides: "An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose." *Id.* This statute, construed together with the statute for the tolling of a minor's claim (OHIO REV. CODE ANN. § 2305.16 (Page 1981)) produced this result.

<sup>76</sup>OHIO REV. CODE ANN. § 3109.01 (Page 1980) (effective date, January 1, 1974).

<sup>77</sup>56 Ohio St. 2d at 238, 383 N.E. 2d at 604.

<sup>78</sup>*Id.* at 237, 383 N.E. 2d at 604.

a key distinction between the two cases. In *Cook*, the plaintiff was of majority during the two year period that he had to bring the action after the effective date of the amendment. In *Baird*, however, the plaintiff's right to bring an action was barred before he ever reached majority and would have had the capacity to bring an action.<sup>79</sup>

The second consideration in determining whether this statute could be applied retroactively, is the statutory restrictions against such application. Until 1972, Ohio Revised Code section 1.20 was in effect and controlled the effect of an amended statute on the causes of action arising prior to its effective date.<sup>80</sup> This provision allowed statutes to be applied retroactively unless the action was actually commenced prior to the effective date of the amended statute.<sup>81</sup> However, section 1.20 was repealed in 1972 and replaced by Ohio Revised Code section 1.58 which provides in pertinent part:

- (A) The reenactment, amendment, or repeal of a statute does not . . .
- (1) Affect the prior operation of a statute or any prior action taken thereunder;
  - (2) Affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder; . . . .<sup>82</sup>

According to section 1.58, it appears that the legislature is barred from applying section 2305.11(B) retroactively in Joseph Baird's situation. He had a vested right to bring a cause of action prior to the amendment of the medical malpractice statute. Because his action was barred before he reached the age of majority, he was effectively precluded from exercising that right. It can be inferred from the language of section 1.58 that the legislature intended to make a major change in its policy and not allow a statute such as section 2305.11(B) to be applied retroactively.<sup>83</sup>

A second statute that must be examined, is Ohio Revised Code section 1.48<sup>84</sup> This statute does not bar a statute's retroactivity, but looks to the last factor in determining retroactivity, the legislative intent. It states that "[a] statute is presumed to be prospective in its operation unless expressly made retrospective."<sup>85</sup>

<sup>79</sup>69 Ohio St. 2d at 537, 433 N.E. 2d at 197 (Brown, J., dissenting).

<sup>80</sup>Act of February 19, 1866, 63 Ohio Laws 22 (repealed 1972).

<sup>81</sup>Elder v. Shoffstall, 90 Ohio St. 265, 274, 107 N.E. 539, 541-42 (1914).

<sup>82</sup>OHIO REV. CODE ANN. § 1.58 (Page 1978).

<sup>83</sup>See Reed v. Hollen, 7 Ohio Op.3d 109 (C. P. Carroll Co. 1977). OHIO REV. CODE ANN. § 1.58 (Page 1978). Prior to the enactment of § 1.58, the distinction was that procedural or remedial statutes could be applied retroactively, but that those relating to substantive rights could not be. Section 1.58 is itself indicative of the change because it leaves out any reference to remedial statutes (such as § 1.20 had), and outlines a simple rule of retroactivity for both. OHIO REV. CODE ANN. § 1.58 (Page 1978).

<sup>84</sup>OHIO REV. CODE ANN. § 1.48 (Page 1978).

<sup>85</sup>*Id.*

Several cases have interpreted the effect of section 1.48 on the retroactive application of statutes. In *Young v. Alberts*,<sup>86</sup> the court held that the amended Ohio Medical Malpractice Statute did not apply retroactively to bar a claim that arose and was filed prior to the July 28, 1975, effective date.<sup>87</sup> The *Young* court refused to reach the substance versus procedure issue because there was no legislative intent that the statute apply retroactively.<sup>88</sup> Relying on section 1.48, the court simply stated that the malpractice statute could not be made retroactive because the General Assembly did not even attempt to do so.<sup>89</sup>

Similar reasoning was used in *Reed v. Hollen*<sup>90</sup> to hold that a claim was not shortened due to the lowering of the age of majority from age twenty-one to age eighteen.<sup>91</sup> The *Reed* court relied upon section 1.48 and the artificial distinction between procedure and substance in support of their decision that the statute was not to be applied retroactively.<sup>92</sup> The *Reed* court also pointed out that the case law holding statutes of limitation to be procedural and, therefore, retroactive, predated section 1.48 and may have become "obsolete because they are superseded by a legislative enactment."<sup>93</sup>

The *Baird* majority failed to examine the legislature's intent with regard to retroactivity and its application to the amended malpractice statute. Where the statute was silent on the issue of retroactivity, the *Baird* court should have looked to section 1.48, as the courts in *Young* and *Reed* did, and concluded that section 2305.11(B) was not intended to be applied retroactively. It is presumed that the legislature is familiar with the statutes that it has previously enacted (section 1.48) and enacts new statutes with those in mind.<sup>94</sup>

#### CONCLUSION

Very few other states have dealt with the issue presented in *Baird v. Loeffler*. The majority of courts that have addressed this or similar issues are in accord with *Baird* and have concluded that the statutes of limitation that shorten the

<sup>86</sup>73 Ohio Op.2d 32, 342 N.E.2d 700 (C. P. Hamilton Co. 1975).

<sup>87</sup>*Id.* at 33, 34, 342 N.E. 2d at 701-02.

<sup>88</sup>*Id.*

<sup>89</sup>*Id.* at 33, 342 N.E. 2d at 701.

<sup>90</sup>7 Ohio Op. 3d 109 (C. P. Carroll Co. 1977).

<sup>91</sup>*Id.* at 110.

<sup>92</sup>*Id.* at 115.

<sup>93</sup>*Id.* at 114. Cf. Comment, *Comparative Negligence in Ohio: Prospective or Retrospective Application*, 14 AKRON L. REV. 647, 650-53 (1981). But cf. *Denicola v. Providence Hospital*, 57 Ohio St. 2d 115, 387 N.E. 2d 231 (1979) which appears to have diminished the importance of § 1.48. The issue presented was whether a statute that the plaintiff conceded to be procedural violated § 1.48 when applied to an action that accrued before the effective date of OHIO REV. CODE ANN. § 2743.43 (Page 1981) (defining who was competent to testify as a medical witness). The *Denicola* court preliminarily concluded that article I, § 28 of the Ohio Constitution was not violated because the statute was procedural. But, the court failed to inquire whether the statute was expressly made retroactive, find it was not, and then apply § 1.48, which would have barred its retroactive application. Instead, the court further examined the procedure versus substance distinction, and relied on pre-§ 1.48 case law to conclude that the statute was to be retroactively applied. 57 Ohio St. 2d at 117-18, 387 N.E. 2d at 233.

<sup>94</sup>See *Smith v. New York Cent. R.R. Co.*, 122 Ohio St. at 56, 170 N.E. at 640-41.

time in which an action can be brought can apply retroactively, as long as a reasonable time is allowed after the amendment's effective date.<sup>95</sup> However, these decisions have strong dissents that parallel the dissent in *Baird v. Loeffler*.<sup>96</sup> At least one state decided in favor of the minor child in a situation similar to Joseph Baird's.<sup>97</sup>

The *Baird* dissent very perceptively outlined the fallacies in the majority's opinion.<sup>98</sup> Ohio, as well as numerous other states, appear to have overreacted to the medical malpractice crisis of the mid-1970's and have appeared to weigh the interests of physicians and medical malpractice insurers above the interests of the injured plaintiff.<sup>99</sup> This is particularly true in situations similar to that of Joseph Baird, who effectively had a vested right to a cause of action barred before he was capable of bringing the action himself.

The strong dissent in *Baird v. Loeffler* is a positive sign that some judges are attempting to achieve a more equitable balancing of the two interests. Hopefully, the opinion espoused by the dissent in *Baird v. Loeffler* will gain strength as the panic from the crisis of the mid-1970's subsides.<sup>100</sup>

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<sup>95</sup>See *Olivas v. Weiner*, 127 Cal. App. 2d 597, 600, 274 P. 2d 476, 478 (Los Angeles Co. 1954). This case dealt with a similar issue as that dealt with in *Baird v. Loeffler*. The *Olivas* court concluded that a "reasonable" time must have been allowed within which to assert the cause. The court held that this reasonable period was the six-year limit imposed by the act. The plaintiff herein filed his action 12 years after the effective date of the amendment. *Id.* at 600, 274 P. 2d at 478. See also *Reese v. Rankin*, 403 So. 2d 158 (Ala. 1981); *Thomas v. Niemann*, 397 So. 2d 90 (Ala. 1981).

<sup>96</sup>See *Thomas v. Niemann*, 397 So. 2d 90, 93 (Ala. 1981) (Embry, Faulkner, and Beatty, JJ., dissenting). They indicated that an amendment to a statute of limitations applied retroactively unless there was clear legislative intent to the contrary. The retroactivity was further restricted by the requirement that it provide a reasonable time for the existing cause of action to be brought. *Id.* at 97. See also, *Reese v. Rankin*, 403 So. 2d at 162 (Faulkner and Embry, JJ., dissenting).

<sup>97</sup>*Doran v. Compton*, 645 F. 2d 440 (5th Cir. 1981). The *Doran* court looked to a statute similar to Ohio Revised Code § 1.48 that provided that the statute would apply prospectively unless there was contrary legislative intent; none was found. *Id.* at 449-52.

<sup>98</sup>69 Ohio St. 2d at 537-38, 433 N.E. 2d at 197-98 (Brown, J., dissenting).

<sup>99</sup>*Id.* (Brown, J., dissenting).

<sup>100</sup>The Ohio Supreme Court faced a very similar issue after deciding *Baird v. Loeffler*; in *Meros v. University Hosp.*, 70 Ohio St. 2d 143, 435 N.E. 2d 117 (1982), the plaintiff's cause of action for medical malpractice accrued prior to the effective date of the amendment to the medical malpractice statute of limitations. She was under a legal disability as the result of the negligence, having suffered brain damage. Her action was brought more than one year after the effective date of the amendment. The court, relying on *Baird*, ruled that § 2305.11(B) applied retroactively and that the plaintiff's cause of action was barred. Justice Brown again dissented, contending that just as a minor should not be denied a day in court, neither should a disabled individual. Chief Justice Celebrezze, who dissented in *Baird*, did not participate. Justice Locher concurred in the dissent. *Id.*