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Application of the Discovery Rule to the Ohio Wrongful Death Statute

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APPLICATION OF THE DISCOVERY RULE TO THE OHIO WRONGFUL DEATH STATUTE

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I. INTRODUCTION

How can anyone be precluded from asserting a claim by a statute of limitations which expires before the discovery of the injury? How can anyone charged with the responsibility of administering justice allow such an absurdity?¹

This was the reaction of Chief Justice Celebrezze in *Amer v. Akron City Hospital*² to the fate of the plaintiff, whose wife was the victim of a hospital's negligent administration of radiation therapy. The plaintiff-husband was barred from bringing suit for loss of consortium and medical expenses by a statute of limitations which required the action be brought

¹ *Amer v. Akron City Hosp.*, 47 Ohio St. 2d 85, 93, 351 N.E.2d 479, 485 (1979); see also *Dincher v. Marlin Firearms Co.*, 198 F.2d 821, 823 (2d Cir. 1952)(Frank, J., dissenting). Judge Frank stated:

Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal 'axiom,' that a statute of limitations does not begin to run against a cause of action before that cause of action exists, i.e., before a judicial remedy is available to the plaintiff. *Id.* (footnotes omitted).

² 47 Ohio St. 2d at 93, 351 N.E.2d at 479.

within two years of the termination of the doctor-patient relationship. The ill effects of the alleged malpractice did not manifest themselves until well after the termination of the doctor-patient relationship.³

An injustice similar to that described occurs when the family of a wrongful death victim is precluded from asserting a wrongful death claim by a two year statute of limitations which expires before the discovery that the death was the result of a wrongful act. This injustice is imposed as a matter of law, however, by Section 2125.02 of the Ohio Revised Code, Ohio's wrongful death statute of limitation.⁴

The focus of this Note will be on the statute of limitation applicable to the Ohio wrongful death statute.⁵ This statute requires that any claim

³ *Id.* at 87, 351 N.E.2d at 481.

⁴ OHIO REV. CODE ANN. § 2121.02 (Baldwin 1987). The statute provides:

(A)(1) An action for wrongful death shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children, and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent.

(2) The jury, or the court if the action is not tried to a jury, may award damages authorized by divisions (B) and (C) of this section, as it determines are proportionated to the injury and loss resulting to these beneficiaries by reason of the wrongful death and may award the reasonable funeral and burial expenses incurred as a result of the wrongful death. In its verdict, the jury or court shall set forth separately the amount, if any, awarded for the reasonable funeral and burial expenses incurred as a result of the wrongful death.

(3) The date of the decedent's death fixes the status of all beneficiaries of the action for purposes of determining the damages suffered by them and the amount of damages to be awarded. A person who is conceived prior to the decedent's death and who is born alive after his death is a beneficiary of the action.

In determining the amount of damages to be awarded, the jury or court may consider all factors existing at the time of the decedent's death that are relevant to a determination of the damages suffered by reason of the wrongful death.

(b) Compensatory damages may be awarded in an action for wrongful death and may include damages for the following:

(1) Loss of support from the reasonably expected earning capacity of the decedent;

(2) Loss of services of the decedent;

(3) Loss of the society of the decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education, suffered by the surviving spouse, minor children, parents, or next of kin;

(4) Loss of prospective inheritance, to the decedent's heirs at law at the time of his death;

(5) The mental anguish incurred by the surviving spouse, minor children, parents, or next of kin.

(C) A personal representative appointed in this state, with the consent of the court making the appointment, may, at any time before or after the commencement of an action for wrongful death, settle with the defendant the amount to be paid.

(D) All actions for wrongful death shall be commenced within two years after a decedent's death.

⁵ OHIO REV. CODE ANN. § 2125.02(D) (Baldwin 1987). It reads: "All actions for wrongful death shall be commenced within two years after a decedent's death."

for wrongful death be brought within two years of the date of death. Application of the discovery rule⁶ to the wrongful death statute would allow an action to be brought within two years of discovering that the death was the result of a wrongful act.

The customary application of the discovery rule to bodily injury and malpractice actions, but not to wrongful death actions, can result in harsh inequities. To best explain the possible inequities involved in this judicially limited application of the discovery rule, the following situations are presented as an illustration. In all the situations below, Herbert is the victim of the wrongful act, Henrietta is Herbert's spouse, and Healthy Hospital is the wrongdoer.

Situation 1 - Just before their wedding, Herbert entered Healthy Hospital for some tests. Herbert had been experiencing a tingling feeling in his fingers and toes. Doctors at Healthy Hospital neglected to run a battery of tests that would have revealed that Herbert was suffering from a nervous disease which was curable if treated early. Herbert's tingling feeling disappeared as quickly and mysteriously as it appeared. Herbert and Henrietta discovered the hospital's negligence on or about their twentieth wedding anniversary when symptoms of the disease again manifested themselves. Herbert and Henrietta may bring a negligence action against Healthy Hospital if the action is commenced before their twenty-second anniversary, i.e., within the applicable statute of limitations.⁷

Situation 2 - Same scenario as Situation 1, except that upon discovery, Herbert refuses to bring a lawsuit and waste the little time he has left in an all-consuming court battle. Herbert dies as a result of the disease three years after he discovered Healthy Hospital's negligence. Henrietta may bring a wrongful death action despite the fact that Herbert failed to bring a claim against Healthy.⁸ Henrietta would have the opportunity to recover.

Situation 3 - The same scenario as Situation 1, except that the disease mysteriously progresses at a rapid rate, but could have been successfully treated with early diagnosis. Herbert dies on their fifth anniversary. On what would have been their twentieth anniversary, Henrietta discovers that Herbert would not have died if Healthy Hospital's doctors had not negligently failed to diagnose and treat Herbert's disease. Absent the discovery rule, Henrietta would be barred from bringing suit for failure to commence the action within the required two years.⁹ Henrietta would be precluded from recovery before she even knew the opportunity to recover existed. Healthy Hospital and its doctors would never be held accountable for their negligence.

⁶ The discovery rule provides that the statute of limitation on an action would not start to run until the party entitled to bring an action discovers or reasonably should have discovered that (1) he or she has been injured, and (2) the injury is the result of the wrongful or negligent action(s) of the defendant. *Oliver v. Kaiser Community Health Found.*, 5 Ohio St. 3d 111, 449 N.E.2d 438 (1983). See generally 66 O.JUR.3D *Limitations and Laches* § 94 (1964).

⁷ See *infra* notes 41-44 and accompanying text.

⁸ See *infra* note 29 and accompanying text.

⁹ See *supra* note 4.

Situation 4 - Same scenario as Situation 3, except that Healthy Hospital takes deliberate steps to prevent Herbert and Henrietta from discovering their negligence. Henrietta discovers the wrongful nature of Herbert's death fifteen years after Herbert's death and twenty years after Healthy's negligence. Henrietta would still be barred from bringing suit because she failed to commence the action within two years of Herbert's death. This result occurs despite the fact that the hospital took deliberate steps to conceal their negligence.¹⁰

In each situation, Healthy Hospital's negligent act was equally severe. In each situation, Herbert and Henrietta were unaware of any possible negligence on the part of the hospital. The only difference was that in Situations 3 and 4, Herbert suffered the additional misfortune of dying from Healthy Hospital's wrongful act many years before the wrongful nature of the act was discovered.

This Note will review the development of both the wrongful death statute and the discovery rule. Next, a discussion of how other states have dealt with this issue will be presented. An outline of the various approaches and how they might be utilized by members of the Ohio legal and judicial communities will follow. The Note will conclude with a recommendation that Ohio reject its longstanding adherence to an archaic rationale that has prevented application of the discovery rule in wrongful death action and that Ohio remedy this inequity by allowing the discovery rule to operate for these claims.

A. Perspective on the Nineteenth Century Statutory Development

The present Ohio wrongful death statute has its origins in nineteenth century English law. The English wrongful death statute, enacted in 1846¹¹ and commonly referred to as Lord Campbell's Act, created a cause of action for wrongful death. Until that time the English common law did not recognize actions for wrongful death¹². Essentially, the Act provided: (1) a plaintiff can bring an action based on wrongful act, neglect, or default, (2) the act, neglect, or default must be such that the decedent would have had a cause of action had death not ensued, (3) the recovery could be had even though the wrongful act could be a felony, (4) the action is brought by the executor or administrator for the benefit of the wife, husband, parents and child of the decedent, and (5) the action must be commenced within one year of the decedent's death.¹³ The provisions of

¹⁰ See *infra* note 128.

¹¹ Lord Campbell's Act, 1846, 9 & 10 Vict. Ch. 93. [hereinafter Lord Campbell's Act].

¹² Baker v. Bolton, 1 Campb. 493, 170 Eng. Rep. 1033 (1808); see also S.M. SPEISER, RECOVERY FOR WRONGFUL DEATH § 1:2 (2d ed. 1975) [hereinafter SPEISER].

¹³ Lord Campbell's Act. See also Ohio Legal Center Institute, Reference Manual for Continuing Legal Education, WRONGFUL DEATH Vol. 129, at 1.02 (1982) [hereinafter OLCI Manual].

the Ohio wrongful death statute enacted in 1851 were very similar to those of Lord Campbell's Act.¹⁴

A very succinct summary of why the common law rule against wrongful death actions developed as it did in England and how American courts adopted the rule was expressed by Justice Harlan in *Moragne v. States Marine Lines, Inc.*¹⁵ Justice Harlan said:

One would expect, upon an inquiry into the sources of the common-law rule, to find a clear and compelling justification for what seems a striking departure from the result dictated by elementary principles in the law of remedies. Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious enough to cause death. On the contrary, that rule has been criticized ever since its inception, and described in such terms as 'barbarous.' Because the primary duty already exists, the decision whether to allow recovery for violations causing death is entirely a remedial matter. It is true that the harms to be assuaged are not identical in the two cases: in the case of mere injury, the person physically harmed is made whole for his harm, while in the case of death, those closest to him — usually spouse and children — seek to recover for their total loss of one on whom they depended. This difference, however, even when coupled with the practical difficulties of defining the class of beneficiaries who may recover for death, does not seem to account for the law's refusal to recognize a wrongful killing as an actionable tort. One expects therefore, to find a persuasive, independent justification for this apparent legal anomaly.

Legal historians have concluded that the sole substantial basis for the rule at common law is a feature of the early English law that did not survive into this century — the felony-merger doctrine. . . . The doctrine found practical justification in the fact that the punishment for the felony was the death of the felon and the forfeiture of his property to the Crown; thus, after the crime had been punished, nothing remained of the felon or his property on which to base a civil action. Since all intentional or negligent homicide was felonious, there could be no civil suit for wrongful death.

The first explicit statement of the common-law rule against recovery for wrongful death came in the opinion of Lord Ellenborough sitting at *nisi prius*, in *Baker v. Bolton*, 1 Camp. 493, 170 Eng.Rep. 1033 (1808). That opinion did not cite authority or give supporting reasoning, or refer to the felony-

¹⁴ OLCI Manual, *supra* note 7, at 1.04. Compare Lord Campbell's Act, 1846, 9 & 10 Vict. Ch. 93 with 43 Ohio Laws 117 (Ohio's original wrongful death statute).

¹⁵ *Moragne v. States Lines, Inc.*, 398 U.S. 375 (1970)(Harlan, J., concurring).

merger doctrine in announcing that '[i]n a civil Court, the death of a human being could not be complained of as an injury.' [citation omitted]. Nor had the felony-merger doctrine seemingly been cited as the basis for the denial of recovery in any of the other reported wrongful-death case since the earliest ones, in the 17th century. . . .

The historical justification marshalled for the rule in England never existed in this country. In limited instances American law did adopt a vestige of the felony-merger doctrine, to the effect that a civil action was delayed until after the criminal trial. However, in this country the felony punishment did not include forfeiture of property; therefore, there was nothing, even in those limited instances, to bar subsequent civil suit. Nevertheless, despite some early cases in which the rule was rejected as 'incapable of vindication,' American courts generally adopted the English rule as the common law of this country as well. Throughout the period of this adoption, the courts failed to produce any satisfactory justification for applying the rule in this country.¹⁶

This historical perspective undermines the foundation for the common law rule against wrongful death actions. It also challenges the premise, which will be discussed in greater detail later, that wrongful death statutes are in derogation of common law.

B. Modern Wrongful Death Statutory Interpretation

The cases cited in this section serve two purposes. First, these cases indicate the modern interpretation of Ohio's wrongful death statute of limitations. Second, they demonstrate some of the inequities that result from the interpretation of the limitation provision.

In *Sabol v. Pekoc, Jr.*¹⁷, the Ohio Supreme Court concluded that the two year statute of limitations applicable to the wrongful death provision was not an ordinary time limitation upon the remedy, but an essential element of the right to bring the action.¹⁸ Mary Sabol worked as a janitress on the defendant's property and died of work-related injuries. The defendant fraudulently represented to the administrator of Mrs. Sabol's estate that the defendant's mother was the actual owner of the property. The defendant encouraged the administrator to bring suit and represented that his mother's insurance would cover any judgment. After the two year statute of limitations had expired, it was discovered that the property actually belonged to the defendant.¹⁹ The administrator's suit was dismissed as being barred by the two year statute of limitation provision of Section 2125.02(D).

¹⁶ *Id.* at 381-85 (citations omitted).

¹⁷ 148 Ohio St. 545, 76 N.E.2d 84 (1947).

¹⁸ *Id.* at 552, 76 N.E.2d at 88.

¹⁹ *Id.* at 549, 76 N.E.2d at 85.

The *Sabol* court made particular note of the fact that the right conferred by the wrongful death statute did not exist at common law.²⁰ As a right created solely by statute, it must be applied strictly in accord with its essential terms.²¹ The statutory language requiring the action to be brought within two years of the decedent's death expressed an "integral element of the right of the action itself . . . , a condition precedent to bringing the action."²²

The "condition precedent" language of the *Sabol* opinion poses trouble for any wrongful death plaintiff for two reasons. First, a plaintiff will be barred from bringing a suit two years after the date of death, despite active concealment on the part of the defendant. Second, the fact that the cause of action will not exist unless brought within two years could possibly place the action outside the protection of the Ohio Constitution's "open court/right-to-a-remedy" provision, Section 16, Article I.²³

The case of *Klema v. St. Elizabeth's Hospital of Youngstown*,²⁴ illustrates the inequities among different types of wrongful death cases. In *Klema*, the decedent died four days after anesthesia was negligently administered and a wrongful death action was subsequently brought within two years required by Section 2125.02(D).²⁵ The defendant-hospital contended that the applicable time limitation should have been Section 2305.11 of the Ohio Revised Code, which required that actions for malpractice be brought within one year of accrual.²⁶ The court conceded that had the decedent survived and brought suit, Section 2305.11 would clearly have provided the applicable time limitation. Pointing to the well established rule that the wrongful death action brought under Section 2125.01 was "completely distinct from that which accrued to the party directly injured," the *Klema* court held one-year time limitation applicable to decedent did not apply to the plaintiff.²⁷ The *Klema* court stated:

²⁰ *Id.* at 552, 76 N.E.2d at 88.

²¹ *Id.*

²² *Id.* See also *Pittsburgh, Cincinnati & St. Louis Ry. v. Hine*, 25 Ohio St. 629 (1874). In 1872, the first amendment to the wrongful death statute raised the maximum recovery to \$10,000 and omitted the two-year statute of limitations provision. The next amendment, in 1880, restored the two-year period of limitation. The death in *Hine* occurred before the 1972 amendment omitting the time limit but the action was commenced after the 1872 amendment. The *Hine* court concluded that the omission did not have the effect of extending the time in which the action could be brought. It also interpreted the time provision as establishing a condition precedent to bringing the action.

²³ Section 16, Article I of the Ohio Constitution provides: "All courts shall be open, and every person, for an injury done to him in his land, goods, person, or reputation, shall have a remedy by due course of law, and shall have justice administered without denial or delay."

²⁴ 170 Ohio St. 519, 166 N.E.2d 765 (1960). See also *Koler v. St. Joseph's Hosp.*, 69 Ohio St. 2d 477, 432 N.E.2d 821 (1982).

²⁵ *Klema*, 170 Ohio St. at 519, 166 N.E.2d at 767.

²⁶ *Id.* (citing *Karr v. Sixt*, 146 Ohio St. 527, 67 N.E.2d 331 (1946)); *May Coal Co. v. Robinette*, 120 Ohio St. 110, 165 N.E. 576 (1929); *Mahoning Valley Ry. v. Van Alstine*, 77 Ohio St. 395, 83 N.E. 601 (1908).

²⁷ *Klema*, at 525, 166 N.E.2d at 766; see also *Koler*, 69 Ohio St. 2d at 479, 432 N.E.2d at 823.

Where an alleged negligent act was such as would have, if death had not ensued, entitled a person to maintain an action therefor, a cause of action for wrongful death exists in such decedent's personal representative, and such cause of action for wrongful death cannot be defeated merely by reason of the bar of limitation which would have been applicable to decedent's action.²⁸

The *Klema* decision brings into focus the distinction between bodily injury or medical malpractice action which the decedent would bring before his death and the wrongful death action which the administrator would bring after the decedent's death. The two types of actions are distinct and independent with distinct and independent statutes of limitation. Although the *Klema* ruling was decided prior to the recognition of the discovery rule, that fact does not diminish the precedential value of the holding. According to the *Klema* rationale, the administrator of the decedent's estate would be able to bring a wrongful death action despite the fact that, before his death, the decedent discovered the existence of a cause of action and failed to bring his action within the appropriate statute of limitation.²⁹ These inequities are further illustrated by comparing Situation 2 to Situation 3, *supra*.

III. DEVELOPMENT OF THE DISCOVERY RULE

Actions brought under Ohio's bodily injury statute and malpractice statute must be brought within a certain period, two and one years respectively, after the cause thereof "accrued."³⁰ The simplest and probably

²⁸ *Klema*, 170 Ohio St. at 519, 166 N.E.2d at 470.

²⁹ *Id.* at 525, 166 N.E.2d at 766. In dictum, the *Klema* court remarked that "had the decedent lived for more than one year after the negligent act without having brought a malpractice action in his own behalf, his personal representative could have brought an action for wrongful death based on such negligent act."

³⁰ See OHIO REV. CODE ANN. §§ 2305.10, 2305.11(A) (Baldwin 1984). Section 2305.10 reads:

An action for bodily injury or injury to 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 asbestos 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.

For purposes of this section, a cause of action for bodily injury incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure.

As used in this section "agent orange," "causative agent," and "veteran" have the same meanings as in section 5903.21 of the Revised Code.

harshest method of determining the accrual date was the general rule that the "cause of action accrue[d] when the wrongful act complained of [was] committed."³¹ This often resulted in the statute of limitations running out before the injury manifested itself.

The first step to reducing the harshness of this rule in malpractice cases was the adoption of a termination rule.³² The termination rule established the accrual date for the running of the time limitation as the date the professional relationship terminated.³³ "The justification given for the termination rule [was] that it strengthen[ed] the physician-patient relationship [by allowing] [t]he patient to rely upon the doctor's ability until the relationship [was] terminated" and to allow the physician to fully treat the patient, including remedying any mistakes made.³⁴

However, in *Wyler v. Tripi*,³⁵ the Ohio Supreme Court acknowledged that the termination rule did little for those whose injuries required a long time to develop and that the rule bore no logical relationship to the injury incurred.³⁶ While recognizing that the purpose of the discovery rule was to ameliorate the harshness of both past and existing rules for es-

For purposes of this section, a cause of action for bodily injury which may be caused by exposure to diethylstilbestrol or other nonsteroidal synthetic estrogens, including exposure before birth, arises upon the date on which the plaintiff learns from a licensed physician that he has an injury which may be related to such exposure, or upon the date on which by the exercise of reasonable diligence he should have become aware that he has an injury which may be related to such exposure, whichever date occurs first.

Section 2305.11(A) provides in part:

(A) An action for libel, slander, malicious prosecution, false imprisonment, or malpractice, including 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, provided that an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation, shall be brought within two years 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.

³¹ *Wyler v. Tripi*, 25 Ohio St. 2d 164, 166, 267 N.E.2d 419, 421 (1971).

³² *Id.* See also *Delong v. Campbell*, 157 Ohio St. 2, 104 N.E.2d 177 (1952); *Bowers v. Santee*, 99 Ohio St. 361, 124 N.E. 238 (1919); *Gillette v. Tucker*, 67 Ohio St. 106, 65 N.E. 865 (1902). These cases were subsequently overruled by *Oliver v. Kaiser Community Health Found.*, 5 Ohio St. 3d 111, 449 N.E.2d 439 (1983). See *infra* note 35 and accompanying text.

³³ *Wyler*, 25 Ohio St. 2d at 166, 267 N.E.2d at 421.

³⁴ *Id.* at 168, 267 N.E.2d at 421 (citing *Bowers v. Santee*, 99 Ohio St. 361, 124 N.E. 238 (1919)).

³⁵ *Wyler*, 25 Ohio St. 2d 164, 267 N.E.2d 419.

³⁶ *Id.* at 168, 267 N.E.2d at 421.

tablishing the accrual date for statute of limitation purposes,³⁷ the *Wyler* court refused to adopt the discovery rule. The court reasoned that it would be legislating³⁸ and preferred to leave the adoption of the discovery rule to the legislature.³⁹

In 1980, the Ohio General Assembly amended Section 2305.10 of the Ohio Revised Code thereby adopting a statutory discovery rule. The "discovery rule amendment" applied only to bodily injury claimants injured by exposure to asbestos, chromium, chemical defoliants, or diethylstilbestrol (DES). The accrual date was established as the date on which the plaintiff was informed by his physician or through the exercise of reasonable diligence should have become aware that the injury was the result of exposure to the above agents.⁴⁰

In 1983, the Ohio Supreme Court judicially created a discovery rule applicable to all types of bodily injury claims under Section 2305.10 and malpractice actions under Section 2305.11. The first case to apply the discovery rule was *O'Stricker v. Jim Walter Corp.*⁴¹ In *O'Stricker*, plaintiff's cancer was related to exposure to asbestos, but the action for bodily injury was brought prior to the General Assembly's amendment to Section 2305.10. Prior to the 1980 amendment, bodily injury actions involving exposure to toxic substances was governed by the "last exposure rule," which dictated that the statute of limitation begins to run upon the date of plaintiff's last exposure. Defendant contended plaintiff's last exposure was in 1973 and that the action would have been thus barred under the "last exposure rule."⁴² The *O'Stricker* court strongly emphasized the inequities that would result if the plaintiffs are not permitted to bring their actions.⁴³

Nor would it be unfair to require defendants to collect . . . documentary evidence, since such records would typically be kept in the ordinary course of business [and] to deny plaintiff an opportunity to pursue his claim, possibly before he knew it existed, would only compound the personal tragedy borne by asbestos workers and their families.⁴⁴

The court applied the discovery rule to medical malpractice actions in *Oliver v. Kaiser Community Health Foundation*.⁴⁵ After discussing the harshness of the existing rules for determining the accrual date and how

³⁷ See *Oliver v. Kaiser Community Health Found.*, 5 Ohio St. 3d 111, 449 N.E.2d 438 (1983); *O'Stricker v. Jim Walter Corp.*, 4 Ohio St. 3d 84, 447 N.E.2d 727 (1983); *Amer v. Akron City Hosp.*, 47 Ohio St. 2d 85, 351 N.E. 479 (1979); *Wyler v. Tripi*, 25 Ohio St. 2d 164, 267 N.E.2d 419 (1971).

³⁸ *Wyler*, 25 Ohio St. 2d at 171, 267 N.E.2d at 423.

³⁹ *Id.*

⁴⁰ OHIO REV. CODE ANN. § 2305.10 (Baldwin 1984). See *supra* note 30.

⁴¹ 4 Ohio St. 3d 84, 447 N.E.2d 727 (1983).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 89, 447 N.E.2d at 731.

⁴⁵ 5 Ohio St. 3d 111, 449 N.E.2d 438 (1983). See also *Skidmore & Hall v. Rottman*, 5 Ohio St. 3d 210, 450 N.E.2d 684 (1983) (discovery rule applied to legal malpractice cause of action).

the discovery rule is consistent with the statute of limitation's purpose of preventing stale claims, the *Oliver* court, in contrast to the *Wylar* court, concluded that to adopt the discovery rule did not amount to judicial legislation.⁴⁶ Since the task of the judiciary is to define statutory terms where the legislature has not done so,⁴⁷ establishing the date of discovery as the accrual date was "no more judicial legislation than determining that it [was] the time of the commission of the act."⁴⁸

Since the *O'Stricker* and *Oliver* decisions, the court has refined and defined the scope of the discovery rule. Part of this refinement includes combining elements of the termination rule with the discovery rule. In *Frysinger v. Leech*,⁴⁹ the plaintiff claimed the defendant-physician permanently disfigured her by negligently performing a breast reduction surgery. Although her suit was brought within two years of the termination of the physician-patient relationship in June, 1978, it was not brought within two years of the date of discovery, March, 1978.⁵⁰ The *Frysinger* court held that "the termination rule encourages the parties to resolve their dispute without litigation, and stimulates the physician to mitigate the patient's damages."⁵¹ The court perceived this worthwhile goal as justifying the retention to the termination rule, "so long as it does not curtail the patient's right to sue after discovering the malpractice injury."⁵² The court held the statute of limitation commences "(a) when the patient discovers or, in the reasonable care should have discovered, the resulting injury, or (b) when the physician-patient relationship terminates, whichever is later."⁵³

The Ohio Supreme Court further refined the discovery rule in *Herschberger v. Akron City Hospital*.⁵⁴ In this case, the plaintiff was allegedly the victim of misdiagnosis and mistreatment of thrombophlebitis in 1977. Suffering leg discomfort after surgery, Herschberger consulted other physicians. In 1984, one physician advised Herschberger that the leg pain was the result of the alleged misdiagnosis and mistreatment in 1977.⁵⁵ The court established the accrual date as the date when the plaintiff discovered, not merely the physical injury, but that the injury was related to specific medical services rendered to him.⁵⁶

IV. PERSPECTIVES ON THE APPLICATION OF THE DISCOVERY RULE TO WRONGFUL DEATH ACTIONS

Jurisdictions other than Ohio have relied on various justifications for either applying the discovery rule to wrongful death actions or denying

⁴⁶ *Oliver*, 5 Ohio St. 3d at 114, 449 N.E.2d at 442.

⁴⁷ *Id.* at 116, 449 N.E.2d at 443.

⁴⁸ *Id.*

⁴⁹ *Frysinger v. Leech*, 32 Ohio St. 3d 38, 512 N.E.2d 337 (1987).

⁵⁰ *Id.* at 39, 512 N.E.2d at 338.

⁵¹ *Id.* at 41, 512 N.E.2d at 341.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Herschberger v. Akron City Hosp.*, 34 Ohio St. 3d 1, 516 N.E.2d 204 (1987).

⁵⁵ *Id.*

⁵⁶ *Id.* at 5, 516 N.E.2d at 209.

its application. By looking to how other states have addressed this issue, a better understanding can be gained as to why Ohio does not presently apply the discovery rule to wrongful death actions and the various approaches that may be utilized by those seeking to have such application permitted in Ohio courts.

A. States Denying Application Of Discovery Rule

1. Strict Statutory Construction

The primary argument for denying application of the discovery rule is strict construction of the wrongful death statute.⁵⁷ In *Cadieux v. International Tel. & Tel. Corp.*,⁵⁸ the decedent died of cancer in 1974 allegedly due to exposure to microwave and X-ray radiation. After a co-worker of the decedent died of cancer in 1975, the plaintiff-widow made the connection between the cancer and the radiation exposure and subsequently filed suit in 1977.⁵⁹ Interpreting the Rhode Island statute, the circuit court refused to extend the discovery rule to wrongful death cases despite the harshness of the decision.⁶⁰ The court noted that the word "accrued" in the negligence statute of limitation⁶¹ left room for judicial interpretation which would allow application of the discovery rule. However, the language of the Rhode Island wrongful death statute⁶² requiring the actions to "be brought within two years of the death."⁶³ foreclosed this option. The *Cadieux* court also recognized that Rhode Island has consistently held that the cause of action for wrongful death is in derogation of common law and "therefore not subject to judicial alteration or expansion."⁶⁴

⁵⁷ See *Pobieglo v. Monsanto Co.*, 402 Mass. 112, 521 N.E.2d 728 (1988); *Trimper v. Porter-Hayden*, 305 Md. 31, 501 A.2d 446 (1985); *With v. General Electric Co.*, 653 P.2d 764 (Colo. App. 1982); *Szlinis v. Moulded Fiber Glass Cos.*, 80 Mich. App. 55, 263 N.W.2d 282 (1977); *Walker v. Beech Aircraft Corp.*, 320 So.2d 418 (Fla. App.), *cert. dismissed*, 338 So.2d 843 (Fla. 1975).

⁵⁸ 593 F.2d 142 (1st Cir. 1979).

⁵⁹ *Id.* at 144.

⁶⁰ *Id.*

⁶¹ R.I. GEN. LAWS § 9-1-14 (1985). The statute provides: an "[a]ction for injuries to the person shall be commenced and sued within three (3) years next after the cause of action shall accrue, and not after."

⁶² R.I. GEN. LAWS § 10-7-2 (1985). The statute states in part that "every such action shall be commenced within two (2) years after the death of such person."

⁶³ *Cadieux*, 593 F.2d at 144.

⁶⁴ *Id.* (citing *Short v. Flynn*, 374 A.2d 787 (R.I. 1977); *Nascimento v. Phillips Petroleum Co.*, 115 R.I. 395, 346 A.2d 657 (1975); *Tillinghast v. Reed*, 70 R.I. 259, 38 A.2d 782 (1944)).

2. Prevention of Stale Claims

In addition to strict construction, the dual policies of prevention of stale claims as well as the recognition of the date of death as the starting point for inquiry into the cause of death have been asserted as reasons for denying application of the discovery rule to wrongful death actions.⁶⁵ For example, in *Krueger v. St. Joseph's Hosp.*,⁶⁶ the North Dakota Supreme Court held that the discovery rule was inapplicable since "the fact of death itself should indicate a starting point for inquiry regarding a cause of action for wrongful death."⁶⁷ Absent fraudulent concealment,⁶⁸ "the facts used to determine whether a cause of action exists are equally available to the plaintiff. . . . [T]his equality exists when death occurs, while in malpractice actions the difficulty of ascertaining the facts indicating malpractice necessitates a 'discovery rule' ".⁶⁹

Another court justified its refusal to adopt a discovery rule in a wrongful death action on the prevention of state claims rationale.⁷⁰ In *DeCosse v. Armstrong Cork Co.*,⁷¹ the court noted that "[i]t is not in the public interest . . . to encourage, literally, the unearthing of wrongful death causes of action long after the death has occurred because there is some suspicion that death [was] caused [by a] wrongful act."⁷² Application of the discovery rule to wrongful death actions would make it impossible for defendants to predict when a claim against them may be barred.⁷³

This reasoning is suspect. Under the present Ohio discovery rule, it is impossible for defendants in bodily injury and malpractice actions to predict when a claim against them may be barred.⁷⁴ This ironic situation permits a tortfeasor who merely injures another person to remain subject to a lawsuit decades after his negligent act, while a tortfeasor who causes the death of the victim can rest easy two years after his victim's death.⁷⁵

B. Jurisdictions Applying The Discovery Rule

Courts have allowed the discovery rule to trigger the statute of limitation for wrongful death actions for various reasons. Some have based

⁶⁵ See *Trimper v. Porter-Hayden*, 305 Md. 31, 501 A.2d 446 (1985); *DeCosse v. Armstrong Cork Co.*, 319 N.W.2d 45 (Minn. 1982); *Krueger v. St. Joseph's Hosp.*, 305 N.W.2d 18 (N.D. 1981).

⁶⁶ 305 N.W.2d 18 (N.D. 1981).

⁶⁷ *Id.* at 23.

⁶⁸ *Id.* at 23-24. The court ruled that the defendants were estopped from asserting that plaintiff's action was time barred where fraud or fraudulent concealment was involved.

⁶⁹ *Id.*

⁷⁰ *DeCosse v. Armstrong Cork Co.*, 319 N.W.2d 45 (N.D.1982).

⁷¹ *Id.*

⁷² *Id.* at 52.

⁷³ *Id.*

⁷⁴ See generally *O'Stricker v. Jim Walter Corp.*, 4 Ohio St. 3d 335, 447 N.E.2d 727 (1983) and *Oliver v. Kaiser Community Health Found.*, 5 Ohio St. 3d 111, 449 N.E.2d 438 (1983).

⁷⁵ *Pobieglo v. Monsanto Co.*, 402 Mass. 112, 521 N.E.2d 728 (1988).

their decisions on public policy or a sense of "fundamental fairness." Other courts have subjected their statute of limitations provisions to constitutional scrutiny.

Relying on the balancing approach articulated by a Massachusetts court,⁷⁶ an Illinois appellate court applied a balancing test to determine whether the discovery rule should apply in wrongful death cases in *Praznik v. Sport Aero Inc.*⁷⁷ The *Praznik* plaintiff failed to bring a wrongful death action within two years of the date of her husband's death because the wreckage of the decedent's airplane was not found until over two years after its disappearance. In ruling the plaintiff's wrongful death action was not barred, the *Praznik* court reasoned that "the difficulty of proof created by the passing of time [must be] balanced against the hardship to the plaintiff who neither knew nor should have known the existence of a right to sue" in determining whether the discovery rule should apply.⁷⁸ This case-by-case approach struck a balance between the hardships to the parties in a wrongful death action. Because the plaintiff in *Praznik* suffered tremendous hardship and the defendant was not prejudiced by the lapse of time, the court held the discovery rule was applicable.⁷⁹

The fundamental fairness of the discovery rule and remedial nature of the wrongful death statute supported application of the discovery rule by the Alaska Supreme Court in *Hanebuth v. Bell Helicopter Int'l.*⁸⁰ The plane wreckage in which plaintiff's decedent was killed was not discovered until nearly eight years after the crash. In ruling that the plaintiff's suit was not barred by the two year statute of limitations, the court reasoned that it would be "profoundly unfair to deprive a litigant of his right to bring a lawsuit before he has had any reasonable opportunity to do so."⁸¹ If the discovery rule were not to apply, "a tortfeasor whose conduct [is] so grievous as to cause death would be exonerated, while another tortfeasor, guilty of the same conduct except for the fortuity that it merely caused injury, would be held responsible."⁸²

To explain the remedial nature of the wrongful death statutes, the *Hanebuth* court, quoted Professor Sutherland, a respected authority on statutory construction:

⁷⁶ *Id.* at 117, 521 N.E.2d at 733. The *Pobieglo* court reasoned that "[t]he application of a post-death discovery rule to survival actions would produce 'an unacceptable imbalance between affording plaintiffs a remedy and providing defendants the repose that is essential to stability in human affairs.'" *Id.* at 119, 521 N.E.2d at 733 (quoting *Olsen v. Bell Tel. Laboratories, Inc.*, 388 Mass. 171, 175, 445 N.E.2d 609, 612 (1982)).

⁷⁷ 42 Ill. App. 3d 330, 355 N.E.2d 686 (1976).

⁷⁸ *Id.* at 336, 355 N.E.2d at 691.

⁷⁹ *Id.* at 337, 355 N.E.2d at 692. Compare with *Pobieglo*, 402 Mass. 112, 521 N.E.2d 728, where the court would always resolve the balancing test against the plaintiff in a wrongful death action.

⁸⁰ 694 P.2d 143 (Alaska 1984).

⁸¹ *Id.* at 147. See *supra* note 1.

⁸² *Hanebuth*, 694 P.2d at 147.

[a wrongful death statute] represents a wholesome remedial policy that has become firmly imbedded in modern jurisprudence, and where the extent of the damages recoverable for wrongful death is measured by the actual injury sustained, these statutes should be liberally construed to accomplish their remedial purpose. But many of the decisions in the past, and a few of the later ones as well, have crippled the operation of the legislation by employing a narrow construction on the basis that these statutes are in derogation of the common law. However, the better and modern authorities are in agreement that the objective and spirit of this legislation should not be thwarted by a technical application.⁸³

The *Hanebuth* court disparaged the underlying reasons for denying application of discovery rule to wrongful death. The court explained that it found the wrongful death not to be in derogation of the common law because, had there been no statute, the court would have in all likelihood established a common law wrongful death action following the lead of the United States Supreme Court in *Moragne v. States Marine Lines, Inc.*⁸⁴ Because the statute was not in derogation of the common law, it need not be strictly construed.⁸⁵

The Illinois Appellate Court in *Fure v. Sherman Hospital*⁸⁶ adopted the discovery rule in a wrongful death action after examining prior Illinois case law and the history of the wrongful death cause of action. The plaintiff's decedent in *Fure* was misdiagnosed as suffering from perforated stomach ulcer and treated accordingly when, in fact, the decedent had a perforated esophagus. The decedent eventually died of an untreated perforated esophagus, and the death certificate listed as the cause of death the medical term for perforated esophagus.⁸⁷

In its examination of prior case law, the *Fure* court first looked to *Kenney v. Churchill Truck Lines Inc.*,⁸⁸ in which a suit was permitted beyond the two-year provision because the defendant was out-of-state serving in the United States Air Force, and it was impossible for the plaintiff to perfect service upon the defendant.⁸⁹ *Fure* then examined *Wilbon v. D.F. Bast Co.*,⁹⁰ in which "a wrongful death action filed on behalf of the minor child of the decedent, and not brought within two years, was allowed on the grounds of public policy."⁹¹ The *Wilbon* court cited Professor

⁸³ *Id.* at 145-46 (quoting C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 71.05 at 337-38 (4th ed. 1973) (footnote omitted)).

⁸⁴ *Hanebuth*, 694 P.2d at 145 n.9 (citing *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970)). See also *supra* note 16 and accompanying text.

⁸⁵ *Hanebuth*, 694 P.2d at 145.

⁸⁶ 64 Ill. App. 3d 259, 380 N.E.2d 1376 (1978).

⁸⁷ *Id.* at 272, 380 N.E.2d at 1386.

⁸⁸ 6 Ill. App. 3d 983, 286 N.E.2d 619 (1972).

⁸⁹ 64 Ill. App. 3d at 267, 380 N.E.2d at 1383 (citing *Kenney v. Churchill Truck Lines, Inc.*, 6 Ill. App. 3d 983, 286 N.E.2d 619 (1972)).

⁹⁰ *Wilbon v. D.F. Bast Co.*, 48 Ill. App. 3d 98, 365 N.E.2d 498 (1977).

⁹¹ 64 Ill. App. 3d at 267, 380 N.E.2d at 1383 (citing *Wilbon*, 48 Ill. App. 3d at 102, 365 N.E.2d at 500).

Sutherland, and held that the statute should be liberally interpreted to achieve its remedial purpose.⁹² The decision in *Praznik v. Sport Aero, Inc.*⁹³ was the final case cited by the *Fure* court. The *Praznik* case presented somewhat of a factual anomaly: the wreckage of the aircraft in which decedent was killed was not found until over two years after his disappearance, plaintiff did not know her husband was dead until the two-year limitations period had expired.⁹⁴ The *Praznik* court, in applying the discovery rule to this wrongful death action, emphasized that the hardship experienced by the plaintiff far outweighed the nominal prejudice to the defendant by the lapse of time.⁹⁵

The *Fure* court discussed the development of the common law rule prohibiting wrongful death actions. "[T]he greater evil [was] given a stronger protection than the lesser, based on the survival or nonsurvival of the victim."⁹⁶ The court concluded that a wrongful death cause of action may be "brought more than two years after the plaintiff knows of the death in question."⁹⁷ In arriving at this result, the court relied on prior case law which indicated acceptable statutory construction and set forth the public policy behind wrongful death statutes.⁹⁸

The Arizona court in *Anson v. American Motors Corp.*⁹⁹ did not examine public policy considerations, nor have available to it, prior case law tolling the statute of limitations when it reached the same conclusion as the *Fure* court. *Anson* involved the wrongful death of plaintiff's son in an automobile accident which allegedly resulted from a defective product. The time limit for bringing the products liability action was the general statute of limitation which established the accrual date for a wrongful death action as the date of death.¹⁰⁰ Plaintiff contended that Arizona's limitations period in the wrongful death statute¹⁰¹ violated equal protection and "open court" provisions. Arizona's constitutional "open court" provision provided: "[t]he right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation."¹⁰² Accepting the plaintiff's argument, the *Anson* court relied heavily on the Arizona Supreme Court

⁹² *Id.*

⁹³ See *supra* note 27 and accompanying text.

⁹⁴ *Fure*, 64 Ill. App. 3d at 268, 380 N.E.2d at 1383.

⁹⁵ *Id.*

⁹⁶ *Id.* at 270, 380 N.E.2d at 1385.

⁹⁷ *Fure*, 64 Ill. App. 3d at 272, 380 N.E.2d at 1386.

⁹⁸ *Id.*

⁹⁹ 155 Ariz. 420, 747 P.2d 581 (1987).

¹⁰⁰ *Id.*

¹⁰¹ ARIZ. REV. STAT. ANN. § 12-542 (1982) (The statute provides in part: "[an action] shall be commenced . . . within two years after the cause of action accrues

2. For injuries done to the person of another when death ensues from such injuries, which action shall be considered as accruing at the death of the party injured.")

¹⁰² ARIZ. CONST. art. II, § 13 (equal protection); ARIZ. CONST. art. 18, § 6 (open court provision which provides that "[t]he right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.")

decision in *Kenyon v. Hammer*,¹⁰³ in which the same constitutional challenges were made to a medical malpractice statute of limitations.¹⁰⁴

In holding that the right to recover for bodily injuries was fundamental, thus subjecting the statute to strict scrutiny, the *Kenyon* court emphasized Arizona's "almost unique . . . provisions regarding tort law."¹⁰⁵ Those provisions include: 1) "a specific clause prohibiting abrogation of 'the right of action to recover damages . . . ' and further providing that 'the amount recovered shall not be subject to statutory limitation,' " 2) a provision prohibiting statutes "limiting the amount of damages to be recovered for causing the death or injury of any person," 3) a provision prohibiting labor contracts with tort immunity provision, and 4) the constitutional requirement that the defenses of contributory negligence or assumption of the risk be questions of fact within the sole purview of the jury.¹⁰⁶

Once the *Kenyon* court found the right to bring an action was a "fundamental right" guaranteed by the state constitution, the court concluded that "the state ha[d] neither a compelling nor legitimate interest in providing economic relief to one segment of society by depriving those who have been wronged to access to, and remedy by, the judicial system."¹⁰⁷ The two year limitation provision was held violative of the equal protection and the stricter Arizona open court provision.¹⁰⁸

Following *Kenyon*, the *Anson* court readily recognized that the right to bring and pursue a wrongful death action is also fundamental, "since the applicable constitutional provisions prohibit 'limiting the amount of damages to be recovered' for injury or death."¹⁰⁹ The court further stated that the general statute of limitation unfairly discriminated against claimants who filed a wrongful death action by allowing bodily injury claimants the benefit of the discovery rule while denying that benefit to wrongful death claimants.¹¹⁰ The *Anson* court concluded that the "distinction [was] not rationally related to important state interests and was thus violative of Arizona's equal protection provision."¹¹¹

¹⁰³ 142 Ariz. 69, 688 P.2d 961 (1984). The *Kenyon* court held that "imposition of an absolute bar three years from the date of injury on most [] medical malpractice claimants, the abolition of general tolling provisions recognized for all other tort claims and the internal distinctions between classes of medical malpractice claimants, all discriminate against and among medical malpractice claimants in a manner which infringes upon fundamental rights." *Id.* at 87, 688 P.2d at 979.

¹⁰⁴ ARIZ. REV. STAT. ANN. § 12-564(A) (1982), *repealed by*, Ariz. Laws 1985, Ch. 84, § 3. The statute provided that a "cause of action for medical malpractice against a licensed health care provider accrues as of the date of the injury . . ." and with certain exceptions is barred three years thereafter.

¹⁰⁵ *Kenyon*, 142 Ariz. at 79-81, 688 P.2d at 971-73.

¹⁰⁶ *Id.* (citing ARIZ. CONST. art. 18, § 6; art. 2, § 31; art. 18, § 3; and art. 18, § 5).

¹⁰⁷ *Kenyon*, 142 Ariz. at 83, 688 P.2d at 975.

¹⁰⁸ *Id.*

¹⁰⁹ *Anson*, 155 Ariz. at 424, 747 P.2d 585 (citing ARIZ. CONST. art. 18, § 6 and art. II, § 31) (emphasis added).

¹¹⁰ *Id.*

¹¹¹ *Id.*

With regard to the open courts provision, the *Anson* court recognized that it is generally within the prerogative of the legislature to adopt a statute of limitation.¹¹² However, pursuant to Arizona constitutional provisions curtailing the legislature's power to limit damages awards, the legislature could not abolish or abrogate causes of action, since abrogation not only limits the amount recoverable but bars recovery completely.¹¹³

Thus a variety of judicial approaches may be utilized to allow for the application of the discovery rule to wrongful death actions. There is ample precedent, accommodating a variety of ideologies, for application of the discovery rule to wrongful death actions. Attorneys and jurists in Ohio have these precedents to draw upon when addressing the issue of application of the discovery rule to wrongful death actions.

C. Policy and Precedents

In deciding to apply the discovery rule to wrongful death actions, courts have focused on the remedial nature of the wrongful death statutes and the fundamental fairness of the discovery rule.¹¹⁴ The remedial nature stems from the provision to the survivors of one killed by another's negligence the opportunity for compensation where none had previously existed at common law.¹¹⁵ The discovery rule is fundamentally fair because a plaintiff cannot fairly be said to have sat on his right to bring an action when he is unaware of the right to bring it.¹¹⁶

The next question is whether the rationales utilized by other jurisdictions would and/or should prompt the Ohio judiciary or legislature to adopt the discovery rule in wrongful death cases. To determine whether the Ohio courts would recognize the remedial purpose of the wrongful death statute and the fundamental fairness of the discovery rule as sufficient justification for suspension of the two-year time limitation, it is necessary to review the courts' views on the importance of the wrongful death statute's remedial nature. Previously recognized exceptions to the two year provision, as in *Fure*,¹¹⁷ would suggest that the provision is open to judicial interpretation and supports the application of the discovery rule in wrongful death claims.

The Ohio Supreme Court has recognized that the wrongful death statute, Section 2125.02 of the Revised Code, is remedial in nature.¹¹⁸

¹¹² *Id.* at 425, 747 P.2d at 586.

¹¹³ See *supra* notes 52-56 and accompanying text. See also *Kennedy v. Cumberland Engineering Co.*, 471 A.2d 195 (R.I. 1984) (statute that required a personal injury action based on products liability be brought within ten years of the original sale ruled unconstitutional); *Daugaard v. Baltic Coop. Bldg. Supply Ass'n*, 349 N.W.2d 419 (S.D. 1984) (statute requiring actions arising from a real property improvement be brought within six (6) years of such construction was ruled unconstitutional); *Overland Constr. Co. v. Sirmons*, 369 So. 2d 572 (1979) (statutory 12-year ban on lawsuits out of improvements to realty declared unconstitutional).

¹¹⁴ See *supra* notes 68-76 and 113.

¹¹⁵ See *supra* notes 9-22 and accompanying text.

¹¹⁶ See *supra* note 1 and notes 30-56 and accompanying text.

¹¹⁷ See *supra* notes 80-93 and accompanying text.

¹¹⁸ *French v. Dwiggins*, 9 Ohio St. 3d 32, 458 N.E.2d 827 (1984).

The wrongful death statute has also long been recognized as being in derogation of common law.¹¹⁹ Despite its remedial nature, Ohio has strictly construed the wrongful death statute in keeping with the rule that statutes in derogation of common law must be strictly construed.¹²⁰ However, the rule of strict construction of statutes in derogation of common law often supersedes the rule of suppressing the evil and advancing the remedy by liberally construing remedial statutes.¹²¹ The rule requiring statutes in derogation of common law be strictly construed has been criticized as lacking "analytical or philosophical justification" and lacking "genuine probative force for the purpose of establishing what the legislature intended."¹²²

Despite the criticisms of the rule, the Ohio courts have consistently emphasized the "derogation of common law - strict construction" rule over the remedial purpose of the statute.¹²³ The Ohio courts have held the two year limitations provision is not a "remedial limitation" but is rather "an essential element" or "condition precedent" to bringing a wrongful death cause of action.¹²⁴ For example, in *Taylor v. Black & Decker MFG. Co.*,¹²⁵ the court held that the minority of the plaintiff did not suspend the two-year provision. The decedent was killed when the mental casing of the defendant's electric hedge trimmer became electrically charged. Nine years later, the administratrix brought a wrongful death suit on behalf of herself and decedent's minor child.¹²⁶ The minor child was denied the benefit of the wrongful death statute despite the fact that the minor lacked standing to prosecute the action himself or to force the personal representative to bring the action on his behalf.¹²⁷

Even fraudulent concealment will not suspend the running of the two-year period.¹²⁸ In Ohio, if a tortfeasor's intentional or negligent actions are concealed for more than two years, he is rendered immune from "stale claims."¹²⁹ It is quite possible that Ohio courts have discounted the remedial purpose of the statute in favor of the "derogation of common law - strict construction" rule.¹³⁰

Unlike the Illinois Appellate court in *Fure* court, the Ohio Supreme Court can look to no case law which has suspended the two year statute of limitation for wrongful death, Section 2125.02(D) of the Ohio Revised

¹¹⁹ See, e.g., *Sabol v. Pekoc, Jr.*, 148 Ohio St. 545, 551-52, 76 N.E.2d 84, 88 (1947).

¹²⁰ *Id.*

¹²¹ C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 60.01, at 55 (4th ed. 1986).

¹²² *Id.* § 61.04, at 101.

¹²³ *Sabol*, 148 Ohio St. 545, 76 N.E.2d 84 (1947).

¹²⁴ *Id.*

¹²⁵ 21 Ohio App. 3d 186, 486 N.E.2d 1173 (1984).

¹²⁶ *Id.*

¹²⁷ *Id.* See also *Mominee v. Scherbarth*, 28 Ohio St. 3d 270, 275, 503 N.E.2d 717 (1986).

¹²⁸ *Fee Adm'r v. Fee*, 10 Ohio 470 (1841).

¹²⁹ See *supra* note 75-76 and accompanying text.

¹³⁰ See *Decosse*, 319 N.W.2d at 50 (quoting *Schmucking v. Mayo*, 183 Minn. 37, 235 N.W. 633 (1931)).

Code.¹³¹ Quite the contrary, Ohio cases hold the wrongful death statute time barred, despite fraudulent concealment and minority, which effectively closes the statute to judicial interpretation.

The Ohio judiciary still holds that the wrongful death statute is in "derogation of common law." Ohio courts should examine the circumstances surrounding wrongful death actions in nineteenth century England, as well as the developments in American jurisdictions with regard to negligence and malpractice actions. Were such an analysis undertaken, the "derogation of common law" rationale would be rendered considerably less persuasive.

As pointed out by Mr. Justice Harlan in *Moragne*, the circumstances justifying the English courts' refusal to recognize wrongful death never existed in the United States and ceased to exist in England soon after Lord Campbell's Act was enacted.¹³² If the circumstances which prompted the British Parliament to enact the wrongful death in "derogation of the common law" have never existed in Ohio or the United States, what purpose is there in continuing to rely on such rationale?

Moreover, the discovery rule has become an established principle in the modern common law of personal injury. The discovery rule was not the result of sweeping legislative enactment in derogation of common law, but rather the result of a consistent and gradual progression in Ohio's common law.¹³³ The Ohio judiciary has applied the discovery rule to most of the statutes of limitations related to personal injury.¹³⁴ The continued failure to recognize the discovery rule in wrongful death is thus, in a sense, in derogation of the modern "common law" of the discovery rule and statutes of limitations.

The gradual development of the discovery rule in recent years indicates a judicial policy of more liberal statutory interpretation for the benefit of personal injury plaintiffs. Recent legislative enactments also indicate a more expansive approach to the rights of personal injury plaintiffs.¹³⁵ The Ohio wrongful death statute was amended in 1981 to allow a surviving spouse, minor children, parents, and next of kin to recover for mental anguish and grief.¹³⁶ The failure to provide for the discovery rule in wrongful death actions is inconsistent with the policy established by the legislature and judiciary of expanding the opportunities for compensation. To exempt the wrongful death statute from a more liberal and remedial interpretation simply because it is in "derogation of common law" or because death should automatically put a the plaintiff on notice that a wrongful death claim may exist is irrational.¹³⁷

¹³¹ See *Borovitz v. American Hard Rubber Co.*, 287 F. 368 (N.D. Ohio 1923). The district court did recognize that the wrongful death statute was subject to an implied exception, that in an action on behalf of alien enemies, the period of war will be excluded from the computation of the two years.

¹³² See *supra* note 15-16 and accompanying text.

¹³³ See *supra* notes 30-48 and accompanying text.

¹³⁴ See *supra* notes 30-48 and accompanying text.

¹³⁵ See OHIO REV. CODE ANN. § 2305.10 (Baldwin 1984) (new provisions regarding asbestos, chromium, chemical defoliants, and synthetic estrogens).

¹³⁶ OHIO REV. CODE ANN. § 2125.02(B)(5) (Baldwin 1987).

¹³⁷ See *infra* notes 145 and 160-163 and accompanying text.

D. Constitutional Challenges

Wrongful death statutes similar to Ohio's have been challenged as violative of state and federal equal protection provisions¹³⁸ and "open-court" or "right-to-a-remedy" provisions.¹³⁹

1. Equal Protection Challenge

There are three tests available to the judiciary for determining the constitutionality of the statute under an equal protection analysis: 1) strict scrutiny, 2) intermediate level scrutiny, and 3) rational basis.¹⁴⁰ The intermediate level scrutiny, used primarily in cases involving gender-based classifications, is inapplicable to this discussion.¹⁴¹

In equal protection problems, one of the first steps is to establish classes of people who are allegedly being treated unequally. The tests would be applied to determine whether bodily injury plaintiffs, whose actions accrue upon discovery, and wrongful death plaintiffs, whose actions accrue upon death regardless of discovery, are being treated unequally in violation of equal protection clauses.

Because the classification in this instance does not affect a suspect class, the determination of the standard of review to be applied hinges upon whether the right to bring an action for recovery of damages is "fundamental."¹⁴² If the right is "fundamental," strict scrutiny will be applied. If the right is not "fundamental," rational basis will be applied.¹⁴³

a. Strict Scrutiny

Is the right to recover damages for wrongful death a fundamental right in Ohio? Section 16, Article I of the Ohio Constitution provides:

All courts shall be open, and *every person, for an injury done him in his land, goods, person, or reputation, shall have a remedy by due course of law, and shall have justice administered without denial or delay.*¹⁴⁴

The wrongful death actions are brought by the administrator or executor of the decedent's estate on behalf of the beneficiaries. The injuries to the beneficiaries are injuries to their persons; separate and distinguishable from any action the decedent might have had.¹⁴⁵ The injury to

¹³⁸ See *supra* notes 94-108; see also *Johnson v. Koppers*, 524 F. Supp. 1182, 1193 (1981); *Cadieux v. International Tel. & Tel. Corp.*, 593 F.2d 142, 145 (1979).

¹³⁹ See authorities cited *supra* note 138.

¹⁴⁰ *Kenyon*, 142 Ariz. at 79, 688 P.2d at 970.

¹⁴¹ See *Michael M. v. Sonoma County Super. Ct.*, 450 U.S. 464 (1981).

¹⁴² *Shapiro v. Thompson*, 394 U.S. 618 (1969).

¹⁴³ *Id.* See also *Board of Educ. of City School Dist. v. Walter*, 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979).

¹⁴⁴ OHIO CONST. art. I, § 16 (emphasis added).

¹⁴⁵ See *supra* notes 26-28 and accompanying text.

the beneficiary, in the form of emotional distress and economic loss, are no less injuries to their person than the same injuries are to the person of bodily injury plaintiff. The statute allows for recovery for injury done to the persons of the beneficiaries in the form of mental anguish incurred by the beneficiaries.¹⁴⁶ Under section 16, Article I of the Ohio Constitution, the Ohio courts must be open to a plaintiff in a wrongful death action to allow him to recover "for injury done him in his . . . person."

Ohio courts have long held that the right of access to the courts is a "fundamental" right.¹⁴⁷ If the Ohio Supreme Court were to recognize as fundamental the right of wrongful death plaintiffs to access to the court, the two-year time limitation could be required to withstand strict scrutiny; i.e., the provision would have to be *necessary* to achieve a *compelling* state interest.¹⁴⁸

Because of the lack of recorded legislative history dating back to 1851, it is difficult to determine exactly what concerns prompted the Ohio General Assembly to adopt the wrongful death statute's two-year provision. The legislature does, however, have an interest in protecting defendants from stale claims. Whether the prevention of stale claims is a *compelling* government interest, is another question entirely.

Since the discovery rule applies to medical malpractice actions or bodily injury claims, the injured party can bring a "stale" claim long after the negligent act was committed. The wrongful death statute precludes stale claims by requiring "all actions . . . be commenced within two years after a decedent's death."¹⁴⁹ In contrast, the language of the bodily injury statute permits judicial interpretations and allows application of the discovery rule because it requires that the "action . . . be brought within two years after the cause thereof arose."¹⁵⁰

A wrongful death plaintiff would argue that if protection of defendants from stale claims were truly a compelling state interest, the legislature would have amended the malpractice and bodily injury statutes to eliminate the "accrual" language and provide defendants protection in accord with the "compelling state interest." Elimination of the "accrual" language would foreclose the judicial application of the discovery rule and thus provide defendants with genuine protection from stale claims. However, even if the Ohio legislature were to take such action, the Ohio courts might follow the lead of the Arizona court in *Kenyon* which found the state interests were *not compelling*, even in the face of evidence of a medical malpractice crisis.¹⁵¹

¹⁴⁶ OHIO REV. CODE ANN. § 2125.02(B) (Baldwin 1987).

¹⁴⁷ See *Knitz v. Harringer*, 99 Ohio St. 240, 124 N.E. 168 (1919); *Baltimore & Ohio Ry. v. Stankard*, 56 Ohio St. 224, 232, 46 N.E. 577, 599 (1897) ("the right to appeal to the courts for the redress of wrongs is one of those rights which are in their nature, under our Constitution inalienable, and cannot be thrown off or bargained away."); *Brown v. Best*, 44 Ohio App. 2d 82, 335 N.E.2d 734 (1974); *Armstrong v. Duffy*, 90 Ohio App. 233, 103 N.E.2d 760 (1951).

¹⁴⁸ *Kenyon*, 144 Ariz. at 79, 688 P.2d at 970 (citing *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973)).

¹⁴⁹ OHIO REV. CODE ANN. § 2125.02(D) (Baldwin 1987).

¹⁵⁰ OHIO REV. CODE ANN. § 2305.10 (Baldwin 1984).

¹⁵¹ *Kenyon*, 144 Ariz. at 79, 688 P.2d at 970.

Even if preventing stale claims is deemed compelling, the statute must be *necessary* to achieve that purpose. The *Anson* court pointed out that the distinction between bodily injury plaintiffs and wrongful death plaintiffs, based upon a scheme which allows the discovery rule to apply in the former action but not the latter, is "arbitrary and unreasonable" and "is not rationally related to important state interests."¹⁵²

There is case law in Ohio which supports the proposition that the right to sue in the courts for damages for injuries is not fundamental.¹⁵³ In *Board of Educ. of City School Dist. v. Walter*,¹⁵⁴ the Ohio Supreme Court rejected the definition of "fundamental" right set forth in *San Antonio Indep. School Dist. v. Rodriguez*.¹⁵⁵ In *Walter*, the plaintiffs brought a class action suit challenging Ohio's system of financing public education. They contended that the statutory system was in violation of federal and state equal protection clauses and was subject to strict scrutiny because the right to education was a fundamental right.¹⁵⁶ Unlike *Rodriguez*, the *Walter* court held that the right is not "fundamental" simply because it is explicitly or implicitly guaranteed in the constitution¹⁵⁷ and stated:

[W]e reject the 'Rodriguez test' for determining which rights are fundamental. While the test may have some applicability in determining which rights are fundamental under the Constitution of the United States, it is not helpful in determining whether a right is fundamental under the Ohio Constitution.¹⁵⁸

Such a rationale would allow Ohio courts to hold that the right of access to the courts is not fundamental and thus not subject to strict scrutiny regardless of the fact that it is expressly provided for in the Ohio Constitution.

b. Rational Basis

If Ohio courts declared the right of access to the courts less than a "fundamental" right, then the rational basis test would be applied under equal protection analysis to determine the constitutionality of the wrongful death act's two year provision.¹⁵⁹ Under the rational basis test, the courts must determine 1) whether the distinction between classes of plaintiffs is wholly irrelevant to the state's objectives¹⁶⁰ or 2) whether it was

¹⁵² *Anson*, 155 Ariz. at 423, 747 P.2d at 585.

¹⁵³ See *Johnson v. Koppers*, 524 F. Supp. 1182 (N.D. Ohio 1981); *Schwan v. Riverside Methodist Hosp.*, 6 Ohio St. 3d 300, 452 N.E.2d 1337 (1983); *Board of Educ. of City School Dist. v. Walter*, 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979); *Elizabeth Gamble Deaconess Home v. Turner Constr.*, 14 Ohio App. 3d 281, 470 N.E.2d 950 (1984).

¹⁵⁴ 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979).

¹⁵⁵ 411 U.S. 1, 33 (1973).

¹⁵⁶ 58 Ohio St. 2d 368, 390 N.E.2d 813.

¹⁵⁷ *Id.* at 374-75, 390 N.E.2d at 819.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Kenyon*, 144 Ariz. at 79, 688 P.2d at 970 (citing *McGowan v. Maryland*, 366 U.S. 420, 425 (1961)).

unreasonable for the legislature to believe the distinction to be relevant.¹⁶¹ If the distinction is found to be either wholly irrelevant or unreasonable, the statute will be held to violate equal protection under the rational basis test, notwithstanding a general presumption of validity accorded to statutes.¹⁶²

A rational basis test was applied by the Ohio Supreme Court in *Schwan v. Riverside Methodist Hosp.*¹⁶³ and *Mominee v. Scherbarth*¹⁶⁴ with regard to the "minority tolling provision" of Section 2305.11 of the Ohio Revised Code, the medical malpractice statute.¹⁶⁵ In *Schwan*, the appellee was fourteen years old when he was allegedly negligently treated by the defendant-hospital. He filed suit two and a half years later, at age sixteen. The lower court ruled that the minor's action was barred by the one year malpractice statute of limitations and that the minor did not fall within the tolling provision of Section 2305.11(B). The appellee challenged the constitutionality of this provision on equal protection grounds.¹⁶⁶ The *Schwan* court found that the Section 2503.11(B) created "a distinction — without reasonable grounds — between medical malpractice plaintiffs who are younger than ten years of age and those older than ten but still minors."¹⁶⁷ The court stated, "a child whose cause of action accrues on the day before his tenth birthday may file an action anytime until his fourteenth birthday. Yet, if the same cause of action accrued on the day

¹⁶¹ *Id.* (citing *Vance v. Bradley*, 440 U.S. 93, 111-12 (1979)).

¹⁶² *Hardy v. VerMeulen*, 32 Ohio St. 3d 45, 48, 512 N.E.2d 626, 629 (1987).

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

¹⁶⁴ 228 Ohio St. 3d 270, 502 N.E.2d 717 (1986).

¹⁶⁵ OHIO REV. CODE ANN. § 2305.11 (Baldwin 1984). Section 2305.11 provides in pertinent part:

(A) An action for *** malpractice, including an action for malpractice against a physician, podiatrist, hospital, or dentist, *** 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 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 on 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.

Another statutory provision addresses the tolling of the statute of limitations when the claimant is within the age of minority. Section 2305.16 of the Ohio Revised Code states that "[u]nless otherwise specially provided in sections 2305.04 to 2305.14, inclusive, and sections 1302.98 and 1304.29 of the Revised Code, if the 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."

¹⁶⁶ *Schwan*, 6 Ohio St. 3d at 300-01, 452 N.E.2d at 1337-38.

¹⁶⁷ *Id.* at 302, 452 N.E.2d at 1339.

after the child's tenth birthday," the one year provision would control.¹⁶⁸

Both the *Schwan* and *Mominee* courts found section 2305.11(B) "irrational" and "patently arbitrary," thus constitutionally infirm under the rational basis test.¹⁶⁹ Since a minor with no standing to sue could be barred before the age of majority, the statute was found to effectively violate the "open court" provision of Section 16, Article I of the Ohio Constitution.¹⁷⁰

The same rationale could be applied to the distinction between bodily injury plaintiffs and wrongful death plaintiffs to render the different treatment of these two groups of plaintiffs "irrational" and "patently arbitrary," and thus invalid under the rational basis test. For example, the cause of action for a person injured and completely incapacitated has yet to accrue on the day before his death. The injured person might live for decades before the action accrued; before he discovers that his injuries are the result of someone's negligent or intentional act. Yet on the day after death, the cause of action is deemed to have accrued, and the two year statute of limitation applies. The family members, who prior to the decedent's death were unaware that the decedent's fatal injuries were the result of negligence, are *not* somehow made aware that a cause of action exists because the injured person died. The application of the *Schwan* rationale to this scenario would support a finding that the statute violates the equal protection clause.¹⁷¹

If the right-to-a-remedy provision is found to be fundamental, the statute can be challenged under the strict scrutiny test as it applies to wrongful death plaintiffs who fail to discover the wrongful nature of their decedents' deaths.¹⁷² The rational basis test would apply if the right-to-a-remedy is deemed not fundamental. The statute could still be challenged, as the distinction made between bodily injury plaintiffs, whose actions accrue upon discovery, and wrongful death plaintiffs, whose cause of action accrue at death, could be found so "irrational" and "patently arbitrary," that no legislature could have rationally believed the statute would serve its purpose.¹⁷³

2. Open Court/Right-To-A-Remedy Challenge

Wrongful death statutes requiring an action to be brought within two years of the date of death even if the wrongful nature of the death was not discovered until beyond the two year period have been challenged as violative of "open court" provisions of state constitutions.¹⁷⁴ Ohio has struck down a number of statutes as violative of the "right-to-a-remedy/

¹⁶⁸ *Id.*

¹⁶⁹ *Mominee*, 28 Ohio St. at 275, 503 N.E.2d at 721.

¹⁷⁰ *Id.*

¹⁷¹ See *supra* notes 157-160 and accompanying text.

¹⁷² See *supra* notes 140-146 and accompanying text.

¹⁷³ See *supra* notes 152-162 and accompanying text.

¹⁷⁴ See, e.g., *Berry v. Beech Aircraft*, 717 P.2d 670 (Utah 1985); *Anson v. American Motors Corp.*, 155 Ariz. 420, 747 P.2d 581 (1987); *Johnson v. Koppers Co.*, 524 F. Supp. 1182 (N.D. Ohio 1981).

open court"¹⁷⁵ provision found in Section 16, Article I of the Ohio Constitution.¹⁷⁶ The most recent case in which the Ohio Supreme Court has struck down a statute as violative of Section 16, Article I was *Hardy v. VerMeulen*.¹⁷⁷

In *Hardy*, two surgical procedures were performed on the plaintiff's right ear in 1973 and 1974. The malpractice injury was not discovered until April, 1985. The lower court dismissed the plaintiff's suit as barred by Section 2305.11(B), since the appellant failed to bring his action within four years following the act or omission constituting the alleged malpractice as required by the statute.¹⁷⁸ The statute challenged in *Hardy* was Ohio's four year medical malpractice statute of limitations; the same statute at issue in *Schwan* and *Mominee*.¹⁷⁹ The statute was challenged as unconstitutional as applied to all medical malpractice plaintiffs, not just minors, who did not know or could not reasonably have known of their injuries.¹⁸⁰

The *Hardy* court quoted *Lafferty v. Shinn*¹⁸¹ which stated that "it is not within the power of the legislature to abridge the period within which existing right may also be so asserted as that there shall not remain a reasonable time within which an action may be commenced."¹⁸² The *Hardy* court continued, "[i]f the legislature may not constitutionally enact an unreasonable statute of limitations, it follows that the legislature cannot deprive one of a right before it accrues."¹⁸³ The court also reasoned that "[w]hen the Constitution speaks of remedy and injury to person, property, or reputation, it requires an opportunity granted at a meaningful time in a meaningful manner."¹⁸⁴ The court concluded that "[t]he right-to-a-remedy provision of Section 16, Article I does not require the analysis of rational basis that is used to decide due process or equal protection arguments against the constitutionality of legislation."¹⁸⁵ Thus, the legis-

¹⁷⁵ See *Hardy v. VerMeulen*, 32 Ohio St. 3d 45, 512 N.E.2d 626 (1987); *Primes v. Tyler*, 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975) (Ohio Guest Statute found to violate Section 16, Article I, "in that it closes the courts and denies a remedy by due course of the law to some but not all the people of the state."); *Williams v. Marion Rapid Transit, Inc.*, 152 Ohio St. 114, 87 N.E.2d 334 (1949) (denial of remedy to unborn viable child violated Section 16, Article I).

¹⁷⁶ Section 16, Article I of the Ohio Constitution provides: "All courts shall be open, and every person, for an injury done to him in his land, goods, person, or reputation, shall have a remedy by due course of law, and shall have justice administered without denial or delay."

¹⁷⁷ 32 Ohio St. 3d 45, 512 N.E.2d 626 (1987).

¹⁷⁸ *Id.*

¹⁷⁹ OHIO REV. CODE ANN. § 2305.11(B) (Baldwin 1984). This section provides in part: "In no event shall any medical claim against a physician, podiatrist, or hospital be brought more than four years after the act or omission constituting the alleged malpractice occurred."

¹⁸⁰ *Hardy*, 32 Ohio St. 3d at 47, 512 N.E.2d at 629.

¹⁸¹ 38 Ohio St. 47 (1882).

¹⁸² *Hardy*, 32 Ohio St. 3d at 47, 512 N.E.2d at 628 (quoting *Lafferty*, 38 Ohio St. at 48).

¹⁸³ 32 Ohio St. 2d at 47, 512 N.E.2d at 628.

¹⁸⁴ *Id.* (emphasis added) (agreeing with the reasoning of *Daugaard v. Baltic Coop. Bldg. Supply Ass'n.*, 349 N.W.2d 419 (S.D. 1984)).

¹⁸⁵ *Id.* at 48, 512 N.E.2d at 629.

lature may not deny a legal remedy even if it has a rational basis.¹⁸⁶

A comparison of Ohio wrongful death statute and the medical malpractice statute of limitations, Section 2503.11(B) of the Revised Code, reveals that the wrongful death statute's two year provision bars the claims of plaintiffs who did not know or could not reasonably have known of their injuries in much the same way that the limitations period in the malpractice statute barred similarly situated medical malpractice claimants. Application of the discovery rule to wrongful death actions is the only way to give wrongful death plaintiffs the opportunity to assert their rights in a meaningful time in a meaningful manner.

A wrongful death *defendant* will contend that the right to bring this claim exists only if the action is commenced within two years of death.¹⁸⁷ This approach may be labeled a "condition precedent" approach, because bringing the action within two years has been held to be a condition precedent to the existence of the right to bring the wrongful death action.¹⁸⁸ If not commenced within two years, there exists no right to bring an action and, thus, no right to be given protection under Section 16, Article I.

Such "condition precedent" rationale *could have* been utilized by the *Hardy* court to exempt from Section 16, Article I protection, medical malpractice plaintiffs who failed to discover their injuries within four years.¹⁸⁹ Under the above rationale the bringing of a medical malpractice action within four years from the date of the negligent act could be considered a condition precedent to the existence of the right to bring the action. Under the condition precedent rationale, the plaintiff's right to bring an action would not exist because it was not brought within the four year limitation period. Despite the charge by the dissent in *Hardy* that the majority was failing to give adequate emphasis to the "existing right" language of *Lafferty v. Shinn*, the court found the statute denying the existence of the right, Section 2305.11(B) to be in violation of Section 16, Article I.¹⁹⁰ If such "condition precedent/existing right" rationale were to apply to all similar statutes of limitations, Section 16, Article I challenges could never be made, as the only persons having standing would be deemed to fall outside the protection of the right-to-a-remedy provision.

Wrongful death plaintiffs challenging Section 2125.02(D) as violative of the right-to-a-remedy provision of the Ohio Constitution must contend with defendants' claims that the injuries sustained by the wrongful death plaintiffs are not injuries to one's "land, goods, person, or reputation" under Section 16, Article I. This is a difficult argument for wrongful death plaintiffs to refute. The bodily injury is to the decedent, not to the beneficiaries. However, it can be argued that because the wrongful death statute permits recovery for mental anguish suffered by the beneficiaries, the statute already provides a right to recover for injuries to the person.¹⁹¹

¹⁸⁶ *Id.*

¹⁸⁷ See *supra* notes 18-22 and accompanying text.

¹⁸⁸ *Id.*

¹⁸⁹ See *Hardy*, 32 Ohio St. 3d at 52, 512 N.E.2d at 633 (Wright, J., dissenting in part).

¹⁹⁰ See *supra* note 180.

¹⁹¹ OHIO REV. CODE ANN. § 2125.02(B)(5) (Baldwin 1987).

The wrongful death statute also allows recovery for the same losses incurred by decedent or the beneficiaries had the decedent only been the victim of bodily injury.¹⁹² That would bolster the argument that these are losses to the "person" in the wrongful death context in just the same way as they are losses to the "person" in the bodily injury context.

The wrongful death plaintiff must show that the right to bring a wrongful death action is an "existing" right regardless of whether or not it is brought within two years, and that any injury suffered by a wrongful death plaintiff is an "injury done him in his land, goods, person, or reputation" as required by the right-to-a-remedy provision. If a wrongful death plaintiff is successful in overcoming these challenges, the wrongful death statute can be struck down as violative of Section 16, Article I. Even though the legislature may have a rational basis for the two year provision, it can be struck down if it denies the opportunity to assert a right of action at a meaningful time in a meaningful manner.¹⁹³

V. A 1981 OHIO FEDERAL DISTRICT COURT'S VIEW OF THE ISSUE

One of the greatest hurdles a wrongful death plaintiff will have in persuading the court to apply the discovery rule to wrongful death actions is the 1981 decision in *Johnson v. Koppers Co.*¹⁹⁴ The cause of death in *Johnson* was the result of asbestos exposure. The plaintiffs did not bring wrongful death actions until over two years after the decedents' deaths. The district court was forced to address the issue of whether, under Ohio law, the discovery rule was applicable to wrongful death action where the underlying theories were negligence and strict products liability.¹⁹⁵ Although the *Johnson* decision it is not binding on the state courts of Ohio,¹⁹⁶ it is persuasive authority. According to the district court's analysis of the relevant state cases, Ohio would not permit the application of the discovery rule to wrongful death action.¹⁹⁷

In *Johnson*, the court first addressed the issue of whether the "two years from the date of death" provision was violative of the "right-to-a-remedy" provision in the state constitution.¹⁹⁸ The court stated that Section 16, Article I, applied only to "wrongs recognized by law."¹⁹⁹ Actions not filed within the two years of the date of death are "not recognized by law."²⁰⁰ The *Johnson* court concluded that the two year requirement is a

¹⁹² OHIO REV. CODE ANN. § 2125.02(B)(1) and (3) (expected earning capacity and loss of society).

¹⁹³ See *supra* notes 175-76 and accompanying text.

¹⁹⁴ 524 F. Supp. 1182 (N.D. Ohio 1981); see also *Bazdar v. Koppers Co.*, 524 F. Supp. 1194 (N.D. Ohio 1981). *Bazdar* was decided the same day as *Johnson*, and the opinion is identical to *Johnson* in all relevant respects.

¹⁹⁵ *Johnson*, 524 F. Supp. at 1182.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 1188.

¹⁹⁹ *Id.* (citing *Building Serv. & Maintenance Union v. St. Luke's Hosp.*, 11 Ohio Misc. 218, 227 N.E.2d 265 (1987)).

²⁰⁰ *Id.*

restriction qualifying the right of action, not a time limitation.²⁰¹

The *Johnson* court, however, did not discuss Ohio state court decisions which have struck down statutes that imposed restrictions qualifying the right of action and that were held violative of the "open court/right-to-a-remedy" provision.²⁰² In *Primes v. Tyler*, the Ohio Guest Statute²⁰³ was struck down as violative of Section 16, Article I, because it acted as a qualification upon the right to bring an action.²⁰⁴ The qualification struck down by the *Primes* court precluded a plaintiff from bringing an action against an automobile driver if the plaintiff had been a passenger in the vehicle.²⁰⁵

One of the grounds the *Johnson* court relied upon was the "condition precedent"/"not-an-existing-right" rationale.²⁰⁶ The district court held that Ohio's "right-to-a-remedy" provision was inapplicable because the provision referred to only "wrongs recognized by law."²⁰⁷ A wrongful death action not commenced within two years of the date of death was not a "wrong recognized by law."²⁰⁸ In both *Hardy* and *Mominee*, the Ohio Supreme Court has since ruled that Section 16, Article I is applicable to protect rights which were not "existing rights."²⁰⁹ The rights in *Hardy* and *Mominee* were neither "existing rights"²¹⁰ nor "wrongs recognized by law."

The *Johnson* court also addressed the due process and equal protection challenges to the two-year limitation.²¹¹ The court, without citing any precedential authority, held the right of access to the courts was not fundamental and thus access could be hindered if the legislation had a rational basis.²¹² The *Johnson* court further found that the limitation in wrongful death actions was rationally related to its purpose.²¹³

Subsequent to the *Johnson* decision, the Ohio Supreme Court, in *Hardy*, held that the right of access to the courts is fundamental and

²⁰¹ *Id.*

²⁰² See *Primes v. Tyler*, 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975); *Williams v. Marion Rapid Transit, Inc.*, 152 Ohio St. 2d 114, 87 N.E.2d 334 (1949) (The denial of remedy to an unborn viable child violated Section 16, Article I because it qualified the right of action and restricted it to those already born.)

²⁰³ OHIO REV. CODE ANN. § 4515.02 (Baldwin 1983). The Ohio Guest Statute provides:

The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest, resulting from the operation of said motor vehicle, while such guest is being transported without payment therefore in or upon said motor vehicle, unless such injuries or death are caused by the willful or wanton misconduct of such operator, owner, or person responsible for the operation of said motor vehicle.

²⁰⁴ *Primes*, 43 Ohio St. 2d 195, 331 N.E.2d 723.

²⁰⁵ *Id.*

²⁰⁶ 524 F. Supp. at 1188.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Hardy*, 32 Ohio St. 3d at 47, 512 N.E.2d 628-29; *Mominee*, 28 Ohio St. 3d 274-75, 503 N.E.2d at 722.

²¹⁰ *Id.*

²¹¹ *Johnson*, 524 F. Supp. at 1193.

²¹² *Id.*

²¹³ *Johnson*, 524 F. Supp. at 1193.

cannot be denied even if the legislature acts with a rational basis.²¹⁴ The distinction between wrongful death plaintiffs and bodily injury plaintiffs has sharpened since the *Johnson* decision, with the recognition of the discovery rule in *O'Stricker* and *Oliver*.²¹⁵ Unlike wrongful death plaintiffs, the medical malpractice and bodily injury plaintiffs may bring actions, by virtue of the discovery rule, long after the negligent act.²¹⁶ The growing disparity between the court's treatment of wrongful death claimants and malpractice and bodily injury claimants brings into question whether Section 2125.02(D)'s two year provision can survive equal protection-rational basis scrutiny. The failure of the classifications in *Schwan* and *Mominee* to pass rational basis scrutiny adds credence to the argument that the distinction made between bodily injury plaintiffs and wrongful death plaintiffs is equally "irrational" and "patently arbitrary."²¹⁷

VI. CONCLUSION

One reason given to justify the disparate treatment of the wrongful death claimants is that death *automatically* puts one on notice to inquire as to possible negligence.²¹⁸ Under the discovery rule, injury only nominally less severe, such as quadriplegia or severe irreversible brain damage, that results from medical malpractice does not entail automatic notice of possible negligence. Is death somehow sufficiently more severe than the most severe non-fatal injuries to automatically put the decedent's survivors on notice of possible malpractice? The determination whether the fatal injury should have put the patient on notice of possible medical malpractice can just as easily be made by the jury in the wrongful death context.

A variety of reasons are generally given to justify the imposition of statutes of limitations. Requiring that actions be brought within a certain period of time protects defendants from stale claims,²¹⁹ provides defendants repose and stability in their lives,²²⁰ and deters plaintiffs from sitting on their rights.²²¹ In the absence of statutes of limitations, the court system would be inundated with cases involving stale evidence and faulty memories.²²²

The fundamental fairness and remedial purpose of the discovery rule were sufficiently compelling to outweigh the traditional justifications for the malpractice and bodily injury statutes of limitations.²²³ There is no

²¹⁴ *Hardy*, 32 Ohio St. at 48, 512 N.E.2d at 629.

²¹⁵ See *supra* notes 41-44 and accompanying text.

²¹⁶ See *supra* notes 41-56 and accompanying text.

²¹⁷ See *supra* notes 156-62 and accompanying text.

²¹⁸ See *supra* note 6, notes 17-29, and note 67 and accompanying text.

²¹⁹ See *supra* note 65 and notes 70-72 and accompanying text.

²²⁰ See *supra* notes 72-74 and accompanying text.

²²¹ See *supra* note 65 and notes 70-72 and accompanying text.

²²² See generally note 70-72 and accompanying text.

²²³ See *supra* note 42 and notes 80-83 and accompanying text.

purpose uniquely peculiar to the wrongful death statute's two-year limitations period that would prevent application of the discovery rule to Section 2125.02(D). Conversely, there is no purpose unique to the discovery rule that would allow its application to malpractice and bodily injury statutes of limitations and at the same time prohibit its application to the wrongful death statute's two-year provision.

What supposedly sets the wrongful death statute apart from the malpractice and bodily injury statutes is the fact that it is in "derogation of common law." The distinction has lost its substance. The right of survivors to recover for the wrongful death of a family member is unquestionably accepted in all American jurisdictions. It cannot be doubted that if all wrongful death statutes were repealed today, a common law wrongful death action would be recognized tomorrow.

The general impact of the discovery rule on wrongful death actions is best illustrated by discussing the impact on the medical profession of the discovery rule's application to wrongful death actions. Presently the discovery rule as outlined and refined in *Oliver v. Kaiser Community Health Foundation*,²²⁴ *Herschberger v. Akron City Hosp.*,²²⁵ and *Frysinger v. Leech*²²⁶ would leave the physician vulnerable to a medical malpractice suit until the patient discovers or reasonably should discover; 1) that he has sustained injury and 2) the injury is related to the act constituting malpractice.

Turning to the argument that the application of the discovery rule to wrongful death actions would result in stale claims being brought against physicians, a physician would not be required to defend against suits any more stale than must already be defended against under the discovery rule as it applies to medical malpractice actions. Whether the action is a stale medical malpractice action or a stale wrongful death action, the action is nonetheless stale.

In an action brought for wrongful death, the decedent is obviously unavailable to assist in determining the facts or date of negligence. However, the plaintiff may be similarly unavailable in medical malpractice or bodily injury suit by virtue of mental or physical incapacitation. Thus, the rationale does not justify the disparate treatment of the two classes of plaintiffs.

To extend the discovery rule to wrongful death actions, the Ohio judiciary must attack long-standing decisional law. The courts possess a variety of weapons with which to launch this attack. The most fundamental approach would be to reject the "derogation of common law" concept and place greater emphasis on the remedial purpose of the wrongful death statute. Adoption of this "remedial purpose" approach would be a less drastic means of changing the present state of the law than a constitutional attack on the statute. However, the harsh injustices resulting from the failure to apply the discovery rule to wrongful death actions

²²⁴ S. M. SPEISER, RECOVERY FOR WRONGFUL DEATH § 1:9 (2d ed. 1975).

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

²²⁶ 34 Ohio St. 3d 1, 516 N.E.2d 204 (1987).

would certainly warrant a constitutional attack on Section 2125.02(D)'s two-year provision. Regardless of the approach utilized, an effective attack may be made on the wrongful death statute's two-year statute of limitations provisions to ensure that its harsh injustices are ameliorated. True to the spirit of Chief Justice Celebrezze's remarks in *Amer*,²²⁷ the Ohio Supreme Court, which is responsible for the administration of justice, must remedy this "absurdity" in the law.²²⁸

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²²⁷ 32 Ohio St. 3d 38, 512 N.E.2d 337 (1987).

²²⁸ See *supra* note 1 and accompanying text.