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Statute of Limitations in Ohio Medical Malpractice An Old Trend Returns and a New Trend Evolves

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STATUTE OF LIMITATIONS IN OHIO MEDICAL MALPRACTICE AN OLD TREND RETURNS AND A NEW TREND EVOLVES

In *Gaines v. Preterm Cleveland, Inc.* [1] the Ohio Supreme Court reversed prior case law in two significant areas of medical malpractice. First, the court held that, "a plaintiff in a medical malpractice action who reasonably did not discover the cause of their injuries until more than three years after the act constituting the alleged malpractice may not be constitutionally deprived of a full year to pursue a medical claim by virtue of the four-year statute of repose contained in R.C. 2305.11(B)." [2] Secondly, the court held that, "a positive misrepresentation of a patient's condition, upon which the patient reasonably relies to his detriment, constitutes a cause of action in fraud independent of any claim of malpractice." [3] Following *Gaines*, a litigant in a medical malpractice action involving fraudulent misrepresentation may be able to utilize the four year statute of limitations for fraud, thereby extending the tolling of the statute from one year to four years. The decision also removes the absolute time bar for all medical malpractice litigants and allows them to bring a cause of action within one year of the date of discovery of the malpractice.

FACTS

In *Gaines*, plaintiff, Evelyn Y. Gaines, went to defendant, Preterm Cleveland, Inc., on April 30, 1980, for the dual purpose of having her pregnancy terminated and her intrauterine device[4] removed.[5] The abortion was successfully completed but the intrauterine device was not removed.[6] Gaines alleged that Preterm told her that it had removed the intrauterine device.[7] Thereafter, Gaines received gynecological, obstetrical and medical services for abdominal pains until October 6, 1982.[8] On October 18, 1983, nearly three and one-half years after the Preterm procedure, Gaines discovered that the intrauterine device remained in her body.[9] The intrauterine device had perforated[10] her uterus and become embedded in her left ligament.[11]

On October 16, 1984, the plaintiff notified the defendants, Preterm and St.

[1] Gaines v. Preterm Cleveland, Inc., 33 Ohio St. 3d 54, 514 N.E. 2d 709 (1987).

[2] *Id.* at 55, 514 N.E.2d at 712 (citing OHIO REV. CODE ANN. 2305.11(B) (Baldwin 1987)).

[3] *Id.* 33 Ohio St. 3d at 55, 514 N.E.2d at 712.

[4] STEDMAN'S MEDICAL DICTIONARY (3rd ed. 1972). An intrauterine device is a "birth control device inserted into the female uterus, the womb, to prevent conception." *Id.*

[5] *Gaines*, 33 Ohio St. 3d at 54, 514 N.E.2d at 711.

[6] *Id.*

[7] *Id.*

[8] Gaines v. Preterm Cleveland Inc., No. 50807, slip op. (8th Cir. Oct. 9, 1986).

[9] *Gaines*, 33 Ohio St. 3d at 54, 514 N.E.2d at 711.

[10] STEDMAN'S MEDICAL DICTIONARY 941 (3rd ed. 1972). Perforated is defined as "pierced with one or more holes." *Id.*

[11] *Gaines*, 33 Ohio St. 3d at 54, 514 N.E.2d at 711; STEDMAN'S MEDICAL DICTIONARY 703 (3rd ed. 1972): A ligament is "a band or sheet of fibrous tissue connecting two or more bones, cartilages or other structures."

Luke's Hospital, that she was considering filing suit.[12] On April 11, 1985, Gaines filed suit in the Cuyahoga County Court of Common Pleas, naming St. Luke's Hospital and Preterm as defendants.[13] Plaintiff claimed that St. Luke's inserted the intrauterine device; that Preterm was negligent in its failure to remove the intrauterine device; and further, that she had relied to her detriment upon Preterm's misrepresentation that it had removed the intrauterine device.[14] The court of common pleas granted Preterm and St. Luke's summary judgment based on R.C. 2305.11(B) (hereinafter the four-year absolute bar statute)[15] and dismissed the complaint on July 31, 1985. On August 22, 1985, plaintiff filed her notice of appeal with the Court of Appeals, Eighth Appellate District, Cuyahoga County. On November 20, 1985, the court granted plaintiff's and St. Luke's joint motion to dismiss the appeal against St. Luke's.[16]

On appeal, Gaines, contended: (1) that the Discovery Rule of Accrual adopted in *Oliver v. Kaiser Community Health Found*[17] should continue to be the standard of review, thereby obliterating the four-year absolute bar of the four-year statute of limitations; and, (2) that she had alleged a separate cause of action in fraud, which was timely filed.[18]

Prior to *Oliver*, the courts of Ohio followed the rule that the termination of the medical relationship commenced the running of the one-year statute of limitations in medical malpractice actions.[19] In *Oliver*, the Ohio Supreme Court held that under R.C. 2305.11(A), a cause of action for medical malpractice accrues and the statute of limitations commences to run when the patient discovers, or, in the exercise of reasonable care and diligence, should have discovered, the resulting injury.[20] All other inconsistent cases were overruled.[21]

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[12] *Gaines*, 33 Ohio St. 3d at 54, 514 N.E.2d at 711. Plaintiff gave notice in accordance with R.C. § 2305.11(A) which reads in pertinent part:

> 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.
>
> 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.

OHIO REV. CODE ANN. § 2305.11(A) (Baldwin 1987).

[13] Gaines v. Preterm Cleveland, No. 50807, slip op. (8th Cir. Oct. 9, 1986).

[14] *Id.*

[15] OHIO REV. CODE ANN. § 2305.11(B) (Baldwin 1987) states in pertinent part, "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."

[16] Gaines v. Preterm-Cleveland, No. 50807, slip op. (8th Cir. Oct. 9, 1986).

[17] Oliver v. Kaiser Community Health Found, 5 Ohio St. 3d 111, 449 N.E.2d 438 (1983). For a more detailed discussion on the Discovery Rule *see* Note, *Torts, Physicians and Surgeons, Medical Malpractice*, 52 U. Cin. L. Rev. 1055 (1983).

[18] Gaines v. Preterm-Cleveland, No. 50807, slip op. (8th Cir. Oct. 9, 1986).

[19] *Oliver*, 5 Ohio St. 3d at 113, 449 N.E.2d at 440.

[20] *Id.*

[21] *Id.* (inconsistent cases concerning the tolling of the statute of limitations: Gillette v. Tucker, 67 Ohio St. 106, 65 N.E. 865 (1902); Bowers v. Santee, 99 Ohio St. 361, 124 N.E. 238 (1919); Amstutz v. King, 103 Ohio

Plaintiff contended that she met the criteria required by R.C. 2305.11(A)(2) by filing a notice of intent to sue within one year of the discovery of the malpractice action and by filing suit within the six month extension period.[22] She further contended that the Discovery Rule of Accrual in *Oliver* extended the time limitation for bringing her cause of action, notwithstanding the four year absolute bar statute.[23]

While the appellate court admitted that this particular issue[24] had not previously been addressed by the courts, it relied on *Haumesser v. Greenburg*[25] in determining that plaintiff's medical malpractice action was time-barred under the four-year absolute bar statute.[26]

In *Haumesser*,[27] the plaintiffs filed suit for medical malpractice on October 18, 1983, alleging that surgery was negligently performed on May 14, 1976.[28] Plaintiffs also alleged that the malpractice was not discovered until October 19, 1982, less than one year before they filed suit.[29] However, the appellate court upheld the four-year time bar when the alleged malpractice was not discovered until after the four year limitation following the act.[30] In the present case, the court supported its decision with the observation that in *Haumesser*,[31] the plaintiff was denied any relief, whereas in the instant case, the plaintiff had at least six months to bring suit before the four-year limitation ran.[32]

Gaines further contended that her misrepresentation claim, regarding the failure to remove her intrauterine device, was subject to the four-year fraud statute of limitations as outlined in R.C. 2305.09, (hereinafter the fraud statute of limita-

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St. 674, 135 N.E.2d 973 (1921); Delong v. Campbell, 157 Ohio St. 22, 104 N.E.2d 177 (1952); Lundberg v. Bay View Hospital, 175 Ohio St. 133, 191 N.E.2d 419 (1971)).

[22] OHIO REV. CODE ANN. § 2305.11(A)(2) (Baldwin 1984) reads in pertinent part:

> 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.

[23] Gaines v. Preterm-Cleveland, No. 50807, slip. op. (8th Cir. Oct. 9, 1986).

[24] *Id.* (Issue: whether a plaintiff who discovers that she has a cause of action prior to the lapse of the four-year rule has an additional year from the time of discovery to bring a cause of action even if the action would be commenced after the four-year rule has elapsed).

[25] Haumesser v. Greenburg, No. 11909, slip op. (9th Cir. June 12, 1985).

[26] Gaines v. Preterm-Cleveland, No. 50807, slip op. (8th Cir. October 9, 1986).

[27] Haumesser v. Greenburg, No. 11909, slip op. (9th Cir. June 12, 1985).

[28] *Id.*

[29] *Id.*

[30] Gaines v. Preterm-Cleveland, No. 50807, slip op. (8th Cir. Oct. 9, 1986).

[31] *Haumesser*, No. 11909, slip op. (9th Cir. June 12, 1985).

[32] *Id.*

[33] OHIO REV. CODE ANN. § 2305.09 (Baldwin 1987) reads in pertinant part:

> An action for any of the following causes shall be brought within four years after the cause thereof accrued: (A) For trespassing upon real property; (B) For the recovery of personal property, or for taking or detaining it; (C) For relief on the ground of fraud.

tions).[33] Citing *Leach v. Shapiro*,[34] she contended that, "misrepresentation of a material fact may provide the basis for an action in fraud, independent of malpractice." [35] In *Leach*,[36] the court stated, "When the physician has knowledge of a fact concerning the patient's physical condition which is material to the patient, the patient-physician fiduciary relationship may render the physician's silence fraudulent. The physician's non-disclosure may give rise to an action in fraud independent of malpractice." [37]

However, the appellate court held that the fraud statute of limitations can only apply in cases where the plaintiff's injury is the result of the defendant's fraud.[38] Because the court found that the Gaines' injury stemmed not from fraud, but from malpractice, the court held that the medical malpractice limitation was to be the applicable statute in this case.[39] Applying that statute, the court further held that Preterm's misrepresentation did not independently extend the malpractice statute of limitations.[40] Accordingly, on October 9, 1986, the appellate court affirmed the lower court's decision.[41]

The Supreme Court of Ohio reversed the decision on both issues on October 21, 1987.[42]

ANALYSIS

Medical Malpractice and the Constitutionality of 2305.11(B)

Prior to July 28, 1975, in Ohio, a person had one year from the date the cause of action accrued to file suit for medical malpractice.[43] However, the limitations period was tolled pursuant to R.C. 2305.16,[44] the disabilities statute. When a person was limited by the age of minority, unsound mind or imprisonment, the statute of limitations did not run until the disability was removed, thereby extending the statute of limitations.

R.C. 2305.11(B) (hereinafter the four-year absolute bar statute) was enacted

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[34] Leach v. Shapiro, 13 Ohio App. 3d 393, 469 N.E.2d 1047 (1984).

[35] Gaines v. Preterm-Cleveland, No. 50807, slip op. (8th Cir. Oct. 9, 1986).

[36] *Leach*, 13 Ohio App. 3d at 397, 469 N.E.2d at 1054 (1984).

[37] *Id.* at 394, 469 N.E.2d at 1048.

[38] Gaines v. Preterm-Cleveland, No. 50807, slip op. (8th Cir. Oct. 9, 1986).

[39] *Id.*

[40] *Id.*

[41] Gaines v. Preterm-Cleveland, No. 50807, slip op. (8th Cir. Oct. 9, 1986).

[42] *Gaines*, 33 Ohio St. 3d at 54, 514 N.E.2d 709 (1987).

[43] Mominee v. Scherbarth, 28 Ohio St. 3d 271, 277, 503 N.E.2d 717, 723 (1986) (citing Oliver v. Kaiser Community Health Found, 5 Ohio St. 3d 111, 449 N.E.2d 438 (1982)).

[44] OHIO REV. CODE ANN. § 2305.16 (Baldwin 1987) states in pertinent part:

> Unless otherwise specifically provided in sections 2305.04 to 2305.14, inclusive, and sectins 1302.98 and 1304.29 of the Revised Code, if a person entitled to bring any action mentioned in such sections unless for penalty or forfeiture, is, at the cause of action accrues, within the age of minority, of unsound mind, or imprisoned, such person may bring it within the times limited by such sections, after such disability is removed.

in legislative response to what was perceived throughout the country to be a medical malpractice "crisis" manifested by sharply increased medical malpractice insurance premiums, cancellation of policies, and physician's work slowdowns or stoppages.[45] The Ohio General Assembly declared the four-year absolute bar statute an emergency measure necessary for the immediate preservation of the public peace, health and safety.[46] Thus, the Assembly's primary goal was to insure that health care was provided to Ohio citizens, while a secondary goal was to prevent stale claims.[47] The means to this end rested in comprehensive legislation designed to reduce medical malpractice insurance premiums.[48]

The Ohio Medical Malpractice Act[49] (OMMA) became effective on July 28, 1975. The OMMA amends the Medical Malpractice Statute. Under the amended statute, in addition to the one-year limitation period, there exists an absolute limit of four years to bring an action alleging medical malpractice.[50] In addition, the amendment specifically excepts the Medical Malpractice Statute from the disabilities tolling statute.[51]

Following the adoption of the new legislation, concern arose over the need to define the scope of various provisions. Since 1980, several cases have interpreted and clarified the Medical Malpractice Statute.[52] However, it was not until 1986 that the constitutionality of the amendment was first attacked. Despite the fact that "the court will not pass on the Constitutionality of a statute unless it is 'absolutely necessary' to the resolution of the 'case or controversy' . . . and a regularly enacted statute of Ohio is presumed to be Constitutional and is therefore entitled to the benefit of every presumption in favor of its Constitutionality,"[53] the court upheld the attack. In *Mominee v. Scherbarth*[54] the four-year absolute bar statute was found unconstitutional as applied to minors under the due course of law provisions[55] of the Ohio Constitution.[56] *Mominee*[57] was succeeded by *Hardy v.*

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[45] *Mominee*, 28 Ohio St. 3d at 274, 503 N.E.2d at 721.

[46] *Id.*

[47] *Id.* at 274-275, 503 N.E.2d at 720-721.

[48] *Id.* at 275, 503 N.E.2d at 721.

[49] Am Sub. H.B. 682, 136 Ohio Laws 2809, 2823 (1975). For a state comparison of the Medical Malpractice Reform Act *See* Note, *Medical Malpractice Reform Act: The New York State Legislature Responds To The Medical Malpractice Crisis with a Perscription for Comprehensive Reform*, 52 Brooklyn L. Rev. 135 (1986).

[50] *Mominee*, 28 Ohio St. 3d at 273, 503 N.E.2d at 719.

[51] *Id.*

[52] *See* Oliver v. Kaiser Community Health Found, 5 Ohio St. 3d 111, 449 N.E.2d 428 (1983); Schwan v. Riverside Methodist Hospital, 6 Ohio St. 3d 300, 452 N.E.2d 1337 (1983); Opalko v. Marymount Hospital, 9 Ohio St. 3d 63, 458 N.E.2d 847 (1984); Vance v. St. Vincent Hospital, 64 Ohio St. 2d 36, 414 N.E.2d 406 (1980).

[53] Hardy v. VerMeulen, 32 Ohio St. 3d 45, 51, 512 N.E.2d 626 (1987).

[54] *Mominee*, 28 Ohio St. 3d at 270, 503 N.E.2d at 717.

[55] OHIO CONST. art. I, § 1.

[56] *Mominee*, 28 Ohio St. 3d at 270, 503 N.E.2d at 717.

[57] *Id.*

VerMeulen.[58] In *Hardy*,[59] the court determined that the four-year absolute bar statute violated the "right to remedy" [60] provision of the Ohio Constitution as to those persons who did not know, or could not reasonably have known, of their injuries.[61]

The *Mominee*[62] and *Hardy*[63] courts both addressed the impact of the 1975 amendment and the concern over the "medical malpractice crisis." Both courts relied heavily on the findings of the Superintendent of Insurance in reaching their conclusions. Section five of the Medical Malpractice Act required the Superintendent of Insurance to report annually to the Ohio General Assembly on the effectiveness of certain amendments in reducing medical malpractice insurance premiums.[64] The Superintendent of Insurance found that the four-year absolute bar statute was not of sufficient consequence to be included for the annual review. Based upon this finding, both courts determined that the absolute four-year bar statute created a classification which did not rationally[65] further the purpose of the OMMA.[66] Therefore, the four-year absolute bar statute was found unconstitutional when applied to minors and those persons who did not know or could not reasonably have known of their injuries.[67]

Until *Gaines*[68], the constitutionality of the four-year absolute bar statute had not suffered further attack. In *Gaines*,[69] the court attacked the statute on three separate grounds: equal protection, due process and the Open Court Provision of the Ohio Constitution. Each of the constitutional grounds centered around the statute's one year provision to pursue litigation under 2305.11(A). In *Oliver v. Kaiser Community Health Found*,[70] the court established that one year was a reasonable time in which to pursue litigation. Numerous subsequent cases have upheld and cited to the *Oliver* decision.[71]

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[58] *Hardy*, 32 Ohio St. 3d at 45, 512 N.E.2d at 626.

[59] *Id.*

[60] OHIO CONST. art. I, § 16.

[61] *Hardy*, 32 Ohio St. 3d at 45, 512 N.E.2d at 626.

[62] *Mominee*, 28 Ohio St. 3d at 270, 503 N.E.2d at 717.

[63] *Hardy*, 32 Ohio St. 3d at 45, 512 N.E.2d at 626.

[64] Schwan v. Riverside Methodist Hospital, 6 Ohio St. 3d 300, 302, 452 N.E.2d 1337, 1339 (1983).

[65] *E.g.*, Denicola v. Providence Hospital, 57 Ohio St. 2d 115, 119, 387 N.E.2d 231, 234 (1970). Analysis of violations of equal protection of the law is governed by a "rational basis test". Under that test the statute must be upheld "if there exists any conceivable set of facts under which the classification rationally furthered a legitimate legislative objective." *Id.*

[66] *Hardy*, 32 Ohio St. 3d at 45, 512 N.E.2d at 626 (citing Mominee v. Scherbarth, 28 Ohio St. 3d 270, 503 N.E.2d 717 (1986)).

[67] *Id.*

[68] Gaines v. Preterm-Cleveland, Inc., 33 Ohio St. 3d 54, 514 N.E.2d 709 (1987).

[69] *Id.*

[70] Oliver v. Kaiser Health Found, 5 Ohio St. 3d 111, 449 N.E.2d 438 (1983).

[71] *See* Adams v. Sherk, 4 Ohio St. 3d 37, 446 N.E.2d 165 (1983); Deskins v. Young, 6 Ohio St. 3d 8, 496 N.E.2d 899 (1986); Hoffman v. Davidson, 31 Ohio St. 3d 60, 508 N.E.2d 958 (1987); Frysinger v. Leech, 32 Ohio St. 3d 38, 512 N.E.2d 337 (1987).

Equal Protection

The *Gaines*[72] court, like the *Mominee*[73] and *Hardy*[74] courts, recognized the purpose and goals the legislature wished to attain in enacting the absolute four-year bar statute.[75] However, the court held that the statute discriminates against those who discover their malpractice injuries before the four-year repose period, but at such time as affords them less than one full year to pursue their claims.[76] The court found that the statute failed to discern any rational basis which furthered a legitimate legislative objective for distinguishing this class of malpractice litigants from other classes.[77] Although the legislature intended to decrease malpractice litigation, the court held that such a decrease cannot be accomplished through an unequal distinction between class members.[78] Accordingly, the court concluded that the absolute four-year bar statute was violative of the right of equal protection.[79]

Due Process

The court further found the four-year absolute bar statute failing under the Due Process of Law Provision in the Ohio Constitution[80] because the statute failed the court's standard: "A legislative enactment will be deemed valid on due process grounds . . . (1) if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public; and, (2) if it is not unreasonable or arbitrary."[81] Although the severance of a right to a claim may bear a "real and substantial" relation to the general welfare of the public by decreasing the number of medical malpractice claims, thereby reducing insurance and lessening the cost of healthcare, the court found this means of achieving such a goal was both unreasonable and arbitrary,[82] stating that a legislative enactment may lawfully shorten the limitation period as long as the claimant is afforded a reasonable time

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[72] *Gaines*, 33 Ohio St. 3d at 54, 514 N.E.2d at 709.

[73] Mominee v. Scherbarth, 28 Ohio St. 3d 270, 503 N.E.2d 717 (1986).

[74] Hardy v. VerMeulen, 32 Ohio St. 3d 45, 512 N.E.2d 626 (1987).

[75] *Gaines*, 33 Ohio St. 3d at 59, 514 N.E.2d at 716.

[76] *Id.*

[77] *Id.* at 59, 514 N.E.2d at 715 (citing Porter v. Oberlin, 1 Ohio St. 2d 143, 205 N.E.2d 363 (1965)): "As with all laws, statutes of limitations must apply equally to all persons unless reasonable grounds permit the legislating body to make distinctions between classes of persons affected by the law." Laws that operate unequally, unfairly or unreasonably when applied to the public are unconstitutional. Equal protection requires the state to have reasonable grounds for any distinction between those within and without a class. To deterine the legitimacy of any distinction the legislature utilizes the "rational basis text." If a class differentiation rationally furthers the stated legislative objective then the statute is constitutional).

[78] *Gaines*, 33 Ohio St. 3d at 59, 514 N.E.2d at 716. (For further discussion on statutes of limitations *See* Note, *Limitation on Recovery of Damages Medical Malpractice Cases: A Violation of Equal Protection*, 54 U. Cin. L. Rev. 1329 (1986)).

[79] *Id.*

[80] OHIO CONST. art. I, § 1.

[81] *Gaines*, 33 Ohio St. 3d at 59, 514 N.E.2d at 715 (quoting Mominee v. Scherbarth, 28 Ohio St. 3d 270, 504 N.E.2d 709 (1987) (quoting 167 Ohio St. 103, 40 Ohio Op. 2d 113, 146 N.E.2d 854 (1957)).

[82] *Gaines*, 33 Ohio St. 3d at 59, 514 N.E.2d at 715.

to enforce his right.[83] Like *Oliver*,[84] it was held in *Adams v. Sherk*[85] that one year after the discovery of the malpractice was a reasonable time in which to institute litigation.[86] Accordingly, the court held that by reducing the one year period the statute violated the Due Process Clause of the Ohio Constitution.[87]

Open Court Provision

Finally, the supreme court identified a third and final constitutional infirmity in the four-year absolute bar statute. Gaines contended that the statute violated the Open Court Provision of the Ohio Constitution.[88] The court concurred, citing its recent decision in *Hardy v. VerMeulen*:[89] "When the Constitution speaks of remedy and injury to person, property or reputation, it requires an opportunity granted at a meaningful time and in a meaningful manner."[90] The court rightfully concluded that the plaintiff in the present case, as well as all others in her class, were denied that meaningful remedy.[91]

Fraudulent Misrepresentation — An Independent Cause of Action

The second issue before the supreme court was whether a positive misrepresentation of a patient's condition, upon which the patient reasonably relied to his detriment, constituted a cause of action in fraud independent of any claim of malpractice.[92]

In reversing the court of appeals, the supreme court found that the action not only sounded in malpractice, but also in fraud, stating that, "A physician's knowing misrepresentation of a material fact concerning a patient's condition, on which the patient justifiably relies to his detriment, may give rise to a cause of action in fraud, independent from an action in medical malpractice."[93] Words or conduct asserting the existence of a fact constitute a misrepresentation if the fact does not exist.[94] In Ohio, misrepresentation must affect the identity, value or character of the subject matter of the transaction to be material.[95] The court separated the

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[83] Adams v. Sherk, 4 Ohio St. 3d 37, 39, 446 N.E.2d 165, 167 (1983).

[84] Oliver v. Kaiser Community Health Found, 5 Ohio St. 3d 111, 449 N.E.2d 438 (1983).

[85] *Adams*, 4 Ohio St. 3d at 37, 446 N.E.2d at 165.

[86] *Id.* at 40, 446 N.E.2d at 168.

[87] *Gaines*, 33 Ohio St. 3d at 59, 514 N.E.2d at 717.

[88] OHIO CONST. art. I, § 16 states in pertinent part, "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, an shall have justice administered without denial or delay."

[89] Hardy v. VerMuelen, 32 Ohio St. 3d, 45, 512 N.E.2d 626 (1987).

[90] *Id.* at 48, 512 N.E.2d at 628.

[91] *Gaines*, 33 Ohio St. 3d at 60, 514 N.E.2d at 716.

[92] *Id.* at 55, 514 N.E.2d at 711.

[93] *Id.* at 56, 514 N.E.2d at 712.

[94] 50 O. JUR. 3D *Fraud and Deceit* § 4 (1984).

[95] 50 O. JUR. 3D *Fraud and Deceit* § 101 (1984).

two issues because Preterm's failure to inform Gaines that the intrauterine device was not removed was not motivated by any medical consideration, thereby bringing Preterm's actions within the confines of a cause of action in fraud.[96]

In *Gaines*,[97] the supreme court held that a reasonable person could conclude that all six of the elements of an action in actual fraud were present[98]: (1) The representation of a fact was satisfied by Gaines' assertion that employees or agents of Preterm told her the intrauterine device was removed; (2) the representation was material to the transaction because Gaines had consulted Preterm for the express purpose of having the intrauterine device removed; (3) knowing falsity was present given the evidence that the intrauterine device had not been removed and Preterm knew that it had not; (4) a reasonable person could believe that the representation was intended to induce Gaines to rely on it (since reliance was expected and would benefit Preterm by creating the false belief that she had been successfully treated); (5) her reliance could be justified since she had no reason to doubt the statement and had insufficient training or ability to evaluate its accuracy; and, (6) the court found it reasonable to conclude that her ongoing abdominal pain and gynecological problems were caused by the unretrieved intrauterine device, which had perforated the uterus and become embedded in the left ligament.[99]

The Medical Malpractice Statute Today

Based upon the foregoing discussion, the four-year absolute bar statute is unconstitutional as applied to adult medical malpractice litigants who, following discovery, do not have the time provided by R.C. 2305.11(A), or one year, in which to file their actions.[100] The *Gaines*[101] decision advances the *Mominee*[102] and *Hardy*[103] decisions to declare the four-year absolute bar statute unconstitutional as it pertains to all medical malpractice litigants, according to the majority opinion.[104] Following this decision, the rule for all medical malpractice litigants is found in R.C. 2305.11(A):

> A cause of action for medical malpractice accrues and the one year statute of limitations commences to run (a) when the patient discovers or, in the exercise of reasonable care and diligence, should have discovered the resulting injury or (b) when the physician-patient relationship for that condition terminates, whichever occurs later. If 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 per-

[96] *Gaines*, 33 Ohio St. 3d at 56, 514 N.E.2d at 713.

[97] *Id.* at 59, 514 N.E.2d at 718.

[98] W. PROSSER, PROSSER ON TORTS 700 (1964).

[99] *Gaines*, 33 Ohio St. 3d at 56, 514 N.E.2d at 712.

[100] *Id.* at 59, 514 N.E.2d at 718.

[101] *Id.* at 54, 514 N.E.2d at 709.

[102] *Mominee v. Scherbarth*, 28 Ohio St. 3d 270, 503 N.E.2d 717 (1986).

son 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 the notice is given.[105]

Despite the majority opinion and the court's previous decisions, the dissent felt this decision did not strike the statute on it's face, and might pass Constitutional muster as a limitation on those malpractice actions where the plaintiff has one year to file or send a letter of notice after an injury had been, or should have been discovered.[106] However, although the dissent raised questions about the due process and Open Court Provisions, it concurred with the majority that the facts of this case supported an equal protection violation.[107]

In review, it is apparent that the legislature may have acted hastily in its sincere desire to maintain healthcare in Ohio, and consequently, passed legislation that was overbroad. From the inception of the 1975 legislation, the four-year absolute bar was not considered a significant measure in the control of the medical malpractice crisis. In fact, there was no plan to monitor this amendment. Yet, due to legislation, there has evolved a series of cases which attack the amendment and attempt to clarify and explain the effects of the amendment dealing with different fact patterns. Those attacks finally culminated in the constitutional attacks, which literally have returned Ohio to the law prior to 1975, notwithstanding the Discovery Rule in 1983. Had the legislature focused on other areas of legislation which were more apparent, and obviously affecting medical care in Ohio, significant time and financial resources would have been preserved. It leads one to ask, "Did this legislation add to the problems of increased litigation and in turn to the financial and service provision dilemma in the state?"

Litigation continues as the courts continue to define and clarify the Medical Malpractice Statute. Following *Gaines,*[108] in *Hershberger v. Akron City Hospital,*[109] the court was asked to define "injury" so the accrual date under R.C. 2305.11(A) could be determined. The questions continue. Hopefully, the legislature will carefully evaluate the need of this statute, assess potential future problems, and balance the issues surrounding it prior to passing legislation in the future.

Additionally, following *Gaines*,[110] a litigant with a medical malpractice cause of action, involving fraudulent misrepresentation or concealment, may have

[103] Hardy v. VerMeulen, 32 Ohio St. 3d 45, 512 N.E.2d 626 (1987).

[104] *Gaines*, 33 Ohio St. 3d at 61, 514 N.E.2d at 716. For further discussion and state comparison *See* Note, *Prescription-What You Don't Know Can Hurt You-Louisiana Adheres To A Three Year Limit On The Discovery Rule*, 58 Tul. L. Rev. 1547 (1984).

[105] *Id.* (citing OHIO REV. CODE ANN. § 2305.11(A) (Baldwin 1987)).

[106] *Id.* at 62, 514 N.E.2d at 719.

[107] *Id.*

[108] *Id.* at 54, 514 N.E.2d at 709.

[109] Hershberger v. Akron City Hospital, 34 Ohio St. 3d 1, 516 N.E.2d 204 (1987).

[110] *Gaines*, 33 Ohio St. 3d at 54, 514 N.E.2d at 709.

grounds for a suit in fraud independent of the malpractice cause of action.[111] However, the Court explicitly said, "We hold that the allegations advanced by Plaintiff, Gaines, generated a genuine issue of fact as to whether fraud occurred, a cause of action we deemed to be cognizable under *these* facts."[112] This statement leaves the impression that the facts of each individual case will be reviewed to determine the applicability of this decision. Furthermore, Justice Moyer, in his dissent, raised three significant issues: (1) Fraud is one area of the law which must be pled with particularity (in the present case the original pleading was misrepresentation and the constructive fraud issue arose following Preterm's motion for summary judgment); (2) actual fraud was never pled, yet the Court said the action sounded in actual fraud; and (3) a discussion of the difference between constructive fraud and actual fraud may best be covered under an action in medical malpractice. Despite the change in the law, since *Gaines*,[113] future court decisions will clarify the reach of the decision. The case facts, the forms of pleadings and the distinction between actual and constructive fraud will be considerations for future court decisions utilizing the *Gaines*[114] rule. The concern of the court will likely center around extending the statute of limitations in a medical malpractice case from the one year to the four year provision under a cause of action in fraud.

CONCLUSION

The *Gaines*[115] decision declared R.C. 2305.11(B) unconstitutional for all medical malpractice litigants. Although the dissent questioned the reach of the decision, following *Gaines*,[116] in the wake of *Mominee*[117] and *Hardy*,[118] it is clear that: (1) R.C. 2305.11(B) is unconstitutional as it relates to minors; (2) R.C. 2305.11(B) is unconstitutional as to those persons who did not know or could not reasonably have known of their injuries; and, (3) R.C. 2305.11(B) is unconstitutional as to those persons who reasonably did not discover the cause of their injuries until more than three years after the act constituting the alleged malpractice, thereby being denied the one year provided under R.C. 2305.11(A) in which to file their claims.

Furthermore, a litigant with a medical malpractice cause of action may simultaneously have another cause of action for fraudulent misrepresentation. The impact lies in the ability to extend the Statute of Limitations from the one year for medical malpractice to the fraud limitation of four years.

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[111] *Id.* at 55, 514 N.E.2d at 712.

[112] *Id.*

[113] Gaines v. Preterm-Cleveland, 33 Ohio St. 3d 54, 514 N.E.2d 709 (1987).

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] Mominee v. Scherbarth, 28 Ohio St. 3d 270, 503 N.E.2d 717 (1986).

[118] Hardy v. VerMeulen, 32 Ohio St. 3d 45, 512 N.E.2d 626 (1987).