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CIVIL PROCEDURE/TORT LAW—BETTER OFF DEAD?: MINORITY TOLLING PROVISION CANNOT SAVE DECEASED CHILD'S CLAIM

Gretchen R. Fuhr

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> *It has been said that a child who loses a parent is an orphan. A man who loses his wife is a widower. A woman who loses her husband is a widow. There is no name for a parent who loses a child, for there are no words to describe this pain.*[1]

INTRODUCTION

Terron Vance, born September 15, 1994, was taken to Henry Ford Hospital in Detroit on July 31, 2002, as a result of pain caused by sickle cell anemia.[2] He was admitted to the hospital for treatment and on the following day, just before his eighth birthday, he died of an alleged morphine overdose.[3] Following his death, Dwunneka Vance was appointed personal representative of Terron Vance's estate. She filed a medical malpractice wrongful death action on September 13, 2004, two days before he would have turned ten.

Dwunneka Vance believed these complaints were filed timely under the savings provision, section 600.5851(7) of the Michigan Compiled Laws, which states,

> if, at the time a claim alleging medical malpractice accrues to a person under section 5838a the person has not reached his or her eighth birthday, a person shall not bring an action based on the claim unless the action is commenced on or before the person's tenth birthday . . . .[4]

Because Terron Vance had not reached the age of eight before he died, Dwunneka Vance made sure to file before Terron's tenth birthday.[5] However, the defendant—Henry Ford Hospital—moved to dismiss as an untimely filing, arguing that the applicable statute

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1. Michael Bloomberg, Mayor, N.Y. City, 9/11 Remembrance Ceremony (Sept. 11, 2004), *available at* http://transcripts.cnn.com/TRANSCRIPTS/0409/11/se.01.html.
2. Vance v. Henry Ford Health Sys., 726 N.W.2d 78, 79 (Mich. Ct. App. 2006).
3. *Id.* at 79.
4. MICH. COMP. LAWS ANN. § 600.5851(7) (West 2000) (footnote omitted).
5. *See Vance*, 726 N.W.2d at 79.

of limitations was section 600.5851(1) of the Michigan Compiled Laws, which provides,

> Except as otherwise provided in subsections (7) and (8), if the person first entitled to make an entry or bring an action under this act is under 18 years of age . . . at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to . . . bring the action although the period of limitations has run. This section does not lessen the time provided for in section 5852.[6]

The defendant believed that Terron's death removed his disability; thus, they argued that the appropriate limitation period for Mrs. Vance to file as personal representative of Terron's estate had expired under section 5852.[7]

The court, in deciding this issue, would determine whether the Vance family could argue its claims and have its day in court, or whether the hospital would be excused from defending itself against a stale claim. Thus, a decision in favor of the defendant would foreclose the claim of any parent who was relying on section 600.5851(7) to bring an action as a result of her child's death.

Several other states have had occasion to consider statutes with seemingly inconsistent infancy tolling provisions where medical malpractice is involved in the death of a child.[8] The majority of courts, including the court in *Vance*, have come to the same conclusion—a child ceases to have birthdays after he dies; therefore, the savings provision no longer applies as it would if he had survived. Instead, the applicable statute of limitations is that which applies to the personal representative of the deceased's estate.[9]

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6. MICH. COMP. LAWS ANN. § 600.5851(1). Subsection 5852, in relevant part, states that a personal representative may initiate suit, "any time within 2 years after letters of authority are issued although the period of limitations has run."

7. *Vance*, 726 N.W.2d at 80; *see also* MICH. COMP. LAWS ANN. § 600.5852 (West 2002).

8. *See generally* Randolph v. Methodist Hosps., Inc., 793 N.E.2d 231 (Ind. Ct. App. 2003); Bailey v. Martz, 488 N.E.2d 716 (Ind. Ct. App. 1986), *superseded by statute*, IND. CODE § 34-23-2-1 (2008), *as recognized in* Ellenwine v. Fairley, 846 N.E.2d 657 (Ind. 2006); Joslyn v. Chang, 837 N.E.2d 1107 (Mass. 2005); Baker v. Binder, 609 N.E.2d 1240 (Mass. App. Ct. 1993); Regents of Univ. of N.M. v. Armijo, 704 P.2d 428 (N.M. 1985); Holt v. Lenko, 791 A.2d 1212 (Pa. Super. Ct. 2002); Campos v. Ysleta Gen. Hosp., Inc. (*Campos II*), 879 S.W.2d 67 (Tex. App. 1994). While the parties are the same in *Campos I*, the causes of action are not interrelated. *See* Campos v. Ysleta Gen. Hosp., Inc. (*Campos I*), 836 S.W.2d 791, 793 (Tex. App. 1992); *see also infra* note 108.

9. *Vance*, 726 N.W.2d at 82-83. *See generally* cases cited *supra* note 8.

From the point of view of these courts, there is no doubt that the claims filed in accordance with infancy tolling provisions are untimely if the child has died. Although it may seem like this bright-line rule is proper under rules of statutory construction and interpretation, it misses the ultimate intent of the legislature and produces unjust results. There is no doubt that the Vances had a viable medical malpractice claim, and that had Terron survived the morphine overdose and filed a negligence suit on his own behalf on the same date that his administrator did, his claim would have gone forward. Yet, because Terron died as a result of the alleged negligence and his family relied on the inapplicable statute of limitations, the family was left with no judicial recourse.

Whether a personal representative of a deceased child's estate should be able to rely on the same statute of limitations that would have applied to the child is a matter of statutory interpretation. Courts have uniformly decided in the negative. This Note suggests that a look into legislative history provides a rationale in opposition to the courts' views, and that allowing this type of claim to go forward is in line with both legislative intent and the general goals of the adversarial system. Part I discusses the origin of statutes of limitation as well as the development of tort law, including wrongful death actions. Part II describes the modern application of statutes of limitation to tort law in the context of minority tolling provisions and medical malpractice lawsuits. Part III discusses the relevant case law dealing with the death of minors due to alleged medical malpractice and the courts' rejection of reliance on minority tolling provisions by the minor's estate. Finally, Part IV analyzes the flaws in the rationale of those courts, followed by the presentation of a fresh approach to interpreting the statutes that both supports legislative intent and promotes public policy.[10]

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10. It should be noted that although medical malpractice litigation is at issue in the Note, it is a vast area of law which has been thoroughly examined in other materials. *See generally* WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS (2004); HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES (2004); Alec Shelby Bayer, *Looking Beyond the Easy Fix and Delving into the Roots of the Real Medical Malpractice Crisis*, 5 HOUS. J. HEALTH L. & POL'Y 111 (2005); Scott Forehand, *Helping the Medicine Go Down: How a Spoonful of Mediation Can Alleviate the Problems of Medical Malpractice Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 907 (1999); Catherine T. Struve, *Doctors, the Adversary System, and Procedural Reform in Medical Liability Litigation*, 72 FORDHAM L. REV. 943 (2004); Anthony J. Sebok, *Dispatches From the Tort Wars*, 85 TEX. L. REV. 1465 (2007) (reviewing TOM BAKER, THE MEDICAL MALPRACTICE MYTH (2005)). While this Note will mention the medical malpractice environment in which the relevant statutes and amendments were passed, it

I. LIMITATION ON ACTION AND THE DEVELOPMENT OF TORT LAW

A statute of limitation is generally defined as "a statute assigning a certain time after which rights cannot be enforced by legal action or offenses cannot be punished."[11] Its purpose is to "require diligent prosecution of known claims, thereby providing finality and predictability in legal affairs and ensuring that claims will be resolved while evidence is reasonably available and fresh."[12] Today's common understanding of statutory limitations is the result of four hundred years of variations and development.[13]

A. *The Statute of James*

The Statute of James was the first limitation-on-action statute.[14] It was enacted in England in 1623 out of a desire to prohibit land from becoming unproductive.[15] Disputes required lengthy investigation and litigation, during which time the land could not be used.[16] Because with the passage of time it became impossible to detect a defective title, statutes of limitation were adopted to "cure this defect" and "repair the injuries committed by time."[17] Several limitation periods were established and subsequently abandoned. Consequently, as Lord Coke understood, "many suits, troubles, and inconveniences" arose, leading to the development of "one constant law," which "certain limitations might serve, both for the time present, and for all times to come."[18] Thus, England enacted The Statute of James, "An Act for Limitation on Action, and for avoid-

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does so only in an attempt to understand the legislative intent behind extending time for minors to file medical malpractice suits.

11. MERRIAM-WEBSTER'S DICTIONARY 1220 (11th ed. 2003) [hereinafter MERRIAM-WEBSTER'S].

12. BLACK'S LAW DICTIONARY 1450-51 (8th ed. 2004) [hereinafter BLACK'S].

13. *See* Note, *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177 (1950).

14. *See* J.K. ANGELL, A TREATISE ON THE LIMITATIONS OF ACTIONS AT LAW AND SUITS IN EQUITY AND ADMIRALTY 6 (John Wilder May ed., 5th ed. 1869); Gail L. Heriot, *A Study in the Choice of Form: Statutes of Limitation and the Doctrine of Laches*, 1992 BYU L. REV. 917, 925-26.

15. ANGELL, *supra* note 14, at 6.

16. *Id.*

17. *Id.* at 7 (emphasis omitted).

18. *Id.* at 9-10. Lord Coke served as the Chief Justice of the King's Bench during the reign of James I. *See generally* 2 CUTHBERT WILLIAM JOHNSON, THE LIFE OF SIR EDWARD COKE, LORD CHIEF JUSTICE OF ENGLAND IN THE REIGN OF JAMES I (Kessinger Publishing 2007) (1845).

ing of Suits at Law."[19] The American colonies later adopted the same statute.[20]

B. *The Development of Tort Law in America*

While statutes of limitation have been recognized since the 1600s, tort law did not develop as an independent branch of law until late in the nineteenth century.[21] During the spread of industrialization at that time, many negligence cases arose between people who had previously been strangers. Simultaneously, a wave of legal scholars began to "question and discard old bases of legal classification."[22] This combination sparked the independence of torts as its own legal category.

In the 1870s, Oliver Wendell Holmes, Jr. emerged as one of the first scholars to explore the subject.[23] His greatest contribution was defining negligence as a separate principle of tort law, which was significant in two aspects.[24] First, his definition expanded the concept of "neglect of a specific, predetermined duty to that of [a] violation of a more general duty potentially owed to all the world."[25] Second, it "provide[d] Torts with a philosophical principle: no liability for tortious conduct absent fault."[26] Additionally, Holmes argued that fault was a requirement of liability, both in the strict sense of intentional wrongs, as well as in the loose meaning of negligent, unintentional wrongs.[27]

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19. An Act for Limitation on Action, and for Avoiding of Suits at Law, 21 Jac., c. 16, § 1 (1623) (Eng.), *reprinted in* H. G. WOOD, A TREATISE ON THE LIMITATION OF ACTIONS AT LAW AND IN EQUITY 631 (1882); *see also* Heriot, *supra* note 14, at 926 (noting that the statute " provided specific lengths of time for numerous real property and personal actions. It explicitly tolled these limitation periods for infancy, insanity, imprisonment, coverture, and absence from the realm, but was silent concerning ignorance. This statute is the model for statutes of limitation adopted by American legislatures").

20. ANGELL, *supra* note 14, at 10.

21. G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 3 (1980).

22. *Id.* At this time Cambridge intellectuals, such as Oliver Wendell Holmes and Nicholas St. John Green, began to challenge the writ pleading system, a system entrenched in esoteric pleading technicalities. *Id.* at 6-8. Dissatisfaction with the system gave way to law-revision committees in Massachusetts and New York in order to make the law more accessible to lay people. *Id.* at 8-9. With the collapse of the writ system, contemporaneous legal thought brought forth the inception of torts as its own classification. *Id.* at 3.

23. *Id.* at 6-7.

24. *Id.* at 13.

25. *Id.*

26. *Id.* (footnote omitted).

27. *Id.*

Holmes's principle that the law imposes a duty of care as well as the ideas of fault and negligence are still chief components of the modern day tort definition.[28] While tort law has expanded since the 1800s to include specific wrongs such as wrongful death and medical malpractice, the theory on which it is based has remained constant: "[The] widespread attitude . . . which presumes that most injured persons are entitled to compensation . . . ."[29] The public policy goals of modern tort law are compensating victims and deterring tortious conduct.[30]

C. *Wrongful Death Causes of Action*

At common law, a cause of action in tort did not survive the victim's death.[31] No action could be brought on behalf of the decedent and no recovery could be obtained. Hence, "it was cheaper for the defendant to kill the plaintiff than to injure him, and . . . the most grievous of all injuries left the bereaved family of the victim, who frequently were destitute, without a remedy."[32] Thus, all wrongful death actions are a result of statutory creation.

An action for wrongful death is "[a] lawsuit brought on behalf of a decedent's survivors for their damages resulting from a tortious injury that caused the decedent's death."[33] Its purpose is "to compensate the statutory beneficiaries for their own loss resulting from the death."[34] Awarding damages for wrongful death addresses the needs of the injured party—the beneficiary—while at the same time seeking to deter the defendant from further wrongdoing. In the *Vance* case, the beneficiary may have had costly medical bills, among other expenses, and undoubtedly would have wanted to prevent future negligent behavior of the hospital and staff.

Compensating the Vance family and preventing the further negligence by the Henry Ford Hospital seems like a win-win, but

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28. *See* BLACK'S, *supra* note 12, at 1526. A tort is defined as "[a] civil wrong . . . for which a remedy may be obtained, usu[ally] in the form of damages; a breach of a duty that the law imposes on persons who stand in a particular relation to one another." *Id.*

29. WHITE, *supra* note 21, at xv.

30. Ernest J. Weinrib, *The Jurisprudence of Legal Formalism*, 16 HARV. J.L. & PUB. POL'Y 583, 585 (1993).

31. Melissa Lyn McLeod Hamrick, Comment, *The MLIIA: Bad Medicine and Bad Law Is a Costly Combination for Texas Minors with Medical Death Claims*, 3 TEX. WESLEYAN L. REV. 123, 141 (1996).

32. *Id.* (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 945 (5th ed. 1984)).

33. BLACK'S, *supra* note 12, at 1644.

34. *In re* McCoy, 373 F. Supp. 870, 875 (W.D. Tex. 1974).

the Vance family was not so fortunate. In this case, it was cheaper for the hospital to kill Terron Vance than it would have been to injure him.[35] This outcome turns on three factors: the application of limitation on action to modern tort law; the atmosphere in which recent statutory limits have been enacted; and the court's "plain meaning interpretation" of the statutes at issue.[36]

II. THE MODERN APPLICATION OF LIMITATIONS ON ACTION TO TORT LAW

Many American statutes of limitation closely resemble the original Statute of James[37] and aim to remedy the same policy issues that plagued seventeenth-century England.[38] Nearly all actions today in the United States are governed by statutes of limitation, which "usually fix time limits . . . on . . . actions for injuries to the person . . . and 'all other actions.'"[39] Each state has varying versions of limitations on actions but they usually utilize one of two possible constructions: (1) "all actions . . . shall be brought within" or (2) "no action . . . shall be brought more than" a

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35. Hamrick, *supra* note 31, at 141. Had Terron survived he and his family would have been able to use his tenth birthday as the applicable statute of limitations. Thus, the hospital would not have been relieved of its liability.

36. *See generally* Vance v. Henry Ford Health Sys., 726 N.W.2d 78 (Mich. Ct. App. 2006).

37. ANGELL, *supra* note 14, at 14 (John Wilder May ed., 6th ed. 1876) (stating that "American acts of limitations, as they relate to personal actions . . . , are either an exact transcript of the statute of James, or a revision and modification of it . . . ."). The Statute of James provided that:

> For quieting of men's estates and avoiding of suits, be it enacted by the King's most excellent majesty . . . that all writs of formedon in descender . . . in remainder . . . in reverter, at any time hereafter to be sued or brought, of, or for any mannors, lands, tenements . . . whereunto any person or persons now hath or have any title, or cause to have or pursue any such writ, shall be sued or taken within twenty years next after the end of this present session of Parliament: And after the said twenty years expired, no person, or persons, or any of their heirs, shall have or maintain any such writ . . . .

An Act for Limitation on Action, and for Avoiding of Suits at Law, 21 Jac., c. 16, § 1 (1623) (Eng.), *reprinted in* WOOD, *supra* note 19, at 631.

38. *See* Note, *supra* note 13, at 1185 ("There comes a time when [a person] ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim when 'evidence has been lost, memories have faded, and witnesses have disappeared.'" (footnote omitted) (quoting Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 349 (1944))).

39. *Id.* at 1179. Some crimes, such as those punishable by death, do not have a statutory period of limitation. *See* 18 U.S.C. § 3281 (2006) ("An indictment for any offense punishable by death may be found at any time without limitation.").

specific number of years after the cause of action accrues.[40] Further, there is a large array of statutes of limitation that attempt to deal with special situations, such as those actions affecting minors and disabled persons.[41]

Since the inception of the Statute of James, it has been recognized that there are some situations in which the statute of limitation that is applicable to most should not be applicable to all:

> It is provided by the seventh section of the statute of James, that if any person entitled to bring any of the personal actions therein mentioned, shall be at the time of the cause of action accrued, within the age of twenty-one years . . . such person shall be at liberty to bring the same actions within the times limited by the statute, after his disability has terminated.[42]

This type of infancy provision is prevalent in United States statutes today.[43] From California[44] to Massachusetts,[45] each state has had an infancy exception extending the period of limitation. However, in order to utilize the extension, the disability must exist at the time that the action accrues—meaning that a disability that affects the claimant after the cause of action has accrued will not delay or interrupt the running of the statute.[46] This rationale reflects a sentiment that the claimant who has had some opportunity to bring a claim is less deserving of a suspension.[47] Additionally, "the dangers of indefinite postponement have impelled the choice

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40. Note, *supra* note 13, at 1179 (omissions in original) (internal quotation marks omitted).

41. *Id.*

42. ANGELL, *supra* note 14, at 194.

43. For a comparative look at various state statutes, see Harry B. Littell, *A Comparison of the Statutes of Limitations*, 21 IND. L.J. 23 (1945).

44. *See* CAL. CIV. PROC. CODE § 340.5 (1975), *invalidated by* Arredondo v. Regents of Univ. of Cal., 31 Cal. Rptr. 3d 800 (Cal. Ct. App. 2005). Although no longer in force because it was held to violate minors' rights to equal protection, this statute stated: "Actions by a minor shall be commenced within three years from the date of the alleged wrongful act except that actions by a minor under the full age of six years shall be commenced within three years or prior to his eighth birthday whichever provides a longer period." *Id.* For a more in depth discussion of this topic, see generally Natalie Mantell, Note, *Limitations on a Minor's Right to Sue for Medical Malpractice: A Constitutional Analysis*, 10 SUFFOLK J. TRIAL & APP. ADVOC. 97 (2005).

45. *See* MASS. GEN. LAWS ch. 231, § 60D (2006) ("[A]ny claim by a minor against a health care provider . . . shall be commenced within three years from the date the cause of action accrues, except that a minor under the full age of six years shall have until his ninth birthday in which the action may be commenced . . . .").

46. Note, *supra* note 13, at 1229.

47. *Id.* at 1230.

of the termination of existing disabilities as a convenient, if arbitrary, time to commence the running of the statutory period."[48]

A. *General Rationale for the Minor's Exception Provisions*

Determining the purpose of both the general limitation and the exception are necessary to establish why denying recovery to the Vance family is both immoral and judicially unsound. Statutes of limitation, once used to settle land disputes, have evolved to extend to nearly all facets of the law.[49] They "prescribe[ ] time limits on the assertion of rights, . . . depriv[ing] one party of the opportunity, after a time, of invoking the public power in support of an otherwise valid claim."[50] Legislatures have used these limitations primarily to protect defendants,[51] reasoning that there should be a time when a potential defendant's "slate has been wiped clean of ancient obligations."[52] However, in personal actions, the main consideration behind limiting actions is that after a certain length of time, there is a lack of evidence and available witnesses.[53] Therefore, by setting a limitation, the courts have been relieved of adjudicating "inconsequential or tenuous claims."[54]

Because statutes of limitation are generally enacted to protect the rights of defendants, legislatures have adopted exclusionary rules to also protect minor plaintiffs. Exceptions are needed to protect minors until they can decide themselves whether to pursue a claim.[55] For example, this provision relates to the situation where "a minor has no parent or guardian to bring suit on its behalf, or whose parent or guardian may, for any number of perfectly valid reasons, be unwilling or unable to do so."[56] The provisions also allow for a situation in which, because of a child's age, he is incompetent to testify on his own behalf, or the full scope of his injuries has not materialized during the regularly applicable time period.[57]

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48. *Id.*
49. *See* Littell, *supra* note 43.
50. Note, *supra* note 13, at 1185.
51. *Id.*
52. *Id.*
53. *Id.* This Note also points out that unsettled claims can have an adverse effect on commercial business.
54. *Id.*
55. Holt v. Lenko, 791 A.2d 1212, 1214 (citing Robinson v. Pa. Hosp., 737 A.2d 291, 294 (Pa. Super. Ct. 1999)).
56. *Robinson*, 737 A.2d at 294.
57. *See* Regents of Univ. of N.M. v. Armijo, 704 P.2d 428, 430 (N.M. 1985) (citing Slade v. Slade, 468 P.2d 627 (N.M. 1970)).

This purpose relates directly to the situation in *Vance*, in which Terron was unable to communicate his injuries to his parents and the full scope of the injuries included his death, which, clearly rendered him unable to testify.[58]

B. *The Medical Malpractice Facet*

Because poor medical treatment can be fatal, wrongful death suits often arise from medical malpractice. Beginning for the first time in the 1970s, a wave of legislative action swept the nation.[59] Inspired by a perceived crisis in medical malpractice litigation, the solution, legislatures agreed, was medical malpractice tort reform.[60] In the 1980s, medical malpractice insurance premiums skyrocketed.[61] The legislative solution this time was to limit the avenues for plaintiffs to get into court and, through tort reform, limit what could be done once in the courtroom.[62] Most recently in 2002, insurance premiums rose again, and, not surprisingly, the effect has been further reform.[63] Controversy exists over whether medical malpractice liability insurance premiums are an accurate reflection of the number of malpractice suits being filed.[64] However, the insurance companies—for the most part—are not raising premiums and supporting tort reform in an effort to make more money at the public's expense.[65] Rather, they are concerned that there is a malpractice litigation epidemic.[66] This perceived epidemic has sparked the type of reform that limits the amount of time a plaintiff has to bring a malpractice suit and encourages the judiciary to narrowly interpret statutes that would extend this limitation period.[67]

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58. Vance v. Henry Ford Health Sys., 726 N.W.2d. 78 (Mich. Ct. App. 2006).
59. BAKER, *supra* note 10, at 1 (2005).
60. *Id.* at 2.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 3.
65. *Id.* at 6-8.
66. *Id.* at 8.
67. *See, e.g.*, Randolph v. Methodist Hosps., Inc., 793 N.E.2d 231 (Ind. Ct. App. 2003). In *Randolph*, the court stated:

> The Medical Malpractice Act was enacted in response to increasing insurance premiums. . . . The purpose of the act was to provide health care providers with some protection from malpractice claims in order to preserve the availability of medical services . . . . Interpreting the statute of limitations exception for minors to include deceased minors would expand liability for health care providers, and would not be consistent with the goals of the Medical Malpractice Act.

Id. at 236.

Regardless of the "true concern" of the insurance companies, there has been evidence available since the mid-1970s that suggests almost the opposite. The California Hospital and Medical Associations sponsored a study during that period that was expected to support the need for tort reform.[68] Instead, the report revealed that medical malpractice affected tens of thousands of victims every year, more than automobile and workplace accidents, and that the victims did not sue.[69] What then has made the insurance premiums spike during certain periods in the last thirty years? Evidence suggests that it is due to "financial trends and competitive behavior in the insurance industry," not litigious Americans.[70]

Still, media focus remains on mass torts, products liability, and medical malpractice; and the symbiotic relationship between doctors, health insurers, and businesses keeps medical malpractice and tort at the forefront of political debates.[71] For example, in January of 2005, President Bush delivered a speech in Collinsville, Illinois, on the issue of medical liability reform.[72] He stood beneath a large banner printed with the words "Affordable Healthcare."[73] Both the banner and his address on the "broken medical liability system" reflected the president's view that health care costs cannot be reduced without tort reform.[74] The president continued to outline his ideas designed to control health care costs,[75] and finally, arrived at his main point:

> What's happening all across this country is that lawyers are filing baseless suits against hospitals and doctors. . . . They know the medical liability system is tilted in their favor. Jury awards in medical liability cases have skyrocketed in recent years. That means every claim filed by a personal-injury lawyer brings the chance of a huge payoff . . . . And because the system is so unpredictable, there is a constant risk of being hit by a massive jury award.[76]

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68. BAKER, *supra* note 10, at 2.
69. *Id.*
70. *Id.* at 3. For example, during the 1980s, the costs of insurance investment and loss predictions were built into the price of malpractice premiums. *Id.* at 51. Once optimistic in their predictions, insurers who had offered low premiums had switched to more pessimistic predictions for the late 1980s and therefore increased their premiums. *Id.* at 51-52.
71. *Id.* at 8-12.
72. *Id.* at 12.
73. *Id.*
74. *Id.* at 13.
75. *Id.*
76. *Id.*

Not surprisingly, the association between contempt towards the frivolous lawsuit, the slimy lawyer, and the baseless claim and increased insurance premiums and unaffordable health care has led to the tort reform that has changed the statutory landscape of our current legal system. Yet, what about the Vance family? Its claim was neither baseless nor frivolous; its lawsuit was not filed in hopes of an unpredictable massive jury award; and the medical liability system was certainly not tilted in its favor. How is it that this family slipped through the cracks of the legal system?

III. Case Law Supports Defendants

Parents attempting to rely on the statute of limitations that would have been available to their child, if living, have a strong moral argument but can rely on little precedent. Case law overwhelmingly supports defendants on the issue of whether a minority tolling provision extends to administrators of a deceased minor's estate.[77] While courts have been clear on the outcome—parents cannot rely on the provision that tolls the statute of limitations for minors—they have arrived at this conclusion via two avenues of thought. The first line of reasoning is based on the child's birthday, and the second finds support in the courts' interpretation of legislative intent.

A. *The "Birthday Rationale"*

Many of the statutes extending the time for minors to file a claim measure that extension in terms of the child's birthday, for example, "on or before the person's tenth birthday."[78] The "birthday rationale" refers to the reasoning behind which some courts

77. *See* Randolph v. Methodist Hosps., Inc., 793 N.E.2d 231 (Ind. Ct. App. 2003) (exception in statute of limitations only applies to a living child); Bailey v. Martz, 488 N.E.2d 716 (Ind. Ct. App. 1986) (minor's death removed age disability), *superseded by statute*, Ind. Code § 34-23-2-1 (2008), *as recognized in* Ellenwine v. Fairley, 846 N.E.2d 657 (Ind. 2006); Regents of Univ. of N.M. v. Armijo, 704 P.2d 428 (N.M. 1985) (minority exception applies only to living minors); Holt v. Lenko, 791 A.2d 1212 (Pa. Super. Ct. 2002) (minority tolling statute not available to deceased minor plaintiff); Campos v. Ysleta Gen. Hosp., Inc. (*Campos II*), 879 S.W.2d 67 (Tex. App. 1994) (minority tolling provision only applicable in wrongful death cases); *cf.* Joslyn v. Chang, 837 N.E. 2d 1107 (Mass. 2005) (statute of repose was not tolled despite defendants' concealment of facts necessary for parents to bring wrongful death action); Baker v. Binder, 609 N.E.2d 1240 (Mass. App. Ct. 1993) (statute of limitations period commenced when father represented minor child in earlier action).

78. Mich. Comp. Laws Ann. § 600.5851(7) (West 2000).

have placed the weight of their decisions.[79] Courts applying the birthday rationale have considered the plain meaning of the statute at issue and decided that, by definition, a dead person cannot have a "birthday." Therefore, courts find these tolling provisions to be inapplicable.[80]

1. *Vance v. Henry Ford Health Systems*

The Michigan Court of Appeals in *Vance v. Henry Ford Health Systems* rejected both parties' arguments and interpretations of the relevant statutes.[81] The relevant Michigan law provided that a plaintiff, absent exclusion, is required to file his claim within two years of its accrual.[82] Additionally, Michigan law provides:

> If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.[83]

The Vance family believed that it was entitled to an exclusion from the standard malpractice claim limitation and filed its case under the time limits prescribed by section 600.5851(7) of the Michigan Compiled Laws,[84] which states:

> [I]f, at the time a claim alleging medical malpractice accrues to a person under section 5838a the person has not reached his or her eighth birthday, a person shall not bring an action based on the claim unless the action is commenced on or before the person's tenth birthday or within the period of limitations set forth in section 5838a, whichever is later.[85]

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79. *See, e.g.*, Vance v. Henry Ford Health Sys., 726 N.W.2d 78, 82-83 (Mich. Ct. App. 2006).

80. *Id.*

81. *Vance*, 726 N.W.2d at 81-83.

82. MICH. COMP. LAWS ANN. § 600.5805(5) ("Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice.").

83. *Id.* § 600.5852.

84. *Vance*, 726 N.W.2d at 82.

85. MICH. COMP. LAWS ANN. § 600.5851(7) (footnote omitted). Section 600.5838a(2) states:

> Except as otherwise provided in this subsection, . . . a claim based on medical malpractice may be commenced . . . within the applicable period prescribed in section 5805 or sections 5851 to 5856, or within 6 months after the

Intuitively, the plaintiffs believed their suit was timely, considering the facts that their son died before the age of eight, and that their suit was filed before his tenth birthday.[86]

The defendants argued that the applicable statute was section 600.5851(1) of Michigan Compiled Laws,[87] which provides:

> Except as otherwise provided in subsections (7) and (8), if the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run.[88]

According to this section, the defendants reasoned, although Terron Vance was under the age of eighteen when the action accrued, his death removed the disability, therefore rendering section 600.5851(7) inapplicable. Thus, there was a one year statute of limitations, subject to the appointment of an administrator under section 600.5852 of Michigan Compiled Laws.[89] Under the defendants' rationale, the Vances had until August 20, 2004, which was two years from the date the personal representative was appointed, to file suit.[90] There was no dispute that the plaintiffs filed on September 13, 2004, two days before the tenth anniversary of Terron's birth, and thus the defendants argued that the claim was time barred.[91]

The court was quick to dispose of the defendants' argument that section 600.5851 was controlling, stating that subsection (1) "unambiguously excludes medical malpractice actions from its scope by including language specifically referencing malpractice actions and the phrase, '[e]xcept as otherwise provided in subsections

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> plaintiff discovers or should have discovered the existence of the claim, whichever is later. However, except as otherwise provided in section 5851(7) or (8), the claim shall not be commenced later than 6 years after the date of the act or omission that is the basis for the claim. . . . A medical malpractice action that is not commenced within the time prescribed by this subsection is barred.

Id. (footnotes omitted).

86. *See Vance*, 726 N.W.2d at 81-82.

87. *Id.* at 81.

88. MICH. COMP. LAWS ANN. § 600.5851(1).

89. *See Vance*, 726 N.W.2d at 79-80.

90. *Id.* at 79.

91. *See id.* at 81.

(7) and (8).'"[92] The court thus concluded that the action was governed by either section 5851(7)—the plaintiff's suggestion—or section 5852—its own proposal—of the Michigan Compiled Laws.[93]

Unfortunately for the Vances, the court did not find that section 600.5851(7) was the appropriate limitation to be applied. However, more important than the outcome was the court's reasoning. The court followed a process of elimination, rather than one of interpretation, in deciding the correct statute of limitation.

Looking at the infancy tolling provision suggested by the Vances, the court stated that, "[w]hen faced with questions of statutory interpretation, the courts must discern and give effect to the Legislature's intent as expressed by the words in the statute."[94] With this in mind, the court reviewed what it understood to be the relevant clauses in the statute: "*person has not reached his or her eighth birthday*," and, "*unless the action is commenced on or before the person's tenth birthday*."[95] The questions presented, then, were: (1) what does the word "birthday" mean; and (2) does "a deceased minor continue[ ] to age after death?"[96]

Where the language of a statute is unambiguous, the canons of statutory construction state that the court is to presume "that the Legislature intended the meaning clearly expressed."[97] Without a definition of "birthday" given in the statute, the Michigan Court of Appeals turned to the plain meaning, finding three potential definitions of "birthday." It could be the day marking the anniversary of a person's birth, the actual day of the person's birth, or a day that commemorated the beginning of a new thing.[98] The court, however, was not persuaded by the plaintiff's argument that "birthday" was meant to cut off rights based on the "anniversary" of the deceased minor's birth.[99] Instead, the court based its rationale on the word "reach."[100] Stating that the court "must give effect to every word, phrase, and clause in [the] statute and avoid an interpretation that would render any part of the statute surplusage or nuga-

92. *Id.* at 82 (second alteration in original) (quoting MICH. COMP. LAWS ANN. § 600.5851(1)).

93. *Id.*

94. *Id.*

95. *Id.* (emphases added) (quoting MICH. COMP. LAWS ANN. § 600.5851(7)).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

tory,"[101] the court determined that a person who dies no longer has "the power, capacity, and ability to act," and thus cannot "reach" his tenth birthday.[102]

In concluding that the section 600.5851(7) minority tolling provision did not apply, the Michigan Court of Appeals deduced that the personal administrator statute of limitation provision, section 600.5852, was the controlling statute, thus barring an otherwise meritorious claim because it had been filed twenty-four days too late.[103]

2. *Campos v. Ysleta General Hospital*

Texas has a similar minority tolling provision to Michigan, which was interpreted to prevent the Campos family from bringing a suit on behalf of their son.[104] Jose Angel Campos, Jr., was five years old when he was taken to Ysleta General Hospital by his mother and uncle.[105] After being refused treatment for failure to demonstrate their ability to pay, they left for another medical treatment center where they were told to fill out forms and remain in the waiting room until an exam room became available.[106] Apparently believing that this too was a denial of treatment, Ms. Campos and her brother-in-law went to a third treatment facility where Jose was seen by physician David Allen Smith for approximately thirty minutes before he was pronounced dead from respiratory arrest.[107]

The Camposes brought a survival action against the hospital for their son's wrongful death.[108] The court held that the suit was

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101. *Id.* (alteration in original) (internal quotation marks omitted) (quoting Vega v. Lakeland Hosps. at Niles & St. Joseph, Inc., 705 N.W.2d 389 (2005)).

102. *See id.* at 81, 83.

103. *Id.* at 83. Under § 5852 the Vances would have had to file by August 20, 2004. However they relied on 5851(7) and filed on September 13, 2004. *Id.* at 79. The tenth anniversary of Terron's birth was September 15, 2004. *Id.*

104. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 2003) (repealed 2003); Campos v. Ysleta Gen. Hosp., Inc. (*Campos II*), 879 S.W.2d 67, 73 (Tex. App. 1994).

105. Campos v. Ysleta Gen. Hosp., Inc. (*Campos I*), 836 S.W.2d 791, 793 (Tex. App. 1992).

106. *See id.* at 793; *see also Campos II*, 879 S.W.2d at 69.

107. *Campos I*, 836 S.W.2d at 791; *see also Campos II*, 879 S.W.2d at 69.

108. The Campos family brought a wrongful death lawsuit against the Ysleta General Hospital, but the Court of Appeals affirmed the trial court's directed verdict for the defendant, stating that the "plaintiffs had presented no evidence that any act or omission of any defendant was a cause in fact of Jose Campos's death." *Campos II*, 879 S.W.2d at 69. Subsequently, on August 19, 1991, almost three years after the death of their five year-old son, the Camposes filed another suit alleging a survival cause of action. *See id.*

frivolous in part because it was brought after the statute of limitations had run.[109] The Camposes appealed, maintaining that the infancy tolling provision in the applicable statute of limitations allowed them to file suit up until Jose's fourteenth birthday.[110] They argued that the clause extending the period of limitation for minors under the age of twelve applied to their situation since their son was only five when he died.[111]

The court rejected the position that the statute of limitations—section 10.01—was applicable, holding that "[u]nder this argument . . . the statute of limitations would *never* run in a situation where a child dies and therefore never reaches the age of fourteen."[112] The court went on to state, without explanation, that "the tolling provi-

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Survival causes of action are different from wrongful death actions in that the "lawsuit [is] brought on behalf of a decedent's estate for injuries or damages incurred by the decedent immediately before dying." BLACK'S, *supra* note 12, at 1486. In contrast to a wrongful death action, which is an action that compensates the beneficiaries of the decedent, a survival claim compensates the decedent's estate for the suffering of the decedent. In this action, the Camposes were specifically alleging harm to their son, which occurred in the hours before his death. *See Campos II*, 879 S.W.2d at 73. The trial court granted the defendants' motion for summary judgment, defendants having argued that the claim was barred both by res judicata and by the applicable two-year statute of limitations. *See id.* at 69. In Texas, res judicata will bar a suit if the subsequent suit "arises out of the same subject matter of a previous suit which through the exercise of diligence, could have been litigated in the prior suit." *Id.* at 73. Sanctions were imposed against the Camposes for filing a groundless suit, brought in bad faith for the purpose of harassment. *Id.* at 70, 72-73.

109. The court was correct in determining that, had the plaintiffs put together a more complete argument in the original suit, both the wrongful death and survival suits could have been tried in one action; thus, the second suit was appropriately barred res judicata. *Id.* at 73. While the Camposes—or their attorney—arguably made poor choices regarding the filing of claims, what is more interesting is their argument on appeal regarding the imposition of sanctions. The plaintiffs argued that sanctions should not be imposed because their suit was not groundless, in bad faith, or filed for the purpose of harassment. *Id.*

110. *See id.* At the time that *Campos II* was decided, the applicable statute of limitations was article 4590i, section 10.01 of Vernon's Texas Revised Civil Statutes Annotated:

> Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made completed; provided that, *minors under the age of 12 years shall have until their 14th birthday in which to file, or have filed on their behalf, the claim.* Except as herein provided, this subchapter applies to all persons regardless of minority or other legal disability.

TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 2003) (repealed 2003) (emphasis added).

111. *Campos II*, 879 S.W.2d at 73.

112. *Id.*

sions for children under twelve [were] clearly not meant to apply in wrongful death or survival cases."[113] Whether the *Campos II* suit would have warranted a damage award for the plaintiffs is somewhat of a moot point. More importantly, this case, like *Vance*, eliminates an avenue of recovery for parents seeking justice for their deceased children.

3. *Holt v. Lenko* and *Awve v. Physicians Insurance Co. of Wisconsin, Inc.*

In *Holt v. Lenko*, the plaintiff, like the Campos family, brought a claim for the death of her son.[114] Nicole Holt, pregnant and in labor, was admitted to Butler Memorial Hospital in Pennsylvania on December 4, 1994.[115] She gave birth to her son Andrew on December 5, 1994, and he died later that same day.[116] Holt filed her complaint on October 29, 1999, alleging that the negligence of the defendant hospital and doctors in their treatment of both mother and child caused Andrew's death.[117]

Holt sought to recover damages under two different Pennsylvania statutes, one governing wrongful death actions and the other survival actions.[118] On appeal, although the plaintiff conceded the wrongful death claim to be untimely, she maintained her argument that the survival action was timely filed.[119] In Pennsylvania, the survival statute provides that in the case where a deceased person had a cause of action at the time of death, the action survives the death of the plaintiff and the administrator or executor of the estate may then bring suit to recover.[120] Furthermore, the survival statute was interpreted to provide that "the statute of limitations begins to run on the date of the injury, as though the decedent were bringing his or her own lawsuit."[121]

Holt's argument was strengthened by the Pennsylvania minority tolling provision, which provides that "[i]f an individual entitled to bring a civil action is an unemancipated minor at the time the

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113. *Id.*

114. Holt v. Lenko, 791 A.2d 1212 (Pa. Super. Ct. 2002).

115. *Id.* at 1213.

116. *Id.*

117. *Id.*

118. *Id.*; *see also* 42 PA. STAT. ANN. § 5533(b)(1)(i) (West 2007) (minority tolling provision); 42 PA. STAT. ANN. § 8302 (West 2004) (survival statute).

119. *Holt*, 791 A.2d at 1213-14. The trial judge, on the defendants' motion for summary judgment, originally dismissed both claims as untimely. *Id.* at 1213.

120. *See* 42 PA. CONS. STAT. ANN. § 8302.

121. *Holt*, 791 A.2d at 1215.

cause of action accrues," then "[s]uch person shall have the same time for commencing an action after attaining majority as is allowed to others by the provisions of this subchapter."[122] The statute further defines "minor" as "any individual who has not yet attained 18 years of age."[123]

Under both the survival statute and the tolling provision for minors, Holt argued on appeal that she had from the time of the original negligence—the day Andrew died—until he *would have* reached the age of majority eighteen years later.[124] Based on the aim of the Pennsylvania survival statute and the minority tolling provision, Holt reasoned that her son *would have* had a right to file a negligence claim for the alleged malpractice of his doctors surrounding his birth until age eighteen, and that his right passed to her upon his death as the administrator of his estate.[125]

The court did not agree with Holt's argument, and she was left with no recourse against the doctors or hospital. Relying on the plain meaning of the statute, the court held that "[t]here is nothing in the statutory language that would indicate that the legislature intended that the minority tolling statute would be available to a deceased minor plaintiff."[126] Without discussing how it reached this conclusion, the court claimed that it found support for its holding in Wisconsin case law.[127]

In *Awve v. Physicians Insurance Co. of Wisconsin, Inc.*, parents faced similar circumstances as Holt when their son died at the very young age of thirty-two weeks, all of which he had spent in the hospital.[128] His parents waited just over four years before filing a medical malpractice claim that included both wrongful death and survival actions.[129]

In Wisconsin, the tolling provision of the statute of limitations for minors' personal injury actions resulting from medical care requires the action to be filed within time limitations of section

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122. 42 PA. CONS. STAT. ANN. § 5533(b)(1)(i).

123. *Id.* § 5533(b)(1)(ii).

124. *See Holt*, 791 A.2d at 1215 (noting that as a survival action, the action survives the death of the victim and "may be brought by the administrator of the decedent's estate to recover the loss to the estate resulting from the tort").

125. *Id.* at 1213-14.

126. *Id.* at 1214.

127. *Id.*

128. Awve v. Physicians Ins. Co. of Wis., Inc., 512 N.W.2d 216, 216 (Wis. Ct. App. 1994); *see also Holt*, 791 A.2d at 1212 (similar factual situation).

129. *See Awve*, 512 N.W.2d at 217-18.

893.55,[130] or "by the time that person reaches the age of 10 years, whichever is later."[131] The Awve family relied on both the latter provision and section 895.01, which provides "that a decedent's personal injury action survives the decedent's death."[132] Using both of these statutes, the Awves apparently believed that their action had nearly ten years to be filed; therefore, filing after only four years was, as they understood it, both timely and diligent.[133]

During the time between the alleged malpractice and the time of filing, the family took numerous steps to investigate the death of their son in anticipation of filing a lawsuit.[134] In early 1991, the parents retained a lawyer and began reviewing medical records with two different doctors, one of whom stated that, "had [the mother] been diagnosed by [her doctor] in a timely fashion as being in labor and had attempts been made by [her] to arrest the labor, those attempts in all probability would have been successful."[135]

Thus, despite evidence that the Awves's case was one of legitimate medical malpractice, or at least a question for a jury, the court dismissed the case.[136] The court stated that because of the lack of cross reference between the survival statute and the minority tolling provision, it needed only to look to section 893.56 (the minority tolling provision) to determine the outcome of the Awves's appeal.[137] The court held that the statute was "unambiguous."[138] Looking to the clause, "by the time that person reaches the age of 10 years," the court held that "reaches" was the operative word, and that in order to "reach" an age, a minor must be living.[139] The

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130. WIS. STAT. ANN. § 893.55 (West 2006). Section 893.55 states in relevant part:

> [A]n action to recover damages for injury arising from any treatment or operation performed by . . . a person who is a health care provider, regardless of the theory on which the action is based, shall be commenced within the later of:
>
> (a) Three years from the date of the injury, or
>
> (b) One year from the date the injury was discovered . . . except that an action may not be commenced under this paragraph more than 5 years from the date of the act or omission.

Id. § 893.55(1m).

131. WIS. STAT. ANN. § 893.56; *see also Awve*, 512 N.W.2d at 218.

132. *Awve*, 512 N.W.2d at 218 (citing WIS. STAT. ANN. § 895.01).

133. *See id.* at 217-18.

134. *See id.*

135. *Id.* at 218 (third alteration in original).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* (internal quotation marks omitted) (quoting WIS. STAT. ANN. § 893.56 (West 2006)).

court then opined that had the legislature intended for deceased minors to be included within the tolling provision, the legislature would have added something to the effect of, "'by the time the minor reaches or would have reached' the age of 10 years."[140]

Like Holt, the Awves were left without remedy against the doctors or the hospital. The Pennsylvania court in *Holt* used the Wisconsin court's decision in *Awve* as persuasive authority.[141] However, neither court entertained alternate interpretations, simply stating that the parents' interpretations were incorrect and the statutes were unambiguous. Furthermore, the Court in *Holt* failed even to establish how its own legislature's intent was furthered by its interpretation, deferring instead to Wisconsin case law. The Pennsylvania statute is substantially different from the Wisconsin statute: the word "reach" never appears within the language of the statute.[142] Accordingly, the Pennsylvania court incorrectly relied on Wisconsin case law and failed to effectively interpret its own statute.

4. *Bailey v. Martz*

Thirteen-year-old Mark Bailey was riding his dirt bike when he was tragically struck by a train rendering him a quadriplegic.[143] Tragedy only continued for Mark during his stay at the hospital. On July 11, 1979, the heart monitor that Mark was wearing malfunctioned and severely burned him.[144] After his release on May 28, 1980, Mark experienced breathing problems and was taken back to the hospital.[145] He was released only to stop breathing again two days later.[146] As a result of this, Mark entered into a coma and died on June 14, 1980.[147]

Because the train failed to blow its whistle, Mark's father retained an attorney to represent him and his son in all possible claims resulting from the accident and the subsequent medical mal-

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140. *Id.*

141. *See* Holt v. Lenko, 791 A.2d 1212, 1214-15 (Pa. Super. Ct. 2002).

142. *Compare* 42 PA. STAT. ANN. § 5533(b)(1)(i) (West 2007), *with* WIS. STAT. ANN. § 893.56.

143. Bailey v. Martz, 488 N.E.2d 716, 718 (Ind. Ct. App. 1986), *superseded by statute*, IND. CODE § 34-23-2-1 (2008), *as recognized in* Ellenwine v. Fairley, 846 N.E.2d 657, 661 (Ind. 2006).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

practice.[148] However, this attorney failed to take any action, including filing a claim against the train company, causing Mr. Bailey to discharge him and retain new counsel.[149] Mr. Bailey hired new counsel on November 11, 1981.[150] However, after learning that they were in possession of the claim when the applicable statute had run, the new counsel withdrew from the case for fear of being sued for malpractice for having failed to file the claim.[151] Mr. Bailey did not retain new counsel until June 14, 1982.[152]

In this case, the defendants were the second set of lawyers that Mr. Bailey had hired to represent him.[153] They were granted summary judgment, and on appeal argued that Mark's claim was not barred by the statute of limitations while they represented him.[154] The defendants relied on Indiana Code section 34-1-2-5, stating that "one who is under legal disability when the cause of action accrues may bring his action within two years after the disability is removed."[155] The attorneys argued that sixteen-year-old Mark fell into this category because a legal disability, for the purposes of the Indiana statute, includes those minors under the age of eighteen.[156] Under this rationale the claim did not expire while in their hands.

While different from the previous cases where plaintiff parents relied on the tolling provisions even after their child's death, the defendants here tried to use the same rationale to escape legal malpractice liability. However, the Indiana court, like the others, found the language of the statute instructive and threw out the attorneys' interpretation.[157]

The Court of Appeals of Indiana held that the legal disability—minority—was removed by death and that the defendants' interpretation of the statute of limitations extending two years beyond the date of his eighteenth birthday was incorrect.[158] The court specifically noted the gross unfairness of its interpretation by stating: "[H]ad Mark lived, running of the applicable statute of limi-

148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 718-19.
152. *Id.* at 719.
153. *See id.* at 716, 718-19.
154. *Id.* at 722.
155. *See id.* (footnote omitted) (citing IND. CODE ANN. § 34-1-2-5 (1982) (repealed 1998)).
156. *Id.*
157. *Id.*
158. *Id.*

tations would have been tolled until July 28, 1982, his 18th birthday. Because Mark did not live, however, his right to recover damages . . . passed on his death . . . ."[159] This Indiana court, like the others, dismissed the possibility of an alternative interpretation and left parents of children like Mark without the hope of litigating their claims beyond the personal representative time limitations.

B. *Legislative Intent Rationale*

In addition to looking to the plain meaning of the minority tolling statutes, several courts have delved deeper, finding that even if the plain language of the statute is ambiguous, an interpretation that protects hospitals and doctors is the accurate reading of the tolling provision.[160] This line of reasoning not only unfairly protects defendants, but is based on what could be a false idea that the health care and insurance industries need protection from litigious Americans.

1. *Randolph v. Methodist Hospitals, Inc.*

On October 7, 1991, Kwabene Randolph was born.[161] He suffered from an anoxic brain injury and had severe breathing difficulties and seizures until his death on May 7, 1992.[162] On September 26, 1997, his mother, Charlotte Randolph, filed a medical malpractice claim under Indiana law claiming that the wrongful death of her son was due to the failure of the medical providers to diagnose his "severe fetal distress, . . . thereby resulting in Kwabene's severe asphyxia, seizures, and ultimately, his premature death."[163]

The trial court dismissed the mother's claims, holding that although they were properly brought on behalf of her son, they were time barred by the Indiana Medical Malpractice Act, which, although since declared unconstitutional, stated:

> A claim, whether in contract or tort, may not be brought against a health care provider . . . unless the claim is filed within two (2) years after the date of the alleged act, omission, or neg-

159. *Id.*

160. *See* Randolph v. Methodist Hosps., Inc., 793 N.E.2d 231, 233 (Ind. Ct. App. 2003); Regents of Univ. of N.M. v. Armijo, 704 P.2d 428, 429 (N.M. 1985); Brown v. Shwarts, 968 S.W.2d 331, 333 (Tex. 1998).

161. *Randolph*, 793 N.E.2d at 233.

162. *Id.*

163. *Id.* (internal quotation marks omitted) (quoting Appellants' Brief at 4, Randolph v. Methodist Hosps., Inc., 793 N.E.2d 231 (Ind. Ct. App. 2003) (No. 45A03-0210-CV-371), *available at* 2003 WL 25266492).

> lect, except that a minor less than six (6) years of age has until the minor's eighth birthday to file.[164]

Randolph relied on the last clause of the Act, believing that her claim was timely because her child died before the age of six, and, as such, would have been able to file his own claim until he turned eight.[165] However the court found that the first clause of the Act's limitation on action applied to the Randolph's claim, and because it was not filed within two years of her son's death, it was dismissed.[166]

Without discussing Indiana's own statute, the court found the decision of the Superior Court in Pennsylvania in *Holt* and the holding of the Wisconsin Court of Appeals in *Awve* persuasive and applicable to its own case.[167] The court noted that even if the language of the statute was ambiguous, the interpretation favoring a narrower reading of the statute "properly gives effect to the intent of the legislature."[168]

The court reasoned that interpreting the statute to include deceased children would defeat the enactment of the Medical Malpractice Act because its purpose was "to provide health care providers with some protection from malpractice claims in order to preserve the availability of medical services for the public health and well-being."[169] Further, the legislation was in response to increasing insurance premiums at a time when "some doctors were already unable to afford malpractice insurance."[170] Including deceased minors in the exception from the two-year limitation would expand liability for providers.[171] The fact that the court refused to allow the claim to go forward for fear that insurance premiums would be affected seems only to support the notion that parents like the Randolphs have valid claims for which they should receive compensation.

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164. IND. CODE ANN. § 34-18-7-1(b) (West 1999), *invalidated by* Booth v. Wiley, 839 N.E.2d 1168 (Ind. 2005).

165. *Randolph*, 793 N.E.2d at 234.

166. *Id.*

167. *Id.* at 235.

168. *Id.* at 236.

169. *Id.* (citing Sue Yee Lee v. Lafayette Home Hosp., Inc., 410 N.E.2d 1319, 1324 (Ind. Ct. App. 1980)).

170. *Id.* (citing *Lee*, 410 N.E.2d at 1323).

171. *Id.*

2. *Brown v. Shwarts* and *Regents of University of New Mexico v. Armijo*

Christina Brown entered the emergency room at Navarro Memorial Hospital in Texas during her third trimester, complaining of nausea, headaches, cough, and wetness in her pants.[172] She was given a hepatitis shot, prescribed a sonogram, and told "to return to the hospital if her symptoms worsened."[173] Days later, Christina returned to the hospital and was seen by another doctor, who told her that she had been leaking amniotic fluid for several days.[174] She subsequently gave birth to a premature baby boy, who died two days later.[175]

The Browns filed a medical malpractice claim against the hospital and the first doctor who saw Christina.[176] The defendants countered that the claim was time-barred under the Medical Liability and Insurance Improvement Act, which states:

> [N]o health care liability claim may be commenced unless the action is filed within two years from the occurrence of the . . . medical . . . treatment that is the subject of the claim . . . provided that, minors under the age of 12 years shall have until their 14th birthday in which to file, or have filed on their behalf, the claim.[177]

The Browns believed their claims were filed well before the expiration of the statute of limitations because the claim was based on the death of their child, who died under the age of twelve. Once again, this court, like so many others, was asked to answer the question, "if the child dies after being born, when does [the statute of] limitations [begin to] run?"[178]

The Texas Supreme Court held, as others have, that the wrongful death claim is barred by the statute of limitations if it is not filed within two years and rejected the idea that the parents could invoke the minority tolling provision.[179] Holding that "[l]imitations on a wrongful death action based on negligent health care is not tolled or extended because the decedent was a minor" and that, "'the tolling provision . . . that applies to a minor does not apply to an adult's

172. Brown v. Shwarts, 968 S.W.2d 331, 333 (Tex. 1998).
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* (quoting TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon 1977) (repealed 2003)).
178. *Id.*
179. *Id.* at 333-34.

wrongful death claims,'" the court acknowledged that this interpretation could result in harsh outcomes.[180] However, the court reasoned that the legislature was free to place any limitations on the period in which a wrongful death suit may be brought, reminding the plaintiffs that the cause of action was a creature of statute, and the right to file a wrongful death suit did not exist at common law.[181] Accordingly, the court held that the Browns filed their claim *one* day too late.[182]

Similar to *Brown*, in *Regents of University of New Mexico v. Armijo*, the Armijo family also lost its infant son.[183] However, because the hospital was a government entity, the Armijos filed their claim under the New Mexico Tort Claims Act of 1978, which provides:

> Actions against a governmental entity . . . for torts shall be forever barred, unless such action is commenced within two years after the date of the occurrence resulting in loss, injury, or death, *except that a minor under the full age of seven years shall have until his ninth birthday in which to file*.[184]

The Court of Appeals held that the Armijos could invoke the minority tolling provision on behalf of their deceased son because the Tort Claims Act included wrongful death suits.[185]

The Supreme Court of New Mexico overturned the Court of Appeals, holding "that the Legislature intended to allow only *living* minors under the age of seven years additional time in which to prosecute actions for loss or injury."[186] The court held that interpreting the statute to apply only to living minors was the most logical conclusion and reasoned that the Court of Appeals' interpretation would broaden the statute by "convert[ing] the two-year limitations period . . . into a possible nine-year limitations period."[187] Such broadening, the court stated, would "undermine the Legislature's intent to . . . protect to some extent the State's financial resources from stale claims."[188]

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180. *Id.* (quoting Baptist Mem'l Hosp. Sys. v. Arredondo, 922 S.W.2d 120, 121 (Tex. 1996)).

181. *Id.*

182. *Id.*

183. Regents of Univ. of N.M. v. Armijo, 704 P.2d 428 (N.M. 1985).

184. *Id.* at 429 (quoting N.M. STAT. § 41-4-15(A) (1977)).

185. Armijo v. Regents of Univ. of N.M., 704 P.2d 437, 441-42 (N.M. App. 1984), *rev'd in part*, 704 P.2d 428 (N.M. 1985).

186. *Regents of Univ. of N.M.*, 704 P.2d at 429.

187. *See id.* at 430.

188. *See id.*

Legislative intent has been a rationale in these courts' decisions to disallow otherwise valid claims as untimely. Whether the statute was passed because of a perceived medical malpractice insurance crisis or as a way to limit a state's liability, these courts have systematically denied parents a way to enforce justice against the medical community. These decisions "force parents to file malpractice actions within the two-year statutory period without full knowledge of the possible negligence visited on their children. Parents should not be required to file premature lawsuits on behalf of their children."[189]

C. *Statutes of Repose Add Additional Problems for Minors*

Several states, including Massachusetts, add an additional caveat known as a statute of repose to their statute of limitations on medical malpractice tort actions.[190] A statute of repose sets a definitive time limit after which no suit can be brought to court, even if the plaintiff does not learn of the injury until after the time limit has lapsed.[191] The relevant statute of repose in Massachusetts states that

> any claim by a minor against a health care provider . . . whether in contract or tort, based on an alleged act, omission, or neglect shall be commenced within three years from the date the cause of action accrues, except that a minor under the full age of six years shall have until his ninth birthday in which the action may be commenced, but in no event shall any such action be commenced more than seven years after occurrence of the act or omission . . . .[192]

These statutes have sparked questions of constitutionality[193] and have also presented problems for parent-plaintiffs who have lost a child due to medical malpractice yet did not learn of the negligence until after the seven-year limit, or who have attempted to rely on the "ninth birthday"[194] language to bring a suit that would otherwise be dismissed because of the repose limitation.

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189. *Id.* (Sosa, J., dissenting).

190. *See, e.g.*, MASS. GEN. LAWS ch. 231, § 60D (2006).

191. BLACK'S, *supra* note 12, at 1451.

192. MASS. GEN. LAWS ch. 231, § 60D.

193. *See generally* Mantell, *supra* note 44.

194. MASS. GEN. LAWS ch. 231, § 60D.

1. *Baker v. Binder* and the Intent of the Massachusetts Legislature

On January 18, 1982, Angelique Baker's father brought a suit on her behalf alleging that the doctor's negligence during her birth ultimately required surgical removal of a portion of her small intestine.[195] Later, in May of 1987, he commenced a second suit relating to additional negligence on the day of his daughter's birth, including negligent supervision by the hospital, failure to diagnose his daughter's condition, and negligent postoperative administration of a feeding tube.[196] Although the second suit was dismissed for reasons unrelated to the minority savings provision, the court took the opportunity to explain the purpose and history of the statute of repose.[197]

In response to concerns about the cost of medical malpractice insurance in the early 1970s, Massachusetts, like many other states, enacted legislation to attempt to limit the number of malpractice claims.[198] It did so by placing special restrictions, which are not otherwise applicable to tort actions, on medical malpractice claims.[199] Until 1976, the statute of limitations for actions by minors did not begin to run until the minor reached the age of majority.[200] However, in 1976 the legislature shortened the period in which an action by a minor could be brought to three years, with the exception that a minor under the age of six had until his ninth birthday to commence a lawsuit.[201]

The apparent purpose of the limited time period was to dispirit claims after an unreasonable amount of time had passed, thus increasing the difficulty of defending the claims and causing increased medical malpractice insurance premiums.[202] The court does not mention how it would be equally difficult to pursue a claim after a long passage of time, nor does it address the difficult situation in which an injury is not discovered until after the statute of limitations has run. The problems created by Massachusetts's shortened

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195. Baker v. Binder, 609 N.E.2d 1240, 1241 & n.4 (Mass. App. Ct. 1993).

196. *Id.* at 1241 & n.5.

197. *Id.* at 1241-42.

198. *Id.* at 1242.

199. *Id.*

200. *Id.*; *see also* MASS. GEN. LAWS ch. 231, § 7 (1972) (repealed 1975).

201. MASS. GEN. LAWS ch. 231, § 60D (2006).

202. *Baker*, 609 N.E.2d at 1242 (citing Austin v. Boston Univ. Hosp., 262 N.E.2d 515 (Mass. 1977).

statute of limitation are highlighted in the case of *Joslyn v. Chang*.[203]

2. *Joslyn v. Chang* and the Problem of Statutes of Repose

Sentree Joslyn was diagnosed with a rare metabolic disorder when she was seven months old.[204] She could not tolerate nourishment and experienced weakness and a general failure to thrive.[205] In October 1992, she was taken to Children's Hospital Boston, where doctors discovered that fluid had built up around her enlarged heart.[206] A resident, supervised by Dr. Chang, performed surgery to drain the fluid.[207] During the surgery, however, the resident punctured Sentree's heart and coronary artery.[208] Sentree lost a significant amount of blood, which ultimately contributed to her death.[209]

The death certificate signed by the resident stated that the death was naturally caused, and neither he nor Dr. Chang told the plaintiffs that their daughter's heart had been punctured during surgery.[210] Instead, the doctors informed the family that Sentree's "heart was 'too weak to withstand the procedure.'"[211] Moreover, the plaintiffs were never made aware of autopsy results or medical records, but were told that "records were not sent to patients because the materials would contain incomprehensible medical terms."[212]

The Joslyns were unaware of the negligence of the resident performing the surgery until nine years later, in 2001, when, at the suggestion of Sentree's pediatrician, the Joslyns obtained all the medical records and learned of the surgical negligence.[213] Following their disturbing discovery, the Joslyns filed suit, which was dismissed as untimely under the Massachusetts statute of repose relating to medical malpractice claims.[214]

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203. Joslyn v. Chang, 837 N.E.2d 1107 (Mass. 2005).
204. *Id.* at 1108.
205. *Id.*
206. *Id.*
207. *Id.* at 1108-09.
208. *Id.* at 1109.
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.* at 1108; *see also* MASS. GEN. LAWS ch. 231, § 60D (2006).

The court pointed to previous case law stating that the statute of repose is an absolute time limit with the effect of placing a "limit on the liability of those within its protection and to abolish a plaintiff's cause of action thereafter, even if the plaintiff's injury does not occur, or is not discovered, until after the statute's time limit has expired."[215] This limitation was enacted by the legislature in response to mounting litigation relating to medical malpractice in an effort to reduce the number of claims that could be filed. It was developed after a 1986 report by a special commission that "address[ed] a 'crisis . . . in Massachusetts medical professional liability insurance.'"[216] The commission stated that malpractice claims had increased by fifty percent in the last six months of 1981.[217] The *Joslyn* court traced this incline back to the 1980 case *Franklin v. Albert* that held that the action for malpractice accrued, "when the plaintiff learn[ed], or reasonably should have learned, that he ha[d] been harmed by the defendant's conduct."[218] This "discovery" rule replaced the previous rule that the action accrued at the time of the alleged malpractice.[219]

Although the court linked the jump in malpractice claims to the adoption of the discovery rule, the special commission noted that the reasons for the jump were "still unexplained."[220] Furthermore, the special commission downplayed the connection, claiming that it had "no information suggesting that such an increase has occurred or will occur."[221] Interestingly, the Massachusetts legislature has proposed legislation that, if passed, would eliminate the age and time limitation,[222] which suggests that there is not a link between the malpractice actions and the *Franklin* decision. It also gives way for future cases like *Joslyn* to be fairly adjudicated.

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215. *Joslyn*, 837 N.E.2d at 1110 (quoting McGuinness v. Cotter, 591 N.E.2d 659, 662 (Mass. 1992)).

216. *Id.* (alteration in original) (quoting H.R. Doc. No. 174-5355, Reg. Sess., at 5 (Mass. 1986)).

217. *Id.* at 1111.

218. *Id.* at 1110 (alterations in original) (internal quotation marks omitted) (quoting Franklin v. Albert, 411 N.E.2d 458, 463 (Mass. 1980)).

219. *See* Pasquale v. Chandler, 215 N.E.2d 319 (Mass. 1966), *overruled by Franklin*, 411 N.E.2d 263.

220. *Joslyn*, 837 N.E.2d at 1111 (internal quotations omitted) (quoting H.R. Doc. No. 174-5355, Reg. Sess., at 5).

221. *Id.* at 1110-11 (internal quotation marks omitted) (quoting H.R. Doc. No. 173-5980, Reg. Sess., at 17 (Mass. 1983)); *see also* infra IV.B.3.

222. H.R. 1341, 185th Gen. Court, Reg. Sess. (Mass. 2007).

IV. Flawed Rationale and Suggestions for the Future

While courts have justified dismissing otherwise valid claims brought by parents wishing to invoke the minority tolling provisions on several grounds, the outcomes have all been the same. Whether based on plain language, statutory interpretation, or legislative intent and history, the holdings of the courts have denied recovery to parents seeking compensation from those who have contributed to the death of their children. These parents deserve the chance to litigate their claims beyond the typical two year statute of limitation and there is justification for allowing them to do so. These are questions of statutory interpretation and public policy, and, while there is not one answer that can accommodate each of the states' issues, there is at least another side to the story.

A. *How the Birthday Rationale Is Flawed*

1. The Plain Meaning Approach

When required to determine the correct interpretation of a statute, a court first looks to the plain meaning of the words for guidance.[223] Under this technique, "it is assumed that the legislature probably used the words . . . in a 'normal' way to communicate its intent . . . ."[224] The term "birthday" has more than one meaning, as recognized by the court in *Vance*.[225] Under the *Random House* definition it can mean, "the anniversary of a birth. . . . [or] the day of a person's birth."[226] The *Merriam-Webster's Dictionary*, too, gives both the anniversary of a birth, and the day of a person's birth as possible definitions.[227] The *Vance* court chose not to determine the appropriate definition of "birthday," and instead found that the term "reach" was determinative.[228] Finding that a deceased child could not effectively "reach" ten years of age, the court determined that the legislature had not intended the tolling provision to apply to claims brought on behalf of deceased children.[229]

While the court was proper in looking to the word "reach" for guidance, it failed to determine the plain meaning of "birthday."

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223. Ronald Benton Brown & Sharon Jacobs Brown, Statutory Interpretation: The Search for Legislative Intent 38 (2002).

224. *Id.*

225. *See* Vance v. Henry Ford Health Sys., 726 N.W.2d. 78, 82 (Mich. Ct. App. 2006).

226. Random House Webster's College Dictionary 134 (2d ed. 1997).

227. Merriam-Webster's, *supra* note 11, at 126.

228. *Vance*, 726 N.W.2d. at 82.

229. *Id.* at 82-83.

The generally accepted canons of statutory construction assume that each word has meaning; therefore, an interpretation that would make some words meaningless should be rejected.[230] The *Vance* interpretation arguably renders the word "birthday" meaningless. The statute states that if at the time of the alleged malpractice a "person has not reached his or her eighth birthday, a person shall not bring an action based on the claim unless the action is commenced on or before the person's tenth birthday."[231] The court rejected a construction that would interpret birthday to mean the anniversary of birth. The only other "plain meaning" alternative is an interpretation of "birthday" as the day on which a person is born. Assuming the court had adopted this definition, the statute would seem to mean that a person is only entitled to the exception if she has not yet reached "the day of a person's birth." Not only does this interpretation render the term "birthday" useless in the statute, but it would seem to apply only to fetuses or actions by mothers for babies in utero.

The more logical interpretation is to interpret "birthday" to mean the anniversary of one's birth. This is the meaning most often used in everyday conversation and is consistent with the canons of interpretation. To decipher legislative intent the court is to "assume[ ] that the legislature probably used the words . . . in a 'normal' way" and give the words "the meaning that they would ordinarily produce."[232] For example, one might say, "Today is Lincoln's birthday." Although Abraham Lincoln died on April 15, 1865, we celebrate the anniversary of the day of his birth on February 12th of each year.[233] Using this common definition, the Michigan statute would be interpreted to mean that if a minor has not reached the eighth anniversary of his birth, he is entitled to the exception.

Similarly, the Pennsylvania court in *Holt* found persuasive a Wisconsin case that held that in order to "reach" a particular age, a minor must be living.[234] However, the *Holt* court did not adequately interpret its own statute before importing Wisconsin case

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230. BROWN & BROWN, *supra* note 223, at 84.

231. MICH. COMP. LAWS. ANN. § 600.5851(7) (West 2000); *see also Vance*, 726 N.W.2d. at 82.

232. BROWN & BROWN, *supra* note 224, at 38.

233. President Abraham Lincoln was born on February 12, 1809. The White House, Biography of Abraham Lincoln, http://www.whitehouse.gov/history/presidents/al16.html (last visited April 15, 2009).

234. Holt v. Lenko, 791 A.2d 1212, 1215 (Pa. Super. Ct. 2002) (citing Awve v. Physicians Ins. Co. of Wis., Inc., 512 N.W.2d 216, 218-19 (Wis. Ct. App. 1994)).

law. The relevant Pennsylvania statute in *Holt* stated that a minor entitled to bring a claim who has not yet attained the age of eighteen "shall have the same time for commencing an action after attaining majority."[235] Under a plain-meaning interpretation, this clause alone does not permit the parents of a deceased child to file a suit invoking the child's minority savings provision. Looking solely at this sentence, it is clear that a deceased child could never reach the age of eighteen; thus, parents are barred from invoking the statute if their child dies.

However, the last clause of the statute, which the *Holt* court fails to emphasize, states that for the purposes of the infancy provision, a minor is defined as, "*any* individual who has not yet attained eighteen years of age."[236] Importing this statutory definition of a minor into the tolling provision, it would seem that any person, living or dead, who has not yet attained the age of eighteen is a minor and can, as a result, rely on the statute.[237]

2. Will a Deceased Child Ever Have a Fourteenth Birthday?

In *Campos*, the court dismissed the idea that the Texas legislature could have intended the minority savings provision to apply to deceased minors because it reasoned that a dead child ceases to age.[238] The court summarized the plaintiff's position, stating that "[u]nder this argument . . . the statute of limitations would *never* run in a situation where a child dies and therefore never reaches the age fourteen."[239] Yet, after death, a child ceases aging but does not cease having birthdays. Under the plain meaning, a birthday is an anniversary of one's birth; thus, a dead child will continue to have birthdays, as does any living child.[240] Therefore, the fourteenth anniversary of the dead child's birth would mark the running of the

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235. *Id.* (internal quotation marks omitted) (quoting 42 PA. CONS. STAT. ANN. § 5533(b)(1)(i) (West 2004)).

236. PA. CONS. STAT. ANN. § 5533(b)(1)(ii) (emphasis added).

237. For an alternative interpretation of the decision in *Holt*, see Christina Gillotti, Note, *Superior Court Interprets Minority Tolling Statute: Statute Does Not Apply to Estate of Minors Who Do Not Survive Injury*, ALLEGHENY COUNTY B. ASS'N. L.J., Mar. 2002, at 2; William M. Green, *From the ACBA: Death of Minor Plaintiff Kills Hope of Tolling Statute of Limitations*, ALLEGHENY COUNTY B. ASS'N. L.J., Oct. 2002, at 4.

238. Campos v. Ysleta Gen. Hosp., Inc. (*Campos II*), 879 S.W.2d 67 (Tex. App. 1994).

239. *Id.* at 73.

240. *See supra* text accompanying notes 226-227.

statute of limitations and satisfy the *Campos* court's concern of the endless statute of limitations.

Additionally, even when a court concludes that the plain-meaning interpretation requires that a child must be leaving to reach a birthday, there exists a "golden rule" that could save a parent's claim. The golden-rule exception to the plain-meaning interpretation states that where the plain meaning produces a result that is ridiculous or unjust, the judge may determine that the legislature could not have intended such a result and reject the interpretation.[241] Early on, this meant that a judge could simply set aside a statute when its plain meaning produced an injustice.[242] However, today the rule is more limited: when the rule applies, the plain meaning is not determinative.[243] Instead, the court must turn to legislative intent, the purpose for which the statute was passed, and the context in which it was passed.[244]

B. *Judicial Determinations of Legislative Intent Have Focused on the Wrong Issue*

Whereas the courts discussed have cited to their own states' perceived medical malpractice litigation crises as the reason for the enactment of statutes shortening the limitations period, there is a more focused point of each statute that relates directly to minors. The pressing issue, which the courts have not directly addressed, is *why* the exception for minors exists in this type of statute. If the reasons for the exception to the rule exist regardless of whether the child survived, then there is good reason to allow the exception to hold even if the child has died.

1. Reasons for Limiting Medical Malpractice Actions

In response to an insurance crisis during the 1970s that had caused physicians to limit their practices, retire early, and refuse patients, Texas passed the Medical Liability Insurance Improvement Act (MLIIA).[245] In determining cases such as *Brown*, the

241. BROWN & BROWN, *supra* note 223, at 40-41; *see also* Shapiro v. United States, 335 U.S. 1, 31 (1948) (explaining that "the 'plain meaning' rule [must] give way where its application would produce a futile result, or an unreasonable result").

242. BROWN & BROWN, *supra* note 223, at 41.

243. *Id.*

244. *Id. at* 42-48; *see also* McCreary County v. ACLU of Ky., 545 U.S. 844, 861 (2005) ("Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country.").

245. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 4.01 (1977) (repealed 2003); *see also* Hamrick, *supra* note 31, at 132.

courts have listed these reasons for enacting the statute and have remarked on the intent of the legislature to limit physician liability and thus decrease insurance premiums by limiting the time period in which a medical malpractice action could be filed.[246] In enacting the MLIIA, the expressed goals of the Texas legislature included: "(1) reducing frequency and severity of health care liability claims; (2) decreasing the costs of malpractice insurance; (3) protecting health care providers from liability through affordable insurance; and (4) ensuring the public access to affordable health care."[247] The *Brown* court apparently inferred from these goals that the legislature did not intend that parents of deceased minors be able to invoke the minority tolling provision, rationalizing that this would only result in more cases.[248]

Similarly, Massachusetts courts have followed the same line of interpretation in determining legislative intent. In 1986, the Massachusetts legislature amended its own medical malpractice statute to include a seven-year statute of repose for minors. [249] The statute was a response to insurers threatening to withdraw from the malpractice market and refusing to insure physicians. Even though the bill's sponsors stated that the insurers were reacting to a national trend of high settlements for medical malpractice claims, they maintained that the further limitations on a minor's ability to bring claims would effectively ensure the availability of physicians' insurance.[250] The statutes of repose and further limitation of minors' rights were enacted to curb malpractice litigation and ensure affordable health care and insurance.[251] The Massachusetts courts have held that allowing a claim like that in *Joslyn* to go forward would defeat the statute's purpose.[252]

The state of Indiana allows the parent of a deceased child to bring a wrongful death claim and "recover for the loss of that child's services, love, care and affection, as well as health care, hospitalization, funeral and burial expenses," among other things.[253] Under this statute a parent may file suit and be awarded damages,

246. *See* Brown v. Shwarts, 968 S.W.2d 331, 333-34 (Tex. 1998); *see also* Hamrick, *supra* note 31, at 132.

247. Hamrick, *supra* note 31, at 137.

248. *See generally Brown*, 968 S.W. 2d 331.

249. Mantell, *supra* note 44, at 100.

250. *Id.* at 99.

251. *See* Joslyn v. Chang, 837 N.E.2d 1107, 110-11 (Mass. 2005).

252. *See id.*

253. Randolph v. Methodist Hosps., Inc., 793 N.E.2d 231, 236 (Ind. Ct. App. 2003).

at "any time between the death of the child and the date the child would have reached twenty years of age."[254] The Court in *Randolph*, however, made the distinction that the wrongful death statute does not apply in an action where the wrongful death resulted from medical malpractice, instead applying the medical malpractice statute and shortening the limitations period.[255]

This inequity is based solely on the manner in which the child died. The parent of a child who died, not as a result of medical malpractice, but from some other negligence could wait until the child would have reached twenty. Yet, the parent of a child who died from a physician's negligence may be denied the same benefit.

Furthermore, the tolling provision in and of itself should be determinative of the intent of each state's respective legislature. While this history of the insurance atmosphere in the 1970s may be helpful in determining why medical malpractice limitation statutes were enacted initially, it misses the mark regarding claims for the wrongful death of children. There are specific provisions within each of the statutes that refer to a minor's right to toll the otherwise applicable limitations period. The rationale behind including a minority tolling provision, instead of the reasons for limiting malpractice litigation, should be the focus of interpretation.

2. The Intent of the Savings Provisions

Children need more legal protection than other classes.[256] From drinking ages to driver's licenses, states have widely recognized this concept in various aspects of the law. With regard to personal injury, Texas has traditionally been protective of its minors: "[T]he numerous Texas statutes allowing minors to toll the commencement of limitations until they attain majority evidence a legislative view that minors are incapable of filing claims while under a disability."[257]

However, there are reasons beyond a minor's incapacity to file for tolling the statute of limitations. As pointed out by the dissent in *Regents of University of New Mexico v. Armijo*, forcing parents to file suit within a two-year limitation period would force claims to be filed without full knowledge of the scope of the harm visited on

254. *Id.*; *see also* IND. CODE ANN. § 34-23-2-1 (2008).

255. *Randolph*, 793 N.E.2d at 237.

256. Holt v. Lenko, 791 A.2d 1212, 1214 (Pa. Super. Ct. 2002) (quoting Robinson v. Pa. Hosp., 737 A.2d 291 (Pa. Super. Ct. 1999)).

257. Hamrick, *supra* note 31, at 175.

their child.[258] Under this rationale it is possible that more, not fewer, frivolous lawsuits would be filed, based on a jump-the-gun mentality. Parents could feel pressured to file any claim, for fear that waiting to discover all facts related to their child's death would result in a total bar on recovery.

Additionally, minors are also given a longer opportunity to file suit so that they have time to discover their injuries.[259] As seen above, several of the deceased children were babies at the time of death. Had they lived to the age of three, four, or five, it is plausible that injuries not otherwise obvious would have presented themselves. The tolling provision, therefore, gives the child an opportunity to grow and develop, while also providing enough time so that the child may speak on her own behalf and possibly testify at a trial.[260]

Some courts have given the rationale that death removes a minor's disability and, thus, there is no reason for the parents to have the opportunity to invoke the tolling provision.[261] Yet, upon the death of a child, the challenges that a child would face bringing a suit under the age of legal majority still exist. Arguably the challenge for a plaintiff bringing suit on behalf of a deceased child is tougher because when a child dies, the best evidence of malpractice dies too. There is no one with visible injuries to take the stand and testify on his own behalf, nor is there an opportunity to see the entirety of the harm develop. Arguably, the same problem exists with a deceased adult. However, with an adult there is a presumption that she would have the cognitive ability to tell her family of the harm she suffered; this is not so with a young child. If parents are forced to rely on administrator statutes and file suit within two years of the death, the lack of their best evidence—the child—means the investigation must begin soon after the funeral.

Defendants argue that while this may be a harsh result for plaintiff parents, it benefits the medical community and "serve[s] to provide some relief to physicians" by "effectively limit[ing] the uncertainty regarding potential claims to a much shorter period."[262]

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258. Regents of Univ. of N.M. v. Armijo, 704 P.2d 428, 430 (N.M. 1985) (Sosa, J., dissenting).

259. *Id.* (citing Slade v. Slade, 468 P.2d 627 (N.M. 1970)).

260. *See id.*

261. *See* Bailey v. Martz, 488 N.E.2d 716, 722 (Ind. Ct. App. 1986) (stating that "[the child's] death removed his legal age disability"), *superseded by statute*, IND. CODE ANN. § 34-23-2-1 (2008), *as recognized in* Ellenwine v. Fairley, 846 N.E.2d 657, 661 (Ind. 2006).

262. Greene, *supra* note 237, at 4.

Fairness to defendants, fresh evidence, and avoiding stale claims are important concerns. However, when applied to parents of the deceased children, this rationale is inconsistent with the very statutes at issue. Living children injured by medical negligence can wait until they are nine years old in Massachusetts,[263] ten in Michigan,[264] fourteen in Texas,[265] eighteen in Indiana,[266] and twenty in Pennsylvania to file a claim.[267] If the evidence is still fresh for a living child after eighteen years, how can it be said that the evidence is stale for a deceased child?

In each of these scenarios, whether the child be living or deceased, after many years it is possible that the evidence and availability of witnesses will cease to be completely accurate, fresh, or otherwise useful. However, if the opportunity is available for a living minor, it should also be available to those bringing a suit on behalf of a deceased minor.

3. Statutes of Repose Slowly Disappear

From Massachusetts to Texas, legislatures and courts have begun to abolish absolute limitations on malpractice actions.[268] Initially enacted to limit the number of medical malpractice claims that could be brought, statutes of repose are beginning to be repealed and struck down as unconstitutional.[269] On grounds of due process and equal protection, "minors filing *medical wrongful death* claims are the only class of plaintiffs whose rights are prematurely terminated."[270]

Recently, the Massachusetts legislature has proposed amending its statute to eliminate the entirety of the minority provision and the statute of repose caveat, and replacing the section with the words "is discovered."[271] The proposed amendment recognizes that an absolute bar on recovery may be unconstitutional and is

263. MASS. GEN. LAWS ch. 231, § 60D (2006).

264. MICH. COMP. LAWS ANN. § 600.5851(7) (West 2000).

265. TEX. CIV. PRAC. & REM. CODE ANN. § 74.251 (Vernon 2005 & Supp. 2008), *invalidated by* Adams v. Gottwald, 179 S.W.3d 101 (Tex. App. 2005).

266. IND. CODE ANN. § 34-18-7-1(b) (2008).

267. *See* 40 PA. CONS. STAT. ANN. § 1303.513 (West Supp. 2008).

268. *See* H.R. 1341, 185th Gen. Court, Reg. Sess. (Mass. 2007); Hamrick, *supra* note 31, at 127-28; *see also* Weiner v. Wasson, 900 S.W.2d 316 (Tex. 1995); Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983).

269. Mantell, *supra* note 44, at 104-05; *see also* Strahler v. St. Luke's Hosp., 706 S.W.2d 7 (Mo. 1986); Schwan v. Riverside Methodist Hosp., 452 N.E.2d 1337 (Ohio 1983); *Sax*, 648 S.W.2d at 661.

270. Hamrick, *supra* note 31, at 128.

271. Mass. H.R. 1341.

certainly contrary to public policy. The discovery rule provides a fairer time period in which the plaintiff can file suit, and promotes honesty within the doctor-patient relationship.[272] Whereas previously claims that were over seven-years-old were ultimately dismissed as untimely in Massachusetts,[273] this proposal allows parents to discover the injury and or malpractice and file suit accordingly. The rule as it stands today encourages deceit by the physician who, because of a medical error, believes a suit may be filed against him. If the physician can deceive the patient and escape being sued immediately, he is effectively off-the-hook after seven years have passed.

Though statutes of repose do not directly address the problem that a parent faces when attempting to invoke a minority tolling provision in a wrongful death suit, it is a helpful analogy. Legislatures and courts are moving toward a more liberal approach to medical malpractice statutes by removing absolute bars on recovery. If it is unconstitutional and unfair to bar a minor's recovery after seven years it can be analogized that barring a parent's claim on behalf of his child is also inequitable.

C. *The Appropriate Interpretation of the Statutes*

Parents who lose a child as a result of medical malpractice should be able to file a wrongful death action and invoke their deceased child's right to toll the statute of limitation until the age of majority. If the plain-language interpretation supporting this position[274] is not convincing on its own, public policy, rules of civil procedure, and the status of the current medical malpractice crisis provide ample support for adopting this interpretation.

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272. The Connecticut case of *Altieri v. CVS Pharmacy, Inc.* provides a good example. *See* Altieri v. CVS Pharmacy, Inc., No. X06CV020171626S, 2002 WL 31898323 (Conn. Super. Ct. 2002). Donna Marie Altieri was given a fatal dose of her prescription due to an error by a CVS pharmacist. *Id.* at *1. The Altieri family was told that she died of a heart attack and only after asking for an autopsy did they find her death to be the result of a morphine overdose. The Altieris became aware of the pharmacist's error after hiring a lawyer to investigate a potential malpractice lawsuit. If the family had delayed hiring an attorney and a statute of repose had been in effect, the pharmacy would have escaped liability. *See* BAKER, *supra* note 10, at 102-03.

273. *See, e.g.*, Joslyn v. Chang, 837 N.E.2d 1107 (Mass. 2005).

274. *See supra* Part IV.A.1.

1. Public Policy and Rules of Civil Procedure Are Furthered by a More Liberal Interpretation

Allowing parents to invoke minority tolling provisions rights furthers the two goals of the tort system: compensation and deterrence.[275] The rules of the tort system deter negligent behavior by imposing the costs of the injuries on the person who could have avoided the accident or injury.[276] Furthermore, the tort system provides victims of negligent behavior compensation for their injuries.[277] By allowing a victim's parents to invoke minority tolling provision rights, the negligent behavior of doctors will be deterred and the victim's family will be compensated for the loss. On the other hand, preventing parents from using the minority tolling provisions not only suppresses the goals of the tort system, but also compromises the rules of civil procedure and the very reasons why our country developed statutes of limitation.

The federal rules of civil procedure were developed to resolve disputes through adjudication.[278] Successful adjudication includes a determination of the appropriate legal standard, the facts of the dispute, and the proper application of the law to the facts to determine the remedy.[279] With these goals in mind, state and federal governments drafted rules of civil procedure. The principal goal of civil procedure is that "cases should not turn on procedural technicalities, but instead should be decided with an emphasis on *accuracy*."[280]

Applying these principles, the legal standard that society seeks to enforce through medical malpractice statutes is the deterrence of negligent medical care. Therefore, a doctor who negligently punctured a child's heart during surgery and caused the death of that child has violated the legal standard.[281] Consequently, compensatory damages should be awarded to the victims of the negligence. However, in the case of parents filing wrongful death malpractice suits, such compensation has been denied due to a technicality—the parents' belief that their claim was timely under the minority tolling

275. ROBERT E. LITAN & CLIFFORD WINSTON, LIABILITY: PERSPECTIVES AND POLICY 3 (1988).

276. *Id.*

277. *Id.*

278. *See* SUZANNA SHERRY & JAY TIDMARSH, ESSENTIALS: CIVIL PROCEDURE 11 (2007).

279. *Id.* at 11-12.

280. *Id.* at 31.

281. *See* Joslyn v. Chang, 837 N.E.2d 1107 (Mass. 2005).

provision. Even if courts are unpersuaded that the plain language refers to both living and deceased minors' rights to bring suit, the fact that an otherwise valid claim is dismissed summarily is against public policy and the goals of the civil procedure system. These claims should be allowed to proceed on their merits, therefore reaching the *accuracy* of the cases. The legislatures have been clear. They intended to enact statutes that allow children who have been victims of medical malpractice to bring valid claims against their tortfeasors. The purpose of the statutes is to allow a child without the faculties or knowledge to have an extended time period in order to develop skills to articulate his injury. To deny parents who have lost a child the same rights that their child would have had, is particularly unjust—especially because the parents have the difficult task of deciphering the harm their child suffered without the help of that child.

2. Medical Malpractice Statutes Are Not Compromised by This Interpretation

Allowing parents of deceased children additional time to bring suit is not inconsistent with the goal of reducing frivolous lawsuits.[282] The limitations were created in response to a medical malpractice crisis to limit the number of suits that could be brought and thereby reduce the cost of physician malpractice insurance premiums.[283] Dismissing claims brought by parents who have relied on the minority tolling provision does not have the effect of reducing frivolous lawsuits. It reduces neither insurance premiums nor the cost of health care because the cases are dismissed before any frivolousness could have been known. The claims are never determined to be frivolous because they are never judged on their merits.

These claims have been summarily dismissed, solely because parents relied on their child's right to toll the statute of limitations. The plaintiffs in these lawsuits could have had excellent evidence that the standard of care was breached, expert witnesses to testify as to the causation, and an otherwise "home run" case. In tort parlance, but for the technicality of the tolling provision, they could have proceeded. Even if these claims were allowed to proceed on their facts, there is no conclusive evidence that medical malpractice premiums would skyrocket as a result. The meritorious claims

282. *See generally* LITAN & WINSTON, *supra* note 275, at 101-27.

283. *See* Randolph v. Methodist Hosps., Inc., 793 N.E.2d 231, 236 (Ind. Ct. App. 2003).

would proceed to settlement or a jury trial—as it should—and the frivolous claims, or claims where there was no proof of causation, would be weeded out through the discovery process. Because the burden of proof is on the plaintiff, and in most cases it has been several years since the alleged malpractice, there is a great probability that few of the parents invoking the minority tolling provision would have successful cases. Thus, the population of plaintiffs having any effect on the insurance industry would be miniscule and the malpractice statutes would still retain their teeth.

3. Changing Perceptions: Are Physicians and Insurance Companies Really the Ones to Blame?

The medical malpractice "crisis" to which so many state legislatures responded may have ties to causes other than "frivolous litigation and runaway juries."[284] "[A]s many as 98,000 people die each year in American hospitals due to medical errors, more than auto accidents, breast cancer, and HIV/AIDS combined."[285] Perhaps the litigation is in response to the sub-par level of care being administered. Additionally, opponents of those who would call the medical insurance premium hike a "crisis" counter this proposition by saying that it is "an insurance crisis, not a tort crisis."[286] Donald Zuk, chief executive of SCPIE Holdings, a medical malpractice insurer, was quoted as stating, "I don't like to hear insurance-company executives say it's the tort system—it's self inflicted."[287] The problem is this:

> Liability insurance goes through a boom-and-bust cycle. . . . Toward the end of the cycle, they take an increasingly optimistic view of future losses and do not set aside enough reserves. As a result, they begin charging prices that are too low in relation to the risk. Because medical malpractice claims take so long to resolve . . . the shortfalls in the reserves to pay medical malpractice claims accumulate over a number of years. When the insurance climate shifts back to a pessimistic view of future losses, insurance companies need to increase their reserves, sometimes quite dramatically . . . and prices rise accordingly.[288]

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284. BAKER, *supra* note 10, at 2.

285. Remaking American Medicine, Episode #1: The Silent Killer, http://www.remakingamericanmedicine.org/episode1.html (last visited Apr. 15, 2009).

286. BAKER, *supra* note 10, at 45.

287. *Id.*

288. *Id.* at 66.

If the problem of unaffordable medical malpractice insurance has forced doctors to leave the profession, perhaps they have only themselves and their insurers to blame. Regardless of the reasons for the increased rates, plaintiffs who bring valid claims to court deserve to have their cases litigated. They should not be summarily turned away on a technicality designed to protect the insurance companies and negligent medical staff.

CONCLUSION

Minority tolling provisions enable minors to realize the full scope of the harm inflicted on them before filing suit. When a child dies, this harm is even more difficult to articulate because the best evidence of what the harm was that led to the death has also died. Allowing a parent to have the same amount of time that the child himself would have had to file suit allows for the parent to fully understand and investigate the potential medical malpractice claim and avoids the quick-fire filing of a frivolous claim. Allowing reliance by the parent, or administrator, only provides the benefit that the child would have had and no more. The argument that this additional time allows for the spoliation of evidence or causes unavailability of witnesses falls short because it is the same time period allowed by statute for a minor. This is especially true in states where the statute is tolled for up to eighteen years.[289]

Furthermore, allowing reliance on the minority tolling provision after the child has died is consistent with both the legislative intent and the plain language of these statutes. This interpretation promotes compensation and deterrence, the goals of the tort system, as well as resolving disputes on the merits of each case, the goal of civil procedure. Additionally, public policy is furthered by a liberal interpretation and application of the minority tolling provisions. Plaintiffs have an opportunity to be heard and can be compensated for their losses while physicians are deterred from wrongdoing. Most importantly, a child's death due to an adult's negligence does not go unpunished or overlooked.

Gretchen R. Fuhr

289. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 5533(b)(1)(i)-(ii) (West 2004) (statute is tolled until minor reaches eighteen years of age).