IN THE SUPREME COURT OF OHIO

BROOKS J. SPRADLIN-CHEEKS	:	On Appeal from the Hamilton County Court of Appeals, First District
Appellant/Plaintiff	:	
v.	:	Court of Appeal Case No. C-090113
DAVID B. SCHWARTZ, M.D.	:	10-0210
DAVID B. SCHWARTZ, M.D., LLC	:	
Appellee/Defendants	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT BROOKS J. SPRADLIN-CHEEKS.

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents critical issues for the preservation of the integrity of the medical community and the protection of its patients. Although a medically caused physical and emotional disaster is undeniably a cognizable event, the discovery of the need to consent and the doctor's alteration of the medical record three years after the young mother was left barren to fabricate the necessary informed consent are additional cognizable events from which the Statutes of Limitations also began to tick away.

Although the medical community deserves protection and are entitled to enjoy statutory damage limits and the production of an affidavit of merit before suit may be filed, it is, similarly of great public and general interest that severely injured patients are not precluded from pursuing the independent torts of failure to obtain an informed consent and misrepresentation of material facts on which a patient relies along with the alteration of medical records to conceal the foregoing all of which are cognizable events, discovery of which, begins a new period for computing the time within which the injured may bring their causes of action.

It is of additional and great general interest that the Court System be available to redress the fraud committed by a physician who attempts to hides his failure to obtain an informed consent by altering a chart three years later even after the Statute of Limitations for medical malpractice may have run.

If allowed to stand, the Decision of the First District Court of Appeals will give protection to miscreant physicians that is not deserved and would leave their

misrepresented and concealed adventures remediless to the detriment of the patients for whom doctors take their oath to treat and protect.

STATEMENT OF THE CASE AND FACTS

Following the delivery of the child in October of 2003, Appellant, Brooks Cheeks ("Brooks Cheeks") had not seen either Appellee, Dr. Schwartz ("Schwartz") or any other obstetrician/gynecologist until she presented herself to Dr. Shannon Juno ("Dr. Juno") on May 2, 2005. After Dr. Juno heard the unusual events that lead from the anticipated natural birth to an unnecessary induction and culminated in a hysterectomy, Dr. Juno was so disturbed when she heard this history, she took it upon herself to obtain the operative record.

On May 12, 2005, Dr. Juno received and reviewed the chart from which she determined that Brooks Spradlin Cheeks had an uncomplicated pregnancy when she was induced at 38 ½ weeks gestation without any medical reason recorded in either Schwartz' office records or the hospital chart. Dr. Juno further determined that the patient's progress the morning of her admission demonstrated no medical reason for caesarian section which Dr. Schwartz decided to perform during his luncheon break. The use of the pitocin and the operative delivery by a surgical c-section are known risks for post partum hemorrhage. To treat what would be medically expected from the induction and C-Section, Dr. Schwartz performed an unnecessary hysterectomy without employing appropriate pre-surgical techniques to stem the blood flow. During this last procedure, Dr. Schwartz' operative note described that he had removed the uterus and cervix in their entirety which Dr. Juno determined by a physical and ultrasound examination was not true.

Dr. Juno further described as the most disturbing event in Schwartz involvement with Brooks Cheeks an inappropriate change to the medical record wherein he fabricated that he had obtained an informed consent to the induction by placing an entry in his chart dated October 7, 2006, to justify his use of pitocin and the c-section performed in October of 2003.

Following the filing of the Motion for Summary Judgment, the Trial Court determined that Brooks Spradlin-Cheeks' awareness of her hysterectomy on October 9, 2003, started the limitation period for the filing of her Complaint filed in January of 2006, and her cause of action was barred as beyond the statutory prescription of O.R.C. 2305.11. Additionally, the Trial Court determined that, since the award of compensatory damages was precluded by the malpractice statute of limitations, actions for fraud that punitive damages were not available.

On December 23, 2009, the First District Court of Appeals, by its judgment entry affirmed the decision of the Trial Court from which this appeal has been taken.

PROPOSITION OF LAW #1

When a physician misrepresents a medical need for a procedure, knowing it to be false and attempts to cover up his misrepresentation by altering his chart, the Statute of Limitations does not begin to run until the fraud and wrongdoing are discovered. These are additional causes of action and cognizable events separate and distinct from the physical catastrophe that she suffered at the hands of her physician.

ARGUMENT

Simply put, a cognizable event implies, if not requires, cognition. Brooks Cheeks knew that she had had a hysterectomy which was certainly a recognized event but she

never knew how or why she got there or even knew what the risks were that were attendant to what Dr. Schwartz told her he was medically doing. Dr. Schwartz lied to Brooks Cheeks and her family that Brooks Cheeks was not progressing naturally, needed pitocin and that the need to deliver the baby operatively was medically necessary for the mother and chid.

The duty of a physician to obtain an informed consent is based upon the theory that every competent human being has a right to determine what shall be done with his or her own body. **Turner v. Children's Hospital,** 76 Ohio App. 3d 541 (1991) citing **Siegal v. Mt. Sinai Hosp.** (1978) 62 Ohio App.2d 12 @ 21. The doctrine of informed consent is not merely the theory of negligence, it represents an independent tort claim. **Nickell v. Gonzalez**, (1985) 17 Ohio St. 3d 136 @ 139, 477 N.E.2d 1145.

In this case, Dr. Schwartz not only failed to obtain informed consent, the record is clear that he lied to Brooks Cheeks, her parents and the father of her child all of which she first became aware when she met with Dr. Juno in May of 2005.

It was the responsibility of the Trial Court to examine the facts of this and similar particular cases and make its determination with respect to the triggering event of the Statute of Limitations. In that regard, the cognizable event is clearly when the injured party became aware, or should have become aware of, not only the medical disaster that occurred but whether she was aware or should have been aware that such condition was related to a specific professional medical omission or error which would put her on notice of the need for further inquiry. **Hershberger v. Akron City Hosp.**, (1987) 34 Ohio St.3d 1 @ pp. 5-6, 516 N.E.2d 204.

PROPOSITION OF LAW #2

The discovery of the alteration of the medical chart by a physician to fabricate an informed consent is an additional cognizable event from which the patient has the one year provided by O.R.C. 2305.11 and four years for a cause of action of fraud as provided in O.R.C. 2305.09. The alternation of the chart to cover up the medical malfeasance of Dr. Schwartz is another and independent tort claim.

ARGUMENT

When a physician's knowingly represents a material fact concerning a patient's condition or need for a medical procedure which the patient justifiably relies on to her detriment, a new cause of action in fraud and a negligent act of commission give rise to a cause of action in fraud and for negligent misrepresentation independent from an action for medical malpractice. **Gaines v. Preterm -Cleveland, Inc.** (1987) 33 Ohio St.3d 54. Brooks Cheeks did not know that there was absolutely no need to induce her labor, c-section her child or to perform a hysterectomy following the c-section because of her bleeding until she was provided this information by Dr. Juno less than one year prior to the filing of her complaints for malpractice and fraud.

The alteration by Dr. Schwartz of the medical chart in October of 2006 for a procedure that he performed in October of 2003 is a further and independent tort claim and a new cause of action. **Moskovitz v. Mt. Sinai Hosp.,** (year) 69 Ohio. St.3d 638 @ 651, **Abrino v. Johnson & Johnson**, (year) 116 Ohio St.3d 468 @488 and **Demora v. Cleveland Clinic Foundation**, (year) 114 O. App.3d 711 @ 720.

CONCLUSION

For the reasons and case authority discussed, previously, this case clearly involves matters of great general interest both to the medical community and to its patients for whom physicians are required to provide medical care and who are not expected to deceive and alter records to cover up that deception.

It is, therefore, respectfully requested that this Court accept jurisdiction so these important issues may be presented and reviewed.

Respectfully submitted,

By _____

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CERTIFICATION OF SERVICE

I hereby certify that a copy of this Notice of Appeal was sent by ordinary U.S. Mail, postage prepaid, this 21st day of January, 2010 to counsel for Appellees:

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IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

BROOKS J. SPRADLIN-CHEEKS,	:	APPEAL NO. C-090113 TRIAL NO. A-0806328
Plaintiff-Appellant,	:	
vs.	:	*JUDGMENT ENTRY.*
DAVID B. SCHWARTZ, M.D.,	:	
and	:	
DAVID B. SCHWARTZ, M.D., LLC,		
Defendants-Appellees.		

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.[1]

Plaintiff-appellant Brooks Spradlin-Cheeks ("Spradlin") appeals the trial court's entry of summary judgment in favor of defendants-appellees David B. Schwartz, M.D., and David B. Schwartz, M.D., LLC, (collectively referred to as "Dr. Schwartz") in a medical-malpractice action. Because Spradlin filed her claims against Dr. Schwartz beyond the applicable limitations period, we affirm the trial court's judgment.

The following facts are taken from the depositions and affidavits of Spradlin, Schwartz, and Shannon Juno, M.D. In her 32nd week of pregnancy, Spradlin

[1] See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and C.Loc.R. 12.

transferred her prenatal care from her former health-care provider to Schwartz. Because of Spradlin's alleged hypertension as well as the alleged stage of dilation and effacement of her cervix, Schwartz recommended that Spradlin's labor be induced during her 38th week of pregnancy. He testified that he had explained the risks of induction and that Spradlin had given her verbal consent. But Spradlin testified that Schwartz had never informed her of the risks of induction, including the increased risk of a cesarean section, which was something that Spradlin did not desire.

Spradlin was admitted to the hospital on October 8, 2003, and signed the hospital's general consent form. She was induced with pitocin early that morning. That afternoon, Schwartz ordered a cesarean section because labor was not adequately progressing. Although Spradlin testified that she had announced to the hospital staff that she did not want a cesarean section, she could not remember if Schwartz was in the room when she stated her wishes. Eventually, the cesarean section was performed, and a healthy baby girl was born.

Several hours later, due to complications from the cesarean section, Spradlin began to hemorrhage. Schwartz and his nursing staff were unable to stop the bleeding. Unfortunately, on October 9, 2003, a hysterectomy was necessary to stop the bleeding and to save Spradlin's life. Spradlin's father signed the consent form for the hysterectomy because Spradlin was in and out of consciousness and had IV lines in both of her hands. According to Schwartz, the hemorrhaging was caused by the placenta being implanted low in the cervix.

After her two follow-up appointments with Schwartz in November 2003, Spradlin never returned to see Schwartz for medical care. In May 2005, she began gynecological care with Dr. Juno. After Spradlin discussed the birth of her daughter

and her emergency hysterectomy, Dr. Juno informed Spradlin that the induction had not been medically necessary and that if Spradlin had not been induced, it was likely that she would have had a successful vaginal delivery. Dr. Juno also discovered that a portion of Spradlin's cervix had not been removed during her hysterectomy, which was contrary to Spradlin's medical records.

In accordance with R.C. 2305.113(B), Spradlin sent a letter dated January 26, 2006, to Schwartz, indicating that she intended to sue. After receiving that letter, Schwartz supplemented Spradlin's medical record by authoring a late entry, which he dated October 2006, recording his recollection of the conversation that he had had with Spradlin regarding the risk of an elective induction.

In her complaint, Spradlin claimed that Schwartz had deviated from the standard of care in the obstetrical treatment that he had provided and that he had failed to obtain informed consent for such treatment. Further, she sought punitive damages from Schwartz for "fabricating" her medical chart by making a late entry. Dr. Schwartz moved for summary judgment, arguing that Spradlin had filed her claims outside the one-year statute of limitations. The trial court agreed and granted summary judgment in favor of Dr. Schwartz.

In her single assignment of error, Spradlin now argues that the trial court erred by entering summary judgment in favor of Dr. Schwartz.

Under Civ.R. 56(C), a motion for summary judgment may be granted only when no genuine issue of material fact remains to be litigated, the moving party is entitled to judgment as a matter of law, and it appears from the evidence that reasonable minds can come to but one conclusion, and with the evidence construed

most strongly in favor of the nonmoving party, that conclusion is adverse to that party.[2] This court reviews the granting of summary judgment de novo.[3]

Under R.C. 2305.11(B)(1), an action for medical malpractice must be brought within one year after either the cause of action accrues or the physician-patient relationship ends, whichever is later.[4] It is undisputed that Spradlin terminated her physician-patient relationship with Schwartz in November 2003. Thus, the issue before us is whether Spradlin's cause of action accrued at a later time.

"A cause of action for medical malpractice accrues and the statute of limitations commences to run when the patient discovers, or, in the exercise of reasonable care and diligence should have discovered, the resulting injury."[5] To determine the accrual date, the inquiry focuses on when there has been a "cognizable event" that does or should lead a reasonable patient to believe that the condition of which the patient complains is related to a medical procedure, treatment, or diagnosis previously rendered to the patient, and that does or should place the patient on notice of the need to purse her possible remedies.[6]

Here, Spradlin contends that her cause of action accrued in May 2005, after she had learned from Dr. Juno that her induction had not been medically necessary and that Schwartz had not obtained her informed consent to induce her. But Schwartz maintains that Spradlin's cause of action accrued the day that she had her hysterectomy—October 9, 2003.

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[2] See *State v. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 1994-Ohio-130, 639 N.E.2d 1189.
[3] *Jorg v. Cincinnati Black United Front*, 153 Ohio App.3d 258, 2003-Ohio-3668, 792 N.E.2d 781, ¶6.
[4] *Frysinger v. Leech* (1987), 32 Ohio St.3d 38, 512 N.E.2d 337, paragraph one of the syllabus.
[5] *Allenius v. Thomas* (1989), 42 Ohio St.3d. 131 133, 538 N.E.2d 93, quoting *Oliver v. Kaiser Community Health Found.* (1983), 5 Ohio St.3d 111, 449 N.E.2d 438, paragraph one of the syllabus.
[6] Id.

In *Laidley v. St. Luke's Med. Ctr.*,[7] the plaintiff had an emergency hysterectomy after she began to hemorrhage following the birth of her child. In determining when the statute of limitations had begun to run for purposes of a malpractice action, the Eighth Appellate District held that the plaintiff's hysterectomy had qualified as the cognizable event. The court pointed out that the plaintiff had failed to present any evidence demonstrating that she was unaware that a hysterectomy was not a normal circumstance of childbirth.

Agreeing with the analysis in *Laidley*, we hold in this case that Spradlin's hysterectomy qualified as the cognizable event that initiated the limitations period. Spradlin, like the plaintiff in *Laidley*, failed to present any evidence that she was unaware that a hysterectomy was not a normal consequence of childbirth.

Spradlin's argument that the improper medical procedure was the failure of Schwartz to obtain her informed consent, and not the actual hysterectomy, does not change our analysis. The hysterectomy was the physical injury that qualified as the cognizable event for the accrual of the cause of action. Once the physical injury was discovered, absent any fraudulent concealment by the doctor, "a reasonably prudent person ha[d] one year to determine if the injury could have been avoided or lessened, and whether[s]he had been given full and correct information."[8]

Although we have held that Spradlin "discovered" her injury on October 9, 2003, the day that she had her hysterectomy, she did not terminate her patient-physician relationship with Schwartz until November 2003. Using this later date as the start of the limitations period, Spradlin had until November 2004 to file her

[7] (June 3, 1999), 8th Dist. No. 2367.
[8] *Leon v. Miller* (July 27, 1987), 1st Dist. No. C-860487

medical-malpractice action. Because she did not file her complaint until January 2006, her action was barred because it was filed outside the statute of limitations.

Briefly, we reject Spradlin's argument that Schwartz's alleged acts of misinforming her that her induction and resultant cesarean section were medically necessary and his alleged misrepresentation that he had performed a total hysterectomy gave rise to an independent claim for fraud, and that such a claim had been timely field within the four-year statute of limitations for fraud. First, her claims regarding Schwartz's misrepresentations about the medical necessity of her induction and cesarean section were related to the need for and the performance of certain medical procedures, and they were thus inextricably tied to her medical-malpractice claim and did not give rise to an independent claim for fraud.[9] With respect to Schwartz's alleged misrepresentation that he had performed a total hysterectomy, Spradlin did not plead or argue that she had relied on that misrepresentation or that she had been harmed by that reliance—she did not allege any injury from this misrepresentation. Accordingly, she could not have maintained a claim for fraud.

Finally, we hold that the trial court also properly entered summary judgment in favor of Dr. Schwartz on Spradlin's claim for punitive damages. Under R.C. 2315.21(C)(2), punitive damages are only recoverable if the trier of fact has awarded compensatory damages. Since the statute of limitations had run on Spradlin's medical-malpractice claim, there was no award of compensatory damages. Thus, there was no basis in law for an award of punitive damages.

[9] See *Knepler v. Couden* (Dec. 23, 1999), 2nd Dist. No. 17473; see, also, R.C. 2305.113(E)(3) (medical claim is defined as any claim that arises out of the "medical diagnosis, care and treatment of any person").

Based on the foregoing, we overrule Spradlin's single assignment of error, and the judgment of the trial court is affirmed.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., DINKELACKER and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on December 23, 2009

per order of the Court _____.

Presiding Judge

ENTERED
DEC 23 2009