

ABOLISHING THE DISCOVERY RULE IN
WRONGFUL DEATH CASES: A MICHIGAN
PLAINTIFF’S PLIGHT

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INTRODUCTION

American common law has developed a doctrine that allows plaintiffs to bring causes of actions after the statute of limitations has run out.¹ Rooted in centuries-old principles of equity and stemming from the courts' English heritage, this doctrine—the discovery rule—has afforded innocent plaintiffs the opportunity to bring a cause of action when it might have otherwise been legally barred.² The rule allows courts to decide if it is fair and just for the plaintiff to obtain relief and choose the circumstances in which the discovery rule may be used to equitably toll the statute of limitations.³

With its decision in *Trentadue v. Gorton*,⁴ the Michigan Supreme Court abolished long-standing precedent that ensured plaintiffs would receive a fair and just remedy in court and not be barred from relief because of circumstances beyond their control.⁵ *Trentadue* was a wrongful death by homicide case in which deoxyribonucleic acid (DNA) evidence surfaced years after the homicide, leading to the identification of the killer.⁶ The court relied on the state's statutory scheme to preclude the use of this equitable rule in the very cases where it should be allowed.⁷ In tort law, the theory behind the discovery rule is that courts should not bar a plaintiff's

1. *Stephens v. Dixon*, 536 N.W.2d 755, 757 (Mich. 1995). The plaintiff in this case was a passenger in an automobile accident and brought an action to recover damages received as a result of the accident more than three years after it had happened. *Id.* at 755-56. Since the statute of limitations had already run, the court noted that it could have applied the discovery rule to allow the plaintiff to bring suit. *Id.* at 757. However, the court did not apply the discovery rule to toll the statute of limitation because the discovery rule is not available to a plaintiff who “merely misjudges the severity” of an injury and therefore fails to bring the cause within the statutory period of limitations. *Id.* at 758.

2. *Id.*

3. *Johnson v. Caldwell*, 123 N.W.2d 785, 791 (Mich. 1963) (holding that the discovery rule applies to allow recovery for a medical malpractice cause of action after statute of limitation had run when the doctor's actions were egregiously negligent, and also giving a discussion of the equities involved in the discovery rule's application). *See also infra* Section I.A for a description of this case and its relevance to the evolution of the Michigan discovery rule.

4. 738 N.W.2d 664 (Mich. 2007).

5. *Id.* at 680.

6. *Id.* at 681 (Weaver, J., dissenting).

7. *Id.* at 671 (majority opinion).

cause of action in a case where she could not, despite the exercise of due diligence, have discovered all the elements of her cause of action until after the statute of limitations had already passed.⁸

Through the abolition of the discovery rule, Michigan courts have denied potential plaintiffs their day in court. Those would-be plaintiffs will have to bear the burden of their misfortunes long after new evidence and technology surface, which identify the source of their grief. States that have abolished the common law discovery rule need to re-examine the principles of equity upon which courts are founded and implement methods that will allow victimized plaintiffs to have their day in court.

A re-examination of these founding equitable principles reveals several possible courses of action that would allow a plaintiff to bring a cause of action past the expiration of the statute of limitations. The first potential solution is for plaintiffs who lack knowledge as to the identity of a defendant to bring actions against “John Doe” defendants prior to the expiration of the statute of limitations.⁹ The second possible solution is for a court to manipulate its interpretation of the statute of limitations in relation to when actions begin to accrue.¹⁰ Finally, the strongest and most practical relief for a plaintiff lies in the hands of the legislature. The surest way to alleviate the confusion caused by the discovery rule would be to change the current statute to begin accrual of wrongful death by homicide actions after a charge or criminal conviction of the defendant.¹¹ A solution is desperately needed in a society where technology uncovers evidence long after the occurrence of a tortious act.

Part I of this Article examines the evolution of the common law discovery rule, distinguishes between equitable and legal remedies in tort law, and analyzes the rule’s application in wrongful death cases as it applies to toll the statute of limitations.¹² This Part also discusses the competing policy rationales governing the discovery rule and statutes of limitations.¹³ Part II analyzes the opposing views expressed by the Michigan Supreme Court

8. John Bourdeau, et al., 16 MICH. CIV. JUR. LIMITATIONS OF ACTIONS § 108 (2007) [hereinafter LIMITATIONS OF ACTIONS] (examining when the accrual period begins for causes of actions and how accrual affects the application of the discovery rule and discussing what elements of a cause of action must be established before accrual can begin).

9. See *infra* Section IV.A (outlining possible ways plaintiffs may remedy the severe effects of the abolition of the discovery rule).

10. See *infra* Section IV.B (outlining possible actions Michigan courts can take to avoid eliminating all equitable relief to plaintiffs when the statute of limitation for a particular cause of action has run).

11. See *infra* Section IV.C (outlining legislative action that would effectively ameliorate the consequences of the *Trentadue* decision and concluding that the most feasible solution would be enacting a statute providing courts the discretion to grant relief in equity).

12. See *infra* Part I.

13. See *infra* Part I.

in the *Trentadue v. Gorton* decision.¹⁴ This Part critiques the majority's analysis by appealing to the purpose and origins of the common law discovery rule.¹⁵ Part III discusses the ramifications that abolishing the discovery rule may have in the context of *Trentadue* and similar cases.¹⁶ Finally, Part IV outlines possible courses of action that Michigan and similarly situated states can take to restore principles of equity in their courts.¹⁷

I. THE DISCOVERY RULE: EVOLUTION AND APPLICATIONS

The discovery rule is applied to prevent unjust results when a plaintiff would otherwise be barred from bringing suit because the statute of limitations for that claim had run out.¹⁸ In the modern era, it is traditionally applied in cases, such as medical malpractice, where the plaintiff did not "discover" a latent injury or could not immediately make a causal connection between an injury and the defendant's actions.¹⁹ The rule requires courts to balance the interests of plaintiffs in receiving a fair result and the burden on defendants of defending stale claims.²⁰ In order to fully understand the purpose and policies behind the rule, it is necessary to first examine its origins and analyze its prior applications.

A. The Discovery Rule Defined

Statutes of limitations are legislatively-set time periods which bar a claimant from bringing a cause of action after a certain amount of time has passed.²¹ They are enacted primarily to protect defendants from having to

14. See *infra* Part II.

15. See *infra* Part II.

16. See *infra* Part III.

17. See *infra* Part IV.

18. LIMITATIONS OF ACTIONS, *supra* note 8.

19. Gerald A. McHugh, Jr., *The Statute of Limitations and the Discovery Rule: Variations on a Theme of Fairness*, 64 PA. B.A. Q. 197, 197 (1993) (discussing the application of the discovery rule in Pennsylvania with a focus on medical malpractice applications). Pennsylvania has adopted a liberal approach toward plaintiffs faced with the statute of limitation as a bar on their cause of action. *Id.* at 207. The focus in Pennsylvania is on the "reasonableness of the plaintiff's conduct" in pursuing the cause of action. *Id.* McHugh concludes that even if the discovery rule is not applicable in death cases, the doctrine of fraudulent concealment may operate to "estop[] a defendant from [asserting] the statute of limitations" as an affirmative defense. *Id.* at 204.

20. See *infra* Section I.C (discussing the policy rationales behind both statutes of limitation and the discovery rule and discussing how a court must determine application of either by weighing the competing policy objectives to determine which party should receive the benefit).

21. LIMITATIONS OF ACTIONS, *supra* note 8, at § 73. This entry gives a good definition of what a tolling provision is and how equitable tolling operates. It also provides a description of the one-year back limitation for the recovery of no-fault personal protection

defend old claims and from burdening the courts.²² “Tolling” a statutory limitation on a cause of action means that a plaintiff shows facts that will either remove the statutory time bar or extend it for a lengthier period of time.²³ The purpose of a tolling provision is to protect plaintiffs from a defendant’s potential statute of limitations affirmative defense.²⁴ Judicial or equitable tolling is generally allowed in courts, but is limited to situations where it is really needed.²⁵ The most common tool used in Michigan to toll the statute of limitations is the Revised Judicature Act, which codifies most situations which can be used to interrupt the running of the statutes of limitations.²⁶ However, it is not the only method by which courts may toll.²⁷

The discovery rule is a form of equitable tolling.²⁸ Circumstances may arise when a plaintiff is harmed by some conduct causing the plaintiff to have a viable claim; however, the plaintiff may nevertheless be precluded from bringing a cause of action through no fault of his own, because the limitations period has run before he had actual knowledge of an injury, or other element of the cause of action.²⁹ In such situations, the common law developed the discovery rule to “avoid the harsh results produced by commencing the running of the statute of limitations before a claimant was aware of any basis for an action.”³⁰ The discovery rule delays the statute of limitations from running until the time a plaintiff discovers, or through the

insurance under Michigan law. *Id.* For further discussion of the one-year relation back rule and its application in automobile negligence cases, see *Devillers v. Auto Club Ins. Ass’n*, 702 N.W.2d 539 (Mich. 2005); *Secura Ins. Co. v. Auto-Owners Ins. Co.*, 605 N.W.2d 308 (Mich. 2000); and MICH. COMP. LAWS § 500.3145(1) (1956).

22. LIMITATIONS OF ACTIONS, *supra* note 8, at § 73.

23. *Id.*

24. *Id.*

25. See *Mazumder v. Univ. of Mich. Bd. of Regents*, 715 N.W.2d 96 (Mich. 2006).

This case was a medical malpractice suit in which the relatives of a deceased patient sued the doctors and medical establishment for their negligence, which led to the death of the deceased. *Id.* at 99. The court held that equitable principles require allowing a malpractice action to commence after the statute of limitations had otherwise barred suit against medical providers. *Id.* at 106-08. This holding largely resulted from the plaintiff’s good faith efforts in pursuing her claim through providing notice of intent to sue to the negligent parties. *Id.* For more examples of situations where judicial or equitable tolling has been used, see *infra* Section I.D (giving examples of a variety of cases where the discovery rule has been used to toll the statute of limitations and giving a detailed account of the application in wrongful death cases).

26. MICH. COMP. LAWS §§ 600.101-600.9948 (1961).

27. See *infra* Sections I.A-I.D (discussing the evolution and various applications of the discovery rule).

28. *Mazumder*, 715 N.W.2d at 106.

29. See generally *id.*

30. *Stephens v. Dixon*, 536 N.W.2d 755, 757 (Mich. 1995) (quoting *Hammer v. Hammer*, 418 N.W.2d 23, 26 (Wis. 1987)).

exercise of reasonable diligence, should have discovered, that a possible cause of action exists.³¹

Johnson v. Caldwell serves as an example of the purpose and effect of the discovery rule.³² After plaintiff Alberta Johnson delivered a baby, her doctor told her that she had an “infection of the womb.”³³ After suffering two years of intense pain, hearing constant reassurances from her doctor that there was nothing he could do, and enduring a failing marriage due to her inability to engage in intercourse, Ms. Johnson switched doctors.³⁴ Her new doctor immediately performed two surgeries on her to correct a prolapsed uterus, a diagnosis which was both obvious to a trained medical professional and something that her original doctor never even suggested.³⁵ Ms. Johnson sued her original doctor for malpractice past the expiration date for such a claim.³⁶ The doctor argued as an affirmative defense that the statute of limitations ran from the time he last examined her, rendering her cause of action stale.³⁷ The Michigan Supreme Court applied the discovery rule to toll the statute of limitations so that the cause of action did not begin to run until the date Ms. Johnson discovered that her original doctor had diagnosed her improperly and potentially committed malpractice.³⁸ The court avoided the “grave inequities” that would have resulted by barring her claim.³⁹ In applying the discovery rule, the court stated that “[t]he limitation statute . . . do[es] not start to run until the date of discovery, or the date when, by the exercise of reasonable care, plaintiff should have discovered the wrongful act.”⁴⁰

In *Johnson*, the court relied on its equitable authority to toll the statute of limitations.⁴¹ The court did this because it would have been unjust to prevent the plaintiff from obtaining relief from the defendant doctor.⁴² It was within the court’s authority to balance the fairness to Ms. Johnson in

31. *Moll v. Abbott Labs.*, 506 N.W.2d 816, 830 (Mich. 1993). This case held that the discovery rule applies in pharmaceutical products liability cases. *Id.* In particular, it held that the cause of action accrued on the date that the plaintiff knew of the link between uterine deformity and diethylstilbestrol (DES) exposure and deformity. *Id.* The discovery rule tolled the plaintiff’s cause of action against pharmaceutical manufacturers for the genital abnormalities and infertility caused by exposure to DES in utero. *Id.* For a detailed analysis of the case and its holding, see also *infra* Subsection I.D.2.

32. 123 N.W.2d 785 (Mich. 1963).

33. *Id.* at 789.

34. *Id.*

35. *Id.*

36. *Id.* at 788.

37. *Id.* at 788, 790.

38. *Id.* at 791.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 792.

bringing her claim and the burden on the doctor to defend a suit “older” than statutorily allowed.⁴³ In Michigan, as elsewhere, the court applies the discovery rule in the type of situation “[w]hen a plaintiff would otherwise be denied a reasonable opportunity to bring suit because of the latent nature of the injury or the inability to discover the causal connection between the injury and the defendant’s breach of duty owed to the plaintiff.”⁴⁴

Courts have applied equitable tolling in cases like *Trentadue* where the identity of the defendant is unknown for years after the statute of limitations has run.⁴⁵ Another example is *Bernoskie v. Zarinsky*, a wrongful death case where, through equitable tolling, the plaintiff was allowed to seek recovery of damages for her husband’s murder forty years after it occurred.⁴⁶ Newly discovered evidence, stemming from comments made by defendant’s sister, allowed the police to definitively pin the murder on defendant despite previously having no suspects.⁴⁷ The trial court found, and the superior court affirmed, that equitable considerations precluded the defendant from asserting the statute of limitations as an affirmative defense.⁴⁸ The equities favored the innocent plaintiff who had no prior ability to learn the identity of the perpetrator.⁴⁹ Under the circumstances, the plaintiff could not have brought suit any earlier.⁵⁰ Even though the court noted that the discovery rule ordinarily does not allow a cause of action to accrue when a plaintiff is aware of the injury but cannot determine the tortfeasor’s identity, equitable tolling did apply under the court’s discretion.⁵¹ The court stated that

43. See INSTITUTE FOR CONTINUING LEGAL EDUCATION, GUIDE TO MICHIGAN STATUTES OF LIMITATION 3 (2007) [hereinafter GUIDE] (defining the discovery rule and stating that it requires a balance of the equities to the plaintiff and defendant).

44. *Larson v. Johns-Manville Sales Corp.*, 399 N.W.2d 1, 5-6 (Mich. 1986), *rev’d*, 534 N.W.2d 695 (Mich. 1995) (holding in a consolidated suit for asbestos-related wrongful death actions that, due to the unique nature of asbestos litigation, those who actually developed cancer from exposure to asbestosis are not precluded from bringing suit pursuant to the discovery rule).

45. See, e.g., *Bernoskie v. Zarinsky*, 781 A.2d 52, 56 (N.J. Super. Ct. App. Div. 2001) (holding equitable tolling allowed plaintiff to bring wrongful death cause of action against defendant whose identity was not known or knowable for forty years after death of decedent); *Knauf v. Elias*, 742 A.2d 980, 985 (N.J. Super. Ct. App. Div. 1999) (stating that the fictitious party rule applies in cases where the identity of the unknown defendant is reasonably capable of discovery and applying the discovery rule in such cases); *Spitler v. Dean*, 436 N.W.2d 308, 310 (Wis. 1989) (holding that under the discovery rule plaintiff’s cause of action did not accrue until he discovered the identity of the person who struck him); *but see* *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 351-52 (Tex. 1990) (holding that the discovery rule does not apply to the statute of limitations for actions for injury resulting in death).

46. *Bernoskie*, 781 A.2d at 52, 57-58.

47. *Id.* at 54.

48. *Id.* at 54-55.

49. *Id.* at 55.

50. *Id.*

51. See *id.* at 56.

“[s]tatutes of limitation are primarily a shield to protect a defendant They should not be used as a sword by a defendant whose conduct contributed to the expiration of the statutory period.”⁵²

B. Origins of the Common Law Discovery Rule

Law in the current American tradition consists of both enacted, statutory rules and case precedent established by the courts. In contrast, equity is an unwritten authority that courts can apply to remedy perceived injustices in our legal system.⁵³ The discovery rule is derived from the law of equity, thus it is important to approach analysis of the rule with a brief understanding of the history behind courts of law and courts of equity. In 1915, the courts of equity and law formally merged in Michigan, giving judges the authority to sit in both law and equity on every case presented before them.⁵⁴ Equity was originally defined as a “body of rules administered by . . . English courts of justice which, were it not for the operation of the Judicature Acts, would be administered only by those courts which would be known as Courts of Equity.”⁵⁵ Equity “denotes considerations of what is fair and just” and has helped shape the rules of law.⁵⁶ Aristotle may have explained equity best when he expounded that “equity is that idea of justice which contravenes the written law.”⁵⁷

In the thirteenth century in England, three courts existed: The King’s Bench, the Court of Common Pleas, and the Exchequer.⁵⁸ The Exchequer was a court of law and a government office with the Chancery serving as the secretarial department.⁵⁹ The Chancery was headed by the Chancellor, who was usually a bishop educated in the Canon and moral law of the Church.⁶⁰ The Chancellor had much authority given to him by the King, but perhaps one of the most important powers he possessed was allowing plaintiffs to present petitions to the King through him by praying for a remedy

52. *Id.* at 57 (quoting *Dunn v. Borough of Mountainside*, 693 A.2d 1248, 1258 (N.J. Super. Ct. App. Div. 1997)).

53. MAITLAND, *EQUITY* 1-11 (1909), reprinted in EDWARD D. RE & JOSEPH R. RE, *REMEDIES* 26-27 (6th ed. 2005).

54. This was accomplished through the Judicature Act of 1915. See generally Charles W. Joiner & Ray A. Geddes, *The Union of Law and Equity: A Prerequisite to Procedural Revision*, 55 MICH. L. REV. 1059 (1957) (discussing how the legislature abolished the separate courts of law and equity in both Michigan and on the federal level).

55. See MAITLAND, *supra* note 53, at 26.

56. RALPH A. NEWMAN, *EQUITY AND LAW: A COMPARATIVE STUDY* 11 (1961).

57. *Id.* at 13.

58. MAITLAND, *supra* note 53, at 26.

59. *Id.*

60. See *id.* at 33.

not available at law.⁶¹ From these judicial powers, the Chancellor developed the “Court of Chancery,” which had both a common law side and an equity side.⁶² On the equity side, the Chancellor, as part of his background in ecclesiastical law and understanding, had the ability to hear petitions to “do what is right for the love of God and in the way of charity.”⁶³ Eventually, in the mid-sixteenth century, the courts’ jurisprudence had changed, and the ecclesiastical Chancellors began to disappear.⁶⁴ Chief Justice Coke later determined that the Court of Chancery was to have the upper hand over the Courts of Law.⁶⁵ Ever since, the Court of Equity (Chancery) has had the authority to give equitable remedies and can make determinations in cases virtually unchecked by Courts of Law.⁶⁶

Maxims originally governed equity,⁶⁷ one being “equity aids the vigilant.”⁶⁸ This maxim expresses the equitable defense of laches.⁶⁹ Laches is essentially the opposite of the discovery rule; it is the equitable doctrine that prevents a plaintiff from bringing a cause of action when he has delayed bringing it for an unreasonable time or in unreasonable circumstances, which would result in harm to the defendant in defending the action.⁷⁰ Historically, the statute of limitations did not apply to suits in equity.⁷¹ However, when the Chancellor was requested to protect a legal right, he held that laches would bar a suit at law when a plaintiff had made unreasonable delay.⁷² The American legal system still reflects these formerly-governing maxims through statutory limitations periods.

Today, in all of England and most of the United States, Courts of Law and Equity have merged, allowing one judge to sit on a case and grant both the legal and equitable remedies plaintiffs request.⁷³ The Constitution

61. Remedies at law were only available according to writs. *Id.* at 27. The Chancellor would have to decide whether the case was one which could be decided on an existing writ or try to create a new writ covering the action if required. *Id.* If he granted a new writ, the courts of law could later quash it as being contrary to the law. *Id.*

62. *Id.* at 23.

63. *Id.* at 24.

64. *Id.* at 31.

65. *Id.* at 27.

66. *Id.* at 32.

67. Maxims are principles granting the authority to exercise equitable jurisdiction and equitable relief. See The Catholic University of America, 5 NEW CATHOLIC ENCYCLOPEDIA 503 (1967).

68. HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 71 (2d ed. 1948). Other maxims include “equity will not suffer a wrong without a remedy” and “one who seeks equity must do equity.” *Id.* For a complete list, see generally *id.*

69. *Id.*

70. 27A AM. JUR. 2D *Equity* § 10 (2007).

71. See MCCLINTOCK, *supra* note 68, at 74.

72. *Id.* at 71.

73. NEWMAN, *supra* note 56, at 12 (giving a summary of the evolution of the common law and courts of equity from England to America).

makes it clear that the Supreme Court's original jurisdiction extends to suits in both law and equity.⁷⁴ Even though the courts have merged, the "debris of maxims and procedural distinctions left by the receding tide of a dual legal system" permeates the current court system.⁷⁵ The discovery rule's attenuated history highlights the confusion that merging law and equity has caused modern American courts.

C. Rationales Behind Defining and Tolling Accrual Periods

Equity is grounded in moral principles and social ideals of what is just and fair.⁷⁶ Aristotle said, "[t]he idea of ethical right is always present in lawmaking, and when it is finally unveiled it can be seen as having been present from the first."⁷⁷ In fact, Aristotle emphasized that the law's very purpose was to effectuate social control and, more importantly, serve as a "moral obligation which is accepted by all and for which a sanction is necessary."⁷⁸

Courts today still appeal to fairness, justice, and social policy concerns when utilizing the discovery rule.⁷⁹ The policy reasons behind both the legislatively enacted statutes of limitations and the judicially enacted discovery rule help to analyze the Michigan Supreme Court's decision in *Trentadue*.

1. Policies Behind Statutes of Limitations

Roman law established limitations on actions.⁸⁰ In fact, the theories behind statutes of limitations date back to Biblical principles.⁸¹ In England,

74. "The judicial Power shall extend to all cases in law and equity." U.S. CONST. art. III, § 2.

75. NEWMAN, *supra* note 56, at 12.

76. See *supra* Section I.B (describing the equitable origins of the discovery rule and American courts' authority to grant relief based on its equitable authority).

77. NEWMAN, *supra* note 56, at 16.

78. *Id.* at 17.

79. For examples of applications of policy analysis in the discovery rule's application, see, e.g., *De Haan v. Winter*, 241 N.W. 923, 924 (Mich. 1932) (stating that the statute of limitations cannot run while the treatment of an injury by a doctor for a leg fracture continues, thus establishing the continuing treatment rule); *Poffenbarger v. Kaplan*, 568 N.W.2d 131, 136 (Mich. Ct. App. 1997), *overruled by* *Miller v. Mercy Mem'l Hosp. Corp.*, 644 N.W.2d 730 (Mich. 2004) (holding that the three-year savings provision for wrongful death actions "does not incorporate the six-month discovery rule applicable to medical malpractice claims" and that the application of the common law discovery rule was not warranted where the medical malpractice statutory discovery rule precluded its application); *Ayers v. Morgan*, 154 A.2d 788, 789 (Pa. 1959) (stating the statute of limitations "must be read in light of reason and common sense" and cannot give an unjust result which the legislature never intended).

80. Comment, *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1177 (1950) [hereinafter *Developments*].

formal statutes were created enacting prohibitions on real property actions as early as 1236.⁸² The Limitation Act of 1623⁸³ conclusively established the beginning of modern statutes of limitations in personal actions in the common law.⁸⁴ The purpose of the Act was to minimize the hardships on those defending suits in the King's Court.⁸⁵ It also helped to minimize the number of suits heard in the King's Court.⁸⁶

Legislative limits on causes of action are necessary.⁸⁷ The United States Supreme Court said the purpose of the statute of limitations is to “‘afford[] plaintiffs what the legislature deems a reasonable time to present their claims [and] . . . protect defendants and courts from having to deal with cases in which the search for truth may be seriously impaired.’”⁸⁸ There comes a point at which a defendant should be secure that the time for a lawsuit has passed.⁸⁹ Defendants fear having to defend claims when “‘evidence has been lost, memories have faded, and witnesses have disappeared.’”⁹⁰ In addition to protection of defendants, courts themselves have an interest in maintaining judicial economy by keeping stale claims out of their courts.⁹¹ Once the statutory limitation period has ended, defendants can be sure that they are safe from suit.

The Michigan Supreme Court has specifically stated the policy reasons behind statutes of limitations in the state.⁹² First, limitations encourage

81. *Deuteronomy* 15:1-2.

Every seventh year you shall grant a remission of debts. And this is the manner of the remission: every creditor shall remit the claim that is held against a neighbor, not exacting it of a neighbor who is a member of the community, because the Lord's remission has been proclaimed.

Id.

82. *Developments, supra* note 80, at 1177.

83. *Id.*

84. *Id.* at 1178.

85. *Id.*

86. *Id.* at 1177-78.

87. *Ira L. Young, Pastierik v. Duquesne Light Co.: Should Pennsylvania Apply the Discovery Rule to Wrongful Death Actions?*, 49 U. PITT. L. REV. 1201 (1988) (outlining the policies underlying the discovery rule and statute of limitations as applied to the title case and concluding that the use of the discovery rule is both fair and sensible).

88. *Id.* at 1205 (quoting *United States v. Kubrick*, 444 U.S. 111, 117 (1979)).

89. *Young, supra* note 87, at 1205.

90. *Order of R.R. Tels. v. Ry. Express Agency, Inc.*, 321 U.S. 342, 349 (1944) (holding that state statutes of limitation do not restrict the power of a federal administrative tribunal to consider and adjust claims); *Myers v. McDonald*, 635 P.2d 84, 86 (Utah 1981) (holding that the policy against stale claims was outweighed by unique circumstances of the plaintiff's hardship in bringing an action for recovery of fourteen-year-old ward's death and, therefore, it was improper for the action to be dismissed on the basis of the statute of limitations).

91. *Developments, supra* note 80, at 1185.

92. *Trentadue v. Gorton*, 738 N.W.2d 664, 683 (Mich. 2007) (Weaver, J., dissenting).

the prompt resolution of suits and recovery of damages.⁹³ Second, they protect defendants from defending stale claims when the circumstances would be unfavorable for them to do so.⁹⁴ Third, limitations allow potential defendants to avoid the fear of litigation years after potential culpability.⁹⁵ Fourth, they prevent the assertion of fraudulent claims.⁹⁶ Finally, and most importantly, statutes of limitations promote judicial economy by freeing the courts from the inconvenience resulting from the delay of asserting legal rights.⁹⁷ There is a delicate balance between the competing policy objectives, and this is why modern American courts have struggled applying the discovery rule.

2. *Policies Behind Utilizing the Discovery Rule to Toll Statutes of Limitations*

The controlling policy behind the discovery rule is fairness to the innocent plaintiff.⁹⁸ It is an appeal to the “Chancery” side of the court to allow a plaintiff who did not, or could not through reasonable diligence, have known all the elements of her cause of action before the statutory period ran out.⁹⁹ The rule has been applied because it would be inequitable to allow a defendant to profit from his own fraud.¹⁰⁰ It is precisely because statutes of limitations do not evidence a legislative intent to “extinguish a cause of action before the plaintiff is aware” of it that the discovery rule exists.¹⁰¹ Courts have to balance the policies behind the application of the discovery rule against the policies and legislative intent of statutes of limitations.¹⁰²

93. *Buzzn v. Muncey Cartage Co.*, 226 N.W. 836, 837 (Mich. 1929) (noting that statutes of limitation are to be fairly construed and should not be defeated by overly strict construction); *First Nat’l Bank of Ovid v. Steel*, 109 N.W. 423, 425 (Mich. 1906) (holding that a cause of action for the fraud arising from fraudulent representation of stock values accrued at the time of the discount of the notes and acceptance of the stock in reliance on such representation).

94. *Jenny v. Perkins*, 17 Mich. 28, 33 (1868) (noting that “[t]he policy of the statute . . . so harmonizes with the kindred doctrine of the court of equity, that in many cases they seem to be nearly blended”).

95. *See Bigelow v. Walraven*, 221 N.W.2d 328, 334 (Mich. 1974) (allowing the statute of limitations to be raised as a defense only if pleaded in an affirmative answer).

96. *See Bailey v. Glover*, 88 U.S. 342 (1875) (discussing fraudulent concealment of bankruptcy).

97. *Lenawee County v. Nutten*, 208 N.W. 613, 614 (Mich. 1926) (holding that a ten year limitation rather than the two year statutory limitation is applicable to an action on sheriff’s bond for failure to pay over fees collected by him).

98. *See supra* Subsection I.C.2.

99. *See supra* Section I.A.

100. *Id.*

101. *Stephens v. Dixon*, 536 N.W.2d 755, 757 (Mich. 1995).

102. *Trentadue v. Gorton*, 738 N.W.2d 664, 673 (Mich. 2007).

D. The Discovery Rule's Applications

Since the discovery rule is an equitable rule used over centuries, it has been applied in numerous cases.¹⁰³ Courts can apply the rule whenever it appears to be the just and appropriate course of action.¹⁰⁴ Each state's common law treats the application of the rule differently, and some courts construe the rule more liberally than others.¹⁰⁵ Michigan has traditionally been one of the states with a more liberal application of the rule.¹⁰⁶ However, the *Trentadue* decision effectively ended this liberal construction.¹⁰⁷ To analyze the ramifications of the wrongful death decision in *Trentadue* it is instructive to know in what circumstances the discovery rule has been applied in Michigan.

1. *General Applications in Wrongful Death Causes of Action*

States have taken varied approaches when deciding whether to toll the statute of limitations in wrongful death cases.¹⁰⁸ There are two primary classifications of jurisdictions discussing the discovery rule: those jurisdictions that employ it and those that do not.¹⁰⁹ Of course, there are variants in between,¹¹⁰ but examination of the two most extreme views is instructive for analyzing its application generally. The first category of jurisdictions adheres to the theory that the time of discovery does not affect the running of the statute of limitations in wrongful death actions.¹¹¹ Rather, the statute of

103. See generally *infra* Subsections I.D.1, I.D.2.

104. See Edward J. Leonard, *Application of the Discovery Rule to the Ohio Wrongful Death Statute*, 3 J.L. & HEALTH 237 (1988-1989) (emphasizing the fundamental fairness and remedial purpose of the discovery rule in wrongful death actions).

105. *Id.* at 248-54.

106. See *infra* Subsection I.D.2.

107. See *infra* Part II.

108. For a thorough discussion of tolling in wrongful death actions, see Judy E. Zelin, *Time of Discovery as Affecting Running of Statute of Limitations in Wrongful Death Action*, 49 A.L.R. 4th 972 (2007).

109. *Id.*

110. *Id.*

111. These jurisdictions include Alabama, Kansas, and New York. See, e.g., *Cofer v. Ensor*, 473 So. 2d 984, 995 (Ala. 1985) (holding that a parent of a deceased minor child could not bring a wrongful death action as it was time barred by the expiration of the statute of limitations and noting that no equitable tolling would apply); *Clark v. Prakalapakorn*, 648 P.2d 278 (Kan. Ct. App. 1982) (holding a suit for alleged medical malpractice and wrongful death accrued on the date of decedent's death, even though plaintiff claimed she did not have an opportunity to reasonably ascertain the claimed negligence of physician until long after decedent's death); *Morano v. St. Francis Hosp.*, 420 N.Y.S.2d 92, 95 (N.Y. Sup. Ct. 1979) (holding the discovery rule inapplicable in determining whether wrongful death medical malpractice suit has been barred by limitations).

limitations is to be strictly applied.¹¹² The primary reasoning behind strict application of the statute is that the date of death is the only conclusive time period after which a wrongful death action should be brought.¹¹³ Since *Trentadue*, Michigan has joined Alabama, Kansas, and New York,¹¹⁴ in refusing to toll the statute of limitations for wrongful death under any circumstances, no matter what principles of equity and conscience require.¹¹⁵ Again, the policy considerations of preventing stale claims, protecting defendants, and encouraging proactive plaintiffs all contribute to this conservative theory.¹¹⁶

The majority of states, however, are in the second category, which adheres to the more liberal view that the time of discovery may affect the running of the statute of limitations in wrongful death actions.¹¹⁷ Examples of jurisdictions that apply the discovery rule to wrongful death causes of action include Alaska, California, Tennessee, and Ohio.¹¹⁸ In Alaska, the court tolled the discovery rule in a wrongful death action arising from a helicopter accident.¹¹⁹ Similarly in California, the Second District has ruled that a statute of limitations is not a bar to a wrongful death cause of action resulting from the recall of a malfunctioning drug.¹²⁰ In Tennessee, the court left to the jury's discretion whether or not the discovery rule should be applied in a

112. Leonard, *supra* note 104, at 248.

113. *Id.*

114. See cases cited *supra* note 111.

115. See cases cited *supra* note 111.

116. See *supra* Subsection I.C.1.

117. These jurisdictions include Alaska, California, Massachusetts, Ohio, Tennessee, and Washington. See, e.g., *Hanebuth v. Bell Helicopter Int'l*, 694 P.2d 143, 146 (Alaska 1984) (stating the discovery rule tolls two-year statute of limitation for wrongful death actions); *Frederick v. Calbio Pharms.*, 152 Cal. Rptr. 292 (Cal. Ct. App. 1979) (holding a one-year statute of limitations does not bar a drug recall wrongful death case); *Heinrich v. Sweet*, 118 F. Supp. 2d 73, 81-83 (D. Mass. 2000) (holding wrongful death claims are tolled by fraudulent concealment); *Collins v. Sotka*, 692 N.E.2d 581, 582 (Ohio 1998) (holding the discovery rule applies to toll the two year statute of limitations for a wrongful death claim); *Gosnell v. Ashland Chem., Inc.*, 674 S.W.2d 737, 739 (Tenn. Ct. App. 1984) (deciding whether a widow exercised reasonable care and due diligence to discover compensable injury within limitations period is a question of fact for the jury); *White v. Johns-Manville Corp.*, 693 P.2d 687, 695 (Wash. 1985) (tolling statute of limitations allowed by widow in asbestos case until time of discovery).

118. See *Hanebuth*, 694 P.2d at 143; *Frederick*, 152 Cal. Rptr. 292; *Collins*, 692 N.E.2d at 581; *Gosnell*, 674 S.W.2d at 737.

119. See *Hanebuth*, 694 P.2d at 144.

120. See *Frederick*, 152 Cal. Rptr. at 292 (holding a one-year statute of limitations is not a bar to a drug recall wrongful death case).

wrongful death case.¹²¹ Courts applying the liberal view tend to embrace their equitable authority where it is appropriate.¹²²

Ohio best exemplifies this liberal approach to the discovery rule. The Ohio Supreme Court decision in *Collins v. Sotka* was based on facts analogous to *Trentadue*.¹²³ In that case, however, the court applied the discovery rule to toll the statute of limitations.¹²⁴ Ohio courts had previously been more conservative than Michigan courts in their application of the discovery rule.¹²⁵ However, the court appealed to policy rationales and principles of equity in liberally applying the discovery rule.¹²⁶

In *Collins*, a seventeen-year-old was abducted and killed.¹²⁷ Her body was not found for five months and autopsies were unable to reveal the exact date of her death.¹²⁸ The girl's family was unable to bring a wrongful death suit against her killer until he was sentenced,¹²⁹ well past the two-year statute of limitations for such an action in Ohio.¹³⁰ The trial court, following precedent, refused to apply the discovery rule on the grounds that the General Assembly¹³¹ created the language governing the statutory limitation period to be strictly construed.¹³² Unlike *Trentadue*, however, the Ohio Supreme Court in *Collins* re-examined the policies behind the strict governance of the wrongful death statute of limitations and the equitable policies behind tolling to resurrect the discovery rule.¹³³

The court explicitly stated that it would be inherently unfair to cause family members of the murdered to have to suffer just because they did not know the identity of the killer.¹³⁴ The court reasoned, "[i]t is illogical to penalize the victim's survivors, who have already suffered a great loss, by shortening or extinguishing the time in which they may bring a wrongful

121. See *Gosnell*, 674 S.W.3d at 739-40 (holding whether a widow exercised reasonable care and due diligence to discover her husband's compensable injuries was within the limitations period is a question of fact for the jury).

122. See *supra* Section I.A.

123. Compare *Collins*, 692 N.E.2d at 581, with *Trentadue v. Gorton*, 738 N.W.2d 664 (Mich. 2007).

124. *Collins*, 692 N.E.2d at 584.

125. See Leonard, *supra* note 104 (noting that Ohio courts did not historically apply the discovery rule and emphasizing the fundamental fairness, remedial purpose, and need for the discovery rule in wrongful death actions).

126. *Id.* at 254.

127. *Collins*, 692 N.E.2d at 581.

128. *Id.* at 581-82.

129. The defendant was convicted through a secret indictment. *Id.* at 582.

130. *Id.*

131. The General Assembly in Ohio is equivalent to the legislature in Michigan and most other United States jurisdictions.

132. *Collins*, 692 N.E.2d at 583.

133. *Id.* at 583-84.

134. *Id.* at 584.

death lawsuit.”¹³⁵ Importantly, the court pointed out that this wrongful death by murder claim should focus on the *wrongful acts* which led to the wrongful death, and until the actor is known, no cause of action can be brought.¹³⁶ It would be too easy for a tortfeasor to “kill his or her victim and fraudulently conceal the cause of death for two years to be absolved from civil liability.”¹³⁷

Additionally, these second-category courts have often subjected their statute of limitations provisions to constitutional scrutiny and found room for judicial interpretation.¹³⁸ In *Moragne v. States Marine Lines, Inc.*, the United States Supreme Court discussed the strict application of the statute of limitations in the context of maritime law.¹³⁹ In *Moragne*, a widow brought a wrongful death action against her widower’s employer under a maritime death statute.¹⁴⁰ The Court came to the conclusion that the “legislative history indicates that Congress intended to ensure” the availability of a wrongful death action under the Death on the High Seas Act because the legislature’s “failure to extend the Act to cover such deaths primarily reflected the lack of necessity for coverage by a federal statute, rather than an affirmative desire to insulate such deaths from the benefits of any federal remedy that might be available independently of the Act.”¹⁴¹ In this case, as is common, the absence of a statutory provision did not preclude the judiciary from granting relief in equity.¹⁴²

2. *The Discovery Rule’s Evolution in Michigan*

In Michigan, as in most states, medical malpractice suits have been a common source of the discovery rule’s application.¹⁴³ Through the evolution of the rule in medical malpractice situations, the discovery rule has gained definition and consistency.¹⁴⁴ A discussion of its application through the years, focusing on medical malpractice suits, gives insight into the rule.

135. *Id.*

136. *Id.* at 583.

137. *Id.* at 584.

138. *See, e.g.*, *Estate of McCarthy v. Mont.* Second Jud. Dist. Ct., 994 P.2d 1090, 1093-94 (Mont. 1999) (applying the rational basis test to determine the constitutionality of the statute of limitations); *Snuszki v. Wright*, 751 N.Y.S.2d 344 (N.Y. Sup. Ct. 2002) (applying rational basis, rather than intermediate scrutiny, constitutional analysis for a provision extending the statute of limitations in crime victims’ actions against inmates by permitting victims to bring action for money damages within three years of discovering convicted person’s funds).

139. 398 U.S. 375, 377-80 (1970).

140. *Id.* at 376.

141. *Id.* at 397-98.

142. *Id.* at 397.

143. *See Johnson v. Caldwell*, 123 N.W.2d 785, 787-91 (Mich. 1963).

144. *Id.* at 791.

In *De Haan v. Winter*, the plaintiff broke his left ankle bones upon which the defendant doctor operated.¹⁴⁵ After surgery, the defendant doctor was negligent in the care of his patient, refusing to take x-rays of the healing bones, refusing to use traction, and failing to give proper instructions to the plaintiff for caring for his injury.¹⁴⁶ As a result, the plaintiff's leg bowed backward, and the bones never properly fused together.¹⁴⁷ The statute of limitations, at that time, was two years from the time the cause of action accrued for medical malpractice suits.¹⁴⁸ The question presented before the court was when, exactly, the plaintiff's action accrued.¹⁴⁹ The court said that "in such an action as this the statute of limitations does not commence to run while treatment of the fracture continues."¹⁵⁰ This statement gave rise to the "last treatment rule" in medical malpractice cases, causing accrual in those suits to commence at the time of the last treatment of the patient.¹⁵¹ In subsequent cases, the court reiterated that the last treatment rule should govern in medical malpractice cases.¹⁵² The last treatment rule gave rise to the discovery rule because it was the first judge-made rule which equitably lengthened the statute of limitations.¹⁵³

The discovery rule in Michigan dates back to the 1963 decision *Johnson v. Caldwell*.¹⁵⁴ The Michigan Supreme Court noted that the lack of consistency in applying the last treatment rule led to more frequent applications of the discovery rule. The court ceased applying the last treatment rule and instead adopted the discovery rule because it tolls accrual for a reasonable time in which a plaintiff may discover all the elements of a potential cause of action rather than putting an exact date at which accrual occurs. It has been applied "'when[ever] the situation requires it.'"¹⁵⁵

145. 241 N.W. at 924.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *See, e.g.,* *Draws v. Levin*, 52 N.W.2d 180, 182-83 (Mich. 1952) (finding no fraudulent concealment in order to toll the statute of limitations well past the two year last treatment discovery provision); *Buchanan v. Kull*, 35 N.W.2d 351, 353 (Mich. 1949) (holding an action to recover damages for alleged medical malpractice brought within two years after the discovery of the cause of action counted from date of last treatment not barred by the two year statute of limitations where the cause of action was fraudulently concealed by physicians); *Dowse v. Gaynor*, 118 N.W. 615, 617 (Mich. 1908) (holding the evidence was insufficient to show running of statute of limitations by fraudulent concealment but noting that a plaintiff can show facts which will supersede the doctrine of laches and allow plaintiff to assert a cause of action).

153. *See generally* Section I.B.

154. *See* Section I.A; *Johnson v. Caldwell*, 123 N.W.2d 785, 791 (Mich. 1963).

155. *Lemmerman v. Fealk*, 507 N.W.2d 226, 228 (Mich. Ct. App. 1993) (quoting *Larson v. Johns-Manville Sales Corp.*, 427 Mich. 301, 310 (1986)) (discussing an action

The Michigan Court of Appeals failed to apply the statutory six-month discovery period,¹⁵⁶ which evolved only in medical malpractice cases, to a wrongful death action in *Poffenbarger v. Kaplan*.¹⁵⁷ In that case, the plaintiff was trying to recover for damages after she learned that the decedent died from lung cancer, which was improperly diagnosed at the outset.¹⁵⁸ The court noted that the limitations period in a wrongful death suit is governed by the statute of limitations for the underlying claim.¹⁵⁹ The court refused to apply the discovery rule because, by that time, medical malpractice accrual periods were strictly established and had no room for judicial interpretation.¹⁶⁰ In differentiating wrongful death claims from medical malpractice suits, the court explained that wrongful death savings provisions are exceptions to general malpractice statutes of limitations.¹⁶¹ The purpose behind the savings provisions is to aid a decedent's representatives in discovering possible causes of action to bring to alleviate some of their grief and suffering.¹⁶² The savings provisions also strive to prevent those representatives from bringing stale claims by "disallowing actions . . . that are not brought within three years after the otherwise applicable period of limitation has run."¹⁶³

Thereafter, the Michigan Supreme Court took a stronger approach to tolling statutes of limitations. In *Moll v. Abbott Laboratories*, a product liability tort case, the court applied the discovery rule to toll the statute of limitations even though the statute expressly gave such suits only three years to accrue.¹⁶⁴ The court's application focused on common sense and the policies behind the discovery rule.¹⁶⁵ The court distinguished medical malpractice cases from pharmaceutical products liability claims because the policy behind each action's statute of limitations was different.¹⁶⁶ Because the statute of limitations behind product liability claims was not comprehensive, the court said that it is "the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought . . . and a statute

against plaintiff's father's estate to recover for physical and sexual abuse received as a child where the court held that the delayed discovery rule for accrual of claims was applicable).

156. For a discussion of statutory evolution of the discovery rule, see *infra* Subsection I.D.2.

157. *Poffenbarger v. Kaplan*, 568 N.W.2d 131 (Mich. Ct. App. 1997).

158. *Id.* at 134.

159. *Id.*; see also MICH. COMP. LAWS ANN. § 600.5805(10) (West 2000).

160. *Poffenbarger*, 568 N.W.2d at 136.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Moll v. Abbott Labs.*, 506 N.W.2d 816, 822-23 (Mich. 1993).

165. *Id.*

166. *Id.* at 823 (explaining that medical malpractice cases involve aspects of diligent care that pharmaceutical product liability claims may not).

that fails to do this cannot possibly be sustained as a law of limitations.”¹⁶⁷ After this reiteration of the policies behind the discovery rule, Michigan courts applied the discovery rule frequently.¹⁶⁸

Michigan has since applied the common law discovery rule in a variety of cases.¹⁶⁹ Perhaps the most important type of case in which the discovery rule has served to save a plaintiff’s cause of action has been wrongful death actions arising from asbestos litigation.¹⁷⁰ In those cases, the discovery rule may be used because of the latent nature of the injury.¹⁷¹ A prime example is *Larson v. Johns-Manville Sales Corp.*, a consolidation of four wrongful death actions on behalf of the estates of deceased insulation workers who died as a result of exposure to asbestos during the course of their employment.¹⁷² The court held that the discovery rule was the proper method for determining the accrual in all of the cases.¹⁷³ In balancing the policy factors, the court determined that applying the discovery rule would not unduly burden the defendants and that preventing plaintiffs from suing would be extremely unfair.¹⁷⁴

Additionally, the discovery rule has been applied in negligent misrepresentation, conspiracy to deny insurance benefits, battery claims for the wrongful transmission of the human immunodeficiency virus (HIV), Uniform Commercial Code claims for breach of warranty, and negligent construction, among others.¹⁷⁵ The Michigan Supreme Court has refused to apply the discovery rule in such cases as those for ordinary negligence “where a plaintiff merely misjudges the severity of a known injury,” for economic losses resulting from sale of goods, and for commercial conversion cases.¹⁷⁶ In short, the rule has only been applied where a “defendant’s

167. *Id.* at 824 n.18 (quoting *Price v. Hopkins*, 13 Mich. 318, 324 (1865)).

168. *Moll*, 506 N.W.2d at 825.

169. For causes of action where the discovery rule has been invoked, see, for example, *Filcek v. Utica Bldg. Co.*, 345 N.W.2d 707, 709 (Mich. Ct. App. 1984) (applying the rule in a negligent construction action when damage to the building was not readily apparent); *Williams v. Polgar*, 215 N.W.2d 149, 158 (Mich. 1974) (applying the discovery rule for negligent misrepresentation because the action is based on a tort rather than contract theory); *Doe v. Johnson*, 817 F. Supp. 1382, 1397 (W.D. Mich. 1993) (applying the discovery rule for a battery claim for the wrongful transmission of the human immunodeficiency virus).

170. See Amicus Curiae Brief of Channing Pollock et al., in Support of Plaintiff-Appellee, *Trentadue v. Gorton*, 738 N.W.2d 664 (Mich. 2007) (No. 128579), 2006 WL 4491314.

171. *Id.* at *6.

172. 399 N.W.2d 1, 2 (Mich. 1986).

173. *Id.* at 3.

174. *Id.* at 6.

175. GUIDE, *supra* note 43, at 5; see also cases cited *supra* note 169.

176. GUIDE, *supra* note 43, at 6 (quoting *Stephens v. Dixon*, 536 N.W.2d 755, 758 (1995)).

actions can be ‘measured against an objective external standard,’” and equity favors the plaintiff.¹⁷⁷

3. Michigan’s Statutes of Limitations—The Statutory Scheme

Michigan’s statutes of limitations are embodied in the Revised Judicature Act of 1961.¹⁷⁸ The Revised Judicature Act was enacted after the discovery rule’s application had been established in medical malpractice cases.¹⁷⁹ In fact, the rule was so commonly applied in medical malpractice actions that the legislature adopted a statutory discovery rule in those types of cases during the enactment of the Revised Judicature Act.¹⁸⁰ The statutes of limitations governing medical malpractice actions are more comprehensive than those covering other tortious causes of action.¹⁸¹ Medical malpractice actions must be commenced within two years from the time the defendant medical professional discontinues treating the plaintiff or within six months of the plaintiff’s discovery of the injury, whichever is later.¹⁸² The medical malpractice statute differs from the statute of limitations covering wrongful death because it contains an express statutory discovery rule within its text.¹⁸³ Legislative reform created the six-month discovery limitation in response to the urgings of the medical insurance industry.¹⁸⁴ This policy consideration differentiates the malpractice statutory discovery rule from other causes of action.¹⁸⁵

177. *Id.* (quoting *Lemmerman v. Fealk*, 534 N.W.2d 695, 699 (Mich. 1995)). For more information on what an objective external standard may be, see GUIDE, *supra* note 43, at 6.

178. See MICH. COMP. LAWS ANN. §§ 600.101-600.9948 (West 1999-2000).

179. See *supra* Subsection I.D.2.

180. See PROSSER ET AL., TORTS: CASES AND MATERIALS 619 (11th ed. 2005).

181. There are only three instances where there is a statutory tolling provision within the Revised Judicature Act. They are MICH. COMP. LAWS ANN. §§ 600.5838(2), 600.5838a(2), and 600.5855 (West 2000).

182. The text of the medical malpractice statute of limitation reads, in part:

Except as otherwise provided . . . an action involving a claim based on malpractice may be commenced at any time within the applicable period . . . or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. The burden of proving that the plaintiff neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim shall be on the plaintiff. A malpractice action which is not commenced within the time prescribed by this subsection is barred.

MICH. COMP. LAWS ANN. § 600.5838(2) (West 2000) (emphasis added).

183. *Id.*

184. See *Sam v. Balardo*, 308 N.W.2d 142, 148-49 n.15 (Mich. 1981) (citing Michigan House of Representative’s Analysis of Senate Bill 227 (June 25, 1975) and holding that legal malpractice suits are subject to the Revised Judicature Act’s two-year statute of limitations for malpractice actions).

185. *Id.*

The medical malpractice statute of limitations was revised to include the six-month statutory discovery rule in addition to the normal two year statute of limitations in order to place stricter limitations on actions for the benefit of health care personnel and their insurers.¹⁸⁶ Before the statutory discovery rule was put in place, malpractice insurance rates were egregiously high because professionals had to defend suits long after their professional services were rendered.¹⁸⁷ At the time it was introduced, the reforming bill's stated purpose was to "make it easier for insurers to determine their potential losses for a given premium year without violating the rights of injured patients who do not discover their injuries" until after the statute of limitations had run.¹⁸⁸ Because the insurance industry was the driving force behind making a more comprehensive malpractice statute, that section of the Revised Judicature Act is different from the others.

In addition to the harsh statutory discovery rule included in the medical malpractice accrual provision, Michigan has implemented an all-encompassing pre-accrual bar to all personal actions preventing a claimant from bringing an action under any circumstances after six years.¹⁸⁹ This pre-accrual bar caps personal causes of action, but again, this provision lacks any language indicating a discovery rule limitation.¹⁹⁰ A cap on actions has severe effects of the exact kind that the discovery rule is applied to ameliorate.¹⁹¹

Importantly, the legislative scheme does not yield to common law interpretation.¹⁹² Only where statutory provisions and the common law are inconsistent must the common law yield.¹⁹³ There must be express contrary intent by the legislature to upset well-settled common law principles.¹⁹⁴ Such principles "are not to be abolished by implication in the guise of statutory construction."¹⁹⁵ Thus, determining legislative intent is imperative for

186. *Id.*

187. *Id.*

188. *Id.*

189. "All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes." MICH. COMP. LAWS § 600.5813 (1979).

190. *Id.*

191. *See supra* Section I.C.

192. *Pulver v. Dundee Cement Co.*, 515 N.W.2d 728, 732 n.8 (Mich. 1994) (interpreting worker's compensation and employment law statutes).

193. *Id.*

194. *Boodt v. Borgess Med. Ctr.*, 728 N.W.2d 471, 476 (Mich. Ct. App. 2006) (internal citation omitted) (dismissing a medical malpractice claim on the ground that notice of intent to sue was invalid and the period of limitations had expired and interpreting that limitations provision).

195. *Id.* (quoting *Marquis v. Hartford Accident & Indem.*, 513 N.W.2d 799 (Mich. 1994)).

determining whether a statute has precluded the operation of long-standing common law rules.¹⁹⁶

II. *TRENTADUE V. GORTON*: A STEP BACK FOR MICHIGAN

The *Trentadue* decision is the basis for this examination of the common law discovery rule. In this wrongful death action, brought by a murdered woman's daughter, the Michigan Supreme Court refused to apply the discovery rule to toll the statute of limitations.¹⁹⁷ Not only did it not apply the rule under the facts, but the court relied on the "comprehensive statutory scheme" to drastically change the face of Michigan law by completely abolishing any and all equitable tolling, including the use of an extra-statutory discovery rule.¹⁹⁸

A. Facts of the Case

In 1981, Dr. Margarette Eby, Provost of the University of Michigan-Flint, leased a two-story gatehouse on the grounds of the Mott estate, managed by the Mott Family Office (MFO).¹⁹⁹ The gatehouse contained valves, hoses, and piping, which supported the sprinkler system of the Mott estate grounds.²⁰⁰ On November 7, 1986, Dr. Eby returned to the gatehouse after a party with two friends.²⁰¹ The friends waited until she was safely inside before leaving.²⁰² Two days later, she was found brutally attacked, raped, and stabbed to death with a knife inside the gatehouse. The police investigation of the murder showed no signs of forced entry into the home and no evidence implicating a specific individual in her death.²⁰³ Police did collect fingerprints and DNA evidence, in the form of semen from Dr. Eby's body.²⁰⁴

Five years later, in 1991, a flight attendant was attacked, raped, and knifed to death in a hotel near the Detroit Metropolitan Airport under sub-

196. *Wold Architects & Eng'rs v. Strat*, 713 N.W.2d 750, 756 (Mich. 2006) (interpreting common law rules as well as statutes).

197. *Trentadue v. Gorton*, 738 N.W.2d 664, 670 (Mich. 2007).

198. *Id.* at 688.

199. *Id.* at 680 (Weaver, J., dissenting).

200. *Id.* at 681. In January of 1985, Dr. Eby complained to Mrs. Mott, who lived in the Mott family home on the grounds of the estate, about break-ins that had been happening in the gatehouse, one resulting in her personal disk player being stolen. *Id.* at 693 (Kelly, J., dissenting). MFO responded to the complaint, and instead of installing the alarm system requested, installed a dead-bolt lock. *Id.* at 681 (Weaver, J., dissenting).

201. *Id.* at 681.

202. *Id.*

203. *Id.*

204. *Id.*

stantially similar circumstances to Dr. Eby's murder.²⁰⁵ Police re-opened the investigation of Dr. Eby's death.²⁰⁶ The DNA evidence collected from the flight attendant's murder and Dr. Eby's matched, leading police to arrest Jeffrey Gorton.²⁰⁷ Gorton was an employee of Buckler Automatic Lawn Sprinkler Company (Buckler), which serviced MFO with lawn sprinkler service.²⁰⁸ Gorton had access to Dr. Eby's basement with a work-provided key.²⁰⁹

"On August 2, 2002, six months after discovering the identity of Dr. Eby's murderer," her daughter and the personal representative of her estate, "Dayle Trentadue, . . . filed a wrongful death [action] against multiple defendants" including Jeffrey Gorton, Buckler, Buckler's owners, Ruth Mott, MFO, and MFO estate employees who had afforded access to the gatehouse asserting various negligence and intentional tort claims.²¹⁰ All defendants moved for summary disposition²¹¹ and, on appeal, the Michigan Court of Appeals found "the discovery rule tolled the period of limitations because [the] plaintiff had no basis to assert claims against any defendant until the murderer's culpability was discovered."²¹²

The Michigan Supreme Court granted certiorari to decide whether the common law discovery rule applied in this situation since the plaintiff could not have known all the elements of a cause of action within the limitations period.²¹³ The court, in a 4-3 decision, overturned decades of common law in Michigan by abolishing the common law discovery rule altogether.²¹⁴

B. Analysis of the *Trentadue* Decision

The majority opinion, written by Justice Corrigan, abolished the common law discovery rule by treating it as a direct contravention of the Revised Judicature Act.²¹⁵ The majority's reasoning notes that because the Act only allows tolling of statutory limitations periods in medical malpractice, professional malpractice, actions for unsafe property, and actions for fraudulent concealment, there can be no other situations in which tolling is allowed—ever.²¹⁶ The majority was not persuaded by the plaintiff's earnest

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* Buckler was owned and operated by Jeffrey Gorton's parents. *Id.*

210. *Id.*

211. Michigan's term for "summary judgment."

212. *Trentadue*, 738 N.W.2d at 682 (Weaver, J., dissenting).

213. *Id.*

214. *Id.* at 696 (Kelly, J., dissenting).

215. *Id.* at 670-72 (majority opinion).

216. *Id.* at 670.

plea that it should invoke the common law discovery rule which can, and has, superseded the statutory limitations and tolling provisions.²¹⁷ The majority viewed the statutory and common law provisions for tolling as conflicting.²¹⁸ However, the dissenters, Justices Weaver, Cavanagh, and Kelly, pointed out that the two do not conflict.²¹⁹ In fact, equitable tolling has always been available to a judge sitting in equity to fill in holes where the statutory provisions would not otherwise provide relief.²²⁰

As the majority aptly pointed out, the discovery rule does not apply when a plaintiff postpones bringing a claim because of reliance upon extra-statutory tolling, but it applies to toll retroactively to provide a plaintiff relief when he could not anticipate his full claim.²²¹ This is the very nature of equity.²²²

III. REVIVING EQUITY: PLAINTIFFS DESERVE THE PROTECTIONS OF THE DISCOVERY RULE

The discovery rule's application in *Trentadue* would have afforded justice to a victimized daughter even sixteen years after her mother's murder. The equitable principles upon which the discovery rule is founded provide for its application in a case where new evidence (e.g., DNA) leads a plaintiff to discover and bring a viable cause of action even after the statute of limitations has run for that action.²²³ The Michigan Supreme Court's abolition of the discovery rule was unwarranted, first, because the Revised Judicature Act does not preclude its application.²²⁴ Instead, the discovery rule was meant to work in conjunction with statutory limitations on actions.²²⁵ Second, plaintiffs who can identify the tortfeasor in a wrongful death action through new evidence deserve the equitable justice which courts applying principles of equity can offer.²²⁶ Finally, Michigan's extreme minority position across American jurisdictions suggests that eliminating equitable relief for innocent plaintiffs produces unjust results.²²⁷

217. *Id.*

218. *Id.*

219. *Id.* at 674 (Justice Weaver states that "it is apparent that the Legislature recognized the continuing existence and viability of the common-law discovery rule and saw fit to limit it in certain instances . . . but not in all instances").

220. *See generally supra* Part I.

221. *Trentadue*, 738 N.W.2d at 673.

222. *See supra* Section I.B; *see also Trentadue*, 738 N.W.2d at 685 (Weaver, J., dissenting) ("[T]he common law has developed equitable rules to mitigate the harsh effects of the statute of limitation. One such exception is the discovery rule.").

223. *See infra* Section III.B.

224. *See infra* Section III.A.

225. *See infra* Section III.A.

226. *See infra* Section III.B.

227. *See infra* Section III.C.

A. The Statutory Scheme Does Not Preclude Application

The applicable statute of limitations for a wrongful death cause of action in Michigan states that “[e]xcept as otherwise expressly provided, the period of limitations runs from the time the claim accrues [A]nd in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.”²²⁸ This is because wrongful death claims arise from some other type of tort, in this case an intentional tort. The provision for a wrongful death cause of action provides that “[t]he period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.”²²⁹ This limitation on the wrongful death cause of action (as a claim not covered explicitly by any other statutory section) is part of Michigan’s Revised Judicature Act of 1961. The purpose of the Act was to provide certainty, and balance the competing policies between fairness to defendants in defending stale claims and affording diligent plaintiffs relief.²³⁰ Furthermore, the insurance industry influenced the Act by lobbying for certain limitations (i.e., those for malpractice) to be more comprehensive than others.²³¹

The policies that apply in medical malpractice cases do not apply in wrongful death causes of action.²³² Michigan’s medical malpractice statute of limitations encompasses a statutory discovery rule.²³³ The statute provides that a malpractice claim must be brought “within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later A malpractice action which is not commenced within the time prescribed by this subsection is barred.”²³⁴ *Trentadue* was a case of an intentional, wrongful act.²³⁵ Mrs. Eby’s killer did not act negligently.²³⁶ Her murderer let himself into her home with a key, raped her, and stabbed her to death.²³⁷ The policy reasons supporting a pre-accrual bar do not apply here, as the majority in *Trentadue* suggests.²³⁸

A wrongful death by homicide action certainly has none of the same insurance concerns that are present in a case of malpractice. The Revised Judicature Act’s provision governing the statute of limitations in *Trentadue*

228. MICH. COMP. LAWS § 600.5827 (1961).

229. MICH. COMP. LAWS § 600.5805(9) (1961).

230. *See supra* Subsection I.D.3.

231. *See supra* Subsection I.D.3.

232. *See supra* Subsection I.D.3.

233. MICH. COMP. LAWS § 600.5805(9); MICH. COMP. LAWS § 600.5838.

234. MICH. COMP. LAWS § 600.5838.

235. *See supra* Section II.A.

236. *See supra* Section II.A.

237. *See supra* Section II.A.

238. *Trentadue v. Gorton*, 738 N.W.2d 664, 670-72 (Mich. 2007).

does not contain a statutory discovery limitation.²³⁹ In fact, there is no section of the Act specifically applicable to a wrongful death suit.²⁴⁰ Rather, the statutory provision that governs an action of wrongful death is a general provision, which lacks the comprehensive coverage of the malpractice provision altogether.²⁴¹ While the legislature may have “intended the scheme to be comprehensive and exclusive,”²⁴² the exceptions to the statutory provisions, including instances of misrepresentation, fraud,²⁴³ intentional conduct, and the lack of statutory discovery provisions and other comprehensive phraseology throughout the Act’s provisions indicate that it is not an all-encompassing comprehensive statutory scheme.²⁴⁴

Even the malpractice statutory tolling provision contains exceptions for conduct that is intentional or fraudulent.²⁴⁵ Importantly, the discovery rule has always been used to give plaintiffs relief when the defendant has fraudulently concealed facts that would allow the plaintiff to sue him or her.²⁴⁶ The exceptions to the Michigan malpractice discovery rule have included cases where such fraud, misrepresentation, or other intentional con-

239. The statutory provisions governing wrongful death actions read:

Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

MICH. COMP. LAWS § 600.5827 (Supp. 1961). “The period of limitations is 3 years *all other actions* to recover damages to injuries to persons and property.” MICH. COMP. LAWS § 600.5805(7) (Supp. 1961) (Amended 2002) (emphasis added).

240. *Id.*

241. *Id.*

242. *Trentadue*, 738 N.W.2d at 671.

243. Fraud also has a statutory exception to the affirmative defense of statute of limitations in Michigan. The language of the statute of limitations for fraud reads:

If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

MICH. COMP. LAWS § 600.5855 (Supp. 1961).

244. See *supra* Subsection I.D.3 for a discussion of the exceptions to the pre-accrual bar in malpractice cases and for a discussion of the lack of inclusiveness in the Revised Judiciary Act.

245. See *Trentadue*, 738 N.W.2d at 671 (citing MICH. COMP. LAWS §§ 600.5838a(1)-5838a(3) (2004)).

246. See, e.g., *Boyle v. Gen. Motors Corp.*, 661 N.W.2d 557, 559-60 (Mich. 2003) (holding the common law discovery rule did not apply in case of fraud since the legislature enacted statutory policy of discovery rule in the fraudulent concealment provision); see also MICH. COMP. LAWS § 600.5855.

duct has occurred.²⁴⁷ Michigan courts have long held that “there is no bar to the use of the discovery rule in fraud actions.”²⁴⁸ The legislature codified a special provision for instances of fraud because of the discovery rule’s inconsistent application in such cases.²⁴⁹

Conduct that is intentional and wrongful, like that of the defendants in *Trentadue*, must be treated differently than conduct that is merely negligent because the equities behind each are different.²⁵⁰ In cases where the basis for the cause of action is more than mere negligence, the courts need to treat plaintiffs with special considerations of equity and fairness. It is within the court’s conscience to grant them relief. Furthermore, a defendant who must defend himself in a civil suit soon after defending himself in a criminal suit covering the same events does not need the same protection against defending a “stale” claim that the statute of limitations was designed to give. It is not unduly burdensome on the defendant to defend that claim, since the evidence is fresh in the minds of all involved parties because of the criminal suit.²⁵¹ Since intentional killing is similar to fraud, another intentional act, special policy considerations apply to both, because the defendant’s actions prevented the plaintiff from suing in a timely fashion.

The Revised Judicature Act is not so comprehensive as to preclude the use of the discovery rule under the facts in *Trentadue*. The policy reasons behind the more comprehensive statutes under the Act and the nature of homicide as an intentional, wrongful act show that there is room, and need, for the discovery rule’s extra-statutory interpretation in this and in other cases.²⁵² Because the Act has holes, the courts have the authority to fill these legislative gaps.²⁵³ Even a purportedly comprehensive statutory scheme has room for judicial interpretation where it is silent on certain issues, such as the application of the discovery rule in wrongful death

247. See, e.g., *Williams v. Polgar*, 215 N.W.2d 149, 158 (Mich. 1974) (holding the discovery rule applicable for negligent misrepresentation because the action is based on a tort rather than contract theory).

248. *Boyle*, 661 N.W.2d at 559 (citing *Williams*, 215 N.W.2d at 158 n.18).

249. See § 600.5855.

250. See *supra* Section I.A.

251. See *supra* Subsection I.C.1 (outlining the policies behind enacting statutes of limitations).

252. See generally *supra* Part I.

253. See *supra* Subsection I.D.1 (describing the courts’ authority to fill legislative gaps); see also *Owendale-Gagetown Sch. Dist. v. State Bd. of Educ.*, 317 N.W.2d 529, 531 (Mich. 1982) (describing the appropriate judicial interpretation and construction of legislation); *City of Grand Rapids v. Crocker*, 189 N.W. 221, 222 (Mich. 1922) (outlining judicial authority to fill legislative gaps).

claims.²⁵⁴ When silent, the legislature opens itself up for judicial interpretation.²⁵⁵

B. The Discovery Rule's Equitable Roots Require Its Application in Wrongful Death Cases

Even if the statutory scheme is completely comprehensive, principles of equity may still be invoked to apply an extra-statutory discovery rule in instances where the judiciary deems it appropriate. This is because equity does not follow the law.²⁵⁶ It is true that a comprehensive statutory scheme may preclude the use of equity. In fact, there have been instances where the legislature successfully abrogated equitable remedies.²⁵⁷ However, in these instances, the legislature expressed an intent to abrogate the common law or any other equitable relief.²⁵⁸ The legislature expressed no such intent to abolish the discovery rule in Michigan.²⁵⁹ The United States Supreme Court in *Moragne* found that holes in legislation, like those in the Michigan Revised Judicature Act, should be filled by judicial interpretation.²⁶⁰

The Revised Judicature Act was not intended to replace the equitable remedies available to Michigan courts.²⁶¹ The Act left intact rules that were “formulated to avoid the harsh results produced by commencing the running of the statute of limitations before a claimant was aware of any basis for an action.”²⁶² Justices have expressed that preventing tolling in all cases would create absolutely absurd results. The Michigan Supreme Court said, “[e]xcept in topsy-turvy land, you can’t die before you are conceived, or be divorced before you ever marry, or harvest a crop never planted, or burn down a house never built.”²⁶³ Likewise, “it has always . . . been accepted,

254. See *supra* Subsection I.D.1.

255. See *Robertson v. DaimlerChrysler Corp.*, 641 N.W.2d 567, 576 (Mich. 2002), *vacated*, 756 N.W.2d 77 (2008) (giving a summary of how courts should interpret statutes and give effect to legislative intent when possible); *Sanchez v. Eagle Alloy Inc.*, 658 N.W.2d 510, 515 (Mich. Ct. App. 2003), *vacated*, 684 N.W.2d 342 (Mich. 2004) (describing when the judiciary should yield to enacted law).

256. See *supra* Section I.B.

257. See, e.g., *City of Lansing v. Lansing Twp.*, 97 N.W.2d 804, 809 (Mich. 1959) (“Courts of equity, as well as of law, must apply legislative enactments in accord with the plain intent of the legislature. . .”).

258. See *id.*

259. See *supra* Subsection I.D.3.

260. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 392-406 (1970), *superseded by statute*, Jones Act, 46 U.S.C.S. § 688(a), *as recognized in* *Smallwood v. American Trading & Transp. Co.*, 839 F. Supp. 1377 (N.D. Cal. 1993); see also *supra* notes 192-96 and accompanying text.

261. See *supra* Part III.

262. *Hammer v. Hammer*, 418 N.W.2d 23, 26 (Wis. Ct. App. 1987).

263. *Moll v. Abbott Labs.*, 506 N.W.2d 816, 822 n.15 (Mich. 1993) (quoting *Patterson v. Her Majesty Indus., Inc.*, 450 F. Supp. 425, 428 n.5 (E.D. Pa. 1978)).

as a sort of legal “axiom,” that a statute of limitations does not begin to run against a cause of action before that cause of action exists, i.e., before a judicial remedy is available to the plaintiff.”²⁶⁴

In addition to the considerations of equity, which support the use of the discovery rule, the court expressed that statutes of limitations do not preclude the rule, since it is equitable in nature.²⁶⁵ It is an *extra-statutory* rule. In *Chase v. Sabin*, the Michigan Supreme Court applied the discovery rule after twenty-six years to allow the plaintiff to recover from the negligent doctor who caused his loss of eyesight, even though the statute of limitations for that cause of action was only three years.²⁶⁶ The court found that legislature-enacted statutes of limitations do not evidence the intent to “extinguish a cause of action before the plaintiff is aware of the possible cause of action.”²⁶⁷ Even after admitting that the claim was indeed stale, the *Chase* court found that, because the defendant uniquely held the evidence of the wrong, the plaintiff was entitled to pursue a remedy.²⁶⁸ “The purpose of the Act was to effect procedural improvements” and not to abolish equitable relief.²⁶⁹ In the absence of a legislative statute explicitly contravening centuries-old common law, common law will prevail. The Act lacks language implicating the discovery rule directly and fails to disallow it in many causes of action, including wrongful death.²⁷⁰ Because equitable policies trump the legislative policies behind the Revised Judicature Act, the discovery rule can be used in conjunction with it. The Act does not textually exclude the common law discovery rule in the wrongful death provision.²⁷¹ The legislature did not issue an express intention to abrogate the discovery rule.²⁷² It merely added a statutory discovery provision in certain circumstances, such as medical malpractice, upon the insistence of lobbying advocates.²⁷³ Since there is no express contravention of the rule, the common law should stand.

C. Michigan is in the Minority of Jurisdictions

Not only was the *Trentadue* decision a radical departure from established Michigan law, it also placed Michigan in the small minority of Amer-

264. *Id.* at 822 n.15 (quoting *Patterson*, 450 F. Supp. at 428 n.5).

265. *See supra* Section I.D.

266. *See supra* Section I.D.

267. *Chase v. Sabin*, 516 N.W.2d 60, 63 (Mich. 1994) (discovery rule applied to plaintiff who discovered that loss of his eyesight, which had occurred twenty-six years previously after cataract surgery, was caused by negligence of nurse anesthetist).

268. *Id.* at 64-65.

269. *Trentadue v. Gorton*, 738 N.W.2d 664, 687 (Mich. 2007).

270. *See supra* Subsection I.D.3.

271. *See supra* Subsection I.D.3.

272. *See supra* Subsection I.D.3.

273. *See supra* Subsection I.D.3.

ican jurisdictions that have completely eliminated the discovery rule. In fact, thirty-five states plus the District of Columbia all employ an extra-statutory discovery rule to toll the statute of limitations.²⁷⁴ While the argument that the majority must be right is not persuasive, the number of jurisdictions recognizing and embracing the need for this judicial remedy to achieve justice shows that the rule is well-founded.

Conversely, Michigan is not alone in its new stance on abolishing the discovery rule. The jurisdictions which have done away with the rule have found simplicity in adhering to statutory limitations and doing away with equity.²⁷⁵ It makes it easier for courts to determine whether a cause of action is asserted in a timely fashion.²⁷⁶ Abolishing the discovery rule alleviates some of the pressure on defendants in defending stale claims, even when new evidence surfaces.²⁷⁷ It also creates *a priori* certainty for plaintiffs, preventing them from filing claims that are clearly barred by the statute of limitations.²⁷⁸ All of these facilitate improving judicial economy. However, it still stands that such a rigid statutory adherence rids the judicial system of its equitable power. Innocent plaintiffs deserving their day in court are denied that opportunity when equitable relief is denied to them.²⁷⁹

Perhaps the nature of newly found evidence may also make a difference. The DNA in the *Trentadue* case is certainly substantial evidence. The facts of the case also make it a prime example of one scenario in which most courts would toll the limitations period. However, the discovery of new evidence which is less substantial or convincing might lead a reasonable judge to not apply the equitable tolling. It should be within the courts' authority to decide under what new-found facts and evidence the discovery rule ought to apply.

Interestingly, federal courts will generally apply a discovery rule when the applicable state law is silent on the issue.²⁸⁰ Generally, federal limitations periods run when a claimant discovers, or should have discovered, the actions giving rise to a claim.²⁸¹ Therefore, a federal case applying Michigan law would apply the discovery rule since the statute for wrongful death is silent on the issue. It is imperative that Michigan apply an equitable dis-

274. See *supra* Section I.D.

275. See cases cited *supra* note 111.

276. See *supra* Subsection I.C.1.

277. See *supra* Subsection I.C.1.

278. See *supra* Subsection I.C.1.

279. See *supra* Subsection I.C.1.

280. Cheryl J. Auger & David E. Christensen, *Will the Common Law Discovery Rule Used to Determine When Plaintiffs' Claims Accrue Soon Be Extinguished?*, ST. B. MICH. NEGL. L. SEC. Q., Fall 2006, at 6, 7 (explaining that the majority of American jurisdictions, as well as federal limitations periods, apply a discovery rule and also emphasizing the equities which weigh in favor of the rule as it applies to plaintiffs' claims).

281. *Id.*

covery rule when necessary to avoid the inevitable forum shopping that results from the inconsistent treatment of the same cause of action in federal and state courts in the same state.

As previously discussed, the strength in the discovery rule's application can be shown, in part, by the number of jurisdictions that use it. States including Alaska, California, Massachusetts, Ohio, Tennessee, and Washington are only a sampling of the states adhering to this more liberal application of the discovery rule.²⁸² These states reason that the discovery rule should be applied broadly to afford relief to innocent plaintiffs trying to recover for the loss of life.²⁸³ Adherents to this theory, considering that plaintiffs have been diligent in bringing their cause, find the policies weigh in their favor, rather than the defendants'.²⁸⁴

The most instructive case for Michigan courts, however, is Ohio's *Collins v. Sotka*.²⁸⁵ The *Collins* court was working with a similar statutory scheme to the Revised Judicature Act, but allowed the discovery rule in that wrongful death by murder case because of the unjust results that would occur otherwise.²⁸⁶ One of the court's primary reasons for applying the discovery rule was because of the power it had to do so in equity, even though there was a controlling statutory scheme. Instead of taking a step backward as Michigan has done, the *Collins* court joined the majority and, in the process, retained more of its own original power.²⁸⁷

Like the plaintiffs in *Bernoskie* and *Collins*, Dayle Trentadue²⁸⁸ deserves to have the limitation on her action extended.²⁸⁹ Much like the murderer in *Bernoskie* who escaped detention for over forty years, the defendant in *Trentadue* concealed himself and avoided suit in civil court.²⁹⁰ The *Collins* court was likewise unsympathetic to a killer who hid the victim's body in a field for months.²⁹¹ The Michigan Supreme Court should be no less sympathetic to a defendant who not only beat, raped, and killed a woman and concealed his identity, but repeated these atrocities sixteen years later to a second victim.²⁹²

282. See cases discussed *supra* note 117.

283. See generally *id.*

284. *Id.*

285. *Collins v. Sotka*, 692 N.E.2d 581 (Ohio 1998); see *supra* Subsection I.D.1.

286. *Collins*, 692 N.E.2d at 581; see *supra* Subsection I.D.1.

287. See *supra* Subsection I.D.1.

288. The plaintiff in *Trentadue v. Gorton*.

289. See *Bernoskie v. Zarinsky*, 781 A.2d 52, 54-55 (N.J. Super. Ct. App. Div. 2001); *Collins*, 692 N.E.2d at 581-82.

290. *Bernoskie*, 781 A.2d at 54; *Trentadue v. Gorton*, 738 N.W.2d 664, 681 (Mich. 2007) (Weaver, J., dissenting).

291. *Collins*, 692 N.E.2d at 581.

292. *Trentadue*, 738 N.W.2d at 681 (Weaver, J., dissenting).

It is indeed questionable that Michigan would join the minority of jurisdictions after centuries of established discovery rule precedent.²⁹³ Michigan should take the route that an increasing number of jurisdictions are following and revisit the equitable principles upon which its legal system was founded. Instead of making progression in the law and clarifying the statutory provisions contained within the Revised Judicature Act, Michigan has regressed by eliminating one whole side of its legal authority. The plaintiff in *Trentadue* was trying to get the courts to join together all the negligent and intentionally wrongful parties in order for her to gain relief. By looking to its power in equity,²⁹⁴ the court could have tolled the statute of limitations and provided the opportunity for complete relief to the innocent plaintiff. For now, the Michigan Supreme Court has allowed the legislature to eliminate equitable considerations.

IV. THE FUTURE OF TOLLING: SOLUTIONS FOR MICHIGAN AND SIMILARLY SITUATED STATES

Courts in Michigan are going to have to strictly apply statutes of limitations after the *Trentadue* decision.²⁹⁵ Furthermore, Michigan courts will no longer be able to grant relief for diligent, innocent plaintiffs who could not have brought their claim within the statutory limitations period through no fault of their own.²⁹⁶ It is possible that because of this one opinion, the court will “bar lawsuit claims against trustees who steal their clients’ money, pension funds that misappropriate their beneficiaries’ retirement funds and manufacturers whose products sicken or kill consumers years after exposure.”²⁹⁷ Because of this disappointing and egregiously unjust result, changes in the state must be effected to afford those innocent persons relief.

A. What Plaintiffs Should Do

In many criminal courts, prosecutors are bringing causes of actions against “John Doe” defendants to preserve their claim while they wait for DNA evidence to surface in future years.²⁹⁸ At least ten states have consid-

293. See *supra* Subsection I.D.1.

294. See *supra* Section I.B.

295. *Trentadue*, 738 N.W.2d at 670.

296. *Id.* at 673.

297. Brian Dickerson, *Justices Race to Appease Big Donors*, DETROIT FREE PRESS, July 27, 2007 (suggesting that the *Trentadue v. Gorton* decision will “ingratiate insurers, who’ve watched an industry-friendly Supreme Court devise ever more ingenious ways to keep plaintiffs from asserting legitimate claims in court” and analyzing other potential effects of the decision).

298. See, e.g., *Gonzales v. State*, 761 S.W.2d 809, 811-12 (Tex. Ct. App. 1988) (holding that a search and arrest warrant authorizing arrest of an unnamed person was not so

ered removing statutes of limitations altogether for criminal offenses when DNA evidence was collected giving rise to the possibility of a future genetic match, with more than twenty states having adopted similar legislation since the year 2000.²⁹⁹ While this may not generally work for many plaintiffs bringing tort causes of action in civil cases because they do not yet know that they have a cause of action, it does serve an interesting proposition in wrongful death claims. If a loved one is murdered by an unknown killer, the deceased's estate may file a suit immediately against such a "John Doe" defendant to allow facts to surface which may show whether or not a viable claim exists.³⁰⁰ It would preserve suits in cases where DNA evidence shows, years later, that there is a person against whom a suit can be brought.³⁰¹ However, if facts are not discovered soon after filing the suit, the suit could be deemed frivolous and be dismissed.³⁰² Certainly, this is not the most desirable method, but until either the courts or the legislature in Michigan change how they approach statutes of limitations in wrongful death suits, there is little else a plaintiff can do. The unfairness to plaintiffs is obvious and egregious in these types of cases.

B. What the Court Should Do

The *Trentadue* court has clearly shown its ability and eagerness to overturn centuries of precedent with a single opinion. Since abolishing the discovery rule and robbing innocent, unknowing potential plaintiffs of their causes of action before they have had a chance to bring them, the court needs to re-examine the policies behind the discovery rule and its authority to govern suits in equity. The most clear and direct remedy would be another drastic reform: a retracting of the decision in *Trentadue* and a re-establishment of the discovery rule. However, this remedy is unlikely given

general as to permit indiscriminate arrests and searches of large numbers of persons and therefore approved by the court); *State v. Dabney*, 663 N.W.2d 366, 374 (Wis. Ct. App. 2003) (filing a complaint and arrest warrant identifying defendant as "John Doe" violated no law or due process rights of the later-named defendant); *but accord* *Knauf v. Elias*, 742 A.2d 980, 985-86 (N.J. Super. Ct. App. Div. 1990) (holding that because assailants were not amendable to service of process, victim was not required to file a complaint utilizing fictitious party names prior to learning their true identities).

299. Rebecca Porter, *DNA Evidence Changes for Whom the Statutes Toll*, TRIAL, Feb. 2004, at 12 (emphasizing Wisconsin state law while discussing bringing suits against "John Doe" when potential defendants remain unidentified for long periods of time).

300. *Id.*

301. *Id.*

302. Other problems with this approach include potential dismissals for failure to prosecute civil lawsuits, increased and substantial costs on the plaintiff, and interference with the judicial system. For this approach to work, the legal system itself would have to reform and create exceptions to normal court rules allowing such suits to continue undeveloped for years at a time.

the reluctance of courts to overturn their own precedent. It is also unlikely that a set of facts like those in *Trentadue* will come before the court, allowing it to reverse its opinion.

Courts wishing to provide plaintiffs with the equitable relief they deserve can carefully side-step the ruling in *Trentadue*. First, courts could accomplish this objective by viewing such cases through the lens of fraudulent concealment. By broadening the application of fraudulent concealment cases, courts could invoke the statutory discovery rule found in the Revised Judicature Act³⁰³ and give plaintiffs more time to bring their claims. Fraudulent concealment has often been a clever disguise for courts wishing to invoke a discovery rule where it is expressly excluded.³⁰⁴ A second possible remedy the court could provide is to grant relief under equitable principles elsewhere. Other possible equitable relief could come in the form of interpreting the statute of limitations as accruing from the time every element of the cause of action is identified to the potential plaintiff rather than a strict interpretation that a claim accrues upon death. In *Trentadue*, this would have prevented the statute of limitations from running until there was an identified wrongdoer. These remedies, however, are limited, and the real power to effectuate change lies in the hands of the legislature.

C. What the Legislature Should Do

If the legislature intended for the statutes to be the only rules allowed in determining statutes of limitations and times of accrual in cases, then it needs to revisit the Revised Judicature Act to make a more complete statutory scheme for such limitations. First, a tolling provision should be added to the wrongful death statute in the Revised Judicature Act. Like the malpractice statutory discovery provision, each individual section needs to be complete, in itself, in order to avoid unnecessary ambiguity.

Alternatively, the legislature could resolve much of the debate and inconsistent applications of the discovery rule by creating a statute which authorizes courts to use the discovery rule where applicable. Such a statute would simply allow tolling when equity deems it necessary. A legislative

303. MICH. COMP. LAWS § 600.5855 (1961).

304. *E.g.*, Texas courts have used this approach. *See* Melanie T. Hewell, *Extending the Application of the Discovery Rule to Wrongful Death Actions: Where Will Texas Draw the Line?*, 38 BAYLOR L. REV. 151, 161 (1986) (suggesting that courts should disguise the discovery rule in the cloak of fraudulent concealment claims under a theory of equitable estoppel); *see also* *Borderlon v. Peck*, 661 S.W.2d 907, 908-09 (Tex. 1983) (holding that fraudulent concealment equitably estopped application of the affirmative defense of statute of limitations in a medical malpractice action); *but cf.* *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 354-55 (Tex. 1990) (recognizing that fraudulent concealment will estop a defendant from relying on the statute of limitations as a defense but not applying the fraudulent concealment doctrine where application conflicted with the open courts doctrine).

section could also be added to the Revised Judicature Act reading: “The Court may apply the discovery rule to provide relief to the plaintiff if not otherwise precluded in this Act.” This type of statute would recognize that there is a need for limits on tolling statutes under certain circumstances but also give the courts discretion in determining when to apply an extra-statutory tolling provision.

Another option would be to make the statute of limitations in wrongful death by murder or intentional tort actions commence after the charge or criminal conviction of the intentional wrongdoer. This is perhaps the best option because of the evolution of DNA evidence and its likelihood to convict wrong-doers years after they have committed a tort.³⁰⁵ The policies granting plaintiffs relief after such intentional actions are different from those of mere negligence, and therefore, the plaintiffs, victims of purposeful acts, could receive relief no matter when the statute of limitations began to run. This would give the courts greater equitable discretion while at the same time limiting the scope of that discretion to instances where it is most deserved. The legislature has already accomplished a similar objective by codifying the tolling provision for fraud. New DNA evidence uncovered after a tort is much like uncovering fraud or intentional misrepresentation. In each scenario the defendant is less deserving of the protection that the black-letter law gives to those defendants who have not misled or otherwise intentionally hurt plaintiffs. The legislature should exercise its authority to mitigate the harsh effects of *Trentadue* and effectuate legal reform granting relief to those plaintiffs so deserving of it.

CONCLUSION

The American judicial system is rooted in principles of equity, and courts in this country have the authority to render equitable relief when it is desired.³⁰⁶ The discovery rule is a creation arising from this equitable heritage. The discovery rule allows an innocent plaintiff to bring a cause of action past the expiration of the statute of limitations. The rule has been important in medical malpractice cases and wrongful death actions where the plaintiff could not have known all the elements of an injury before the statute of limitations had accrued.

In *Trentadue v. Gorton*, the Michigan Supreme Court abolished the discovery rule.³⁰⁷ The court relied on Michigan’s statutory limitations scheme and denied the plaintiff an opportunity to have her day in court. Under Michigan law, the court *could* have allowed the plaintiff to bring a wrongful death action by applying the discovery rule to toll the accrual pe-

305. See Porter, *supra* note 299.

306. See generally *supra* Part I.

307. See generally *supra* Part II.

riod for the statute of limitations, thereby granting relief to her years after the statute had run.

The Michigan Supreme Court overstepped its authority in *Trentadue*. In a wrongful death case where the plaintiff could not possibly have brought suit within the statute of limitations, principles of equity require that tolling occur when the fairness to the plaintiff outweighs the burden on the defendant of defending the action.³⁰⁸ Where evidence in tort cases surfaces years after the initial tort, courts, according to their common law roots, should allow suits to commence by tolling the statute of limitations period until the plaintiff knew, or could have known, all the elements of their cause of action. To hold otherwise eliminates the courts' equitable authority and deprives the justice system of the ability to grant relief to deserving parties.

The potential ramifications of the elimination of the discovery rule doctrine include preventing victims whose loved ones were wrongfully murdered from bringing suit against later-discovered assailants. It will cause persons suffering from asbestosis from bringing actions against manufacturers to recover for their ailments. Its abolition may prevent many malpractice actions not discoverable within the statutory six month time period. There are some possible solutions to these otherwise tragic results.³⁰⁹ First, plaintiffs could assert "John Doe" actions before the statute of limitations runs and later substitute the identity of the wrongful party. Second, courts can get creative and still dole out equitable remedies by broadening the definition of fraud and construing the accrual period for statutes more liberally. Finally, and most importantly, the legislature has the capability to fill the holes in the current statutory scheme or to create a new provision that grants the courts explicit power to utilize the discovery rule.

Along with abolishing the discovery rule, the Michigan Supreme Court has also abolished courts' ability to grant innocent plaintiffs the right to have their day in court. The American judicial system is a product of the marriage of equity and law. By slowly eliminating equitable relief, the judiciary is effectively eradicating its own power to do what is fair in the eyes of justice.

308. See *supra* Sections I.B, I.C.

309. See *supra* Part IV.