SAVING MEDICAL MALPRACTICE CLAIMS FROM THE STATUTE OF REPOSE

MICHAEL SCHMELTZER

Michael is an attorney at Amer Cunningham Co., L.P.A. He represents clients in a wide variety of complex cases, including general civil litigation, personal injury, medical and other professional malpractice, insurance disputes, business and commercial litigation, and employment-related disputes.

Michael is recognized as an "Ohio Rising Star" and frequently writes and lectures on timely legal issues. He also holds key positions with a number of bar association committees and is associated with community legal aid programs.

Michael is licensed to practice law in all Ohio State courts and the U.S. District Courts for the Northern and Southern Districts of Ohio. He attended Kent State University, where he earned his B.A. degree in journalism with a minor in political science. Michael later attended the University of Akron School of Law, where he served as assistant editor of the Akron Law Review, was a member of its Jessup International Moot Court competition team, and served as executive editor of its Journal of Technology Transfer (now the Akron Journal of Intellectual Property).

INTRODUCTION

Much to the disdain of the Plaintiff's bar, the most recent formulation of Ohio's medical malpractice statute of repose was affirmed as a lawful expression of legislative authority by the Ohio Supreme Court in *Ruther v. Kaiser* (even though the Court had previously struck down such legislation as an unconstitutional incursion upon the right to a remedy).[1] The statute of repose, codified at R.C. 2305.113(C), appears to contain a relatively straightforward rule: a medical malpractice claimant must commence an action within four years of the conduct giving rise to his or her claim, irrespective of whether the claimant "discovered" the medical negligence during the repose period; otherwise, the claim is forever barred. Medical malpractice defendants, however, are anxious to complicate things.

A powerful arrow in every plaintiff's quiver is the right to dismiss his or her original case and retain the right to re-file within a year, regardless of whether the re-filed case is brought outside of any applicable statute of limitations. This procedural device, which "saves" claims from limitations statutes, is codified at R.C. 2305.19 and commonly referred to as the "savings statute." The savings statute has been a fundamental component of the Ohio civil justice system for more than 60 years.[2] It exemplifies the law's preference for deciding disputes upon their substantive merits, especially when they have been brought within the appropriate timeframes but failed for technical reasons only.[3]

The law of limitation of actions is the product of competing policies: those supporting the extinguishment of untimely claims and those encouraging the resolution of claims upon their merits. Traditional statutes of limitation are meant to encourage plaintiffs to act diligently and without delay by filing their claims promptly after discovering them.[4] For example, the medical malpractice statute of limitations begins to run when the medical claim "accrues" (i.e, when the claim is discovered, or at least should have reasonably been discovered).[5] It is the accrual date that triggers the duty to promptly commence litigation.

Statutes of repose, on the other hand, are unrelated to accrual and may operate to bar the claim before it is even discovered.[6] Statutes of repose are meant to provide certainty to defendants with respect to the timeframe within which they may be sued. They are also meant to reduce the cost of guarding against potential claims well into the future.[7]

Inspired by the Court's decision in *Ruther* and relying upon the statute of repose for ammunition, medical malpractice defendants are now taking aim at the savings statute. They seek to avoid the merits of medical malpractice claims by arguing the statute of repose operates to cut off the availability of the savings statute outside of the repose period. Their argument goes like this: A medical claim which is (i) timely commenced within the statute of limitations and statute of repose periods but (ii) subsequently dismissed and then re-filed outside of the repose period is time barred by the statute of repose – even though the plain language of the savings statute would permit re-filing. In other words, they maintain that the statute of repose absolutely bars bringing a medical malpractice lawsuit outside of the four-year repose period.

What these defendants fail to appreciate is that the statute of repose, the statute of limitations, and savings statute are all congruent parts of a broader statutory scheme governing the commencement of civil actions. All that is required to comply with the statute of repose is the fulfillment of a single condition. So long as the medical malpractice claimant commences – pursuant to Civ.R. 3(A) – any action at all prior to the expiration of the repose period, the statute of repose never operates to bar the claim. Thus, the medical claimant is free to re-file his or

No matter how you slice it, there is simply no justification for depriving a diligent plaintiff of his or her rights when the original action was commenced in compliance with both the statute of limitations and statute of repose. . . . The only effect of interpreting the statute of repose to abrogate the availability of the savings statute would be to frustrate the important policies served by the savings statute.

her claim in accordance with the savings statute – even outside of the repose period.

MEDICAL MALPRACTICE DEFENDANTS OPT FOR AN INTERPRETATION LIMITING THE SAVINGS STATUTE

The issue of whether the statute of repose abrogates the availability of the savings statute was recently raised in a medical malpractice case currently being handled by my firm. The defendants moved to dismiss our clients' claims because they were re-filed outside of the repose period. The trial court ultimately agreed with our position and denied the defendants' motion. The litigation is still pending, however, and the case has yet to be tried.

The defendants did not contend that their ability to defend against the case was somehow prejudiced when our client re-filed their claims. The defendants received notice of the claims years earlier when they were served with process in the original lawsuit, answered the complaint, and proceeded with discovery. Rather, the defendants asked the court to dismiss the case based upon the broad language contained in Subsection (C)(1) of the statute of repose (conveniently ignoring Subsection (C)(2)), which they argued absolutely bars lawsuits outside of the repose period. The defendants further asserted that the statute's plain terms are in conflict with, and take precedence over, the savings statute.

The statute of repose states, in pertinent part:

> (1) **No action** upon a medical, dental, optometric, or chiropractic claim **shall be commenced** more than four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim.
>
> (2) **If an action** upon a medical, dental or optometric, or chiropractic claim is **not commenced** within four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim, **then**, any action upon that claim is barred.

R.C. 2305.113(C).

When considering an ambiguous statute, the paramount concern is determining what the legislature truly intended.[8] In our case, the defendants claimed that the General Assembly intended to abrogate savings statute because (1) the statute of repose is the later enacted statute and therefore takes precedence over the savings statute, and (2) the statute of repose contains certain enumerated exceptions, none of which are for the savings statute. This reasoning is misguided.

THE STATUTE OF REPOSE IS AMBIGUOUS AND CAN BE READ TO CONFLICT WITH THE SAVINGS STATUTE

The plain language of the statue of repose must be applied unless it is ambiguous.[9] A statute is ambiguous if it is susceptible to more than one reasonable interpretation.[10] Because the statute of repose can reasonably be interpreted in two very different ways, the rules of statutory construction must

be applied to determine and effectuate the legislature's true intent.[11]

A plain language reading of Subsection (C)(1) of the statute prohibits, in declaratory fashion, commencement of any and all actions upon a medical malpractice claim outside of the repose period – regardless of whether the savings statute would permit re-filing. A plain language reading of Subsection (C)(2), on the other hand, only bars the claim "if" a plaintiff fails to meet a certain condition (i.e., the plaintiff fails to commence "an" action within the repose period). The necessarily corollary is that if any action at all is brought within the requisite timeframe, the repose period is eliminated before it expires and the statute never operates to bar the plaintiff's claim. Subsection (C)(2) would, therefore, permit a plaintiff to re-file his or her claim in accordance with the savings statute.

For obvious reasons, these distinctions become potentially problematic for plaintiffs seeking to re-file their cases outside of the repose period in accordance with the savings statute. Because the statue of repose may reasonably be interpreted to both permit and prohibit the re-filing of a medical malpractice claim outside of the repose period, the rules of statutory construction must be applied to determine whether the legislature intended to abrogate the savings statute when it enacted the statute of repose.

ANY APPARENT CONFLICT BETWEEN THE STATUTE OF REPOSE AND SAVINGS STATUTE IS RECONCILABLE

The rule of statutory construction that a later enacted statute takes precedence over a previously enacted statute applies only where the two statutes are irreconcilable. The law prefers an interpretation that gives effect to both statutes, rather than abrogating one statute in favor of another.[12] Furthermore, "[a]ll statutes pertaining to the same general subject matter must be read in *pari materia*."[13] And terms that have acquired a "technical" meaning, such as the ones at issue here, must be construed accordingly.[14]

The statute of repose and savings statute can – and should – be interpreted to be congruent parts of a broader statutory scheme governing the commencement of civil actions. When consideration is given to this scheme, which ascribes special legal meaning to "commenc[ing]" "an action[,]" any apparent conflict with the savings statute is reconciled. So, too, is the internal conflict within the statute of repose itself (i.e., the plain language conflict between Subsections (C)(1) and (C)(2)). Therefore, a construction that permits re-filing in accordance with the savings statute outside of the repose period is required.

In formulating the statute of repose, the General Assembly purposefully chose to utilize the technical, legal terms "commence[]" and "action." Revised Code 2305.113(A) – the statute of limitations applicable to medical claims – employs these same terms. It provides that "an **action** upon a medical . . . claim shall be **commenced** within one year after the cause of action accrued."[15] Ohio's savings statute utilizes these terms as well. It provides:

> In any **action** that is **commenced** or attempted to be **commenced**, . . . if the plaintiff fails otherwise than upon the merits, the plaintiff . . . may commence a new action within one year after the date of the . . . failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later. . . .

(Emphasis added.) Civil Rule 3(A) sets forth two requirements for the "commence[ment]" of an "action": (1) the filing of a complaint and (2) obtaining service within one year of filing the complaint.[16]

Not only do the statute of repose and statute of limitations share the same technical terminology, but these statutes are also contained in same section of the Revised Code (R.C. 2305.113), which is titled "Time limitations for bringing medical, dental, optometric, or chiropractic claims." Section 2305.113 does not refer to a "statute of repose" or otherwise distinguish between its subsections, nor is there any other indication that the savings statute should apply to them differently.

Accordingly, the statutory scheme provides that an "action" upon a medical claim must be "commenced" within the applicable "time limitations" (i.e., the statute of limitations and the statute of repose). In order to properly commence an action, Civ.R. 3(A) requires only that a complaint be filed and service be obtained within one year. The savings statute is then plainly available if the action fails otherwise than upon the merits and permits re-filing within a year – regardless of the time limitations set forth in R.C. 2305.113.

One weakness in this line of reasoning is that the savings statute references the filing of a "new action." It does not state the original action may be "re-filed." Medical defendants will be sure to point this out. Despite this distinction, case law confirms that the re-filing of an action in accordance with the savings statute relates back to and is part of the original action that was timely commenced.[17] In other words, it revives an action commenced before the statute of limitations or repose expired, as opposed to permitting an entirely new action commencing after the limitations period has run.[18] This construction makes sense because the savings statute "is neither a statute of limitations nor a tolling statute extending the statute of limitations."[19] There is no doubt that the General Assembly was well aware of this legal paradigm when it formulated the statute of repose.

Because this analysis reconciles the apparent conflict between the savings statute and the statute of repose (and within the statute of repose itself), these provisions are in harmony and permit the re-filing of a medical claim in accordance with the savings statute more than four years after the alleged wrongful conduct. This interpretation does not offend the terms of the statute of repose (or the statute of limitations, for that matter) because re-filing the complaint does not constitute the commencement of an action outside of the repose period – the action was commenced when the original complaint was filed.

THE GENERAL ASSEMBLY DID NOT INCLUDE AN EXCEPTION FOR OR OTHERWISE REFERENCE THE SAVINGS STATUTE BECAUSE THE GENERAL ASSEMBLY INTENDED IT TO OPERATE CONGRUENTLY WITH THE STATUTE OF REPOSE

Nevertheless, medical defendants will argue that rigid and unyielding application is required because the statute of repose contains certain identified exceptions – none of which are for the savings statue. But the exceptions could just as easily

indicate the General Assembly intended it to operate flexibly and harmoniously.[20] As recognized by the Seventh Circuit in *Hinkle v. Henderson*, this "argument . . . reveals little about legislative intent because it could just as easily cut the other way. The legislature, aware of the savings statute when drafting the statute of repose, could have expressly excepted the savings statute . . . ."[21] But it did not.

Subsection (D) of R.C. 2305.113 sets forth two express exceptions to the statute of repose. The first exception permits plaintiffs to extend the repose period by up to a year. If a plaintiff discovers the injury in the fourth year of the repose period, it permits him or her to commence an action no later than one year after the date he or she reasonably discovered the injury.[22] The second exception permits plaintiffs to potentially extend the repose period for years on end. It provides that if a foreign object is negligently left inside a plaintiff's body, he or she may commence an action not later than one year after the foreign object was, or reasonably should have been, discovered.[23]

Accordingly, the statute of repose is not an inflexible barrier to suit beyond the four-year repose period. The fact that there are specific exceptions is simply not an adequate basis to conclude that the statute of repose cuts off the availability of the savings statute. And while R.C. 2305.113's silence about the saving statute does not, in and of itself, determine legislative intent, the history and evolution of the statute of repose confirms that the General Assembly intended the statutes to operate congruently.

When interpreting an ambiguous statute, courts are permitted to consider the circumstances under which the statute was enacted, the legislative history, the common law or former statutory provisions, including laws on the same or similar subjects.[24] A prior version of the statute of repose, enacted in 1981 and codified as R.C. 2305.11(B), provided that "[i]n no event shall any medical claim . . . be brought more than four years after the act or omission . . . ."[25] Following some intervening changes to the repose language, the General Assembly in 2002 transferred the medical malpractice time limitations provisions, including the statute of limitations and repose language, from R.C. 2305.11 to R.C. 2305.113.[26] At that time, the General Assembly modified its language to its present form.[27]

There was certainly a stronger argument that the 1981 version of the statute of repose limited the availability of the savings statute since it specified that "in no event" could a "medical claim . . . be brought" outside of the repose period.[28] It did not contain language similar to Subsection (C)(2) of the current statute, which conditions barring a medical claim upon the plaintiff's failure to commence an action within the repose period. But even under the formulation enacted in 1981, the Tenth District in *Wade v. Reynolds* – the only Ohio court of appeals to consider the issue discussed in this article – concluded that if the General Assembly intended to limit the availability of the savings statute beyond the repose period, it would have explicitly so stated.[29]

It is also worth mentioning that the savings statute was substantively revised in 2004 – years after the current version of the statute of repose was enacted.[30] There is absolutely no mention of the statute of repose or any terms that would bar the savings statute outside of the repose period. To the contrary, the General Assembly extended the savings statute's availability to permit plaintiffs to re-file their cases within one year after dismissal or within the time remaining under the statute of limitations, whichever is longer.[31] Under the prior version, the savings statute was only available if the original statute of limitations had already expired.[32]

CONCLUSION

As recognized by the Seventh Circuit in *Hinkle v. Henderson*, the weight of authority nationally holds that statutes of repose do not bar the re-filing of actions in accordance with savings statutes unless they explicitly so state. This includes authority from the Supreme Courts of Kansas, Tennessee, and Indiana, as well as Illinois courts of appeal.[33] The result is no different here in Ohio.

Ohio rules of statutory construction require courts to reconcile, if possible, any apparent conflict within or between statutes. Reconciliation it is not only possible here, but it is clearly expresses the General Assembly's true intent.

The General Assembly understood full well the interplay between the savings statute and R.C. 2305.113 (and prior to that R.C. 2305.11) when it enacted the statute of repose and subsequently amended it to share technical legal terms with Civ.R. 3(A), the statute of limitations, and the savings statute. Moreover, it enacted the statute of repose following the Tenth District's decision in *Wade*, which determined that an express provision was required to limit the availability of the savings statute. The General Assembly surely knew about *Wade* when it revised the statute of repose in 2002, yet it did not include any such provisions. Therefore, the only reasonable conclusion is that the General Assembly intended for the statute of repose and the savings statute to operate as congruent parts of the same statutory scheme for the commencement of civil action. Moreover, this conclusion is the only conclusion that honors the policies served by all of the statutes at issue.

One hundred years ago, Oliver Wendell Holmes, Jr. asked, "What is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time?"[34] No matter how you slice it, there is simply no justification for depriving a diligent plaintiff of his or her rights when the original action was commenced in compliance with both the statute of limitations and statute of repose. The policies embodied by the statute of repose are not offended by interpreting it to operate congruently with the savings statute because the defendant will necessarily have received timely notice of the plaintiff's claims. Furthermore, the time period within which the defendant can be sued remains fixed and finite – so costs can be controlled. The only effect of interpreting the statute of repose to abrogate the availability of the savings statute would be to frustrate the important policies served by the savings statute.

Endnotes

1. *See Ruther v. Kaiser*, Slip Op. No. 2011-0899, 2012-Ohio-5686 (Dec. 6, 2012), *overruling Hardy v. VerMeulen*, 32 Ohio St.3d 45, 512 N.E.2d 626 (1987) and *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 337.
2. 1953 H.B. No. 1.
3. *Stone v. North Star Steel Co.*, 152 Ohio App.3d 29, 2003-Ohio-1223, 786 N.E.2d 508 (7th Dist.); *Kinney v. Ohio Dept. Admin. Serv.*, 30

Ohio App.3d 123, 126 (10th Dist. 1986), *citing Gruelich v. Monnin*, 142 Ohio St. 113, 116 (1943).

4. *Cundall v. U.S. Bank*, 122 Ohio St.3d 188, 2009-Ohio-2523, 909 N.E.2d 1244, ¶ 22, *citing O'Stricker v. Jim Walter Corp.*, 4 Ohio St.3d 84, 88, 447 N.E.2d 727 (1983).
5. *Frysinger v. Leech*, 32 Ohio St.3d 38, 512 N.E.2d 337, paragraph one of the syllabus (1987).
6. *Ruther*, *supra*, at ¶¶ 18, 24-25.
7. *Id*. at ¶¶ 19-21.
8. *United States Steel Corp. v. Zaleski*, 98 Ohio St.3d 395, 2003-Ohio-1630, 786 N.E.2d 39, ¶ 12); *Van Dyke v. Public Employees Retirement Bd.*, 99 Ohio St.3d 40, 2003-Ohio-4123, 793 N.E.2d 438, ¶ 27.
9. *Bailey v. Republic Engineered Steels, Inc.*, 91 Ohio St.3d 38, 40 (2001).
10. *Id.*
11. *Id.*; *State v. Anthony*, 96 Ohio St.3d 173, 2002-Ohio-4008, 772 N.E.2d 1162.
12. R.C. 1.52(A); *Gahanna Jefferson Local School Dist. Bd. of Educ. v. Zaino*, 93 Ohio St.3d 231, 234, 2001-Ohio-1335, 754 N.E.2d 789); *Zweber v. Montgomery County Bd. of Elections*, 2nd Dist. No. 19305, 2002-Ohio-2152, 2002 WL 857857, *3 (2002).
13. *Hughes v. Ohio Bur. of Motor Vehicles*, 79 Ohio St.3d 305, 308, 1997-Ohio-387, 681 N.E.2d 430 (1997); *Saunders v. Choi*, 12 Ohio St.3d 247, 249, 466 N.E.2d 889, 250 (1984).
14. R.C. 1.42. If terms acquire a particular or special meaning, either by legislative definition or by judicial construction, that meaning is to be ascribed to them. *John Ken Alzheimer's Ctr. v. Ohio Cert. of Need Review Bd.*, 65 Ohio App.3d 134, 583 N.E.2d 337 (10th Dist. 1989). *See also Wade v. Reynolds*, 34 Ohio App.3d 61, 61, 517 N.E.2d 227 (1986) (recognizing that the statute of repose is part of a comprehensive scheme of limitations, including the medical malpractice statute of limitations and savings statute, and does not limit the availability of the savings statute).
15. R.C. 2305.19 (emphasis added).
16. *See also Seger v. For Women, Inc.*, 110 Ohio St.3d 451, 854 N.E.2d 188, 2006-Ohio-4855, ¶¶ 7-10 (2006) (defining R.C. 2305.113(A)'s use of the terms "commenced" and "action" with reference to Civ.R. 3(A)).
17. *Frysinger*, *supra*, at ¶ 42 ("Where R.C. 2305.19 applies, the date for filing [a] new action relates back to the filing date for the preceding action for limitations purposes."); *Seger*, *supra*, at ¶¶ 8, 10-11 (no requirement that service be obtained within the statute of limitations – only within one year of filing; the action will be deemed commenced as of the date of filing the original complaint).
18. *See Mihalcin v. Hocking College*, 4th Dist. No. 99CA32, 2000 WL 303138, *4 (March 20, 2000) (concluding that filing a "third complaint . . . fails to qualify for re-filing under R.C. 2305.19 because it constitutes an attempt to re-file an action that was not commenced before the expiration of the statute of limitations" (emphasis omitted); *Thompson v. State Univ. Hosps.*, 10th Dist. No. 06AP-1117, 2007-Ohio-4668, 2007 WL 2668745) (Sept. 11, 2007).
19. *Conway v. RPM, Inc.*, 8th Dist. No. 88024, 2007-Ohio-1007, 2007 WL 701094, ¶ 8 (March 8, 2007), *citing Reese v. Ohio State Univ. Hosp.*, 6 Ohio St.3d 162 (1983). *See also Mihalcin*, *supra*, at *4, *citing Reese*, *supra*, at 163.
20. *See Jain v. Johnson*, 398 Ill.App.3d 135, 143, 922 N.E.2d 1188 (2010) (recognizing that such exceptions "cannot be read as imposing an inflexible barrier to suit").
21. *Hinkle v. Henderson*, 85 F.3d 298, 304, 64 USLW 278 (7th Cir. 1996), *citing Wade*, *supra*, at 228.
22. R.C. 2305.113(D)(1)
23. R.C. 2305.113(D)(2).
24. R.C. 1.49.
25. 1981 Am.Sub.H.B. No. 243. *See also Wade*, *supra*, at 61.
26. *See*, *e.g.*, 1996 Am.Sub.H.B. No. 350; 2001 Sub.S.B. No. 108 (reviving the version of R.C. 2305.11, including the statute of repose, that existed prior to the effective date of 1996 Am.Sub.H.B. No. 350; 2002 Am.Sub.S.B. No. 281 (transferring the medical malpractice statute of limitations and statute of repose from R.C. 2305.11 to R.C. 2305.113).
27. 2002 Am.Sub.S.B. No. 281.
28. 1981 Am.Sub.H.B. No. 243. *See also Wade*, *supra*, at 61.
29. *Wade*, *supra*, at 61-62. *See also Vesolowski v. Repay*, 520 N.E.2d 433 (Ind.1988) (recognizing that although Indiana's statute of repose contained exceptions – none of which referenced the savings statute – the legislature would have explicitly limited the availability of the savings statute had it intended to do so).
30. 2004 Am.Sub.H.B. No. 161.
31. *Id.*
32. 1953 H.B. No. 1
33. *Hinkle*, *supra*, at 300-301, *citing See v. Hartley*, 257 Kan. 813, 896 P.2d 1049 (1995), *Cronin v. Howe*, 906 S.W.2d 910 (Tenn.1995), *Vesolowski v. Repay*, 520 N.E.2d 433 (Ind.1988), *Limer v. Lyman*, 241 Ill.App.3d 125, 181 Ill.Dec. 667, 608 N.E.2d 918 (1993). In fact, only Georgia's state Supreme Court has held to the contrary. *Wright v. Robinson*, 262 Ga. 844, 426 S.E.2d 870 (1993).
34. Oliver W. Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 476 (1897).