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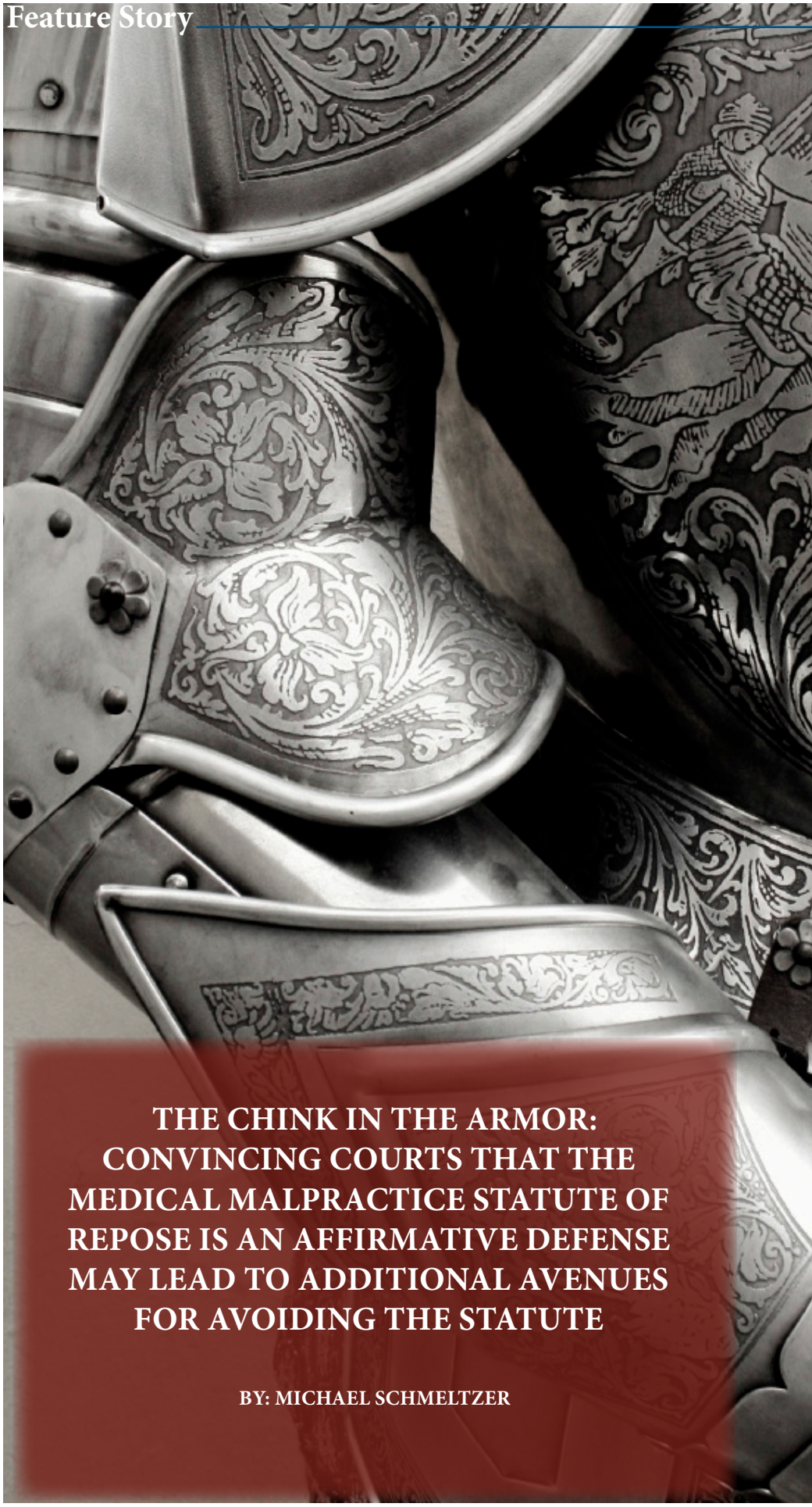

THE CHINK IN THE ARMOR: CONVINCING COURTS THAT THE MEDICAL MALPRACTICE STATUTE OF REPOSE IS AN AFFIRMATIVE DEFENSE MAY LEAD TO ADDITIONAL AVENUES FOR AVOIDING THE STATUTE

BY: MICHAEL SCHMELTZER

INTRODUCTION

As Ralph Waldo Emerson once wrote, "God offers to every mind its choice between truth and repose. Take which you please — you can never have both." The Ohio legislature made up its mind on the issue of truth versus repose when it enacted Am.Sub.S.B. No. 281. In so doing, the General Assembly abandoned truth in certain medical malpractice cases, effectively voicing its "judgment that justice requires an adversary to be put on notice to defend for a specific period of time, after which the 'right to be free of stale claims in time comes to prevail over the right to prosecute them.'"[1] The Bill, which became effective in 2002, contains Ohio's medical malpractice "statute of repose" and is codified at R.C. 2305.113(C).

The statute of repose has razor-sharp teeth, eviscerating the availability of otherwise valid medical claims if those claims are not brought within four years of the wrongful conduct.[2] Traditional statutes of limitations are meant to encourage plaintiffs to act diligently and without delay by filing their claims promptly after discovering them. Accordingly, they begin to run when the claim "accrues" (i.e, when the claim is discovered, or at least should have reasonably been discovered). It is the accrual date that triggers the duty to promptly commence litigation. Statutes of repose are different. They are unrelated to accrual and may operate to bar a claim before it is even discovered.

Those who defend the statute of repose argue that it is necessary "to give medical providers certainty with respect to the time within which claims can be brought and a time after which they may be free from the fear of litigation."[3] This rationale holds that stale claims may create "litigation uncertainty" and prejudice a defendant's ability to defend because evidence to disprove a claim may have been lost or rendered untrustworthy over time.[4] Moreover, a party who is uncertain about when he may be sued will become distracted by the Sword of Damocles' and devote resources to unproductive purposes.[5]

Opponents, on the hand, decry the statute as an unfair deprivation of an innocent party's right to recover a remedy – due to no fault of his own and under circumstances where he has not even had an opportunity to yet discover his claim. Under the rule of law, providing effective recourse to those whose rights have been violated is essential. Without a remedy for a wrong, justice is of little use. Because the statute of repose has the power to obliterate the right to proceed upon a claim before it has even been discovered, it perpetrates injustice.

But whatever your feelings are about the statute of repose, the General Assembly and the Ohio Supreme Court have affirmed the policy considerations upon which it rests.[6] If, however, the statute is permitted to operate in a vacuum, irrespective of other legal doctrines such as waiver, tolling, and estoppel, then it will become a tool for gamesmanship and chicanery. The plaintiff's bar must resist such efforts.

The path back to justice may begin with convincing courts that the statute of repose is an affirmative defense that can be waived, as opposed to an absolute, jurisdictional bar to bringing a claim outside of the repose period. For all of the reasons detailed in this article, I believe the former conclusion is not only legally correct, but it is also the "right" one.

If courts agree, that may open the door for medical claimants to explore the factual circumstances under which the defense has been asserted. That, in turn, may lead to additional avenues for avoiding the statute. For example, a medical claimant who suffers injury as a result of a series of related acts may be able to avoid the statute under a continuing violations theory. Or he may be able to avoid it by alleging, and later proving, that the defendant fraudulently concealed his medical claim in order to prevent the filing of a lawsuit within the repose period. If, on the other hand, courts deem the statute to be jurisdictional in nature, the opportunity to avoid the statute will be even more limited than it already is.

DEFENSES, GENERALLY

An affirmative defense asserts a bar to the plaintiff's recovery – even if the plaintiff is otherwise able to establish a *prima facie* case.[7] It is, therefore, separate and distinct from the plaintiff's claims.[8] The determination of whether a defense is an "affirmative" one generally depends upon whether it controverts an element of the plaintiff's claim or, instead, raises matters beyond the scope of the plaintiff's *prima facie* case.[9] Stated another way, "[a]n affirmative defense is any defensive matter in the nature of a confession and avoidance. It admits for pleading purposes only that the plaintiff has a claim (the 'confession') but asserts some legal reason why the plaintiff cannot have any recovery on that claim (the 'avoidance')."[10]

The defendant, therefore, ultimately bears the burden of proving an affirmative defense, and an affirmative defense is waived if it is not timely asserted.[11] Imposition of waiver derives from the same principles of fairness and notice that require a plaintiff to adequately set forth the basis of his claims. "[W]here a defendant has a full, complete defense that may defeat the plaintiff's prima facie case, . . . [the defendant has] the responsibility to assert it in a timely fashion."[12]

These concepts are incorporated into the Civil Rules. Civil Rule 8(C) addresses affirmative defenses. It sets forth 20 specific defenses that must be affirmatively pleaded, including the statute of limitations. The Rule does not mention the statute of repose, but it does include a catch-all provision. In addition to the listed defenses, "any ***other matter*** constituting an avoidance or affirmative defense" shall be affirmatively pleaded as well. (Emphasis added.) The Rule's reference to "any other matter" indicates that "[t]his list is by no means exhaustive."[13] These affirmative defenses are waived if they are not raised in the responsive pleading.[14]

Civil Rule 12(B) addresses seven additional defenses. These defenses include lack of jurisdiction, improper venue, insufficiency of process, insufficiency of service of process, failure to state a claim, and failure to join a party under Civ.R. 19 and Civ.R. 19.1. Lack of subject matter jurisdiction cannot – under any set of circumstances – be waived, and the defenses of failure to state a claim and failure to join an indispensable party under Civ.R. 19 may be made in a pleading, by motion for judgment on the pleadings, or at trial.[15] All other Civ.R. 12(B) defenses are waived if they are not included in the responsive pleading or raised in a pre-answer motion.[16]

In order to prove a claim for medical negligence, the plaintiff must prove four elements. Those elements are: (1) the existence of a duty owed to the plaintiff by the defendant, (2) a breach of the defendant's duty, (3) causation based on probability, and (4) damages.[17] Assuming the plaintiff establishes her *prima facie* case, the defendant can nevertheless "avoid" the claim if he can demonstrate that the repose period has run. Accordingly, the statute of repose is – conceptually – an affirmative defense. And because Civ.R. 8 and Civ.R. 12 do not specifically mention the statute of repose, the statute would appear to fall within the catchall provision of Civ.R. 8(C).

COURTS, NATIONALLY, ARE SPLIT ON THE ISSUE OF WHETHER STATUTES OF REPOSE ARE AFFIRMATIVE DEFENSES

Authority, nationally, is divided on the issue of whether statutes of repose are affirmative defenses. The Tennessee Supreme Court, for example, recently held "statutory language which bars a claim does not operate to deprive a court of subject matter jurisdiction over the case."[18] Rather, "statutes of repose, like statutes of limitation, attach to and bar only the claim itself."[19] Therefore, it is an affirmative defense that is waived if not

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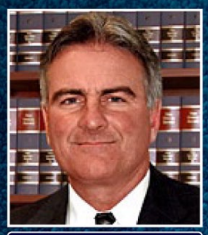

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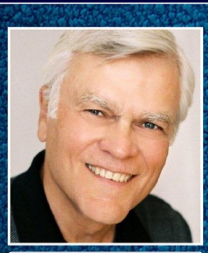

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timely asserted.[20] Despite the statute's rigid language (i.e., "*In no event* shall any such action be brought [outside of the repose period] . . . ."), the court explained that – as a matter of policy – the statute should "not authorize Defendant to sit on its hands and not assert the defense. Our rules of procedure require that matters be raised before trial if a party intends to rely on them. To hold otherwise would be to invite parties to lie in wait and, after a long and expensive trial, assert a defense."[21] A Washington court of appeals agreed that while statutes of repose bar *claims*, they do not deprive courts of *subject matter jurisdiction*.[22]

Other courts treat statutes of repose as conditions precedent to the plaintiff's cause of action.[23] These courts hold that failure to timely raise the defense cannot revive a claim that has already been extinguished.[24] The Arkansas Supreme Court, for example, determined that "[a] statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time."[25] The court found that while a statute of limitation is a procedural device that operates to bar the *remedy*, a statute of repose cuts off the right to a *claim* before it accrues.[26] The court, therefore, concluded that a "statute of repose is neither an avoidance nor a defense to a cause of action . . .[,] and the failure to plead the statute of repose as an affirmative defense could not resurrect a cause of action that no longer exists."[27]

Similarly, the Delaware Supreme Court held that "the running of a statute of repose will extinguish both the remedy and the right."[28] Thus, it is a "substantive provision [that] relates to the jurisdiction of the court; hence 'any failure to commence the action within the applicable time period extinguishes the right itself and divests the . . . the court of any subject matter jurisdiction which it might otherwise have."[29]

AUTHORITY IN OHIO IS LIMITED, BUT THE EIGHTH AND NINTH DISTRICTS RECOGNIZE STATUTES OF REPOSE ARE DEFENSES THAT CAN BE WAIVED

Whether Ohio courts will treat the statute of repose as an affirmative defense or as a jurisdictional bar to recovery is less than clear at this point. The Eighth and Ninth Districts, however, have had the occasion to consider the issue, and both Districts recognize that statutes of repose are defenses that can be waived.

In *Hetzer-Young v. Precision Airmotive Corp.*, the Eighth District held that although the 18-year repose period established by the General Aviation Revitalization Act creates

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2. *A breach of the defendant's duty.*
3. *Causation based on probability.*
4. *Damages.*

"an explicit statutory right not to stand trial[,]" it is an affirmative defense that must be proved.[30] And in *Fazio v. Gruttadauria*, it held that the defendant stockbroker, who was sued for breach of fiduciary duty, fraud, negligent misrepresentation, conversion, and promissory estoppel, waived any statute of repose defense because he failed to answer the complaint.[31]

In *Lawson v. Valve-Trol Co*., the Ninth District implicitly agreed that statutes of repose are defenses that can be waived. [32] However, it completely lost its way when analyzing the issue. The *Lawson* court considered, among other things, whether Indiana's statute of repose applicable to certain real property improvement claims had been waived. In an attempt to deal with the defendant's failure to specifically raise statute of limitations and statute of repose defenses in its answer, the court emphasized that statutes of repose and statutes of limitations are, fundamentally, different.[33] The court noted that while Civ.R. 8(C) specifically refers to "statute[s] of limitations," it does not explicitly mention statutes of repose.[34] Although the court did not actually say it, this line of reasoning is apparently meant to support the conclusion that while Civ.R. 8(C) may require the statute of limitations to be raised in the responsive pleading, the statute of repose does not need to be so raised. And failure to do so will not result in a waiver of the defense.

The court ultimately concluded that the defendant timely raised the statute of repose because it asserted in its answer that the plaintiffs failed to state a claim upon which relief could be granted.[35] In support of its conclusion, the court re-iterated that statutes of repose, as substantive provisions, do "not take away an existing cause of action . . . [but], rather, . . . prevent what might otherwise be a cause of action from ever arising."[36]

The *Lawson* decision is misguided because it fails to analyze the issue of waiver in light of the framework established by the Civil Rules. Civil Rule 8(C) provides that all affirmative defenses – other than Civ.R. 12(B) defenses – are waived if they are not asserted in a responsive pleading. While asserting a statute of limitations defense may not be the same thing as asserting a statute of repose defense for the purpose of satisfying Civ.R. 8(C), the court completely ignored Civ.R. 8(C)'s catchall provision referring to all "other matters constituting an avoidance or affirmative defense."

Instead, the court strained to characterize the statute of repose as a defense subsumed within the defendant's Civ.R. 12(B)(6) failure to state a claim defense. But as recognized by the Ohio Supreme Court, raising a failure to state a claim defense "preserves on the record such party's continuing objection to the sufficiency of the complaint." It relates to the plaintiff's pleading and whether it sufficiently alleges that the plaintiff is entitled to relief under a particular legal theory.[37] The Ohio Supreme Court has explained, "[t]o warrant a recovery on the petition, it must show a cause of action *in the plaintiff*." Otherwise, the complaint fails to state a claim. [38]

The issue before the Ninth District was whether the defendants waived their statute of repose defense, not whether the plaintiff had sufficiently set out the elements of a medical negligence claim. As discussed *supra*, the statute of repose goes beyond

the elements of a medical claim, which hearken back to English common law and have been part of our jurisprudence since the beginning. For pleading purposes, a medical claimant has never been required to aver that she has complied with statutes limiting the time within which medical claims must be brought. The statute of repose is entirely irrelevant to properly pleading a medical claim.

Rather, the crux of the issue is whether statutes of repose deprive courts of subject matter jurisdiction. If they are not jurisdictional (which, under the Civil Rules, is the only type of defense that cannot be waived), then it falls within the purview of Civ.R. 8(C)'s catchall provision and must be affirmatively pleaded in the defendant's answer. Otherwise, it is waived.

THE RUNNING OF THE STATUTE OF REPOSE DOES NOT CREATE A JURISDICTIONAL DEFECT

Subject matter jurisdiction is a court's power to hear and decide a case on the merits.[39] As discussed *supra*, a jurisdictional defect cannot be waived.[40] Accordingly, lack of jurisdiction can be raised at any time, even for the first time on appeal.[41] This is because "jurisdiction is a condition precedent to the court's ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void."[42] And "where there is a complete want of jurisdiction on the part of the inferior court, the writ [of prohibition] will issue 'to prevent usurpation of jurisdiction ***.'"[43]

Whether the running of the statute of repose deprives courts of subject matter jurisdiction is a question of statutory interpretation. When interpreting a statute, it is axiomatic that absent an ambiguity, the primary goal is to apply the legislative intent as manifested in the words of the statute.[44] 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) (emphasis added).

The path back to justice may begin with convincing courts that the statute of repose is an affirmative defense that can be waived, as opposed to an absolute, jurisdictional bar to bringing a claim outside of the repose period.

The statue is devoid of any language restricting the subject matter jurisdiction of the courts. In *Sanquily v. Court of Common Pleas of Lucas County*, the Ohio Supreme Court considered whether R.C. 2743.02(C) vested the Court of Claims with exclusive jurisdiction to determine whether the defendant state employee was immune from the plaintiff's medical malpractice claim, thus depriving the Lucas County Court of Common Pleas of jurisdiction over the matter.[45] The Court found that it did. The statute, however, specifically stated that certain actions against state employees "shall first be filed against the state in the court of claims, which has **exclusive original jurisdiction** to determine, initially, whether the officer or employee is entitled to personal immunity . . ."[46] Unlike the statute at issue in *Sanquily*, the medical malpractice statute of repose does not even mention "jurisdiction."

Moreover, "[j]urisdiction does not relate to the *rights* of the parties, but to the *power* of the court."[47] This is an important distinction because the statute of repose concerns a medical claimant's "right" to proceed upon his claim; it does not mention the power of the courts. There simply is no basis to conclude that the statute plainly expresses the General Assembly's intent to divest courts of subject matter jurisdiction over medical claims filed outside of the repose period.

In *Dunton v. Whitewater West Recreation*, a Colorado court of appeals held that statutes of repose are jurisdictional only if they contain **specific language** to that effect.[48] Because the statute at issue did not contain such language, the court determined that it "has no effect upon a court's jurisdiction . . . [and] must be pleaded and proven as an affirmative defense.[49] The court reasoned that "[w]hile some prior decisions have stated that this statute constitutes an "absolute bar" to a claim, . . . such language was used to distinguish the statute's effect from the effect of the bar of a statute of limitations. ***That term was intended merely to emphasize that a claim can be barred by such a statute even before the claim has accrued; it was not used in any jurisdictional context***."[50]

The specificity requirement makes sense in light of the maxim that "every reasonable presumption will be indulged in favor of the rightful exercise of jurisdiction . . . ."[51] As U.S. Supreme Court Justice Ginsberg explained, "It is anomalous to classify time prescriptions, even rigid ones, under the heading 'subject matter jurisdiction.'"[52] It is also consistent with the Ohio rule that a writ of prohibition will issue only if "a statute 'patently and unambiguously' prevents" a court of common pleas from exercising general, original jurisdiction.[53] Because Ohio's medical malpractice statute of repose does not specifically deprive courts of jurisdiction, it should not be interpreted to do so.

Furthermore, the statute of repose is not an absolute, inflexible barrier to suit outside of the repose period. Considering whether certain equitable principles applied to a statute of repose for professional negligence against public accountants, an Illinois court of appeals held because the statute did "not require 100% enforcement[,]" it was subject to the parties' tolling agreement.[54] The court determined this was true even though the statue provided that "[i]n no event shall such action be brought [outside of the repose period]."[55] The court emphasized that certain exceptions applied to the statute.[56] It also noted that "the statute of repose for medical malpractice . . . may be tolled by a plaintiff based on a continuing negligent course of treatment for a specific condition"; "statutes of repose are affirmative defenses subject to forfeiture"; claims may be re-filed outside of the repose period pursuant to a savings statute; and "[i]ndividuals generally may waive substantive rules of law, statutory rights,

and even constitutional rights enacted for their benefit, so long as the waiver is knowing, voluntary, and intentional."[57] For all of these reasons, the court held that the statute was not jurisdictional and, thus, could be tolled.[58]

Likewise, Ohio's medical malpractice statute of repose does not require strict filing within the repose period. It does not apply to minors or persons of unsound mind, and exceptions exist for malpractice discovered during the fourth year after treatment and for malpractice that leaves a foreign object in a patient's body.[59] Those exceptions allow for an additional year after discovery of an injury to file suit.[60] And at least one trial court has held that the statute of repose does not affect the availability of the savings statute outside of the repose period.[61] The statute of repose should not be considered jurisdictional for all of these reasons as well.

CONCLUSION

In *Ruther v. Kaiser*, the Ohio Supreme Court affirmed the General Assembly's power to shut the courthouse doors to medical claimants who fail to bring their claims within the four-year repose period. Even so, an opportunity exists to limit the statute's application. That opportunity starts with convincing courts that the statute of repose is an affirmative defense that may be waived, rather than an absolute, jurisdictional bar to bringing a medical claim outside of the repose period.

This issue may, at first blush, seem to be relatively benign. But if courts determine that the statute of repose is an affirmative defense, that may very well prove to be the proverbial "chink in the armor" which exposes additional weaknesses – weaknesses vulnerable to doctrines such as the continuing violations doctrine, tolling, estoppel, and fraud.

Biography:

Michael is an attorney at Slater & Zurz, LLP, where he represents clients in a wide variety of complex cases, including general civil litigation, personal injury, medical and other professional malpractice, product and consumer claims, insurance disputes, business litigation, and employment-related disputes.

Before joining Slater & Zurz, LLP, Michael began his legal career at respected plaintiff's firm in Akron. He later spent a number of years with a mid-size, Cleveland defense firm before transitioning his practice back to the plaintiff's side of things. At Slater & Zurz, LLP, Michael's practice is focused on his passion - standing up for everyday people against those who refuse to take responsibility for their wrongful conduct.

Endnotes

1. *Cargill Ferrous Int'l v. M/V Elikon*, 857 F.Supp. 45, 47 (N.D.Ill. 1994), *quoting United States v. Kubrick*, 444 U.S. 111, 117, 1000 S.Ct. 352, 62 L.Ed.2d 259 (1979).
2. R.C. 2305.113(C).
3. *See*, *e.g.*, *Ruther v. Kaiser*, 134 Ohio St.3d 408, 983 N.E.2d 291, 2012-Ohio-5686, at ¶ 19 (2012).
4. *Id.* at ¶ 20.
5. *See*, *e.g.*, *Young v. United States*, 535 U.S. 43, 47 (2002) (stating that all limitations periods provide "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities") (*quoting Rotella v. Wood*, 528 U.S. 549, 555 (2000) (internal quotation marks omitted)); *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988) ("The State's interest in a self-executing statute of limitations is in providing repose for potential defendants and in avoiding stale claims."); *Wood v. Carpenter*, 101 U.S. 135, 139 (1879) ("They promote repose by giving security and stability to human affairs.").
6. *See Ruther*, *supra*.
7. *See Turner v. Cent. Local Sch. Dist.*, 85 Ohio St. 3d 95, 98, 706 N.E.2d 1261, 1999-Ohio-207 (1999)
8. *Nat'l City Mortg. Co. v. Richards,* 182 Ohio App. 3d 534, 913 N.E.2d 1007, 2009-Ohio-2556, ¶ 20 (10th Dist. 2009).
9. *Caesars Riverboat Casino, LLC v. Kephart*, 934 N.E.2d 1120, 1125 (Ind. 2010).
10. Baldwin's Ohio Civil Practice, § 8:14.
11. *Driscoll v. Austintown Associates*, 42 Ohio St.2d 263, 276 (1975).
12. *Turner*, *supra*, at 98.
13. *Mitchel v. Borton*, 70 Ohio App. 3d 141, 144, 590 N.E.2d 832 (6th Dist. 1990).
14. *Jim's Steak House, Inc. v. Cleveland*, 81 Ohio St.3d 18, 20, 688 N.E.2d 506, 1998-Ohio-440 (1998); *Richards*, *supra*, at ¶ 20.
15. Civ.R. 12(H)(2), (3).
16. Civ.R. 12(H)(1).
17. *Stinson v. England*, 69 Ohio St.3d 451, 455, 633 N.E.2d 532 (1994).
18. *Pratcher v. Methodist Healthcare Memphis Hospitals*, 407 S.W.3d 727, 734-35 (Tenn. 2013).
19. *Pratcher*, *supra*, *quoting Estate of Palmer*, 145 Wash.App. 249, 187 P.3d 758, 763 (Wash. App. 2008) (internal quotation marks omitted).
20. *Id.* at 742. *See also* the following cases recognizing that statutes of repose are affirmative defenses that can be waived:

Authority from Various State Supreme Courts: *Pratcher*, *supra*, at 739 ("We hold that the statute of repose is an affirmative defense that is generally waived if not timely asserted."); *Federal Deposit Ins. Corp. v. Lenk*, 361 S.W.3d 602 (Tex. 2012) ("[A]s an affirmative defense, the statute of repose if only available to parties that properly raise it in the trial court."); *Pinigis v. Regions Bank*, 942 So.2d 841, 847-48, 59 UCC Rep.Serv.2d 475 (Ala. 2006) (recognizing that statutes of repose must be specifically please; otherwise, they are waived).

Authority from Various Courts of Appeals: *Smith v. Krolik*, Ill. 1st Dist., 4th Div. No. 1–10–1132, 2011 WL 10068662, at *16 (Ill. App. 2011) ("The law in Illinois establishes that 'defendants have the burden of proof for a statue of repose, because it is an affirmative defense, while plaintiffs have the burden of proving the existence of facts that would toll the repose period or constitute an exception to the general repose rule.'"); *S. Side Trust & Sav. Bank of Peoria v. Mitsubishi Heavy Indus., Ltd.*, 401 Ill.App. 3d 424, 438, 927 N.E.2d 179, 339 Ill.Dec. 638, 927 N.E.2d 179 (Ill.App. 2010) ("A defendant has the burden of proof in showing that an affirmative defense such as a statute of repose applies."); *Hetzer-Young v. Precision Airmotive Corp.*, 184 Ohio App.3d 516, 921 N.E.2d 683, 2009-Ohio-5365, ¶ 32 (8th Dist. 2009) (recognizing that the subject statute of repose "acts as an affirmative defense and 'creates an explicit statutory right not to stand trial.'"); *McRaith v. BDO Seidman, LLP*, 391 Ill.App.3d 565, 584, 909 N.E.2d 310, 330 Ill.Dec.597 (Ill.App. 2009) (recognizing that "statutes of repose are affirmative defenses subject to forfeiture"); *Fazio v. Gruttadauria*, 8th Dist. No. 90562, 2008-Ohio-4586, 2008 WL 4175040, ¶ 23 (Sept. 11, 2008) ("The statute of repose is likewise considered an affirmative defense."); *Willett v. Cessna Aircraft Co.*, 366 Ill.App.3d 360, 371, 303 Ill. Dec. 439, 851 N.E.2d 626, (Ill.App. 2006) ("In Illinois, defendants have the burden of proof for a statute of repose, because it is an affirmative defense, while plaintiffs have the burden of proving the existence of facts that

would toll the repose period or constitute an exception to the general repose rule."); *Estate of Palmer*, 145 Wash.App. 249, 187 P.3d 758, ¶ 3 (Wash.App. 2008) ("[Statutes of repose] do[] not affect the court's jurisdiction; rather, statutes of repose, like statutes of limitation, attach to and bar only the claim itself."); *Dunton v. Whitewater West Recreation*, 942 P.2d 1348, 1350-51 (Colo.App. 1997) (holding that because the statute of repose at issue "ha[d] no specific language evidencing the General Assembly's intent to restrict the judiciary's subject matter jurisdiction over claims to which the statute applies[, the statute] ha[d] no effect upon a court's jurisdiction . . . ."); *Square D Co. v. State Farm Casualty Co.*, 610 So.2d 522 (Fla.App. 1992) ("Contrary to the appellant's contention, the Statute of Repose cannot be equated with subject matter jurisdiction. Therefore, unlike the question of subject matter jurisdiction, the rights accruing to a manufacturer by virtue of the Statute of Repose can be waived if not raised in a timely manner.").

Authority from Various Federal Courts: *McMahon v. Eli Lilly and Company*, 774 F.2d 830, 837 (7th Cir. 1985) (recognizing that Illinois' statute of repose applicable to product liability claims was waived because the defendants "fail[ed] to promptly bring [the] affirmative defense to the attention of the court . . . ."); *S.W. v. United States*, S.D. Miss. No. 3:10CV502-DPJ-FKB, 2013 WL 1342763 (Apr. 2, 2013) (holding that "statutes of repose must be pleaded" pursuant to Fed.R.Civ.P. 8(c)).

21. *Pratcher*, *supra*, at 735.
22. *Estate of Palmer*, *supra*, ¶ 17, *citing Rice v. United States*, 122 U.S. 611, 621-22, 7 S.Ct. 1377, 30 L.Ed. 793 (1887).
23. *See*, *e.g.*, *Whittaker v. Todd*, 176 N.C. App. 185, 625 S.E.2d 860 (2006).
24. *See*, *e.g.*, *Luzadder v. Despatch Oven Co.*, 834 F.2d 355 (3d Cir. 1987) (applying Pennsylvania law); *Fetterhoff v. Fetterhoff*, 354 Pa.Super. 438, 512 A.2d 30 (Penn.App. 1986).
25. *Ray & Sons Masonry Contractors, Inc. v. U.S. Fid. & Guar. Co.*, 353 Ark. 201, 218, 114 S.W.3d 189 (Ark. 2003), *quoting First United Methodist Church of Hyattsville v. United States Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989).
26. *Id.*
27. *Id.*
28. *Cheswold Volunteer Fire Co.* v. Lambertson Const. Co., 489 A.2d 413 (Del. 1984)
29. *Id.* at 421.
30. 184 Ohio App.3d 516, 921 N.E.2d 683, 2009-Ohio-5365, ¶ 32 (8th Dist.).
31. 8th Dist. No. 90562, 2008-Ohio-4586, 2008 WL 4175040, ¶ 23 (Sept. 11, 2008), *citing Tubbs Jones v. Suster*, 84 Ohio St.3d 70, 75, 701 N.E.2d 1002, 1998-Ohio-275; *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 883 N.E.2d 377, 2008-Ohio-546, ¶ 251.
32. 81 Ohio App.3d 1, 610 N.E.2d 425 (9th Dist. 1991).
33. *Id.* at 428.
34. *Id.*
35. *Id.*
36. *Id.*, *citing Sedar v. Knowlton Const. Co.*, 49 Ohio St. 3d 193, 551 N.E.2d 938 (1990), *overruled* by *Brennaman v. RMI Co.*, 70 Ohio St.3d 460, 639 N.E.2d 425, 1994-Ohio-322 (1994).
37. *Ander v. Clark, OD*, 10th Dist. No. 14AP-65, 2014-Ohio-2664, ¶ 7 (June 19, 2014), *citing Hanson v. Guernsey Cty. Bd. Of Commrs.*, 65 Ohio St.3d 545, 548 (1992).
38. *Bridges v. Nat'l Eng'g & Contracting Co.*, 49 Ohio St. 3d 108, 551 N.E.2d 163, ¶ 1 of the syllabus (1990).
39. *Morrison v. Steiner*, 32 Ohio St.2d 86, 61 O.O.2d 335, 290 N.E.2d 841, ¶ 1 of the syllabus (1972).
40. *See also Painesville v. Lake Cty. Budget Comm.*, 56 Ohio St.2d 282, 284, 10 O.O.3d 411, 383 N.E.2d 896 (1978).
41. *See Byard v. Byler*, 74 Ohio St.3d 294, 296, 658 N.E.2d 735 (1996).
42. *Jones v. Suster*, 84 Ohio St. 3d 70, 75, 701 N.E.2d 1002, 1998-Ohio-275.
43. *Sanquily v. Court of Common Pleas of Lucas County*, 60 Ohio St.3d 78, 573 N.E.2d 606, 79 (1991), *quoting Adams v. Gusweiler*, 30 Ohio St.2d 326, 329, 59 O.O.2d 387, 285 N.E.2d 22 (1972).
44. *Proctor v. Kardassilaris*, 115 Ohio St. 3d 71, 873 N.E.2d 872, 2007-Ohio-4838, ¶ 12, *citing Herman v. Klopfleisch*, 72 Ohio St.3d 581, 584, 651 N.E.2d 995 1995).
45. *Sanquily*, *supra*, at 78.
46. *Id.* at 79, *quoting* R.C. 2743.02(F) (emphasis added).
47. *Executors of Long's Estate v. State*, 21 Ohio App. 412, 415, 153 N.E. 225 (1926).
48. *Dunton*, *supra*, at 1350-51.
49. *Id.* at 1351.
50. *Id.* at 1350 (emphasis added).
51. *Foster v. Givens*, 67 F. 684, 685 (6th Cir. 1895). *See also Symons v. Eichelberger*, 110 Ohio St. 224, 2 Ohio L. Abs. 308, 144 N.E. 279 (1924); *Acme Lumber Co. v. Hallowell*, 2 Ohio Law Abs. 555, 555, 1924 WL 1983 (1st Dist. 1924) ("The United States sule [sic] is laid down in *Hanley v Donoghue*, 116 U. S. 1, that if it appears upon its face to be a record of a court of general jurisdiction, the court is presumed to have jurisdiction over the cause and parties, unless disproved by extrinsic evidence or the record itself.")
52. *Carlisle v. United States*, 517 U.S. 416, 434, 116 S.Ct. 1460, 134 L.E.2d 613 (1996) (Ginsburg, J. concurring).
53. *Sanquily*, *supra*, at 80.
54. *McRaith v. BDO Seidman, LLP*, 391 Ill.App. 565, 580, 909 N.E.2d 310 (Ill.App. 2009).
55. *Id.* at 578.
56. *Id.*
57. *Id.* at 579, 580-81, 583-84.
58. *Id.* at 580.
59. R.C. 2305.113(D)(1) and (2).
60. *Id.*
61. *Neisel v. Sherock, Jr., D.O., et al.*, Stark County C.P. Case No. 2012 CV 03490, January 16, 2013 Judgment Entry and related briefing. *See also* "Saving Medical Malpractice Claims from the Statute of Repose," OHIO TRIAL, Spring 2013; *Hinkle v. Henderson*, 85 F.3d 298, 304, 64 USLW 278 (7th Cir. 1996) (recognizing that 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).