A new defense tactic based on *Antoon v. Cleveland Clinic Foundation*

A new trend has developed in the defense bar, sprung from a recently decided Ohio Supreme Court case. If a medical negligence case is properly filed within the statute of limitations, properly dismissed under Ohio Civ. R. 41(A), and properly refiled under Ohio's saving statute, defense counsel seeks to dismiss if the refiling occurs more than four years from the date of the underlying negligent act. The rationale? The refiling violates the four-year statute of repose for medical claims. While this position is legally unsupported, it is important to understand the foundations of this defense tactic and be prepared to combat it through motion practice.

In *Antoon v. Cleveland Clinic Foundation*, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, the Ohio Supreme Court confirmed the constitutionality of Ohio's statute of repose when applied to medical claims filed more than four years after the alleged act of negligence. While medical providers will rely on the case to draw a line in the sand to dismiss any claim filed beyond the four-year date certain, a closer look at the case demonstrates its holding is limited and injured plaintiffs still have options beyond the four-year statute of repose.

Ohio's medical statute of repose, R.C. 2305.113(C), bars a medical malpractice action commenced more than four years after the act that constitutes the alleged malpractice, even if the four years ends before the plaintiff suffers any injury. In the medical context, statutes of repose are intended to provide certainty to medical providers that after the passage of a definite period of time, they will be free from liability for past negligence. But legislatively created statutes of repose must pass constitutional muster. Article 1, Section 16 of the Ohio Constitution Courts guarantees Ohio citizens the right to open courts and a remedy by due

course of law. *Antoon* gave the Ohio Supreme Court the opportunity to weigh Ohio's medical statute of repose against a plaintiff's constitutional right to a remedy.

In *Antoon*, the Clinic's alleged malpractice to start the four-year statute of repose period occurred on December 11, 2008. The Antoons timely commenced their medical malpractice claim in state court, but voluntarily dismissed without prejudice on June 13, 2011. They also filed a whistleblower action against the Clinic in federal court, and believed a federal tolling statute would preserve their state court action under Ohio's saving state, R.C. 2305.19(A). They refiled the medical malpractice suit in state court on November 14, 2013. Since the Antoons' recommenced action fell outside the four-year statute of repose, the trial court granted the Clinic's motion to dismiss. The Eighth District Court of Appeals reversed and held the Antoons' vested claim was not subject to the statute of repose.

The supreme court examined R.C. 2305.113(C) and found it is clear and unambiguous and means what it says: "If a lawsuit bringing a medical, dental, optometric, or chiropractic claim is not commenced within four years after the occurrence of the act or omission constituting the basis for the claim, then any action on that claim is barred." The court specifically noted that filing, then dismissing, an action does not indefinitely suspend the statute of repose. Once dismissed under Civ. R. 41(A), the law treats that action as if it never existed. Only the refiled complaint is relevant to determining whether the suit was commenced under the statute of repose. Thus, the date the Antoons filed their original action was not relevant to the statute of repose analysis.

One key fact limits the application of *Antoon*: the Antoons could not avail themselves of the saving statute. The court acknowledged: "We do not decide today whether Ohio's saving

statute, R.C. 2305.19, . . . properly invoked may allow actions to survive beyond expiration of the statute of repose." In his concurring opinion, Justice Pfeifer admonished the majority, which could have reversed the court of appeals by simply saying the plaintiffs filed their complaint too late and could rely on the saving statute. "Alas, this court saw an opportunity to further assault the fundamental constitutional right to a remedy."

Justice Pfeifer's concerns are valid. The majority's decision places more emphasis on restricting lawsuits against medical providers than protecting injured plaintiffs' constitutional right to a remedy. Nonetheless, by acknowledging it was not considering the effect of Ohio's saving statute, the *Antoon* majority hedged its holding. And that one sentence provides the ammunition the plaintiffs' bar needs to argue the saving statute applies to medical claims, even when they fall outside the four-year statute of repose.

The saving statue, R.C. 2305.19, is a broad statute of general application. There is nothing in R.C. 2305.19 proscribing its application to 2305.113(C). Likewise, there is nothing in R.C. 2305.113(C) to indicate the saving statute does not apply. Statutes of repose are to be read as enacted and not with an intent to circumvent legislatively imposed time limitations. Ohio's legislature also enacted the saving statute. Where possible, statutes should be read to coexist.

If a statute of repose is intended to provide medical providers with certainty with respect to the time to defend claims, the saving statute serves that purpose. The saving statute imposes a one-year time limitation within which an action can be recommenced. It only applies to timely commenced actions. It does not extend a statute of limitations. Medical providers cannot, therefore, argue that a properly refiled action violates the purpose of the statute of repose. Once dismissed, the plaintiff must refile within one year—giving injured plaintiffs their

constitutional right to a remedy and medical providers a date certain for commencement of an action.

Another argument against the defense's "line in the sand" position comes from the clear language of the medical statute of repose. R.C. 2305.113(D)(1) states that if a person could not have discovered an injury within three years, but discovers it before the expiration of four years, the person can commence a claim within one year of discovery. The statute itself creates an opportunity for claims to be filed beyond the four-year limit because R.C. 2305.113(D)(1) contemplates a plaintiff filing suit up to five years after the malpractice occurs.

Medical providers will use *Antoon* to move to dismiss any action filed more than four years after the occurrence of malpractice. But legislatively created time limitations must be measured against protecting constitutional rights. Once a claim is timely filed, normal rules of statutory construction apply, including application of the saving statute. Even under *Antoo*n, R.C. 2305.113(C) does not predominate over the saving statute or the constitutional right to a remedy. The saving statute and statute of repose can co-exist, even when commencing cases beyond four years.

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