IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

SHARON WALLACE, PLAINTIFF, v. MARCO AURELIO DE ALVIM COSTA, M.D., ET AL. DEFENDANTS.	)	Case No. CV 16-871593 JUDGE MICHAEL E. JACKSON **JOURNAL ENTRY AND OPINION: DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS.**

The Court denies Defendants Marco Aurelio De Alvim Costa M.D., University Hospitals Medical Group, Inc., and University Hospitals Health Systems' (Defendants) motion for judgment on the pleadings (Motion) pursuant to Civ.R 12(C), filed on December 7, 2016. Defendants assert that Plaintiff Sharon Wallace's (Wallace) re-filed medical claims are time barred by R.C. 2305.113(C) (Statute of Repose). Wallace counters by asserting that her re-filed complaint is timely because she has complied with R.C. 2305.19 (Savings Statute). Since parties agree that she properly invoked the Savings Statue, as discussed in this Journal Entry and Opinion, the issue is whether Wallace has properly commenced her refiled medical malpractice case by complying with the Savings Statute when the four-year period to commence her case has expired by the terms of the Statute of Repose.

FACTS

Wallace's medical malpractice claims arise out of a diagnostic cardiac catheterization performed by Defendant Dr. Marco Aurelio de Alvim Costa at University Hospitals Cleveland

Medical Center, Inc. on October 29, 2012. Wallace asserts that Defendants breached their professional duty of care by performing this procedure because it occurred without her informed consent, was experimental in nature, and not indicated for but used in her left main artery. As a result, she alleges a medical battery that caused her harm. Defendants deny these claims.

Wallace commenced an action on these medical claims against these Defendants in CV 14 82441, and then voluntarily dismissed these claims on November 16, 2015 pursuant to Civ.R. 41(A)(1)(a). On November 8, 2016, Wallace re-filed the present complaint[1] with the same or similar medical claims against all but one of the Defendants, within the one-year required under the Savings Statute.

On October 25, 2016, the Supreme Court of Ohio determined that "R.C. 2305.113(C) is a true statute of repose that applies to both vested and nonvested claims … [and that] any medical-malpractice action must be filed within four years of the occurrence of the act or omission alleged to have caused a plaintiff's injury." *Antoon v. Cleveland Clinic Found.*, 2016-Ohio-7432, ¶ 1. In doing so, it reversed an Eighth Appellate District Court's determination that a trial court errored when it dismissed plaintiffs' medical claims because the complaint was not filed within the relevant four-year Statute of Repose for medical claims. *Id.* at ¶ 35. On February 5, 2015, the Eighth Appellate District Court held that once a claim is vested, it is no longer controlled by the statue of repose, rather the claim is controlled by the statute of limitations or tolling provisions. *Antoon v. Cleveland Clinic Found.*, 2015-Ohio-421, ¶ 11 (8th Dist.), *rev'd*, 2016-Ohio-743. The Eighth Appellate District Court's opinion was the controlling case law over

[1] Dr. Michel Farah, who was a defendant in CV-14-824441, is not a party to this action.

Wallace's claims until The Supreme Court of Ohio reversed the decision on October 25, 2016.

LAW & ANALYSIS

Civ.R. 12(C) provides that a motion for judgment on the pleadings is filed after the pleadings are closed, but within such time as not to delay the trial when any party may move for judgment on the pleadings.[2] *Piersant v. Bryngelson*, 61 Ohio App.3d 359, 362, 572 N.E.2d 800 (8th Dist.1989). "A motion for judgment on the pleadings is the same as a motion to dismiss filed after the pleadings are closed and raises only questions of law. The pleadings must be construed liberally and in a light most favorable to the party against whom the motion is made, and every reasonable inference in favor of the party against whom the motion is made should be indulged. *Vaught v. Vaught* (1981), 2 Ohio App.3d 264, 2 OBR 293, 441 N.E.2d 811; *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 63 O.O.2d 262, 297 N.E.2d 113. The motion should be denied if it cannot be determined from the face of the pleadings that the pleading does not state a claim upon which relief can be granted. *Calhoun v. Supreme Court of Ohio* (1978), 61 Ohio App.2d 1, 15 O.O.3d 13, 399 N.E.2d 559." *Piersant* at 362, citing, *Case Western Reserve Univ. v. Friedman* (1986), 33 Ohio App.3d 347, 348, 515 N.E.2d 1004, 1005.

Statute of Repose

The Statute of Repose states:

> Except as to persons within the age of minority or of unsound mind as provided by section 2305.16 of the Revised Code, and except as provided in division (D) of this section, both of the following apply:

[2] Although Defendants filed their motion as a motion for judgment on the pleadings, and prayed that the Court enter judgment on the pleadings, they repeatedly cited to Civ.R. 56 regarding summary judgment and that rule's legal standard. There is no burden-shifting standard in a motion for judgment on the pleadings like there is for a Civ.R. 56 motion for summary judgment. This Court has only considered the pleadings, and those documents properly attached to the pleadings when making its ruling.

> (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, 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).

The Savings Statute

The Savings Statute states:

> In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, the plaintiff's representative may commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later. This division applies to any claim asserted in any pleading by a defendant. R.C. 2305.19.

Defendants argue that the Savings Statute does not apply because the Statute of Repose requires that medical claims commence within four years of the act or omission, which in this case was on or before October 29, 2016. For the purposes of satisfying the Statute of Repose, Wallace had to commence her action by that date and she failed to do so. Defendants rely on the Supreme Court of Ohio's holding that "R.C. 2305.113(C) is a true statute of repose that applies to both vested and nonvested claims … [and that] any medical-malpractice action must be filed within four years of the occurrence of the act or omission alleged to have caused a plaintiff's injury." *Antoon*, 2016-Ohio-7432 at ¶ 1. Defendants' also argue that previously filed cases that were dismissed are treated as if they have never been commenced. *See generally Zimmie v. Zimmie*, 11 Ohio St.3d 94, 95, 464 N.E.2d 142 (1984)(a trial court is deprived of jurisdiction to

reinstate claims after they are voluntarily dismissed)[3]. As a result, Defendants' argue that "commencement" for Wallace's claims are her re-filing date, November 8, 2016, and therefore, she failed to commence her re-filed case before the last day to comply with the Statue of Repose, October 29, 2016.

In *Antoon*, the Supreme Court of Ohio explained the purpose of the Statute of Repose, as follows:

> {¶ 22} In [*Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291], … [w]e explained that "[t]he statute of repose exists to give medical providers certainty with respect to the time within which a claim can be brought and a time after which they may be free from the fear of litigation," *Id*. at ¶19, and emphasized that "if the General Assembly cannot legislate a statute of repose, medical providers are left with the possibility of unlimited liability indefinitely." *Id.* at ¶ 29. (emphasis added).
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> {¶ 23} Today, we affirm that R.C. 2305.113(C) is a statute of repose because the time for bringing a suit under the section begins running from the occurrence of the act or omission[4] constituting the alleged basis of the claim. And we find that the plain language of the statute is clear, 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.

However, Defendants' total reliance on *Antoon* as the final word on this issue is

[3]Defendants' cases address other issues related to the effects of voluntarily dismissing a case under Civ.R. 41(A), and do not address the issues of temporal limitations as reflected in the Savings Statue. Defendants rely on the following cases: *De Ville Photography, Inc. v. Bowers*, 169 Ohio St. 267, 272, 159 N.E.2d 443 (1959)("Where an action or proceeding is dismissed without prejudice, rulings preceding the final judgment or decree of dismissal are, as a general proposition, not capable of becoming res judicata."); *Denham v. City of New Carlisle*, 86 Ohio St.3d 594, 598, 1999-Ohio-128, 716 N.E.2d 184 (in litigation involving multiple parties a voluntary dismissal under Civ.R. 41(A) renders the parties as if no suit had ever been filed against only the dismissed parties; therefore, a court ruling on summary judgment is a final appealable order as to the remaining parties.); *Wolk v. Paino*, 2010-Ohio-1755, ¶¶ 20-21(discovery requests in an action that was voluntarily dismissed, cannot serve as a basis for a motion to compel in a refiled action when there is no indication of any discovery requests being made in the refiled action.) Accordingly, these cases are not persuasive to resolve the issue in this case.

[4]Contrast with the statute of limitations regarding medical malpractice claims which includes discovery of the alleged occurrence or omission beyond one year based on what a reasonable person knew or should have known. The concept of discovery is not available in the Statute of Repose, except in limited circumstances when a one-year extension is available. R.C. 2305.113(D).

overstated and must be tempered by the fact that the Supreme Court of Ohio explicitly declined to decide "whether Ohio's saving statute, R.C. 2305.19…. properly invoked, may allow actions to survive beyond expiration of the statute of repose." *Antoon*, 2016-Ohio-7432, at ¶ 30.

The plaintiffs in the *Antoon* case, did not properly re-file their voluntarily dismissed medical claims within the one-year right to refile under the Savings Statue[5]. As a result, the Ohio Supreme Court did not face the more difficult issue before this Court where both parties acknowledge that Wallace timely re-filed her medical malpractice claims in accordance with the requirements of the Saving Statute.

Wallace relies on the Supreme Court of Ohio's determination that "where [the Savings Statute] applies, the date for filing the new action relates back to the filing date for the preceding action for [statute of] limitations purposes." *Frysinger v. Leech*, 32 Ohio St.3d 38, 42, 512 N.E.2d 337 (1987). Wallace argues that the same logic that the Supreme Court of Ohio applied in *Frysinger* concerning the statute of limitations should also apply to a similar situation concerning the temporal limitations imposed by the Statute of Repose.

Wallace contends that she timely commenced her original medical claims against Defendants, and properly dismissed those claims pursuant to Civ.R 41(A)(1)(a) and complied with the Savings Statute because her case failed "otherwise than on the merits." Accordingly, she argues that the Savings Statute protects her ability to have claims decided on the merits because

[5] There was also an issue raised relating to 28 USCS § 1367(D) that protects claims while pending in Federal Court (Federal Tolling Statute); however, the Supreme Court of Ohio determined that this federal tolling statue did not apply because plaintiffs' medical claims were never pleaded in Federal Court, which also declined to decide whether proper invocation of the Federal Tolling Statue would allow actions to survive beyond the time to commence an action before the statute of repose would extinguish claims. *Antoon* at ¶ 30.

she commenced this new action with substantially similar medical claims on November 8, 2016, eight days before November 16, 2016, the one-year anniversary of the date those failed claims. Finally, Wallace argues that the Savings Statute only applies when a case is timely commenced, then dismissed without prejudice, and timely re-filed within one year. *Lewis v. Connor*, 21 Ohio St.3d 1, 4, 487 N.E.2d 285 (1985). She argues that she has complied and that her proper invocation of the Savings Statute satisfies the commencement requirement for the Statute of Repose because the November 8, 2016 re-filing relates back to the original filing.

Courts apply R.C. 1.51 to resolve a situation where the application of two statutes produces different results.

> If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevails. R.C. 1.51.

This Court must construe the Statute of Repose and the Savings Statute "if possible, so that effect is given to both statutes," based on the circumstances of this case. *Id*. The analysis starts with "commencement," which is a term used in both statutes. A plaintiff commences a civil case by filing a complaint and by obtaining service within one year of the filing of a complaint upon a named defendant. Civ.R. 3(A). In addition, plaintiff must comply with the applicable medical malpractice statute of limitations, which is one year from the date of the occurrence[6].

[6] Pursuant to R.C. 2305.113(B)(1) a claimant may obtain a 180 day extension of time to file medical malpractice claims if the claimant gives to the person who is the subject of that claim written notice that the claimant is considering bringing an action upon that claim, that action may be commenced against the person notified at any time within one hundred eighty days after the notice is so given.

The Savings Statute specifically entitles, without any exceptions, a claimant to refile any type of civil claim that was properly filed, and properly refiled in accordance with the Savings Statute. It unequivocally states that in any action commenced or attempted to be commenced that fails "otherwise than on the merits" then it may be commenced as a new action within one year of the failure, or within the original statute of limitations whichever is the longer time period. Yet, the Statute of Repose requires that medical malpractice claims must commence "no more than four years after the occurrence of the actor or omission [or] that claim is barred." Defendants assert that Wallace failed to do so because, as they argue, the first filing must be treated as if it was never filed, and she did not re-file before the four year anniversary of Defendants' alleged acts or omissions, which bars her claim by this statute.

The common purpose of both a statute of limitations and a Statute of Repose is to limit the time in which a putative wrongdoer must be prepared to defend a claim. *Antoon*, 2016-Ohio-7432, at ¶ 11. The Supreme Court of Ohio in *Antoon* observed that "if the General Assembly cannot legislate a statute of repose, medical providers are left with the "possibility of unlimited liability indefinitely" and later concluded that "[s]ignificant public-policy considerations support granting repose to defendants, and the General Assembly has determined that four years as the reasonable length of time to bring a medical malpractice claim." *Id.* at ¶¶ 22, 34.

However, that concern of the "possibility of unlimited liability indefinitely" is certainly not presented by the facts of Wallace's case. Because of the initial complaint filed by Wallace, Defendants know the allegations of the alleged medical malpractice; they are not facing "unlimited liability." Neither are they facing "liability indefinitely" because Wallace must comply with the Saving Statute in order to gain the one-year period within which to refile her

case and then have it relate back to the original commencement date. *Frysinger*, 32 Ohio St.3d 38, at 42. This one-year period is not "unlimited liability indefinitely."

Further, the Statute of Repose itself provides for one-year extensions concerning certain alleged medical malpractice claims[7]. When comparing a plaintiff who is exercising rights under the Savings Statute to another plaintiff who qualifies for the Statue of Repose extension, neither plaintiff will have more than one year to assert their claim. Under the Statute of Repose, neither circumstance creates the "possibility of unlimited liability", nor defeats the purpose of the Statute of Repose "to give medical providers certainty with respect to the time within which a claim can be brought and a time after which they may be free from fear of litigation." *Antoo*n, 2016-Ohio-7432, at ¶ 22.

If "significant public-policy considerations" existed for the General Assembly when it passed the Statute of Repose on April 11, 2003 to permit a one year extension of time to file certain medical malpractice claims pursuant to the Statute of Repose, then the same considerations exist for properly filed medical malpractice claims under the Savings Statute which the General Assembly passed about one year later in March 2, 2004, "[W]hen the General Assembly acts, it has knowledge of prior legislation when it enacts subsequent legislation." *Schindler Elevator Corp. v. Tracy*, 84 Ohio St.3d 496, 499, 705 N.E.2d 672 (1998) (citation omitted). Not only was the General Assembly aware of the Savings Statute, they were aware of

[7] R.C. 2305.113 has two exceptions to the four year statute of repose set forth in section C. Pursuant to R.C. 2305.113(D), a claimant who proves by clear and convincing evidence that in the exercise of reasonable care and diligence he could not have either discovered within the four year statute of repose that a foreign object was left in his body, or if he could not have discovered the resulting injury within three years of the occurrence of the act or omission, but in the exercise of reasonable care and diligence discovers an act or omission prior to the four year statue of reposing lapsing, then he will be granted a one year extension to file his claims.

the *Frysinger* decision. They could have excluded the application of this case regarding the Statue of Repose or limited the application of *Frysinger* to the statute of limitations cases. They did neither.

Moreover, the Supreme Court of Ohio in *Frysinger* was called upon to construe the statute of limitations and the Savings Statute and did so by giving effect to both of these statutes. In that medical malpractice case, the plaintiff timely filed the complaint, and thereafter voluntarily dismissed the case. *Frysinger,* 32 Ohio St.3d 38, at 39-40. The plaintiff re-filed the medical malpractice complaint within the one-year period permitted by the Saving Statute; however, in the interim, the statute of limitation for the medical malpractice claim expired before the refiling of the new lawsuit. The Supreme Court of Ohio determined that a medical malpractice action that is voluntarily dismissed pursuant to Civ.R 41(A)(1)(a), is a failure "otherwise than upon the merits" within the meaning of the Savings Statue, thereby allowing that statute to be applied to the refiling of medical claims. *Id.* at 43. The Supreme Court of Ohio permitted the legislative relief and protection provided by the Saving Statute and determined that plaintiff complied with the statute limitations because the refiling by the plaintiff within the one-year time period of the Saving Statute constituted a "new action [that] relates back to the filing date for the preceding action for limitations purposes." *Id*. (emphasis added).

Pursuant to R.C.1.51, this Court determines that the Supreme Court of Ohio's analysis and decision in *Frysinger* provides the proper analysis to construe the Saving Statute and the Statute of Repose to give effect to both statutes.

The defendant in *Frysinger* argued that plaintiff should have her case dismissed pursuant to the statute of limitations for medical malpractice claims, but the Supreme Court of Ohio

disagreed because the plaintiff had complied with the Savings Statute. *Frysinger*, 32 Ohio St.3d 38, at 39, 43. Likewise, Defendants argue that Wallace should have her medical malpractice case dismissed pursuant to the Statute of Repose, based upon their assertion that the Saving Statute does not apply.

Since the Supreme Court of Ohio in *Frysinger* held for the plaintiff by stating that "where R.C. 2305.19 applies, the date for filing the new action relates back to the filing date for the preceding action for limitations purposes," this Court now holds that Wallace has properly complied with all of the terms and conditions of the Saving Statute. *Id*. at 42. The date for filing Wallace's new action relates back to the date filing date of the preceding action, CV 14 82441, for Statute of Repose purposes. *Id.* Accordingly, Wallace's compliance with the Savings Statute allows her re-filed case to continue because the "commencement" date relates back to the original filing, which is within the four-year Statue of Repose.

Based on this determination, there is no need to apply the terms of R.C. 1.51 regarding "if the conflict between the provisions is irreconcilable." *Id.* Even if the Saving Statute and the Statute of Repose were considered "irreconcilable," and even if the resulting analysis of this aspect of R.C. 1.51 concluded that the Statute of Repose should be applied rather than the Savings Statute[8], the Court determines that Defendant's Motion still would be denied. The Court

[8] The Savings Statute is the general provision that was effective on March 2, 2004 while the Statute of Repose is a special provision that was effective on April 11, 2003. As the later adopted provision, the Savings Statute prevails if it is "the manifest intent [that] the general provision prevail." R.C. 1.51. Since the General Assembly is aware of its previous legislation, , it is reasonable to conclude that when the Savings Statue was passed, the General Assembly stated it was their "manifest intent" to have the Savings Statue prevail over the Statute of Repose. R.C. 1.51; *Schindler Elevator Corp.* at 499. Moreover, this Court discussed the relationship of the statutory conditions that allow the Statute of Repose to be extended by one year, and the subsequent passage of the Savings Statute after the Supreme Court of Ohio's holding in *Frysinger. Supra at 9-10.* Based on all of these factors, the manifest intention of the Legislature is that the Savings Statute prevails over the Statute of Repose.

does so because it would be unjust to apply the Statute of Repose to bar Wallace's claims, based upon the Supreme Court of Ohio's view of the constitutional limits regarding the application of the Statute of Repose as articulated in *Antoon*, 2016-Ohio-743 at ¶ 28.

It is necessary to understand the procedural history of the *Antoon* case to understand this constitutional issue. On February 5, 2015, the Eighth Appellate District Court determined that the plaintiffs, David and Linda Antoon, had a vested claim that was filed before the Statute of Repose lapsed, and that since the claim vested, the Statute of Repose no longer applied. *Antoon*, 2015-Ohio-421, ¶ 11, *rev'd*, 2016-Ohio-743. Instead of the Statute of Repose, the claim would be controlled by the statute of limitations and any tolling provisions. *Id.* As a result, the Eighth Appellate District Court determined that the trial court errored when it dismissed plaintiffs' medical claims because the complaint was not filed within the relevant four-year Statute of Repose for medical claims. *Id.* at ¶ 9.

From February 5, 2015 to October 25, 2016, the Eighth Appellate District Court's determination in *Antoon* was the controlling law for Wallace's claims. On October 25, 2016, the Supreme Court of Ohio reversed the decision of the Eighth Appellate District Court; this occurred just four days before October 29, 2016, the end of the four-year time period regarding Wallace's claims based only on the Statute of Repose.

The Supreme Court of Ohio in *Antoon* clearly stated that with regard to the Statute of Repose, a party does not have an unlimited amount of time to bring a vested cause of action. *Antoon*, 2016-Ohio-743, at ¶ 28. However, that party must receive only a "reasonable" amount of time in order for a law to pass the constitutional muster regarding the Ohio Constitution's right to a remedy. *Id.* The right-to-remedy provision provides, "All courts shall be open, and every

person, for an injury done to him in his land, goods, person or reputation, shall have remedy by due process of law***." *Article 1, Section 16, Ohio Constitution; Antoon* at ¶ 28.

When Wallace dismissed her claims pursuant to Civ.R 41(A)(1)(a) on November 16, 2015, the Eighth Appellate District Court's decision in *Antoon* had been in place about 10 months and would remain in place for about another 11 months before the Supreme Court of Ohio overturned that decision. During this approximately 21 months, Wallace had no legal reason to believe that she had to refile her dismissed case before October 29, 2016, the final date for the Statute of Repose. Her legal obligation was to ensure that her case was refiled by November 16, 2016, the final date of the Saving Statute, and she complied timely by refiling on November 8, 2016.

In fact, the Eighth Appellate District Court's decision in *Antoon* provided Wallace with legal protection of her claims because the Statute of Repose was not an issue since her claim was vested. However, that legal protection vanished on October 25, 2016 when the Supreme Court of Ohio overturned that decision. Thereafter, Wallace re-filed her claims on November 8, 2016, within 14 days of the Supreme Court of Ohio's decision overturning the Eighth Appellate District Court's decision.

As applied to Wallace, enforcing the Statute of Repose in her case is unconstitutional because she did not receive a "reasonable amount of time" under these facts. Imposing the terms of the Statute of Repose in this situation completely forecloses Wallace's constitutional right to a meaningful right-to-remedy when the refiling of her case would have been upheld based on the Eighth Appellate District Court's decision, and when she filed her new complaint within 14 days of the Supreme Court of Ohio's decision. *Antoon*, 2016-Ohio-743, at ¶ 28. Until the Supreme

Court of Ohio overturned the Eighth Appellate District Court's ruling, Wallace was reasonable in relying on the Eighth Appellate District Court's legal conclusion that once a claim was vested, the Statue of Repose no longer applied, and the only legal considerations in play were statute of limitations or tolling provisions. Accordingly, the Court determines that Wallace's claims were filed within a reasonable time to enforce her right to a remedy under *Article 1, Section 16, Ohio Constitution,* based on the change in interpretation of law so close to the accrual date for alleged acts or omissions constituting Wallace's medical claims.

CONCLUSION

For all of the reasons stated above, the Court denies Defendants Motion. The Court considered the pleadings and motion by construing them liberally and in a light most favorable to Wallace, the party against whom the motion is made, and making every reasonable inference in her favor. Civ.R. 12(C).

IT IS SO ORDERED.

DATED: _____ **JUDGE MICHAEL E. JACKSON**

THE CLERK OF COURT SHALL SERVE A COPY OF THE FOREGOING JOURNAL ENTRY AND OPINION ON ALL COUNSEL OF RECORD AT THE ADDRESS LISTED ON THE COURT DOCKET.