[Cite as *Portee v. Cleveland Clinic Found.*, 2017-Ohio-1053.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104693

PAMELA PORTEE, ET AL.

PLAINTIFFS-APPELLANTS

vs.

CLEVELAND CLINIC FOUNDATION, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-848438

BEFORE: Blackmon, J., E.A. Gallagher, P.J., and Stewart, J.

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ATTORNEYS FOR APPELLANTS

Donald P. Kotnik
600 West Maple Street
North Canton, OH 44720

Matthew Schiller
Schiller Law Offices, L.L.C.
8470 Allison Pointe Boulevard
Suite 222
Indianapolis, IN 46250

David V. Patton
The Patton Law Firm, L.L.C.
33595 Bainbridge Road, Suite 200A
Solon, OH 44139-2981

ATTORNEYS FOR APPELLEES

Martin T. Galvin
Ronald A. Mingus
Reminger Co., L.P.A.
1400 Midland Building
101 Prospect Avenue West
Cleveland, OH 44115

PATRICIA ANN BLACKMON, J.:

{¶1} Pamela Portee, et al. ("Portee") appeals from the trial court's granting summary judgment in favor of the Cleveland Clinic Foundation, et al. ("the Clinic") in this medical malpractice action. Portee assigns the following error for our review:

> I. The trial court erred in granting summary judgment to the Defendants on the grounds that the statute of limitations had expired, where under Ohio's Savings Statute, R.C. 2305.19, this action was timely filed within one year of the dismissal, other than on its merits, of the Plaintiffs' federal lawsuit.

{¶2} Having reviewed the record and pertinent law, we find that the savings statute applies to the case at hand, and we reverse the trial court's judgment and remand for further proceedings consistent with this opinion. The apposite facts follow.

{¶3} On October 3, 2012, Portee, who is an Indiana resident, came to Cleveland and underwent elbow surgery at the Clinic. Allegedly, Portee's ulnar nerve was severed during the procedure, resulting in damage and "a second revision surgery" on May 8, 2013.

{¶4} On October 2, 2013, Portee filed a medical malpractice case in federal court against the Clinic. *Portee v. Cleveland Clinic Found.*, S.D.Ind. No. 1:13-cv-01582-SEB-TAB (Jul. 28, 2014). On July 28, 2014, the federal court granted the Clinic's motion to dismiss the case for lack of personal jurisdiction.

{¶5} On July 17, 2015, Portee filed an identical medical malpractice case against the Clinic in the Cuyahoga County Court of Common Pleas. On June 7, 2016, the court granted the Clinic's motion for summary judgment based on the statute of limitations. The heart of this appeal beats around whether the savings statute found in R.C. 2305.19 applies when the initial case was dismissed, otherwise than on the merits, in federal court.

Standard of Review for Summary Judgment

{¶6} Appellate review of granting summary judgment is de novo. Pursuant to Civ.R. 56(C), the party seeking summary judgment must prove that (1) there is no genuine issue of material fact; (2) they are entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party. *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996).

Statute of Limitations and Savings Statute

{¶7} Pursuant to R.C. 2305.113(A), "an action upon a medical * * * claim shall be commenced within one year after the cause of action accrued." Additionally, R.C. 2305.19 permits a plaintiff, "[i]n any action that is commenced," to refile his or her case within one year after the action has failed otherwise than upon the merits, even if the applicable statute of limitations has expired. Under Ohio law, a dismissal for lack of personal jurisdiction operates "as a failure otherwise than on the merits." Civ.R. 41(B)(4)(a).

{¶8} R.C. 2305.19 does not specify in which court an action must be commenced for the savings statute to apply. Portee argues that her original action in federal court was timely, the federal court dismissed her case for reasons other than on the merits, and she filed an identical suit in state court within one year of the dismissal. Therefore, the savings statute should apply.

{¶9} The Clinic argues that the trial court properly found that Portee's "action is barred by the applicable statute of limitations" pursuant to *Howard v. Allen*, 30 Ohio

St.2d 130, 133-134, 283 N.E.2d 167 (1972), which held that R.C. 2305.19 "is not applicable to actions commenced or attempted to be commenced in foreign states." The Clinic further argues that "there is no case law (or other authority) that stands for the proposition that the Ohio savings statute can be used to 'save' a lawsuit filed and dismissed other than on the merits in another jurisdiction." However, the law is not as straightforward as the Clinic would have this court believe.

{¶10} Prior to *Howard*, the Ohio Supreme Court decided *Wasyk v. Trent*, 174 Ohio St. 525, 530, 191 N.E.2d 58 (1963), which held that "where a plaintiff institutes a civil action in a federal court and * * * the court * * * dismisses the action * * * otherwise than upon the merits * * * such plaintiff can bring a new action in a court of this state under the provisions of Section 2305.19, Revised Code." *Wasyk* is procedurally on point with the case at hand. *Howard* differs slightly, because the initial action was filed in a state court (South Carolina to be precise), rather than a federal court. *Howard*, 30 Ohio St.2d at 130-131. In fact, *Howard* does not mention federal courts, nor does it mention, let alone overrule, *Wasyk*.

{¶11} At oral argument, the Clinic focused on the phrase "foreign states" from the *Howard* opinion to support its argument that R.C. 2305.19 does not apply to save an action originally filed in Indiana. However the statute itself is silent on the issue of what jurisdiction or court an action must originate in; rather, the statute applies to "any action that is commenced" by a plaintiff. Additionally, R.C. 2305.19(A) states that "[t]his division applies to any claim asserted in any pleading by a defendant."

{¶12} Furthermore, in 2002, the Ohio Supreme Court carved out an exception to *Howard* in *Vaccariello v. Smith & Nephew Richards, Inc.*, 94 Ohio St.3d 380, 382, 2002-Ohio-892, 963 N.E.2d 160. *Vaccariello* expressly modified the application of *Howard* by holding that "[t]he filing of a class action, whether in Ohio or the federal court system, tolls the statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." In *Vaccariello*, the Ohio Supreme Court further implied that *Howard* was not infallible: "This court has not had occasion to revisit, or even cite, *Howard* in the intervening thirty or so years. Much has changed since *Howard* was decided. * * * We conclude that it is more important to ensure efficiency of litigation than to rigidly adhere to the rule of *Howard*." *Id*. at 381-382.

{¶13} Additionally, in *Osborne v. AK Steel/Armco Steel Co.*, 96 Ohio St.3d 368, 2002-Ohio-4846, 775 N.E.2d 483, the court found that R.C. 2305.19 applied to save an age discrimination claim that was timely filed in federal court, dismissed without prejudice, then refiled in state court one year later. The issue in *Osborne* concerned whether R.C. 2305.19 applied to statutory-based age discrimination claims, not whether the savings statute applied when the original claim was filed in federal court. Nonetheless, it just so happens that Osborne's original claim *was* filed in federal court and his subsequent state claim was "saved" by R.C. 2305.19.

{¶14} The Second, Sixth, and Ninth District Courts of Appeals have cited *Wasyk* and held that the savings statute applies to actions that are dismissed other than on the

merits in federal court and refiled within one year in state court. *See Shade v. Kaiser*, 2d Dist. Montgomery No. 24974, 2012-Ohio-4979, ¶ 21 (R.C. 2305.19 "applies to actions commenced in state court on claims for relief that previously failed otherwise than on the merits in a federal action"); *Firsdon v. Mid-American Natl. Bank & Trust Co.*, 6th Dist. Wood No. 90WD083, 1991 Ohio App. LEXIS 4808 (Oct. 11, 1991) ("when a cause of action is commenced in a federal court, and the federal court determines that it has no jurisdiction over the cause of action, * * * 'such plaintiff can bring a new action in a court of this state under' R.C. 2305.19") (quoting *Wasyk*); *D'Amico v. Stow*, 9th Dist. Summit No. 13376, 1988 Ohio App. LEXIS 2899 (July 20, 1988) (applying the savings statute to a "new action" filed beyond the statute of limitations when the initial action was timely filed in federal court and voluntarily dismissed.)

{¶15} The Fourth and Seventh District Courts of Appeals, on the other hand, have cited *Howard* and determined that it prohibited the application of R.C. 2305.19 to cases initially filed in federal court. *See Reed v. Jagnow*, 7th Dist. Mahoning No. 12MA201, 2013-Ohio-2546, ¶ 45 (holding that "appellant's savings statute argument fails" when he filed in state court within one year of a federal dismissal. "*Howard* is still the law in cross-jurisdictional tolling in those cases not involving class actions"); *Ruble v. Ream*, 4th Dist. Washington No. 03CA14, 2003-Ohio-5669, ¶ 26-30 (concluding that *Osborne* and *Vaccariello* did not overrule *Howard* and R.C. 2305.19 only applies to actions commenced in Ohio within the appropriate statute of limitations.)

{¶16} Prior to *Vaccariello*, this court held that a class action filed in a Wisconsin state court did not "toll" the statute of limitations in Ohio. *Ohio Hosp. Assn. v. Armstrong World Indus*., 8th Dist. Cuyahoga No. 76067, 2000 Ohio App. LEXIS 1538 (Apr. 6, 2000) ("this court is unable to conclude that under the current state of Ohio law, the appellant is entitled to a tolling of the applicable statute of limitations during the period in which the [class action] litigation was pending in a Wisconsin court, prior to the decertification of the proposed class.") Neither party to the instant case cited *Armstrong*. *Vaccariello* was decided two years after *Armstrong*, and although *Vaccariello* mentioned *Armstrong* without expressly overruling it, it appears that *Armstrong* is no longer "good law" in Ohio. *See also Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554, 94 S.Ct. 756, 38 L.E.2d 713 (1974) ("the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.")

{¶17} Additionally, it does not appear that this court has applied *Howard* to any other cases involving the savings statute and cross-jurisdictional tolling. Accordingly, we find that the following issue is unresolved in this court: Whether R.C. 2305.19 "saves" a case that was timely filed but ultimately dismissed, other than on the merits, in federal court then refiled in state court within one year.

{¶18} In the instant case, neither party is challenging that the initial federal court case was timely filed and that the claims and parties in both the federal court case and the state court case are the same. These facts must be in place for the savings statute to

apply. *Accord Gati v. Americredit Fin.*, 8th Dist. Cuyahoga No. 96919, 2012-Ohio-361, ¶ 20 (R.C. 2305.19 cannot save an action unless the initial action was filed within the appropriate statute of limitations); *Children's Hosp. v. Ohio Dept. of Pub. Welfare*, 69 Ohio St.2d 523, 525, 433 N.E.2d 187 (1982) ("the saving statute [is] inapplicable in a case where the parties and relief sought in the new action are different from those in the original action.")

{¶19} Historically, Ohio courts have based decisions involving the savings statute on "strong policy considerations":

> The laudable purpose of the statute of limitations is to promote justice by preventing surprise through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared. Since the savings statute is available only to plaintiffs whose actions were timely commenced, such statutes are perfectly consistent with the goals statutes of limitations are designed to serve.
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> Additionally, we are in accord with the view expressed by Chief Justice Weygandt concerning the savings statute. He stated the statute is "broad and unambiguous" and should be "liberally construed in order that controversies * * * be decided upon important substantive questions rather than upon technicalities of procedure." *Gruelich v. Monnin* (1943), 142 Ohio St. 113, 116, 26 O.O. 314, 315, 50 N.E. 2d 310, 312.

Kinney v. Ohio Dept. of Adm. Servs., 30 Ohio App.3d 123, 126, 507 N.E.2d 402 (10th Dist.1986). *See also Cleveland Indus. Square, Inc. v. Dzina*, 8th Dist. Cuyahoga Nos. 85336, 85337, 85422, 85423, 85441, 2006-Ohio-1095, ¶ 51 ("We are * * * mindful of the liberal construction that the savings statute is to be provided.")

{¶20} Furthermore, the savings statute may only be used once. *Koslen v. Am. Red Cross*, 8th Dist. Cuyahoga No. 71733, 1997 Ohio App. LEXIS 4007 (Sept. 4, 1997); *Thomas v. Freeman*, 79 Ohio St.3d 221, 680 N.E.2d 997 (1997). "The statute may not be relied upon to indefinitely keep a cause of action alive," because this would frustrate the purpose of the civil rules. *Seawright v. Zabell*, 8th Dist. Cuyahoga No. 55323, 1989 Ohio App. LEXIS 1601 (Apr. 27, 1989).

{¶21} Accordingly, given the law and the policy considerations behind a liberal application of the savings statute, we find that Portee's July 17, 2015 medical malpractice case was timely filed in the Cuyahoga County Court of Common Pleas pursuant to R.C. 2305.19 and 2305.113(A). The court erred as a matter of law in granting summary judgment to the Clinic based on the statute of limitations having run. Portee's sole assigned error is sustained, the court's judgment is reversed, and this case is remanded to the trial court for proceedings consistent with this opinion.

{¶22} Judgment reversed and remanded.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

EILEEN A. GALLAGHER, P.J., and
MELODY J. STEWART, J., CONCUR