

Is it impossible for me to perform? The Bullet Point: Volume 2, Issue 23

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Accrual of Claims

Schmitz v. Natl Collegiate Athletic Assn, Slip Op. No. 2018-Ohio-4391.

In this appeal, the Ohio Supreme Court considered whether various tort claims were time-barred or whether the discovery rule to the statute of limitations applied.

Mr. Schmitz sustained various concussions while playing football in college in the 1970's. In 2012 he was diagnosed with a degenerative brain disease, Alzheimer's disease, and dementia – all of which he claimed were caused or aggravated by the concussions he suffered playing football. He passed away in February 2015. Prior to his death, Mr. Schmitz and his wife filed suit against Defendant NCAA and others alleging that they failed to notify, educate, or protect him from the long term dangers of repeated concussions.

He asserted claims for negligence, constructive fraud, and fraudulent concealment. Defendants moved to dismiss the claims, arguing that they were all barred by the applicable statute of limitations, and the trial court granted the motion. On appeal, the Eighth Appellate District affirmed.

Mr. Schmitz's heirs appealed to the Ohio Supreme Court which reversed, finding that, as plead, the amended complaint did not conclusively show the claims were time-barred, as the discovery rule could have applied to toll the statute of limitations.

The Bullet Point: Fraudulent concealment and constructive fraud claims are subject to a two-year statute of limitation under R.C. 2305.10(A). A cause of action for bodily injury accrues and the limitations period begins to run "when the injury* * * occurs." R.C. 2305.10(A). Because this could result in a bar on an injured party's right to recover even before he or she is aware that an injury exists, the Supreme Court developed a "discovery rule" exception to this statute of limitation. With respect to a latent injury, a claim accrues under the discovery rule on either "the date on which the plaintiff is informed by competent medical authority that he has been injured, or upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had

been injured, whichever date occurs first.” Accrual of a cause of action for bodily injury requires that the plaintiff “knows or, by the exercise of reasonable diligence should have known, that he had been injured by the conduct of the defendant.” In other words, the statute of limitation begins to run when the plaintiff knows or, in the exercise of reasonable diligence, should have known that he or she suffered a cognizable injury.

This becomes problematic when the injury is a “latent injury.” As the Supreme Court noted, “the procedural dilemma confronting a plaintiff in cases where a long latency conflicts with a short statute of limitations provides the plaintiff with only an illusory opportunity to litigate his or her claim.”

Impossibility of Performance

Paulozzi v. Parkview Custom Homes, LLC, 8th Dist. Cuyahoga No. 106617, 2018-Ohio-4425.

This was an appeal of a trial court’s denial of a motion to compel arbitration and stay the case. The plaintiffs had entered into a construction agreement with the defendant. The agreement contained a “Remedies” provision which stated, in relevant part, that “in the event any remedy or limitation of remedy is invalid or unenforceable, such invalidity or unenforceability shall not adversely effect any other limitation....” The agreement also contained a broad arbitration clause.

The plaintiffs claimed that the defendant built them a home but within a year of moving in, they had issues with the driveway and kitchen floor. They contend they notified the defendant of the problems but the issues were never fixed. Thereafter, plaintiffs filed suit against the defendant. Defendant, in turn, filed a motion to compel arbitration and stay the case. The plaintiffs responded that the arbitration clause was unenforceable. The trial court agreed.

On appeal the Eighth Appellate District reversed, finding that performance of the arbitration agreement was not impossible as plaintiffs alleged.

The Bullet Point: Impossibility of performance can be a defense to enforcement of an arbitration clause.

“Impossibility of performance occurs where after the contract is entered into ‘an unforeseen event arises rendering impossible the performance of one of the contracting parties. * * * However, a contracting party will not be excused from performance merely because performance may prove difficult, dangerous, or burdensome.’” Moreover, under Ohio law, public policy favors the enforcement of arbitration provisions, and any doubt regarding arbitration should be resolved in its favor.