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Moore and Goolsby: What's Changed In Ohio Supreme Court Precedent Addressing Civil Rule 3(A) and The Savings Statute?

By Brenda M. Johnson

On August 20, 2020, the Ohio Supreme Court issued its decision in *Moore v. Mount Carmel Health System*,[1] in which the Court examined the relationship between Ohio's savings statute, R.C. § 2305.19(A), and the provisions of Civil Rule 3(A), for purposes of determining whether a medical malpractice action had been "commenced" in a timely fashion for purposes of the applicable statute of limitations.

The upshot of the Court's ruling is this – in order to have the benefit of the savings statute, a plaintiff must file her complaint within the applicable statute of limitations, and then must either (a) obtain service on the defendant within the one year period provided in Civil Rule 3(A), or, (b) after having attempted to obtain service, dismiss the action without prejudice within that same one year period. There are no exceptions.

In getting to this conclusion, the Court placed strict limits on *Goolsby v. Anderson Concrete Corp.*,[2] an earlier opinion addressing the interplay between R.C. § 2305.19(A) and Civil Rule 3(A). In *Goolsby*, the Court held that filing instructions for service in an action where the one-year period for service set forth in Rule 3(A) had passed could serve as the equivalent of refiling the complaint for purposes of the savings statute. *Moore* now conclusively establishes this rule applies **only** in cases where instructions for service that are filed *outside* Rule 3(A)'s one-year period are filed *before* the statute of limitations has expired.[3]

Moore added one more caveat – now, where service has been attempted, but not perfected, a failure "otherwise than on the merits' must occur *before* the one-year period for service under Rule 3(A) has elapsed in order for the savings statute to apply. In other words, *Moore* now stands for the proposition that a Rule 41(A) dismissal of a case in which service has been attempted, but not perfected, must be made *before* the one-year for service provided in Rule 3(A) has expired, or the savings statute will not preserve the dismissed case.

Moore's Procedural History

Moore arose from a medical malpractice case involving allegations of negligence on the part of an anesthesiologist. The complaint was filed one day before the statute (which had been extended by 180 day letters) was about to expire, naming the anesthesiologist as a defendant, along with his practice group, as well as the hospital at which the care at issue was provided. The plaintiff, who originally filed *pro se*, requested service on all defendants, but effective service on the treating anesthesiologist was not completed within the year following the filing of the complaint.[4]

After the year for service had passed, all three defendants moved for summary judgment, arguing that the plaintiff's claim against the anesthesiologist was time-barred because the plaintiff had failed to serve him within the one year period set forth in Civ. R. 3(A).[5] Plaintiff responded by issuing instructions to the clerk for

personal service on the anesthesiologist, which was perfected on the physician at his home.[6]

The trial court granted summary judgment in favor of all three defendants based on plaintiff's failure to obtain service on the anesthesiologist defendant within the year required under Civil Rule 3(A).[7] The Tenth District reversed, based on *Goolsby*.[8] As will be discussed below, the Supreme Court found that the Tenth District's reliance on *Goolsby* was misplaced.

The Holding In *Goolsby*

Goolsby arose from an auto case in which the plaintiff filed her action within the statute of limitations, but instructed the clerk of courts not to attempt service of the complaint and summons at the time of filing.[9] Then, two days before the statute was due to expire, she instructed the clerk to serve the defendant, which occurred six days thereafter.[10] The plaintiff then dismissed her action with leave of court pursuant to Rule 41(A)(2), and refiled four days later.[11]

The defendant moved to dismiss the second suit, arguing that no action had been commenced in the first suit because service had not be made within a year of filing, as required under Rule 3(A).[12] The trial court agreed and dismissed the suit, but the Supreme Court held otherwise.

The Court acknowledged that a "purely technical" application of Rule 3(A), which defines commencement of an action as requiring service within a year of filing the complaint, "would result in a finding that Goolsby had not commenced her action . . ." on the facts presented.[13] At the same time, the Court noted that " [o]ne clear consequence" of Rule 3(A), "is that it is not necessary to obtain service upon a defendant within the limitations period . . ., " which means the rule allows a plaintiff to "file a complaint on the last day of the limitations period and have a full year beyond that date within which to obtain service."[14] The Court also noted the parties did not dispute "that, had Goolsby dismissed her complaint and again filed at the time instructions for service were given, the [first] action would have been commenced" for purposes of Rule 3(A).[15]

Based on this, the Court held that under the circumstances presented, "when service has not been obtained within one year of filing a complaint, and the subsequent refiling of an identical complaint within rule would provide an additional year within which to obtain service and commence an action under Civ. R. 3(A), an instruction to the clerk to attempt service on the complaint will be equivalent to a refiling of the complaint."[16]

How *Moore* Limits *Goolsby*

The Court's core analysis in *Moore* is based on the language of Rule 3(A) and the savings statute, R.C. § 2305.19, and not on prior precedent. Yet, as discussed below, the Court used *Moore* as an opportunity to place strict limits on *Goolsby*, an opinion it currently disagrees with but was not ready to overrule.

The Court first looked to Rule 3(A), which, as the Court noted, provides that an action is "*commenced* by filing a complaint with the court, *if service is obtained within one year* from such filing . . ."[17] "The upshot" of this, according to the Court, "is that to comply with the statute of limitations, an action must be "commenced" within the limitations period," which under Rule 3(A) "occurs when the action is filed within the limitations period and service is obtained within one year of that filing."[18] The Court then noted that the savings statute applies to (a) "any action that is commenced or attempted to be commenced" in which (b) the plaintiff fails otherwise than on the merits.[19]

Construing the rule and the statute together, the Court held that the savings statute did not apply, as the Court determined that Moore's action did not fail otherwise than on the merits; instead, it failed because the statute of limitations had run, which in turn had occurred because service had not been made within the year provided in Rule 3(A).[20] The Court further found that Moore had not filed a "new action" when he instructed the clerk's office to serve the original complaint, as required by the savings statute.[21]

It was on this second point that the Court undertook to address *Goolsby*. As the Court first noted, the facts in *Goolsby* differed from those in *Moore*, given that the limitations period had not yet run when Goolsby filed her instructions for service.[22] Based on this, the Court held that the rule in *Goolsby* did not apply.[23] Even so, the Court took pains to address its disagreement with, and intention to limit the applicability of, *Goolsby* in future cases:

> We have little difficulty in concluding that the rule announced in [*Goolsby*] does not apply in this case. But that leaves us with the question of the continued viability of our holding in *Goolsby*. Had we simply applied the plain language of the statutory scheme in *Goolsby*, we would have reached a different conclusion. Our decision in that case, however, was driven by a interest in judicial economy and avoiding unnecessary procedural hurdles. As today's case demonstrates, however, some courts have extended *Goolsby* well beyond the facts of that case, and in so doing, have extended the statute of limitations beyond what was ordained by the legislature. To prevent any further confusion, we make clear today that *Goolsby* is

limited to the factual circumstance that motivated its holding. **Thus, the rule announced in *Goolsby* – that a new instruction to the clerk to serve a complaint that is made after Civ. R. 3(A)'s commencement period has expired may be treated as a dismissal and refiling for purposes of the savings statute– applies only when the statute of limitations has not yet expired.**[24]

Rule 41 Dismissal And The Savings Statute - A Trap for the Unwary

In addition to limiting *Goolsby*, *Moore* also rejected the argument that a failure to perfect service within the year operates as a failure otherwise than on the merits for purposes of the savings statute, if service was attempted within the year provided in Rule 3(A).[25]

As framed by the Court, the argument it rejected was this: An attempt was made to commence the action when the complaint and initial request for service was filed, and the claim failed "otherwise than on the merits" when the year for perfecting service under Rule 3(A) elapsed, thereby triggering an additional year under the savings statute in which to file a new action.[26] In response, the Court observed that it had applied the savings statute in *Thomas v. Freeman*,[27] a case where service was attempted, but not perfected (and thus the action had not been "commenced"), but noted that the dismissal in that case had occurred before the year for perfecting service had elapsed.[28]

More importantly, the Court held that plaintiff's interpretation of the savings statute would effectively grant plaintiffs an automatic extension of time in which to serve a defendant, adding up to a total of two years in order to "commence" an action by effecting service, in derogation of Rule 3(A):

> Moore's argument would essentially change Civ. R. 3(A)'s one-year commencement rule to a two-year commencement rule. We decline to adopt such a construction in the face of the explicit language of Civ. R. 3(A). The savings statute does not apply *automatically* to extend the one-year commencement requirement. It applies only when its terms are met: when an action is commenced or attempted to be commenced; when a judgment is reversed or an action fails otherwise than on the merits, that is when there is either a voluntary dismissal under Civ. R. 41(A) or an involuntary dismissal without prejudice under Civ. R. 41(B); and when the complaint is refiled within one year.[29]

In other words, under the Court's analysis, when the statute of limitations has run on an action in which a complaint has been timely filed, and service has been attempted but not perfected within the one-year period provided under Civ. R. 3(A), the savings statute will *only* apply if either the plaintiff or the court formally dismisses the action without prejudice *before* the one-year service period elapses. Thus, if service has not been perfected in such an instance, and the year will elapse before service can be made, a plaintiff's only choice is to dismiss her case and refile – there is no other option.

Conclusion

Under *Moore*, if the year for service under Rule 3(A) elapses and the statute of limitations has run, a failure to perfect service on a defendant within that year will operate as a failure on the merits *unless* the action is dismissed without prejudice *before* the year elapses. The current Court has made it clear that there are no exceptions, whether based on judicial economy, equitable principles, or any theories other than strict statutory interpretation. ■

End Notes

1. 2020-Ohio-4113 (*slip op.*).
2. 61 Ohio St.3d 549, 575 N.E.2d 801 (1991).
3. *Moore* at ¶ 26 ("[T]he rule announced in *Goolsby*– that a new instruction to the clerk to serve a complaint that is made after Civ. R. 3(A)'s commencement period has expired may be treated as a dismissal and refiling for purposes of the savings statute– applies only when the statute of limitations has not yet expired.").
4. *Moore* at ¶¶ 3-5. As is reflected in the underlying Tenth District opinion, as well as the Tenth District's opinion certifying a conflict to the Supreme Court, the clerk of courts initially was instructed to serve the anesthesiologist by certified mail at the hospital's address, and the docket reflected that service had been completed at that address. *See Moore v. Mount Carmel Health Sys., (Moore II)* 10th Dist. Franklin No. 2017APE-10-574, 2018-Ohio-4130, ¶ 9. The anesthesiologist, however, had retired from practice by the time the action was brought. *See Moore v. Mount Carmel Health Sys., (Moore I)* 10th Dist. Franklin No. 2017APE-10-754, 2018-Ohio-2831 at ¶¶ 3-12. This apparently did not become clear until the anesthesiologist (who had participated at all times in the action) was deposed, which did not occur until over a year after the action was filed. *Moore I* at ¶ 10.
5. *Moore* at ¶ 7.
6. *Moore* at ¶ 7.
7. *Moore* at ¶ 8.
8. *Moore I* at ¶¶ 50-92.
9. *Goolsby* at 549.
10. *Goolsby* at 549.
11. *Goolsby* at 550.
12. *Goolsby* at 550.
13. *Goolsby* at 550.
14. *Goolsby* at 550.
15. *Goolsby* at 551.
16. *Goolsby* at 551.
17. *Moore* at ¶ 15 (quoting Civ. R. 3(A); emphasis in original).
18. *Moore* at ¶ 16.
19. *Moore* at ¶ 17 (quoting R.C. § 2305.19(A)).
20. *Moore* at ¶ 19.
21. *Moore* at ¶ 19 ("[I]f the savings statute means what it says, it does not apply.")
22. *Moore* at ¶¶ 22, 25.
23. *Moore* at ¶ 26.
24. *Moore* at ¶ 26 (emphasis added).
25. *Moore* at ¶¶ 27-29.
26. *Moore* at ¶ 27.
27. 79 Ohio St.3d 221, 10997-Ohio-395, 680 N.E.2d 997.
28. *Moore* at ¶ 28.
29. *Moore* at ¶ 30 (emphasis in original).