

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

R. DAVID SCOTT,	:	APPEAL NO. C-180641
	:	TRIAL NO. A-1506865
and	:	
MISSY SCOTT	:	<i>OPINION.</i>
Plaintiffs-Appellants,	:	
vs.	:	
ABUBAKAR ATIQ DURRANI, M.D.,	:	
CENTER FOR ADVANCED SPINE	:	
TECHNOLOGIES, INC.,	:	
	:	
WEST CHESTER HOSPITAL, LLC,	:	
	:	
and	:	
	:	
UC HEALTH, LLC.	:	
Defendants-Appellees.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded

Date of Judgment Entry on Appeal: September 17, 2021

Strauss Troy Co., LPA, Robert R. Sparks, Nicholas M. Nighswander, PLLC, and Nicholas M. Nighswander, for Plaintiffs-Appellants,

Bonezzi Switzer Polito & Hupp Co., L.P.A., Paul W. McCartney and Thomas F. Glassman, for Defendant-Appellee Abubakar Atiq Durrani, M.D.,

OHIO FIRST DISTRICT COURT OF APPEALS

Lindhorst & Dreidame, Michael F. Lyon and James F. Brockman, for Defendant-Appellee Abubakar Atiq Durrani, M.D. and Center for Advanced Spine Technologies, Inc.,

Rendigs, Fry, Kiely & Dennis, Jeffrey M. Hines, Karen A. Carroll, and Ryan J. Dwyer for Defendant-Appellee West Chester Hospital, LLC, and UC Health, LLC.

BERGERON, Judge.

{¶1} In this latest chapter of a series of cases concerning alleged medical malpractice, we confront issues of tolling-by-abscondment, waiver, and the effect of a permanently-revoked medical license on the medical malpractice statute of repose. We conclude that plaintiffs’ claims against Dr. Durrani are not barred by the statute of repose, and we reverse the trial court’s judgment to that extent. But we find plaintiffs’ arguments as to Center for Advanced Spine Technologies, Inc. (“CAST”) and West Chester Hospital (“WCH”) unavailing, and affirm the trial court’s dismissal of claims against those defendants.

I.

{¶2} Plaintiff-appellant Ralph David Scott underwent six total surgeries with defendant-appellee Dr. Abubakar Atiq Durrani, the last of which occurred on September 9, 2011. He and his wife, Missy Scott, originally filed their claims against Dr. Durrani, CAST, West Chester Hospital, LLC, (“WCH”) and UC Health, LLC, (which manages WCH) in 2013, within the statute of repose. After the suspension of their lawyer’s (Eric Deters) law license, however, the Scotts dismissed their case and retained new counsel. They refiled their complaint in December 2015, alleging negligence, gross negligence, lack of informed consent, negligent hiring, supervision, and retention, civil conspiracy, and fraud, among other claims.

{¶3} WCH answered the complaint in February 2017, but did not affirmatively raise the statute of repose in R.C. 2305.113(C) as a defense (although it did move for judgment on the pleadings on that basis). Apparently recognizing, in March 2018, that it had neglected to insert that affirmative defense, WCH moved to amend its answer to add the statute of repose as an affirmative defense. The trial court granted this motion over the Scotts’ objections, and eventually granted

separate motions by Dr. Durrani and CAST and by UC Health and WCH for judgment on the pleadings.

{¶4} In *McNeal v. Durrani*, we sustained the Scotts’ first assignment of error on the basis of R.C. 2305.19(A) and dismissed their remaining assignments of error as moot. *McNeal v. Durrani*, 2019-Ohio-5351, 138 N.E.2d 1231, ¶ 29, *rev’d on other grounds*, *Scott v. Durrani*, 162 Ohio St.3d 507, 2020-Ohio-6932, 165 N.E.3d 1268. This holding was overturned by the Ohio Supreme Court on the authority of *Wilson v. Durrani*, Slip Opinion No. 2020-Ohio-6827, and the case is now before us on remand to consider the issues we previously deemed moot. *Scott* at 507.

II.

{¶5} In their first assignment of error, the Scotts argue that the trial court erred by finding the tolling statute in R.C. 2305.15(A) inapplicable to their claims. After a thorough analysis of the tolling statute and relevant statutory scheme, we held in *Elliot v. Durrani* that R.C. 2305.15(A) (when applicable) tolls all limitations periods in R.C. 2305.113(C), including the statute of repose. *Elliot v. Durrani*, 1st Dist. Hamilton No. C-180555, 2021-Ohio-3055, ¶ 43 (“Based on the plain language, purpose, and history of R.C. 2305.15(A), as well as a cohesive reading of the Revised Code, we conclude that R.C. 2305.15(A) applies to toll the four-year medical statute of repose in R.C. 2305.113(C).”). As applied to the Scotts, Mr. Scott’s last surgery occurred in September 2011. Dr. Durrani absconded in December 2013, less than four years after the act constituting the basis of the Scotts’ claim. Therefore, based on the analysis of *Elliot*, which we incorporate by reference, we find that his abscondment tolls the statute of repose, and we accordingly sustain the Scotts’ first assignment of error.

III.

{¶6} Our disposition of the Scotts’ first assignment of error allows their claims to proceed against Dr. Durrani, but not against CAST or WCH. *Elliot* at ¶ 50 (“[T]he tolling provision in R.C. 2305.15(A) applies only to claims against Durrani and not to claims against CAST.”). Accordingly, we must address the Scotts’ remaining assignments of error to determine whether the statute of repose in R.C. 2305.113(C) properly bars their claims as to those defendants.

{¶7} In their second assignment of error, the Scotts contend that WCH waived its R.C. 2305.113(C) affirmative defense by failing to assert the defense in its initial answer to the complaint. They characterize the trial court’s subsequent decision to allow WCH to amend its answer and include an R.C. 2305.113(C) affirmative defense as an abuse of discretion.

{¶8} The Scotts concede that the decision to grant or deny leave to amend “shall not be disturbed on appeal absent a showing of bad faith, undue delay, or undue prejudice to the opposing party.” *Hoover v. Sumlin*, 12 Ohio St.3d 1, 465 N.E.2d 377 (1984), paragraph two of the syllabus. However, they assert that the two-year gap between WCH’s answer and its motion to amend renders this case comparable to *Turner v. Cent. Local School Dist.*, 85 Ohio St.3d 95, 99-100, 706 N.E.2d 1261 (1998), where the Ohio Supreme Court held that a trial court abused its discretion in allowing a school district to plead a sovereign immunity defense for the first time two years and ten months into litigation.

{¶9} We find the analogy to *Turner* unpersuasive on this record. In *Turner*, the Ohio Supreme Court deemed the school district’s belated filing both “prejudicial and untimely.” *Id.* It explained that the delay “unnecessarily forced [the parties] through the appellate system on two separate occasions” and emphasized the school

district’s unexplained failure to plead the defense until “after all experts were in place and discovery was complete * * *.” *Id.* Although the two-year timeline in this case appears similar to *Turner* at first blush, the procedural postures of the two cases differ starkly. When WCH moved to amend its answer, the case still sat at its infancy— discovery had barely begun and no date was set for trial. The delay was far more attributable to the unique nature of the *Durrani* litigation than to any specific action by WCH. Moreover, on the issue of prejudice, it strains credulity for the Scotts to claim surprise that WCH might raise an R.C. 2305.113(C) defense in this case or suggest that they were unprepared to respond to it. Dr. Durrani and CAST raised the R.C. 2305.113(C) defense from the outset of the case, and the Scotts had already briefed the issue in response to WCH’s first motion for judgment on the pleadings (filed long before its amended answer).

{¶10} The Scotts simply cannot demonstrate bad faith, undue delay, or undue prejudice on this record. *See Hoover* at paragraph two of the syllabus. We therefore conclude that the trial court did not abuse its discretion by allowing WCH to amend its answer with an R.C. 2305.113(C) defense, and we overrule the Scotts’ second assignment of error.

IV.

{¶11} Next, in their third assignment of error, the Scotts assert that their fraud claims are not “medical claims” at all, and thus the trial court erred by applying R.C. 2305.113(C).

{¶12} This argument is a familiar one, already raised (unsuccessfully) by other plaintiffs in many of our *Durrani* cases. *See, e.g., Freeman v. Durrani*, 2019-Ohio-3643, 144 N.E.3d 1067, ¶ 18-21 (1st Dist.); *Jonas v. Durrani*, 2020-Ohio-3787, 156 N.E.3d 365, ¶ 9 (1st Dist.), *rev’d on other grounds, Carr v. Durrani*, 163 Ohio

St.3d 207, 2020-Ohio-6943, 168 N.E.3d 1188; *McNeal*, 2019-Ohio-5351, 138 N.E.3d 1231, at ¶ 18 (1st Dist.), *rev'd on other grounds*, *Scott*, 162 Ohio St.3d 507, 2020-Ohio-6932, 165 N.E.3d 1268. Recognizing that this precedent weighs against them, the Scotts construct a novel frame for the issue, positing that Dr. Durrani's "pattern and practice of fraud" continuing after Mr. Scott's surgeries should give rise to an independent, nonmedical fraud claim.

{¶13} But a review of the Scotts' complaint reveals that they alleged no independent harm stemming from fraudulent misrepresentations by, or follow-up treatment with, Dr. Durrani. Instead, as in *Jonas*, "all of the harm flows from the underlying claim that the surgery was negligently performed." *Jonas* at ¶ 13. Mr. Scott argues that he continued follow-up treatment with Dr. Durrani long after his most recent surgery, including follow-up appointments that date less than four years from the filing of his complaint. But he never explains how any act or omission by Dr. Durrani in any of these follow-up appointments inflicted injury beyond what he had already sustained from the surgeries. Follow-up treatment certainly *could* form the basis for an independent harm, but the Scotts' complaint pleads no such harm, rendering it indistinguishable from those we deemed insufficient in *Freeman*, *Jonas*, and *McNeal* (among others). We therefore overrule the Scotts' third assignment of error.

V.

{¶14} Finally, in their fourth assignment of error, the Scotts argue that Dr. Durrani is ineligible to invoke the protection of R.C. 2305.113(C) because he was no longer a licensed physician when this suit was filed. Our decision in *Elliot* resolves this question, determining that the relevant point in time for ascertaining Dr. Durrani's "physician" status is the date he performed the procedure at issue. *Elliot*,

1st Dist. Hamilton No. C-180555, 2021-Ohio-3055, at ¶ 57 (“Thus, Durrani’s subsequent loss of his medical license does not make the medical statute of repose inapplicable to this case.”) Because Dr. Durrani was a licensed physician when he operated on Mr. Scott, we overrule the Scotts’ fourth assignment of error.

* * *

{¶15} We sustain the Scotts’ first assignment of error, and thus reverse the trial court’s grant of judgment on the pleadings as to Dr. Durrani. However, because we overrule the Scotts’ second, third, and fourth assignments of error, we affirm the trial court’s grant of judgment on the pleadings to CAST and WCH. The cause is remanded for further proceedings consistent with this opinion.

Judgment affirmed in part, reversed in part, and cause remanded.

CROUSE, J., concurs.

Zayas, P.J., concurs in judgment only.

Please note:

The court has recorded its entry on the date of the release of this opinion.