

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

DEBORAH ROARK,	:	APPEAL NO. C-180647
	:	TRIAL NO. A-1601421
Plaintiff-Appellant,	:	
	:	
vs.	:	
	:	
ABUBAKAR ATIQ DURRANI, M.D.,	:	<i>JUDGMENT ENTRY.</i>
	:	
CENTER FOR ADVANCED SPINE	:	
TECHNOLOGIES, INC.,	:	
	:	
and	:	
	:	
RIVERVIEW HEALTH INSTITUTE,	:	
	:	
Defendants-Appellees.	:	
	:	

The court sua sponte removes this case from the regular calendar and places it on the court's accelerated calendar, 1st Dist. Loc.R. 11.1.1(A), and this judgment entry is not an opinion of the court. See Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

This appeal concerns the latest in a long line of cases brought by the former patients of Dr. Abubakar Atiq Durrani alleging various forms of malpractice, fraud, and negligence against Dr. Durrani, the Center for Advanced Spine Technologies, Inc., (“CAST”) and associated hospitals. Ms. Roark began treating with Dr. Durrani at Riverview Health Institute (“RHI”) in September 2011, after experiencing pain in the back of her head, tingling, and numbness in her limbs. Dr. Durrani quickly recommended cervical spine surgery, which he performed on October 28, 2011. During the surgery, Dr. Durrani implanted (without Ms. Roark’s knowledge or consent) BMP-2. Ms. Roark’s symptoms did not abate following surgery.

Ms. Roark now asserts claims against Dr. Durrani for negligence, battery, lack of informed consent, intentional infliction of emotional distress, fraud, and spoliation of evidence. She asserts claims against RHI for negligence, negligent credentialing and retention, fraud, spoliation of evidence, violations of the Ohio Consumer Sales Protection Act, and violations of the Ohio Product Liability Act.

Ms. Roark filed her original complaint against Dr. Durrani on May 28, 2014, less than four years after her surgery. The complaint was voluntarily dismissed and refiled on March 10, 2016. Subsequently, appellees filed motions for judgment on the pleadings under Civ.R. 12(C), and Ms. Roark moved to amend her complaint to add a state civil RICO claim. The trial court denied Ms. Roark’s motion to amend the complaint and granted the motions of RHI and Dr. Durrani for judgment on the pleadings. Ms. Roark’s appeal was stayed at the parties’ request while the motion for reconsideration in *Wilson v. Durrani* was pending before the Ohio Supreme Court. We now decide her appeal for the first time with the benefit of the Supreme Court’s guidance.

In her first assignment of error, Ms. Roark presents seven issues for review. First, she contends that Ohio’s one-year saving statute, R.C. 2305.19, enables her claims against Dr. Durrani to survive beyond the expiration of the statute of repose. The Ohio Supreme Court recently considered this issue and concluded otherwise, ruling that the saving statute “neither operates as a statute of limitations nor operates to toll the statute

of limitations.” *Wilson v. Durrani*, Slip Opinion No. 2020-Ohio-6827 (“The saving statute anticipates the commencement of a new action, not the reactivation of the prior action, and it says nothing about the new action relating back to the filing date of the prior action.”). *Id.* at ¶ 28, citing *Antoon v. Cleveland Clinic Found.*, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, ¶ 24. On this authority, we reject Ms. Roark’s first issue presented.

Second, Ms. Roark contends that her fraud in the inducement claims are not “medical claims,” but rather are independent nonmedical fraud claims. This argument was rejected for substantially identical claims in *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; *Freeman v. Durrani*, 2019-Ohio-3643, 144 N.E.3d 1067, ¶ 18-21 (1st Dist.); and *McNeal v. Durrani*, 2019-Ohio-5351, 138 N.E.3d 1231, ¶ 18 (1st Dist.), *rev’d on other grounds*, *Scott v. Durrani*, 162 Ohio St.3d 507, 2020-Ohio-6932, 165 N.E.3d 1268. We decline the invitation to revisit issues that are well-settled in this district.

Third, Ms. Roark argues that her negligent credentialing claims are not “medical claims” under R.C. 2305.113(E)(3) and not subject to the statute of repose. This argument is squarely foreclosed by *Young v. Durrani*, 2016-Ohio-5526, 61 N.E.3d 34, ¶ 21 (1st Dist.); *Jonas* at ¶ 10; and *McNeal* at ¶ 19. We decline the invitation to revisit this settled law.

Fourth, Ms. Roark argues the trial court erred in ruling that the foreign object exception does not apply to bar the statute of repose. We recently considered—and rejected—the identical theory posited that Dr. Durrani’s implantation of BMP-2 constitutes a “foreign object” pursuant to R.C. 2305.113(D)(2). *Jonas* at ¶ 15-22. (“A plain, common sense, reading of the statute in the context of the caselaw demonstrates that ‘foreign objects’ refers to objects that were meant to be removed upon the procedure's conclusion.”). We decline to revisit this issue.

In her fifth issue presented under the first assignment of error, Ms. Roark claims Dr. Durrani's fleeing the country in 2013 tolls the statute of repose as to him. We answered this question recently in *Elliot v. Durrani* and decided that R.C. 2305.15(A) does indeed toll the statute of repose in R.C. 2305.113(C). *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 Ms. Roark, her last surgery occurred in October of 2011. Dr. Durrani absconded in December of 2013, less than four years after the act constituting the basis of her claim. Therefore, based on the analysis of *Elliot*, we agree with Ms. Roark's fifth issue presented.

In her next issue presented, Ms. Roark urges this court to apply judicial doctrines of fraud and equitable estoppel to create an exception to the statute of repose. We have repeatedly rejected this invitation in the past and do the same here. *See Jonas* at ¶ 11; *Freeman v. Durrani*, 2019-Ohio-3643, 144 N.E.3d 1067, ¶ 24 (1st Dist.). "Where the General Assembly could have included an equitable estoppel or fraud exception (as some other states have done), but declined to do so, our job is not to supplant that authority, but rather to apply the statute as written." *Jonas* at ¶ 11.

In her last issue presented under the first assignment of error, Ms. Roark contends 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* resolved this question, finding 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 Ms. Roark, we overrule this issue presented. The first assignment is sustained in part and overruled in part.

In her second assignment of error, Ms. Roark argues the trial court abused its discretion in denying her motion to amend her complaint in order to request follow-up appointments be considered in determining when the statute of repose was triggered, and to plead a violation of Ohio's state civil RICO statute, the Ohio Corrupt Practices Act ("OCA"). See R.C. 2923.32. We have repeatedly rejected similar attempts to characterize follow-up appointments and post-surgical care as separate acts or omissions for purposes of the statute of repose. *Jonas* at ¶ 12-13. See *McNeal* at ¶ 11-12, 15. Any attempt to amend the complaint on that basis is futile.

As to the OCA claim, Ms. Roark's proposed amended complaint lacks the requisite specificity to plead a state civil claim under the OCA. See *Jonas*, 2020-Ohio-3787, 156 N.E.3d 365 at ¶ 29, citing *Morrow v. Reminger & Reminger Co., L.P.A.*, 183 Ohio App.3d 40, 2009-Ohio-2665, 915 N.E.2d 696, ¶ 27 (10th Dist.), and *Herakovic v. Catholic Diocese of Cleveland*, 8th Dist. Cuyahoga No. 85467, 2005-Ohio-5985, ¶ 16. In *Jonas*, we reiterated the principle that "conclusory statements punctuated with an incantation of the elements of the statute" will not suffice to plead a viable OCA claim. *Jonas* at ¶ 29. Ms. Roark's proposed amended complaint offers conclusory statements such as "Dr. Durrani is an enterprise," but "[n]owhere in the amended complaint can we discern how [s]he envisions structure, continuity, and separate existence from the corrupt practice to establish an 'enterprise' within the meaning of R.C. 2923.31(C)." See *id.*, citing *Morrow* at ¶ 38. The trial court did not err in denying the motion to amend as futile, and Ms. Roark's second assignment of error is overruled.

We accordingly sustain Ms. Roark's first assignment of error as it pertains to Dr. Durrani by virtue of his abscondment. We reverse the trial court's judgment in that respect and remand this cause for further proceedings consistent with this judgment entry. Ms. Roark's assignments of error are overruled and the trial court's judgment is affirmed in all other respects.

OHIO FIRST DISTRICT COURT OF APPEALS

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed equally between Ms. Roark and Dr. Durrani.

ZAYAS, P.J., BERGERON, and CROUSE, JJ.

To the clerk:

Enter upon the journal of the court on September 17, 2021,
per order of the court_____.

Administrative Judge