

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

JOSEPH BAUMGARDNER, : APPEAL NO. C-190744
and : TRIAL NO. A-1700289
ELIZABETH BAUMGARDNER, : *JUDGMENT ENTRY.*
Plaintiffs-Appellants, :
vs. :
ABUBAKAR ATIQ DURRANI, M.D., :
CENTER FOR ADVANCED SPINE :
TECHNOLOGIES, INC., :
and :
CHRIST HOSPITAL, :
Defendants-Appellees, :
and :
WEST CHESTER HOSPITAL, LLC, et :
al., :
Defendants. :

MICHAEL BROPHY, : APPEAL NO. C-190745
Plaintiff-Appellant, : TRIAL NO. A-1504460
vs. : *JUDGMENT ENTRY.*
ABUBAKAR ATIQ DURRANI, M.D., :
CENTER FOR ADVANCED SPINE :
TECHNOLOGIES, INC., :
and :
CHRIST HOSPITAL, :

Defendants-Appellees, :
and :
CHILDREN’S HOSPITAL :
Defendant. :

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.

The consolidated appeals now before us represent two of among a multitude of cases filed against Dr. Abubakar Atiq Durrani and several area hospitals for claims stemming from the alleged malpractice of Dr. Durrani.

Plaintiff-appellant Joseph Baumgardner first met with Durrani in 2009 after having trouble with the motor skills in his left hand, extreme headaches, eye strain and neck pain. Durrani immediately recommended surgery and performed surgery on Baumgardner on July 15, 2009, at the Christ Hospital (“TCH”). After the surgery, Baumgardner continued to experience the same pain and additionally experienced new pain that radiated down from his shoulder to his back. Durrani recommended an immediate second surgery and performed a second surgery on Baumgardner at West Chester Medical Center on November 12, 2009. Following the second surgery, Baumgardner experienced increased pain and complete numbness. Additionally, Baumgardner now must sleep upright and use a “CPAP machine” to prevent his throat and airway from becoming completely blocked. Baumgardner and his wife Elizabeth brought suit against Durrani, the Center for Advanced Spine Technologies, Inc., (“CAST”) TCH, and other defendants on September 25, 2015. The complaint

alleged claims (1) against Durrani for negligence, battery, lack of informed consent, intentional infliction of emotional distress, fraud, and loss of consortium, (2) against CAST for vicarious liability, negligent hiring, retention, and supervision, fraud, violation of the Ohio Consumer Sales Protection Act, and loss of consortium, and (3) against TCH for negligence, negligent credentialing and retention, fraud, spoliation of evidence, and loss of consortium. TCH filed a motion to dismiss the complaint, asserting the claims were time barred by the statute of repose. Durrani and CAST filed a motion to dismiss the complaint or for judgment on the pleadings, asserting the claims were time barred by the statute of repose.

Plaintiff-appellant Michael Brophy first met with Durrani in 2008 for neck pain and complications with his neck posture. Durrani recommended surgery and performed surgery on Brophy at TCH on April 2, 2008. Following the surgery, Brophy continued to experience the same pain and additionally experienced less flexibility than before. In October of 2008, Brophy again met with Durrani after experiencing neck, back, and left hip pain. Durrani recommended a second surgery and performed a second surgery on Brophy at TCH on November 26, 2008. After the second surgery, Brophy experienced intense and constant pain. Brophy brought suit against Durrani, CAST, TCH and another defendant on August 19, 2015. The complaint alleged claims (1) against Durrani for negligence, battery, lack of informed consent, intentional infliction of emotional distress, fraud and spoliation of evidence, (2) against CAST for vicarious liability, negligent hiring, retention, supervision and credentialing, spoliation of evidence, and fraud, and (3) against TCH for negligent credentialing, supervision and retention, spoliation of evidence, fraud, violation of the Ohio Consumer Sales Protection Act, and products liability. Durrani, CAST, and

TCH, defendants-appellees, all filed motions to dismiss the complaint as time barred by the statute of repose.

The trial court granted the defendants-appellees' respective motions in each case. Plaintiffs-appellants now appeal, raising a sole assignment of error that the trial court erred by granting defendants-appellees' motions to dismiss and dismissing their respective negligent-credentialing and fraud claims. In support of this contention, they present four issues for review, all of which have been previously decided by this court.

In the first issue presented for review, plaintiffs-appellants assert that the trial court erred by finding that their negligent-credentialing claims against TCH are "medical claims" subject to the statute of repose. This court has previously held that negligent-credentialing claims are "medical claims" under R.C. 2505.113(E)(3)(c)(ii) and are therefore subject to the statute of repose. *E.g.*, *Young v. Durrani*, 2016-Ohio-5526, 61 N.E.3d 34, ¶ 21 (1st Dist.), *appeal not accepted*, 149 Ohio St.3d 1406, 2017-Ohio-2822, 74 N.E.3d 464; *Crissinger v. Durrani*, 2017-Ohio-9256, 106 N.E.3d 798, ¶ 17 (1st Dist.); *McNeal v. Durrani*, 2019-Ohio-5351, 138 N.E.3d 1231, ¶ 19 (1st Dist.), *rev'd on other grounds*, 162 Ohio St.3d 507, 2020-Ohio-6932, 165 N.E.3d 1268; *Couch v. Durrani*, 1st Dist. Hamilton Nos. C-190703, C-190704, C-190705, C-190706 and C-190707, 2021-Ohio-726, ¶ 22; *Janson v. Christ Hosp., Inc.*, 1st Dist. Hamilton Nos. C-200047, C-200048, C-200050, C-200052, C-200053, C-200054, C-200055 and C-200056, 2021-Ohio-1467, ¶ 22. Therefore, we find no error in the trial court's decision on this issue.

In the second issue presented for review, plaintiffs-appellants assert that the trial court erred by finding there is no fraud or equitable-estoppel exception to the statute of repose. This court has previously held that there is no fraud or equitable-

estoppel exception to the statute of repose. *E.g.*, *Crissinger* at ¶ 24; *Freeman v. Durrani*, 2019-Ohio-3643, 144 N.E.3d 1067 (1st Dist.), *appeal not accepted*, 158 Ohio St.3d 1436, 2020-Ohio-877, 141 N.E.3d 250; *Couch* at ¶ 25; *Janson* at ¶ 24. Therefore, we find no error in the trial court’s decision on this issue.

In the third issue presented for review, plaintiffs-appellants assert that the trial court erred by holding that plaintiffs-appellants’ fraud claims are “medical claims,” and not independent, nonmedical fraud claims. This court has previously considered substantially the same argument and found the fraud claims to be “medical claims” subject to the statute of repose. *E.g.*, *Hensley v. Durrani*, 1st Dist. Hamilton No. C-130005, 2013-Ohio-4711, *appeal not accepted*, 138 Ohio St.3d 1435, 2014-Ohio-889, 4 N.E.3d 1051; *Freeman* at ¶ 20; *Couch* at ¶ 29-30; *Janson* at ¶ 31. Therefore, we find no error in the trial court’s decision on this issue.

In the fourth issue presented for review, plaintiffs-appellants assert that the trial court erred by dismissing the spoliation-of-evidence claims against CAST and TCH. One of the elements a plaintiff must show to prevail on a spoliation-of-evidence claim is disruption of his case. *Smith v. Howard Johnson Co.*, 67 Ohio St.3d 28, 29, 615 N.E.2d 1037 (1993). Where all other claims in a case are properly dismissed by the trial court, a plaintiff will ultimately be unable to prove disruption of their case and a spoliation-of-evidence claim will inevitably fail. *Janson* at ¶ 32. Here, all other claims brought by plaintiffs-appellants against defendants-appellees were properly dismissed by the trial court. Therefore, dismissal of the spoliation-of-evidence claims was proper as it appears beyond doubt from the complaint that plaintiffs-appellants could prove no set of facts which would entitle them to recovery on these claims.

Plaintiffs-appellants did not assert any argument that the trial court erred in dismissing their remaining claims against defendants-appellees. Therefore, we find that plaintiffs-appellants abandoned any argument regarding their respective remaining claims. *See Janson* at ¶ 33.

For the foregoing reasons, we overrule plaintiffs-appellants' sole assignment of error and affirm the judgments of the trial court.

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 under App.R. 24.

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

To the clerk:

Enter upon the journal of the court on June 11, 2021,
per order of the court_____.

Administrative Judge