

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

SHAWNDA BENTON,	:	APPEAL NO. C-180459
Plaintiff-Appellant,	:	TRIAL NO. A-1503378
vs.	:	<i>JUDGMENT ENTRY.</i>
ABUBAKAR ATIQ DURRANI, M.D.,	:	
and	:	
THE CHRIST HOSPITAL, INC.,	:	
Defendants-Appellees.	:	

We consider this appeal on the accelerated calendar, 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 and alleging various forms of malpractice, fraud, and negligence against Durrani, the Center for Advanced Spine Technologies (“CAST”) and associated hospitals. Benton underwent spinal surgery with Durrani at The Christ Hospital on July 7, 2005. The surgery did not improve Benton’s condition; on the contrary, Benton contracted MRSA and E-Coli and required extensive post-operative treatment. Benton now asserts claims against Durrani for negligence, battery, lack of informed consent, intentional infliction of emotional distress, fraud, and spoliation of evidence. She also asserts claims against The Christ Hospital for negligence, negligent credentialing, supervision, and retention, fraud,

spoliation of evidence, violations of the Ohio Consumer Sales Protection Act, and violations of the Ohio Product Liability Act.

In her first assignment of error, Benton contends that the trial court erred in granting The Christ Hospital's motion to dismiss under Civ.R.12(B)(6) and Durrani's motion for judgment on the pleadings under Civ.R. 12(C). But Benton's claims were filed for the first time on April 25, 2014—more than six years after her surgery and well outside the four-year statute of repose in R.C. 2305.113(C). Attempting to circumvent the statute of repose, Benton raises seven distinct issues within her first assignment of error. Unfortunately for Benton, all of these issues have been squarely considered and rejected by this court in previous Durrani cases.

First, Benton urges that her claims are not “medical claims,” but instead independent fraud claims. This argument was rejected for substantially identical claims in *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.), *appeal accepted on other grounds*, 158 Ohio St.3d 1522, 2020-Ohio-3018, 145 N.E.3d 312.

Second, Benton argues that her negligent-credentialing claim against The Christ Hospital is not a medical claim subject to R.C. 2305.113(C). This argument is squarely foreclosed by *Young v. Durrani*, 2016-Ohio-5526, 61 N.E.3d 34, ¶ 21 (1st Dist.), *Crissinger v. Christ Hospital*, 2017-Ohio-9256, 106 N.E.3d 798 (1st Dist.), and *McNeal* at ¶ 19.

Third, Benton asserts that the foreign-object exception in R.C. 2305.113(D)(2) applies to bar the statute of repose. This issue was decided against Benton in *Jonas v. Durrani*, 2020-Ohio-3787, ___ N.E.3d ___, ¶ 20-22 (1st Dist.) (“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 * * * [plaintiff] never alleges that the BMP-2 was meant to be removed at the conclusion of her surgery or accidentally introduced into her * * * .”).

Fourth, Benton contends that R.C. 2305.19 applies to preserve the filing date of her first complaint. Benton is correct that, had her original claims been filed within the four-year statute of repose, R.C. 2305.19 would “save” the claims for re-filing within a year of voluntary dismissal. *See Wilson v. Durrani*, 2019-Ohio-3880, 145 N.E.3d 1071, ¶ 31 (1st Dist.), *appeal accepted*, 157 Ohio St.3d 1562, 2020-Ohio-313, 138 N.E.3d 1152. But Benton's first complaint was not filed within the four-year statute of repose, and R.C. 2305.19 “cannot revive an untimely complaint.” *Jonas* at ¶ 12.

In a further attempt to apply R.C. 2305.19 to save her claims, Benton argues that her post-operative treatment was the “last culpable act” from which the statute of repose runs, and therefore, her first complaint was timely filed. 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. *McNeal* at ¶ 11-12, 15; *Jonas* at ¶ 12-13. Nothing in the complaint indicates that any separate harm occurred by virtue of these subsequent appointments—the harm alleged in the complaint resulted from the underlying surgery.

Fifth, Benton argues that Durrani's flight to Pakistan in December of 2013 tolls all limitations periods against him under R.C. 2305.15(A). As we explained in *Jonas*, this claim is inapposite for plaintiffs whose repose period ran in its entirety before Durrani's flight. *Jonas* at ¶ 14; *see McNeal* at ¶ 16. Benton's surgery was in 2005, which means that the statute of repose for her claims ran in 2009—long before Durrani left the country. Consequently, R.C. 2305.15(A) cannot apply to save Benton's claims.

Sixth, Benton urges us to craft a fraud or equitable-estoppel exception to the statute of repose. We have repeatedly rejected this invitation in the past and do the same here. *See Freeman* at ¶ 24; *Jonas* at ¶ 11 (“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.”).

Seventh, Benton contends that her claims are not “medical claims” because Durrani’s medical license was revoked before the claims were filed. We dealt with an identical argument in *Jonas*, where—as here—Durrani was “a licensed doctor at the time he performed the surgery and at all times relevant for the repose period.” *Jonas* at ¶ 14. Because Benton’s claims were “medical claims” for the full duration of the repose period, Durrani’s subsequent loss of license cannot be used to revive them. *Id.*

Because Benton filed her complaint more than four years after the underlying surgery and presents no novel argument as to why R.C. 2305.113(C) should not apply, her claims are barred by the statute of repose. Therefore, the trial court did not err in granting defendants-appellees’ motions, and Benton’s first assignment of error is overruled.

In her second assignment of error, Benton asserts that the trial court abused its discretion by denying her motion to amend the complaint to join as defendants CAST and Cincinnati Children’s Hospital Medical Center (“CCHMC”). But all of Benton’s claims against CAST and CCHMC are identical to her claims against The Christ Hospital. Therefore, Benton’s claims against CAST and CCHMC are likewise untimely—and her proposed amendment could not rectify that fact. The trial court

did not err in denying Benton's motion to amend the complaint, and her second assignment of error is also overruled.

We accordingly affirm the judgment of the trial court.

Further, 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.

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

To the clerk:

Enter upon the journal of the court on November 10, 2020
per order of the court _____.

Presiding Judge