

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

TROY BECKELHIMER,	:	APPEAL NO. C-180460
and	:	TRIAL NO. A-1404075
EMILY BECKELHIMER	:	<i>JUDGMENT ENTRY.</i>
Plaintiffs-Appellants,	:	
vs.	:	
ABUKAR ATIQ DURRANI, M.D.,	:	
and	:	
THE CHRIST HOSPITAL,	:	
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 Dr. Durrani, the Center for Advanced Spine Technologies (“CAST”) and associated hospitals. Following a motorcycle accident, Mr. Beckelhimer underwent surgery with Dr. Durrani at The Christ Hospital on December 13, 2007. The surgery did not improve Mr. Beckelhimer’s condition; on the contrary, his pain only increased. Mr. Beckelhimer now asserts claims against Dr. Durrani for negligence, battery, lack of informed consent, intentional infliction of emotional distress, fraud, and spoliation of evidence. He 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. Finally, Mrs. Beckelhimer asserts loss of consortium claims against both Dr. Durrani and The Christ Hospital.

In their first assignment of error, the Beckelhimers contend that the trial court erred in granting The Christ Hospital's motion to dismiss under Civ.R. 12(B)(6) and Dr. Durrani's motion for judgment on the pleadings under Civ.R. 12(C). But the Beckelhimers' various claims were filed for the first time on February 27, 2014—more than six years after Mr. Beckelhimer's surgery and well outside the four-year statute of repose in R.C. 2305.113(C). Attempting to circumvent the statute of repose, the Beckelhimers raise seven distinct issues within their first assignment of error. Unfortunately for the Beckelhimers, all of these issues have been squarely considered and rejected by this court in previous Durrani cases.

First, the Beckelhimers urge that their claims are not “medical claims,” but independent non-medical fraud claims. This argument was rejected for substantially identical claims in *Jonas v. Durrani*, 1st Dist. Nos. C-180457 and C-180458, 2020-Ohio-3787, ¶ 9; *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* 158 Ohio St.3d 1522, 2020-Ohio-3018, 145 N.E.3d 312.

Second, the Beckelhimers argue that their negligent credentialing claim against The Christ Hospital is a non-medical claim not subject to R.C. 2305.113(C). This argument is squarely foreclosed by *Jonas* at ¶ 10, *McNeal* at ¶ 19, and *Young v. Durrani*, 2016-Ohio-5526, 61 N.E.3d 34, ¶ 21 (1st Dist.).

Third, the Beckelhimers assert that the foreign object exception in R.C. 2305.113(D)(2) applies to bar the statute of repose for their claims. This issue was decided contrary to the Beckelhimers' argument in *Jonas* at ¶ 20-22 (“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 * * * [plaintiff] never alleges that the BMP-2 was meant to be removed at the conclusion of her surgery or accidentally introduced into her * * * .”).

Fourth, the Beckelhimers contend that R.C. 2305.19 applies to save their claims because the last culpable act or omission by defendants-appellees was in 2013, and therefore, the Beckelhimers' first complaint against Dr. Durrani was timely. The Beckelhimers are correct that, had their original claim been filed within the four-year statute of repose, R.C. 2305.19 would 'save' the claim 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 R.C. 2305.19 "cannot revive an untimely complaint," and we have repeatedly rejected similar attempts to characterize follow-up appointments and postsurgical care as separate acts or omissions for purposes of the statute of repose. *Jonas* at ¶ 12-13; *see McNeal* at ¶ 11-12, 15. 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, the Beckelhimers argue that Dr. 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 Dr. Durrani's flight. *Jonas* at ¶ 14; *see McNeal* at ¶ 16. Mr. Beckelheimer's surgery was in 2007, which means that the statute of repose for his claims ran in 2011—long before Dr. Durrani left the country. Consequently, R.C. 2305.15(A) cannot apply to save the Beckelhimers' claims.

Sixth, the Beckelhimers urge 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* at ¶ 24. "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.

Seventh, the Beckelhimers contend that their claims are not "medical claims" because Dr. Durrani's medical license was revoked by the time the claims were filed in

2014. We dealt with an identical argument in *Jonas*, where—as here—Dr. Durrani “was, in fact, a licensed doctor at the time he performed the surgery and at all times relevant for the repose period.” *Jonas* at ¶ 14. The Beckelhimers’ claims were “medical claims” for the full duration of the repose period; as a consequence, Dr. Durrani’s subsequent loss of license cannot be used to revive them. *Id.*

Because the Beckelhimers filed their first complaint against Dr. Durrani more than four years after Mr. Beckelhimer’s surgery and present no novel argument as to why R.C. 2305.113(C) should not apply, their claims are barred by the statute of repose. The trial court was correct to grant defendants-appellees’ motions, and the Beckelhimers’ first assignment of error is overruled.

Finally, in their second assignment of error, the Beckelhimers assert that the trial court abused its discretion by denying their motion to amend the complaint to elaborate on their existing claims. But, as explained above, all of the Beckelhimers’ claims are untimely—and their proposed amendment could not (and does not purport to) rectify that fact. *See Jonas* at ¶ 24-25. Therefore, the trial court did not err in denying the Beckelhimers’ motion to amend the complaint as futile, and their second assignment of error is also overruled. We accordingly affirm the judgment 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.

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

To the clerk:

Enter upon the journal of the court on October 21, 2020 ,
per order of the court_____.

Presiding Judge