

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

PAUL BAKER	:	APPEAL NO. C-180582
	:	TRIAL NO. A-1504464
and	:	
KIMBERLEY BAKER,	:	<i>JUDGMENT ENTRY.</i>
Plaintiffs-Appellants,	:	
vs.	:	
ABUBAKAR ATIQ DURRANI, M.D.,	:	
CENTER FOR ADVANCED SPINE TECHNOLOGIES, INC.,	:	
and	:	
TRIHEALTH, INC., f.d.b.a. "GOOD SAMARITAN 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. Paul Baker first visited Dr. Durrani in 2008, seeking treatment for lower back pain that radiated a burning sensation down his legs. Dr. Durrani suggested lumbar spine surgery, which he performed on Mr. Baker on April 6,

2009. Following the surgery, Mr. Baker developed an incision infection and new pain in his back. Dr. Durrani recommended two additional surgeries, which Mr. Baker declined.

Mr. Baker now asserts claims against Dr. Durrani for negligence, battery, lack of informed consent, intentional infliction of emotional distress, fraud, and spoliation of evidence. He asserts claims against CAST for vicarious liability, negligent hiring, retention, and supervision, fraud, violations of Ohio's Consumer Sales Protection Act, and spoliation of evidence. Finally, he asserts claims against Good Samaritan Hospital for negligence, negligent credentialing, supervision, and retention, fraud, spoliation of evidence, and violations of Ohio's Consumer Sales Protection Act.

In his first assignment of error, Mr. Baker contends that the trial court erred in granting Dr. Durrani and CAST's Civ.R. 12(C) motion for judgment on the pleadings and Good Samaritan Hospital's Civ.R. 12(B)(6) motion to dismiss. But Mr. Baker's various claims were filed for the first time on February 27, 2014—more than four years after the date of his surgery and outside the statute of repose in R.C. 2305.113(C). Attempting to circumvent the statute of repose, Mr. Baker raises seven distinct issues within his first assignment of error. Unfortunately for Mr. Baker, all of these issues have been squarely considered and rejected by this court in previous Durrani cases.

First, Mr. Baker urges that his claims are not “medical claims,” but independent fraud claims. This argument was rejected for substantially identical claims in *Jonas v. Durrani*, 1st Dist. Hamilton 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, Mr. Baker argues that his negligent credentialing claim against Good Samaritan Hospital is a nonmedical 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, Mr. Baker asserts that the savings statute in R.C. 2305.19 applies to save his claims because the last culpable act or omission by defendant-appellees was in 2012, and therefore, Mr. Baker's first complaint against Dr. Durrani was timely. Mr. Baker is correct that, had his 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 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. 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, which occurred more than four years before the complaint was filed.

Fourth, Mr. Baker argues 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*, 2020-Ohio-3787, at ¶ 14; *McNeal*, 2019-Ohio-5351, 138 N.E.3d 1231, at ¶ 16. The statute of repose for Mr. Baker's claims tolled in April of 2013, eight months before Dr. Durrani left the country. Consequently, R.C. 2305.15(A) cannot save Mr. Baker's claims.

Fifth, Mr. Baker 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*, 2019-Ohio-3643, 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.

Sixth, Mr. Baker asserts that his 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. Mr. Baker’s 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.*

Finally, Mr. Baker argues that the trial court erred in holding that his spoliation of evidence claim failed to state a claim against defendants-appellees. But in order to state a spoliation of evidence claim, Mr. Baker must show (among other elements) that willful destruction of evidence actually disrupted his case. *Simek v. Orthopedic & Neurological Consultants, Inc.*, 10th Dist. Franklin No. 17AP-671, 2019-Ohio-3901, ¶ 99. Here, because all of Mr. Baker’s other claims are barred as untimely, the trial court was correct to dismiss Mr. Baker’s spoliation claim as derivative of his other, unsuccessful claims. *See Heimberger v. Zeal Hotel Group, Ltd.*, 2015-Ohio-3845, 42 N.E.3d 323, ¶ 38 (1st Dist.) (“[S]ummary judgment against a spoliation claimant is appropriate where the evidence alleged to be willfully destroyed, altered, or concealed would not have changed the result of an unsuccessful underlying case, and no other damages are alleged.”).

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

Finally, in his second assignment of error, Mr. Baker asserts that the trial court abused its discretion by denying his motion to amend his complaint to plead a violation of Ohio’s state civil RICO statute, the Ohio Corrupt Practices Act (“OCPA”). *See* R.C. 2923.32. However, this amendment would have been futile twice-over, and the trial court correctly denied it as such.

First, as we held in *McNeal*, Mr. Baker’s OCPA claims as pleaded “merely present ‘medical claims’ in different attire.” *McNeal*, 2019-Ohio-5351, at ¶ 22. The OCPA claims are just as untimely as the rest of Mr. Baker’s medical claims and are barred by the statute of repose.

Second, 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 OCPA claim. *Jonas*, 2020-Ohio-3787, at ¶ 29. Upon review, the portion of Mr. Baker’s proposed amended complaint alleging his OCPA claim is nearly identical to the complaint we rejected in *Jonas*. Mr. Baker offers conclusory statements such as “Dr. Durrani is an enterprise,” but “[n]owhere in the amended complaint can we discern how he envisions structure, continuity, and separate existence from the corrupt practice to establish an ‘enterprise’ within the meaning of R.C. 2923.31(C).” *Id.*, citing *Morrow v. Reminger & Reminger Co., L.P.A.*, 183 Ohio App.3d 40, 2009-Ohio-2665, 915 N.E.2d 696, ¶ 38 (10th Dist.). On top of the fact that Mr. Baker’s claims are untimely, Mr. Baker’s proposed amended complaint lacks the requisite specificity to plead a state civil claim under the OCPA. *Id.*, citing *Morrow* at ¶ 27, and *Herakovic v. Catholic Diocese of Cleveland*, 8th Dist. Cuyahoga No. 85467, 2005-Ohio-5985, ¶ 16. Accordingly, the trial court did not err in denying the motion to amend as futile, and Mr. Baker’s second assignment of error is also overruled. The judgment of the trial court is affirmed.

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., ZAYAS and BERGERON, JJ.**

To the clerk:

Enter upon the journal of the court on November 25, 2020,  
per order of the court \_\_\_\_\_.

Presiding Judge