

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

REBECCA BREITENSTEIN,	:	APPEAL NO. C-180681
	:	TRIAL NO. A-1306847
Plaintiff-Appellant,	:	
	:	<i>JUDGMENT ENTRY.</i>
and	:	
ALAN BREITENSTEIN,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	
ABUBAKER ATIQ DURRANI, M.D.,	:	
	:	
CENTER FOR ADVANCED SPINE	:	
TECHNOLOGIES, INC.,	:	
	:	
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.

Plaintiff-appellee Rebecca Breitenstein appeals decisions of the Hamilton County Court of Common Pleas (1) granting a motion to dismiss filed by defendant-appellee, The Christ Hospital, Inc., (“Christ”), (2) granting motions for judgment on the pleadings filed by defendants-appellees, Abubakar Atiq Durrani, M.D., and Center for Advanced Spine Technologies, Inc., (“CAST”), and (3) denying Breitenstein’s motion to

amend her complaint. We find no merit in her two assignments of error, and we affirm the trial court's judgment.

Breitenstein was injured in a motor vehicle accident. Following various treatments to alleviate pain resulting from that accident, she was eventually referred to Durrani for treatment. Durrani performed spinal surgery on Breitenstein in February 2009. She contends that the surgery was medically unnecessary and that Durrani performed the surgery improperly, causing her to suffer severe back pain.

The record shows that Breitenstein filed a complaint against Durrani and CAST on October 10, 2013. She later amended that complaint twice, adding Christ as a defendant. She set forth numerous causes of action, including negligence, battery, lack of informed consent, intentional infliction of emotional distress, fraud, spoliation of the evidence, vicarious liability, negligent hiring, retention and supervision, violations of the Ohio Consumer Sales Protection Act, and violations of the Ohio Product Liability Act. Her husband, Alan Breitenstein, also set forth loss-of-consortium claims, but he has not appealed the dismissal of his claims.

In their motions to dismiss and for judgment on the pleadings, the appellees argued that Breitenstein's claims were barred by the four-year statute of repose set forth in former R.C. 2305.113(C). The trial court found their arguments to be meritorious, granted their motions, and dismissed the action.

In her first assignment of error, Breitenstein contends that the trial court erred in granting the appellees' motions to dismiss and for judgment on the pleadings and in dismissing the case. Under this assignment of error, she sets forth seven issues for review.

First, Breitenstein contends that her fraud claims are independent, nonmedical claims and not "medical claims" for purposes of the statute of repose. We have

repeatedly held that similar claims arose out of claims for medical care, diagnosis and treatment, and therefore, fell within the definition of a medical claim as defined in the statute of repose. *See 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, ¶ 14-24 (1st Dist.); *McNeal v. Durrani*, 2019-Ohio-5351, 138 N.E.3d 1231 ¶ 18 (1st Dist.); *Young v. Durrani*, 2016-Ohio-5526, 61 N.E.3d 34, ¶ 18-25 (1st Dist.).

Second, Breitenstein argues that the trial court erred in holding that her negligent-credentialing claim against Christ is not a medical claim under former R.C. 2305.113(C) and thus, not subject to the statute of repose. We have also rejected that argument numerous times. *See Jonas* at ¶ 10; *McNeal* at ¶ 19; *Young* at ¶ 21.

Third, she argues that the trial court erred in finding that the foreign-object exception to the statute of repose set forth in former R.C. 2305.113(D)(2) did not apply. The record shows that Durrani intentionally used the substance BMP-2, although allegedly improperly and without consent. But the use of the substance was intentional and was part of the medical procedure he performed. In rejecting a similar argument, we stated, “A plain, common sense, reading of the statute in context of the caselaw demonstrates that ‘foreign objects’ refers to objects that were meant to be removed upon the procedure’s conclusion.” *Jonas* at ¶ 20. Breitenstein never alleged that the BMP-2 was meant to be removed at the conclusion of her surgery or accidentally introduced into her. *See id.* at ¶ 22. To adopt Breitenstein’s position “would be to expand the ‘foreign objects’ exception and render every medical device case a potential candidate for a longer repose period.” *Id.* at ¶ 21.

Fourth, Breitenstein argues that Ohio’s savings statute, R.C. 2305.19, preserves the original filing date of the initial action. Though it is not readily apparent in the record, she claims that on April 11, 2013, she filed her initial complaint, which was

dismissed without prejudice on June 26, 2013. She refiled her complaint on October 10, 2013, which was within one year of the dismissal as required by the savings statute. But this argument ignores that even if the initial complaint was filed on April 11, 2013, it was still not filed within the statute of repose.

We have held that if the original complaint that failed “otherwise than upon the merits” was filed within the four-year statute of repose, it was timely under the savings statute as long as it was refiled within one year of the dismissal of the initial complaint. *See Deck v. Durrani*, 1st Dist. Hamilton C-180685, 2020-Ohio-3790, ¶ 8-9; *Wilson v. Durrani*, 2019-Ohio-3880, 145 N.E.3d 1071, ¶ 31 (1st Dist.). But R.C. 2305.19 “cannot revive an untimely complaint barred by the statute of repose.” *Jonas*, 1st Dist. Hamilton Nos. C-180457 and C-180458, 2020-Ohio-3787, at ¶ 12; *McNeal*, 2019-Ohio-5351, 138 N.E.3d 1231, at ¶ 11-12.

Breitenstein argues that the court erred in using the date of the surgery as the starting date for the running of the statute of repose. She contends the surgery was not the last culpable act or omission of the appellees, which included “post-surgery concealments, omissions, and misrepresentations,” and that the “wrongdoings were ongoing.” We have rejected similar arguments attempting to characterize follow-up appointments and postsurgical care as separate acts or omissions for purposes of the statute of repose. *Deck* at ¶ 7; *Jonas* at ¶ 12-13; *McNeal* at ¶ 13-15. Nothing in the complaint indicates that any separate harm occurred due to those subsequent appointments. The harm alleged in the complaint resulted from the underlying surgery.

Fifth, Breitenstein argues that Durrani’s flight to Pakistan in December of 2013 tolled all limitations periods against him under R.C. 2305.15(A). But Breitenstein’s surgery was in February 2009, meaning that the repose period on her claims ran in

February of 2013. Thus, Durrani's flight occurred after the repose period had run. Therefore, his flight did not toll the repose period, and R.C. 2305.15(A) cannot apply to save her claims. *See Jonas* at ¶ 14; *McNeal* at ¶ 16.

Sixth, Breitenstein urges this court to apply judicial doctrines of fraud and equitable estoppel to create exceptions to the statute of repose. We have repeatedly rejected that argument because the legislature could have included those exceptions in the statute and declined to do so. *See Jonas*, 1st Dist. Hamilton Nos. C-180457 and C-180458, 2020-Ohio-3787, at ¶ 11; *Freeman*, 2019-Ohio-3643, 144 N.E.3d 1067, at ¶ 24; *Crissinger v. The Christ Hosp.*, 2017-Ohio-9256, 106 N.E.3d 798, ¶ 23-24 (1st Dist.).

Finally, Breitenstein contends that her claims are not "medical claims" because Durrani's medical license was revoked and he was no longer a physician within the meaning of the statute of repose. We rejected an identical argument in *Jonas*. Durrani's medical license was revoked in March 2014, after the expiration of the repose period in February 2013. Consequently, Breitenstein's claims were "medical claims" for the full duration of the repose period, and Durrani's subsequent loss of his license cannot be used to revive them. *Jonas* at ¶ 14.

Because Breitenstein's claims were barred by the statute of repose, she can show no set of facts that would entitle her to relief. Therefore, the trial court did not err in granting Durrani's and CAST's motions for judgment on the pleadings or in granting Christ's motion to dismiss. *See Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268, ¶ 11; *State ex rel. Findlay Publishing Co. v. Hancock Cty. Bd. of Commrs.*, 80 Ohio St.3d 134, 136, 684 N.E.2d 1222 (1997); *Eward v. The Christ Hosp.*, 141 Ohio App.3d 572, 575, 752 N.E.2d 326 (1st Dist.2001). Consequently, we overrule Breitenstein's first assignment of error.

OHIO FIRST DISTRICT COURT OF APPEALS

In her second assignment of error, Breitenstein contends that the trial court abused its discretion by denying her motion for leave to file an amended complaint. We review the denial of leave to amend a pleading for an abuse of discretion. *Patterson v. V & M Auto Body*, 63 Ohio St.3d 573, 576, 589 N.E.2d 1306 (1992); *Freeman*, 2019-Ohio-3643, 144 N.E.3d 1067, at ¶ 26. While Civ.R. 15(A) provides that leave to amend should be granted freely, a trial court may properly refuse to grant leave when an amendment would be futile. *Jonas*, 1st Dist. Hamilton Nos. C-180457 and C-180458, 2020-Ohio-3787, at ¶ 24; *Freeman*, 2019-Ohio-3643, 144 N.E.3d 1067, at ¶ 27; *Hensley v. Durrani*, 1st Dist. Hamilton No. C-130005, 2013-Ohio-4711, ¶ 14.

Breitenstein sought to amend her complaint to add a fraud claim against Christ. These new allegations arose out of her medical diagnosis, care and treatment. Therefore they are medical claims subject to the four-year statute of repose, and to allow her to amend her complaint would have been futile. *See Jonas* at ¶ 24-25; *Freeman* at ¶ 27. Under the circumstances, we cannot hold that the trial court abused its discretion in denying Breitenstein's motion for leave to amend her complaint. Therefore, we overrule her second assignment of error and affirm the trial court's judgment.

A certified copy of this judgment entry constitutes 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