

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

ANDREW CARR,	:	APPEAL NO. C-180458
	:	TRIAL NO. A-1505422
Plaintiff-Appellant,	:	
	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
	:	
ABUBAKAR ATIQ DURRANI, M.D.,	:	
	:	
CENTER FOR ADVANCED SPINE	:	
TECHNOLOGIES, INC.,	:	
	:	
and	:	
	:	
THE CHRIST HOSPITAL,	:	
	:	
Defendants-Appellees.	:	

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.

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, Inc., (“CAST”) and associated hospitals. Beginning in 2004, Andrew Carr sought care for a curvature of his spine, which ultimately led to a 2005 operation with Dr. Durrani at Children's Hospital. Another surgery in 2007 at Christ Hospital ensued, followed by yet a third surgery in 2010 at West Chester Hospital. After this series of surgeries failed to alleviate Mr. Carr's back issues, he eventually filed suit in Butler County in 2013, but then voluntarily dismissed that case under Civ.R. 41(A) in 2015. Subsequently refiled the case later that same year in Hamilton County, Mr. Carr raised claims against Dr. Durrani, CAST, Children's, Christ Hospital, West Chester Hospital, and UC Health, including claims of negligence, battery, fraud, lack of informed consent, and negligent credentialing, among others.

Dr. Durrani, CAST, and the relevant defendant hospitals moved to dismiss the pending claims against them based on Ohio's four-year medical malpractice statute of repose. Agreeing with the defendants, the trial court dismissed the claims, deeming them untimely as falling outside the four-year window allotted under the statute. Mr. Carr appealed the dismissal of his complaint and the denial of his motion to amend. After filing his appeal, however, Mr. Carr voluntarily dismissed with prejudice his pending claims against West Chester Hospital, UC Health, and Children's, leaving only Dr. Durrani, CAST and Christ Hospital as parties relevant for appeal.

On appeal, Mr. Carr urged this Court to allow his suit filed in 2013 to move forward despite being filed outside the statute of repose period. He claimed R.C. 2305.19(A), Ohio's saving statute, permitted the lawsuit because it was filed within one year of the dismissal of the original complaint. We agreed and remanded that issue to the trial court for further proceedings. The Ohio Supreme Court overturned this holding on the authority of *Wilson v. Durrani*, Slip Opinion No. 2020-Ohio-6827. We then stayed this action pending disposition of the *Wilson* plaintiff's motion for

reconsideration. In light of recent decisions from this Court and the Ohio Supreme Court, we now consider Mr. Carr’s single assignment of error claiming that the trial court improperly granted judgment on the pleadings.

In the first issue presented for review, Mr. Carr contends that his claims are not “medical claims,” but independent nonmedical fraud claims. This argument was rejected for substantially identical claims in *Jonas v. Durrani*, 2020-Ohio-3787, 156 N.E.3d 365, ¶ 9 (1st Dist.), *rev’d on other grounds*, *Carr v. Durrani*, 163 Ohio St.3d 207, 2020-Ohio-6943, 168 N.E.3d 1188; *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.), *rev’d on other grounds*, *Scott v. Durrani*, 162 Ohio St.3d 507, 2020-Ohio-6932, 165 N.E.3d 1268. We decline the invitation to revisit issues that are well-settled in this district.

In the second issue presented for review, Mr. Carr contends that the trial court erred by holding that his negligent credentialing claims against The Christ Hospital are “medical claims” subject to the statute of repose. This argument is squarely foreclosed by *Young v. Durrani*, 2016-Ohio-5526, 61 N.E.3d 34, ¶ 21 (1st Dist.); *Jonas* at ¶ 10; and *McNeal* at ¶ 19. We decline the invitation to revisit this settled law.

In his third issue presented for review, Mr. Carr argues the trial court erred in ruling that the foreign object exception does not apply to bar the statute of repose. We recently considered—and rejected—the identical theory posited that Dr. Durrani’s implantation of BMP-2 constitutes a “foreign object” pursuant to R.C. 2305.113(D)(2). *See Jonas* at ¶ 15-22. (“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.”). We decline to revisit this issue.

In the fourth issue presented, Mr. Carr contends the Ohio saving statute, R.C. 2305.19, preserved the original filing date of his initial action. The relevant surgery at issue here occurred on February 15, 2010. Mr. Carr initially brought suit in Butler County on April 11, 2013, within the medical malpractice repose period, but voluntarily

dismissed that suit. He later refiled in Hamilton County; this second complaint fell outside the statute of repose. This Court agreed the saving statute operated to save the claims still within the four-year repose period at the time of his initial filing in 2013 (i.e., his 2010 surgery). The Ohio Supreme Court recently considered this issue and came to the opposite conclusion, holding that the saving statute “neither operates as a statute of limitations nor operates to toll the statute of limitations.” *Wilson*, Slip Opinion No. 2020-Ohio-6827, at ¶ 28 (“The saving statute anticipates the commencement of a new action, not the reactivation of the prior action, and it says nothing about the new action relating back to the filing date of the prior action.”), citing *Antoon v. Cleveland Clinic Found.*, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, ¶ 24. On this authority, we overrule Mr. Carr’s fourth assignment of error.

In his fifth issue presented for review, Mr. Carr argues that Dr. Durrani’s flight in December of 2013 tolls the statute of limitations in regards to Dr. Durrani and CAST (but not The Christ Hospital). We answered this question recently in *Elliot v. Durrani*, and decided that R.C. 2305.15(A) does toll the statute of repose in R.C. 2305.113(C). *Elliot v. Durrani*, 1st Dist. Hamilton No. C-180555, 2021-Ohio-3055, ¶ 43 (“Based on the plain language, purpose, and history of R.C. 2305.15(A), as well as a cohesive reading of the Revised Code, we conclude that R.C. 2305.15(A) applies to toll the four-year medical statute of repose in R.C. 2305.113(C).”). As applied to Mr. Carr, his last surgery occurred in February of 2010. Dr. Durrani absconded in December of 2013, less than four years after the act constituting the basis of Mr. Carr’s claim. Therefore, based on the analysis of *Elliot*, we sustain Mr. Carr’s fifth assignment of error as to Dr. Durrani alone but not as to CAST. *See Elliot* at ¶ 50 (“[T]he tolling provision in R.C. 2305.15(A) applies only to claims against Durrani and not to claims against CAST”).

Finally, in his last issue presented, Mr. Carr 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*, 2020-Ohio-3787, 156 N.E.3d 365, at ¶ 11; *Freeman*, 2019-Ohio-3643, 144 N.E.3d 1067,

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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.

We accordingly overrule Mr. Carr’s assignment of error in all respects except that we sustain his assignment of error as it pertains to Dr. Durrani by virtue of Dr. Durrani’s abscondment. We reverse the trial court in that respect and remand for further proceedings consistent with this judgment entry.

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 equally between Mr. Carr and Dr. Durrani. No costs shall be taxed to either The Christ Hospital or CAST.

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

To the clerk:

Enter upon the journal of the court on September 17, 2021,
per order of the court_____.

Administrative Judge