

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

DAMON DECK,	:	APPEAL NO. C-180685
	:	TRIAL NO. A-1506307
Plaintiff-Appellant,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
ABUBAKAR ATIQ DURRANI, M.D.,	:	
and	:	
CENTER FOR ADVANCED SPINE	:	
TECHNOLOGIES, INC.,	:	
Defendants-Appellees,	:	
and	:	
UC HEALTH, et al.,	:	
Defendants.	:	

The court sua sponte removes this cause 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 cause is before us on remand from the Ohio Supreme Court. This appeal is one of a long line of cases brought by former patients of Dr. Abubaker Atiq Durrani alleging various forms of malpractice, fraud, and negligence against Dr. Durrani, the Center for Advanced Spine Technologies, Inc., (“CAST”) and associated hospitals. Damon Deck visited Durrani to seek treatment for his chronic back pain. Durrani performed surgery on Deck on November 3, 2010. Deck eventually sued Durrani, as well as CAST, West Chester Hospital, LLC, and UC Health, for claims arising from

that surgery. The complaint was originally filed in the Butler County Court of Common Pleas on April 1, 2013. That complaint was voluntarily dismissed on December 22, 2014, pursuant to Civ.R. 41(A). Deck then refiled the suit on November 19, 2015.

Appellees filed a motion to dismiss the complaint pursuant to Civ.R. 12(C). Appellees claimed that the refiled suit was untimely as the statute of repose had expired. Deck argued that the suit was timely filed because the suit had been refiled within one year of the prior dismissal, and such refileing is permitted pursuant to R.C. 2305.19(A). The trial court dismissed the refiled complaint and denied a pending request by Deck to amend his complaint.

Deck appealed the trial court's judgment and this court entered judgment on July 22, 2020, in *Deck v. Durrani*, 1st Dist. Hamilton No. C-180685, 2020-Ohio-3790. We reversed the trial court's judgment based on our opinion in *Wilson v. Durrani*, 2019-Ohio-3880, 145 N.E.3d 1071 (1st Dist.), *rev'd*, *Wilson v. Durrani*, 164 Ohio St.3d 419, 2020-Ohio-6827, 173 N.E.3d 448. Because we reversed the trial court's decision on the savings-statute issue, we declined to address several of Deck's arguments. *Deck* at ¶ 10. Durrani and CAST appealed this court's decision, and the Ohio Supreme Court accepted the appeal.¹ On December 31, 2020, the Ohio Supreme Court reversed this court's judgment on the authority of its decision in *Wilson*, and remanded this matter for this court to consider Deck's arguments, which we previously declined to address. *Deck v. Durrani*, 162 Ohio St.3d 707, 2020-Ohio-6945, 166 N.E.3d 1242.

¹ West Chester Hospital and UC Health were dismissed as appellees in this case on June 20, 2019.

The remaining issues for consideration are: (1) whether the repose period was tolled under R.C. 2305.15(A); (2) whether the doctrines of fraud or equitable estoppel apply to bar application of the statute of repose; (3) whether revocation of Durrani's medical license transforms the claims into nonmedical claims; and (4) whether R.C. 2305.113(D)(2), the foreign-objects exception, applies to bar the statute of repose.

Tolling

Deck argues that Durrani's flight in December 2013 tolls all limitations periods as to Durrani and CAST under R.C. 2305.15(A). We recently decided this issue in *Elliot v. Durrani*, 1st Dist. Hamilton No. C-180555, 2021-Ohio-3055, and held that R.C. 2305.15(A) does toll the statute of repose found in R.C. 2305.113(C). *Elliot* at ¶ 43. R.C. 2305.15(A) provides:

When a cause of action accrues against a person, if the person is out of the state, has absconded, or conceals self, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14 * * * of the Revised Code does not begin to run until the person comes into the state or while the person is so absconded or concealed. After the cause of action accrues if the person departs from the state, absconds, or conceals self, the time of the person's absence or concealment shall not be computed as any part of a period within which the action must be brought.

Durrani absconded in December 2013, less than four years after performing surgery on Deck in November 2010. Therefore, the statute of repose is tolled and does not bar Deck's claims against Durrani. However, the same result cannot be said for Deck's claims against 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”). Since more than four years ran between the date of the surgery and the date of the filing of the Hamilton County complaint, any claims against CAST are barred by the statute of repose.

Doctrines of Fraud and Equitable Estoppel

Deck argues that the trial court erred by finding that there is no fraud or equitable-estoppel exception to the statute of repose. This court has previously held that there is no fraud or equitable-estoppel exception to the statute of repose. *E.g.*, *Crissinger v. Christ Hosp.*, 2017-Ohio-9256, 106 N.E.3d 798, ¶ 24 (1st Dist.); *Freeman v. Durrani*, 2019-Ohio-3643, 144 N.E.3d 1067, ¶ 13 (1st Dist.); *Couch v. Durrani*, 1st Dist. Hamilton Nos. C-190703, C-190704, C-190705, C-190706 and C-190707, 2021-Ohio-726, ¶ 25; *Janson v. Christ Hosp.*, 1st Dist. Hamilton Nos. C-200047, C-200048, C-200050, C-200052, C-200053, C-200054, C-200055 and C-200056, 2021-Ohio-1467, ¶ 24. Therefore, we find no error in the trial court’s decision on this issue.

Revocation of Durrani’s Medical License

Deck argues that his claims are not “medical claims” subject to R.C. 2305.113 because Durrani had his medical license revoked on March 12, 2014. We disagree. “[T]here is ‘nothing in the [statute of repose] to suggest that a medical claim based upon the medical treatment rendered by a licensed physician is suddenly transformed into a “non-medical” claim if that physician’s license is revoked years after the cause of action arose * * *.’” *Elliot*, 1st Dist. Hamilton No. C-180555, 2021-Ohio-3055, at ¶ 56, quoting *Levandofsky v. Durrani*, S.D. Ohio No. 1:18-CV-809, 2020 WL 5535872 (Feb. 26, 2020). Durrani was licensed to practice medicine when he performed the surgery on Deck. There is nothing to suggest that Durrani’s

subsequent loss of his license in any way transformed the nature of the claims he asserted. Therefore, we find no error in the trial court's decision on this issue.

Foreign-Objects Exception

Deck argues that the trial court erred by ruling that the foreign-objects exception found in R.C. 2305.113(D)(2) does not apply to bar application of the statute of repose, because Durrani's use of BMP-2 constitutes a foreign object. This court has previously considered substantially the same argument and found that, because there was no allegation that BMP-2 was meant to be removed at the conclusion of the surgery or no allegation that BMP-2 was inserted by accident, "the 'alleged basis of the medical claim' is not a foreign object trespassing in the body but rather negligently-performed surgery with an improper device." *Jonas v. Durrani*, 2020-Ohio-3787, 156 N.E.3d 365, ¶ 22, *rev'd in part on other grounds*, *Carr v. Durrani*, 163 Ohio St.3d 207, 2020-Ohio-6943, 168 N.E.3d 1188. Therefore, we find no error in the trial court's decision on this issue. The first assignment of error is sustained in part and overruled in part.

For the foregoing reasons, we affirm the trial court's judgment regarding Deck's claims against CAST, but we reverse the trial court's judgment regarding Deck's claims against Durrani and remand this cause to 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 50% to appellant and 50% to Durrani under App.R. 24.

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

To the clerk:

Enter upon the journal of the court on November 10, 2021,

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per order of the court_____.

Administrative Judge