**IN THE SUPREME COURT OF OHIO**

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| RICHARD ELLIOT, | : | |
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| Appellee | : | Supreme Court Case No. 2021-1352 |
| v. | : | |
| | : | |
| ABUBAKAR ATIQ DURRANI, M.D., | : | First District Court of Appeals |
| | : | Case No. C1800555 |
| Appellant. | : | |
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# APPELLANT'S MERIT BRIEF

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEALS

Philip D. Williamson (0097174)
Aaron M. Herzig (0079371)
Russell S. Sayre (0047125)
Anna M. Greve (0099264)
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, OH 45202-3957
Phone: (513) 381-2838
pwilliamson@taftlaw.com
aherzig@taftlaw.com
sayre@taftlaw.com
agreve@taftlaw.com

*Counsel for Appellant Abubakar Atiq Durrani, M.D.*

Robert A. Winter Jr. (0038673)
P.O. Box 175883
Fort Mitchell, KY 41017-5883
Phone: (859) 250-3337
robertawinterjr@gmail.com

*Counsel for Appellee Richard Elliot*

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## INTRODUCTION

Less than two years ago, in *Wilson v. Durrani*, this Court reaffirmed for the third time that Ohio's medical malpractice statute of repose, R.C. 2305.113(C), is a "true statute of repose" that bars any action that is commenced more than four years after the underlying act of malpractice. And for the third time, this Court made it clear that the only exceptions to the statute of repose are the three stated in the statute of repose itself.

Perhaps the fourth time will be the charm. The First District Court of Appeals (again) tried to add another unstated exception to the statute of repose: the absent defendant saving statute in R.C. 2305.15(A). And so this Court must (again) reverse and repeat settled law: "R.C. 2305.113(C) is a true statute of repose that, except as expressly stated in R.C. 2305.113(C) and (D), clearly and unambiguously precludes the commencement of a medical claim more than four years after the occurrence of the alleged act or omission that forms the basis of the claim." *Wilson v. Durrani*, 164 Ohio St.3d 419, 2020-Ohio-6827, 173 N.E.3d 448, ¶ 38.

The First District opinion disregarded this Court's decision in *Wilson* (and *Antoon* and *Ruther*), created a rule that directly contradicts the text of the medical claim statute of repose, and upended the quintessential purpose of statutes of repose. As this Court explained in *Wilson*, Ohio's statutes of repose reflect the General Assembly's decision that defendants should be "free from liability after a legislatively determined time." *Wilson* at ¶ 10. But if the absent defendant statute applies to statutes of repose, then defendants can instead face indefinite liability if they do not remain in Ohio. This Court ruled in *Wilson* that the reversal saving statute, which would only have extended the repose period by a few years at most, could not enlarge the repose period. But applying the absent defendant statute to statutes of repose would extend liability potentially forever, which is a far greater distortion of repose statutes than the one plaintiffs proposed—and this Court rejected—in *Wilson*.

## STATEMENT OF THE CASE

Like *Wilson*, this is one of approximately 500 medical malpractice suits filed against Dr. Abubakar Atiq Durrani and his former practice, Center for Advanced Spine Technologies, Inc. ("CAST").[1] And like the Appellees in *Wilson*, Richard Elliot filed two lawsuits against Dr. Durrani. His first suit was untimely under the language of the statute of repose. For tactical reasons, he voluntarily dismissed it before the trial court could. He then filed a new action, just as untimely as the first.

Elliot first argued that the reversal saving statute, R.C. 2305.19, tolled the statute of repose and saved his second filing. That argument was doomed from the start because his first action was itself untimely. But in any event, this Court closed the door on that argument—and the erroneous statutory interpretation it embodied—in *Wilson*. Undeterred, Elliot tried a new tactic, arguing that the absent defendant saving statute, R.C. 2305.15(A), tolls the statute of repose. The First District agreed. Along the way, the court of appeals committed the very same errors that this Court corrected in *Wilson*: a faulty approach to statutory construction, an improper reliance on that court's policy preferences, and a misreading of this Court's prior decisions.

This Court stated unequivocally in *Wilson* that the only exceptions to the statute of repose are those written in the statute itself, in R.C. 2305.113(C) and (D). The Court need say no more to resolve this case. But evidently, it must say so again.

### I. Facts

In January 2010, Richard Elliot suffered from lower back pain that forced him to walk with a limp. *Elliot v. Durrani*, Hamilton County Common Pleas No. A1504466, Complaint ¶ 9,

[1] CAST is not a party to this appeal.

Supp. 45. For a time, Elliot chose to "simply deal[] with the pain," rather than see a doctor. *Id.* ¶ 10, Supp. 45. But one day, he saw a television ad for CAST and decided to consult with Dr. Durrani. *Id.* ¶ 8, Supp. 44. He first met with Dr. Durrani on January 5, 2010, and, according to Elliot, Dr. Durrani immediately recommended surgery. *Id.* ¶ 11, Supp. 45. On March 1, 2010, Dr. Durrani performed an L5-S1 fusion surgery on Elliot at Good Samaritan Hospital. *Id.* ¶ 18, Supp. 45. Over the following six weeks, Elliot was in and out of the hospital while battling a MRSA infection. *Id.* ¶¶ 21-33, Supp. 46-47. Elliot's substantive allegations end there, but he believes that his surgery was "medically unnecessary and improperly performed," and that he has "suffered harm" because of Dr. Durrani's negligence. *Id.* ¶¶ 27, 34, Supp. 46-47.

## II. Procedural background

### A. Elliot Dismissed His First Hamilton County Action.

Four and a half years after his surgery, Elliot decided to sue. On June 12, 2014, he filed a complaint in the Hamilton County Court of Common Pleas against Dr. Durrani, CAST, and Good Samaritan Hospital. *Elliot v. Durrani*, Hamilton County Common Pleas No. A 1403492, Complaint, Supp. 1-40. Against Dr. Durrani, Elliot asserted claims for negligence, battery, lack of informed consent, intentional infliction of emotional distress, fraud, and spoliation of evidence. *Id.* ¶¶ 66-91, Supp. 8-12. Against CAST, he alleged claims for vicarious liability, negligent hiring, retention and supervision, violations of the Ohio Consumer Sales Practices Act, and spoliation of evidence. *Id.* ¶¶ 91-116, Supp. 12-15. And against Good Samaritan, he alleged claims for negligence, negligent hiring, retention, and supervision, fraud, violations of the Ohio Consumer Sales Practices Act, products liability and spoliation of evidence. *Id.* ¶¶ 117-180, Supp. 15-25. Three months later, Elliot dismissed his suit. *Elliot v. Durrani*, Hamilton County Common Pleas No. A 1403492, Notice of Dismissal, Supp. 41-42.

### B. The Trial Court Dismissed Elliot's Second Hamilton County Action.

Five years after his surgery, on August 19, 2015, Elliot filed another lawsuit in Hamilton County Common Pleas. *Elliot v. Durrani*, Hamilton County Common Pleas No. A1504466, Complaint, Supp. 43-120. .He raised largely the same claims against the same defendants as he did in his first action.[2] *Id.* ¶¶ 306-432, Supp. 93-111. All three defendants moved to dismiss Elliot's complaint as barred by the four-year medical claim statute of repose, R.C. 2305.113(C). *Elliot v. Durrani*, Hamilton County Common Pleas No. A1504466, Dr. Durrani and CAST's Motion to Dismiss, Supp. 121-130. The statute of repose began to run on the date of Elliot's surgery, March 1, 2010. But Elliot filed his complaint more than five years later. Elliot argued that two saving statutes tolled the statute of repose: the absent defendant saving statute, R.C. 2305.15(A), and the reversal saving statute, R.C. 2305.19. As relevant here, Elliot believed that R.C. 2305.15(A) tolled the statute of repose after Dr. Durrani returned to Pakistan in December 2013, less than four years after his surgery. App. Op. ¶ 9, Appx. 6.

It then took three years to resolve the motion to dismiss because of the Durrani plaintiffs' "group trial" gambit. Elliot's counsel, which represented most of the more than 500 plaintiffs in malpractice actions against Dr. Durrani, had filed most of the lawsuits in Butler County. After losing four trials, the plaintiffs voluntarily dismissed their pending lawsuits *en masse* and then filed new lawsuits in Hamilton County. Each new complaint, including Elliot's, included the following note: "All new Dr. Durrani cases shall go to Judge Ruehlman per his order." Supp. 43.

That assignment "order" was part of plaintiffs' counsel's scheme to consolidate all of the Durrani-related cases for a year-long "massive group trial" in front of a single judge and jury.[3]

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[2] Elliot added a new fraud claim against CAST.

[3] *Wilson* arose in a nearly identical posture. The plaintiffs in *Wilson* were typical of the Durrani-related plaintiffs who originally sued Dr. Durrani in Butler County Common Pleas, but left the

*See Elliot v. Durrani*, Hamilton County Common Pleas No. A 1504466, Dec. 15, 2015 General Order on all Dr. Durrani Hamilton County Cases, Supp. 132-159. This Court eventually vacated the consolidation order and appointed a visiting judge to preside over the litigation. *State ex rel. Durrani v. Ruehlman*, 147 Ohio St.3d 478, 2016-Ohio-7740, 67 N.E.3d 769.

Once the cases were properly assigned, the trial court turned to the backlog of dispositive motions. The court granted the motions to dismiss Elliot's Complaint, finding that the case involved a routine application of the statute of repose. Appx. 24-46 (Entry and Decision on Dr. Durrani and CAST's Motion to Dismiss). The trial court issued its decision more than a year before this Court accepted jurisdiction in *Wilson*—but it anticipated *Wilson* and rejected both of Elliot's saving statute arguments:

> [T]he medical claim statute of repose, R.C. 2305.113(C), as written and enacted by the General Assembly, carefully specifies just two exceptions, those circumstances provided by R.C. 2305.16 and those circumstances provided by R.C. 2305.113(D). Although it could have easily done so, the General Assembly did not provide an exception . . . for the circumstances set forth in R.C. 2305.15(A)[.]
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> * * *
>
> Although it easily could have done so, the General Assembly did not provide an exception to the medical claim statute of repose . . . for the circumstances set forth in R.C. 2305.19. For much the same reasons we determined that R.C. 2305.15(A) does not toll the running of the statute of repose, we determine that the "saving statute" in R.C. 2305.19 does not apply to allow the Plaintiff to rely on a previous filing within the four-year time period.

Appx. at 40-41.

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jurisdiction for a friendlier venue after four Butler County juries returned defense verdicts for Dr. Durrani. *Wilson v. Durrani*, Supreme Court No. 2019-1560, Appellants' Br. at 4-5. Elliot is typical of the plaintiffs who filed their original actions in Hamilton County, but dismissed those actions and filed new ones in order to join the consolidated trial effort.

### C. The First District Court of Appeals Reversed.

Elliot appealed to the First District Court of Appeals, where he again argued that R.C. 2305.19 and 2305.15(A) tolled the statute of repose. *Elliot v. Durrani*, First District No. C180555, Appellant's Br. at 5-11. After the parties briefed Elliot's appeal, this Court accepted jurisdiction in *Wilson v. Durrani*, No. 2019-1560. The First District stayed the case pending this Court's resolution of *Wilson*.

After this Court decided *Wilson*, the First District requested supplemental briefing on whether R.C. 2305.15(A) tolled the statute of repose. Dr. Durrani and CAST explained that R.C. 2305.15(A) is not a "stated exception" to the statute of repose, so under this Court's decision in *Wilson*, R.C. 2305.15(A) cannot toll the statute of repose. The First District disagreed, reversed the trial court, and revived Elliot's Complaint.

The First District's opinion started in the wrong place. In *Wilson*, this Court started with the statute of repose. *Wilson* at ¶ 24 ("we first turn to the language of R.C. 2305.113(C)(1)."). But instead of starting with the statute of repose, the First District started with the absent defendant saving statute. App. Op. ¶ 13, Appx. 7 ("To answer that question now, we first turn to the plain language of R.C. 2305.15.").

After starting the wrong place, the First District then asked the wrong question. In *Wilson*, this Court asked whether the reversal saving statute was an exception to the statute of repose (it was not). The First District reversed the analysis, asking instead whether the statute of repose was an exception to the absent defendant statute. *Id.* ¶ 29, Appx. 13 ("Since the 1950s, the General Assembly has amended R.C. 2305.15 three times and has never excluded statutes of repose from the time limitations to which it applies."). Which is to say, the court below assumed that the absent defendant statute applied and looked for indications that the statute of repose excluded it.

The First District did nod toward the right question, acknowledging that "[b]uilt into the statute of repose is an express exception for legal disabilities under R.C. 2305.16." App. Op. ¶ 33, Appx. 14. And the court rightly pointed out that R.C. 2305.15(A) and R.C. 2305.16 are strikingly similar—"virtually identical," even—using the same structure and similar language. *Id.* ¶¶ 33-35, Appx. 13-14. However, the court drew precisely the wrong conclusion from those premises. The court decided that "it would make no logical sense" to apply 2305.16 to the statute of repose, yet *not* apply the virtually identical language of 2305.15(A). *Id.* ¶ 35, Appx. 15. But there is a logical reason: R.C. 2305.16 is an express exception written into the statute of repose, and R.C. 2305.15 is not. *See* R.C. 2305.113(C).

Only after finishing its own exercise in statutory construction—and reaching the wrong answer—did the First District turn to this Court's opinion in *Wilson*. This Court's holding was seemingly unmistakable: "Unless one of the stated exceptions applies, R.C. 2305.113(C) clearly and unambiguously prohibits the commencement of any action upon a medical claim more than four years after the act or omission upon which the claim is based." *Wilson v. Durrani*, 164 Ohio St.3d 419, 2020-Ohio-6827, 173 N.E.3d 448, ¶ 29; *see also id.* ¶ 38. But on the thinnest of grounds, the First District decided the holding of *Wilson* did not apply.

According to the First District, "the decision in Wilson analyzed a very narrow issue—whether the savings statute in R.C. 2305.19 applied to extend the statute of repose in R.C. 2305.113(C)." App. Op. ¶ 37, Appx. 16. And this Court's decision in *Wilson* was not controlling, the First District reasoned, because "Unlike R.C. 2305.19 [the statute at issue in *Wilson*,] R.C. 2305.15(A) is a tolling provision." *Id.* ¶ 40, Appx. 16. In the First District's view, a saving statute adds time to the repose clock, "provid[ing] a plaintiff with a limited period of time in which to refile a dismissed claim by commencing a new action that would otherwise be barred

by the statute of limitations." *Id.* ¶ 39, Appx. 16. A tolling provision, on the other hand, stops the repose clock. *Id.* ¶ 40, Appx. 16. So in the First District's opinion, *Wilson* applied only to saving statutes, but not to tolling statutes.

But *Wilson*'s holding stemmed from an analysis of the medical claim statute of repose and statutes of repose generally. This opinion did not turn on whether R.C. 2305.19 was a "tolling" statute or a "saving" statute—it did not matter. If "R.C. 2305.113(C) clearly and unambiguously" imposes a four-year limit on medical claims "unless one of the stated exceptions applies," then the Court does not have to focus on whether this or that *un*stated exception applies. The answer is the same in every case: no. Although the saving statute (the "exception") at issue here is different from the one addressed in *Wilson*, the repose statute is the same—which is why the First District should have started its analysis with the repose statute.

The First District concluded that neither the reasoning nor the holding of *Wilson* had any implications for how it should read R.C. 2305.113(C), or whether it could add any exceptions to the statute's express, exhaustive list. That was the same mistake it made in *Wilson*, when it concluded that this Court's clear reasoning about the statute of repose in *Antoon* should not inform its decision. *See Wilson v. Durrani*, 2019-Ohio-3880, 145 N.E.3d 1071, ¶ 27 (1st Dist.).

In the end, the First District decided to ignore *Wilson* for the same reason it ignored *Antoon* before: the First District focused on what it saw as the salutary policy outcome of adding exceptions to the statute of repose. The First District decided that "When defendants leave the state, potentially becoming difficult to locate or hard to serve, the privilege granted by the statute of repose is frustrated. Therefore, the absent-defendant statute must control." App. Op. ¶ 26. Appx. 11. That outcome-based policy analysis ignored the plain text of R.C. 2305.113(C) and ignored the lessons (and holding) of *Wilson*. This Court should reverse.

## PROPOSITION OF LAW AND ARGUMENTS IN SUPPORT

**Proposition of Law: The absent defendant statute, R.C. 2305.15(A), does not toll the medical claim statute of repose, R.C. 2305.113(C), (D).**

### I. Applying this Court's unambiguous decision in *Wilson*, the absent defendant statute cannot toll the medical claim statute of repose.

Ohio's medical claim statute of repose provides that "Except as to persons within the age of minority or of unsound mind as provided by section 2305.16 of the Revised Code, and except as provided in division (D) of this section," no action on a medical claim shall be commenced more than four years after the act giving rise to the claim. R.C. 2305.113(C). As this Court explained in *Wilson*, the statute of repose "clearly and unambiguously prohibits the commencement of any action upon a medical claim more than four years after the act or omission upon which the claim is based[,]" unless "one of the stated exceptions applies." *Wilson*, 164 Ohio St.3d 419, 2020-Ohio-6827, 173 N.E.3d 448, at ¶ 29.

It is undisputed that Elliot commenced even his first action more than four years after the act giving rise to those claims (his surgery). It is likewise undisputed that Elliot is not a minor or "of unsound mind," nor does he fit any of the provisions of R.C. 2305.113(D). By the clear and unambiguous terms of the statute of repose, his claims are barred.

Elliot tried to invoke the absent defendant saving statute, R.C. 2305.15(A). But that statute is not a "stated exception" to the statute of repose, and so cannot save his claims. *Wilson* at ¶¶ 29, 38. The Court can decide this case by copying just five sentences from the end of *Wilson*:

> R.C. 2305.113(C) is a true statute of repose that, except as expressly stated in R.C. 2305.113(C) and (D), clearly and unambiguously precludes the commencement of a medical claim more than four years after the occurrence of the alleged act or omission that forms the basis of the claim.
>
> * * *

> For these reasons, we reverse the judgment of the First District Court of Appeals. Because appellee[ ] commenced [his] action[ ] in Hamilton County more than four years after the alleged conduct that formed the basis of [his] claims, the statute of repose barred appellee['s] refiled action[ ]. Accordingly, the trial court appropriately granted appellant['s] motion for judgment on the pleadings.
>
> Judgment reversed.

*Wilson* at ¶¶ 38-39.

Elliot and the First District's opinion suggest that *Wilson*'s application is narrowly limited to saving statutes as opposed to "tolling provisions." But that view is at odds with both the majority and the dissent in *Wilson*. A foundation of the *Wilson* dissent is what it saw as the difference between saving statutes, such as R.C. 2305.19, and general "tolling" provisions. The dissent believed (incorrectly) that saving statutes should apply to the repose period specifically because they still require a lawsuit to be filed within four years—i.e., saving statutes honor the four-year cutoff to file suit, and later allow another year to "recommence" the suit that had already been timely filed. Tolling provisions, on the other hand, "either" extend "the time to *commence* an action or add[] additional time to *commence* an action" beyond the four-year cutoff. *Wilson* at ¶ 43 (Stewart, J., dissenting) (emphasis added). For such tolling provisions, the dissent noted, "[T]he three exceptions listed in R.C. 2305.113(C) operate as" the only "*true* exceptions" to filing a suit within four years. *Id.* (emphasis added). Under the dissent's view, the absent defendant statute is a tolling statute that is not a "true exception" listed in R.C. 2305.113(C). Because R.C. 2305.15(A) is not expressly incorporated into the repose statute, it does not apply to the repose statute. *Id.*

The dissent thus recognized that where the General Assembly intends to create a tolling exception to a statute of repose, it writes that exception into the statute. The express exceptions in the statute of repose, the dissent said, reflect a legislative judgment that in some cases "the

plaintiff will likely be unable to commence an action within the four-year repose period—hence the need for tolling or additional time modifications to the general rule." *Id.* So the majority and dissent agree that if the General Assembly intends to "modify" the general time limit of the statute of repose—particularly through a tolling statute—then it will say so expressly *in the statute of repose*.

In short, both the majority and dissent in *Wilson* reject Elliot's (and the First District's) approach. For that reason alone, the judgment below should be reversed.

## II. Applying the unambiguous language of R.C. 2305.113(C), the absent defendant statute cannot toll the medical claim statute of repose.

If the Court proceeds further, it will find that it has already covered most of the ground in this case. The Court stated three times in three cases that R.C. 2305.113(C) is a "true statute of repose." *Wilson*, 164 Ohio St.3d 419, 2020-Ohio-6827, 173 N.E.3d 448, at ¶ 38; *Antoon v. Cleveland Clinic Found.*, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, ¶ 35; *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, ¶ 18. The twelve justices who have used the phrase "true statute of repose" over the last decade chose those words carefully, and knew what they meant. But for the sake of completeness, a brief sketch of R.C. 2305.113 and its place in Ohio's overall statutory framework follows.

### A. Statutes of repose are not subject to tolling, except where the General Assembly clearly and unambiguously creates an exception to the time limit.

Chapter 2305 of the Revised Code creates a comprehensive scheme of time limits on civil actions in Ohio. In three places, the General Assembly paired a short statute of limitations with a longer statute of repose: R.C. 2305.10 (product liability), R.C. 2305.113 (medical claims), and R.C. 2305.131 (premises liability).

As this Court has already explained, a statute of limitations is plaintiff-focused, emphasizing "plaintiffs' duty to diligently prosecute known claims." *Wilson* at ¶ 10 (quoting

*CTS Corp. v. Waldburger*, 573 U.S. 1, 8, 134 S.Ct. 2175, 189 L.Ed.2d 62 (2014)). And because it is plaintiff-focused, the statute of limitations is trigged by the accrual of a cause of action—typically, when the plaintiff "knew or should have known" that he was injured. *Wilson* at ¶ 10. But for that same reason, a statute of limitations is a conditional limit, subject to tolling for a variety of circumstances that might prevent an otherwise diligent plaintiff from pursuing a claim: minority, mental disability, fraud, an absent defendant (*i.e.*, one who cannot be summoned to court), and the like. *See CTS Corp.* at 9; 54 C.J.S. Limitations of Actions § 7.

As a default rule, if the legislature creates an exception to the running of a period of limitations, that exception will apply to a statute of limitations. But as this Court explained in *Wilson*, a statute of repose is a different legislative creature. A statute of repose is defendant-focused, reflecting a judgment that "at some point a defendant should be able to put past events behind him." *Wilson*, 164 Ohio St.3d 419, 2020-Ohio-6827, 173 N.E.3d 448, at ¶ 9. And because it is defendant-focused, a statute of repose begins to run from the date of the allegedly tortious conduct—the thing the *defendant* did or did not do (allegedly). *Id.*; *Antoon*, 148 Ohio St. 3d 483, 2016-Ohio-7432, 71 N.E.3d 974, at ¶ 11. For that same reason, a statute of repose is inflexible and generally not subject to tolling except as clearly expressed in the statute. *Wilson* at ¶ 29 ("exceptions to a statute of repose require 'a particular indication that the legislature did not intend the statute to provide complete repose …' as when the statute of repose itself contains an express exception."). *See also* 54 C.J.S. Limitations of Actions § 7 ("A statute of repose … will not be tolled for any reason.").

"One central distinction between statutes of limitations and statutes of repose" is that a statute of limitations may be tolled, while a statute of repose cannot. *CTS Corp.*, 573 U.S. at 9. Thus, a "true statute of repose" like R.C. 2305.113(C) "creates a right to repose precisely where

the applicable statute of limitations would be tolled or deferred. More to the point, a statute of repose serves no purpose unless it has this effect." *Methodist Healthcare Sys. of San Antonio, Ltd., L.L.P. v. Rankin*, 307 S.W.3d 283, 290 (Tex. 2010).

### B. The General Assembly did not clearly and unambiguously create an exception to the medical claim statute of repose for R.C. 2305.15(A).

Twice, this Court has affirmed that R.C. 2305.113(C) is clear, unambiguous, and "means what it says." *Wilson*, 164 Ohio St.3d 419, 2020-Ohio-6827, 173 N.E.3d 448, at ¶ 24; *Antoon*, 148 Ohio St. 3d 483, 2016-Ohio-7432, 71 N.E.3d 974, at ¶ 23. And what does it say?

> (C) Except as to persons within the age of minority or of unsound mind as provided by section 2305.16 of the Revised Code, and except as provided in division (D) of this section, both of the following apply:
>
> (1) No action upon a medical, dental, optometric, or chiropractic claim shall be commenced more than four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim.
>
> (2) If an action upon a medical, dental, optometric, or chiropractic claim is not commenced within four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim, then, any action upon that claim is barred.

As this Court explained in *Wilson*, the statute of repose "clearly and unambiguously prohibits the commencement of any action upon a medical claim more than four years after the act or omission upon which the claim is based[,]" unless "one of the stated exceptions applies." *Wilson* at ¶ 29; *see also id.* at ¶ 38 ("R.C. 2305.113(C) is a true statute of repose that, except as expressly stated in R.C. 2305.113(C) and (D), clearly and unambiguously precludes the commencement of a medical claim more than four years after the occurrence of the alleged act or omission that forms the basis of the claim.").

The first stated exception is R.C. 2305.16, which extends statutes of limitations if a person is "within the age of minority or of unsound mind" at the time his cause of action accrues. The second stated exception is R.C. 2305.113(D), which extends the medical claim statute of repose if the plaintiff discovers his injury in the last year of the repose period, or if the malpractice "involves a foreign object that is left in the body of the person making the claim." R.C. 2305.113(D). It is undisputed that neither of these exceptions apply to Elliot's claims.

So Elliot looked elsewhere to try to save his claims. He first tried the reversal saving statute. But this Court closed the door on that argument in *Wilson*. So Elliot moved to the absent defendant saving statute, R.C. 2305.15(A). He admits that R.C. 2305.15(A) is *not* one of the "stated exceptions" to the statute of repose. Under this Court's jurisprudence, this case is straightforward. The statute of repose means exactly what it says. *Antoon*, 148 Ohio St. 3d 483, 2016-Ohio-7432, 71 N.E.3d 974, at ¶ 23. The statute contains an exclusive, exhaustive list of exceptions. *Wilson*, 164 Ohio St.3d 419, 2020-Ohio-6827, 173 N.E.3d 448, at ¶¶ 29, 38. The courts cannot add words that the General Assembly chose not to include. *See Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, 936 N.E.2d 481, ¶ 30. That means that courts also cannot add to a statute exceptions that the General Assembly chose not to include. Thus R.C. 2305.15(A) does not toll the statute of repose, and Elliot's claims are barred.

## III. Traditional and statutory canons of construction confirm that R.C. 2305.15(A) does not toll the medical claim statute of repose.

"When a statute's language is clear and unambiguous, a court must apply it as written." *Estate of Johnson v. Randall Smith, Inc.*, 135 Ohio St.3d 440, 2013-Ohio-1507, 989 N.E.2d 35, ¶ 16. This Court has already held twice that R.C. 2305.113 is clear and unambiguous. *Wilson*, 164 Ohio St.3d 419, 2020-Ohio-6827, 173 N.E.3d 448, at ¶ 24; *Antoon*, 148 Ohio St. 3d 483, 2016-Ohio-7432, 71 N.E.3d 974, at ¶ 23. And it clearly and unambiguously precludes reliance

on R.C. 2305.15(A). The Court resorts to canons of construction only if a statute is ambiguous. But if the Court decided upon its fourth review that R.C. 2305.113(C) is ambiguous, the traditional canons of construction confirm that it is not tolled by R.C. 2305.15(A).

### A. The General Assembly incorporated one saving statute, R.C. 2305.16, into the medical claim statute of repose; the General Assembly therefore intentionally excluded the others.

Within Chapter 2305, there are three statutes that can extend the statute of limitations for a given action: (1) R.C. 2305.15 tolls the statute of limitations for a defendant who leaves the state or conceals himself; (2) R.C. 2305.16 tolls the statute of limitations for a plaintiff under legal disability, *i.e.*, minority or unsound mind; and (3) R.C. 2305.19 permits a plaintiff to refile an otherwise timely action that fails "otherwise than upon the merits." The General Assembly provided that just one of those statutes, R.C. 2305.16, would also apply to the medical claim statute of repose. R.C. 23015.113(C) ("Except as to persons within the age of minority or of unsound mind as provided by *section 2305.16 of the Revised Code* …"). Under the principle of *expressio unius est exclusio alterius*, "if a statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded." *Thomas v. Freeman*, 79 Ohio St.3d 221, 224-225, 680 N.E.2d 997 (1997) (quoting Black's Law Dictionary (6 Ed.1990) 581); *see also State ex rel. Ohio Presbyterian Ret. Servs., Inc. v. Indus. Comm'n of Ohio*, 151 Ohio St.3d 92, 2017-Ohio-7577, 86 N.E.3d 294, ¶ 28 ("under the statutory-construction maxim expressio unius est exclusio alterius … the express reference to division (B) of R.C. 4123.57 in R.C. 4123.58(E) but not to division (A) of R.C. 4123.57 indicates that the omission of division (A) was intentional.").

Indeed, the Court relied on precisely that principle to explain why a different saving statute, R.C. 2305.19, did not toll the statute of repose: "Because the statute of repose now expressly incorporates only one statutory exception, other statutes that extend the time in which

to bring an action must necessarily be excluded." *Wilson*, 164 Ohio St.3d 419, 2020-Ohio-6827, 173 N.E.3d 448, at ¶ 33.

Further, the General Assembly crafted two detailed exceptions that are unique to medical claims, extending the statute of repose for claims that could not be discovered until the last year of the repose period, and for claims based on a foreign object left in the patient's body. R.C. 2305.113(D). Those specific exceptions are further evidence that the General Assembly made intentional choices about what exceptions to include and exclude from the statute of repose. *See Wilson* at ¶ 29.

### B. If the Court applies the absent defendant saving statute to the statute of repose, it will render portions of the statute superfluous.

The First District's reading improperly renders portions of R.C. 2305.113 superfluous. "No part of the statute should be treated as superfluous unless that is manifestly required." *State ex rel. Carna v. Teays Valley Local Sch. Dist. Bd. of Educ.*, 131 Ohio St.3d 478, 2012-Ohio-1484, 967 N.E.2d 193, ¶ 19. Implying R.C. 2305.15(A) into the statute of repose would make the exceptions already in the text superfluous. If any of the three saving or tolling statutes could be read into the statute of repose by the judiciary, then there would be no reason for the General Assembly to refer to R.C. 2305.16 alone in the medical claim statute of repose. If the General Assembly *intended* for any combination of R.C. 2305.15, 2305.16, and 2305.19 to apply to the medical claim statute of repose, it would not communicate that intent by referencing only 2305.16 directly in the text, writing a specific extension into the statute (R.C. 2305.113(D)), and leaving courts to determine whether it would be wise to apply the other saving statutes (and to select which ones) by implication.

The trial court's approach correctly followed this Court's instruction to "give some effect to every part" of the statutory text. *State v. Arnold*, 61 Ohio St.3d 175, 178, 573 N.E.2d 1079

(1991). The medical claim statute of repose contains certain exceptions. Those exceptions should be given their full effect, and no other exceptions should be read into the text. *State v. Maxwell*, 95 Ohio St.3d 254, 2002-Ohio-2121, 767 N.E.2d 242, ¶ 10 ("In determining legislative intent, our duty is to give effect to the words used, not to delete words used or to insert words not used."). The First District's approach, urged by Elliot, does *not* give effect to every part of the statute of repose, but instead invites the judiciary to rewrite the statute and second-guess the General Assembly. That is not the role of Ohio courts.

### C. A comparison of R.C. 2305.15(A) and R.C. 2305.16 shows that the General Assembly did not intend for the absent defendant saving statute to apply to the medical claim statute of repose.

The First District got one thing right: R.C. 2305.15(A) and 2305.16 are "virtually identical." App. Op. ¶ 35, Appx. 15. The statutes provide as follows:

> 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, 1302.98, and 1304.35 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.

R.C. 2305.15(A).

> Unless otherwise provided in sections 1302.98, 1304.35, and 2305.04 to 2305.14 of the Revised Code, if a person entitled to bring any action mentioned in those sections, unless for penalty or forfeiture, is, at the time the cause of action accrues, within the age of minority or of unsound mind, the person may bring it within the respective times limited by those sections, after the disability is removed. When the interests of two or more parties are joint and inseparable, the disability of one shall inure to the benefit of all.
>
> After the cause of action accrues, if the person entitled to bring the action becomes of unsound mind and is adjudicated as such by a court of competent jurisdiction or is confined in an institution or

> hospital under a diagnosed condition or disease which renders the person of unsound mind, the time during which the person is of unsound mind and so adjudicated or so confined shall not be computed as any part of the period within which the action must be brought.

R.C. 2305.16.

Both statutes apply to the same sections of the Revised Code: 1302.98, 1304.35, and 2305.04 to 2305.14. Both statutes toll a limitations period for the relevant condition (an absent defendant or legally disabled plaintiff) if that condition exists when "the cause of action accrues." And if the condition arises "after the cause of action accrues," then that time "shall not be computed as any part of the period within which the action must be brought."

The First District started to ask the right question: If the two provisions are virtually identical, then why apply one to the statute of repose and not the other? But the First District avoided the simple, dispositive answer: Because the General Assembly said so. The General Assembly decided to apply R.C. 2305.16 to the medical claim statute of repose (indeed, to all of Ohio's statutes of repose, *see* R.C. 2305.10(C)(5); R.C. 2305.131(A)(3)). But the General Assembly decided *not* to apply the nearly identical R.C. 2305.15 to *any* of the statutes of repose. "The General Assembly's use of particular language to modify one part of a statute but not another part demonstrates that the General Assembly knows how to make that modification and has chosen not to make that modification in the latter part of the statute." *Hulsmeyer v. Hospice of Southwest Ohio, Inc.*, 142 Ohio St.3d 236, 2014-Ohio-5511, 29 N.E.3d 903, ¶ 26. This Court should (indeed, must) respect that choice.

## IV. Applying the unambiguous language of R.C. 2305.15(A), the absent defendant statute cannot toll the medical claim statute of repose.

The General Assembly did not include words in the absent defendant statute that apply it to statutes of repose.

### A. R.C. 2305.15(A) depends on the "accrual" of a cause of action, indicating that it applies to statutes of limitations but not statutes of repose.

The absent defendant statute, by its terms, does not apply to the medical claim statute of repose because R.C. 2305.15(A) applies only to a "period of limitation" that is triggered by the accrual of a cause of action. As explained above in Part II.A., only a statute of limitations is trigged by the "accrual" of a cause of action. *See also Ruther,* 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, at ¶ 25 (noting that accrual occurs "upon the later of the termination of the doctor-patient relationship or the discovery of the injury" (citing *Frysinger v. Leech,* 32 Ohio St.3d 38, 512 N.E.2d 337 (1987))).

A statute of repose is markedly different. It begins to run from "the occurrence of the act or omission constituting the alleged basis" for the claim. R.C. 2305.113(C) (1). A statute of repose does not turn on the accrual of a cause of action; indeed, it can operate to *prevent* the accrual of an action in the first place. *Antoon,* 148 Ohio St. 3d 483, 2016-Ohio-7432, 71 N.E.3d 974, at ¶ 11 ("A statute of repose bars any suit that is brought after a specified time since the defendant acted … even if this period ends before the plaintiff has suffered a resulting injury."). So the absent defendant statute's reference to "accrual" shows that it does not apply to statutes of repose. And this means that, though the absent defendant statute applies "as provided in sections 2305.04 to 2305.14," it only applies to statutes of limitations within that specified range, and not to statutes of repose.

### B. R.C. 2305.15(A) can alter when a "period of limitation" "begins to run," indicating that it does not apply to the fixed trigger for a statute of repose.

The absent defendant statute says that a "period of limitation" does not "begin to run" until the putative defendant comes into Ohio. That makes sense as applied to a statute of limitations. There is no fixed time for the beginning of a statute of limitations; it "begins to run" at the variable date of when the plaintiff discovers (or should discover) his injury. But it does not

make sense as applied to a statute of repose because a statute of repose, on the other hand, is trigged by the fixed point of the defendant's tortious conduct.

Consider a common situation: a new doctor is recruited to Ohio to be a medical resident. She performs surgery on a patient in 2010. The medical resident then finds a job in another state in 2011, permanently settles there, and does not return to Ohio. The patient does not discover the injury (meaning that the claim does not "accrue") until 2016 or 2026. The absent defendant statute says that "When a cause of action accrues against a person, if the person is out of the state … the period of limitation … does not begin to run until the person comes into the state. …" If the absent defendant statute applies to the statute of repose, the absent defendant statute would dictate that the repose period does not "begin to run" until the doctor returns to Ohio. But that is a problem because the very nature of repose statutes means that the repose period had been running since the surgery. So applying the absent defendant statute to the medical claim statute of repose would mean that, even though the statute of repose had been running since the surgery, it would retroactively revert to *not* have been running once the claim accrues. That makes no sense and warps how repose statutes operate.

Elliot may well respond that the absent defendant statute prevented the statute of repose from running in the first place. But the text of the absent defendant statute shows that this argument fails. Why? The absent defendant statute has no application until a claim accrues. The absent defendant statute only kicks in "When a cause of action accrues" (the first part of the absent defendant statute) or "After the cause of action accrues" (the second part of the absent defendant statute). So the absent defendant statute never applies before a claim accrues, but the statute of repose commonly begins running before claims accrue. Indeed, the statute of repose can cut off a claim before it accrues in the first place. *See Antoon*, 148 Ohio St. 3d 483, 2016-

Ohio-7432, 71 N.E.3d 974, at ¶¶ 11, 28. This is yet more textual support showing that the absent defendant statute was only written to apply to statutes of limitation, not repose.

### C. Applying the absent defendant statute to the medical claim statute of repose will erode the purpose of the repose statute.

If the Court holds that the absent defendant statute tolls statutes of repose, then the purpose of statutes of repose will be undermined to the point of meaninglessness. Statutes of repose "are vital instruments that provide time limits, closure, and peace of mind to potential parties of lawsuits." Am.Sub.S.B. No. 80, 2004 Ohio Laws File 144, Note 2315.21, § 3(A)(5)(a). Without a statute of repose for medical claims, for example, doctors would be required to preserve patient records and liability insurance indefinitely—up to decades after treating the patient at issue or retiring from the practice of medicine. *Ruther*, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, at ¶ 20.

This Court has rejected the idea that a repose period can be forever tolled. *See Antoon* at ¶ 24 ("We reject the Antoons' assertion that filing then dismissing a claim will indefinitely suspend the statute of repose by 'commencing' the suit on the date of the first filing"). *Wilson* emphasized that point. *See Wilson* at ¶ 25 ("We have already rejected the argument that commencement of a medical claim within the four-year repose period satisfies the statute of repose once and for all, irrespective of a later voluntary dismissal." (citing *Antoon*)). The First District has ignored *Antoon* and *Wilson*, and it has undermined the General Assembly's design, which is to end claims and give certainty after a reasonable period of time. Instead, the First District effectively created permanent liability for many defendants.

Elliot's (and the First District's) position destroys the core purpose of the medical claim statute of repose. Section 2305.15(A) tolls the statute of limitations for any departure from the state. So a physician who retires and permanently leaves Ohio before the statute of limitations

expires cannot avail himself of the statute of limitations defense. *Garber v. Menendez*, 888 F.3d 839, 841 (6th Cir. 2018). If the Court adopts Elliot's position, then physicians who retire and leave Ohio cannot avail themselves of the statute of repose either. But that is *precisely* the group that the statute of repose is designed to protect. *Ruther*, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, at ¶¶ 20-21.

This Court held that R.C. 2305.15(A) tolls the statute of limitations for each and every day a defendant spends outside the state. So a defendant who takes a ten-day vacation across the river into Kentucky will find that the statute of limitations stopped running while he was away. *Johnson v. Rhodes*, 89 Ohio St.3d 540, 543, 733 N.E.2d 1132 (2000); *see also Wetzel v. Weyant*, 41 Ohio St.2d 135, 323 N.E.2d 711 (1975) (absent defendant statute applied where defendant was absent from Ohio for several weeks over the course of several years to vacation in Wisconsin, Michigan, and Florida). Under Elliot's approach, the same will be true of the statute of repose. A physician who decides to take a vacation will also run the risk of extending the statute of repose for any patient he has treated in the four years prior—and the plaintiff will be entitled to take discovery on the physician's travel history. *See Johnson* at 540 ("In the course of discovery … It was also established that defendant, Harold Rhodes … traveled to Pittsburgh, Pennsylvania, for one day in order to receive an evaluation for a kidney transplant.") *Gehr v. Elden*, 9th Dist. Lorain No. 91CA005192, 1992 WL 161393, *1 (July 8, 1992) (noting that the plaintiff served interrogatories asking how long the defendant had been absent from Ohio).

This is no hypothetical danger. Indeed, plaintiffs in other cases against Dr. Durrani are already delving into his prior vacation schedule in an attempt to circumvent the statute of repose. *See, e.g., Matthews v. Durrani*, Hamilton County CP, No. A2104004 (Nov. 18, 2021) (alleging that "every calendar year 2008 through 2013, Durrani traveled to his native Pakistan for

vacation/personal reasons for about two months for a total of one year. He also traveled out of state for approximately four months during the same time period (16 months total).").

This even affects professionals who live in bordering states and work in Ohio. A nurse who lives in West Virginia and works in St. Clairsville would be "out of the state" for every day spent at home. So too would an architect who works in Toledo but lives in Michigan (for purposes of the premises liability statute of repose). The decision below could even affect medical professionals who travel through other states to get to work, such as a doctor in Southwest Ohio who lives in Anderson Township, works in Cincinnati's Clifton neighborhood and takes I-275 and I-471 through Kentucky to get to and from work each day. At the very least, the Court will have to decide whether that day "counts" toward the statute of repose. In short, the First District's decision creates near- permanent liability for professionals who live across state lines—including in Cincinnati, Portsmouth, Toledo, Youngstown, or any of the hundreds of Ohio communities that are located near a state border.

The statute is not just limited to people who actually leave Ohio. The absent defendant statute applies "if a person is out of the state, has absconded, *or conceals self*." R.C. 2305.15(A) (emphasis added). So under the First District's decision, the absent defendant statute applies even to a difficult-to-locate Ohio resident. This would create a morass, in which nothing is certain. Whenever defendants asserts the statute of repose as a legitimate defense, a plaintiff could argue that the absent defendant statute applies if the defendants moved within Ohio and neglected to update their mailing address or were otherwise difficult to find. This turns what should be an easy question—whether the lawsuit was commenced within the repose period—into a fact-intensive (and ultimately law-intensive) mess. Does a the defendant "conceal" herself by unplugging for the weekend in Hocking Hills State Park without letting anyone know, or taking a

boat out on the Ohio portion of Lake Erie? A plaintiff will request discovery to try to figure that out. And a plaintiff could avoid motions under Civil Rules 12 and 56 by claiming that material issues of fact exist regarding whether a person was "concealed" during every one-off absence.

Suffice it to say, these inquiries are a far cry from the "certainty with respect to the time within which a claim can be brought and a time after which they may be free from the fear of litigation" that the statute of repose is supposed to give to defendants. *Wilson*, 164 Ohio St.3d 419, 2020-Ohio-6827, 173 N.E.3d 448, at ¶ 16 (quoting *Ruther*, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, at ¶ 19)).

## CONCLUSION

"R.C. 2305.113(C) is a true statute of repose that, except as expressly stated in R.C. 2305.113(C) and (D), clearly and unambiguously precludes the commencement of a medical claim more than four years after the occurrence of the alleged act or omission that forms the basis of the claim." If R.C. 2305.113(C) means what it says—and if this Court meant what it said in *Wilson*—then the judgment of the First District must be reversed.

Respectfully submitted,

/s/ *Philip D. Williamson*
Philip D. Williamson (0097174)
Aaron M. Herzig (0079371)
Russell S. Sayre (0047125)
Anna M. Greve (0099264)
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, OH 45202-3957
Phone: (513) 381-2838
pwilliamson@taftlaw.com
aherzig@taftlaw.com
sayre@taftlaw.com
agreve@taftlaw.com

*Counsel for Appellant Abubakar Atiq Durrani, M.D.*

## CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing memorandum was served upon the following persons on April 18, 2022 by email:

Robert A. Winter Jr. (0038673)
P.O. Box 175883
Fort Mitchell, KY 41017-5883
robertawinterjr@gmail.com

*Counsel for Appellee Richard Elliot*

Lauren S. Kuley (0089764)
Jeffrey W. DeBeer (0089499)
SQUIRE PATTON BOGGS (US) LLP
201 E. 4th Street, Suite 1900
Cincinnati, Ohio 45202
lauren.kuley@squirepb.com
jeffrey.debeer@squirepb.com

*Counsel for Amicus Curiae, Ohio Hospital Association, Ohio State Medical Association, and Ohio Osteopathic Association*

Sean McGlone (0075698)
OHIO HOSPITAL ASSOCIATION
155 E. Broad St., Suite 301
Columbus, Ohio 43215
sean.mcglone@ohiohospitals.org

*Counsel for Amicus Curiae Ohio Hospital Association*

*/s/ Philip D. Williamson*

# Appendix

## APPENDIX

**Document** **Appx. Page**

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

| | | |
|---|---|---|
| RICHARD ELLIOT, | : | APPEAL NO. C-180555 |
| Plaintiff-Appellant, | : | TRIAL NO. A-1504466 |
| vs. | : | |
| ABUBAKAR ATIQ DURRANI, M.D., | : | *ENTRY DENYING MOTION TO CERTIFY A CONFLICT, APPLICATION FOR EN BANC CONSIDERATION AND APPLICATION FOR RECONSIDERATION* |
| THE CENTER FOR ADVANCED SPINE TECHNOLOGIES, INC., | : | |
| and | : | |
| TRIHEALTH, INC., f.d.b.a. THE GOOD SAMARITAN HOSPITAL OF CINCINNATI, OHIO, | : | |
| Defendants-Appellees. | : | |

This cause came on to be considered by the Court upon the plaintiff-appellant's motion to certify a conflict, application for en banc consideration and application for reconsideration, filed on September 13, 2021.

The Court finds that the applications and motion are not well taken, and denies the same.

**To The Clerk:**

**Enter upon the Journal of the Court on 11/4/2021 per Order of the Court.**

**By:** _____
**Presiding Judge**

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

| | | |
|---|---|---|
| RICHARD ELLIOT,<br><br>Plaintiff-Appellant,<br><br>vs.<br><br>ABUBAKAR ATIQ DURRANI, M.D.,<br><br>THE CENTER FOR ADVANCED SPINE TECHNOLOGIES, INC.,<br><br>and<br><br>TRIHEALTH, INC., f.d.b.a. THE GOOD SAMARITAN HOSPITAL OF CINCINNATI, OHIO,<br><br>Defendants-Appellees. | : | APPEAL NO. C-180555<br>TRIAL NO. A-1504466<br><br>*JUDGMENT ENTRY.* |



This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed in part, reversed in part, and cause remanded for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty, and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

**To The Clerk:**

**Enter upon the Journal of the Court on September 3, 2021, per Order of the Court.**

**By:** _____
**Administrative Judge**

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

| | | |
|---|---|---|
| RICHARD ELLIOT, | : | APPEAL NO. C-180555<br>TRIAL NO. A-1504466 |
| Plaintiff-Appellant, | : | *OPINION.* |
| vs. | : | |
| ABUBAKAR ATIQ DURRANI, M.D., | : | |
| THE CENTER FOR ADVANCED SPINE TECHNOLOGIES, INC., | : | |
| and | : | |
| TRIHEALTH, INC., f.d.b.a. THE GOOD SAMARITAN HOSPITAL OF CINCINNATI, OHIO, | : | |
| Defendants-Appellees. | : | |



Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded

Date of Judgment Entry on Appeal: September 3, 2021

*Robert A. Winter Jr., The Deters Law Firm Co., II, PA, James F. Maus* and *Alex Petraglia*, for Plaintiff-Appellant,

*Lindhorst & Dreidame Co., LPA, Michael F. Lyon, James F. Brockman, Taft Stettinius & Hollister LLP, Aaron M. Herzig, Russell S. Sayre, Philip D. Williamson* and *Anna M. Greve*, for Defendants-Appellees Abubakar Atiq Durrani, M.D., and the Center for Advanced Spine Technologies, Inc.,

*Rendigs, Fry, Kiely & Dennis, LLP, Michael P. Foley, Thomas M. Evans* and *Jessica L. Worth*, for Defendant-Appellee TriHealth, Inc., f.d.b.a. Good Samaritan Hospital.

**CROUSE, Judge.**

{¶1} Plaintiff-appellant Richard Elliot appeals the trial court's denial of his motion for leave to amend his complaint, and the trial court's grant of Abubakar Atiq Durrani, M.D., ("Durrani"), the Center for Advanced Spine Technologies, Inc., ("CAST"), and TriHealth, Inc.'s motions to dismiss. For the reasons that follow, we reverse the dismissal as to Durrani, but affirm the dismissal as to CAST and TriHealth.

## *I. Facts and Procedure*

{¶2} In early 2010, Elliot began suffering lower back pain and sought treatment from Durrani. Durrani allegedly recommended lumbar spinal-fusion surgery to alleviate Elliot's pain. Elliot underwent the surgery on March 1, 2010, at Good Samaritan Hospital. Unfortunately, Elliot's surgical wounds became infected and he required extensive postoperative treatment.

{¶3} In June 2014, Elliot filed suit against Durrani, CAST, and TriHealth (formerly Good Samaritan Hospital). Elliot voluntarily dismissed the case a few months later, in September 2014. He refiled the claims less than a year after dismissal, in August 2015. Elliot alleged medical malpractice, battery, lack of informed consent, intentional infliction of emotional distress, and fraud against Durrani. Elliot alleged vicarious lability, negligent hiring, retention, and supervision, fraud, and other statutory violations against CAST and TriHealth. Elliot later moved to amend the complaint to add a civil state law RICO claim against all of the defendants.

{¶4} Durrani, CAST, and TriHealth all moved to dismiss the complaint against them. All of the defendants asserted that Elliot's claims were barred by the medical statute of repose. Agreeing with the defendants, the trial court dismissed the case with prejudice. The trial court also denied Elliot's motion to amend his complaint, finding it futile in light of the statute of repose. Elliot appealed.

{¶5} After oral argument, but while this appeal was pending, the Ohio Supreme Court decided *Wilson v. Durrani*, Slip Opinion No. 2020-Ohio-6827. Therein, the court held that the saving statute, R.C. 2305.19, does not permit the refiling of actions beyond expiration of the medical statute of repose, R.C. 2305.113(C). The *Wilson* plaintiffs moved for reconsideration on three grounds: (1) the statute of repose had not yet expired due to the tolling provision in R.C. 2305.15(A), (2) the court wrongly determined that the saving statute does not apply to the statute of repose, and (3) the decision in *Wilson* should apply only prospectively. Due to the potentially binding effects of *Wilson*, Durrani and CAST moved to stay this appeal pending disposition of the motion for reconsideration. We granted the stay. We also stayed several other cases pending before this court that had the same issue in dispute.

{¶6} On March 2, 2021, the Ohio Supreme Court denied the motion for reconsideration as to the saving statute, but granted the motion for reconsideration as to the tolling statute and remanded *Wilson* for this court to consider, in the first instance, whether the repose period was tolled under R.C. 2305.15(A). On that same day, the court reversed a number of other cases on the authority of *Wilson* and remanded those cases to this court to consider the tolling-statute issue. For the efficient administration and resolution of these matters, we designated this appeal as the lead case, ordered supplemental briefing, and heard consolidated arguments on the issue. We address the argument, along with Elliot's other arguments, herein.

### *II. Statute of Repose*

{¶7} In his first assignment of error, Elliot contends that the trial court erred by granting Durrani, CAST, and TriHealth's motions to dismiss. We review de novo the grant of a motion to dismiss pursuant to Civ.R. 12(B)(6). *McNeal v. Durrani*, 2019-

Ohio-5351, 138 N.E.3d 1231, ¶ 9 (1st Dist.), *rev'd on other grounds, Scott v. Durrani*, 162 Ohio St.3d 507, 2020-Ohio-6932, 165 N.E.3d 1268.

{¶8} The motions to dismiss focused on the applicability of R.C. 2305.113(C), Ohio's four-year statute of repose for medical claims. Elliot alleges that his injuries arose from a March 1, 2010 spinal surgery performed by Durrani. He filed this lawsuit on August 9, 2015, more than five years after the surgery. Therefore, the statute of repose bars his claims unless an exception applies. Elliot argues that numerous exceptions apply in this case.

A. Absent-Defendant Tolling Statute

{¶9} In December 2013, less than four years after Elliot's surgery, Durrani, who was under federal indictment, fled the country. Elliot claims that Durrani's flight from Ohio to Pakistan tolls all limitations periods, including the statute of repose, as to Durrani and CAST by virtue of R.C. 2305.15(A).[1]

{¶10} Elliot contends that R.C. 2305.15(A) expressly encompasses "sections 2305.04 to 2305.14 * * * of the Revised Code," and thus, applies to the statute of repose contained in R.C. 2305.113(C). Elliot cites several recent Ohio federal district court cases in support of his argument. *See, e.g., Landrum v. Durrani*, S.D.Ohio No. 1:18-cv-807, 2020 WL 3512808, *4 (Mar. 25, 2020) ("The tolling provision at §2305.15(A) expressly applies to '2305.04 to 2305.14,' thus encompassing the statute of repose at §2305.113(C)."); *Powers v. Durrani*, S.D.Ohio No. 1:18-cv-788, 2020 WL 5526401, *2 (Sept. 15, 2020) (applying *Landrum*); *Mahlenkamp v. Durrani*, S.D.Ohio No. 1:18-cv-817, 2021 WL 2012939, *3 (May 19, 2021) (same); *Sterling v. Durrani*, S.D.Ohio No. 1:18-cv-802, 2021 WL 2013012, *3 (May 19, 2021) (same).

[1] In his appellate brief, Elliot does not claim that R.C. 2305.15(A) applies to TriHealth. *See* Appellant's brief at 10 ("This error was preserved in the opposition briefs to the motions of Dr. Durrani/CAST.").

{¶11} Appellees argue that R.C. 2305.113(C) contains only a few exceptions to the four-year repose period, and tolling due to a defendant's absence is not one of them.

1. Claims Against Durrani

{¶12} The Ohio Supreme Court's decision in *Wilson*, Slip Opinion No. 2020-Ohio-6827, left open the question of whether the absent-defendant statute, R.C. 2305.15(A), applies to toll the four-year medical statute of repose, R.C. 2305.113(C).

{¶13} To answer that question now, we first turn to the plain language of R.C. 2305.15. R.C. 2305.15 is titled, "Tolling during defendant's absence, concealment or imprisonment," and states in pertinent part:

> (A) 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, 1302.98, and 1304.35 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.

{¶14} Elliot argues that R.C. 2305.15(A) expressly applies to "period[s] of limitation for the commencement of the action" and "period[s] within which the action must be brought," broad phrases which incorporate both the statute of limitations and the statute of repose set forth in R.C. 2305.113. Appellees conversely argue that because R.C. 2305.15(A) uses the phrase "the period of limitation" and the word "accrues," it refers only to the statute of limitation set forth in R.C. 2305.113(A).

{¶15} The first sentence of R.C. 2305.15(A) applies when the defendant absconds before the cause of action accrues. Under this circumstance, "the period of limitation for commencement of the action as provided in [R.C. 2305.113] does not begin to run * * * while the person is so absconded."

{¶16} R.C. 2305.113(C)(1), the medical statute of repose, states, "No action upon a medical * * * claim **shall be commenced** more than four years after the occurrence of the act or omission constituting the alleged basis of the medical * * * claim." (Emphasis added.) Thus, R.C. 2305.113(C) sets forth a "period of limitation for the commencement of the action."

{¶17} This view is affirmed by the Ohio Supreme Court's decision in *Wilson*, Slip Opinion No. 2020-Ohio-6827, at ¶ 35, wherein the court recognized that a "period of limitation" is broader than the "statute of limitations." In *Wilson*, the court noted that the phrase "period of limitation" "reasonably encompasses not only the statute of limitations, but also the statute of repose." *Id.* Thus, the first sentence of R.C. 2305.15(A) broadly applies to both the statute of limitations and the statute of repose.

{¶18} The second sentence of R.C. 2305.15(A) applies when the defendant absconds after a cause of action accrues. Under this circumstance, "the time of the person's absence * * * shall not be computed as any part of a period within which the action must be brought."

{¶19} R.C. 2305.113(C)(2) states, "If an action upon a medical * * * claim is not commenced within four years after the occurrence of the act or omission constituting the alleged basis of the medical * * * claim, then, any action upon that claim is barred." Thus, under R.C. 2305.113(C)(2), an action upon a medical claim must be brought within four years of the act or omission constituting the basis of the claim; any action brought more than four years after the act or omission is precluded. Based on this

language, R.C. 2305.113(C) sets forth "a period within which the action must be brought." Accordingly, the second sentence of R.C. 2305.15(A) also applies to both the statute of limitations and the statute of repose.

{¶20} The General Assembly's inclusion of the word "accrues" does not detract from this interpretation. A claim "does not accrue" if the injury giving rise to the claim "is undiscovered until after the [repose period] has ended." *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, ¶ 21. If the injury is undiscovered when the statute of repose expires, then the "statute of repose bars the claim—the right of action—itself." *Wilson,* Slip Opinion No. 2020-Ohio-6827, at ¶ 9. That is, if the injury is not discovered within four years, then the claim never accrues and the cause of action never comes into existence.[2] *See CTS Corp. v. Waldburger*, 573 U.S. 1, 16-17, 134 S.Ct. 2175, 189 L.Ed.2d 62 (2014) (holding that statutes of repose define the scope of the cause of action, and thus, "a statute of repose can prohibit a cause of action from coming into existence.").

{¶21} A review of R.C. Chapter 2305 demonstrates the General Assembly's intent to prevent causes of action from accruing after a specified repose period. For example, the products-liability statute of repose, R.C. 2305.10(C)(1), provides that "**no cause of action** based on a product liability claim **shall accrue** against the manufacturer or supplier of a product **later than ten years** from the date that the product was delivered to its first purchaser or first lessee[.]" (Emphasis added.) Likewise, the construction statute of repose, R.C. 2305.131(A)(1), provides that "**no cause of action** * * * that arises out of a defective and unsafe condition of an

[2] We note that *Antoon v. Cleveland Clinic Found.*, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, seems to suggest that a cause of action can accrue after the statute of repose expires. *Id.* at ¶ 26 ("[O]ur discussion of vested causes of action was made solely in the context of addressing a claim that accrued after the statute of repose had expired."). However, the decision in *Antoon* concerned only whether the statute of repose applied to vested claims (claims that accrued within the four-year statute of repose). Thus, unlike the *Ruther* court, the *Antoon* court never squarely addressed whether a claim can accrue after the statute of repose has expired.

improvement to real property * * * **shall accrue** * * * **later than ten years** from the date of substantial completion of such improvement."[3] (Emphasis added.)

{¶22} These statutes evince a legislative understanding that the word "accrues" necessarily limits R.C. 2305.15(A) to circumstances in which the injury was discovered before the statute of repose expired. *See CTS Corp.* at 16 (interpreting similar language in North Carolina's statute of repose and finding "it mandates that there shall be no cause of action beyond a certain point, even if no cause of action has yet accrued."). A cause of action can never accrue after the statute of repose has run. Thus, R.C. 2305.15(A) can only be invoked to toll the four-year repose period if the cause of action is discovered during the repose period.

{¶23} Although R.C. 2305.15(A), on its face, applies to R.C. 2305.113(C), a statute of repose is subject to tolling only where there is " 'a particular indication that the legislature did not intend the statute to provide complete repose but instead anticipated the extension of the statutory period under certain circumstances[.]' " *Wilson,* Slip Opinion No. 2020-Ohio-6827, at ¶ 29, quoting *California Pub. Employees' Retirement Sys. v. ANZ Securities, Inc.*, ___ U.S. ___, 137 S.Ct. 2042, 2050, 198 L.Ed.2d 584 (2017). "[W]here the legislature enacts a general tolling rule in a different part of the code * * * courts must analyze the nature and relation of the legislative purpose of each provision to determine which controls." *California Pub. Employees' Retirement Sys.* at 2050.

[3] A prior version of the medical statute of repose provided that "**no cause of action** for [medical malpractice] **shall accrue later than six years** from the date of the occurrence of the act or omission constituting the alleged basis of the claim of malpractice." Former R.C. 2305.11(A)(2)(a). This language was repealed in 2001, following the Ohio Supreme Court's declaration that the Tort Reform Act was unconstitutional in its entirety. *See State ex rel. Ohio Academy of Trial Lawyers v. Sheward,* 86 Ohio St.3d 451, 715 N.E.2d 1062 (1999).

{¶24} Statutes of repose target defendants and "emphasize [their] entitlement to be free from liability after a legislatively determined time."[4] *Wilson* at ¶ 10, quoting *CTS Corp.*, 573 U.S. at 9, 134 S.Ct. 2175, 189 L.Ed.2d 62. "A statute of repose confers on a defendant a personal privilege of sorts, in the form of an immunity from further liability." *Secy., United States Dept. of Labor v. Preston*, 873 F.3d 877, 884 (11th Cir.2017). They are intended to provide " 'a fresh start' " and " 'embody[] the idea that at some point a defendant should be able to put past events behind him.' " *Wilson* at ¶ 9, quoting *CTS Corp.* at 9. For that reason, statutes of repose begin to run on the date of the defendant's last culpable act or omission instead of when the cause of action accrues. *CTS Corp.* at 8.

{¶25} Because statutes of repose are designed to "grant complete peace to defendants," they are generally not subject to equitable tolling. *California Pub. Employees' Retirement Sys.* at 2052. However, the repose period may be subject to alteration through statute. *Id.* at 2050.

{¶26} Absent-defendant tolling statutes, much like statutes of repose, target defendants[5] and ask whether the defendant relinquished a time limitation by leaving the state, absconding himself, or concealing himself. When defendants leave the state, potentially becoming difficult to locate or hard to serve, the privilege granted by the statute of repose is frustrated. Therefore, the absent-defendant tolling statute must control.

{¶27} The enactment and legislative history of R.C. 2305.15(A) provide further evidence that the General Assembly intended to toll every limitation period under R.C.

[4] Compare statutes of limitations which target plaintiffs and "emphasize [their] duty to diligently prosecute known claims." *Wilson* at ¶ 10, quoting *CTS Corp.* at 8.
[5] Compare saving statutes which focus on the plaintiff's particular circumstances and the fairness of holding him or her to a rigid statute of limitations.

2305.113. The General Assembly enacted the absent-defendant tolling statute in 1853. *See* Gen. Code 11228. As originally enacted, the tolling provision provided:

> When a cause of action accrues against a person, if he is out of the state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in this chapter, shall not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, or absconds or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought.

Gen. Code 11228. In 1953, the General Assembly relocated the absent-defendant statute to R.C. 2305.15(A) and specified its application to "sections 2305.04 to 2305.14 * * * of the Revised Code."

**{¶28}** The absent-defendant statute was unquestionably intended to apply to statutes of limitations—i.e., the only time limitations in existence at its creation. However, the General Assembly began enacting statutes of repose in the late 1950s and early 1960s in response to "architects and builders [who] were increasingly subjected to suits brought by third parties long after work on a building had been completed." *Groch v. GMC*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 337, ¶ 112. Over time, the General Assembly enacted statutes of repose in other areas of the law. In 1975, it enacted the first medical statute of repose. *See* Am.Sub.H.B. No. 682, 136 Ohio Laws, Part II, 2809, 2810-2811; *Mominee v. Scherbarth*, 28 Ohio St.3d 270, 272, 503 N.E.2d 717 (1986). Despite the addition of these new limitation periods, the absent-defendant statute has remained virtually unchanged.

{¶29} Since the 1950s, the General Assembly has amended R.C. 2305.15 three times and has never excluded statutes of repose from the time limitations to which it applies. In 2002 Am.Sub.S.B. No. 281 ("S.B. 281"), the General Assembly relocated the medical statute of repose from R.C. 2305.11(B) to R.C. 2305.113(C). Despite other amendments to R.C. 2305.15, the General Assembly maintained that R.C. 2305.15(A) applied to "sections 2305.04 to 2305.14 * * * of the Revised Code"; a range inclusive of the newly-enacted R.C. 2305.113(C).

{¶30} In the same bill, the General Assembly amended R.C. 2305.15(B) to expressly include the newly-enacted R.C. 2305.113. The amended version of R.C. 2305.15(B) provides: "When a person is imprisoned for the commission of any offense, the time of the person's imprisonment shall not be computed as **any part of any period of limitation, as provided in section * * * 2305.113** * * * of the Revised Code, within which any person must bring any action against the imprisoned person." (Emphasis added.) The Final Bill Analysis for S.B. 281 described the amendment of R.C. 2305.15 as "add[ing] a reference to section 2305.113 in the list of sections currently referenced by section 2305.15," and made no distinction between the statute of limitations and the statute of repose within R.C. 2305.113. S.B.No. 281, Final Bill Analysis. The legislature could have easily limited its cross-reference to the statute of limitations alone, or it could have located the statute of repose in a different section, but it chose not to do so. Instead, it retained the expansive language in R.C. 2305.15(B) and added a cross-reference to R.C. 2305.113 in its entirety.

{¶31} Reading both subsections of R.C. 2305.15 together, it would be inconsistent to find that the tolling provision in one subsection of the statute applies only to statutes of limitations while the tolling provision in the very next subsection applies to both statutes of limitations and statutes of repose. *See State ex rel. Herman v.*

*Klopfleisch*, 72 Ohio St.3d 581, 585, 651 N.E.2d 995 (1995), citing *United Tel. Co. of Ohio v. Limbach*, 71 Ohio St.3d 369, 372, 643 N.E.2d 1129 (1994) ("All statutes relating to the same general subject matter must be read in pari materia, and in construing these statutes in pari materia, this court must give them a reasonable construction so as to give proper force and effect to each and all of the statutes."). This further bolsters our conclusion that the General Assembly intended for a defendant's absence from the state to toll all applicable time limitations, including any applicable statute of repose.

{¶32} Furthermore, R.C. 2305.15(A) cannot be read in isolation from the rest of the Revised Code. Rather, the General Assembly's limitation of actions must be read as a cohesive chapter of the Revised Code.

{¶33} Built into the statute of repose is an express exception for legal disabilities under R.C. 2305.16. There are striking similarities between the absent-defendant statute in R.C. 2305.15(A) and the legal-disabilities statute in R.C. 2305.16. R.C. 2305.16 states:

> Unless otherwise provided in sections * * * 2305.04 to 2305.14 of the Revised Code, if a person entitled to bring any action mentioned in those sections, * * * is, **at the time the cause of action accrues**, within the age of minority or of unsound mind, the person may bring it within the respective times limited by those sections, after the disability is removed.
>
> * * *
>
> **After the cause of action accrues**, if the person entitled to bring the action becomes of unsound mind * * *, the time during which the person is of unsound mind and so adjudicated or so confined shall not be computed as **any part of the period within which the action must be brought.**

(Emphasis added.)

{¶34} A review of the relevant language shows that both statutes operate to toll the statutory period of limitations. Both statutes refer to these limitation periods as the "period within which the action must be brought." In addition, both statutes focus on when "the cause of action accrues." The only notable difference between R.C. 2305.15(A) and R.C. 2305.16 is the express exception in R.C. 2305.113(C) for application of the legal-disabilities statute.[6]

{¶35} There is no question that the language of R.C. 2305.16 applies to the statute of repose. So it would make no logical sense to conclude that the virtually identical language of R.C. 2305.15(A) does not apply to the statute of repose. But appellees claim that the broad language in *Wilson* prohibits such an interpretation.

{¶36} In *Wilson*, Slip Opinion No. 2020-Ohio-6827, at ¶ 29, the Ohio Supreme Court held that R.C. 2305.113(C) prohibits the commencement of any action upon a medical claim more than four years after the act or omission upon which the claim is based "[u]nless one of the stated exceptions applies." The court found that R.C. 2305.113(C) "expressly provides for tolling of the statute of repose under R.C. 2305.16 * * *, while not providing for application of any other statutory provisions that would toll or extend statutory time periods." *Id.* at ¶ 33. The court thus concluded, "Because the statute of repose now expressly incorporates only one statutory exception, other statutes that extend the time in which to bring an action must necessarily be excluded." *Id.*

[6] The General Assembly included R.C. 2305.16 as an express exception to the medical statute of repose only after the Ohio Supreme Court held the four-year repose period unconstitutional as applied to minors. *See Mominee v. Scherbarth*, 28 Ohio St.3d 270, 503 N.E.2d 717 (1986). As originally enacted, the medical statute of repose applied "to all persons regardless of legal disability and notwithstanding 2305.16." However, the year following the court's decision in *Mominee*, the General Assembly amended the medical statute of repose to include tolling for persons "within the age of minority, of unsound mind, or imprisoned, as provided by R.C. 2305.16."

{¶37} However, the decision in *Wilson* analyzed a very narrow issue—whether the savings statute in R.C. 2305.19 applied to extend the statute of repose in R.C. 2305.113(C).

{¶38} R.C. 2305.19(A) provides:

> In any action that is commenced or attempted to be commenced, * * * if the plaintiff fails otherwise than upon the merits, the plaintiff * * * may commence a new action within one year after the date of * * * the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later.

{¶39} R.C. 2305.19 is a saving statute. Saving statutes "are remedial and are intended to provide a litigant an adjudication on the merits." *Wilson* at ¶ 11. Thus, R.C. 2305.19 does not "operate[] to toll the statute of limitations." *Id.* at ¶ 18. "Rather, it provides a plaintiff with a limited period of time in which to refile a dismissed claim by commencing a new action that would otherwise be barred by the statute of limitations." *Id.* R.C. 2305.19 is made applicable to statutes of repose only by express incorporation. *See* R.C. 2305.10(C) (stating that the products-liability statute of repose applies "[e]xcept as otherwise provided in" R.C. 2305.19).

{¶40} Unlike R.C. 2305.19, R.C. 2305.15(A) is a tolling provision. Thus, R.C. 2305.15(A) does not allow a plaintiff to commence an action outside the statutory period. Instead, R.C. 2305.15(A) tolls the time to commence a timely action. R.C. 2305.15(A) extends the applicable period of limitation while the defendant is out of state or otherwise absconded, and permits a plaintiff to file a timely action within the extended period.

{¶41} Furthermore, unlike R.C. 2305.19, R.C. 2305.15(A) is not made applicable to statutes of repose by express incorporation. In fact, R.C. 2305.15(A)'s tolling

provision is not expressly included as an exception in *any* section of the Revised Code. Instead, R.C. 2305.15(A) alone sets forth the statutory sections to which it applies. By its terms, R.C. 2305.15(A) applies to "sections 2305.04 to 2305.14, 1302.98, and 1304.35 of the Revised Code."

{¶42} Comparing the two sections, it is clear that the nature and structure of R.C. 2503.15(A) vastly differs from that of R.C. 2305.19. Thus, although *Wilson* held that R.C. 2305.19 cannot save a plaintiff's claims beyond the medical repose period, the same rule cannot be applied to the dissimilar tolling provision of R.C. 2305.15(A). Accordingly, the Ohio Supreme Court's decision in *Wilson* does not control the result in this case.

{¶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). Because Durrani fled the country in December 2013, less than four years after Elliot's surgery, the statute of repose is tolled and does not bar Elliot's claims against Durrani.

2. Claims Against CAST

{¶44} We are next asked to analyze whether R.C. 2305.15(A) tolls the statute of repose as to CAST.

{¶45} For R.C. 2305.15(A) to apply, the person against whom the cause of action accrues must be out of state, absconded, or concealed. However, Elliot does not contend that CAST is out of state, absconded, or concealed. Instead, Elliot contends that because Durrani is the sole owner of CAST, CAST is bound by Durrani's flight.

{¶46} Elliot cites *Tausch v. Riverview Health Inst.*, 187 Ohio App.3d 173, 2010-Ohio-502, 931 N.E.2d 613 (2d Dist.) in support of his argument. The court in *Tausch* held that when a statute of limitations is tolled as to a doctor pursuant to *Frysinger v.*

*Leech*, it is also tolled as to the hospital where the doctor performed the surgery. *Id.* at ¶ 36.

{¶47} *Frysinger v. Leech*, 32 Ohio St.3d 38, 512 N.E.2d 337 (1987), established an exception to the "discovery rule" for the accrual of medical-malpractice actions. In general, "a cause of action for medical malpractice accrues and the statute of limitations commences to run when the patient discovers, or, in the exercise of reasonable care and diligence should have discovered, the resulting injury." (Internal quotations omitted.) *Id.* at 40. However, under *Frysinger*, the statute of limitations is tolled until the physician-patient relationship terminates. *Id.* at 41-42.

{¶48} The goals of the "termination rule" are to " 'encourage[] the parties to resolve their dispute without litigation, and stimulate[] the physician to mitigate the patient's damages.' " *Tausch* at ¶ 26, quoting *Frysinger* at 41. Due to "the values *Frysinger* identified and relied on in adopting the termination rule," the court in *Tausch* held that a related vicarious-liability claim arising out of the physician's negligence must be tolled against the hospital while the physician-patient relationship continues. *Id.* at ¶ 36. The court essentially determined that "it would be unreasonable to require a plaintiff to commence a suit against a hospital alleging negligence by a physician while still being treated by that physician." *Landrum v. Durrani* (*Landrum II*), S.D.Ohio No. 1:18-CV-807, 2020-WL-3501399, *4 (June 29, 2020).

{¶49} Thus, *Tausch* concerned only the "termination rule" in *Frysinger*, which tolls the statute of limitations for vicarious-liability claims against the hospital while the plaintiff is still being treated by the physician. *Tausch* is inapplicable to the tolling provision in R.C. 2305.15(A), which tolls the limitations periods when a physician is out of state, absconds, or conceals self, because its "reasoning only applies to tolling due to a continuing patient-physician relationship." *Landrum II* at *4.

{¶50} Accordingly, the tolling provision in R.C. 2305.15(A) applies only to claims against Durrani and not to claims against CAST.

B. Other Exceptions to the Statute of Repose

{¶51} The remaining arguments that Elliot has presented in an effort to circumvent the statute of repose have already been rejected by the Ohio Supreme Court or this court in recent precedent.

{¶52} First, Elliot contends that Ohio's savings statute, R.C. 2305.19(A), preserves his claims beyond the four-year statute of repose. This argument is squarely foreclosed by the Ohio Supreme Court in *Wilson*, Slip Opinion No. 2020-Ohio-6827. In *Wilson*, the court held that a plaintiff may not take advantage of the saving statute to refile a medical claim after the four-year repose period has expired. Thus, R.C. 2305.19 cannot save Elliot's untimely claims.

{¶53} In an attempt to elongate the repose period, Elliot argues that the statute of repose began to run from the last date of treatment rather than the date of surgery. The statute of repose measures liability from the date of "the act or omission constituting the alleged basis of the medical claim"—i.e., the "last culpable act" of the defendant. R.C. 2305.113(C); *Powers*, S.D.Ohio No. 1:18-cv-788, 2020 WL 5526401, at *2. We have previously held that postsurgical care does not constitute the "last culpable act" where the alleged negligently-performed surgery forms the basis of the medical claim. *McNeal*, 2019-Ohio-5351, 138 N.E.3d 1231, at ¶ 16.

{¶54} A review of the complaint in this case shows that Elliot's underlying claims rest on the assertion that "the surgery performed by Dr. Durrani was medically unnecessary and improperly performed." Although the complaint mentions improper follow-up care, those assertions necessarily flow from the alleged negligently-performed surgery. The postoperative care did not independently form

the basis of Elliot's claims, and nothing in the complaint alleges that any separate harm occurred by virtue of the postoperative care. Thus, the act from which the statute of repose runs is the March 1, 2010 surgery, which makes the underlying 2015 lawsuit untimely.

{¶55} Elliot further attempts to evade the statute of repose by arguing that because the Ohio Medical Board revoked Durrani's license before this action was filed, claims against Durrani are not claims against a "physician," and thus, not "medical claims" for purposes of R.C. 2305.113.[7]

{¶56} In *Levandofsky v. Durrani*, S.D.Ohio No. 1:18-CV-809, 2020 WL 5535872 (Feb. 26, 2020), the Southern District of Ohio addressed this issue and held that there 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 but before a patient files suit." *Id.* at *5. The court noted, "If interpreted otherwise, a physician who retired, or let his or her license lapse, would forever be subject to potential liability for medical claims." *Id.* at fn. 7. We agree with this reasoning and indicated as much in *Jonas v. Durrani*, 2020-Ohio-3787, 156 N.E.3d 365, ¶ 14 (1st Dist.), *rev'd on other grounds, Carr v. Durrani*, 163 Ohio St.3d 207, 2020-Ohio-6943, 168 N.E.3d 1188, when we stated, "the statute of repose is a 'true statute of repose' and nothing suggests that a doctor's subsequent loss of license after the repose period runs revives a forfeited claim."

{¶57} Durrani was licensed to practice medicine at the time he performed the March 2010 surgery. As stated above, Elliot's underlying claims rest on the assertion that "the surgery performed by Dr. Durrani was medically unnecessary and

[7] R.C. 2305.113(E)(3) defines a medical claim as "any claim that is asserted in any civil action against a physician * * * [.]"

improperly performed." There is nothing to suggest that Durrani's subsequent loss of license changed the nature of those claims. Thus, Durrani's subsequent loss of his medical license does not make the medical statute of repose inapplicable to this case.

{¶58} Finally, Elliot attempts to characterize his fraud and negligent-credentialing claims as nonmedical claims outside the purview of the statute of repose. However, we have repeatedly held that such claims fall squarely within the definition of "medical claims" under R.C. 2305.113(E)(3). *See Freeman v. Durrani*, 2019-Ohio-3643, 144 N.E.3d 1067, ¶ 23 (1st Dist.) ("[C]laims of post-surgery fraud fall under R.C. 2305.113(E)(3)(c)(i)–the claims arise out of medical treatment and result from acts or omissions in providing medical care."); *Couch v. Durrani*, 1st Dist. Hamilton Nos. C-190703, C-190704, C-190705, C-190706 and C-190707, 2021-Ohio-726, ¶ 10 ("[N]egligent-credentialing claims are 'medical claims' as defined in R.C. 2305.113(E)(3)(b)(ii)."). We see no reason to depart from our line of cases, and accordingly hold Elliot's fraud and negligent-credentialing claims constitute "medical claims" for purposes of the statute of repose.

{¶59} Based on our recent precedent, the statute of repose bars Elliot's claims against CAST and TriHealth.

{¶60} Elliot's first assignment of error is sustained in part and overruled in part.

### *III. Amended Complaint*

{¶61} In his second assignment of error, Elliot contends that the trial court erred by denying his motion for leave to file an amended complaint. Through his amended complaint, Elliot sought to add a civil state law RICO claim pursuant to the Ohio Corrupt Practices Act ("OCPA") under R.C. 2923.31 et seq.

{¶62} The denial of leave to amend a pleading is reviewed under an abuse-of-discretion standard. *Patterson v. V & M Auto Body*, 63 Ohio St.3d 573, 576, 589 N.E.2d 1306 (1992). "[A] trial court properly refuses to grant leave to amend when amendment would be futile." *Hensley v. Durrani*, 1st Dist. Hamilton No. C-130005, 2013-Ohio-4711, ¶ 14, citing *Natl. City Bank v. Citizens Natl. Bank of Southwest Ohio*, 2d Dist. Montgomery No. 20323, 2004-Ohio-6060, ¶ 26.

> {¶63} To plead a civil RICO claim under the OCPA, the plaintiff must show: (1) that conduct of the defendant involves the commission of two or more specifically prohibited state or federal criminal offenses; (2) that the prohibited criminal conduct of the defendant constitutes a pattern; and (3) that the defendant has participated in the affairs of an enterprise or has acquired and maintained an interest in or control of an enterprise.

*McNeal*, 2019-Ohio-5351, 138 N.E.3d 1231, at ¶ 21. "The failure to plead any of those elements with particularity results in a defective complaint that cannot withstand a Civ.R. 12(B)(6) motion to dismiss." *Morrow v. Reminger & Reminger Co., L.P.A.*, 183 Ohio App.3d 40, 2009-Ohio-2665, 915 N.E.2d 696, ¶ 27 (10th Dist.).

{¶64} Elliot's proposed amended complaint lacked the level of specificity required under the OCPA. Elliot claims that Durrani and TriHealth engaged in a pattern of corrupt activity by attempting to profit from unnecessary surgeries. However, Elliot's proposed amended complaint provided only conclusory statements that largely mirrored the language of the statute. The proposed complaint plainly alleged that Durrani performed unnecessary surgeries on patients at Good Samaritan Hospital and that TriHealth billed the patients for those surgeries. These allegations demonstrate, at best, a simple conspiracy devoid of the "degree of hierarchical organization and structure" required for a RICO enterprise. *Hager v. ABX Air, Inc.*, S.D.Ohio No. 2:07-

CV-317, 2008 WL 819293 (Mar. 25, 2008). Thus, Elliot did not plead facts sufficient to establish a civil state law RICO claim under the OCPA. *See McNeal* at ¶ 21 ("[T]he allegations primarily consist of conclusory statements that the defendant hospitals engaged in a pattern of corrupt activity by allowing Dr. Durrani to continue the surgeries, which is insufficient for purposes of R.C. 2923.32."). Accordingly, amendment would have been futile and denial of leave to amend was properly entered.

{¶65} Elliot's second assignment of error is overruled.

### *IV. Conclusion*

{¶66} For the foregoing reasons, we overrule Elliot's first assignment of error as to CAST and TriHealth, and affirm the judgment of the trial court. We also overrule Elliot's second assignment of error in its entirety. However, we sustain Elliot's first assignment of error as to Durrani, reverse the judgment of the trial court, and remand the cause for further proceedings consistent with this opinion.

Judgment accordingly.

**ZAYAS, P.J.**, and **BERGERON, J.**, concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

ENTERED
SEP 12 2018

| | | |
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| RICHARD ELLIOT,<br><br>Plaintiff<br><br>v.<br><br>ABUBAKAR ATIQ DURRANI, M.D.,<br><br>and<br><br>CENTER FOR ADVANCED SPINE TECHNOLOGIES, INC.<br><br>and<br><br>TRI-HEALTH, INC. F/D/B/A GOOD SAMARITAN HOSPITAL<br><br>Defendants | : | CASE NO. A1504466<br><br>JUDGE SCHWEIKERT<br><br><br>ENTRY DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT AND TO IMPOSE SANCTIONS AGAINST TRI-HEALTH, INC. F/D/B/A GOOD SAMARITAN HOSPITAL, DENYING MOTION TO IMPOSE SANCTIONS AGAINST DR. DURRANI AND CAST; GRANTING DEFENDANTS, TRI-HEALTH, INC., F/D/B/A GOOD SAMARITAN HOSPITAL'S MOTION TO DISMISS AND GRANTING DEFENDANTS ABUBAKAR ATIQ DURRANI, M.D. AND CENTER FOR ADVANCED SPINE TECHNOLOGIES, INC.'S MOTION TO DISMISS |

This matter came before the Court upon the following motions:

- Plaintiffs' Motion to Stay Proceedings pending the Deposition of Dr. Durrani filed on or about February 7, 2018;
- Plaintiffs' Motions to Amend the Complaint to add an Allegation that Dr. Durrani is Not a Physician filed on March 12, 2018;
- Plaintiffs' Motion to Amend the Complaint on the Statute of Repose Issue and to add a State Civil RICO Claim filed on or about January 19, 2017 and on or about September 12, 2017;
- Plaintiff's Motion for Sanctions Against Defendants filed on or about March 15, 2018;
- Defendants Abubakar Atiq Durrani, M.D. and Center for Advanced Spine Technologies, Inc.'s Motion to Dismiss filed on or about September 30, 2015.

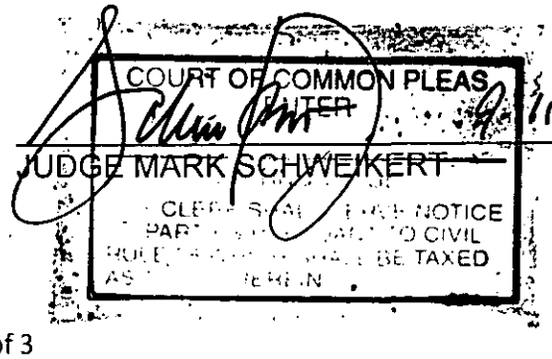
- Defendant Tri-Health, Inc., F/D/B/A Good Samaritan Hospital's Motion to Dismiss filed on January 9, 2017.

The Court, having heard the argument of counsel and having read the motions, supporting memoranda and opposing memoranda, and pursuant to this Court's Decisions entered on July 12, 2018, rules as follows:

- Plaintiff's Motions to Amend the Complaint are DENIED.
- Plaintiff's Motion for Sanctions is DENIED.
- Plaintiff's Motion for Stay is DENIED.
- Defendants' Abubakar Atiq Durrani, M.D. and Center for Advanced Spine Technologies, Inc.'s Motion to Dismiss is GRANTED.
- Defendant Tri-Health, Inc., F/D/B/A Good Samaritan Hospital's Motion to Dismiss is GRANTED.

The granting of the Motion to Dismiss of Abubakar Atiq Durrani, M.D. and Center for Advanced Spine Technologies, Inc., and Motion to Dismiss of Tri-Health, Inc., F/D/B/A Good Samaritan Hospital, disposes of the entire case and this is a final appealable order pursuant to Civ. R. 58. Court costs are assessed to Plaintiff. Pursuant to Civ. R. 58(B), the Clerk of Courts is directed to serve this judgment in the manner prescribed by Civ. R. 5(B). The Clerk must indicate on the docket the names and addresses of all parties, the method of service and the costs associated with the service.

IT IS SO ORDERED.




7-11-2018

HAVE SEEN AND AGREED:

*/s/ James F. Brockman*
Michael F. Lyon (0006749)
James F. Brockman (0009469)
Paul Vollman (0065680)
LINDHORST & DREIDAME CO., L.P.A.
312 Walnut Street, Suite 3100
Cincinnati, OH 45202-4048
(513) 421-6630 phone
(513) 421-0212 facsimile
mlyon@lindhorstlaw.com
jbrockman@lindhorstlaw.com
pvollman@lindhorstlaw.com
*Attorneys for Defendants, Abubakar Atiq Durrani, M.D. and Center for Advanced Spine Technologies, Inc.*

*/s/ Michael P. Foley*
Michael P. Foley, Esq. (0061227)
Rendigs Fry Kiely & Dennis, LLP
600 Vine Street, Suite 2650
Cincinnati, OH 45202
mfoley@rendigs.com
*Attorney for Defendant, Tri-Health, Inc.*

Frederick J. Johnson, Esq. (0083071)
The Deters Law Firm, P.S.C.
441 Vine Street, 44th Floor
Cincinnati, OH 45202
fjohnson@ericdeters.com
*Attorney for Plaintiffs*

Pursuant to Loc. R. 17(A), a copy of this Entry was submitted to opposing counsel seeking approval thereof for submission to the Court. Opposing counsel refused to approve or endorse the proposed entry without explanation. Pursuant to Loc. R. 11(I), a copy of the Entry is being served upon opposing counsel upon submission to the Court.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served, pursuant to Civil Rule 5(B)(2)(f) by electronic mail only on this __ day of September, 2018:

Frederick Johnson
The Deters Firm
5247 Madison Pike
Independence, KY 41051

Michael P. Foley, Esq.
Rendigs Fry Kiely & Dennis, LLP
600 Vine Street, Suite 2650
Cincinnati, OH 45202

*/s/ James F. Brockman*




**COURT OF COMMON PLEAS**
**HAMILTON COUNTY, OHIO**
**CIVIL DIVISION**

| | | |
|---|---|---|
| RICHARD ELLIOT,<br>Plaintiff | : | Case No. A1504466 |
| v. | : | JUDGE MARK SCHWEIKERT |
| ABUBAKAR ATIQ DURRANI, M.D. ET AL.,<br>Defendants | : | DECISION ON DEFENDANTS ABUBAKAR ATIQ DURRANI, M.D. AND THE CENTER FOR ADVANCED SPINE TECHNOLOGIES INC. MOTION TO DISMISS AND OTHER RELATED MOTIONS |

This matter is before the Court on a motion to dismiss filed by Defendants, Abubakar Atiq Durrani, M.D. (Dr. Durrani), and the Center for Advanced Spine Technologies, Inc. (CAST), seeking dismissal of the claims filed against them by Plaintiff, Richard Elliot. Also pending before this Court are the Plaintiff's motions to amend his complaint and to impose sanctions against Dr. Durrani and CAST for alleged discovery violations.

**Factual and Procedural Background**

The case before us is one of a series of cases involving alleged malpractice by Dr. Durrani, a spine surgeon. Plaintiff filed a complaint against Dr. Durrani, CAST, and Trihealth, Inc. f/d/b/a Good Samaritan Hospital (Good Samaritan Hospital) on August 19, 2015.[1] In this complaint Plaintiff alleges that he first visited Dr. Durrani at CAST on January 5, 2010 and that Dr. Durrani performed surgery on Plaintiff at Good Samaritan Hospital on March 1, 2010 and that Dr. Durrani used Infuse/BMP-2 during the surgery without Plaintiff's consent. See

[1] Plaintiff filed an earlier complaint on June 12, 2014 in Hamilton County Court of Common Pleas Case No. A 1403492 that was voluntarily dismissed.

Complaint at ¶¶ 11-20. Plaintiff alleges that following surgery Plaintiff suffered infections, pain, additional hospital stays, and weight loss. *Id.* at ¶¶ 21-33.

Plaintiff claims that Dr. Durrani improperly performed the surgery, and improperly used Infuse/BMP-2 in the surgery and that the surgery was medically unnecessary. *Id.* at ¶¶ 20, 27. Plaintiff's claims against Dr. Durrani include negligence, battery, lack of informed consent, intentional infliction of emotional distress, fraud, and spoliation of evidence. His claims against CAST include vicarious liability for the negligent and improper acts of its employee, Dr. Durrani, negligent hiring, retention, and supervision, of its employee, Dr. Durrani, fraud, violation of the Ohio Consumer Sales Practices Act (OCSPA), and spoliation of evidence. His claims against Good Samaritan Hospital include negligence, negligent credentialing, supervision and retention, fraud, violation of the OCSPA, product liability, and spoliation of evidence.

On December 15, 2015, this Court adopted a case management order that further adopted this Court's September 2, 2015 decision declaring R.C. 2305.113 unconstitutional, and denying the motions to dismiss of all defendants. On January 4, 2016, the defendants filed an appeal. The First District Court of Appeals found, pursuant to the writ of prohibition issued by the Supreme Court of Ohio in *State ex rel. Durrani v. Ruehlman*, 147 Ohio St.3d 478, 2016-Ohio-7740, ¶ 26, the trial court did not have jurisdiction, and its order was a nullity, and accordingly there was no final, appealable order, and the appeal was dismissed on December 6, 2016.

Subsequently there have been several judicial assignments of this case, most recently the assignment of the consolidated Durrani cases in Certificate of Assignment 17JA2178. Pursuant thereto, joint motion hearings were conducted and the parties have submitted various dispositive motions, including this one, for decision. Although a timely response and reply may not have been filed, this Court has generally granted leave and is considering the oral arguments presented

by plaintiffs and defendants to be generally considered for the purposes of these motions in order to advance the administration of justice.

**Dr. Durrani and CAST's Motion to Dismiss**

On September 30, 2015, Dr. Durrani and CAST moved for dismissal pursuant to Civ.R. 12(B)(6) on Plaintiff's claims against them related to the surgery performed by Dr. Durrani on Plaintiff on September 23, 2011. Dr. Durrani and CAST assert that Plaintiff's claims against them are medical claims and are time barred pursuant to the medical claim statute of repose contained in R.C. 2305.113(C) because the complaint alleges that the surgery performed by Dr. Durrani on March 1, 2010 occurred more than four years before the Plaintiff filed suit against Dr. Durrani and CAST on August 19, 2015.

In considering a Civ.R. 12(B)(6) motion to dismiss, a court "must accept all factual allegations in the complaint as true and draw all reasonable inferences in favor of the nonmoving party." *Conkin v. CHS-Ohio Valley, Inc.*, 1st Dist. Hamilton No. A-1104723, 2012-Ohio-2816, citing Mitchell v. Lawson Milk Co., 40 Ohio St.3d 190, 192 (1988). Determination of a Civ.R. 12(B)(6) motion is restricted solely to the allegations in the complaint. *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 569-570 (1996). A motion to dismiss based on a statute of limitations may be granted when the complaint shows conclusively on its face that the action is time barred. *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, ¶ 11. "In order for a court to dismiss a complaint under Civ.R. 12(B)(6) for failure to state a claim upon which relief may be granted, it must appear beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle the plaintiff to relief." *Id.*, citing *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975).

There have been some significant court decisions regarding the Ohio medical claim statute of repose included in R.C. 2305.113(C) since this complaint was filed. In *Young v. UC Health*, 1st Dist., Hamilton Nos. C-150562, C-150566, the First District held that, contrary to what this Court had determined, the Youngs' claims against The Christ Hospital (TCH) for negligence; negligent credentialing, supervision and retention; fraud; loss of consortium; OCSPA violations; and products-liability are medical claims under R.C. 2305.113(E)(3), and thus are subject to the four-year limitations period in the medical statute of repose in R.C. 2305.113(C), and therefore the Youngs were barred from bringing those medical claims against TCH because they failed to file them within four years after the "act or omission" on which the medical claims were based. *Id.* at ¶¶ 18-25. The First District determined that the act or omission on which the medical claims were based was Young's surgery performed by Dr. Durrani at TCH in 2008. *Id.* at ¶ 28. The First District further held that this Court erred in finding R.C. 2305.113(C) unconstitutional, because the Ohio Supreme Court had declared R.C. 2305.113(C) constitutional as recently as 2012 in *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, syllabus, and this Court "had no authority to effectively overrule the Ohio Supreme Court." *Id.* at ¶ 29. The First District reversed this Court's judgment to the extent that it denied TCH's motion to dismiss the claims against it and remanded the case to this Court for dismissal of the Youngs' medical claims against TCH and "for further proceedings consistent with law and this opinion." *Id.* at ¶ 33. The Youngs timely appealed the First District's decision in *Young* to the Ohio Supreme Court. Two months after the First District issued its decision in *Young*, the Ohio Supreme Court issued its decision in *Antoon v. Cleveland Clinic Foundation*, 148 Ohio St.3d 483, 2016-Ohio-7432, in which the court reaffirmed its decision in *Ruther* upholding the constitutionality of Ohio's medical claim statute of repose, R.C. 2305.113(C). *Id.* at ¶ 20-26. On May 17, 2017, the Ohio

Supreme Court declined to accept jurisdiction over the Youngs' appeal of the First District's decision in *Young*.

The claims asserted by Plaintiff against Dr. Durrani include negligence, battery, lack of informed consent, intentional infliction of emotional distress, fraud, and spoliation of evidence.

R.C. 2305.113(E)(3) defines "Medical claim" as follows:

> "Medical claim" means any claim that is asserted in a civil action against a physician * * * and that arises out of the medical diagnosis, care, or treatment of any person. "Medical claim" includes the following:
> (a) Derivative claims for relief that arise from the plan of care, medical diagnosis, or treatment of a person;
> (b) Claims that arise out of the plan of care, medical diagnosis, or treatment of any person and to which either of the following apply:
> (i) The claim results from acts or omissions in providing medical care.
> (ii) The claim results from the hiring, training, supervision, retention, or termination of care givers providing medical diagnosis, care, or treatment.

All of the Plaintiff's claims against Dr. Durrani are medical claims under R.C. 2305.113(E)(3), and thus are subject to the medical claim statute of repose, R.C. 2305.113(C), which bars such claims when they are not filed within four years after the act or omission on which the claim is based. *Id.* at ¶¶ 18-27. The act or omission on which the Plaintiff's medical claims are based is the surgery performed on Plaintiff by Dr. Durrani on March 1, 2010. See Complaint at ¶ 18. The Plaintiff did not bring this action against Dr. Durrani until August 19, 2015.[2] Because the complaint shows conclusively that the Plaintiff waited more than four years to bring the medical claims against Dr. Durrani, the claims are barred by the medical claim statute of repose, R.C. 2305.113(C). Accordingly, Dr. Durrani is entitled to dismissal of Plaintiff's medical claims against him. See *Young* at ¶¶ 19-25.

[2] The earlier complaint was filed on June 12, 2014, more than four years past the date of the surgery.

The claims asserted by Plaintiff against CAST closely track the claims that the Youngs' asserted against TCH in *Young*, see *id.* at ¶ 4. The First District determined in *Young* that all of these claims, except the spoliation-of-evidence claim, were medical claims under R.C. 2305.113(E)(3), and thus were subject to the medical claim statute of repose, R.C. 2305.113(C), which bars such claims when they are not filed within four years after the act or omission on which the claim is based. *Id.* at ¶¶ 18-27. The act or omission on which the Plaintiff's medical claims are based is the surgery performed by Dr. Durrani on March 1, 2010. See Complaint at ¶18. The Plaintiff did not bring this action against CAST until August 19, 2015. Because the complaint shows conclusively that the Plaintiff waited more than four years to bring the medical claims against CAST, the claims are barred by the medical claim statute of repose, R.C. 2305.113(C). Accordingly, CAST is entitled to dismissal of the Plaintiff's medical claims against it.

Plaintiff asserts that the four-year period in the medical claim statute of repose should not be deemed to have commenced on the date of the surgery. Plaintiff essentially argues that the question of when the running of the four-year period in the medical claim statute of repose commences will always present a question of fact that will never be able to be decided on a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim, a Civ.R. 12(C) motion for judgment on the pleadings, or a Civ.R. 56(C) motion for summary judgment.

"A statute of limitations establishes 'a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)[,]'" *Antoon*, at ¶ 11, quoting *Black's Law Dictionary* 1636 (10th Ed.2014)[,]" whereas "[a] statute of repose bars 'any suit that is brought after a specified time since the defendant acted * * * even if this period ends

before the plaintiff has suffered a resulting injury[,]'" *Antoon*, quoting *Black's Law Dictionary* at 1637.

R.C. 2305.113(A), the medical claim statute of limitations, states that, except as provided elsewhere in this section, "an action upon a medical * * * claim shall be commenced within one year after the cause of action accrued." R.C. 2305.113(C), the medical claim statute of repose, states that "[n]o action upon a medical * * * claim shall be commenced more than four years after the occurrence of the act or omission constituting the alleged basis of the medical * * * claim," R.C. 2305.113(C)(1), and that "[i]f an action upon a medical * * * claim is not commenced within four years after the occurrence of the act or omission constituting the alleged basis of the medical * * * claim, then any action upon that claim is barred," R.C. 2305.113(C)(2).

Thus, R.C. 2305.113(A) provides that the one-year period in the medical statute of limitations is triggered when the plaintiff's cause of action accrued, as when the plaintiff's injury occurred or was discovered, *Antoon* at ¶ 11, while R.C. 2305.113(C) provides that the four-year period in the medical claim statute of repose is triggered on the occurrence of the act or omission constituting the alleged basis of the medical claim. The Ohio Supreme Court explained in *Antoon* that "R.C. 2305.113(C) provides that the time for bringing a medical malpractice claim has an absolute limit[,]" *Antoon* at ¶ 21, and that "the plain language of the statute is clear, unambiguous, and means what it says," *id.* at ¶ 23.

In *Young*, the First District determined that because Young's surgery took place in 2008 and the complaint was not filed until 2014, Young's medical claims against TCH were barred under R.C. 2305.113(C), and therefore, the court granted TCH's Civ.R. 12(B)(6) motion to dismiss with respect to the Youngs' medical claims. See *id.* at ¶ 28-32. It is clear from *Young* that the First District viewed the surgery as "the act or omission on which the [Youngs'] claim is

based," for purposes of R.C. 2305.113(C), *id.* at ¶ 27, and thus viewed the date of the surgery as the date on which the four-year limitation period in the medical claim statute of repose in R.C. 2305.113(C) began running, see *id.* at ¶¶ 27-32. This case presents a situation that is similar to *Young*, and therefore we find that decision controlling here.

Plaintiff also asserts that the fraud claim satisfies Civ.R. 9(B) and 12(B)(6) because he pleaded the claims with "sufficient particularity" and fraud is an independent non-medical claim that can be brought as an independent claim separate from a medical malpractice claim. However, the fraud claim that Plaintiff has brought against Dr. Durrani and CAST closely tracks the one brought against TCH in *Young*, which was found to constitute a medical claim that was subject to the medical claim statute of repose and thus barred under R.C. 2305.113(C) because the Youngs failed to bring the claim within four years of the date of Young's surgery. *Id.* at ¶¶ 22-23. Thus, Plaintiff's fraud claim against Dr. Durrani and CAST must fail for the same reason.

The same is true for Plaintiff's OCSPA-violation claim against CAST, which involved Dr. Durrani's use of Infuse/BMP-2 on Plaintiff. See Complaint at ¶¶ 360-369. The First District held that the Young's OCSPA-violation claim against TCH "is a 'dressed-up' medical claim." *Young* at ¶ 24. We conclude that Plaintiff's OCSPA-violation claim against CAST is also a medical claim and thus is barred by the four-year period of the medical claim statute of repose.

Plaintiffs' claims against CAST include that CAST should be held vicariously liable for Dr. Durrani's conduct. This claim must fail.

" '[G]enerally, an employer or principal is vicariously liable for the torts of its employees or agents under the doctrine of respondeat superior.' " *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St. 3d 594, 598–600, 2009-Ohio-3601, ¶ 20, quoting *Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St.3d 435, 438 (1994). "Although a party injured by an

agent may sue the principal, the agent, or both, a principal is vicariously liable only when an agent could be held directly liable." *Wuerth* at ¶ 22. "The liability for the tortious conduct flows through the agent by virtue of the agency relationship to the principal. If there is no liability assigned to the agent, it logically follows that there can be no liability imposed upon the principal for the agent's actions." *Comer v. Risko,* 106 Ohio St.3d 185, 2005-Ohio-4559, ¶ 20. Thus, the Ohio Supreme Court held in *Comer* that a hospital could not be held liable for the alleged negligence of a physician when that physician could not be sued due to the expiration of the statute of limitations. *Id.* at ¶ 2.

Here, we similarly conclude that since the four-year limitation period in the medical claim statute of repose in R.C. 2305.113(C) has expired on Plaintiff's claim against Dr. Durrani, Plaintiff cannot sue CAST on a theory of vicarious liability.

Plaintiff asserts that his spoliation-of-evidence claim cannot be dismissed. We disagree. In order to bring a spoliation-of-evidence claim, Plaintiff was required to allege that Dr. Durrani's and CAST's "willful destruction of evidence" actually disrupted his case and that he sustained damages as a proximate result of Dr. Durrani's and CAST's alleged acts. See *Smith v. Howard Johnson Co., Inc.*, 67 Ohio St.3d 28, 29. Here, however, Plaintiff cannot show that any disruption was caused to his case or that he sustained damages that were proximately caused by Dr. Durrani's and CAST's alleged acts, because after applying the medical claim statute of repose, there is no case left to disrupt, nor is there any prejudice apparent from Dr. Durrani's and CAST's alleged acts. *Greissmann v. Durrani*, Hamilton C.P. No. A1400624, p. 5 (J. Myers).

Plaintiff contends that R.C. 2305.113(C) is unconstitutional as applied to his case because the statute (1) violates a plaintiff's "right to redress" and rights to "due process" under Article I, Section 16 of the Ohio Constitution and the First Amendment of the United States Constitution;

(2) abolishes a person's "right to a legal remedy" when he or she is injured by closing the courts to potential civil plaintiffs in violation of Article I, Section 16 of the Ohio Constitution; and (3) allows the General Assembly to "usurp[ ] the judicial power of Ohio's Courts" in violation of Article II, Section 32 and Article IV, Section I of the Ohio Constitution. However, the Ohio Supreme Court made it clear in *Antoon* and *Ruther* that R.C. 2305.113(C) does not violate a plaintiff's rights to redress his or injuries or due process under the Ohio and United States Constitutions. See *Antoon* at ¶¶ 26, 29, and *Ruther* at ¶ 28. Plaintiff's argument that R.C. 2305.113(C) abolishes a person's right to a legal remedy is taken from *Hardy v. VerMeulen*, 32 Ohio St.3d 45 (1987), which declared former R.C. 2305.113(C) unconstitutional for these reasons. However, the Ohio Supreme Court reversed its decision in *Hardy* in *Ruther* and recently reaffirmed its holdings in *Ruther* in *Antoon*. Plaintiff argues that this Court should not follow *Ruther* but, instead, should find that R.C. 2305.113(C) is unconstitutional "as applied" to Dr. Durrani's patients like him. We reject Plaintiff's as-applied challenge to the medical claim statute of repose on the basis of *Antoon* and *Ruther* and the First District's decision in *Young*.

Plaintiff argues that R.C. 2305.113(C) is unconstitutional because it allows the General Assembly to "usurp[ ] the judicial power of Ohio's Courts" in violation of Article II, Section 32 and Article IV, Section I of the Ohio Constitution. Specifically, Plaintiff, citing *State v. Hochhausler*, 76 Ohio St.3d 455, contends that the legislative and executive branches of government cannot "direct, control, or impede" the exercise of an "inherent function" of the judicial branch of government. Plaintiff asserts that by enacting R.C. 2305.113(C) and thereby "[d]isallowing a plaintiff from bringing a case before the plaintiff knows whether he or she has an actionable claim," the General Assembly is "directing an 'inherent' judicial function,"

presumably, by passing a law that requires trial courts to dismiss a claim filed outside the four-year medical claim statute of repose. However, Plaintiff's reliance on *Hochhausler* is misplaced.

In *Hochhausler* , the Ohio Supreme Court ruled that the "no stay" provision in the administrative license suspension provisions in former R.C. 4511.191(H)(1), which prohibited "any court" from granting a stay of an administrative license suspension, was unconstitutional because the power to grant or deny stays is "[i]nherent within a court's jurisdiction, and essential to the orderly and efficient administration of justice," and "[t]o the extent that [former] R.C. 4511.191(H)(1) deprives courts of their ability to grant a stay of an administrative license suspension, it improperly interferes with the exercise of a court's judicial functions" and thus violated the doctrine of separation of powers, rendering that portion of the statute unconstitutional. *Id.* at 463.

Here, R.C. 2305.113(C) contains no provision that deprives a court of an "inherent judicial function," such as granting or denying a stay. Rather, it merely establishes "'a time limit after which an injury is no longer a legal injury,'" which is something the General Assembly has a right to do. *Antoon* at ¶ 26, quoting *Ruther* at ¶ 14.

The Plaintiff asserts that R.C. 2305.113(C) is unconstitutional because it does not bear a reasonable relation to the General Assembly's reasons for passing the statute, i.e., to prevent physicians from having to defend against claims where pertinent documents may not have been retained and to address concerns that technological advances would create a different and more stringent standard not applicable to earlier times. However, there is a strong presumption in favor of a statute's constitutionality, and a statute is constitutional unless it is clearly unconstitutional beyond a reasonable doubt. *Antoon* at ¶29. *Antoon* plainly demonstrates that R.C. 2305.113(C) is not clearly unconstitutional beyond a reasonable doubt. See *id.* (R.C.

2305.113(C) complies with right-to-remedy clause since it does not completely foreclose a cause of action for injured plaintiffs or otherwise eliminate their ability to receive a meaningful remedy).

Plaintiff requests that we create a "fraud exception" or "equitable estoppel" exception to the medical claim statute of repose. We decline to do so. R.C. 2305.113(C) sets forth certain exceptions to the applicability of the medical-claim statute of repose, including minors and persons who discover their injury in the third year of the four-year period of the statute of repose, R.C. 2305.113(D)(1). If the General Assembly had wanted to make an exception for fraud, it could have included one in the statute but did not. Additionally, the Ohio Supreme Court has given no indication that the doctrine of equitable estoppel is available to extend the four-year period of the medical claim statute of repose, see generally, *Antoon* at ¶ 21 ("R.C. 2305.113(C) provides that the time for bringing a medical-malpractice complaint has an absolute limit"). Counsel for Plaintiff has repeatedly called upon this Court in argument to carve out an exception for Plaintiff and hundreds of others whose allegations have been brought forward against Dr. Durrani and the hospitals and organizations he was affiliated with when he performed surgery only after they became aware of certain other public allegations against this physician and certain hospitals. We reject Plaintiff's request to adopt such a rule in this case. As the Supreme Court of Ohio has said, " '* * * however reprehensible the conduct alleged, these actions are subject to the time limits created by the Legislature. Any exception to be made to allow these types of claims to proceed outside of the applicable statutes of limitations would be for the Legislature * * *.' " *Doe v. Archdiocese of Cincinnati,* 109 Ohio St.3d 491, 2006-Ohio 2625, ¶ 49, quoting *Zumpano v. Quinn*, 6 N.Y.3d 666 (2006). We expect the same determination will apply here.

Plaintiff contends that pursuant to the saving statute in R.C. 2305.15(A), "the statutes of limitations and repose should have been tolled when Dr. Durrani left the United States for Pakistan in December of 2013." We find this assertion unpersuasive.

R.C. 2305.15(A) states:

> (A) 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, 1302.98, and 1304.35 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.

R.C. 2305.113(C) applies "[e]xcept as to persons within the age of minority or unsound mind as provided by section 2305.16 of the Revised Code, and except as provided in division (D) of this section[.]" R.C. 2305.113(D) provides:

> (D)(1) If a person making a medical claim, dental claim, optometric claim, or chiropractic claim, in the exercise of reasonable care and diligence, could not have discovered the injury resulting from the act or omission constituting the alleged basis of the claim within three years after the occurrence of the act or omission, but, in the exercise of reasonable care and diligence, discovers the injury resulting from that act or omission before the expiration of the four-year period specified in division (C)(1) of this section, the person may commence an action upon the claim not later than one year after the person discovers the injury resulting from that act or omission.
> (2) If the alleged basis of a medical claim, dental claim, optometric claim, or chiropractic claim is the occurrence of an act or omission that involves a foreign object that is left in the body of the person making the claim, the person may commence an action upon the claim not later than one year after the person discovered the foreign object or not later than one year after the person, with reasonable care and diligence, should have discovered the foreign object.
> (3) A person who commences an action upon a medical claim, dental claim, optometric claim, or chiropractic claim under the circumstances described in division (D)(1) or (2) of this section has the affirmative burden of proving, by clear and convincing evidence, that the person, with reasonable care and diligence, could not have discovered the injury resulting from the act or omission constituting the alleged basis of the claim within the three-year period described in division (D)(1) of this section or within the one-year period described in division (D)(2) of this section, whichever is applicable.

As can be seen, the medical claim statute of repose, R.C. 2305.113(C), as written and enacted by the General Assembly, carefully specifies just two exceptions, those circumstances provided by R.C. 2305.16 and those circumstances provided by R.C. 2305.113(D). Although it could have easily done so, the General Assembly did not provide an exception to the medical claim statute of repose, R.C. 2305.113(C), for the circumstances set forth in R.C. 2305.15(A), involving persons who have a cause of action against another that accrues when the other person is out of state, has absconded, or conceals self, *or* after the cause of action accrues, the other person departs from the state, absconds, or conceals self. Given the foregoing, we conclude that the saving statute in R.C. 2305.15(A) does not toll the running of the four-year limitation period of the medical claim statute of repose in R.C. 2305.113(C).

Plaintiff states in his complaint that this case has been previously dismissed pursuant to Civ. R. 41(A)(1)(a) and is now being refiled within the time allowed by R.C 2305.19, suggesting that this case should get the benefit of the "saving statute" in R.C. 2305.19. This Court recognizes that an action that was commenced, but then voluntarily dismissed pursuant to Civ. R. 41, is a nullity[3] and not to be considered for purposes of the four-year computation under the statute of repose. The General Assembly specifically provided for just two exceptions to the application of the statute of repose R.C. 2305.113(C). Although it could have easily done so, the General Assembly did not provide an exception to the medical claim statute of repose, R.C. 2305.113(C), for the circumstances set forth in R.C. 2305.19. For much the same reasons we determined that R.C. 2305.15(A) does not toll the running of the statute of repose, we determine

[3] See *Antoon* at ¶¶ 24-25.

that the "saving statute" in R.C. 2305.19 does not apply to allow the Plaintiff to rely on a previous filing within the four-year time period.[4]

R.C. 2305.113(D)(2) provides, "If the alleged basis of a medical claim * * * involves a foreign object that is left in the body of the person making the claim, the person may commence an action upon the claim not later than one year after the person discovered the foreign object or not later than one year after the person, with reasonable care and diligence, should have discovered the foreign object." Plaintiff argues that BMP-2 was improperly used without Plaintiff's consent by Dr. Durrani in performing the alleged surgery and that Plaintiff did not discover this circumstance until Plaintiff's counsel reviewed the relative medical records and thus the four year period was tolled until that time. This argument fails. As alleged, the use of BMP-2 by Dr. Durrani was an intentional use of the substance as part of the medical procedure he performed. The foreign object exception does not apply to foreign objects intentionally placed as part of the medical procedure. *Favor v. W.L. Gore Assocs., Inc.*, S.D.Ohio, Eastern Division, No. 2:13-cv-655, *3, 2013 WL 4855196. A sensible reading of the statute would indicate that this section applies to such objects as surgical sponges, needles, drill bits, or other objects not intended as part of the medical procedure and inadvertently or negligently allowed to remain in the body.

Finally, Plaintiff requests that we adopt a rule allowing the "continuous treatment doctrine" to toll the running of the four-year period in the medical claim statute of repose in R.C. 2305.113(C). Again, we decline to do so, because if the General Assembly had desired such a rule, it could have included such a provision in R.C. 2305.113(C), but it chose not to do so. See *Antoon* at ¶ 17, quoting *Townsend v. Eichelberger*, 51 Ohio St. 213, 216 (1894) ("'It is not the

[4] The earlier filing on May 28, 2014 was also outside the four-year statute of repose period.

province of the courts to make exceptions [to the statutes of repose or statutes of limitations] to meet cases not provided for by the legislature'").

**Plaintiff's Motions to Amend Complaint**

Plaintiff has moved to amend his complaint on the statute of repose issue and to add a state civil RICO claim.

Civ.R. 15(A) provides that after the period in which a plaintiff may amend his complaint as a matter of right has expired, the party must seek agreement with his or her opponent, or seek leave of the court to amend his complaint. The rule also provides that a trial court must "freely" grant a party's request for leave to amend his or her complaint. While "the language of Civ.R. 15(A) favors a liberal amendment policy and a motion for leave to amend should be granted absent a finding of bad faith, undue delay or undue prejudice to the opposing party[,]" the trial court's decision whether or not to grant leave to amend rests within the trial court's discretion, and the court's decision will not be reversed absent an abuse of discretion, *Hoover v. Sumlin*, 12 Ohio St.3d 1, 6 (1984). A trial court may properly deny leave to amend a complaint where the amendment would be futile. *L.E. Sommer Kidron, Inc. v. Kohler*, 9th Dist. Wayne No. 06 CA 0044, 2007-Ohio-885, ¶ 56.

Plaintiff moved to amend the complaint on the statute of repose issue shortly after *Young* and *Antoon* were issued. In his motion, Plaintiff argues that the date of the surgery should not be considered to be the date the four-year period in R.C. 2305.113(C) commenced in this case. However, the First District determined otherwise in *Young*. See *id.* at ¶ 27. Plaintiff likely wishes to amend the complaint to circumvent the First District's decision in *Young* by adding allegations that the claim is based not just on the surgery performed on Plaintiff by Dr. Durrani in March 2010, but also on Dr. Durrani's alleged malpractice during Plaintiff's follow-up

appointments with Dr. Durrani following the surgery. Plaintiff contends that these follow-up appointments should be taken into account in determining when the four-year period in R.C. 2305.113(C) was triggered in this case, and therefore Plaintiff is apparently seeking an opportunity to add allegations to his complaint to show that the lawsuit against Dr. Durrani and CAST was, in fact, timely filed.

However, allowing Plaintiff to amend the complaint to add such allegations would be futile. *Young* makes it clear that the four-year period in the medical claim statute of repose is triggered by the occurrence of the act or omission that forms the basis of the medical claim. *Young* also makes it clear that the act or omission that forms the basis of Plaintiff's medical claim against Dr. Durrani and CAST is Plaintiff's surgery performed by Dr. Durrani in March 2010. Any attempt to amend the complaint to show otherwise would be futile.

Plaintiff's motion to amend the complaint also involves adding a "state civil RICO claim," i.e., a claim under the Ohio Corrupt Activities Act, R.C. 2923.31 et seq., but this too would be futile. Plaintiff is seeking to amend the complaint to add this claim in an attempt to recast the claims for medical malpractice, product liability, and fraud as a corrupt-activities claim in hope that the claims will be classified as something other than medical claims that are subject to the four-year medical claim statute of repose. However, any corrupt-activities claim brought by Plaintiff would be barred for the same reason that the claims for fraud, medical malpractice, and products liability against TCH were barred in *Young*, namely, " '[c]lever pleading cannot transform what are in essence medical claims' " that are time barred under the medical claim statute of repose into corrupt-activities claims. See *Young* at ¶¶ 22-23.

We find instructive the statements made by U.S. District Court Judge Timothy S. Black in rejecting a similar claim filed by the Durrani-plaintiffs in federal court:

> At the core, Plaintiffs seek recovery in federal court under anti-racketeering laws ("RICO") for their state law personal injury claims, a practice which the Sixth Circuit has expressly rejected. *See Jackson v. Sedgwick,* 731 F.3d 556 (6th Cir.2013) (*en Banc*). Simply stated, RICO "is not a means for federalizing personal injury tort claims arising under state law." *Id.* at 568–69.
>
> Among other things, if the Court were to accept Plaintiffs' theory, any hospital will have engaged in a pattern of racketeering activity when a credentialed physician of the hospital is accused of committing medical malpractice. This is nonsense.
>
> Despite having filed no fewer than seven complaints in these consolidated cases, Plaintiffs have never alleged facts supporting the existence of a plausible claim under RICO or Ohio RICO. Plaintiffs' latest clumsy attempt to repackage medical malpractice and product liability claims is without any plausible basis, notwithstanding its prolixity.

*Aaron v. Durrani*, S.D.Ohio Nos. 1:13-CV-202, 1:13-cv-214, 2014 WL 996471, at *1 (Mar. 13, 2014).

Finally, the Plaintiff argues that he needs to amend his complaint to include additional details supporting his claims for fraud and equitable estoppel. However, allowing Plaintiff to amend his complaint to buttress his arguments for a fraud exception to the medical claim statute of repose or application of the doctrine of equitable estoppel in these circumstances would be futile for the same reasons that we rejected these arguments earlier: This Court is obligated to follow the law in this state as written, and any argument to change or modify the law should be addressed to the General Assembly.

**Plaintiff's Motion to Impose Discovery Sanctions**

Plaintiff has moved to impose Civ.R. 37(D) sanctions against the defendants for their alleged discovery violations. However, the motion presently before us is a Civ.R. 12(B)(6) motion to dismiss, and as explained earlier, determination of such a motion is restricted to the allegations in the complaint. *State ex rel. Midwest Pride IV, Inc.*, 75 Ohio St.3d at 569-570. Accordingly, discovery has little, if any, impact in these proceedings, and the same is true for any alleged refusal by the Defendant Hospital to cooperate with discovery. Similarly, because

R.C. 2305.113 (C) is a statute of repose and a complete bar to any action on a claim that is not timely brought, failure to meet the time requirements of the statute bars any action on the claim, including discovery. Thus, we conclude that it would be inappropriate to impose discovery sanctions against Dr. Durrani and CAST under the circumstances of this motion.

**Remaining Motions**

On February 7, 2018, Plaintiff moved to stay the proceedings pending the deposition of Dr. Durrani. However, Dr. Durrani's deposition took place in February and March of 2018, so the motion is now moot. Even if the motion was not moot, this Court would have overruled it, because determination of a Civ.R. 12(B)(6) motion is restricted solely to the allegations in the complaint. *State ex rel. Midwest Pride IV, Inc.,* 75 Ohio St.3d at 569-570. Therefore, any additional facts discovered in Dr. Durrani's deposition would not have been considered in ruling on Dr. Durrani's and CAST's motion to dismiss.

On March 12, 2018, Plaintiff moved to amend the complaint to add an allegation that Dr. Durrani is not a "physician" as defined in R.C. 2305.113 (E)(2) and therefore the medical claim statute-of-repose in R.C. 2305.113(C) does not apply to bar his claims. On May 1, 2018, this Court issued a decision permitting Plaintiff to amend his complaint to add this claim. However, in *Scott v. Durrani*, Case No. A1506865 (June 7, 2018), pages 7-9, this Court rejected the argument that Dr. Durrani cannot avail himself of the protections of R.C. 2305.113(C) since his medical license was permanently revoked in March 2014 by the Ohio Medical Board.

On March 15, 2018, Plaintiff moved to have several of Defendants' attorneys found in contempt and for sanctions to be imposed on them regarding the taking of Dr. Durrani's deposition, and on March 21, 2018, Plaintiff moved to have Defendants' attorney, Paul M. McCartney, found in contempt and sanctioned for his behavior during Dr. Durrani's deposition.

This Court held a hearing on these motions and overruled them after determining that the attorneys did not violate an order of this Court.

On May 2, 2018, Plaintiff requested that this Court take judicial notice that Dr. Durrani's license to practice medicine in Ohio was permanently revoked. This issue is now moot in light of this Court's previous ruling dismissing Plaintiffs' claims on statute-of-repose grounds.

**Conclusion**

In light of the foregoing, this Court DENIES Plaintiff's motions to amend the complaint and impose discovery sanctions on Defendants, Dr. Durrani and CAST, and GRANTS the motion to dismiss of Dr. Durrani and CAST. Accordingly, all Plaintiff's claims against Dr. Durrani and CAST, shall be dismissed with prejudice. Court Costs to be paid by Plaintiff.

Counsel shall prepare a proper journal entry in accordance with Local Rule 17 for the Court's signature.

IT IS SO ORDERED.

7-11-2018

Judge Mark R. Schweikert Date