IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al Plaintiffs, v. Kisling, Nestico & Redick, LLC, et al Defendants.	Case No. CV-2016-09-3928 Judge James Brogan **Dr. Sam Ghoubrial's Notice of Filing Additional Authority in Support of Memorandum in Opposition to Plaintiffs' Motion for Leave to File Fifth Amended Complaint**

Please take notice that Defendant, Dr. Sam Ghoubrial, M.D. ("Dr. Ghoubrial"), through counsel, hereby submits as additional authority two decisions of Judge Mark Schweikert granting motions for judgment on the pleadings in *Koehler v. Durrani, et al.*, Case No. A1504135, Hamilton County Court of Common Pleas (decision December 12, 2017) (attached as Exhibit A) and *Knauer v. Durrani, et al.*, Case No. A1504130, Hamilton County Court of Common Pleas (decision December 10, 2017) (attached as Exhibit B).

Both attached decisions lend additional support to Dr. Ghoubrial's argument that Plaintiffs' Motion for Leave to File Fifth Amended Complaint is futile because each new claim against Dr. Ghoubrial are disguised medical claims barred by Ohio's four-year statute of repose and one-year statute of limitations.

Like the proposed claims against Dr. Ghoubrial, the dismissed claims in *Koehler* and *Knauer* each arose out of alleged medically unnecessary surgeries performed by Dr. Abubakar Atiq Durrani, M.D. ("Dr. Durrani"). (Exhibit A, at p. 2; Exhibit B, at p. 2). In *Koehler* and *Knauer*, each plaintiff brought claims against Dr. Durrani for negligence, battery, lack of informed consent, intentional infliction of emotional distress, fraud, and spoliation of evidence. (*Id.*) In both cases, Dr. Durrani

moved for judgment on the pleadings pursuant to Civ.R. 12(C), successfully arguing that under the statute of repose contained in R.C. 2305.113(C), *Koehler* and *Knauer's* claims against him were time-barred medical claims because Dr. Durrani performed each alleged unnecessary surgery more than four years before *Koehler* or *Knauer* first filed suit against him. (Exhibit A, at p. 3; Exhibit B, at p. 3).

Relying on *Young v. UC Health*, 1st Dist., Hamilton Nos. C-150562, C-150566, the court agreed with Dr. Durrani in each case, concluding that all claims, including claims for fraud, were merely disguised medical claims under R.C. 2305.113(E)(3), and therefore were barred by the four-year statute of repose in R.C. 2305.113(C). (Exhibit A, at pp. 6, 8-9; Exhibit B, at pp. 5, 7). Notably, the court simultaneously denied each plaintiffs motions for leave to file amended complaints, concluding that an amendment would be futile in light of the statute of repose. (Exhibit A, at p. 18; Exhibit B, at p. 16). Additionally, in both cases the court held that the saving statute in R.C. 2305.15(A) does not apply to statutes of repose, stating "The time when a cause of action accrues is relevant to determining whether an action is timely brought under the applicable statute of limitations. However, the time when a cause of action accrues has no relevance to questions regarding the statute of repose, since the state of repose 'bars any suit that is brought after a specified time since defendant acted * * * even if this period ends before the plaintiff has suffered a resulting injury." (Citations omitted.) (Exhibit A, at p. 14; Exhibit B, at p. 12).

Likewise, the proposed class allegations against Dr. Ghoubrial in Plaintiffs' Motion for Leave to File Fifth Amended Complaint are unquestionably time-barred medical claims. Dr. Ghoubrial's alleged medical treatment occurred well over four years prior to the filing of the Fourth Amended Complaint. Accordingly, the Motion for Leave should be denied, as it is futile.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was electronically filed with the Court and served via electronic mail on this 20th day of November, 2018 to the following:

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COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CIVIL DIVISION

ROSE KOEHLER, Plaintiff	:	Case No. A1504135
v.	:	JUDGE MARK SCHWEIKERT
ABUBAKAR ATIQ DURRANI, M.D. ET AL., Defendants	:	DECISION ON DEFENDANT ABUBAKAR ATIQ DURRANI, M.D. AND THE CENTER FOR ADVANCED SPINE TECHNOLOGIES INC. MOTION FOR JUDGMENT ON THE PLEADINGS AND OTHER RELATED MOTIONS.

This matter is before the Court on a motion for judgment on the pleadings 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, Rose Koehler. Also pending before this court are the Plaintiff's motions to amend her 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. Abubakar Atiq Durrani, M.D. ("Dr. Durrani"), a spine surgeon. Plaintiff filed a complaint against Dr. Durrani, The Center For Advanced Spine Technologies Inc. (CAST), The Christ Hospital (TCH) and Cincinnati Children's Hospital Medical Center (Children's Hospital) on July 18, 2014 which she later dismissed.[1] Subsequently, the Plaintiff filed a new complaint in this case against Dr. Durrani, CAST, TCH, and Children's Hospital on August 4, 2015. In this complaint Plaintiff alleged that in May 2007 she jumped off the I-275 bridge into the Ohio River and suffered injuries. Plaintiff alleges that on March 26, 2008, Dr. Durrani performed the first

[1] Hamilton County County Court of Common Pleas Case No A1404203.

surgery on her TCH consisting of a posterior spinal fusion from T10-L1 at TCH and that Dr. Durrani improperly used Infuse/BMP-2 during the surgery without Plaintiff's consent. See Complaint ¶¶ 23-24. Plaintiff alleges that on February 25, 2009, Dr. Durrani performed a second surgery on her at TCH consisting of a laminoplasty from C2-C7 at TCH and that Dr. Durrani improperly used Infuse/BMP-2 during the surgery without Plaintiff's consent. *Id.* at ¶¶ 33-34. Plaintiff alleges that she now suffers from worse pain in her back and neck than before the surgeries. *Id.* at ¶ 38.

Plaintiff claims that Dr. Durrani improperly performed the surgery and that the surgery was medically unnecessary. *Id.* at ¶ 42. Plaintiff's claims against Dr. Durrani include negligence, battery, lack of informed consent, intentional infliction of emotional distress, fraud, and spoliation of evidence. Plaintiff's claims against CAST include vicarious liability, negligent credentialing, supervision and retention of Dr. Durrani, fraud, violation of the Ohio Consumer Sales Protection Act, and spoliation of evidence. Plaintiff's claims against TCH include negligent credentialing, supervision and retention of Dr. Durrani, fraud, violation of the Ohio Consumer Sales Protection Act, products liability and spoliation of evidence. Plaintiff's claims against Children's Hospital include vicarious liability, negligent credentialing, supervision and retention, fraud, violation of the Ohio Consumer Sales Protection Act (OCSPA), products 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 all defendants' motions to dismiss, for judgment on the pleadings, or for summary judgment. On January 4, 2016, Children's Hospital filed an appeal, and on January 5, 2016, Dr. Durrani and CAST 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, the trial court did not have jurisdiction, *id.* at ¶26, 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.

The Defendants' Motion for Judgment on the Pleadings

On August 23, 2017, Dr. Durrani and CAST moved for judgment on the pleadings pursuant to Civ.R. 12(C) on the Plaintiff's claims against them. 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 last surgery performed by Dr. Durrani on Plaintiff was on February 25, 2009 and that the surgery occurred more than four years before Plaintiff filed suit against them and the defendant hospitals on August 4, 2015. Dr. Durrani and CAST also assert that the complaint fails to state a viable claim for relief against them for spoliation of evidence because such a claim cannot be sustained in the absence of the other claims in the complaint.

Civ.R. 12(C) provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." A Civ.R. 12(C) motion for

judgment on the pleadings may be granted where the court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his or her claim that would entitle him or her to relief. *State ex rel. Midwest Pride IV, Inc. v. Pontious,* 75 Ohio St.3d 565, 569-570 (1996). Determination of a Civ.R. 12(C) motion is restricted to the allegations in the complaint and answer, *Euvrard v. The Christ Hospital*, 141 Ohio App.3d 572, 574-575 (1st Dist. Hamilton Cty. 2001), and "any material attached to the pleadings or incorporated by reference in the pleadings." *State ex rel. Powell v. Mt. Healthy*, 1st Dist. Hamilton No. C-130116, 2013-Ohio-4873, ¶ 11. 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.

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:

> (E) As used in this section:
> * * *
> (3) "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 Plaintiff's claims against the defendant 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 are the two surgeries performed on Plaintiff by Dr. Durrani in March 2008 and February 2009, the last of which occurred on February 25, 2009. See Complaint at ¶¶ 23-24 and 33-34. The Plaintiff did not bring this action against Dr. Durrani until August 4, 2015. Because the complaint shows conclusively that the Plaintiff waited more than four years to bring the medical claims against the defendant Dr. Durrani, the claims are barred by the medical claim statute of repose, R.C. 2305.113(C). Accordingly, the defendant Dr. Durrani is entitled to judgment on the pleadings on these medical claims. See *Young* at ¶¶ 19-25.

The claims asserted by Plaintiff against CAST are similar to the claims that the Youngs' asserted against TCH, which were the subject of the appeal 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 acts or omissions on which the Plaintiff's medical claims against CAST are based are the surgeries performed by Dr. Durrani in March 2008 and February 2009, the last of which occurred on February 25, 2009. See Complaint at ¶¶ 23-24 and 33-34. The Plaintiff did not bring this action against CAST until August 4, 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, the defendant CAST is entitled to judgment on the pleadings on these medical claims. See *Young* at ¶¶ 19-25.

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 claim 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. 12(B)(6) and 9(B) because she pleaded the claims with "sufficient particularity" and that 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 and the defendant hospitals are similar to the one brought against TCH in *Young* at ¶¶ 22-23, 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. Thus, Plaintiff's fraud claim against CAST must fail for the same reason.

The same is true for Plaintiff's OCSPA-violation claim, see *id.* at ¶ 24, which involved Dr. Durrani's use of Infuse/BMP-2 on Plaintiff, see *id.* at ¶ 25. The First District held this claim is actually a medical claim under R.C. 2305.113(E)(3), and thus is barred under the four-year period of the medical claim statute of repose. *Id.* at ¶¶ 2-25.

Plaintiff argues that CAST should be held vicariously liable for the acts of its employee Dr. Durrani. This argument 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 prevail against CAST on a theory of vicarious liability.

Plaintiff asserts that judgment on the pleadings cannot be granted against her on her spoliation-of-evidence claim. We disagree. In order to bring a spoliation-of-evidence claim, Plaintiff was required to allege that the defendants' Dr. Durrani's and CAST's "willful destruction of evidence" actually disrupted her case and that she was prejudiced thereby. See *Smith v. Howard Johnson Co., Inc.*, 67 Ohio St.3d 28, 29. Here, however, Plaintiff cannot show that any disruption was caused to her case or that she was prejudiced by the disruption, because, after applying the medical claim statute of repose, there is no case left to disrupt, nor is there any prejudice apparent from the actions of defendants Dr. Durrani and CAST. *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 her 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 in 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*. See *id.* at ¶¶ 22-26. 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 Plaintiff her. However, 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 (1996), 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[.]" *Id.* at 464. The court further ruled that "[t]o the extent that [former] R.C. 4511.191(H)(1) deprive[d] courts of their ability to

grant a stay of an administrative license suspension, it improperly interfere[d] 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.*

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.

Finally, 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 also 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, 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.

(Emphasis added.)

As noted earlier, "[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), while "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.

The saving statute in R.C. 2305.15(A) begins by stating, "When a cause of action *accrues* against a person * * *," and later states, "After the cause of action *accrues* * * *." (Emphasis added.) The time when a cause of action accrues is relevant to determining whether an action is timely brought under the applicable statute of limitations. See, e.g., R.C. 2305.113(A), and *Antoon*. However, the time when a cause of action accrues has no relevance to questions regarding the statute of repose, since the 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*. And the four-year period in the medical claim statute of repose, R.C. 2305.113(C), is triggered by "the occurrence of the act or omission on which the claim is based" rather than the date on which the cause of action accrued. *Id.* Thus, while R.C. 2305.15(A) applies to the statutes of *limitation* listed in that section, it does not apply to statutes of *repose* like R.C. 2305.113(C).

Our conclusion that R.C. 2305.15(A) does not apply to the statute of repose in R.C. 2305.113(C) is further supported by the fact that 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 indicates in her 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 O.R.C 2305.19

suggesting that this case should get the benefit of the "saving statute", 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[2] 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 that the "saving statute" does not apply to allow the Plaintiff to rely on a previous filing within the four year time period.[3]

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.*, S.D. Ohio No. 2:13-cv-655 (September 11, 2013). A sensible reading of the statute would indicate that this section applies

[2] See *Antoon* at ¶¶ 24-25.
[3] The earlier filing on July 18, 2014 was also outside the four-year statute of repose period.

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 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 her 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 her motion, Plaintiff argues that the date of the surgery should not be deemed 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 her claim is based not just on the surgeries performed on her by Dr. Durrani in March 2008 and February 2009, but also on Dr. Durrani's alleged malpractice during her follow-up appointments with him following the surgeries. 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 she apparently is seeking an opportunity to add allegations to her complaint to show that her lawsuit against Dr. Durrani 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 the date of Plaintiff's surgeries performed by Dr. Durrani. Any attempt to amend the complaint to show otherwise would be futile.

Plaintiff's motion to amend the complaint also includes a request to add 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 she needs to amend her complaint to include additional details supporting her claims for fraud and equitable estoppel. However, allowing Plaintiff to amend her complaint to buttress her arguments for a fraud exception to the medical claim statute of repose or for 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 defendants Dr. Durrani and CAST for their alleged discovery violations. However, the motion presently before us is a Civ.R. 12(C) motion for judgment on the pleadings, and as explained earlier, determination of such a motion is restricted to the allegations in the complaint and answer, *Euvrard*, 141 Ohio App.3d at 574-575, and "any material attached to the pleadings or incorporated by reference in the pleadings," *State ex rel. Powel*, 2013-Ohio-4873 at ¶ 11. Accordingly, discovery has little, if any, impact in these proceedings, and the same is true for any alleged refusal by Dr. Durrani 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.

Conclusion

In light of the foregoing, this Court DENIES Plaintiff's motions to amend the complaint and impose discovery sanctions on Dr. Durrani and CAST, and GRANTS the motion for judgment on the pleadings of Dr. Durrani and CAST. Accordingly, Dr. Durrani and CAST are entitled to judgment in their favor on all Plaintiff's claims against them. Plaintiff to pay court costs.

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

IT IS SO ORDERED.

12-12-2017

Judge Mark R. Schweikert Date

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CIVIL DIVISION

MAGGIE KNAUER, Plaintiff	:	Case No. A1504130
v.	:	JUDGE MARK SCHWEIKERT
ABUBAKAR ATIQ DURRANI, M.D. ET AL., Defendants	:	DECISION ON DEFENDANT ABUBAKAR ATIQ DURRANI, M.D. MOTION FOR JUDGMENT ON THE PLEADINGS AND OTHER RELATED MOTIONS

This matter is before the Court on a motion for judgment on the pleadings filed by Defendant, ABUBAKAR ATIQ DURRANI, M.D. (Dr. Durrani) seeking dismissal of the claims filed against him by Plaintiff, Maggie Knauer. Also pending before this Court are the Plaintiff's motions to amend her complaint and to impose sanctions against Dr. Durrani for alleged discovery violations.

Factual and Procedural Background

The case before us is one of a series of cases involving alleged malpractice by Dr. Abubakar Atiq Durrani, M.D., a spine surgeon. Plaintiff filed a complaint against Dr. Durrani and The Christ Hospital (the Christ Hospital) on February 3, 2014 which she later dismissed.[1] Subsequently, the Plaintiff filed a new complaint in this case against Abubakar Atiq Durrani and the Christ Hospital on August 4, 2015.[2] In this complaint Plaintiff alleges that her first visit with Dr. Durrani was at the Christ Hospital in the spring of 2008 and shortly thereafter on May 7, 2008, Dr. Durrani performed surgery on Plaintiff consisting of an ACDF C4-5 and C6-7 and

[1] Hamilton County Court of Common Pleas Case No. A1400619.
[2] The complaint also makes allegations and asserts six counts against Cincinnati Children's Hospital Medical Center, *id.* at ¶¶ 367-433, but Cincinnati Children's Hospital Medical Center was not named as a defendant in this action, and it appears it was never served.

removal of C6 cervical plate and that Dr. Durrani improperly used Infuse/BMP-2 or PureGen during the surgery without Plaintiff's consent. See Complaint at ¶¶ 8-15. Plaintiff alleges that she continues to experience severe pain in her neck and back. Id. at ¶¶ 16-19.

Plaintiff claims that Dr. Durrani improperly performed the surgery and that the surgery was medically unnecessary. See *id.* at ¶23. Plaintiff's claims against Dr. Durrani include negligence, battery, lack of informed consent, intentional infliction of emotional distress, fraud, and spoliation of evidence. Plaintiff's claims against the Christ Hospital include negligence, negligent credentialing, supervision and retention of Dr. Durrani, fraud, 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 Dr. Durrani's motion for summary judgment herein. On January 4, 2016, Dr. Durrani 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.

The Defendant Dr. Durrani's Motion for Judgment on the Pleadings

On July 28, 2017 Dr. Durrani moved for judgment on the pleadings pursuant to Civ.R. 12(C) on Plaintiff's claims against him. Dr. Durrani asserts that Plaintiff's claims against him 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 on Plaintiff by Dr. Durrani was on May 7, 2008 and that the surgery occurred more than four years before the Plaintiff first filed suit against Dr. Durrani on February 3, 2014. Dr. Durrani also asserts that the complaint fails to state a viable claim for spoliation of evidence because such a claim cannot be sustained in the absence of the other claims in the complaint.

Civ.R. 12(C) provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Determination of a Civ.R. 12(C) motion is restricted to the allegations in the complaint and answer, *Euvrard v. The Christ Hospital*, 141 Ohio App.3d 572, 574-575 (1st Dist. Hamilton Cty. 2001), and "any material attached to the pleadings or incorporated by reference in the pleadings." *State ex rel. Powell v. Mt. Healthy*, 1st Dist. Hamilton No. C-130116, 2013-Ohio-4873, ¶ 11. A Civ.R. 12(C) motion for judgment on the pleadings may be granted where the court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his or her claim that would entitle him or her to relief. *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.

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 * * * [or] hospital * * * 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 her by Dr. Durrani at the Christ Hospital on May 7, 2008. The Plaintiff did not bring this action against Dr. Durrani until August 4, 2015. 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 judgment on the pleadings on these medical claims. See *Young* at ¶¶ 19-25.

The 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. The 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. 113(C) provides that the four-year period

in the medical 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.

The Plaintiff asserts that her fraud claim against Durrani satisfies Civ.R. 9(B) and 12(B)(6) because she pleaded the claims with "sufficient particularity" and that 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 the Plaintiff has brought against Dr. Durrani is similar to 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. We reject Plaintiff's fraud claim against Dr. Durrani for the same reason.

The Plaintiff asserts that judgment on the pleadings cannot be granted against her on the spoliation-of-evidence claim against Dr. Durrani. We disagree. In order to bring a spoliation-of-evidence claim, the Plaintiff was required to allege that Dr. Durrani's "willful destruction of evidence" actually disrupted her case and that she sustained damages as a proximate result of Dr. Durrani's alleged acts. See *Smith v. Howard Johnson Co., Inc.*, 67 Ohio St.3d 28, 29. Here, however, the Plaintiff cannot show that any disruption was caused to her case or that she sustained damages, 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 alleged acts. *Greissmann v. Durrani*, Hamilton C.P. No. A1400624, p. 5 (J. Myers).

The Plaintiff contends that R.C. 2305.113(C) is unconstitutional as applied to her 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 her. However, 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 also 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.

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).

The Plaintiff requests that we create a "fraud exception" or "equitable estoppel" exception to the medical-malpractice 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-malpractice 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 this 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 the Plaintiff's request to adopt such a rule in this case. As the Supreme Court of Ohio 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.

The 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.

(Emphasis added.)

As noted earlier, "[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) while "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.

The saving statute in R.C. 2305.15(A) begins by stating, "When a cause of action *accrues* against a person * * *," and later states, "After the cause of action *accrues* * * *." (Emphasis added.) The time when a cause of action accrues is relevant to determining whether an action is timely brought under the applicable statute of limitations. See, e.g., R.C. 2305.113(A), and *Antoon*. However, the time when a cause of action accrues has no relevance to questions regarding the statute of repose, since the 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*. And the four-year period in the medical claim statute of repose, R.C. 2305.113(C), is triggered by "the occurrence of the act or omission on which the claim is based" rather than the date on which the cause of action accrued. *Id.* Thus, while R.C. 2305.15(A) applies to the statutes of *limitation* listed in that section, it does not apply to statutes of *repose* like R.C. 2305.113(C).

Our conclusion that R.C. 2305.15(A) does not apply to the statute of repose in R.C. 2305.113(C) is further supported by the fact that 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 statute of repose in R.C. 2305.113(C).

Plaintiff states in her 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 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

[3] See *Antoon* at ¶¶ 24-25.
[4] The earlier filing on February 3, 2014 was also outside the four-year statute of repose period.

objects not intended as part of the medical procedure and inadvertently or negligently allowed to remain in the body.

Finally, the 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 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'").

The Plaintiff's Motions to Amend Complaint

The Plaintiff has moved to amend her 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 or her 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 the 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.

The Plaintiff filed this motion to amend the complaint on the statute of repose issue shortly after *Young* and *Antoon* were issued. In this 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. The 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 Dr. Durrani performed on her the Christ Hospital on May 7, 2008, but also on Dr. Durrani's alleged malpractice during Plaintiff's follow-up appointments with Dr. Durrani following the surgery. The 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 her complaint to show that her lawsuit against Durrani was, in fact, timely filed.

However, allowing the Plaintiff to amend her 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 the Plaintiff's medical claim against Dr. Durrani is the surgery he performed on Plaintiff on May 7, 2008. Any attempt to amend the complaint to show otherwise would be futile.

The 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. The 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 the 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 ¶ 23, quoting Hensley at ¶ 19.

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 has argued that she needs to amend the complaint to include additional details supporting her claims for fraud and equitable estoppel. However, allowing Plaintiff to amend the complaint to buttress her arguments for a fraud exception to the medical claim statute of repose or for 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.

The Plaintiff's Motion to Impose Discovery Sanctions

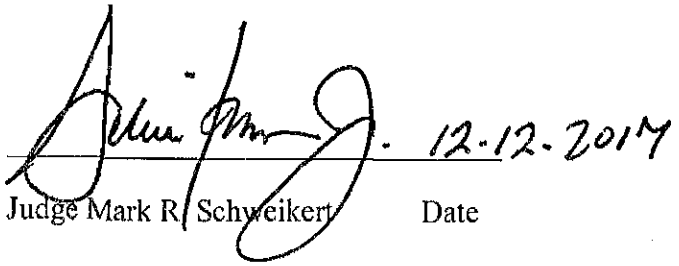
The Plaintiff has moved to impose Civ.R. 37(D) sanctions against the defendants for their alleged discovery violations. However, the motion presently before us is a Civ.R. 12(C) motion for judgment on the pleadings, and as explained earlier, determination of such a motion is restricted solely to the allegations in the complaint and answer, *Euvrard v. The Christ Hospital*, 141 Ohio App.3d 572, 574-575 (1st Dist. Hamilton Cty. 2001), and any material properly attached to the pleadings or incorporated by reference in the pleadings. *State ex rel. Powell v. Mt. Healthy*, 1st Dist. Hamilton No. C-130116, 2013-Ohio-4873, ¶ 11. Accordingly, discovery has little, if any, impact in these proceedings, and the same is true for any alleged refusal by the defendants in this action 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 under the circumstances of this motion.

Conclusion

In light of the foregoing, this Court DENIES the Plaintiff's motions to amend the complaint and impose discovery sanctions on the Defendant, Dr. Durrani, and GRANTS the motion for judgment on the pleadings of the Defendant, Dr. Durrani. Accordingly, Dr. Durrani is entitled to judgment in his favor on all Plaintiff's claims against him. Plaintiff to pay the court costs.

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

IT IS SO ORDERED.



12-12-2018

Judge Mark R. Schweikert Date