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 Second 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 a very recent decision of Judge Mark Schweikert granting another motion for judgment on the pleadings in *Scott v. Durrani, et al.*, Case No. A150865, Hamilton County Court of Common Pleas (decision October 30, 2018) (attached as Exhibit A). The particularly recent attached decision lends 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 *Scott* arose out of alleged medically unnecessary procedures performed by Dr. Abubakar Atiq Durrani, M.D. ("Dr. Durrani"). (Exhibit A, at p. 2). In *Scott*, the plaintiff brought claims against Dr. Durrani, Dr. Durrani's practice, and the hospitals where Dr. Durrani performed the procedures. (*Id.* at p. 1). The plaintiff brought a slew of claims, including, negligence and gross negligence, lack of informed consent, negligent misrepresentation, fraud and fraudulent concealment, civil conspiracy, loss of consortium, battery, and punitive and exemplary damages. (*Id.*at pp. 2-3). Thereafter, the defendant hospital 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), *Scott's* claims were time-barred medical

claims because Dr. Durrani performed each alleged unnecessary procedure more than four years before *Scott* first filed suit against him. (Exhibit A, at p. 5).

Relying on *Crissinger v. The Christ Hospital*, 1st Dist., Hamilton Nos. C-150796, C-160157, C-160034, C¬160182, C-160053, C-160067, C-160087, and C-160113, 2017-Ohio-9256, ¶¶ 15-20, citing *Young v. Durrani*, 1 Dist. Hamilton Nos. C-150562, C-150566, 2016-Ohio-5526, ¶¶ 18-25, the court agreed with the hospital, 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 p. 5).

Additionally, the court held that the saving statute in R.C. 2305.19 does not apply to the medical claim statute of repose, stating "there is no precedent in Ohio case law that interprets the current statute to be subject to an exception not referenced specifically in RC 2305.113(C)." (Exhibit A, at p. 11). In fact, the court noted:

> the Ohio Supreme Court has determined that the plain language of R.C. 2305.11(C) is "clear, unambiguous and means what it says. If a lawsuit bringing a medical, dental, optometric, or chiropractic claim is not commenced within four years after the occurrence of the act or omission constituting the basis for the claim, then any action on that claim is barred." *Antoon v. Cleveland Clinic Found.*, 148 Ohio St.3d 483, 2016-Ohio-7432, ¶ 23.

(*Id.* at p. 8).

Moreover, the court refused to acknowledge a proposed "fraud exception" or an "equitable estoppel exception" to the medical claim statute of repose. (*Id.* at p. 12). On this, the court poignantly stated:

> This Court rejects these arguments for the same reasons it has rejected them on numerous, recent occasions: the General Assembly could have included these exceptions in the medical claim statute of repose but chose not to do so.

(Citations omitted.) (*Id.* at p. 12). The court rendered the *Scott* decision less than thirty days ago and the same rationale applies in the present case: the state legislature did not chose to include a fraud exception in the medical claim statute of repose, thus, none exists.

Consequently, 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. Clever pleadings cannot escape the applicable statute of repose and the legislature has not included any "fraud exception." Accordingly, the Motion for Leave should be denied, as it is futile.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CIVIL DIVISION

DAVID SCOTT, ET AL.,	:	CASE NO. A1506865
PLAINTIFFS	:	JUDGE MARK SCHWEIKERT
v.	:	DECISION ON DEFENDANT WEST CHESTER HOSPITAL'S AND UC HEALTH'S MOTION FOR JUDGMENT ON THE PLEADINGS
ABUBAKAR ATIQ DURRANI, M.D., ET AL.,	:	
DEFENDANTS	:	

Defendants, West Chester Hospital and UC Health (Defendant Hospital), move for judgment on the pleadings on the claims brought by Plaintiffs, David and Missy Scott.

Factual and Procedural Background

This case is one of a series of cases involving alleged malpractice by Dr. Durrani, a spine surgeon. CAST was the name of Dr. Durrani's practice. Dr. Durrani performed surgeries at a number of area hospitals, including Defendant Hospital. Dr. Durrani fled the country in January 2013 after being sued by many of his former patients.

Plaintiffs filed a complaint against Dr. Durrani, CAST, and Defendant Hospital on December 16, 2015. Plaintiffs allege that David first received medical care and treatment from Dr. Durrani in 2005, and that in October 2006 Dr. Durrani performed spine surgery on him at The Christ Hospital, "fusing L-5-S1." Complaint at ¶ 12-13. Plaintiffs allege that several weeks later, David began experiencing "severe pinching" in his lower back and unresolved and worsening pain, and in April 2008 Dr. Durrani performed another surgery on David at The Christ Hospital, "fusing C6-C7, and inserting hardware." *Id.* at ¶ 14-15. Plaintiffs allege that after this

surgery, David continued to experience back pain and unresolved and worsening numbness, tingling, and extremity pain, and on January 25, 2010 Dr. Durrani performed surgery on David at Defendant Hospital, fusing T6-T10, and using Infuse BMP-2, a bone morphogenetic protein, on David, without his knowledge or consent. *Id.* at ¶ 16-20. Plaintiffs allege that after this surgery David continued to experience pain in his spine, and Dr. Durrani advised him that "immediate spine surgery was now required to fuse C7-T1," and on September 8, 2010 Dr. Durrani performed this surgery on David at Defendant Hospital, again using Infuse BMP-2 on him without his consent. *Id.* at ¶ 23-27.[1] Plaintiffs allege that when David continued to experience pain, Dr. Durrani advised him that he needed additional spine surgery to fuse L4-L5, and on December 6, 2010 Dr. Durrani performed this surgery on David at Defendant Hospital, again using Infuse BMP-2, without David's consent. *Id.* at ¶ 32-36. Plaintiffs allege that when David continued to experience pain, Dr. Durrani performed another spine surgery on him at Defendant Hospital on September 9, 2011, fusing C1-C2, and again using Infuse BMP-2 on Plaintiff, without his consent. *Id.* at ¶ 41-45. Plaintiffs allege that during this surgery, Dr. Durrani placed a metal screw in David's "spinal area during the C1-C2 fusion surgery that caused [David] * * * to suffer a stroke during the surgery and place[d] him in a life and death situation during and after the surgery." *Id.* at ¶ 46.

Plaintiffs bring claims against Dr. Durrani, CAST, and Defendant Hospital for negligence and gross negligence (Count 1), lack of informed consent (Count 3), negligent misrepresentation (Count 4), fraud and fraudulent concealment (Count 5), civil conspiracy (Count 7), fraud (Count 9), loss of consortium (Count 13), and punitive and exemplary damages (Count 14). Plaintiffs also bring a claim against the "Hospital Defendants" for the "non-delegable duty" to provide

[1] The timeline in Plaintiff's complaint is confusing at this point, since in ¶ 23 of the complaint, he alleges that Dr. Durrani advised him in *October* 2010 that he required "immediate surgery," but in ¶ 24-26 of the complaint, Plaintiff says that Dr. Durrani scheduled this surgery for *September 8*, 2010 and performed it on that date.

medical care to him (Count 2), a claim against Defendant Hospital for negligent hiring, supervision, and credentialing (Count 6), a claim against Dr. Durrani for battery (Count 8), a claim against Defendant Hospital for vicarious liability and agency by estoppel (Count 10), a claim against Defendant Hospital for violation of the Ohio Consumer Sales Practices Act ("OCSPA") (Count 11), and a claim against Defendant Hospital for violation of the Ohio Product Liability Act ("OPLA") (Count 12).

On January 17, 2018, Defendant Hospital moved for judgment on the pleadings pursuant to Civ.R. 12(C), arguing, among other things, that Plaintiffs' claims are barred by the medical claim statute of repose in R.C. 2305.113(C). On February 20, 2018, Plaintiffs filed a response to the Civ.R. 12(C) motion, arguing, among other things, that Defendant Hospital waived any statute-of-repose defense by failing to raise it in its answer to the complaint. On March 12, 2018, Defendant Hospital filed a reply to Plaintiffs' response and a motion seeking leave to amend its answer to include the statute-of-repose defense. On June 7, 2018, this Court, over Plaintiffs' objections, granted Defendant Hospital leave to file an amended answer, and on June 15, 2018, Defendant Hospital filed an amended answer, including a statute-of-repose defense. This Court can now turn to the remaining issues in Defendant Hospital's motion for judgment on the pleadings.

Motion for Judgment on the Pleadings

Defendant Hospital moves for judgment on the pleadings pursuant to Civ.R. 12(C), arguing that it is entitled to dismissal of all Plaintiffs' claims, because they are "medical claims" as defined in R.C. 2305.113(E)(3), Plaintiffs failed to file the medical claims within four years of the act or omission constituting the alleged basis of those claims, and therefore the claims are barred under the medical claim statute of repose in R.C. 2305.113(C).

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 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.

R.C. 2305.113(C), the statute of repose, states:

> (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.

R.C. 2305.113(E)(3) defines "medical claims," in pertinent part, as follows:

> (3) "Medical claim" means any claim that is asserted in any civil action against a physician, podiatrist, hospital, home, or residential facility, against any employee or agent of a physician, podiatrist, hospital, home, or residential facility, or against a licensed practical nurse, registered nurse, advanced practice registered nurse, physical therapist, physician assistant, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic, 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 applies:
>
> (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 caregivers providing medical diagnosis, care, or treatment.

Here, Plaintiffs' claims against Defendant Hospital arise from the four surgeries that Dr. Durrani performed on David at Defendant Hospital on January 25, 2010, September 8, 2010, December 6, 2010, and September 9, 2011. This Court concludes that all of these claims are "medical claims" for purposes of R.C. 2305.113(E)(3), because the claims were "asserted against a physician or hospital and 'ar[ose] out of "the medical diagnosis, care, or treatment of"' David. *Crissinger v. The Christ Hospital*, 1st Dist. Hamilton Nos. C-150796, C-160157, C-160034, C-160182, C-160053, C-160067, C-160087, and C-160113, 2017-Ohio-9256, ¶¶ 15-20, citing *Young v. Durrani*, 1st Dist. Hamilton Nos. C-150562, C-150566, 2016-Ohio-5526, ¶¶ 18-25. This Court further concludes that all of these claims are barred by the medical claim statute of repose in R.C. 2305.113(C), because Plaintiffs failed to bring them within four years of the occurrence of the act or omission constituting the alleged basis of those claims, namely, the four surgeries that Dr. Durrani performed on David on four separate dates between January 2010 and September 2011.

Plaintiffs assert that the question of "[w]hen [David] should have discovered his claim 'in the exercise of reasonable care and diligence,'" for purposes of the exception to the medical claim statute of repose in R.C. 2305.113(D)(1), "is necessarily a question of fact which cannot be decided" on Defendant Hospital's motion for judgment on the pleadings, and that "[a]t a minimum, discovery should be permitted on this issue." This argument must fail.

R.C. 2305.113(D)(1) 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.

Here, Plaintiffs' medical claims are based on the four surgeries that Dr. Durrani performed on David on four separate dates between January 2010 and September 2011. Plaintiffs have raised no allegation in their complaint that David, "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, discover[ed] the injury resulting from that act or omission before the expiration of the four-year period specified in division (C)(1) of this section." R.C. 2305.113(D)(1).

Plaintiffs argue that the "well-established justifications in Ohio for statutes of repose are not implicated" in this case, and therefore there is no reason to apply the medical claim statute of repose in this case to dismiss their claims. However, the Ohio Supreme Court has stated that courts "must apply a statute as it is written when its meaning is unambiguous and definite," *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, ¶ 52, and in *Antoon v. Cleveland Clinic Found.*, 148 Ohio St.3d 483, 2016-Ohio-7432, ¶ 23, the court stated:

> Today, we affirm that R.C. 2305.113(C) is a statute of repose because the time for bringing a suit under the section begins running from the occurrence of the act or omission constituting the alleged basis of the claim. And we find that the plain language of the statute is clear, unambiguous, and means what it says. If a lawsuit bringing a medical, dental, optometric, or chiropractic claim is not commenced within four years after the occurrence of the act or omission constituting the basis for the claim, then any action on that claim is barred.

Accordingly, there is no basis for this Court not to apply the medical claim statute of repose as written to the facts of this case.

Plaintiffs argue that Defendant Hospital's motion for judgment on the pleadings should be denied because the complaint was previously dismissed pursuant to Civ.R. 41(A)(1)(a) and was re-filed within the time allowed by the saving statute in R.C. 2305.19. This Court recently rejected this argument on numerous occasions, having determined that if the General Assembly had wanted the saving statute to serve as an exception to the medical claim statute of repose, it could have expressly stated so in R.C. 2305.113(C) but did not. See e.g., *Carr v. Durrani*, Hamilton C.P. No. A1505422, Decision on Defendant Abubakar Atiq Durrani, M.D. Motion for Judgment on the Pleadings and Other Related Motions (December 14, 2017), pages 15-16.

Plaintiffs argue that the "specific" saving statute in R.C. 2305.19 controls over the "more general" medical claim statute of repose in R.C. 2305.113(C). This argument fails.

R.C. 1.51 states:

> If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

R.C. 1.51 applies only when statutes conflict on the *same* subject matter. See, e.g., *Watkins v. Dept. of Youth Serv.*, 143 Ohio St.3d 477, 2015-Ohio-1776, ¶ 6-19 (the "specific" childhood abuse statute of limitation in R.C. 2305.111, setting the accrual date for claims based on childhood sexual abuse as the date the victim attains the age of majority and expanding the limitations period for such claims to 12 years, applied to claims against the state, rather than the "general two-year" statute of limitations for claims against the state in R.C. 2743.16(A)). Here, the two statutes in question do not conflict on the same subject matter but, instead, have a separate and distinct purpose.

R.C. 2305.19 states in pertinent part:

> (A) In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, the plaintiff's representative may commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period of the *original applicable statute of limitations*, whichever occurs later. This division applies to any claim asserted in any pleading by a defendant.

(Emphasis added.)

As noted earlier, the Ohio Supreme Court has determined that the plain language of R.C. 2305.113(C) is "clear, unambiguous, and means what it says. If a lawsuit bringing a medical, dental, optometric, or chiropractic claim is not commenced within four years after the occurrence of the act or omission constituting the basis for the claim, then any action on that claim is barred." *Antoon*, 2016-Ohio-7432 at ¶ 23. R.C. 2305.113(C) provides that the only exceptions to this rule are for persons within the age of minority or of unsound mind as provided in R.C. 2305.16 or for the circumstances listed in R.C. 2305.113(D).

In *Antoon* at ¶ 11, the Ohio Supreme Court set forth the differences between statutes of repose and statutes of limitation, as follows:

> Statutes of repose and statutes of limitation have distinct applications, though they are occasionally used interchangeably. Both share a common goal of limiting the time for which a putative wrongdoer must be prepared to defend a claim. *See CTS Corp. v. Waldburger*, —— U.S. ——, 134 S.Ct. 2175, 2182, 189 L.Ed.2d 62 (2014). The differences between statutes of repose and statutes of limitations have been recognized for nearly 40 years. *Id.* at 2186. 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)." *Black's Law Dictionary* 1636 (10th Ed.2014). A statute of repose *487 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." *Id.* at 1637.

R.C. 2305.19 allows a plaintiff to avoid the implications of the original applicable statute of limitation by commencing a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period of the

original applicable statute of limitations, whichever occurs later. R.C. 2305.19 does not reference any original applicable statute of repose.

As to Plaintiff's contentions that R.C. 2305.19 is the "specific" statute and R.C. 2305.113(C) is the "more general" statute, and that R.C. 2305.19 should control over R.C. 2305.113(C) because R.C. 2305.19 is the later enactment, the Court finds that there is no basis to find a manifest intent that R.C. 2305.19 is to prevail over the statute of repose contained in R.C. 2305.113(C).

Additionally, this Court finds that it is of great significance that the General Assembly made no reference to the saving statute in R.C. 2305.19 in the medical claim statute of repose in R.C. 2305.113(C), but did make a reference to the saving statute in R.C. 2305.19 in the product liability statute of repose in R.C. 2305.10(C)(1):

> (C)(1) Except as otherwise provided in divisions (C)(2), (3), (4), (5), (6), and (7) of this section or in section 2305.19 of the Revised Code, 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 who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly, or rebuilding of another product.

In light of the foregoing, this Court rejects Plaintiffs' request to treat R.C. 2305.19 as an additional exception to R.C. 2305.113(C), since the General Assembly could have, but did not, include R.C. 2305.19 as an exception to the medical claim statute of repose in R.C. 2305.113(C).

Plaintiffs argue that they had a "vested right" in their medical malpractice claim against Defendant Hospital, which was re-filed in accordance with the savings statute within the time granted by the General Assembly for re-filing the claim, and therefore their claim cannot not be extinguished without running afoul of the right-to-remedy clause of the Ohio Constitution. This argument fails. In *Antoon*, 2016-Ohio-7432 at ¶ 1, the court held that "R.C. 2305.113(C) is a true statute of repose that applies to both vested and nonvested claims" and "[t]herefore, any

medical malpractice action [footnote omitted] must be filed within four years of the occurrence of the act or omission alleged to have caused a plaintiff's injury." And this Court has repeatedly held recently that the saving statute in R.C. 2305.19 does not provide an exception to the medical claim statute of repose in R.C. 2305.113(C). See, e.g., *Carr* at 15-16.

Plaintiffs have recently filed "Plaintiffs' Notice of Supplemental Authority in Opposition to Defendants', West Chester Hospital and UC Health, Motion for Judgment on the Pleadings." Defendants, West Chester Hospital and UC Health, filed a "Motion to Strike Plaintiffs' Notice of Supplemental Authority."

Inasmuch as the Court allowed Plaintiffs' counsel the opportunity to supplement its argument herein, Defendant's motion to strike is overruled. Plaintiffs' notice of supplemental authority to this motion reiterates its earlier argument regarding the Defendant Durrani. There the Plaintiffs contended that "newly released" decisions in state and federal court support their argument that the savings statute in R.C. 2305.19 should apply to this case and preclude dismissal of their medical claims pursuant to the statute of repose in R.C. 2305.113(C).

First, Plaintiffs cite language in the Ohio Supreme Court's recent decision in *Portee v. Cleveland Clinic Foundation*, No. 2017-0616, 2008-Ohio-3263, ¶ 25, stating, "[i]f an action is commenced in ***another state*** in either a state or ***federal court*** and fails otherwise than upon the merits, and the statute of limitations for commencement of such action has expired, the Ohio savings statute (R.C. 2305.19) does not apply to permit commencement of a new action within one year." (Bold and italicized emphasis added by Plaintiffs in their motion for reconsideration.) Plaintiffs argue that this language from *Portee,* stated "another way," should be interpreted as meaning that "if the action is commenced in the same state and fails otherwise than upon the merits, and the statute of limitation for commencement of such action has expired, the Ohio

savings statute (R.C. 2305.19) ***does apply*** to permit commencement of a new action in the same state within one year." (Emphasis sic.) However, *Portee* involved a question regarding the statute of *limitations* in R.C. 2305.113(A), while the case before us involves an issue regarding the statute of *repose* in R.C. 2305.113(C). Thus, *Portee* does not control resolution of this case.

Second, Plaintiffs, relying on *Atwood v. UC Health*, S.D. Ohio No. 1:16v593 (Aug. 17, 2018), argue that the saving statute in R.C. 2305.19 should apply in this case to preclude their claims from being dismissed pursuant to the statute of repose in R.C. 2305.113(C), because the saving statute applies when the original action and the new action are substantially the same; as a matter of policy, the saving statute is to be liberally construed so that controversies are decided upon important substantive questions rather than procedural technicalities; and that "[t]he separate and distinct purpose of the one-time use of the Savings Statute as applied to the facts of this case does not impair the Statute of Repose's purpose of a limitation on the time in which to file suit." However, this Court is not obligated to follow the federal district court's decision in *Atwood*, see *Northwestern Nat'l. Ins. Co. v. Ferstman*, 42 Ohio App. 55, 63 (8th Dist.1932), and there is nothing in *Atwood* or any of Plaintiffs' arguments that causes this Court to change course on this issue.

The Plaintiffs further suggest that this Court reached its determination on grounds not based in the law. Plaintiffs' counsels' argument is misguided. To this Court's knowledge, there is no precedent in Ohio case law that interprets the current statute to be subject to an exception not referenced specifically in RC 2305.113(C). The Plaintiffs cite none. *Atwood* cites none. While the Court in *Atwood*, in an effort to preserve the claims of the Plaintiffs, offers extensive analysis of the intended applicability of the saving statute in R.C. 2305.19, it avoids the clear unambiguous language of the RC 2305.113(C) that except for only certain enumerated

exceptions, claims filed beyond the time limit are absolutely barred. Absent any precedent to the contrary, this Court's ruling is based on the law as it is written in the statute and it is without authority to do otherwise.

Plaintiffs argue that there should be a "fraud exception" and an "equitable estoppel" exception to the medical claim statute of repose. This Court rejects these arguments for the same reasons it has rejected them on numerous, recent occasions: the General Assembly could have included these exceptions in the medical claim statute of repose but chose not to do so. See e.g., *id.* at 12-13.

Plaintiffs observe that the saving statute in R.C. 2305.15(A) states that "[w]hen 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." Plaintiffs assert that the savings statute should toll the running of the limitation period of the medical claim statute of repose in R.C. 2305.113(C). However, this Court rejects this argument for the same reason it has rejected it recently on numerous occasions, namely, this is not one of the specific exceptions to the operation of the medical claim statute of repose. See, e.g., *id.* at pages 14-15.

Plaintiffs contend that Defendant Hospital breached a "non-delegable duty" that it owed to them under 42 C.F.R. 482 "to provide safe and effective delivery of surgical services" and that Plaintiffs sustained damages as a result. Plaintiffs further contend that their C.F.R. claim is not a claim under Ohio law and thus is outside the medical claim statute of repose, and therefore Defendant Hospital's motion for judgment on the pleadings cannot succeed on this claim. This argument fails.

Courts that have considered claims similar to the one presented by Plaintiffs have concluded that 42 C.F.R. 482, et seq., does not provide a basis for tort liability to patients. For example, in *Sepulveda v. Stiff*, Civil Action No. 4:05CV167, 2006 WL 3314530 (E.D.Va. Nov. 14, 2006), *8, the plaintiff brought a medical malpractice action against a hospital and a number of individual physicians, alleging that the hospital had breached its "contractually non-delegable duty, under 42 CFR § 482.12 *et seq.*," which establishes those conditions of compliance for each hospital participating in the Medicaid and Medicare programs and provides, *inter alia*, that the hospital must "* * * ensure that the services performed under a contract are provided in a safe and effective manner * * *." *Id.* at *6. The court rejected the plaintiff's claim for the following reasons:

> It is clear to this Court that the provision upon which Plaintiff relies does not create a private right of action, whether express or implied. Sections 482.1 *et seq.* are merely intended to set out the guidelines for determining whether a hospital may participate in Medicaid or Medicare; indeed, that is its stated purpose. *See id.* The Court, therefore, finds no support for Plaintiff's claim Congress intended to create a new private right of action, exposing hospitals to liability for medical malpractice, in §§ 1302 and 1395 of the Social Security Act, or the implementing regulations contained in 42 C.F.R. §§ 482.1, *et seq.*
>
> Because the Court finds that the C.F.R. is not applicable, Plaintiff's claim that a non-delegable duty exists between the hospital and patients pursuant to the C.F.R. must necessarily fail as well.

Id. at * 8. See also, *Neiberger v. Hawkins*, 208 F.R.D. 301 (D.Colo.2002) (while 42 C.F.R. § 482 *et seq.* sets the standards for, *inter alia*, psychiatric hospitals participating in Medicare, *see* 42 C.F.R. § 482.1(2), and thus compliance with these regulations is a condition of participation in Medicare, the regulations do not provide patients with a private right of action). Given the foregoing, Plaintiffs have failed to state a federal claim under Title 42 of the C.F.R. on which relief may be granted.

Conclusion

In light of the foregoing, this Court GRANTS the Defendants, West Chester Hospital's and UC Health's motion for judgment on the pleadings on all Plaintiffs' claims against them.

Defendants' counsel shall prepare a proper journal entry in accordance with Local Rule 17 for the Court's signature within 14 days of the issuance of this decision. This matter is set for entry on November 13, 2018 at 9:00 AM.

IT IS SO ORDERED.

10.24.2018

Judge Mark Schweikert Date