

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

JUDY YOUNG,	:	APPEAL NO. C-180193
	:	TRIAL NO. A-1406361
and	:	
CECIL YOUNG,	:	<i>JUDGMENT ENTRY.</i>
	:	
Plaintiffs-Appellants,	:	
	:	
vs.	:	
	:	
ABUBAKAR ATIQ DURRANI, M.D.,	:	
	:	
and	:	
	:	
CENTER FOR ADVANCED SPINE TECHNOLOGIES, INC.,	:	
	:	
Defendants-Appellees,	:	
	:	
and	:	
	:	
UC HEALTH,	:	
	:	
WEST CHESTER HOSPITAL, LLC,	:	
	:	
THE CHRIST HOSPITAL,	:	
	:	
and	:	
	:	
MICHAEL DEWINE, OHIO ATTORNEY GENERAL,	:	
	:	
Defendants.	:	

We consider this appeal on the accelerated calendar. This judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Plaintiffs-appellants Judy and Cecil Young appeal from the trial court's dismissal their claims against defendants-appellees Abubakar Atiq Durrani, M.D., and the Center for Advanced Spine Technologies, Inc. ("CAST").¹ Durrani had performed spinal surgeries on Judy Young in November 2008 and October 2009. The Youngs claim that the surgeries were medically unnecessary and have left Judy physically impaired and in constant pain.

The Youngs filed this action in October 2014 asserting claims against Durrani, CAST, and other defendants, sounding in negligence, negligent credentialing and retention, loss of consortium, fraud, products liability, spoliation of evidence, and violations of the Ohio Consumer Sales Practices Act.

In 2016, this court held that each of the Youngs' claims against defendant The Christ Hospital had been asserted against a physician or hospital and "ar[ose] out of the medical diagnosis, care, or treatment of" the plaintiffs. *Young v. Durrani*, 2016-Ohio-5526, 61 N.E.3d 34, ¶ 21 (1st Dist.) ("*Young I*"), quoting former R.C. 2305.113(E). Therefore, they were "medical claims" subject to the four-year statute of repose found in R.C. 2305.113(C). Since the Youngs had filed their claims more than four years after "the act or omission constituting the alleged basis of the medical * * * claim," their claims were barred by R.C. 2305.113(C)(1). *Id.* at ¶ 23. The Ohio Supreme Court declined to hear an appeal from our decision. *Young v. UC Health, W. Chester Hosp., L.L.C.*, 149 Ohio St.3d 1406, 2017-Ohio-2822, 74 N.E.3d 464.

¹ On June 24, 2019, the Youngs voluntarily dismissed, with prejudice, their claims against UC Health and Wester Chester Hospital, the only other defendants remaining in the action.

On January 13, 2017, Durrani and CAST moved to dismiss the Youngs' claims under Civ.R. 12(B)(6), arguing that they also were medical claims barred by the statute of repose. Ten days later, the Youngs moved to amend their complaint to add claims for fraud, equitable estoppel, and a pattern of corrupt activity under Ohio's RICO statute, R.C. 2923.32 et seq.

In December 2017, the trial court denied the Youngs' motion to amend their complaint. On March 1, 2018, in a detailed, written decision, the court granted Durrani's and CAST's motions to dismiss. It found that the Youngs' claims were medical claims brought more than four years after "the act or omission constituting the alleged basis of the medical * * * claim" and thus were barred by the statute of repose.

In their first assignment of error, the Youngs contend that the trial court erred in granting Durrani's and CAST's motions to dismiss their complaint. They argue that the four-year statute of repose for medical claims should be subject to exceptions for fraud and equitable estoppel, and that their fraud claims are independent claims not subject to the medical-claims statute of repose.

A motion to dismiss based upon a statute of repose may be granted when the complaint shows conclusively on its face that the action is time-barred. *See Antoon v. Cleveland Clinic Found.*, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, ¶ 35; *see also Freeman v. Durrani*, 1st Dist. Hamilton No. C-180197, 2019-Ohio-3643, ¶ 6. We review de novo a trial court's dismissal of a complaint under Civ.R. 12(B)(6). *See Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5.

As we noted in the Youngs' previous appeal, this court's task in determining the period in which claims must be brought is to look "to the actual nature or subject matter of the case, rather than to the form in which the action is pleaded." *Young I*, 2016-Ohio-

5526, 61 N.E.3d 34, at ¶ 22, quoting *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183, 465 N.E.2d 1298 (1984).

In recent decisions, we have declined to adopt either a fraud or an equitable-estoppel exception to the medical-claims statute of repose. *See Freeman* at ¶ 11 and 24; *see also Crissinger v. Christ Hospital*, 2017-Ohio-9256, 106 N.E.3d 798, ¶ 24 (1st Dist.). Moreover, we have held that when, as here, the language of the complaint shows that a plaintiff's fraud claims arise out of a tortfeasor's medical diagnosis, care, or treatment, the claims are medical claim for purposes of the statute of repose. *See Freeman* at ¶ 14-24; *see also Young I* at ¶ 18-25.

Because the Youngs' claims were barred by the statute of repose, they can show no set of facts that would entitle them to relief. Therefore, the trial court did not err in granting Durrani's and CAST's motions to dismiss. *See State ex rel. Hanson v. Guernsey Cty. Bd. Of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992). The first assignment of error is overruled.

In their second assignment of error, the Youngs assert that the trial court erred in denying their motion for leave to amend their complaint. The motion was filed 27 months after the complaint had been filed, and ten days after Durrani and CAST had filed their Civ.R. 12(B)(6) motions.

While Civ.R. 15(A) contemplates that leave to amend should be "freely give[n]," a trial court may refuse that leave when the amendment would be futile. *See Freeman*, 1st Dist. Hamilton No. C-180197, 2019-Ohio-3643, at ¶ 27. We review a trial court's denial of leave to amend a pleading only for an abuse of discretion. *Patterson v. V & M Auto Body*, 63 Ohio St.3d 573, 576, 589 N.E.2d 1306 (1992).

We note that while the Youngs filed a three-page memorandum in support of their motion to amend their complaint, they failed to file a proposed amended complaint.

While the proposed amended complaint is not available for our review, the appellees and the trial court described the contents of the proposed amended complaint and addressed the Youngs' arguments on the merits. The trial court ultimately denied their motion finding that "allowing [the Youngs] to amend [their] complaint * * * would be futile" since they raised only proposed medical claims that were time barred under the statute of repose.

In reviewing the record in this case, we hold that the trial court did not abuse its discretion in reaching its futility determination. Each of the claims sought to be added were medical claims subject to the four-year statute of repose. *See Freeman* at ¶ 27; *see also Young I*, 2016-Ohio-5526, 61 N.E.3d 34, at ¶ 18-25; *Aaron v. Durrani*, S.D. Ohio No. 1:13-CV-202, 2014 WL 996471, *1 (Mar. 13, 2014). Therefore the trial court's decision exhibited a "sound reasoning process" and will not be disturbed on appeal. *See AAAA Ents., Inc. v. River Place Community Urban Redev. Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). The second assignment of error is overruled.

Therefore, we affirm the trial court's judgment.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

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

To the clerk:

Enter upon the journal of the court on October 23, 2019,
per order of the court _____.
Presiding Judge