Supreme Court of Ohio Clerk of Court - Filed August 16, 2021 - Case No. 2021-1011

IN THE SUPREME COURT OF OHIO

DONNA SMALLWOOD	:	
	:	**Supreme Court Case No. ___________**
Appellant	:	
	:	**On Appeal from the Hamilton**
v.	:	**County Court of Appeals,**
	:	**First Appellate District**
CHRIST HOSPITAL	:	
	:	**Case No. C-190671**
Appellee	:	

SHERRIE SPANGENBERG, *ET AL.*	:	
	:	**Supreme Court Case No. ___________**
Appellants	:	
	:	**On Appeal from the Hamilton**
v.	:	**County Court of Appeals,**
	:	**First Appellate District**
CHRIST HOSPITAL	:	
	:	**Case No. C-190672**
Appellee	:	

ELAINE CAROLD WAXLER	:	
	:	**Supreme Court Case No. ___________**
Appellant	:	
	:	**On Appeal from the Hamilton**
v.	:	**County Court of Appeals,**
	:	**First Appellate District**
CHRIST HOSPITAL	:	
	:	**Case No. C-190673**
Appellee	:	

WILLIAM WOLDER	:	
	:	**Supreme Court Case No. ___________**
Appellant	:	
	:	**On Appeal from the Hamilton**
v.	:	**County Court of Appeals,**
	:	**First Appellate District**
CHRIST HOSPITAL	:	
	:	**Case No. C-190674**
Appellee	:	

AMBER WORK	:	
	:	**Supreme Court Case No. ___________**
Appellant	:	
	:	**On Appeal from the Hamilton**
v.	:	**County Court of Appeals,**
	:	**First Appellate District**
CHRIST HOSPITAL	:	
	:	**Case No. C-190675**
Appellee	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS DONNA SMALLWOOD, SHERRIE SPANGENBERG, GUY SPANGENBERG, ELAINE CAROL WAXLER, WILLIAM WOLDER, AND AMBER WORK

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THESE CASES INVOLVE QUESTIONS OF PUBLIC OR GREAT GENERAL INTEREST

As with other appeals pending before this Court against appellee Christ Hospital ("TCH"), the five appeals here present three critical issues regarding the scope and application of Ohio's four-year medical malpractice statute of repose, R.C. 2305.113(C) (the "SOR"), and the term defined within it of "medical claim" at R.C. 2305.113(E)(3). These issues are:

1. Whether the courts below erred by ruling R.C. 2305.113(E)(3) "legislatively superseded" this Court's landmark decision of *Browning v. Burt*, which was recently cited by this Court with approval in *Evans v. Akron Hospital*, and holding a claim against a hospital arising from its negligent credentialing of an incompetent physician is NOT an independent, non-medical claim, but is a "medical claim" under R.C. 2305.113(E)(3) and subject to the SOR?

2. Whether the SOR is subject to a fraud exception premised upon the judiciary's inherent power and authority to attenuate fraud whenever it is pled and proven?

3. Under circumstances where a surgery is unnecessary, inappropriate, and fraudulent, and the physician's and hospital's services are not "medical" in nature but rather "financial," serving their own pecuniary interests, is a fraud claim to recover damages therefrom an independent, non-medical claim, or a "medical claim."

A "medical claim" under R.C. 2305.113(C) is "any claim that is asserted in any civil action against a physician [or] hospital. . . that arise[s] out of the medical diagnosis, care, or treatment of any person." R.C. 2305.113(E)(3). For a claim to be a "medical claim," it must both: (1) arise out of the medical diagnosis, care, or treatment of any person, and (2) be asserted against one or more of the statutorily enumerated medical providers. *Estate of Stevic v. Bio-Medical App. of Ohio, Inc.*, 121 Ohio St.3d 488, 491, 2009-Ohio-1525, syllabus & ¶¶18-19.

First, appellants' claims for negligent credentialing against TCH address the breach of its direct duty to its patients to grant staff privileges only to competent physicians. R.C. 2305.251;

Browning v. Burt, 66 Ohio St.3d 544, 555-557, 1993-Ohio-178; *Schelling v. Humphrey*, 123 Ohio St.3d 387, 390, 394, 2009-Ohio-4175, ¶¶17, 19, 30; *Evans v. Akron General Medical Center,* 2020-Ohio-5535, ¶10, 163 Ohio St.3d 284, 170 N.E.3d 1. A negligent credentialing claim does not arise out of the medical diagnoses, care, or treatment of a person. *Browning,* 66 Ohio St.3d at 557. Such a claim occurs during the credentialing process and not during the diagnosis, care, or treatment of patients. *Id.* Further, "[a] hospital does not practice medicine and is incapable of committing malpractice." *Schelling*, 123 Ohio St.3d at 390, 2009-Ohio-4175, ¶14, citing R.C. 4731.41. This duty imposed upon hospitals to grant and continue staff privileges only to competent physicians is "an independent duty of care owed *directly* to those admitted to the hospital." *Browning,* 66 Ohio St.3d at 555-556 (Court's emphasis). *Schelling*, 123 Ohio St.3d at 390, 394, 2009-Ohio-4175, ¶¶17, 30. *See Evans,* 2020-Ohio-5535, ¶10. **The First District erred by uniquely finding R.C. 2305.113(E) "legislatively superseded" this Court's holding in *Browning*** and ruling that negligent credentialing claims constitute "medical claims" under the statute of repose. However, other Ohio courts of appeals follow and apply the *Browning* and *Schelling* rule that negligent credentialing claims are not "medical claims" under either R.C. 2305.113(E)(3) or its predecessor statute, R.C. 2305.11(D)(3). A federal district court recently observed that a conflict exists among Ohio's courts of appeals on whether or not a negligent credentialing claim is a medical claim under R.C. 2305.113.(E)(3). *Landrum v. Durrani,* No. 1:18-cv-807, 2020 WL 3501399 (S.D. Ohio June 29, 2020). This Court should reaffirm *Browning* and its progeny and resolve the conflicting Ohio appellate court decisions as to whether negligent credentialing claims are not "medical claims." **This Court should review whether its precedent has been "legislatively superseded."**

Second, Abubakar Atiq Durrani ("Durrani") formerly practiced medicine in Ohio. TCH credentialed Durrani to practice medicine and enabled him to perform spine surgeries. Most of

the appellants were several of his many patients. Durrani performed unnecessary, fraudulent and reckless spine surgeries on appellants at TCH during 2007, 2008, or 2009. TCH knew of the fraudulent, unnecessary, and reckless nature of Durrani's surgeries and medical practices and, nevertheless, certified and approved them. Appellants had no such knowledge. The surgeries' purpose was to further the health care practitioners' financial gain – and was not for appellants' benefit. Durrani was actually indicted for fraudulent surgeries by the federal grand jury.[1] Durrani jumped bond and fled to his native Pakistan, where he resides presently. On these facts, the court of appeals erred in finding that appellants and other Durrani Victims have engaged in "clever pleading" by suing TCH for fraud simply to avoid the SOR. Durrani is a dangerous criminal who victimized hundreds with the full knowledge and approval of TCH.

Appellants' cases are five more of approximately 500 actions brought by the former patients against Durrani and the various hospitals in the greater Cincinnati area, including TCH, whereby medical malpractice, fraud, and negligent credentialing claims were asserted arising from fraudulent, reckless, unnecessary and inappropriate spine surgeries performed for the purpose of health care professionals' profit, financial gain and greed. Appellants' and the other former patients' surgeries had no medical bases.

Appellants did not discover the wrongs perpetrated by TCH within four years of the surgery. The SOR allegedly bars all their "medical claims" against TCH. Although there are stated exceptions to the operation of the SOR, there is no express exception for fraud.

Nevertheless, fraud vitiates everything it touches. It is well established in Ohio that a wrongdoer will not be permitted to profit from his fraudulent conduct or wrongdoing. Until now, no court will tolerate fraud or a fraudulent scheme. The judiciary has the inherent power to

[1] *United States v. Durrani,* U.S. District Court, Southern District of Ohio, Case No. 1:13-CR-84.

attenuate fraud whether it is contrived by common law or in a statute. The absence of the legislature's insertion of a fraud exception within the SOR cannot impair a court's inherent power to vitiate fraud wherever found. The Court should acknowledge the inherent judicial power it possesses to attenuate fraud in the context of the SOR.

Third, the Courts below held that appellants' fraud claims arose out of Durrani's medical diagnosis, care, and treatment of each of them with TCH's knowledge and approval. This classifies appellants' common law fraud claims as a "medical claim" and subject to the four-year SOR. However, appellants received no benefit from TCH's services. The actual purpose of the surgery was for Durrani's and TCH's pecuniary gain. Durrani's knowingly performing this unnecessary, fraudulent, and reckless surgery and TCH's knowing approval of the surgery and Durrani's course of professional conduct are not medical in nature, but rather pecuniary.

Appellants and all patients of Ohio doctors and hospitals -- the consumers of medical services in Ohio -- have a great interest in whether they can still have medical and fraud claims against wrongdoer doctors and hospitals when the patients discover the wrongs after the lapse of four years due to practitioners' fraudulent concealment. Members of the general public have a great interest in whether they can assert fraud claims against wrongdoer doctors and hospitals when the latter knows the surgeries performed and services rendered were fraudulent, unnecessary and inappropriate, and allows them to proceed. These claims are not medical claims.

STATEMENT OF THE CASES

Durrani was licensed to practice medicine in the State of Ohio. TCH is a hospital that credentialed Durrani with the privilege to perform surgeries and render medical services. TCH willfully ignored the information readily available to it pertaining to Durrani and credentialed him and granted him surgical privileges anyway prior to the surgeries at issue here in contravention of its bylaws, JCAHO rules, and other authority. During the credentialing process,

TCH failed, among other things, adequately to review, look into, and otherwise investigate Durrani's educational background, work history and peer reviews; ignored complaints about Durrani's treatment of patients reported to it by TCH staff, doctors, patients and others; and ignored adverse information it knew or should have known regarding Durrani's surgical privilege time at other area hospitals. TCH was negligent for credentialing Durrani.

Five of the appellants sought treatment with Durrani for problems experienced at various places in the neck or back. During their first office visits or very shortly thereafter, Durrani recommended some kind of spine surgery. Durrani falsely represented that the proposed surgeries were medically necessary, that Durrani "could fix" them, that more conservative treatment was unnecessary and futile, that the surgeries would be simple or "no big deal," and that each appellant would be walking normally within days after the surgery.

Durrani performed spine surgeries on appellants at TCH: Ms. Smallwood on June 27, 2006; Ms. Spangenberg in January 2007; Ms. Waxler in March 2006; Mr. Wolder on October 30, 2008; and Ms. Work on July 1, 2009. The thrust of appellants' claims resulting therefrom was that Durrani knowingly and intentionally employed various schemes and devises to convince his patients, including appellants, to unwittingly undergo unnecessary and experimental surgery for the purpose of financial enrichment for himself and TCH. The surgeries were not for appellants' medical benefit. Durrani then covered up his wrongdoings post-surgery**.** TCH knew of Durrani's wrongdoings to their patients, approved of them, and credentialed him with full knowledge of his incompetence. The wrongdoing and incompetence were knowingly overlooked by TCH due to the profitability of the wrongful activities. Nothing was done by TCH to stop the fraudulent scheme in place whose purpose was to make money at the patients' expense.

Appellants' claims were initially filed against TCH on August 15, 2016, except for Mr. Wolder, whose claims were filed on September 21, 2015, and the Spangenbergs, who initially

filed against TCH on May 28, 2014, dismissed their initial case on September 29, 2014, and refiled their claims on September 1, 2015. Each surgical appellant asserted claims against TCH for Negligent Credentialing, Supervision, & Retention, Spoliation of Evidence, and Fraud. Appellant Guy Spangenberg asserted a loss of consortium claim.

TCH moved to dismiss appellants' complaints pursuant to Civ. R. 12(B)(6). TCH argued, among other things, appellants' claims were "medical claims" under R.C. 2305.113(E)(3) and, therefore, time-barred by the SOR. Appellants contended that their negligent credentialing and fraud claims are non-medical claims and beyond the SOR. They also contended that the SOR is subject to a fraud exception premised upon the judiciary's inherent power to attenuate fraud. The trial court agreed with TCH and dismissed their complaints.

Appellants timely appealed from the trial court's adverse judgment to the First District. The Court affirmed the trial court's decisions within its *Judgment Entry* of May 28, 2021. On June 7, 2021, appellants filed a *Motion to Certify Conflict* and an *Application for En Banc Consideration*, which were denied July 1, 2021.

PROPOSITIONS OF LAW AND ARGUMENTS IN SUPPORT

> **Proposition of Law I:** A negligent credentialing claim brought by a patient against a hospital arising from its failure to satisfy its duty to grant and continue staff privileges only to competent physicians is an independent, non-medical claim and not within the scope of R.C. 2305.113(E)(3) and, consequently, not governed by the SOR.

In *Browning v. Burt,* 66 Ohio St.3d 544, 557, 1993-Ohio-178, this Court held that a claim for negligent credentialing is a separate cause of action and not a medical claim subject to the one-year statute of limitations. *See Evans,* 2020-Ohio-5535, ¶10. The claim does not arise from medical diagnosis, care, or treatment of a patient but rather during the credentialing process. *Browning; Evans*; R.C. 2305.251. In *Schelling v. Humphrey*, 123 Ohio St.3d 387, 391, 2009-Ohio-4175, ¶¶19, 30, this Court again ruled that negligent credentialing is a separate cause of

action. This decision came six years after the passage of the present version of R.C. 2305.113.

This Court also had an opportunity to discuss *Browning* in *Schmitz v. NCAA*, 155 Ohio St.3d 389, 2018-Ohio-4391. The *Schmitz* Court recognized that medical malpractice and negligent credentialing claims are different. *Id.,* 155 Ohio St.3d at 395, ¶21. The two causes of action have differing triggering events for the commencement of the running of their respective statutes of limitations. *Id.* Of course, the *Schmitz* Court's discussion would have been meaningless had negligent credentialing claims truly been medical claims. The *Schmitz* decision was rendered two years after the First District's contrary *Young* decision and one year after *Crissinger*. Therefore, it is beyond clear that this Court considered the *Browning* decision on negligent credentialing to be THE statement of the law on this issue.

This Court recently decided *Evans v. Akron General Medical Center*, 2020-Ohio-5535, ¶10, 163 Ohio St.3d 284, 170 N.E.3d 1, which reaffirmed and cited to the holding of *Browning v. Burt,* 66 Ohio St.3d 544, 1993-Ohio-178, 613 N.E.2d 993, that "Negligent credentialing claims arise out of the hospital's failure to satisfy its independent duty to grant and continue staff privilege only to competent physicians." It is difficult to understand the First District's statement in *Couch* that "the decision in *Evans* actually supports a finding that negligent-credentialing claims are 'medical claims . . . ." *Couch,* ¶19. *Evans* does not so support.

The standards governing a hospital's credentialing or retention of an incompetent physician have little to do with medical malpractice claims against a physician that arise out of the medical diagnosis, care, or treatment of a patient. Under Ohio's negligent credentialing statute, R.C. 2305.251, a plaintiff/patient must not prove medical malpractice in a negligent credentialing case, but rather a *pattern* of incompetence, knowledge the doctor will engage in fraud, or "otherwise inappropriate behavior." R.C. 2305.251. Thus, the general assembly provided on negligent credentialing of a physician by a hospital, in pertinent part, that:

> A hospital shall be presumed to not be negligent in the credentialing of an individual who has, or has applied for, staff membership or professional privileges at the hospital pursuant to section 3701.351 of the Revised Code . . . if the hospital . . . proves by a preponderance of the evidence that, at the time of the alleged negligent credentialing of the individual, the hospital . . . was accredited by one of the following:
>
> (a) The joint commission on accreditation of healthcare organizations;
> (b) The American osteopathic association;
> (c) The national committee for quality assurance;
> (d) The utilization review accreditation commission.

R.C. 2305.251(B)(1). However, the patient/plaintiff may rebut this presumption against negligent credentialing by showing, by a preponderance of the evidence, any of the following:

* * * * * * * * * * *

> (c) The hospital . . . , through its medical staff executive committee or its governing body and sufficiently in advance to take appropriate action, knew that a previously competent individual had <u>developed a pattern of incompetence or otherwise inappropriate behavior</u>, either of which indicated that the individual's staff membership, professional privileges, or participation as a provider should have been limited or terminated prior to the individual's provision of professional care to the plaintiff.
>
> (d) The hospital. . . , through its medical staff executive committee or its governing body and sufficiently in advance to take appropriate action, knew that a previously competent individual would <u>provide fraudulent medical treatment</u> but failed to limit or terminate the individual's staff membership, professional privileges, or participation as a provider prior to the individual's provision of professional care to the plaintiff.

R.C. 2305.251(B)(2)(c)-(d) (Emphasis added).

The general assembly also demonstrates unequivocally at subsection (C) that a patient's negligent credentialing claim against a hospital is independent of and separate from his/her medical claims – "Nothing in this section otherwise shall relieve any individual or health care entity from liability arising from treatment of an individual." R.C. 2305.251(C). The negligent credentialing statute's subsection (C) preserves the patients' separate medical claims. *Id.*

Additionally, the current version of R.C. 2305.113(E)(3), enacted in 2002, excludes the term "negligent credentialing" from the definition of a "medical claim." This omission's

significance is made manifest by the fact that a prior version of the term "medical claim" specifically included "negligent credentialing." The present omission of "negligent credentialing" from R.C. 2305.113(E)(3) demonstrates the legislature intended for the statute to conform to the *Browning* and *Schelling* decisions. The legislature removed "negligent credentialing" from the defined term "medical claim" following *State ex rel. Ohio Trial Lawyers v. Sheward*, 86 Ohio St.3d 451 (1999), where this Court struck down Am. Sub. H.B. No. 350 (tort reform) *en toto*. *Grandillo v. Montesclaros*, 137 Ohio App.3d 691,702, 2000-Ohio-1839 (3rd Dist.) (the Court acknowledging *Sheward* and explaining its impact on negligent credentialing claims as not medical claims).

The legislature repealed, revived, and amended R.C. 2305.11(D)(3) in 2001 Ohio Laws File 26 (H.B. 108), to delete "negligent credentialing" as a "medical claim." "An act of the General Assembly, which was unconstitutional at the time of enactment, can be revivified only by re-enactment." *State v. Hodge,* 128 Ohio St.3d 1, 6-7, 2010-Ohio-6320, ¶23, 941 N.E.2d 768, 773-774 (emphasis added), *citing Middletown v. Ferguson*, 25 Ohio St.3d 71, 80, 495 N.E.2d 380 (1986); *Franklin Cty. Bd. of Elections v. State ex rel. Schneider*, 128 Ohio St. 273, 191 N.E. 115 (1934), paragraph five of the syllabus. This part of the former statute defining "medical claims" was never revived because the term "negligent credentialing" remains absent from the definition of a "medical claim" to this very day. In fact, R.C. 2305.113 has been amended approximately nine times since "negligent credentialing" was deleted from the definition of "medical claim" in 2001. The General Assembly is presumed to have been aware of the *Browning* decision, and its failure to add "negligent credentialing" claims to those listed in R.C. 2305.113(E)(3) shows that it has been content to let the statute stand as the *Browning* Court previously interpreted it. *Spitzer v. Stillings*, 109 Ohio St. 297, 305, 142 N.E. 365 (1924). *See*

also State v. Hassler, 115 Ohio St.3d 322, 2007-Ohio-4947, ¶16 (despite amending statute eight times, legislature showed no intent to supersede judicial interpretation of statute).

The First District based its prior decisions of negligent credentialing being a medical claim on a finding that Durrani was a caregiver for purposes of R.C. 2305.113(E)(3)(c)(ii). However, the First District cases[2] simply do not surmount the requirement of the *Stevic Estate* Court that appellants' negligent credentialing claims do not arise out of TCH's medical diagnosis, care, or treatment of any person but rather its negligent credentialing of Durrani.

Notwithstanding the First District's prior decisions, appellants' negligent credentialing claims also do not arise from TCH's "hiring, training, supervision, retention, or termination of *caregivers* providing medical diagnosis, care, or treatment" under R.C. 2305.113(E)(3)(c)(ii) (emphasis added). Durrani was not a "caregiver" to appellants, but rather a "physician." R.C. 2305.113(E)(2). A "caregiver" is a generic job title. *State v. Garrett*, 2019-Ohio-750, ¶24, 132 N.E.3d 1100, 1105 (12th Dist.), *rev'd. on other grounds*, 2019-Ohio-2672, 2019 WL 2763001 (12th Dist. Jul. 1, 2019) (*en banc*). In a hospital setting, "caregivers" consist of nurses, nurse practitioners, physician's assistants, licensed practical nurses and nursing assistants and housekeeping staff. *See, e.g., Cope v. Miami Valley Hospital,* 195 Ohio App.3d 513, 520, 960 N.E.2d 1034, 1039, 2011-Ohio-4869, ¶¶25-26 (2d Dist.) (nurses, medical technicians, and radiological technicians are not physicians, even if they are doing work similar to that of a physician). One characteristic that all "caregivers" have in common is that they "proceed pursuant to the directions of the clients' physicians." *Miracle Home Health Care, LLC, v. Ohio*

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[2] These decisions include *McNeal v. Durrani,* 2019-Ohio-5351, ¶19, 138 N.E.3d 1231, 1237 (1st Dist.); *Crissinger v. The Christ Hospital*, 2017-Ohio-9256, ¶17, 106 N.E.3d 798, 804 (1st Dist.); *Young v. Durrani,* 2016-Ohio-5526, ¶21, 61 N.E.3d 34, 41 (1st Dist.); *Jonas v. Durrani,* 156 N.E.3d 365, 368-369, 2020-Ohio-3787, ¶¶9-10 (1st Dist.); *Couch v. Durrani*, Hamilton Nos. C-190703 (lead case), 2021 WL 942849, 2021-Ohio-726 (1st Dist. Mar. 12, 2021).

Dept. of Job and Family Services, Franklin No. 12AP-318, 2012-Ohio-5669, ¶26, 2012 WL 6043965 at *6 (10th Dist. Dec. 4, 2012). The legislature failed to include the term "physicians" within R.C. 2305.113(E)(3)(c)(ii), along with "caregivers," as it easily could have.

Notwithstanding the First District's belief that "the case law that has evolved since the 2002 statute is not particularly helpful . . . ," *Couch,* ¶14, most Ohio Courts of Appeals characterize negligent credentialing claims as not being "medical claims" under either R.C. 2305.113(E)(3) or its predecessor statute, R.C. 2305.11(D)(3).[3] *United States Fid. & Guar. Co. v. St. Elizabeth Medical Center*, 129 Ohio App.3d 45, 53, 716 N.E.2d 1201, 1206 (2d Dist. 1998); *Grandillo v. Montesclaros*, 137 Ohio App.3d 691, 701-702, 739 N.E.2d 863, 871, 2000-Ohio-1839 (3d Dist.); *Dicks v. U.S. Health Corp.*, Scioto No. 95 CA 2350, 1996 WL 263239 at *4 (4th Dist. May 10, 1996); *McFarren v. Canton*, 59 N.E.3d 652, 660-661, 2016-Ohio-484, ¶¶38-39 (5th Dist.); *Malcolm v. Duckett,* Lucas No. L-10-1110, 2011 WL 686398, 2011-Ohio-865, ¶35 (6th Dist. Feb. 25, 2011); *Haskins v. 7112 Columbia, Inc.*, 20 N.E.3d 287, 290, 2014-Ohio-4154, ¶12 (7th Dist.); *Hill v. Wadsworth-Rittman Area Hospital,* 185 Ohio App.3d 788, 792, 925 N.E.2d 1012, 1015, 2009-Ohio-5421, ¶14 (9th Dist.); *Allinder v. Mount Carmel Health,* Franklin No. 93AP-156, 1994 WL 49792 at *3 (10th Dist. Feb. 17, 1994); *Erickson v. Mgt. & Training Corp.,* Ashtabula No. 2012-A-0059, 2013 WL 4799163, 2013-Ohio-3864, ¶¶37-38 (11th Dist. Sept. 9, 2013).

Appellants request that this Court reaffirm the holdings of *Browning* and its progeny that a negligent credentialing claim is not a medical claim, and resolve the split of authority.

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[3] The Court of Appeals for the Second and Ninth Districts correctly characterized the language of the predecessor statute, R.C. 2305.11(D)(3), is virtually identical to the current language of R.C. 2305.113(E)(3). *Hill,* 185 Ohio App.3d at 792, 925 N.E.2d at 1015, 2009-Ohio-5421, ¶14; *Wagers v. Kettering Affiliated Health Services,* Montgomery No. 28192, 2020 WL 40008, 2020-Ohio-11, n.2 (2nd Dist. Jan. 3, 2020).

> **Proposition of Law II:** The SOR is subject to a fraud exception for use in cases against rogue health care providers that fraudulently conceal their activities to their patients. This exception is grounded in the judiciary's inherent power to attenuate fraud whenever it is pled and proven for which the legislature may not abridge or impede.

The First District has consistently ruled that fraud cannot be an exception to the SOR because the legislature did not enact a fraud exception. This holding misses the point.

Appellants acknowledge there is no legislatively enacted fraud exception to R.C. 2305.113(C), and "The General Assembly has the right to define the contours of a cause of action." *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, ¶26. **Nevertheless, Ohio courts have always possessed inherent judicial power to attenuate fraud in every case where it is pled and proven. The First District does not acknowledge that the legislature may not abridge or impede a power that is an inherent power of the court.** *See, e.g., Van DeRyt v. Van DeRyt,* 6 Ohio St.2d 31, 36, 215 N.E.2d 698, 704 (1966)("To protect its integrity, a court has inherent power to crush the fruits of fraud and collusion."); *Johnson v. Routzong,* Darke No. 980, 1979 WL 208630 at *3 (2d Dist.) ("There is no more solemn rule of law than that fraud vitiates all proceedings thereunder and that the court has the inherent power to reject it and eliminate its influence or effect entirely. There is no exception to this rule."). *See State ex rel. Butler v. Demis,* 66 Ohio St.2d 123, 132, 420 N.E.2d 116, 122 (1981) (the power to appoint counsel to represent indigent parties in an inherent power of the court that cannot be impeded by the legislature); *State v. Local Union 5760, United Steelworkers of America,* 172 Ohio St. 75, 80, 173 N.E.2d 331, 336 (1961) (the power of a court of general jurisdiction to impose punishment for contempt is an inherent power of the court that may not be abridged by the General Assembly). Thus, even though the legislature did not expressly enact a fraud exception to R.C. 2305.113(C), it did not need to do so because Ohio courts always possesses inherent judicial power to extinguish fraud.

It is well established -- at least until these Durrani cases -- that "Equity will not allow a statute to be used as a cloak for fraud." Delaney & Ferguson, *The Equitable Maxims*, 48-SUM Brief 44, 49 (ABA Summer 2019) (summarizing the maxims of equity). Ohio courts hold that they will not allow a person to profit by their own wrongdoing through the misuse of common-law principles or manipulating a statute. *See, e.g., Yoskey v. Eric Petroleum Corp.*, Columbiana No. 13-CO-42, 2014 WL 4291629, 2014-Ohio-3790, ¶49, n.3 (7th Dist. Aug. 29, 2014); *Shrader v. Equitable Life Assur. Soc. of U.S.,* 20 Ohio St.3d 41, 46, 485 N.E.2d 1031, 1035 (1985).

These rules should be particularly germane where, as here, the relationship of health care providers to their patient is fiduciary in nature. *Tracy v. Merrell Dow Pharmaceuticals, Inc.,* 58 Ohio St.3d 147, 150, 569 N.E.2d 875, 879 (1991)("The physician-patient relationship is a fiduciary one based on trust and confidence and obligating the physician to exercise good faith."); *Fort Hamilton-Hughes Memorial Hosp. Center v. Southard*, 12 Ohio St.3d 263, 268, 466 N.E.2d 903, 907 (1984) ("A hospital has a fiduciary duty to the public that must be exercised reasonably and for the public good."). When fraud or wrongdoing is proven by a plaintiff, the applicable rule is "**[n]o court will tolerate such a thing**." *Rupright v. Heyman*, 67 Ohio App. 355, 358, 36 N.E.2d 902, 903 (6th Dist. 1940) (emphasis added).

If this Court were to sanction and approve the dishonesty, concealment, and fraud committed by TCH by abdicating safeguarding the public from these kinds of fraudulent acts and concealments by so-called health care professionals through its construction of the SOR, then Ohio may wind up becoming a breeding ground for incompetent doctors and hospitals. Ohio courts would, in essence, affirmatively state that as long as a doctor or hospital is sneaky enough, if the doctor or hospital is conniving and untrustworthy enough, then he, she, or it may escape all liability by hiding, lying, concealing and betraying their fiduciary duty owed to the patients for four years. It is simply an unconscionable result and a needless risk to create.

It is error to hold that because the legislature did not include a fraud exception in R.C. 2305.113(C), Ohio courts lack power to attenuate fraud through their inherent judicial power to do so. The legislature is without authority to abridge this inherent judicial power.

> **Proposition of Law III:** When a surgery performed on a doctor's and hospital's patient is unnecessary, inappropriate, and fraudulent, the services rendered are not "medical" in nature but rather "financial" serving the medical practitioner's own pecuniary interests, and a fraud claim to recover damages therefrom is not a "medical claim" under R.C. 2305.113(E)(3).

The First District erred by holding that appellants' fraud claims are not independent non-medical claims but rather are "medical claims" under R.C. 2305.113(E)(3) and *Young v. UC Health,* 2016-Ohio-5526, 61 N.E.3d 34 (1st Dist.). Appellants' fraud claims are governed by *Gaines v. Preterm–Cleveland, Inc.,* 33 Ohio St.3d 54, 56, 514 N.E.2d 709, 712-713 (1987):

> [a] physician's knowing misrepresentation of a material fact concerning a patient's condition, on which the patient justifiably relies to his detriment, may give rise to a cause of action in fraud independent from an action in medical malpractice. The fraud action is separate and distinct from the medical malpractice action which stems from the surrounding facts **where the decision to misstate the facts cannot be characterized as medical in nature**. In the instant cause, it cannot be said that the statement to appellants that her IUD had been removed when in fact it had not was motivated by any medical consideration. . . . Reasonable minds could certainly conclude that **the misstatement in the instant cause was prompted not by medical concerns but by motivations unrelated and even antithetical to appellants' physical well-being.**"

Gaines, 33 Ohio St.3d at 56, 514 N.E.2d at 712-713 (emphasis added and internal citations omitted). *See Pierce v. Durrani*, 2015-Ohio-2835, ¶¶36-37, 35 N.E.3d 594 (1st Dist.)("The court in *Gaines* held that while an action in fraud may give rise to a cause of action independent from an action in medical malpractice, it is only separate where the decision to misstate the facts is not "medical in nature. . . ."); *Newberry v. Silverman*, 789 F.3d 636, 643-646 (6th Cir. 2015) (dental patient's claim that dentist fraudulently misrepresented that patient's toothache was caused by patient biting down too hard, despite having knowledge that a claimed complete root canal on patient had not been performed, was not subject to the four-year statute of repose at R.C.

2305.113(C) for “dental claims,” and were instead subject to the four-year limitations period for fraud). The *Gaines* rule also applies to claims of a medical practitioner’s fraudulent inducements made to entice a patient to undergo a procedure. *Kerns v. Schmidt*, 94 Ohio App.3d 601, 611-612, 641 N.E.2d 280, 286-287 (10th Dist. 1994). Inducements were made here.

As noted above, appellants’ fraud claims is not one of the much aligned “clever pleading” variety. Their cases are not isolated instances. It is yet another example of TCH’s decisions to misstate or conceal material facts from its patients on a mass scale that cannot reasonably be characterized as “medical” in nature; rather, they were business/economic benefitting themselves to the patients’ detriment. *Gaines*, 33 Ohio St.3d at 56, 514 N.E.2d at 712-713; *Pierce*, ¶¶36-37; *Newberry,* 789 F.3d at 643-646. After all, a provider’s “decision to misstate the facts is not ‘medical in nature.’” *Pierce,* 35 N.E.3d at 603, ¶36, citing *Gaines,* 33 Ohio St.3d at 56, 514 N.E.2d 709. *See Estate of Leach v. Shapiro*, 13 Ohio App.3d 393, 397-398, 469 N.E.2d 1047 (1984) (“We join those courts holding that a physician's non-disclosure may give rise to an action in fraud independent of malpractice.”); *Byrne v. Pediatric Associates, Inc,* Franklin 84AP-593, 1985 WL 10234 at *3 (10th Dist. Apr. 4, 1985).

CONCLUSION

This case involves matters of public and great general interest requiring resolution by this Court. This Court should acknowledge and affirm *Browning* and its progeny and resolve the conflict among the appellate courts about negligent credentialing claims being independent, non-medical claims. Also, by not recognizing a judicially-created fraud exception to the SOR and this Court’s rule originating with *Gaines* that fraud on a patient regarding his or her medical condition is an independent, non-medical claim, the courts below abolished any cause of action based on fraud for a provider/hospital that successfully dupes its patient for four years.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing were served upon the following by electronic mail on this 16th day of August 2021:

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