

ORIGINAL

SC

01-6129 (

IN THE
OHIO SUPREME COURT

No. **12-0791**

Aaron Raiser,
Petitioner/Plaintiff/Appellant

v.

Netcare Access et. al.,
Respondents/Defendants/Appellees,

Oral Argument Requested

Notice of Appeal

from the Court of Appeals, Tenth District 11AP-494
Franklin County Court of Common Pleas
Civil Case No.: 10 CV 012622

Notice of Appeal

FILED
MAY 07 2012
CLERK OF COURT
SUPREME COURT OF OHIO

Aaron Raiser, Pro Se
aaron_raiser@yahoo.com
20058 Ventura Blvd. #113
Woodland Hills, Ca 91364
Fax: 866.528.0524

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Notice of Appeal

The notice of appeal shall state all of the following:

(a) The name of the court of appeals whose judgment is being appealed;

Ohio Court of Appeals, Tenth District

(b) The case name and number assigned to the case by the court of appeals;

11AP-494

(c) The date of the entry of the judgment being appealed;

December 30, 2011; Original

Motion to Reconsider Filed: January 9, 2012

Motion to Reconsider Denied: March 21, 2012

(d) That one or more of the following are applicable:

(i) The case involves affirmance of the death penalty;

No.

(ii) The case originated in the court of appeals;

Appeal from that court.

(iii) The case raises a substantial constitutional question;

Yes.

(iv) The case involves a felony;

(v) The case is one of public or great general interest;

Yes.

(vi) The case involves termination of parental rights or adoption of a minor child, or both;

(vii) The case is an appeal of a court of appeals' determination under App. R. 26(B).

April 29, 2012



Aaron Raiser

Memorandum In Support of Jurisdiction

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CONSTITUTIONAL QUESTIONS

Issues On Appeal

1.

Whether Redress for injury and Due process under Bill of Rights §16 of the Ohio Constitution were denied Petitioner where, after briefing and submission of a Motion for Summary Judgment, where Petitioner would have otherwise prevailed on the Motion for Summary Judgment, the trial judge imposed his own ideas for summary judgment, never before raised, and without allowing briefing or the chance to submit a Rule 56(f) Motion for Discovery related to the reasons the trial judge raised, the trial judge summarily dismisses the cases based on his own views, without briefing, or the chance to seek and produce discovery to show that Petitioner could produce facts to show that the basis for the trial judge's dismissal was lacking.

2.

Whether Redress for injury and Due process under Bill of Rights §16 of the Ohio Constitution were denied Petitioner where the trial court made a decision of fact the reasonableness of Petitioner's efforts to discover both an unseen injury and who caused that unseen injury where (1) the applicability of the discovery rule is an issue of fact and (2) Petitioner was unaware of the injury and who was responsible for that injury.

3.

Whether the Discovery Rule is applicable to the discovery of a Violation of Civil Rights cause of action.

4.

Whether Redress for injury and Due process under Bill of Rights §16 of the Ohio Constitution were denied Petitioner where Petitioner filed a Motion to Amend the Complaint first, then the Defendant filed a motion for summary judgment, and the trial court decided the motion for summary judgment first, then denied the motion to amend based on alleged issues of fact (Issue #1) where had the motion to amend been considered first, it would have been permitted, which would have required the defendant to file a new motion for summary judgment to challenge the amended complaint.

Issues of Great Public Importance

5.

Whether the Discovery Rule can apply to causes of action for Defamation where Petitioner showed that the current holding that it cannot was based on case precedents from the 1800's decided on the premise that the discovery rule only applies where the legislature specifically states that it applies and where the current state of the law is that absent legislative decrees to the contrary, it is up to the judiciary to decide whether the discovery rule applies.

6.

Whether the courts below have placed too great of a requirement on a person against whom a legal wrong has been made, to investigate and if necessary initiate litigation in order to put all possible persons who have or may have committed a wrong against that person under oath to tell the truth, in order for that person to discover the wrong committed and who committed that wrong, where the person against whom the wrong committed (a breach of confidence/medical confidence in this case) was unknown to the person wronged and the person wronged was otherwise unaware of any injury causes by that wrong.

Rule of Law. Ohio Constitution

§16 All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

Statement of the Case

Plaintiff was wrongfully committed to COPH (now Twin Valley on 1960 W. Broad st.).
Original Complaint (OC) ¶9. See also the proposed First Amended Complaint (FAC) ¶9

While there, the doctors attempted to get Plaintiff to take medicine and Plaintiff refused. OC, FAC ¶10. In order to medicate Plaintiff, the doctor went privately to Plaintiff's father, and using confidential information, convinced Plaintiff's father to take guardianship over Plaintiff. OC, FAC ¶¶12-17. The doctor then used private confidential information to get his father to decide that

Plaintiff should be forced medicated, and Plaintiff was forced medicated. OC, FAC ¶17.

Plaintiff gave up working within the court system (Plaintiff later learned that he was about to be transferred to long term in Chillicothe, Ohio), and was able to escape to a western state, and returned to college and then worked as a software engineer until attending law school. OC, FAC ¶¶19-21.

Upon approaching his moral character evaluation, Plaintiff learned that his commitment and guardianship would affect his ability to practice law, and Plaintiff took steps to get that expunged and to otherwise find out exactly what had happened and why. OC, FAC ¶¶22-23.

During this investigation Plaintiff learned of the causes of action of the original Complaint and after serving statutory notice to the Defendants, Plaintiff filed the underlying case claiming causes of action for defamation, medical malpractice, breach of fiduciary duty and breach of confidence.

Subsequently, Plaintiff was also sent additional documents he requested concerning his commitment which took some time to find by the probate court, and Plaintiff learned of additional causes of action and sought leave to amend the complaint to include the additional claims.

The FAC showed that on the day before his commitment hearing to decide if Plaintiff would be committed for a year at COPH, an attorney who was to represent Plaintiff came to visit Plaintiff and was waiting in a room which required Plaintiff to pass through the nurses' station to get to the room where the attorney was. However, the nurse physically blocked Plaintiff from entering the nurses' station and when Plaintiff attempted to walk around her the nurse pushed Plaintiff out of the nurses' station and he fell to the floor of the hallway. FAC ¶¶71-78.

The next day when the hearings were held, Plaintiff attempted to attend the hearing. However, the same nurse again blocked Plaintiff's access to the nurses' station through which all the wards had to pass to go to the hearing room. Plaintiff was denied his chance to attend the hearing and defend himself, and of course he was committed to COPH for a year. FAC ¶¶79-83.

While that event took place in 1990, Plaintiff recently learned via handwritten court notes by the court staff that the nursing staff lied to the judge and told him that Plaintiff had voluntarily declined to attend the hearing, which was not the case. FAC ¶84. This new discovery served as the basis for a new civil rights cause of action under 42 USC §1983.

Plaintiff also learned in the new set of documents sent to him by probate court that Plaintiff's Order initially committing him to COPH for 1 weeks observation was never signed by a judge. FAC ¶113. What happened was the state psychologist who was assigned by the judge to take a closer look at Plaintiff, went to observe Plaintiff and never saw Plaintiff do anything where he placed himself or

others in harms way or danger. In fact all Plaintiff did was go out for his morning run and while he was doing sit ups near his apartment the state psychologist drove by Plaintiff in an old beat up Datsun and without identifying himself asked Plaintiff what he was doing in a gruffy voice and Plaintiff figuring it was a heckler ignored him. FAC ¶114-115. (Plaintiff was observed doing nothing that presented either a danger to himself or others.)

The state psychologist then went directly to a court clerk who signed the Order committing Plaintiff to COPH for a week and directing the sheriff to take Plaintiff to COPH. This formed the basis for a second 42 USC §1983 cause of action. A judge must sign any Order which deprives a citizen of their basic right to be free.

Plaintiff also included a cause of action for personal injury arising out of his suspicion that the Haldol given to him is responsible for certain uncontrolled nervous and muscular system problems Plaintiff is noticing in his life. These are not severe or debilitating and are more of an annoyance, and Plaintiff believes these can be attributed to and caused by to the Haldol. Haldol it is noted is a very powerful drug which causes severe pain and discomfort and uncontrolled muscular contractions in the wards to whom it is given. Words do not exist to describe the pain, anguish and misery it causes.

Dismissal was not based on the merits of the underlying case, it was dismissed because Plaintiff discovered the wrongs and who was responsible for those wrongs after the statutes of limitations traditionally would have run AND because the trial judge held that the discovery rule did not apply.

The problem is that the basis for dismissal raised by the judge was never raised by the Defendant. The basis the judge raised for dismissal was that the Plaintiff did not exercise due diligence to discover the wrongs and who was responsible, and therefore the discovery rule could not apply. Plaintiff could have shown that his efforts to discover the wrongs and who was responsible was reasonable and proper given his circumstances had he been given a chance to conduct discovery. Plaintiff is familiar with the workings of Rule 56 and that Plaintiff cannot rest on the pleadings at summary judgment, however, the Defendants did not ever point out in their motion for summary judgment that the Plaintiff did not exercise due diligence, instead arguing that the statute of limitations had run because Plaintiff's real injury was a physical injury and that because the injury was a physical injury the discovery rule could not apply to any of the causes of action no matter what the facts were. This was a purely legal attack on the pleadings.

Plaintiff filed a Rule 56 motion for discovery and because the only factual attack on Plaintiff's case centered on whether Netcare employed Dr. Kavak and whether they operated COPH, Plaintiff's

only request for the need for discovery centered on Dr. Kavak's relationship to Netcare and Netcare's role in operating COPH.

The trial judge seized on Plaintiff's narrow request for discovery and pointed out that he asked for no other discovery or need for discovery in the case. However, Plaintiff had no need to as Defendant had not challenged anything factually other than Dr. Kavak being their employee and their having no control over COPH.

Had Netcare ever raised the issue that Plaintiff did not exercise due diligence and as a result the discovery rule did not apply, Plaintiff would have included the need for discovery into whether he exercised due diligence or not given the facts and circumstances in his Rule 56 Motion for Discovery.

The trial judge then came up with his own reasons for dismissal without notifying Plaintiff of those reasons and without giving Plaintiff any opportunity to produce affidavits or discovery evidence to show that he did exercise due diligence. Without those affidavits and discovery evidence the trial judge ruled Plaintiff could not rest on his pleadings, and dismissed the case. However, our court system is an adversarial system of justice, and here the Defendant never put Plaintiff on notice by challenging his due diligence with respect to the discovery rule, and therefore Plaintiff had no need or reason to (1) produce any affidavit to counter that which was not challenged and (2) seek discovery into an area that was not in dispute.

This appears to be an issue of first impression, and Plaintiff summarizes the issue as follows:

A trial judge cannot dismiss a case on summary judgment based on a reason which the trial judge came up with for the first time where (1) no discovery has been conducted and (2) if discovery has been conducted, no opportunity is given to the Plaintiff to file a Rule 56 motion for discovery to claim a need to produce discovery to counter the factual challenged raised by the trial judge.

To summarize: The trial judge dismissed the case on summary judgment based on his claim of a lack of facts concerning due diligence of Plaintiff concerning the discovery rule; the trial judge never allowed discovery in the case and never put Plaintiff on notice that there was a need to include that request for discovery in his Rule 56 motion for discovery.

In other words, Defendant did not point out or allege a factual weakness in the pleadings with respect to due diligence. If they did not raise it, summary judgment should have been denied. The trial judge then came up a new basis for dismissal at summary judgment without giving Plaintiff a chance to ever conduct discovery to show that basis for dismissal was lacking and presented an issue of fact at trial.

The case is further factually involved with respect to the discovery rule and the reasonableness of Petitioner's due diligence.

First, Petitioner was aware, 100%, that he had a cause of action for the nurse physically prohibiting Petitioner from either meeting with his attorney or attending his legal proceedings, where absolutely no basis existed for denial of those fundamental rights.

However, Petitioner was forced to escape from COPH and flee to another state or risk spending the rest of his life in Chillicothe force medicated with haldol, as opposed to returning to college, getting a job, going to law school, a walk in the park etc.

Once Petitioner regained his freedom, the choice was clear. Petitioner could pursue his case against Netcare, which would expose his location, which would risk Petitioner's return to a place and accompanying abuse which politely stated he simply wants to forget about, or Petitioner could keep his whereabouts secret, live a free life, go to college etc.

Petitioner chose to keep his location secret.

The only thing Petitioner could see at the time he escaped as being wrongful with his commitment was the nurse's actions in blocking Petitioner's access to his attorney and the courts. With respect to his guardianship, while wrongful, the only thing Petitioner was aware of with respect to any wrongdoing was that the probate judge refused Petitioner the chance to have his own expert evaluate and testify on behalf of Petitioner in the proceedings. (Petitioner had an expert who had worked at COPH, who backed out 2 days prior to the guardianship hearing and the probate judge refused an extension of time to find a replacement).

Petitioner was unaware of any other wrongs. Thus he had no incentive or reason to attempt to investigate or discovery other wrongs or who might have caused those wrongs.

The applicability of the discovery rule and whether Petitioner's efforts to discovery any other unknown wrongs is further complicated by the fact that Petitioner escaped COPH with only \$.25 in his pocket and made his way to a western state.

The applicability of the discovery rule and whether Petitioner's efforts to discovery any other unknown wrongs is further complicated by the fact that Petitioner broke off communications with his family after his escape and has not spoken with them for over 20 years.

Petitioner also argued that even had he attempted to find out other wrongs and who was responsible it likely would have not been productive. For example, had Petitioner called the doctor who disclosed Petitioner's private medical information to his father without Petitioner's permission, the

doctor likely would have been aware of the breach of medical record information and would not have told him the truth anyway, assuming he felt he was under any obligation to respond to the question at all. The same holds true had Petitioner had contact with his family, there is some question that his father would have been forthcoming with what had happened, or at least discovery into this would have been helpful to the trier of fact.

In short, Petitioner was unaware there had been a breach of confidence in the disclosure of his medical records, Petitioner had no feasible way to attempt to discover other wrongdoings as he was in fear of being returned to Ohio as, for example, had Petitioner asked COPH to mail him his medical records, the law would discover his location and return him to Chillicothe for the rest of his life (the system doesn't always work....). Petitioner further had no money to make any phone calls with or for postage (though at some point in time which the record doesn't state, Petitioner did get enough money to return to college).

Given these very complicated set of facts, there was an issue for the trier of fact as to whether Petitioner's due diligence in discovering some unknown wrong in a state 2000 miles away, or at least Petitioner deserved a chance to do discovery to develop the facts, prior to any decision being made. The holding of the trial court and court of appeals imposes a duty on every person ever committed to a mental hospital to immediately conduct a thorough investigation about all aspects of their commitment in an attempt to somehow discover if any other wrongs had been committed and to ask under oath all persons who had anything to do with the commitment or "treatment" of a person whether or not they had engaged in any wrongdoing or breached any medical records confidentiality. Given that no one is going to voluntarily give out that information, a court order would be necessary.

This issue goes beyond a simply civil commitment, it goes to anyone who is a patient at any regular hospital, or for that matter, anyone who ever visits a doctor, psychologist or psychiatrist. Should all such persons after visiting that professional or hospital then have to depose under oath ever their professional or hospital staff to learn whether or not they had made a wrongful disclosure of their medical or confidential information? Such a requirement simply is not workable.

Such a requirement simply is not workable. Thus, in addition to the constitutional reasons given, this issue is of sufficient public importance with respect to the discovery rule,

I. Issue #1,2,5, 6

(Error found in Order Granting Summary Judgment at 5)

A. **Rule of Law.**

1. The Discovery Rule. A cause of action generally accrues at the time of the wrongful act. The discovery rule provides an exception to this rule and the statute of limitations does not run until the injured party discovers, or by reasonable diligence should have discovered that they were injured by the wrongful conduct of the defendant. Luft v. Perry County Lumber, Franklin App. No. 02AP-559, 2003-Ohio-2305 at ¶55. The discovery rule entails a two prong test (1) the discovery of the injury and (2) the discovery of who was responsible for the injury. *Id.*

2. Discovery Rule Applicability an Issue of Fact for Trier of Fact/Jury.

Plaintiff, a resident of California, was unable to locate any Ohio state court authority on this matter. Plaintiff did locate various Ohio Federal Court cases applying Ohio's discovery rule which show that whether the discovery rule applies is an issue of fact for the jury/trier of fact to decide in any given case.

The following are jury instructions on the Ohio Discovery Rule from a case from the Ohio Southern District Federal Court:

A statute of limitations is a law setting a time period within which a lawsuit must normally be filed. Plaintiffs filed this lawsuit on October 8, 2002. Defendants claim that Plaintiffs failed to file the claims of spoliation, intention infliction of emotional distress and civil conspiracy within the four year statute of limitations which applies to those claims. Defendants have the burden of proof on this affirmative defense. In order to prevail on this affirmative defense they must establish by a preponderance of the evidence that before October 8, 1998, reasonable person knew (1) of these harms and (2) that the conduct of Defendants caused these harms.

See Doc. 222 of S.D. Ohio case 1:02-cv-00722 at 12-13, *Fossyl v. Watson* (attached as Appendix A herewith).

3. Burden of Proof On Defendant.

From the above jury instructions it can be seen that with respect to the discovery rule and whether it applies, the burden is on the Defendant to show that it does not apply. This makes sense because it is an affirmative defense, related to the statutes of limitations barring suit, which is a common affirmative defense.

4. Summary Judgment.

- a. “there is no requirement in Civ.R. 56 that the moving party support its motion for summary judgment with any affirmative evidence, i.e., affidavits or similar materials produced by the movant.” Dresher v. Burt, ___ Ohio St.3d ___, 1996-Ohio-107 at p. 25.
- b. “ ... Celotex makes clear that the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party’s claim.” Dresher v. Burt, ___ Ohio St.3d ___, 1996-Ohio-107 at p. 25-26.
- c. “To accomplish this, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment. The evidentiary materials listed in Civ.R. 56(C) include ‘the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any.’” Id.
- d. “If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.” Id. at 26.

B. Analysis

The initial issue is whether Defendant (1) informed the trial court of the basis for its motion (2) identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party’s claim.

The answer to this initial issue is resoundingly in Plaintiff’s favor. Defendant’s arguments for summary judgment were as follows:

1. Breach of Confidence, Fiduciary Duty

Defendant argued that they did not employ Dr. Kavak and had nothing to do with COPH. Here Defendant specifically pointed to the affidavit of Mr. Hughes in support. See Motion for Summary Judgment (MSJ) at 4-5. Plaintiff in response claimed he needed discovery into this area. See Plaintiff’s Rule 56 Motion for Discovery and Affidavit.

2. Breach of Confidence, Fiduciary Duty

Defendant next argued that the breach of fiduciary duty claims and breach of confidence claims were actually claims for were actually claims for bodily and physical injury. MSJ at 5-6. Defendant then claimed that the discovery rule did not apply to these two claims because the discovery rule did

not apply to claims for physical/bodily injury, relying on R.C. 2305.10(A) and McDowell v. DeCarlo, 23376-Ohio-1262, and also because the discovery rule was never applicable for claims under 2305.09(D). See MSJ at 7-8. Nowhere did Defendants point to anything in the record that shows that factually Plaintiff's claim was lacking.

Here the basis for Defendant's motion or summary judgment on these two causes of action is purely a legal one. The argument is claiming that whatever the facts of the case are with respect to the discovery rule, those facts are irrelevant, because the discovery rule can never apply to these claims.

In other words, Defendant Netcare never claimed before the trial court that the basis for its motion for summary judgment on these claims was based on a lack of evidence in the record that Plaintiff did not exercise due diligence in investigating his claims.

The trial court never addressed Defendant's arguments for summary judgment, instead coming up with its own reason for dismissal which was never raised by Defendant.

3. Medical Malpractice

Defendants claimed that this claim failed because (1) it did not arise out of medical treatment and (2) there was no affidavit of merit. MSJ at 8-9. Nowhere did Defendants point to anything in the record that shows that factually Plaintiff's claim was lacking.

The trial court never addressed Defendant's arguments for summary judgment, instead coming up with its own reason for dismissal which was never raised by Defendant.

4. Defamation

Defendants argument was that the discovery rule never applied to a defamation cause of action. MSJ at 9-10. Nowhere did Defendants point to anything in the record that shows that factually Plaintiff's claim was lacking.

The trial court never addressed Defendant's arguments for summary judgment, instead coming up with its own reason for dismissal which was never raised by Defendant.

5. Summary

The rule of law with respect to summary judgment is that Defendant "bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." Dresher v. Burt, ___ Ohio St.3d ___, 1996-Ohio-107 at p. 25-26.

Defendant did inform the trial court of its basis for summary judgment. The trial court never

addressed those arguments. Defendant, however, never met its burden by “identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party’s claim.” as required.

For these reasons the trial court simply should have denied the motion for summary judgment or addressed the motion for summary judgment on the merits of Defendants arguments, which it never did.

For the trial court to dismiss the case based on its own reasons without giving Plaintiff a chance to ever address those reasons or show he needed discovery to present evidence to counter those reasons was prejudicial and merits reversal. Ours is an adversarial court system. Due process of law means notice and opportunity to be heard. Here the trial court unilaterally came up with its own reasons for dismissal without given Plaintiff notice of those reasons and an opportunity to be heard relevant to those reasons prior to dismissal of the action.

Rule 56 places the burden on the moving party to come up with the reasons for dismissal, not the judge. Here the judge came up with the reasons and factual infirmities it believed were the basis for summary judgment, not the Defendant, and Rule 56 requires the moving party, and not the judge, to do these things.

C. Opportunity for Discovery, Rule 56 Motion for Discovery Must Be Given Into the Basis for the Trial Judge’s Due Diligence Argument for Dismissal

As a procedural right, Plaintiff must be given some opportunity to be heard by the trial judge with respect to his arguments on due diligence and the discovery rule. The would allow Plaintiff to present legal arguments in response. It would also allow Plaintiff a chance to point out in the Pleadings factual support for his opposition OR it would allow Plaintiff a chance to present an affidavit to give a factual basis for that opposition. Further, it would give Plaintiff a chance to seek a Rule 56 motion for discovery in the case.

Because these procedural formalities were never followed which formalities are in place to ensure due process of law, reversal is appropriate.

D. No Evidentiary weakness ever pointed out with respect to basis for dismissal

At summary judgment the pleadings and facts on record must be viewed in a light most strongly favoring the non-moving party. In the present matter, Plaintiff is the non-moving party.

“Summary judgment is a procedural device to terminate litigation and to avoid a formal trial where there is nothing to try. It must be awarded with caution, resolving doubts and construing

evidence against the moving party, and granted only when it appears from the evidentiary material that reasonable minds can reach only an adverse conclusion as to the party opposing the motion. * * *"
Norris v. Ohio Std. Oil Co. (1982), 70 Ohio St.2d 1, 2. Recently, this court reiterated that, because summary judgment is a procedural device to terminate litigation, it must be awarded with caution. Doubts must be resolved in favor of the non-moving party. Osborne v. Lyles (1992), 63 Ohio St.3d 326, 333.

In the present matter the pleadings were never challenged or contradicted factually. The basis for summary judgment was a legal challenge, not factual.

"If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E), which provides that:

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." (Emphasis added.)"

Dresher v. Burt, ___ Ohio St.3d ___, 1996-Ohio-107 at p. 27.

As previously shown, Defendant is required to (1) inform the trial court of the basis for its motion (2) identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.

The only portions of the record identified was lacking factually dealt with whether Dr. Kavak was employed by Defendant and whether Defendant operated COPH.

Plaintiff could not rest on his pleadings with respect to these matters, and these matters alone, and filed the necessary Rule 56 motion for discovery.

If not, a defendant could identify one factual matter for one cause of action and then imply (or not even mention it at all) that the remainder of the complaint is somehow deficient factually, opening up the requirement for a non-moving party to produce evidence on each and every aspect of the case and complaint or face dismissal.

Rule 56 requires the moving party to specifically point to those facts which are lacking in order for the non-moving party to produce evidence to counter those assertions.

E. Issue of Fact Present on the "Due Diligence" and Applicability of the Discovery Rule

The pleadings viewed in a light most favorable to him, which is required under Rule 56(c), (e) show that Plaintiff exercised reasonable diligence with respect to the discovery rule.

The original complaint showed that Plaintiff was being forced medicated against his will, and that he was imprisoned at COPH. These are very serious intrusions into a persons personal liberties. These are essential liberties and fundamental to a person's existence. Viewed in a light favorable to Plaintiff, Plaintiff had lost his freedom and was not happy about it, and was being forced to take drugs having some unknown affect on Plaintiff which was also making him unhappy to the point that he found a way to escape his dire circumstances.

Plaintiff also had damage of an unspecified nature to his family relations.

The proposed FAC adds additional information that Plaintiff escaped with only .25 cents in his pocket and fled Ohio to Utah, that he was about to be sent to the Chillicothe long term facility, and that in Utah he was not only in fear of being discovered and sent back to Ohio, he was in "astronomical" fear of being returned to Ohio if anyone found out where he was.

In Utah Plaintiff had his freedom, his liberty, was free from a very intrusive and heinous forced medication of Haldol, and he was not facing what likely amounted to a a life sentence in Chillicothe. Basically the system was broke. As the FAC points out, Nurses would prevent Plaitniff from attending his court hearings, meeting with attorneys, and the one time Plaintiff was permitted to attend his guardianship hearing the probate judge refused Plaintiff any chance to get his own expert witness.

There was no way Plaintiff was going to risk in any way shape or form going back to Ohio. If Plaintiff picked up the phone to call from where he was living to get information from COPH to attempt to discovery any wrongdoing, that number could be easily traced and Plaintiff picked up and returned to Ohio. Pay phones can also be traced.

Further, Plaintiff was no exactly rich when he got to Ohio, and that is supported by the fact he left Ohio with .25 cents in his pocket. Thus even if Plaintiff could call Ohio, how can he afford to pay for the phone calls? There is sufficient information in the record to support this and it has to be viewed in a light favorable to Plaintiff.

Further, lets say Plaintiff did call Dr. Kavak and asked him if he disclosed confidential information to his father to get him to take guardianship, does anyone really believe Dr. Kavak would have actually given him that information and subject himself to civil liability? He is a doctor and no dummy as to the threats of litigation, as any doctor is aware of such threats. Further, he has no obligation to tell Plaintiff anything. Likely, Dr. Kavak would attempt to find out where Plaintiff was and get him returned to Ohio.

Let's say Plaintiff wrote the court asking for his probate records. He would have to give out his

address to have it mailed to, and there was simply no way Plaintiff could risk that.

The other option was Plaintiff could hire an attorney to do all the research, however, given the distance from Ohio and Plaintiff only having .25 cents there are no attorneys that can be expected to take such a case either in Ohio or Utah.

Further, should every person that is committed to COPH have to hire an attorney to research all the aspects of their commitment to find out if they have a court case against anyone? For example, Plaintiff is expected to somehow find and retrieve notes from the probate court that showed the COPH staff lying to the probate judge that Plaintiff voluntarily refused to attend the hearing where the truth was that they physically prevented him from attending? Plaintiff is to somehow suspect and then find out that a court clerk signed the order to the sheriff to take Plaintiff to COPH, and not a judge? Plaintiff is somehow expected to find out that a doctor and violated Plaintiff's confidentiality rights and disclosed medical information to Plaintiff's father to get Plaintiff's father to do what the doctor could not do – force medicate Plaintiff? These are simply unreasonable expectation and it is questionable how successful Plaintiff would have been.

The other issue on this is Plaintiff's inability to contact his family to find out anything. If Plaintiff did, his whereabouts would be discovered and he would be returned to COHP or Chillicothe. That simply wasn't an option. Further, if Plaintiff could submit his own affidavit or conduct discovery in the case, he can show that he is severed from his family and has no direct communications with them for some 20 years as a result of all that has happened surrounding the commitment and the problems it has caused Plaintiff and his family, thus getting information from his family was not an option. Further, there was no guarantee they would have given any helpful information.

The other consideration is that Plaintiff's inability to investigate is directly attributable to the wrongful conduct of the Defendants. Here they are benefitting from that misconduct by preventing Plaintiff from conducting any investigation given the threats they presented to return Plaintiff to a life of bondage and forced medication had he ever attempted any investigation. Further, Plaintiff's only having .25 cents is attributable to the defendants and the circumstances they forced Plaintiff into.

The legislature simply could not envision such circumstances when they put into place the current statues of limitations.

Here there is an issue of fact as to whether Plaintiff's actions were reasonable. In circumstances where it is difficult for a person to discovery their injury or who is responsible that person does not lose the right to the discovery rule. Dike v. Peltier Chevrolet 2011 WL 1205246

(Ohio). In the present matter, the circumstances made it extremely difficult for Plaintiff to conduct any investigation.

Plaintiff maintains that given the facts of this case and that the wrongful conduct of Defendants prevented any chance to either investigate the wrongdoing or institute an action for the misconduct such as preventing him from meeting with his attorney or attending hearings that all statutes of limitations must be waived in this case to allow justice. Certainly Rule 1 which admonishes that the rules be interpreted to secure a just outcome supports such a waiver. At minimum, however, there is an issue of fact which at this stage favors the Plaintiff and that given the circumstances and that there should not be much if any expectation that Plaintiff should have been even aware that he had been wronged, and the discovery rule must apply.

F. Ohio Case Law Supporting Plaintiff's Arguments

A case that is analytically similar with respect to due diligence and the discovery rule is Norgard v. Brush Wellman Inc. (2002) 95 Ohio St. 3d 165.

The case is cited at length as it shows the Supreme Court's manner in analyzing the facts and law with respect to the discovery rule and its importance in allowing a remedy for a wrongful injury.

*** David Norgard began working for appellee, Brush Wellman, Inc., in 1981 as a fluoride furnace operator at its beryllium plant in Elmore, Ohio. Within a few weeks of the start of his employment, Norgard broke out in a rash. The rash became so severe that it turned [*2] into skin ulcers. *** In August 1992, he received the formal diagnosis that he had chronic beryllium disease ("CBD"), a debilitating, and sometimes fatal, lung disease, caused by his exposure to beryllium. ***

In October 1995, Norgard read an article in a local newspaper about some beryllium lawsuits involving Brush Wellman and its employees in Arizona. Norgard contacted the law firm mentioned in the article. The attorney, who represented the Brush Wellman employees, told Norgard that for years Brush Wellman had withheld information about the causes of beryllium-related diseases and the acceptable levels of beryllium to which an employee could be exposed without harm, that Brush Wellman [*4] knew that its air-sampling collections were faulty and inaccurate and that a large number of its employees were developing CBD, and that there might have been problems related to respiratory equipment and ventilation that led to unnecessarily elevated beryllium exposures. Within two years of receiving this information, Norgard filed an intentional-tort action against Brush Wellman. ***

The question before us is whether the employer intentional-tort claim is barred by the statute of limitations. Both parties agree that the applicable statute of limitations for this claim is R.C. 2305.10, which provides for a two-year period in which to bring suit. The parties also agree that the discovery rule [*5] applies. However, the parties differ as to what triggered the statute of

limitations.

Brush Wellman argues and the court of appeals found that the statute of limitations began to run in August 1992 when Norgard learned he had contracted CBD at the workplace. This argument equates Norgard's knowledge that conditions at the plant had caused his illness with knowledge that his illness was caused by Brush Wellman's conduct. Norgard, however, contends that the statute of limitations was triggered in October 1995, when he claims that he discovered Brush Wellman's wrongful conduct. For the following reasons, we agree with Norgard's position. Accordingly, we reverse the court of appeals and remand the cause for a trial.

Generally, a cause of action accrues and the statute of limitations begins to run at the time the wrongful act was committed. *Collins v. Sotka* (1998), 81 Ohio St. 3d 506, 507, 692 N.E.2d 581. However, the discovery rule is an exception to this general rule and provides that a cause of action does not arise until the plaintiff discovers, or by the exercise of reasonable diligence should have discovered, that he or she was injured by the [*6] wrongful conduct of the defendant. *Id.*, citing *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St. 3d 84, 4 OBR 335, 447 N.E.2d 727.

In *O'Stricker*, the court emphasized that the discovery rule entails a two-pronged test--i.e., discovery not just that one has been injured but also that the injury was "caused by the conduct of the defendant"--and that a statute of limitations does not begin to run until both prongs have been satisfied. *O'Stricker*, 4 Ohio St. 3d at 86, 4 OBR 335, 447 N.E.2d 727, paragraph two of the syllabus.

Since the rule's adoption, the court has reiterated that discovery of an injury alone is insufficient to start the statute of limitations running if at that time there is no indication of wrongful conduct of the defendant. Moreover, the court has been careful to note that the discovery rule must be specially tailored to the particular context to which it is to be applied. *Browning v. Burt* (1993), 66 Ohio St. 3d 544, 559, 613 N.E.2d 993.

In *Browning*, the court considered claims against Dr. James C. Burt, who had performed experimental surgeries on his patients, severely [*7] maiming them. Jimmie Browning brought a malpractice claim against Dr. Burt and a claim against the hospital for negligent credentialing.

Initially, we found that negligent credentialing and medical malpractice are separate claims. Thus, while discovery of the injury and its immediate cause may have been sufficient to trigger the statute of limitations on the malpractice claim, they were not sufficient to trigger the statute of limitations on the negligent-credentialing claim. The distinction turned on the fact that discovery of malpractice and its attendant injury was not sufficient to raise suspicion of the hospital's credentialing practices. We found:

"Discovery of a physician's medical malpractice does not, in itself, constitute an 'alerting event' nor does discovery implicate the hospital's credentialing practices or require investigation of the hospital in this regard. To hold otherwise would encourage baseless claims of negligent credentialing and a hospital would be named in nearly every lawsuit involving the malpractice of a physician." *Id.*, 66 Ohio St. 3d at 561, 613 N.E.2d 993.

Thus, that Browning was injured by Dr. Burt [*8] was not enough for Browning to suspect that

the hospital's conduct was wrongful. It was the second event, in the Browning case a television program detailing the number of women injured by Dr. Burt, which was held to be the "alerting event," which placed Browning on notice of the need to investigate an action for negligent credentialing.

Another case where we drew a distinction between discovery of an injury and discovery of wrongful conduct was *Ault v. Jasko* (1994), 70 Ohio St. 3d 114, 637 N.E.2d 870, where we applied the discovery rule to a sexual abuse case involving repressed childhood memories. In that case, the defendant's intentional conduct caused the injury, but this fact was not immediately known to the plaintiff. Therefore, we held that the plaintiff must discover the sexual abuse in order for the statute of limitations to begin running on the claim for assault and battery. *Id.* at syllabus.

Collins, supra, 81 Ohio St. 3d 506, 692 N.E.2d 581, provides another example. *Collins* involved a wrongful-death claim stemming from a murder. The victim's body was found almost five months after her official death date [*9] of July 31, 1992. An autopsy revealed the cause of death to be multiple stab wounds. In January 1993, Mark Sotka was indicted for the murder. He pleaded guilty on February 5, 1993, and was sentenced accordingly. On February 6, 1995, the administrator of the estate, Luckye Collins, filed a wrongful-death against Sotka. The trial court dismissed the action as time-barred because the action was filed more than two years from the date of death. The court of appeals affirmed. We reversed, holding that the date of death is not the appropriate measure for starting the statute of limitations. "A wrongful death claim is not triggered merely by the death of a person, but by 'the death of a person * * * caused by a wrongful act.'" (Emphasis added.) R.C. 2125.01(A)(1). Therefore, in order for a wrongful death case to be brought, the death must be wrongful." (Citation omitted.) *Id.* at 509, 692 N.E.2d 581. Again, in *Collins*, we drew a distinction between the injury and the conduct that caused the injury. "The fact that a body was discovered and/or that a death took place is irrelevant unless there is proof that a defendant was at fault and caused the [*10] death." *Id.*

The reasoning of these cases applies with equal force here. These cases all stand for the proposition that the statute of limitations begins to run once the plaintiff acquires additional information of the defendant's wrongful conduct. For instance, consider the facts of *Browning*. Just as a negligent-credentialing claim is dependent on facts necessary to form a medical-malpractice action, so too is an employer intentional-tort claim dependent on facts necessary to form a workers' compensation action. According to *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St. 3d 115, 570 N.E.2d 1108, paragraph one of the syllabus, a plaintiff must prove three elements to support a claim for employer intentional tort. One of these elements is proof that the employer knew, with substantial certainty, that the employer's conduct would harm the worker. Thus, claims for both negligent credentialing and an employer intentional tort accrue only when the plaintiff acquires knowledge about the defendant above and beyond the injury itself.

Accordingly, we hold that a cause of action based upon an employer intentional tort accrues when the employee discovers, [*11] or by the exercise of reasonable diligence should have discovered, the workplace injury and the wrongful conduct of the employer.

This holding is consistent with the rationale underlying a statute of limitations and the discovery rule. Its underlying purpose is fairness to both sides. Once a plaintiff knows of an injury and the cause of the injury, the law gives the plaintiff a reasonable time to file suit. Yet if a plaintiff is

unaware that his or her rights have been infringed, how can it be said that he or she slept on those rights?

See Norgard v. Brush Wellman Inc., 95 Ohio St. 3d 165 at *2 - *11, (2002)

The *Brush Wellman* case shows that Ohio courts are very lenient in favor of the injured plaintiff as to what constitutes discovery.

G. Analysis of Trial Judge's Basis for Dismissal

"Plaintiff's Complaint establishes that he fled to Utah in 1991. He can not refute that , at that time he was aware of his involuntary commitment, forced medication, and the guardianship. By his own admission, he did not make any further inquiry for nearly 20 years." OSJ at 5. The court then finds that this did not constitute "due diligence". Plaintiff notes that the case law cited by the trial judge states that the party must exercise "reasonable diligence" to discover the wrong, and given the circumstances and the fact Plaintiff was unaware he had been wronged, his conduct was in fact reasonable, or at least there is an issue of fact. Further, whether the discovery rule applies is a fact intensive inquiry and must be made in light of the all the facts of the case, and here the trial judge never allowed discovery, and had Plaintiff been informed of the trial judge's concerns about the discovery rule, Plaintiff would have sought a Rule 56 motion for discovery.

How can Plaintiff be expected to investigate something he is not aware happened such as the disclosure of confidential information to his father to induce him to take guardianship and force medicate Plaintiff? Plaintiff, unaware this had happened, had no motivation to investigate anything. He was in Utah, had little money to investigate anything, no money to hire an attorney, was in fear of disclosing his location to anyone in fear he would be returned to Ohio, locked up and forced medicated for life, which was a legitimate fear. The system was broke as the court can see, both with what happens and COPH and the legal system that attempts to oversee what they do. Not until Plaintiff graduated from law school did he have any need or reason to inquire or investigate anything about his commitment and the details of what had happened, and in that course of that investigation Plaintiff learned of the basis for the present case.

Where a person is unaware that a wrong was committed, they can not be held to some high standard to investigate.

As such, the trial judge's analysis of the case and facts is very superficial and omits key analysis which Plaintiff could have provided had the trial judge given Plaintiff a chance to be heard relative to the trial judge's view of the facts and circumstances.

Looking at the OSJ, it becomes apparent why perhaps the trial judge ruled the way he did as he relied on case law that did not fit the facts of this case.

For example, the trial judge looked to a medical malpractice case and its holdings on how the discovery rule should apply. In a typical medical malpractice case the patient is aware they were operated on and it is a fact intensive inquiry as when the patient might have noticed something amiss.

In the present case, the medical malpractice did not arise out of a physical operation or some misdiagnosis. The medical malpractice arose out of the disclosure of congenital patient information to a third party. The reason Plaintiff included this cause of action is that the disclosure of that confidential information was in furtherance of, or done in the course of, Plaintiff's medical treatment. For example, Dr. Kavak wanted to medicate Plaintiff yet he could only do so on an emergency basis. Dr. Kavak then went to Plaintiff's father and disclosed Plaintiff's diagnosis and related information to get Plaintiff's father to take guardianship and order Plaintiff medicated. This is a heinous plan and act by a doctor. Here, the disclosure of the confidential information was to further Plaintiff's "treatment" and achieve the goals of the doctor. Thus it qualifies as a medical malpractice claim.

To summarize, (1) the trial judge expected Plaintiff to investigate something where Plaintiff had no reason to suspect a wrong had been committed, (2) trial judge failed to consider if Plaintiff's actions were reasonable given (a) Plaintiff's extreme poverty, (b) his distance from Ohio and (c) Plaintiff's legitimate fear that if he did attempt to investigate anything his location would be found out and his life would literally be over with, being spent in Chillicothe with the doctors there force medicating Plaintiff the rest of his life.

H. Comparison Between *Brush Wellman* and the Present Case

In *Brush Wellman* the plaintiff worked for a Beryllium processing company. In 1992 the plaintiff learned he had been formally diagnosed with chronic beryllium disease. Wouldn't that event have triggered the duty of the plaintiff to exercise due diligence? The court of appeal held that it did. The Ohio Supreme Court reversed, stating that the statute of limitations began to run in 1995 when the plaintiff learned that his employer, Brush Wellman was responsible for that injury.

In the present case, Plaintiff was aware that he was wrongfully institutionalized, force medicated and that there was a guardianship. However, Plaintiff was unaware that confidential information was disclosed to bring about that guardianship and subsequent forced medication. Thus the discovery rule should apply.

In *Brush Wellman* the plaintiff only learned when by chance he read information in a newspaper

that Brush Wellman was likely responsible for his illness. In the present matter Plaintiff, by chance almost, applied to law school where he then had a motivating reason to generally investigate the details of his commitment when coming up on the moral character evaluation. At that time he came across the detail showing the wrongful conduct of the Defendants.

That analysis and facts of *Brush Wellman* favor Plaintiff and the argument that the discovery rule should apply in the present case.

I. Defendant's Arguments for Summary Judgment Fail

While not addressed by the trial judge, Plaintiff shows that Defendant's arguments for summary judgment are lacking.

1. Breach of Confidence, Fiduciary Duty

Defendant claimed that a cause of action for a breach of confidence is really one for bodily and physical injury, and never addressed the actual merits of the breach of confidence or fiduciary duty claims.

While Plaintiff was injured as a result of the breach of confidence in having to flee Ohio and had very disastrous consequences on Plaintiff's relationship with his family, all of the elements for a breach of confidence and fiduciary duty claim are satisfied and that is the cause of action that must be used in the case.

The rule of law with respect to the discovery rule is that if the legislature has not stated one way or the other whether the discovery rule applies to a given set of facts or cause of action, it is up to the judiciary to decide whether it applies.

A breach of confidence claim would come under R.C. 2305.09(D) which Defendants claim does not receive the benefit of the discovery rule. MSJ at 8. That assertion is not supported by current Ohio Supreme Court case law. In *Harris v. Liston* (1999) 86 Ohio St.3d 203 [FN1] the Ohio Supreme Court cited with approval paragraph one of *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84 where the Ohio Supreme Court held, "Absent legislative definition, it is left to the judiciary to determine when a cause 'arose' for purposes of statutes of limitations." *Harris* was a case brought under 2305.09(D), and the Ohio Supreme Court clearly held in that case that the discovery rule applied to 2305.09(D) claims.

With respect to Defendant's claim that a breach of fiduciary duty is barred in 4 years absent fraud, that is not the case. In *Cundall v. U.S. Bank* (2009), 122 Ohio St. 3d at ¶24, the actual wording states: an "action against trustees for breach of trust involving tortious conduct such as bad faith,

negligence, and double-dealing is one that accrues, "in the absence of undiscovered fraud," when the trusteeship is terminated, and the action is barred in four years". In the present case, Plaintiff is not suing a trustee so that case and holding provides no guidance.

2. Medical Malpractice

a. **The confidential information disclosed in furtherance of, or done in the course of, Plaintiff's medical treatment.** For example, Dr. Kavak wanted to medicate Plaintiff yet he could only do so on an emergency basis. Dr. Kavak then went to Plaintiff's father and disclosed Plaintiff's diagnosis and related information to get Plaintiff's father to take guardianship and order Plaintiff medicated. This is a heinous plan and act by a doctor. Here, the disclosure of the confidential information was to further Plaintiff's "treatment" and achieve the goals of the doctor. Thus it qualifies as a medical malpractice claim.

A medical claim is defined by R.C. 2305.11 which states that a "medical claim" must arise out of the medical diagnosis, care or treatment of any person.

What has been missed by the Defendants in their claim that no medical claim is stated is that Dr. Kavak was unable to administer any medicine to Plaintiff as Plaintiff refused. Dr. Kavak, in order to treat and care for Plaintiff, disclosed the confidential information and defamed Plaintiff with his false diagnosis etc of Plaintiff in order to allow him to medicate and care for Plaintiff. Dr. Kavak's acts were done in furtherance of that goal to treat Plaintiff, and were done as part of the performance of his clinical responsibilities to medicate Plaintiff, and a medical claim is properly stated. At minimum, there is an issue of fact for the jury as to whether Dr. Kavaks actions were part of Plaintiff's treatment and care which should defeat a motion for summary judgment.

If Dr. Kavak was on his way to the medicine cabinet to medicate Plaintiff, and Plaintiff was standing in the way, and Dr. Kavak negligently or perhaps intentionally pushed Plaintiff out of the way, injuring Plaintiff, would there be a claim for medical malpractice? Was the wrong committed as part of Dr. Kavak's work? Was it during the necessary steps which he would take in the course of his treating Plaintiff? Was it outside the bounds of what is expected of a doctor? These questions are important to understand the liability of Dr. Kavak in the present case. Dr. Kavak committed the wrongs as part of his work efforts to medicate Plaintiff. His actions were outside the accepted conduct of a doctor.

Likewise, Dr. Kavak conveyed a false or wrong "medical diagnosis" to Plaintiff's father, in order to get his father to agree to take guardianship and medicate Plaintiff. This fully qualifies as medical malpractice.

A medical claim is also stated if it meets the criteria of R.C. 2305.113(E)(3):

(b) Claims that arise out of the medical diagnosis, care, or treatment of any person and to which either of the following applies:***

(ii) The claim results from the hiring, training, supervision, retention, or termination of caregivers providing medical diagnosis, care, or treatment.

In the present matter, there are sufficient facts to support a claim that Dr. Kavak's actions were the result of improper training or supervision by Netcare and/or the state of Ohio. Plaintiff should be permitted the opportunity to amend the complaint if necessary to make these allegations specifically. Further, discovery would have likely shown the facts to support such a claim, and discovery should be allowed into this matter prior to dismissal of this action.

Plaintiff can personally testify as to culture that exists at COPH/Twin Valley, at least at the time he was there, with respect to the complete disregard for the rule of law and a person's civil rights. That culture exists due to a lack of training and supervision. 100%. There is a massive culture to medicate persons at COPH at any and all costs.

For example, Plaintiff refused medication. Instead of honoring that, which is supported by law, the staff would barge into Plaintiff's room at 7 am or so, and the head nurse would have a needle in here hand, holding it out in front of her, pointed up, as if ready to inject Plaintiff. She would then say that she had an order from the doctor to medicate Plaintiff via injection if he refused to orally take the medicine. She would be accompanied by 1 or 2 staff and would say she was ready to have Plaintiff held down and inject him if he refused the medicine. Plaintiff was asleep all night and was not otherwise a threat, laying in bed quietly, to qualify for an emergency injection. See Declaration of Plaintiff accompanying the Amended Motion for Summary Judgment. Plaintiff complained to the only available person, the patient advocate who was supposed to represent the rights of Plaintiff to the administration, yet nothing was ever done.

Plaintiff was standing in the commons area of one of the wards and his new doctor approached him to talk. Plaintiff refused to talk to her. The doctor then said that Plaintiff's refusal to talk to her were signs he was catonic, and that catonic people are some of the most dangerous persons around, and then went to the nurse and on an emergency basis ordered Plaintiff injected with Haldol for 3 days. See Declaration of Plaintiff accompanying the Amended Motion for Summary Judgment. Plaintiff complained to the patient advocate who was supposed to represent the rights of Plaintiff to the administration, and to Ohio Legal Rights, whose attorney talked to the administration, yet nothing was

ever done to change anything by Netcare.

On one occasion Plaintiff witnessed similar treatment of a patient who had been sitting in a chair, quietly, in the commons area of the ward for 2 hours, and in fact appeared to be asleep. A staff meeting was also being held in a room next to where the patient was sitting with the psychiatrist about various patients. That meeting lasted about 1 ½ hours. The doctor/psychiatrist walked out of the meeting directly to the nurse's station, and ordered emergency medication of the patient, who had been sitting quietly. Plaintiff personally can say the patient was not, and in fact never was dangerous, or anything close to it, at any time he was there in the ward, and he had been there about 1 ½ months. The patient was mild mannered and never dangerous or presented an emergency to force medicate him. See Declaration of Plaintiff accompanying the Amended Motion for Summary Judgment.

When Plaintiff was physically denied the chance to meet with his attorney and then to attend his commitment hearing by hospital staff as outlined in Plaintiff's proposed Amended Complaint filed with his Motion to Amend the Complaint, he personally complained via a telephone call and conversation from COPH to Dr. Davis, yet nothing was done. See Declaration of Plaintiff accompanying his rule 56(F) motion for discovery.

These events are support that there is lax or no supervision, or deliberate indifference on the part of Netcare and/or the state, and is evidence they do not train properly their doctors. For example, not disclosing private confidential patient information should be a basic training issue. Yet there is evidence there is no training on that subject, or if there is no one cares if it is enforced.

Plaintiff's own stay there shows the culture where in order to medicate him the Dr. Kavak and/or other staff went to Plaintiff's father to take guardianship and declared him incompetent. Some evidence exists how wrong they were as Plaintiff finally escaped, went back to BYU and got a job as a software engineer and then went on to graduate from law school. Never having been back to a mental hospital. It not only shows or supports the presence of a lack of training and supervision at COPH and the culture there, it supports a claim that Plaintiff was in fact defamed.

b. Defendants next claim that Plaintiff failed to supply an affidavit of merit under Civ. R. 10(D).

i. When enacting Rule 10(D) the legislature intended it be used for actual physical medical type injuries, not for malpractice surrounding a breaches of confidence as in this case which took place during the care and treatment of a patient, or which resulted from a lack of training for supervision. This is supported by Rule 10(D)(2)(a) which plainly states that the "affidavit of merit shall be provided

by an expert witness pursuant to Rules 601(D) and 702 of the Ohio Rules of Evidence.” This is mandatory by the use of the word “shall”.

However, Ohio Evidence Rule 702 states:

A witness may testify as an expert if all of the following apply:

(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

See ORE 702(A).

Here, the expert witness in the affidavit must testify in accordance with ORE 702(D). However, Rule 702 requires that the subject matter of that affidavit relate to a matter “beyond the knowledge or experience possessed by lay persons”.

If the expert is testifying as to things within the grasp and understanding of a lay person – Defamation, Breach of confidence etc - then the expert is not permitted to testify pursuant to Rule 702. And if the expert can not testify pursuant to Rule 702 (which Rule 10(D) mandates) then he can not testify under Rule 10(D).

Rulings on evidentiary matters are the province committed to the discretion of the presiding judge in a case. Thus, whether or not the disclosure of private, confidential medical records to an unauthorized third party constitutes a violation of a duty of care of the physician is within the grasp of a lay person, then no affidavit is required because any expert is disallowed from testifying by ORE 702(A), and because Rule 10(D) mandates that expert to testify pursuant to ORE 702, the expert would have to violate ORE 702 in order to testify pursuant to Rule 10(D). However, Rule 10(D) doesn't allow the expert to violate ORE 702.

Because the wrongfulness of a disclosure by a physician of a patients confidential medical records to an unauthorized third party is easily within the grasp of a lay person, Rule 10(D) can not require an expert affidavit because an expert would be forbidden from testifying pursuant to ORE 702, and only if the expert can testify in accordance with ORE 702 can they testify in a Rule 10(D) affidavit.

ii. Rule 10(D) Must Consider a Litigant's Financial Ability to Pay An Expert

If a plaintiff can not afford to pay for an expert to complete the affidavit of Rule 10(D), there is some question as to the constitutionality of such a requirement. For example, if the expert were to charge \$1000, and a citizen had no ability to pay that sum, can they be denied access to the courts to redress a wrong done? There is no possible way that such an outcome could be constitutional under either the Ohio or Federal Constitutions. Thus there would have to be some waiver for such a

requirement for good cause shown, or the state would have to pay for the expert witness. The right-to-a-remedy provision of the Ohio Constitution's art. I, § 16 would be violated if those who could not afford an expert were denied access to the courts.

In the present case, Plaintiff is under severe financial conditions. Plaintiff had the filing fee waived and completed an affidavit/declaration to that effect. See also Declaration of Plaintiff accompanying the Amended Motion for Summary Judgment.

Because it is relevant here, Plaintiff notes he is a homeless person and barely has sufficient funds to pay for food and other necessities in life. See Declaration of Plaintiff accompanying the Amended Motion for Summary Judgment. That portrayal is not an exaggeration.

Because Plaintiff can not pay for such an expert, and does not expect to be able to pay for such an expert in the near future, due process of law must allow for some exception to the standard Rule 10(D) requirement for good cause such as poverty, assuming Rule 10(D) does require such an affidavit.

iii. Proper Procedure Not Followed

The proper procedure to follow if the appellant did not file an affidavit of merit pursuant to Rule 10(D) is for the Defendant to file a motion to dismiss under rule 12(B)(6) of the civil procedure rules. See *Fletcher v. University Hospitals of Cleveland* (2008) 120 Ohio St. 3d 167. Because Defendant failed to file a motion to dismiss under rule 12(B)(6), their request for dismissal and affirmance is procedurally deficient and must be denied.

For the following reasons, we hold that the proper response to the failure to file the affidavit required by Civ.R. 10(D)(2) is a motion to dismiss filed under Civ.R. 12(B)(6). We further hold that a dismissal of a complaint for failure to file the affidavit required by Civ.R. 10(D)(2) is an adjudication otherwise than on the merits. The dismissal, therefore, is without prejudice. Accordingly, we reverse the judgment of the court of appeals.

See *Fletcher*, Id. Paragraph ¶3.

iv. Dismissal Under 12(B)(6) Would Still Be Without Prejudice To Allow Chance To Cure Deficiency

Plaintiff can also cure the omission of the Rule 10(D) affidavit by filing an amended complaint which includes either the affidavit or, most likely, a motion for an extension of time to file such an affidavit.

... when a medical claim is dismissed for want of an affidavit of merit, that problem could be rectified in a refiling simply by including the requisite affidavit. However, if a case was dismissed with prejudice on its first filing for failure to comply with Civ.R. 10(D)(2), then that plaintiff would be foreclosed from seeking relief despite the fact that the plaintiff might very well be able to

obtain an affidavit of merit for purposes of refileing.

Id. ¶19.

Because courts are to construe the Civil Rules to achieve a just result, Civ.R. 1(B), *LaNeve v. Atlas Recycling, Inc.*, 119 Ohio St.3d 324, 2008-Ohio-3921, 894 N.E.2d 25, ¶ 21, and for the reasons outlined above, a dismissal for failure to comply with Civ.R. 10(D)(2) is without prejudice because it is an adjudication otherwise than on the merits.

Id. at ¶ 20.

v. No Facts to Review

Lastly, Rule 10(D)(2)(a)(i) requires the expert to review “all medical records” reasonably available.

In the present matter, there are no medical records to review. See Declaration of Plaintiff accompanying the Amended Motion for Summary Judgment. Any records concerning what took place at COPH, including medical diagnosis and related records have been destroyed, and were not microphiched. See *Id.* Further, at issue is not the actual diagnosis or physical/mental conditions, it is the disclosure of that information to an unauthorized third party that is at issue of the medical malpractice claim.

If an expert did testify pursuant to Rule 10(D), the expert would simply be giving an opinion based on a hypothetical set of facts presented to them as found in the Complaint. The ends of Rule 10(D) would be little served by such an affidavit.

The disclosure of that confidential medical information had as its ends to further Plaintiff's treatment at COPH. Specifically, the doctor and others at COPH wanted to medicate Plaintiff in an [very misguided] effort to better his “condition” or make him “better” etc. That disclosure, allowed or influenced or motivated Plaintiff's parents to then take guardianship, which would allow them to authorize the Doctor to medicate Plaintiff, against Plaintiff's wishes, which would allow Plaintiff to be medicated by the doctor and staff members at COPH.

c. Discovery Rule Applies to Defamation

Case Law Superseded

Contrary to Defendant's argument in the Motion for Summary Judgment, the discovery rule applies to the Defamation cause of action. Legal analysis of the applicable cases shows that the Ohio case law holding that the discovery rule does not apply to defamation has been over-ruled by the Ohio Supreme Court.

Defendant cites to *Palmer v. Westmeyer* (1988), 48 Ohio ap. 3d 296, 302 for the proposition that the discovery rule does not apply to defamation causes of action. *Palmer* cites to *Rainey v. Shaffer*

(1983), 8 Ohio app. 3d 262, 263. *Rainey* in turn cites to *Pearl v. Koch*, 5 Ohio Dec. 5 (1894) for its source of authority that the discovery rule does not apply in a defamation cause of action, even when the defamation was in private.

Pearl involved a case in slander as the present case. There the defamatory words were spoken yet not discovered by the plaintiff until after the statute of limitations set forth in R.C. 4983 (of 1894). The court in *Pearl* stated:

In *Howell v. Young*, 5 B. and C., 254 the same doctrine is affirmed, and the statute held to run from the time of the injury, that being the cause of the action, and not from the time of damages of discovery of the injury.

Pearl at *2.

The court in *Pearl* then goes on to discuss the discovery rule and fraud, which fraud was not present in that case. *Pearl* also discussed the application of the discovery rule which was allowed in courts of equity, and that in a court of law the discovery rule was not permitted. The court in *Pearl* then concluded that “In a court of the statute [the statute of limitations then found in R.C. 4983] must receive a strict construction, and an exception can not be introduced which the legislature has not authorized.” *Pearl* at 4.

Here then is the problem of *Pearl* and the cases that rely on it. *Pearl* held that the discovery rule would not apply in a court of law unless the legislature specifically authorized it. Based on that rule of law, *Pearl* held that the discovery rule did not apply to a case of defamation. That was 1894.

The rule of law relied on in *Pearl* – that the discovery rule would not apply in a court of law unless the legislature specifically authorized it – was overruled by the Ohio Supreme Court. In *O’Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, 4 OBR 335, 447 N.E.2d 727, paragraph one of the syllabus, the Ohio Supreme Court held, “**Absent legislative definition, it is left to the judiciary to determine when a cause ‘arose’ for purposes of statutes of limitations.**”. See also *Harris , v. Liston*, 86 Ohio St.3d 203 [FN1 of that decision] (1999)(noting paragraph one of *O’Stricker* and that that was the rule of law in Ohio).

This if the court in *Pearl* were to revisit their ruling in light of the state of the law on Ohio today, or rule on whether the discovery rule applies the outcome would be different because the underlying rule of law – that the legislature must specifically state that the discovery rule applies - has been overturned. Today’s rule of law – that “Absent legislative definition, it is left to the judiciary to determine when a cause ‘arose’ for purposes of statutes of limitations.” – must be applied to defamation causes of action,

and relying on holding from cases in 1894 are generating erroneous outcomes.

Another possible reason for the confusion in Ohio's discovery rule and its application stems from the merger of law and equity into the same court. Equity allowed for the discovery rule, while courts of law did not. Thus the discovery rule should apply in Ohio in courts of law as the courts of law and equity have been merged.

The Ohio Supreme Court found that the discovery rule applies when the application of the general rule that a cause of action exists from the time the act was committed would lead to the unconscionable result (equity) that the injured party's right to recovery can be barred by the statute of limitations before he is even aware of its existence. See Oliver v. Kaiser Cmty. Health Found., 449 N.E.2d 438, 440 (Ohio 1983).

In the present case, an unconscionable result would ensue without the application of the discovery rule. The wrong was committed in private and Plaintiff was unaware of the wrong until after the statute of limitations had passed.

For the above reasons, the discovery rule must apply in the present case.

Private v. Public Disclosure

In other jurisdictions, which Ohio should follow, the application of the discovery rule hinges on whether the disclosure was public or private. If private, the discovery rule applies.

Other states in the United States to have considered the matter has found that the discovery rule applies where the defamatory statements were published in private, and if there are any that held it doesn't, they have not considered the distinction between private and public disclosure. Simply because no Ohio Court has considered the distinction, or because the attorney for the plaintiff did not bring to the attention of the Ohio courts this distinction, does not bar Plaintiff in the present case from bringing this distinction to its attention, to allow this Court to do the necessary legal analysis to arrive at a just outcome based on the facts of the present case, and not the outcome of other defamation cases that differ factually, and thus legally.

Courts have applied the discovery rule to defamation cases, but only in the limited cases of defamatory material contained in confidential reports or files or was non-public. (See, e.g., Manguso v. Oceanside Unified School Dist. (1979) 88 Cal.App.3d 725, 730-731 (Manguso) [school principal placed libelous material in teacher's personnel file]; Staheli v. Smith (Miss. 1989) 548 So.2d 1299, 1303, and cases cited therein ["inherently undiscoverable" libel contained in a written recommendation against tenure]; Kittinger v. Boeing Co. (1978) 21 Wash.App. 484 [585 P.2d 812] [libel contained in

confidential business memoranda]; Armstrong v. Morgan (Tex.Civ.App. 1976) 545 S.W.2d 45 [false report by physician regarding plaintiff's medical condition]; Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc. (1975) 61 Ill.2d 129 [334 N.E.2d 160, 164] [defamatory credit report]; Flynn v. Associated Press, 519 N.E.2d at p. 1307 [suggesting that discovery rule only applies to "inherently unknowable" defamatory publications].)

By contrast, courts have generally declined to apply the discovery rule in circumstances where the defamatory statement is published in the mass media or receives publicity or is otherwise not a secret or concealed communication. (See, e.g., Shively v. Bozanich (2003), 31 Cal.4th 1230.1249-1251 and cases cited therein; Flotech, Inc. v. E. I. DuPont de Nemours Co. (D.Mass. 1985) 627 F.Supp. 358 [defamatory press release was not "inherently unknowable"].) This distinction has been explained thusly: "[C]ases involving claimed defamations by credit reporting agencies can be readily distinguished from those involving alleged defamations through so-called mass-media publication. In claimed libels involving, for example, magazines, books, newspapers, and radio and television programs, the publication has been for public attention and knowledge and the person commented on, if only in his role as a member of the public, has had access to such published information." (Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc., supra, 334 N.E.2d at p. 164; see also McGuinness v. Motor Trend Magazine, supra, 129 Cal.App.3d at p. 63.

This court must at least address this issue and use its own logic and reasoning and consider the facts of this case. The defamation was made privately, and few cases deserve as this one the application of the Supreme Court's holding that the discovery rule should apply where it would be unjust to prevent adjudication for a wrong simply because a party has no possible way to discover the wrong.

The Ohio Supreme Court found that the discovery rule applies when the application of the general rule that a cause of action exists from the time the act was committed would lead to the unconscionable result that the injured party's right to recovery can be barred by the statute of limitations before he is even aware of its existence. See Oliver v. Kaiser Cmty. Health Found., 449 N.E.2d 438, 440 (Ohio 1983).

In O'Stricker v. Jim Walter Corp. (1983), 4 Ohio St.3d 84, 4 OBR 335, 447 N.E.2d 727, paragraph one of the syllabus, the Ohio Supreme Court held, "Absent legislative definition, it is left to the judiciary to determine when a cause 'arose' for purposes of statutes of limitations." See also Harris, v. Liston, 86 Ohio St.3d 203 [FN1 of that decision] (1999)(noting paragraph one of O'Stricker and that that was the rule of law in Ohio).

Here the defamation was made in private. Adding importance to finding an injustice if the discovery rule does not apply, Plaintiff was forced to escape COPH and flee Ohio as a direct result of defamatory statement. Plaintiff fled COPH because he was being force medicated with Haldol, which is one of the most insidious substances known to mankind, as to the physical and mental torment it induces. Plaintiff had no choice. The reason however he was being force medicated was because Plaintiff's father took guardianship and made that decision. The only reason Plaintiff's father took guardianship and ordered the medication was due to Dr. Kavak and his breach of confidence and defamation. As the complaint states, had those events not taken place, Plaintiff would not have been force medicated, and would not have fled.

Having fled, Dr. Kavak and Netcare then benefit further from their wrongs as Plaintiff could not remain in Ohio where he could have had an opportunity to discovery the wrongs and use the Ohio court system to redress the defamation back in 1991 when they occurred. Further, Plaintiff had to flee with the shirt on his back to Utah and attempt to rebuild his life and was further in fear of making his location known as he feared being forced back to Ohio and re-medicated with Haldol. A rule of the courts is that a wrongdoer should not benefit from their wrongs, and without the discovery rule applying in these unique circumstances, that shall happen.

Because an injustice shall occur if the discovery rule does not apply, and because it is left to the judiciary to determine if the discovery rule applies – based on the facts and legal arguments and reasoning of each case – the discovery rule should apply.

J. Defendant was required to supply affidavits with its motion for summary judgment on the issue of the discovery rule.

“... a party who moves for summary judgment need not support its motion with affidavits, provided that the party does not bear the burden of proof on the issues contained in the motion.”

Dresher v. Burt, ___ Ohio St.3d ___, 1996-Ohio-107 at p. 37.

That being the case, the converse must be true that if the party who moves for summary judgment does bear the burden of proof on the issue contained in the motion then it must support its motion with affidavits

In the present matter, the issue which was dispositive in granting summary judgment was the discovery rule. Defendant bears the burden of proof at trial on this affirmative defense.

Because Defendant failed to provide any affidavit on the issue of the discovery rule, the motion for summary judgment must be denied.

K. Trial Judge Should Have Addressed The Arguments of Defendants For Summary Judgment and Denied Summary Judgment if Those Arguments Were Lacking

“If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.” Dresher v. Burt, ___ Ohio St.3d ___, 1996-Ohio-107 at p. 26.

In the present matter the legal and factual arguments of the Defendant’s motion for summary judgment were never addressed. The judge instead came up with his own separate reasons for summary judgment. See OSJ at 5. Defendants never raised a lack of reasonable or due diligence with respect to the discovery rule.

Plaintiff has shown that each of the arguments of the Defendants were lacking and thus summary judgment should have been denied as a matter of law. The “initial burden” of the defendants was met only as to their arguments and affidavits presented in their motion for summary judgment, which were not the same as the arguments of the trial judge for dismissal.

There are two options. First, this court can remand the case to the trial court and allow the judge to address the issues of the Defendants in their motion for summary judgment, and if those arguments fail, then summary judgment should be denied, or second, this court could likely address the merits of Defendant’s motion for summary judgment, and if found lacking, then the whole case can be remanded and reversal of dismissal is proper.

Rule 56 requires the Defendant to bear the burden of providing the legal and factual arguments for their motion and in the present matter the judge to stepped in without addressing the only arguments that summary judgment allows him to consider, the arguments presented in their motion for summary judgment.

“The requirement that a party seeking summary judgment disclose the basis for the motion and support the motion with evidence is well founded in Ohio law.” Dresher v. Burt, ___ Ohio St.3d ___, 1996-Ohio-107 at p. 29.

In the present matter the party seeking summary judgment never disclosed as a basis for summary judgment that Plaintiff did not exercise reasonable or due diligence to discovery the wrongs committed against him where Plaintiff had no idea they had been committed.

It is the Defendant, not the judge, who must disclose and present the arguments for summary judgment, and here Defendants did not inform the trial court of the basis for which summary judgment was granted, and summary judgment must therefore be denied and dismissal reversed in this case.

Issue #4 - Denial of Motion To Amend

(Found at OSJ at p. 5)

A. Rule of Law

1. A “motion for leave to amend should be granted absent a finding of bad faith, undue delay or undue prejudice to the opposing party.” Hoover v. Sumlin (1984), 12 Ohio St.3d 1, 6 (citation omitted).
2. A reviewing court may find an abuse of discretion when the court denies a motion, timely filed, seeking leave to file an amended complaint, where it is possible that plaintiff may state a claim upon which relief may be granted and no reason otherwise justifying denial of the motion is disclosed. Peterson v. Teodosio (1973), 34 Ohio St.2d 161, paragraph six of the syllabus.

B. Analysis

In the present matter there was no finding whatsoever by the trial judge of bad faith, undue delay or undue prejudice to the opposing party. In its opposition to the motion to amend the complaint, Netcare never claimed Plaintiff was acting in bad faith, that there was undue delay or that there was any prejudice. For these reasons denial of the motion to amend should be reversed. See Hoover v. Sumlin (1984), 12 Ohio St.3d at 6.

A separate basis exists for reversal based on Peterson v. Teodosio. In the present matter it “was possible” the proposed amendments stated “a claim upon which relief may be granted” and because the trial judge gave no basis for denial of the motion to amend other than saying that it was not deserved, which is functionally equivalent to giving no reason at all. It can be assumed safely that the denial of any motion to amend is because the judge believed it was not deserved. For these additional reasons denial of the motion to amend should be reversed.

- C. The proposed amended complaint mainly added claims which were related to the discovery of information in the documents received from probate court, which took them some to locate, with Plaintiff pressing them for them when they claimed nothing existed.

Therein Plaintiff learned that the COPH staff lied to the probate judge telling him that Plaintiff voluntarily refused not to attend his commitment hearing, where it was due to the nurse physically blocking Plaintiff’s ability to go to the hearing. Clearly, there was no way for Plaintiff to be aware of the existence of that note. While the chance to bring suit arising out of the original denial of the chance to attend the hearing likely might be lost, the discovery of that note allowed a cause of action for lying to the judge, which was newly discovered.

Plaintiff also discovered as previously shown that the original commitment Order was never signed by a judge. There was simply no way a person could suspect that this wrong had taken place.

Thus, on these causes of action, the discovery rule would apply and the amendment should have been allowed.

The judge provided little if any basis for denying the motion to amend and his denial should be reversed on that alone. A judge should give some basis for the denial, and here that was never given, other than saying it did not present a basis which justice would allow for it. Clearly, Plaintiff could have brought a separate action out of those facts, however, because all causes of action should be brought against a defendant, Plaintiff attempted to amend the complaint to include them in the present case. Because amendment should be liberally allowed under rule 15, Plaintiff did not anticipate the amendment would be denied. If the amendments are based on newly discovered evidence and those new claims based on those newly discovered facts are actionable, then it is an abuse of discretion to deny amendment.

It appears, from one word, that the trial judge denied amendment based on futility. OSJ at 5 uses the word "again" to preface the denial, and it appears that the trial judge is relying on Plaintiff's lack of diligence to attempt to discover the wrongs as the basis for denying the amendments.

As shown above, Plaintiff's actions were reasonable given the circumstances and his lack of awareness of any wrongdoing, and his poverty and plight that any attempts to discovery further wrongs would lead to his location and return to Ohio and the rest of his life as a ward of the state in Chillicothe in a broken system.

Certainly Plaintiff could not be required to attempt to discover notes from the court which disclose that the COPH staff lied to the judge when Plaintiff was unaware they had ever lied to the judge in the first place. Certainly a citizen should not be required to suspect that a judge would not have signed an Order committing him to COHP in the first place. Thus denial of the motion to amend was incorrect on these counts.

With respect to the breach of contract/forced contract that presents a closer issue. Plaintiff was unaware that the contract he had signed was invalid until he took contracts in law school. Perhaps that claim could be allowed so that the matter can be fully briefed so the judge can make an informed decision which might be a better approach than to deny amendment altogether on that claim.

The other cause of action was for what Plaintiff believes are very mild yet real problems he faces with his nervous system and uncontrolled muscular contractions. Plaintiff has noticed these for

some years, however, it never occurred to him until recently that these might be caused by the Haldol given to him. When that occurred, Plaintiff realized that the symptoms could be caused by the Haldol as it is a very powerful substance on a person's nervous and muscular system. There is no real way that Plaintiff sees that the discovery rule cannot apply to such circumstances and Plaintiff argues that this presents an issue of fact for the trier of fact as to whether it should apply, and amending the complaint to include this cause of action would be appropriate.

For these reasons, allowing amendment was proper and the judge abused his discretion. Rule 15 requires a judge to allow amendment liberally and when the judge does not follow that guideline, his discretion was abused because the furtherance of justice was not allowed.

D. Motion To Amend Filed First, Should have Been Ruled On First

The other issue that Plaintiff argues is relevant which might have changed the outcome, is that Plaintiff filed the motion to amend first, and the motion for summary judgment was filed later, yet ruled on first.

Plaintiff argues that the trial judge should have ruled on the motion to amend first as it was filed first and not considered the motion for summary judgment. This can be seen as relevant as the judge denied the motion to amend, or appears to have, based on the reasons for summary judgment.

The motion to amend clearly states valid causes of action for which the discovery rule should apply, and that is an issue of fact. Had the motion to amend been given, Defendant would have had to answer that new complaint and challenge its sufficiency via a motion for summary judgment or motion to dismiss. This likely would have changed the outcome as the new causes of action presented new issues under the discovery rule and new facts to support the application of the discovery rule, and Defendants might have then challenged the reasonableness of Plaintiff's efforts to discover the wrongs, and then Plaintiff could have briefed the matter and shown that he needed to conduct discovery in the case to factually support the claim that the discovery rule applied. Also had discovery been allowed other wrongdoing might have been discovered to support the case. For example, did the nurse act on her own when she blocked the doorway to prevent Plaintiff from meeting with his attorney and attending his commitment hearing, or was that encouraged by a doctor or Netcare itself. This is why it is so important to allow discovery in a case and to allow cases to be decided on their merits.

At least that opportunity should have been given. As it stands the trial judge decided the case based on his own reasons he supplied at summary judgment without allowing any challenge to those reasons or to hear Plaintiff out on the matter, and this is a clear denial of due process of law. The

judge7also never allowed plaintiff the chance to show he needed discovery to challenge the judge's basis for dismissal.

II. Issue #1,4

Failure to allow Plaintiff the chance to file a Rule 56 Motion For Discovery was Prejudicial to factually counter the trial judge's reasons which he claimed showed dismissal was proper was error where the moving party never raised those factual contentions in their moving papers and where the trial judge raised these issues for the first time in his Order Allowing summary judgment.

(Found at OSJ at p. 4)

A. Rule of Law

“The requirement that a party seeking summary judgment disclose the basis for the motion and support the motion with evidence is well founded in Ohio law.” Dresher v. Burt, ___ Ohio St.3d ___, 1996-Ohio-107 at p. 29.

“the moving party must state specifically which areas of the opponent's claim raise no genuine issue of material fact and such assertion may be supported by affidavits or otherwise as allowed by Civ.R. 56(C).” Id. at 29.

“Requiring that the moving party provide specific reasons and evidence gives rise to a reciprocal burden of specificity for the non-moving party [outlined in Civ.R. 56(E)].” Id. at 30.

B. Analysis

The only reciprocal burden Plaintiff had as the non-moving party was to address the legal arguments specifically raised by the moving party and if necessary produce evidence to counter the claimed legal or factual weakness of the complaint, or seek leave of court to conduct the necessary discovery.

Whether or not the discovery rule applies in a case as this is an issue of fact. That means discovery is necessary to develop the facts of the case so the trier of fact can make an informed decision.

Having only a reciprocal burden to specifically address the legal and factual matters necessary to counter the specific arguments of the moving party, Plaintiff was not under any obligation to seek discovery or provide an affidavit to counter any factual matters regarding whether or not he exercised reasonable diligence.

Because the trial judge raised his own reasons, which were never covered by the moving party, Plaintiff did not provide his own affidavit or seek discovery to provide the necessary evidence to show he did in fact exercise reasonable diligence. Reversal of dismissal and remand to allow Plaintiff to provide such an affidavit or seed such discovery is necessary in this case.

C. Dismissing a case without the chance to do discovery is a severe step and must be taken with caution.

The motion for discovery was denied because Plaintiff only sought discovery into the Dr. Kavak/Netcare association and whether Netcare in fact had some administrative control over COPH.

These were the ONLY factual challenges to the pleadings or evidence available in the case and according to Rule 56, Plaintiff was only obligated to produce affidavits or evidence (or a motion to seek such discovery) related to those factual issues. Further, NOWHERE did Netcare ever ever challenge or claim that Plaintiff failed to reasonably attempt to discovery the other wrongs alleged in the complaint. Thus Plaintiff had no obligation under Rule 56 to produce evidence to counter what they never challenged OR to seed discovery into areas they never challenged.

The motion for summary judgment should have been denied on the challenges raised by Defendant and with that denial Plaintiff would have been permitted to proceed in the case and perform discovery and prove up the facts of his case, and ideally those of the proposed First Amended complaint.

Issue #3

The right to add claims for the violation of due process of law regarding (1) the discovery that no judicial officer signed Plaintiff's papers to forceably take him off the streets and subject him to an evaluation, where Plaintiff was observed doing nothing other than going out for a jog and doing sit ups by where he lived, legally, posing no danger to himself or anyone, whatsoever, (2) the discovery that COPH staff lied to the judge after preventing Plaintiff from attending his hearing, telling the judge that Plaintiff voluntarily refused to attend the hearing have grave Constitutional importance under both the state and federal constitution provisions mandating due process of law and the right to be free from unreasonable seizure.

While the court of appeals ignored these issues directly, that it would implicitly require a person to have to flee Ohio in literal fear for their existence – being sent to Chillicothe for likely the rest of their life and be force medicated with Haldol – with on \$.25 in their pocket all as a result of the wrongdoing of Defendant who fully denied Plaintiff a chance to attend his hearings putting Plaintiff in

fear that he'll never again get a chance to attend any other hearings if his whereabouts is discovered and he is forced back to COPH only to have Netcare continue to lie to the judges and prevent him from attending his hearings, this issue can not be decided as a matter of law, as material issues of fact exist and as stated above, Plaintiff was denied his chance to do discovery as the Judge simply came up with his own reasons without briefing them after the summary judgment matter was fully briefed.

V. Conclusion, Relief Sought

The case needs to be remanded, Plaintiff allowed to amend his complaint and the issues of fact surrounding the discovery rule need developing at discovery and the chance to allow these issues of fact to be decided by a jury.

Dated May 5, 2012



Aaron Raiser

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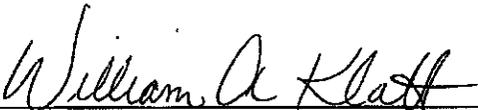
IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

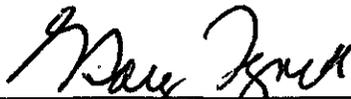
Aaron Raiser,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 11AP-494
v.	:	(C.P.C. No. 10CVA-08-12622)
	:	
Netcare Access,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

JOURNAL ENTRY

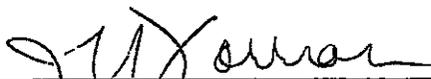
For the reasons stated in the memorandum decision of this court rendered herein on March 20, 2012, it is the order of this court that appellant's motion for reconsideration is denied. Costs are assessed against appellant.



 Judge William A. Klatt



 Judge G. Gary Tyack



 Judge Julia L. Dorrian

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IN THE COURT OF APPEALS OF OHIO

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OHIO

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Aaron Raiser,	:	
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Plaintiff-Appellant,	:	
	:	
v.	:	No. 11AP-494 (C.P.C. No. 10CVA-08-12622)
	:	
Netcare Access,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

MEMORANDUM DECISION

Rendered on March 20, 2012

Aaron Raiser, pro se, and Heather Keck.

Kegler, Brown, Hill & Ritter, Timothy T. Tullis and Traci A. McGuire, for appellee.

ON MOTION FOR RECONSIDERATION

PER CURIAM.

{¶ 1} Appellant, Aaron Raiser ("appellant") has filed a motion for reconsideration of this court's decision in *Raiser v. Netcare Access*, 10th Dist. No. 11AP-494 (Dec. 30, 2011) (memorandum decision). In that decision, we overruled appellant's three assignments of error and affirmed the trial court's judgment denying appellant's motion to amend the complaint and granting summary judgment in favor of appellee Netcare Access ("appellee").

{¶ 2} "The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been." *Matthews v. Matthews*, 5 Ohio App.3d 140 (10th Dist.1981), paragraph two of the syllabus. Reconsideration will be denied where the moving party simply seeks to "rehash the

arguments [the party] made in its appellate brief." *Garfield Hts. City School Dist. v. State Bd. of Edn.*, 85 Ohio App.3d 117, 127-28 (10th Dist.1992).

{¶ 3} In his motion for reconsideration, appellant misconstrues this court's prior decision, asserting that we concluded that the discovery rule did not apply to his claims. However, in our prior decision, this court explicitly stated that we did not determine whether the discovery rule applied to appellant's claims but that, for the purposes of analysis, we would consider the claims as if the discovery rule applied to them. Even under that analytical framework, this court found that the statute of limitations barred appellant's claims.

{¶ 4} After asserting that our prior decision held that the discovery rule did not apply to his claims, appellant then argues that we misapplied the discovery rule. In our prior decision, we held that, taking appellant's factual assertions as true, he had sufficient knowledge when he fled Ohio in June 1991 that would lead a reasonable person to investigate potential legal claims against those who had wronged him. In his motion for reconsideration, appellant argues that there was no "alerting event" triggering his duty to investigate until "by chance he decided to practice law and had a need to investigate that matter." (Appellant's motion for reconsideration, 3.) Appellant cites to *Browning v. Burt*, 66 Ohio St.3d 544 (1993), and *Norgard v. Brush Wellman, Inc.*, 95 Ohio St.3d 165, 2002-Ohio-2007, in support of this argument. However, appellant's case is more analogous to this court's decision in *Luft v. Perry Cty. Lumber & Supply Co.*, 10th Dist. No. 02AP-559, 2003-Ohio-2305. The plaintiff in *Luft* asserted various claims against multiple defendants arising from problems with paint that had been applied to structures the plaintiff owned. *Id.* at ¶ 2-4. The trial court granted summary judgment as to certain of the defendants who had supplied the paint and done the painting work on the grounds that the statute of limitations had expired as to the claims against those defendants. *Id.* at ¶ 53. On appeal, the plaintiff asserted that the trial court erred in granting summary judgment and that the statute of limitations did not begin to run until he was notified that those defendants might have been responsible for his damages. *Id.* at ¶ 54. This court affirmed the trial court's grant of summary judgment, finding that the plaintiff's realization that he was having problems with the paint was a sufficient "alerting event" to

place him on notice of the need to investigate an action against those defendants. *Id.* at ¶ 58.

{¶ 5} As we noted in our prior decision, taking appellant's assertions as true, when appellant escaped medical confinement and fled Ohio in June 1991, he knew that he had been involuntarily committed, that his father had taken guardianship over him, and that he had been medicated without his consent. Similar to the plaintiff in *Luft*, appellant's knowledge of these facts was sufficient to trigger his obligation to investigate how he came to be involuntarily committed, placed under guardianship, and force-medicated and any potential legal claims he may have had arising from those events. Accordingly, even the longest statute of limitations that could have applied to any of appellant's claims expired well before he filed his complaint on August 26, 2010. This issue was properly considered in our prior decision and does not provide a basis for reconsideration.

{¶ 6} Appellant also seeks reconsideration of the portion of our prior decision affirming the trial court's denial of appellant's motion for additional discovery under Civ.R. 56(F). Appellant argues that the lack of a properly notarized affidavit in support of his Civ.R. 56(F) motion was a non-jurisdictional issue and that this court *sua sponte* raised the issue for the first time on appeal. However, we note that appellee raised the lack of a proper affidavit in its memorandum in opposition filed with the trial court. Moreover, in our prior decision, the finding that appellant failed to file a proper affidavit was merely an *additional* reason for affirming the trial court's denial of the motion for additional discovery. This does not provide a basis for reconsideration.

{¶ 7} Finally, appellant appears to renew his argument that he was entitled to an opportunity to seek additional discovery under Civ.R. 56(F) to establish that he exercised reasonable diligence in discovering his claims against appellee. However, as noted in our prior decision, appellant never filed a motion seeking discovery into this subject. Thus, there was no final appealable order related to this matter for this court to review. With respect to this matter, appellant's motion for reconsideration essentially rehashes the arguments raised in his appellate brief. This does not constitute sufficient grounds for granting a motion for reconsideration. *Garfield Hts.*, 85 Ohio App.3d at 127.

{¶ 8} Appellant's motion for reconsideration does not demonstrate an obvious error in this court's decision, and it does not raise an issue this court did not consider or did not fully consider. Accordingly, we deny appellant's motion for reconsideration.

Motion for reconsideration denied.

KLATT, TYACK & DORRIAN, JJ., concur.

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COURT OF APPEALS
FRANKLIN CO. OHIO

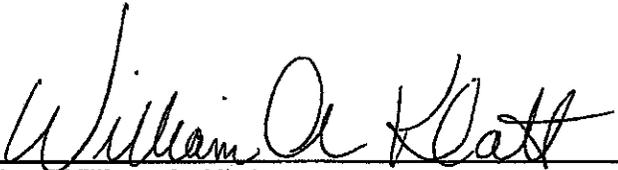
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CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Aaron Raiser,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 11AP-494
v.	:	(C.P.C. No. 10CVA-08-12622)
	:	
Netcare Access,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

JUDGMENT ENTRY

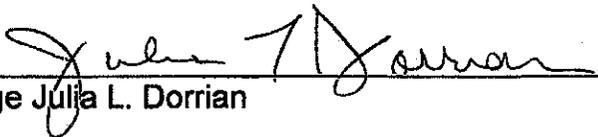
For the reasons stated in the memorandum decision of this court rendered herein on December 30, 2011, appellant's three assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.



Judge William A. Klatt



Judge G. Gary Tyack



Judge Julia L. Dorrian

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Aaron Raiser, :
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 Plaintiff-Appellant, :
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 v. :
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 Netcare Access, :
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 Defendant-Appellee. :

No. 11AP-494
(C.P.C. No. 10CVA-08-1262)
(REGULAR CALENDAR)

FILED
COURT OF APPEALS
TENTH APPELLATE DISTRICT
OHIO
2011 DEC 30 PM 2:07
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MEMORANDUM DECISION

Rendered on December 30, 2011

Aaron Raiser, pro se, and Heather Keck.

Kegler, Brown, Hill & Ritter, Timothy T. Tullis and Traci A. McGuire, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

PER CURIAM.

{¶1} Plaintiff-appellant, Aaron Raiser ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas denying a motion for discovery under Civ.R. 56(F), denying a motion to amend appellant's complaint, and granting summary judgment in favor of defendant-appellee, Netcare Access ("appellee"), on the claims in appellant's complaint. For the reasons that follow, we affirm.

{¶2} Appellant states that he is currently a resident of California but that he was a resident of Franklin County, Ohio, between January 1989 and June 1991. Appellant claims that, at some point during that period, he was institutionalized at the Central Ohio

Psychiatric Hospital ("COPH"). Appellant claims that his doctor at COPH, Dr. Kavak, or the COPH staff disclosed confidential medical information to appellant's father in an attempt to persuade appellant's father to seek guardianship over appellant. He states that his father then sought and was awarded guardianship. Appellant further claims that Dr. Kavak or the COPH staff also disclosed confidential medical information in order to persuade his father to allow forced medication of appellant. He claims that he was subjected to forced injections of the medication Haldol.

{¶3} Appellant claims that he escaped COPH and fled to Utah. At some point thereafter, appellant re-enrolled in college and became a software engineer. Appellant claims that he then attended and graduated from law school. As part of the process for applying to the practice of law, appellant began to investigate the events surrounding his commitment to COPH. Appellant claims that, as part of this investigation, he learned that Dr. Kavak had disclosed false and confidential information to his father.

{¶4} On August 26, 2010, appellant filed a complaint in the Franklin County Court of Common Pleas, asserting claims of breach of fiduciary duty, breach of confidence, medical malpractice, and defamation against appellee and various John Doe defendants. On March 22, 2011, appellant moved to file an amended complaint, which would add two claims for denial of due process of law, a claim for "coerced inducement to contract," and a claim for personal injury. Appellee moved for summary judgment on all claims contained in the complaint. Appellant then filed a memorandum in opposition to summary judgment and a motion for additional discovery under Civ.R. 56(F). The trial court denied appellant's motion for discovery and motion to amend the complaint and granted appellee's motion for summary judgment on all claims in the complaint.

{¶5} Appellant appeals the trial court's judgment, setting forth the following assignments of error for this court's review:

[1.] Summary judgment was improper.

[2.] Amending the complaint should have been allowed.

[3.] Failure to allow [Appellant] the chance to file a Rule 56 Motion For Discovery to factually counter the trial judge's own reasons which he claimed showed dismissal was proper was prejudicial error where the moving party never raised those factual or legal contentions in their moving papers and where the trial judge raised these issues for the first time in his Order granting summary judgment.

{¶6} As an initial matter, we note that appellant filed his briefs in this appeal and his pleadings in the court below pro se. Pro se litigants are generally held to the same rules and procedures as litigants who are represented by counsel. *Williams v. Griffith*, 10th Dist. No. 09AP-28, 2009-Ohio-4045, ¶21. "Although appellate courts often afford some leniency to pro se appeals, they do not 'conjure up questions never squarely asked or construct full-blown claims from convoluted reasoning.' " *Id.*, quoting *State ex rel: Kamasu v. Tate* (1992), 83 Ohio App.3d 199, 206.

{¶7} In his first assignment of error, appellant asserts that the trial court erred in granting summary judgment in favor of appellee on the claims in appellant's complaint. Appellant asserted four causes of action in his complaint: breach of fiduciary duty, breach of confidence, medical malpractice, and defamation. The trial court granted summary judgment based on its conclusion that the statute of limitations barred each of appellant's claims.

{¶8} "Appellate review of summary-judgment motions is de novo." *Capella III, L.L.C. v. Wilcox*, 190 Ohio App.3d 133, 2010-Ohio-4746, ¶16, citing *Andersen v. Highland*

House Co., 93 Ohio St.3d 547, 548, 2001-Ohio-1607. "De novo appellate review means that the court of appeals independently reviews the record and affords no deference to the trial court's decision." *Holt v. State*, 10th Dist. No. 10AP-214, 2010-Ohio-6529, ¶9 (internal citations omitted). Summary judgment is appropriate where "the moving party demonstrates that (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made." *Capella III* at ¶16, citing *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶6. Therefore, we undertake an independent review to determine whether appellee was entitled to judgment as a matter of law.

{¶9} Appellant's claims arise from events that occurred between January 1989 and June 1991. Appellant filed his complaint in the trial court on August 28, 2010. Thus, appellant seeks to recover for events that occurred approximately 20 years prior to the filing of his complaint. Under Ohio law, appellant's defamation and medical malpractice claims are each subject to a one-year statute of limitations. R.C. 2305.11; 2305.113. With respect to the breach of fiduciary duty and breach of confidence claims, it is difficult to determine the nature of the injuries alleged and, thus, difficult to ascertain what statute of limitations would apply to these claims. Appellee argues that these claims sound in negligence resulting in bodily or personal injury and, thus, are subject to a two-year statute of limitations under R.C. 2305.10. However, these claims might fall within the four-year "catch-all" statute of limitations under R.C. 2305.09. Therefore, the longest possible statute of limitations that could apply to any of the claims in appellant's complaint is four years. On the face of the complaint, because appellant seeks to recover for

injuries arising from events that allegedly occurred 20 years ago, appellant's claims would be barred by the applicable statutes of limitations.

{¶10} Appellant asserts that his claims are not time-barred, however, because they are subject to the discovery rule. "The discovery rule provides that a cause of action does not arise until the plaintiff knows, or by the exercise of reasonable diligence should know, that he or she has been injured by the conduct of the defendant." *Flagstar Bank, F.S.B. v. Airline Union's Mtge. Co.*, 128 Ohio St.3d 529, 2011-Ohio-1961, ¶14. The rule was first applied in a medical malpractice case but has since been applied in cases involving several areas of law. *Id.* at ¶15. Appellant asserts that he escaped from COPH and fled to Utah with only 25 cents in his pocket. He further claims that he was in fear that, if anyone in Ohio discovered his location, he would be seized and returned to Ohio for further confinement and treatment. Appellant argues that these factors prevented him from investigating the circumstances surrounding his commitment and discovering any causes of action that he may have had against appellee or other parties. Appellant asserts that he only learned of the events giving rise to his claims much later as he was preparing to apply for admission to the practice of law. Thus, appellant argues, the statute of limitations on his claims did not begin to run until he obtained this information.

{¶11} The trial court concluded that, even if the discovery rule applied to the claims in appellant's complaint, those claims would still be barred by the statute of limitations because appellant did not exercise due diligence in investigating any potential claims during the 20 years between his flight from Ohio and the filing of his complaint.¹

¹ In this decision, we do not determine whether the discovery rule actually applies to any of appellant's claims. Rather, for purposes of analysis, we consider these claims as if the discovery rule applied to them. Even under this analysis, we find that appellant's claims were barred by the statute of limitations.

After reviewing appellant's assertions, we reach the same conclusion. "The discovery rule tolls the statute of limitations only until a plaintiff has an ' "indication of wrongful conduct of the defendant." ' " *Dalesandro v. Ohio Dept. of Transp.*, 10th Dist. No. 10AP-241, 2010-Ohio-6177, ¶21, quoting *Twee Jonge Gezellen, Ltd. v. Owens-Illinois, Inc.* (C.A.6, 2007), 238 Fed.Appx. 159, 163, quoting *Norgard v. Brush Wellman, Inc.*, 95 Ohio St.3d 165, 2002-Ohio-2007, ¶10. " ' "If a person has knowledge of such facts as would lead a fair and prudent man, using ordinary care and thoughtfulness, to make further inquiry, and he fails to do so, he is chargeable with knowledge which by ordinary diligence he would have acquired." ' " *Dalesandro* at ¶21, quoting *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio St.3d 179, 181, quoting *Schofield v. Cleveland Trust Co.* (1948), 149 Ohio St. 133, 142. Moreover, "[a] plaintiff need not have discovered all relevant facts necessary to file a claim to trigger the statute of limitations." *Dalesandro* at ¶22.

{¶12} Taking as true appellant's assertions regarding the events leading to the filing of his complaint, it appears that he did not exercise reasonable diligence in investigating any potential claims. Upon fleeing from COPH to Utah, appellant was aware that he had been involuntarily committed, that his father had taken guardianship over him, and that he had been medicated without his consent. Knowledge of these facts would lead a reasonable person to investigate potential legal claims against those who had wronged him.

{¶13} Appellant argues that, when he arrived in Utah, he lacked the financial resources to investigate any potential claims and that he feared revealing his location and being forced to return to Ohio for further confinement. However, appellant cites no case law establishing that these factors would shield him from exercising reasonable diligence

to discover any claims he may have had arising from his commitment to CPH. Moreover, appellant asserts that, at some point after fleeing Ohio, he was able to return to college, become a software engineer, and attend law school. Appellant admits that he only began to investigate the events surrounding his commitment once he undertook the process of applying for admission to practice law. Thus, we must assume that, when appellant re-enrolled in college and when he was employed as a software engineer, he was no longer subject to the financial limitations and fear of being returned to Ohio that initially prevented him from investigating any potential claims. Accordingly, under these circumstances, we find that even if the discovery rule applies to appellant's claims, he had sufficient knowledge in 1991 that reasonable diligence would have led him to make further investigation of potential claims that he may have against appellee or others arising from his commitment and forced treatment. Therefore, because approximately 20 years passed between the events giving rise to appellant's complaint and the filing of that complaint, appellant's claims are barred by operation of the statute of limitations.

{¶14} Accordingly, appellant's first assignment of error is without merit and is overruled.

{¶15} In his second assignment of error, appellant asserts that the trial court erred by denying his motion to amend his complaint. In his proposed amended complaint, appellant sought to add two claims of denial of due process under 42 U.S.C. 1983, a claim of "coerced inducement to contract," and a claim for personal injury. The trial court denied appellant's motion to amend the complaint.

{¶16} Civ.R. 15(A) provides that, when leave of court is required to amend a complaint, it "shall be freely given when justice so requires." This rule "favors a liberal

policy of granting leave to amend a pleading when the trial court is faced with a motion beyond the time when amendments are automatically allowed." *Grenga v. Youngstown State Univ.*, 10th Dist. No. 11AP-165, 2011-Ohio-5621, ¶14. A trial court's decision on a motion to amend a complaint is reviewed for abuse of discretion. *Sullivan v. Wilkinson*, 10th Dist. No. 03AP-117, 2003-Ohio-7028, ¶16, citing *Wilmington Steel Prods., Inc. v. Cleveland Elec. Illuminating Co.* (1991), 60 Ohio St.3d 120, 122. An abuse of discretion occurs where the trial court's attitude is " 'unreasonable, arbitrary or unconscionable.' " *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶17} The trial court denied appellant's motion to amend based on its finding that this was not a case where justice required granting leave to amend the complaint. Appellant sought to amend the complaint to include two claims of denial of due process under 42 U.S.C. 1983. Those claims would be subject to a two-year statute of limitations. *White v. Unknown*, 10th Dist. No. 09AP-1120, 2010-Ohio-3031, ¶8. Appellant also sought to add a claim for personal injury, which likewise would be subject to a two-year statute of limitations. R.C. 2305.10(A). See also *Duckworth v. Burger King Corp.*, 159 Ohio App.3d 540, 2005-Ohio-294, ¶16 (referring to the two-year statute of limitations for personal injury claims).

{¶18} Appellant also sought to add a claim for "coerced inducement to contract." Appellant claimed that, before he left COPH, he was coerced into signing an agreement that he would not sue anyone affiliated with the hospital. As appellee notes, duress is generally a contract defense rather than the basis for a cause of action on a contract. See *Shearer v. VCA Antech, Inc.*, 10th Dist. No. 11AP-44, 2011-Ohio-5171, ¶22 (referring

to fraud, duress, and unconscionability as state law contract defenses). See also *Brown v. Vaniman* (Aug. 20, 1999), 2d Dist. No. 17503 ("Duress is typically asserted as an affirmative defense. It does not state a cause of action for which relief can be granted."). However, assuming that appellant could assert some sort of cognizable claim based on the contract, it would likely be subject to a 15-year statute of limitations under R.C. 2305.06.

{¶19} Each of the claims appellant sought to add to the complaint was based on events that allegedly occurred between 1989 and 1991. Accordingly, even under the 15-year statute of limitations for a claim arising upon a contract, appellant's proposed amended claims would be time-barred. Further, similar to the claims in the original complaint, these claims would be barred by the statute of limitations even if they were subject to the discovery rule because appellant had sufficient knowledge in 1991 that reasonable diligence would have led him to make further investigation of his potential claims.

{¶20} Thus, appellant's proposed amendment would be futile because each of the claims he sought to add to the complaint have been barred by the statute of limitations. Despite the policy favoring liberal amendment of pleadings, a trial court does not commit an abuse of discretion by denying a motion to amend when the amendment would be futile. *Bushman v. Mid-Ohio Regional Planning Comm.* (1995), 107 Ohio App.3d 654, 659-60. Under these circumstances, the trial court did not err by denying appellant's motion to amend his complaint.

{¶21} Accordingly, appellant's second assignment of error is without merit and is overruled.

{¶22} In his third assignment of error, appellant asserts that the trial court erred by failing to permit him to file a motion for additional discovery under Civ.R. 56(F). Appellant appears to argue that, because the trial court determined that his claims would be barred by the applicable statutes of limitations even if the discovery rule applied to those claims, he was entitled to an opportunity to seek additional discovery under Civ.R. 56(F) to establish that he exercised reasonable diligence in discovering his claims against appellee. However, appellant never filed a motion seeking discovery into this subject, nor did he file any sort of request to file such a motion. Thus, there is no final appealable order for this court to review; absent a motion for discovery or request to file a motion for discovery, the trial court could not issue an order denying such motion. See generally *Estate of Beavers v. Knapp*, 175 Ohio App.3d 758, 2008-Ohio-2023, ¶75 ("[A]ppellate jurisdiction is limited to review of final orders or judgments that are appealable."). Accordingly, to the extent that appellant's third assignment of error claims that the trial court erred by denying him the opportunity to seek discovery into these matters, that assignment of error is overruled.

{¶23} We note that appellant filed a motion for discovery under Civ.R. 56(F) regarding appellee's assertion that it did not own or operate COPH and that it did not employ Dr. Kavak. The trial court denied this motion based on its conclusion that the statute of limitations issues were dispositive of appellant's claims. Therefore, appellant's third assignment of error may be intended to appeal that ruling, and we will consider it in this context.

{¶24} Civ.R. 56(F) provides that "[s]hould it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons

stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just." A party seeking a continuance or additional discovery under Civ.R. 56(F) bears the burden of demonstrating why the party cannot present sufficient facts to oppose summary judgment without the continuance or additional discovery. *Culbreath v. Golding Ent. LLC*, 10th Dist. No. 05AP-1230, 2006-Ohio-2606, ¶13. "Whether a party has met its burden under Civ.R. 56(F) is within the trial court's discretion, and a trial court's denial of a motion for continuance will not be reversed absent an abuse of discretion." *Id.* at ¶14. See also *All Erection & Crane Rental Corp. v. Bucheit*, 7th Dist. No. 05 MA 16, 2006-Ohio-889, ¶32 ("Our general standard of review in determining whether the trial court erred in failing to continue the case and compel further discovery is an abuse of discretion."); *Clark Cty. Solid Waste Mgt. Dist. v. Danis Clarkco Landfill Co.* (1996), 109 Ohio App.3d 19, 38 (holding that abuse of discretion standard applied in determining whether trial court erred by granting summary declaratory judgment without providing additional discovery).

{¶25} Appellee moved for summary judgment on appellant's complaint, asserting that it never employed Dr. Kavak and did not operate or control COPH, that appellant's breach of fiduciary duty, breach of confidence, and defamation claims were barred by the statute of limitations, that the discovery rule did not apply to those claims, and that appellant's medical malpractice claim failed as a matter of law. In response, appellant moved for discovery under Civ.R. 56(F), explaining that he needed to obtain evidence to counter appellee's assertion that it did not employ Dr. Kavak and that it did not own or

operate COPH. Appellant did not indicate that he intended to seek discovery into matters related to the statutes of limitations or the history of his claims.

{¶26} The trial court ultimately granted appellee's motion for summary judgment based on its conclusion that appellant's claims were barred by the statute of limitations. Because appellant only planned to seek discovery regarding whether appellee employed Dr. Kavak and operated or controlled COPH, any information he obtained would not have related to the application of the statute of limitations. Thus, even if appellant's motion for discovery had been granted, the trial court likely would still have granted summary judgment for appellee based on the statute of limitations. Under these circumstances, we cannot conclude that the trial court acted in an unreasonable, arbitrary, or unconscionable manner by denying discovery into subjects that did not relate to the court's basis for rejecting appellant's claims.

{¶27} Moreover, under Civ.R. 56(F), a party must submit an affidavit stating the reasons justifying an extension of discovery. *Morantz v. Ortiz*, 10th Dist. No. 07AP-597, 2008-Ohio-1046, ¶22. An affidavit is a sworn statement, made under penalty of perjury, and must appear, on its face, to have been made before the proper officer and in compliance with all legal requirements. *Gumins v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 10AP-941, 2011-Ohio-3314, ¶12. Appellant's motion was accompanied by a signed "declaration" explaining why additional discovery was necessary, but this document did not constitute an affidavit because it was not made under penalty of perjury and was not made in the presence of an officer authorized to witness such statements. Therefore, to the extent that appellant's third assignment of error constitutes an appeal of the trial court's denial of his motion for discovery under Civ.R. 56(F), the assignment of

error is overruled.

{¶28} Accordingly, appellant's third assignment of error is without merit and is overruled.

{¶29} For the foregoing reasons, appellant's three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

KLATT, TYACK and DORRIAN JJ., concur.

Appendix A

See Appendix A
to opening Brief
in Court of Appeals

Certificate of Service

I, Aaron Raiser, hereby certify that on may 5, 2012, I deposited in the U.S. Mail, postage prepaid

Notice of Appeal ;Memorandum In Support of Jurisdiction

to:

Traci McGuire
Suite 1800
65 E. State St.
Columbus, Ohio 43215



Aaron Raiser