

ORIGINAL

IN THE SUPREME COURT OF OHIO

AARON RAISER,

Plaintiff-Appellant,

v.

Netcare Access

Defendant-Appellee.

Case No. 12-0791
On Appeal from the Franklin County
Court of Appeals, Tenth District,
Case No. 11AP-494

NETCARE ACCESS' MEMORANDUM IN OPPOSITION TO JURISDICTION

Aaron Raiser, pro se
20058 Ventura Boulevard, #113
Woodland Hills, California 91364
Aaron_raiser@yahoo.com

Pro Se Plaintiff-Appellant

Therese (Traci) McGuire (0071259)
Timothy T. Tullis (0042585)
Kegler, Brown, Hill & Ritter
65 East State Street, Suite 1800
Columbus, Ohio 43215
614/462-5400 (phone)
614/464-2634 (fax)
tmcguire@keglerbrown.com
ttullis@keglerbrown.com

Attorneys for Defendant-Appellee Netcare
Access

FILED
JUN 06 2012
CLERK OF COURT
SUPREME COURT OF OHIO

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I. INTRODUCTION

A. Overview

This action comes to the Supreme Court by way of discretionary appeal from the Tenth District Court of Appeals based on *pro se* Appellant Aaron Raiser's ("Raiser") contention that this case "raises a substantial constitutional question" and "is one of public or great general interest." Raiser is attempting to maintain claims based on events which took place over twenty (20) years ago, even though Raiser admits he had knowledge of these events at the time they occurred twenty (20) years ago. The crux of this case is whether Raiser's claims are barred by the statute of limitations and whether any of his claims enjoy the benefit of the discovery rule. The lower courts properly applied well-established Ohio case law and determined that Raiser's claims are time barred, even if the discovery rule applies. This case presents the classic application of an unambiguous body of case law to undisputed facts and does not present a substantial constitutional question, or raise issues of public or great general interest.

B. Procedural Background

Raiser's original complaint was filed on August 26, 2010. On March 22, Appellant filed a "Motion for Permission to File First Amended Complaint." Arguing that all of Raiser's claims are time barred, on April 1, 2011, Netcare filed a Motion for Summary Judgment and a Memorandum in Opposition to Raiser's motion seeking to file an amended complaint. On April 14, 2011, Raiser filed a 12 page response to Netcare's Motion for Summary Judgment, and in the same pleading moved pursuant to Rule 56(F) for time to conduct discovery. On April 18, 2011, Raiser filed a 17 page amended response to Netcare's Motion for Summary Judgment, and in the same pleading again moved pursuant to Rule 56(F) for time to conduct discovery. Netcare filed an opposition to Raiser's request for discovery on April 27, 2011 contending that no amount of

discovery would alter the fact that all of Raiser's claims are barred by the statute of limitations. On May 11, 2011 the Trial Court granted Netcare's Motion for Summary Judgment and denied Raiser's motions to amend his complaint and conduct discovery. On June 2, 2011, Raiser appealed to the Tenth District Court of Appeals. The Court of Appeals unanimously affirmed the trial court ruling and held that even if all of Raiser's claims were subject to the discovery rule, they remain time barred. On September 18, 2011 Raiser filed a motion for reconsideration. The Court of Appeals unanimously denied the motion for reconsideration stating that Raiser did not "demonstrate an obvious error" in the Court's decision, or raise issues that had not already been considered.

II. STATEMENT OF THE CASE AND FACTS

This case is based on a set of alleged facts that took place over twenty (20) years ago. All of Raiser's claims – including those set forth in Raiser's proposed Amended Complaint – are based upon the same set of allegations, that between January 1989 and June 1991, while Raiser was wrongfully institutionalized at COPH, and medicated against his will, "Dr. Kravak" and/or "the COPH staff" improperly disclosed false and confidential medical information to his father. Raiser contends that these alleged improper disclosures constitute claims of (1) breach of fiduciary duty; (2) breach of confidence; (3) medical malpractice; and (4) defamation. Raiser then sought to file an amended complaint and add four (4) new causes of action – coerced inducement to contract; personal injury; and two (2) claims predicated on 42 U.S.C. 1983.

Raiser contends that he suffered the following injuries as a result of the alleged improper disclosure of confidential information:

- (1) He was injured in having to flee Ohio;
- (2) He was injured in having confidential information disclosed;

(3) He was injured in his family relationship; and

(4) He suffered emotional distress.

Raiser's alleged injuries all occurred during or before his institutionalization from 1989 to 1991. Raiser filed this action on August 26, 2010, nearly twenty (20) years after his injuries occurred. Raiser contends that the discovery rule should apply to save his otherwise time barred claims.

The law does not permit Raiser to wait twenty (20) years to explore the existence of any potential claims. Raiser admittedly knew of his injuries prior to 1991 and had an obligation to conduct due diligence and ascertain any information necessary to assert his claims within the statute of limitations. Raiser failed to do so and the Trial Court and Court of Appeals properly granted summary judgment in favor of Netcare, and denied Appellant's motion for leave to amend his complaint, and his motion for discovery.

The Ohio legislature and courts have developed statutes and case law designating defined statutes of limitations for specific causes of action. Likewise, there is an abundance of Ohio case law discussing the application of the discovery rule. For the reasons set forth below, this case does not present a substantial constitutional question or have public or great general interest and Raiser's Memorandum in Support of Jurisdiction should be denied.

III. REASONS WHY CASE LACKS PUBLIC OR GENERAL INTEREST AND DOES NOT PRESENT A SUBSTANTIAL CONSTITUTIONAL ISSUE

Raiser's appeal does not present a substantial constitutional issue or issues of public or great general interest. As set forth below, this is a classic case properly analyzed under established Ohio statutes and well-developed case law regarding the application of statutes of limitations and the discovery rule. Raiser's arguments that the lower courts improperly applied these standards to conclude that all of his claims are time barred have no merit.

A. Under Well-Established Ohio Law, All Of Raiser's Claims Are Time Barred

The law governing the application of statutes of limitations is consistent and well-established. The application of this body of law is not unique. There is no dispute that Raiser's claims arise from events that occurred between January 1989 and June 1991. His complaint was filed on August 26, 2010. The following law establishes the applicable statute of limitations for each potential claim:

Claim	Statute of Limitations	Authority
Defamation	1 year	R.C. 2305.11(A); <i>Palmer v. Westmeyer</i> (1988), 48 Ohio App.3d 296, 302 citing <i>Snell v. Drew</i> (Nov. 1, 1985), 6 th Dist. No. L-85-074; <i>Rainey v. Shaffer</i> (1983), 8 Ohio App.3d 262, 263
Medical Malpractice	1 year	R.C. 2305.11; R.C. 2305.113
Breach of fiduciary duty and breach of confidence	2 years; or 4 years	R.C. 2305.10 (2 years); <i>Lukas v. Lonz Winery, Inc.</i> , Dec. 17, 1976, 6 th Dist. No. L-76-103 834; <i>Lawyers Coop. Publ'g Co. v. Muething</i> (1992), 65 Ohio St.3d 273 R.C. 2305.09 (4 years); <i>Kondrat v. Morris</i> , 118 Ohio App. 3d 198 (8 th Dist. 1997)
Coerced inducement of contract (likely not a cognizable claim)	15 years	R.C. 2305.06
Personal injury	2 years	R.C. 2305.10(A); <i>Duckworth v. Burger King Corp.</i> , 159 Ohio App.3d 540, 2005-Ohio-294; <i>Lukas v. Lonz Winery, Inc.</i> , Dec. 17, 1976, 6 th Dist. No. L-76-103.
Denial of due process under 42 U.S.C. § 1983 (2 claims)	2 years	<i>White v. Unknown</i> , 10 th Dist. No. 09AP-1120, 2010-Ohio-3031, ¶ 8; <i>Browning v. Pendleton</i> , 869 F.2d 989, 992 (6 th Cir. 1989); <i>Nadar v. Blackwell</i> , 545 F.2d 459 (6 th Cir. 2008)

B. The Discovery Rule Does Not Operate To Save Raiser's Claims

Raiser contends that his claims should be saved by the discovery rule. The law governing the application of the discovery rule is also consistent and well established. Moreover, the law requiring the exercise of due diligence to explore potential wrongdoing and related causes of action is well-settled. "The discovery rule provides that a cause of action does not arise until the

plaintiff knows, or by the existence 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. This Court has defined “due diligence” as:

The diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. The existence of due diligence is a factual finding by the trial court that must be supported by the record. **In the context of the discovery rule, the due diligence requirement ensures that the ‘Appellant bear[s] some meaningful, affirmative responsibility to determine facts that would form the basis for his or her cause of action.’**

Collins v. Sotka (1998), 81 Ohio St.3d 506, 512 (citations omitted) (emphasis added). The Court of Appeals considered Raiser’s claims as if the discovery rule applied, and even under that analysis concluded that his claims were barred by the statute of limitations.

Finally, Raiser has not articulated a substantial constitutional issue for review. Raiser cites to Article 1, Section 16 of the Ohio Constitution and contends that he was denied “redress for injury and due process.” Simple reference to Ohio’s Constitution does not equate to a substantial constitutional question ripe for this Court’s review. The mere fact that Raiser pursued his alleged claims in the Ohio courts signifies that “[a]ll courts shall be open” to him “for an injury done him in his land, goods, person or reputation” and “shall have remedy by due course of law.” Ohio Constitution Article 1 Section 16. Just because Raiser disagrees with the lower court rulings does not mean he was denied remedy by due course of law. Raiser’s dissatisfaction with the statute of limitations and discovery rule decisions does not present a substantial constitutional issue for review.

IV. ARGUMENT IN OPPOSITION TO APPELLANT’S “ISSUES ON APPEAL”

In a May 21, 2012 Entry, this Court denied Raiser’s Motion to Exceed the page limitations and ordered that pages 21-42 of his Memorandum in Support of Jurisdiction are stricken. Based on

this ruling, the issues raised in these pages are not before this Court for review and will therefore not be addressed herein. Raiser's pagination designates the title page as page 1, and continues sequentially thereafter including numerically identifying the table of contents, table of cases and listing of issues on appeal. In deference to S.Ct. Prac. R. 3.1(C) (rule on pagination), and the spirit intended by this Court's ruling, Netcare's opposition responds to the first 21 pages of substantive argument set forth in Raiser's Memorandum in Support of Jurisdiction, which is paginated as pages 7 – 28.

In Raiser's truncated Memorandum In Support of Jurisdiction, he argues the following "issues on appeal":

Whether Redress for injury and Due process under Bill of Rights Section 16 of the Ohio Constitution were denied Petitioner where:

Issue 1: 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

Issue 2: the trial court made a decision of fact the reasonableness of Petitioner's efforts to discovery 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

and,

Issue 5: Whether the Discovery Rule can apply to causes of action for Defamation

Issue 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

For the reasons set forth below, the lower courts properly held that Raiser's claims were time barred, even if the discovery rule applied.

A. **The Lower Courts Properly Granted Netcare's Motion For Summary Judgment Because All Of Appellant's Claims Are Barred By The Statutes Of Limitations And Discovery Rule**

At the heart of Raiser's Memorandum in Support is the criticism that the lower courts reached an independent, and therefore improper ruling, that Raiser failed to conduct the necessary due diligence to examine his potential claims and assert them before the expiration of the statute of limitations. Raiser contends that the lower courts dismissed the case "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." (Memo p. 16).

Raiser's contention that Netcare's Motion for Summary Judgment was devoid of arguments about due diligence, or that the lower court decisions were based on novel theories is illogical and wrong. Netcare set forth clear and credible arguments that Raiser's claims are time barred, and not saved by the discovery rule. It is not up to Netcare to ask Raiser to identify what due diligence he has done to sustain his claims. Rather, Raiser had the obligation to take all necessary steps to inform the Trial Court why his claims are not time barred. Raiser is correct in one respect – Netcare made a "legal challenge" – because Raiser's pleadings are legally insufficient to sustain his alleged claims as all of the events at issue took place over twenty (20) years ago, well beyond the statute of limitations.

Under the discovery rule, a "discovery" that will cause the statute of limitations to run is an actual discovery or what might in the exercise of **due diligence** have been discovered. *Glen Homeowners Assn., Inc. v. Towne Properties, Ltd.* (Dec. 6, 1995), 1st Dist. No. C-940369. In general, information sufficient to apprise a person of the possibility of wrongdoing gives rise to

the duty to inquire into the matter with due diligence. *Doe v. First United Methodist Church* (1994), 68 Ohio St.3d 531. The Ohio Supreme Court has defined “due diligence” as:

The diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. The existence of due diligence is a factual finding by the trial court that must be supported by the record. **In the context of the discovery rule, the due diligence requirement ensures that the ‘Appellant bear[s] some meaningful, affirmative responsibility to determine facts that would form the basis for his or her cause of action.’**

Collins v. Sotka (1998), 81 Ohio St.3d 506, 512 (citations omitted) (emphasis added).

Contrary to Raiser’s assertion, the lower courts did not make independent rulings based on reasoning that was new or novel. Rather, the lower courts held that “Appellant’s Complaint [was] based upon events that occurred twenty years ago, [and] was clearly filed outside the applicable statutes of limitations.” The lower courts further held that Raiser did not “exercise due diligence in investigating any potential claims against Netcare.” In other words, as required by *Collins*, Raiser had an affirmative responsibility to investigate and determine facts that would form the basis for any potential causes of action. The lower courts properly determined that Raiser failed to do so prior to the expiration of the statute of limitations. The lower courts rationale is consistent with the four primary reasons for statutes of limitations: (1) to ensure fairness to defendant; (2) to encourage prompt prosecution of causes of action; (3) to suppress stale and fraudulent claims; and (4) to avoid the inconvenience engendered by delay, specifically the difficulties of proof present in older cases. *O’Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 8, 88.

B. The Application Of The Discovery Rule Does Not Save Raiser's Claims From Being Time Barred

Raiser contends that because he was unable to fully investigate his situation, the discovery rule should be applied in a unique way, allowing for the special circumstances in this case. Specifically, Raiser contends that the facts of this case, as well as Netcare's wrongful conduct prevented him from investigating any alleged wrongdoing or instituting an action, and therefore "all statutes of limitations must be waived in this case to allow justice." (Memo Jurisdiction, p. 20). "At a minimum," Raiser contends there is an issue of fact and "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." (*Id.*). Raiser offers no legal support for his untenable position that the discovery rule was improperly applied in this case, or that the statutes of limitations should be waived, or that his due diligence obligations should be lessened.

Raiser now argues that he did exercise due diligence and his actions were reasonable. The fact remains – the lower courts were presented with this same information and concluded that "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" and "knowledge of these facts was sufficient to trigger his obligation to investigate. . .any potential legal claims he may have had arising from those events."

Raiser's Memorandum contemplates a lengthy analysis and analogy of the facts and application of the discovery rule as detailed in *Norgard v. Brush Wellman Inc.*, 95 Ohio St.3d 165. Specifically, Raiser highlights *Norgard* to "show[] that Ohio courts are very lenient in favor of the injured plaintiff as to what constitutes discovery." (Memo in Support, p. 23). Raiser's analogy falls flat as *Norgard* was an employer intentional tort case and its holdings were limited to that specific

cause of action. As noted in *Norgard*, “the discovery rule must be specially tailored to the particular context to which it is to be applied.” *Id.* Moreover, the syllabus of *Norgard* is very narrow: “A cause of action based upon an employer intentional tort accrues when the employee discovers, or by the exercise of reasonable diligence should have discovered, the workplace injury and the wrongful conduct of the employer.” *See i.e. Luft v. Perry County Lumber & Supply Co.*, (May 8, 2003, 10th Dist. No. 02AP-559, 2003-Ohio-2305 (“[T]he test enunciated in *Norgard* should be construed very narrowly to apply only to employer intentional tort cases.”)). Regardless of how *Norgard* is interpreted, as the lower courts concluded, even if the discovery rule is applied, Raiser’s claims remain time barred.

C. The Lower Courts Had No Obligation To Provide Raiser With An Opportunity To Conduct Discovery

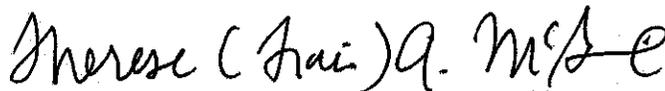
Raiser claims that “[a]s a procedural right” he must be “given some opportunity to be heard by the trial judge with respect to his arguments on due diligence and the discovery rule.” (Memo in Support, p. 16). Raiser is too late. Raiser was well aware that the application of the discovery rule was at issue in this case. In its Motion for Summary Judgment, and opposition to Raiser’s motion to file an amended complaint, Netcare argued, in detail, that all of Raiser’s claims were time barred, and that the discovery rule was not applicable. In response, Raiser had the obligation to produce any information necessary to prove otherwise. Moreover, Raiser **did** file a Rule 56 Motion seeking discovery to counter Netcare’s position that it never owned or operated the activities of COPH or its employees, and it never employed someone named Dr. Kavak. If Raiser needed to conduct additional discovery to withstand Netcare’s statute of limitations attacks, he knew how to do so, and had the opportunity to articulate this to the Court in his Rule 56(F) motion. Under Civ.R. 56(F), the movant bears the burden of establishing why the party cannot present sufficient facts to justify its opposition to a motion for summary

judgment without a continuance. *Carolina Tobacco Co. v. Petro* (March 16, 2006), 10th Dist. No. 04AP-1125, 2006-Ohio-1205, P39.

V. CONCLUSION

For all the foregoing reasons, Appellee Netcare Access respectfully requests that this Court deny Appellant Raiser's application to this Court to exercise jurisdiction over this appeal.

Respectfully submitted,



Timothy T. Tullis, Esq. (0042585)

Therese (Traci) A. McGuire, Esq. (0071259)

Kegler, Brown, Hill & Ritter, LPA

65 East State Street, Suite 1800

Columbus, OH 43215

Telephone: (614) 462-5400

Facsimile: (614) 464-2634

Attorneys for Defendant-Appellee Netcare Access

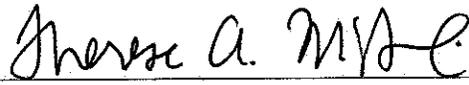
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Memorandum in Opposition to Jurisdiction* has been delivered via regular U.S. mail, postage pre-paid to the following on this

6th day of June, 2012:

Aaron Raiser
20058 Ventura Blvd. #113
Woodland Hills, California 91364

Plaintiff-Appellant, pro se



Therese (Traci) A. McGuire