

IN THE SUPREME COURT OF OHIO

12-1706

JOSEPH D. MONTGOMERY

Plaintiff-Appellant,

v.

THE OHIO STATE UNIVERSITY

Defendant-Appellee.

Sup. Ct. Case No.:

On Appeal from the Tenth Appellate District Court of Appeals

Court of Appeals
Case No. 11-AP-1024

Court of Claims
Case No. 2010-01174

NOTICE OF APPEAL
OF
APPELLANT, JOSEPH D. MONTGOMERY

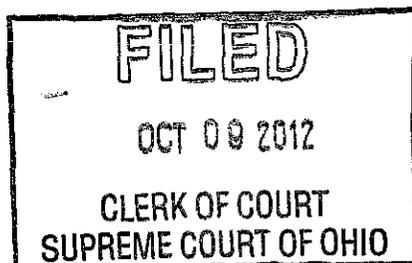
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NOTICE OF APPEAL OF APPELLANT JOSEPH D. MONTGOMERY

Appellant, Joseph D Montgomery, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, tenth Appellate District, entered in *Joseph D. Montgomery v. The Ohio State University*, Court of Appeals case no. 11-AP -1024 on August 23, 2012.

A copy of the decision appealed from is annexed hereto as Exhibit A period

This case is of public or great general interest.

Dated: October 9, 2012

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this *Notice of Appeal* was served upon the following by first-class

U. S. Mail, postage prepaid, and electronic mail, this 9th day of October 2012:

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
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CLERK OF COURTS

Joseph D. Montgomery,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	No. 11AP-1024
	:	(Ct. of Cl. No. 2010-01174)
The Ohio State University,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on August 23, 2012

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Michael DeWine, Attorney General, Karl W. Schedler, and
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APPEAL from the Court of Claims of Ohio.

SADLER, J.

{¶ 1} Plaintiff-appellant, Joseph D. Montgomery, appeals from a judgment entered by the Court of Claims of Ohio dismissing two of the causes of action in his complaint and entering summary judgment in favor of defendant-appellee, The Ohio State University ("OSU"), on the third cause of action. For the following reasons, we affirm.

I. Background

{¶ 2} Appellant played football for OSU from 1994 to 1998. During his senior year, appellant began the recruitment process for employment with the National Football

League ("NFL"). As part of the recruitment process, the NFL sent OSU a "Medical and Injury History Questionnaire" requesting information relating to appellant's medical history from OSU's "team physician, athletic trainers, or other medical personnel." (NFL questionnaire, 1.) The form was completed by Douglas Calland, one of OSU's athletic trainers. Under the section inquiring as to whether appellant had a history of specified diseases or illnesses, Calland checked boxes indicating hay fever and high blood pressure. Appellant was eventually selected by the New York Giants as the 49th overall pick in the 1999 NFL draft.

{¶ 3} In January 2010, appellant filed a complaint against OSU in the Court of Claims, alleging one count of defamation based on information provided by Calland in the 1998 NFL questionnaire. Appellant alleged that OSU published false and misleading statements by representing to the NFL that appellant had been diagnosed with high blood pressure. Appellant claimed he was unaware of the information in the NFL questionnaire until ten years later, when he was evaluated in order to obtain workers' compensation benefits in California. According to the complaint, Dr. Mark Hyman assessed appellant as suffering from "hypertensive heart disease" in August 2009, with 50 percent of the disease being apportioned to "pre-existing (pre-NFL) conditions." (Original Complaint, ¶ 33.) Appellant alleged that the "false" information in the NFL questionnaire injured his ability to obtain disability or workers' compensation benefits.

{¶ 4} According to the original complaint, appellant did not learn of the information in the NFL questionnaire until he received Dr. Hyman's assessment in August 2009. After that time, appellant contacted OSU about the letter and eventually received a response from OSU's team physician, Dr. Christopher Kaeding. Appellant alleged that Dr. Kaeding's letter "reconfirmed" the "false statements published * * * in the NFL Questionnaire." (Original Complaint, ¶ 36, 53.)

{¶ 5} OSU moved to dismiss the complaint on February 1, 2010, arguing that appellant's defamation claim was barred by the one-year statute of limitations in R.C. 2305.11(A), which, according to OSU, began to run in 1998 when Calland allegedly published the NFL questionnaire. Appellant filed a memorandum in opposition to OSU's motion to dismiss, but, concurrently therewith, he also requested leave to file an amended complaint, which the trial court later granted.

{¶ 6} Appellant's amended complaint reincorporated allegations from the original complaint but identified three separate causes of action. The first cause of action was titled "Negligence" and alleged that OSU allowed Calland to "practice medicine without a license" by completing the NFL questionnaire and providing a false "diagnosis" resulting in pecuniary harm. (Amended Complaint, ¶ 69, 72.) The second cause of action was titled "Medical Malpractice" and alleged that Dr. Kaeding was negligent by stating, in his 2009 letter to appellant, that the information provided in the NFL questionnaire was accurate. The third cause of action was titled "Defamation." However, unlike the defamation claim in his original complaint, which was based on the publication of the NFL questionnaire in 1998, appellant's new defamation claim was based on Dr. Kaeding's 2009 letter.

{¶ 7} OSU moved to dismiss the first two causes of action, pursuant to Civ.R. 12(B)(6), alleging that the negligence claim was time-barred and that the medical malpractice claim failed to sufficiently allege the existence of a physician-patient relationship between appellant and Dr. Kaeding. Appellant filed a memorandum opposing OSU's motion; however, appellant no longer referred to the first and second causes of action as claims of negligence and medical malpractice. Instead, appellant repeatedly characterized the counts as separate causes of action for "negligent misrepresentation." (Memorandum in Opposition, 4, 8.)

{¶ 8} In a decision filed September 10, 2010, the trial court dismissed the first two causes of action. Although appellant styled his first cause of action as a claim of negligence and later attempted to recharacterize it as a claim of negligent misrepresentation, the trial court construed it as a defamation claim and found it barred by the one-year statute of limitations in R.C. 2305.11(A). In dismissing the second cause of action, the trial court found that appellant failed to allege the existence of a duty as Dr. Kaeding's letter was based on any physician-patient relationship. The trial court concluded that appellant's only surviving claim was the defamation claim in count three, which was based on the 2009 letter from Dr. Kaeding.

{¶ 9} OSU subsequently moved for summary judgment in its favor on the remaining defamation claim, asserting that Dr. Kaeding's letter was never published to a third party and did not contain defamatory statements. Appellant filed a memorandum in

opposition and, in a decision and entry filed November 8, 2011, the trial court awarded summary judgment to OSU.

II. Assignments of Error

{¶ 10} In a timely appeal, appellant advances the following assignments of error¹ for our consideration:

[1.] The Trial Court Erred in Granting Defendant's Motion to Dismiss.

[2.] The Trial Court Erred in Granting Appellee's Motion for Summary Judgment.

A. First Assignment of Error

{¶ 11} In his first assignment of error, appellant challenges the trial court's decision to dismiss counts one and two of the amended complaint. Our review of this assignment of error is hindered, however, by appellant's failure to differentiate the arguments pertaining to his first cause of action from those pertaining to his second cause of action. Nevertheless, as we review the trial court's decision, we will address appellant's arguments to the extent we can discern them.

{¶ 12} We review de novo a trial court's decision to dismiss a complaint for failure to state a claim pursuant to Civ.R. 12(B)(6). *GLA Water Mgt. Co. v. Univ. of Toledo*, 10th Dist. No. 10AP-1129, 2011-Ohio-4655, ¶ 10. When deciding whether to dismiss a complaint under Civ.R. 12(B)(6), a trial court must presume the truth of all factual allegations in the complaint and must construe the complaint in a light most favorable to the plaintiff, drawing all reasonable inferences in favor of plaintiff. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192 (1988). A trial court cannot dismiss a complaint under Civ.R. 12(B)(6) unless it appears beyond a doubt from the complaint that the plaintiff can prove no set of facts entitling the plaintiff to recovery. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), syllabus. "A motion to dismiss based upon a statute of limitations may be granted when the complaint shows conclusively on its face

¹ Appellant's brief does not actually present assignments of error, as required by App.R. 16(A)(3); however, a panel of this court, in a decision filed January 29, 2012, decided to construe his "Statement of the Issues" as the two "assignments of error" identified above.

that the action is time-barred." *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, ¶ 11.

1. First Cause of Action

{¶ 13} Appellant contends that the trial court erred by finding his first cause of action to be barred by the one-year statute of limitations for defamation claims in R.C. 2305.11(A). We disagree. " [I]n determining which limitation period will apply, courts must look to the actual nature or subject matter of the case, rather than to the form in which the action is pleaded. The grounds for bringing the action are the determinative factors, the form is immaterial." *Love v. Port Clinton*, 37 Ohio St.3d 98, 99 (1988), quoting *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183 (1984).

{¶ 14} Defamation is the publication of a false statement made with some degree of fault, reflecting injuriously on one's reputation, or exposing one to public hatred, contempt, ridicule, shame, or disgrace, or affecting a person adversely in his or her trade business or profession. *Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, ¶ 9, citing *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 7 (1995). Generally, "defamation can come in two forms: slander, which is spoken; and libel, which is written." *Cruse v. Shasta Beverages, Inc.*, 10th Dist. No. 11AP-519, 2012-Ohio-326, ¶ 46, citing *Dale v. Ohio Civ. Serv. Emp. Assn.*, 57 Ohio St.3d 112 (1991). In either form, the elements of defamation are (1) a false and defamatory statement concerning another, (2) publication of that statement to a third-party, (3) injury to the plaintiff, and (4) fault on the part of the defendant. *Cruse* at ¶ 46, citing *Celebrezze v. Dayton Newspapers, Inc.*, 41 Ohio App.3d 343 (8th Dist.1988).

{¶ 15} Here, the first count of appellant's amended complaint, though titled "negligence," was premised on the same theory of defamation alleged in the original complaint. Appellant reincorporated the allegations that Calland completed the NFL questionnaire in a "false/and or materially misleading" manner and that the "publication" of the questionnaire caused him to suffer pecuniary harm. (Amended Complaint, ¶ 31, 42,

56, 75.) Despite his attempt to recast his defamation claim in terms of negligence,² the fact remains that appellant sought recovery for the alleged publication of false information to a third party. Therefore, we find that the trial court was correct in construing appellant's first cause of action as a claim for defamation. See *Grover v. Bartsch*, 170 Ohio App.3d 188, 2006-Ohio-6115, ¶ 53 (2d Dist.) ("the essential character of the infliction of emotional distress claims was defamation, and those claims were subject to the one-year statute of limitations set forth in R.C. 2305.11(A)").

{¶ 16} As a defamation claim, appellant's action was subject to the statute of limitations in R.C. 2305.11(A), which states that such actions "shall be commenced within one year after the cause of action accrued." This court has consistently recognized that "[a] cause of action for defamation accrues on the date of publication of the alleged defamatory matter." *Stubbs v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 11AP-484, 2012-Ohio-1374, ¶ 16, quoting *Pankey v. Ohio Adult Parole Auth.*, 10th Dist. No. 11AP-36, 2011-Ohio-4209, ¶ 9. Because appellant's amended complaint alleged that the allegedly defamatory statements were published in 1999, his action was barred by the statute of limitations in R.C. 2305.11(A). Therefore, the trial court was correct in finding appellant's defamation claim based on Calland's completion of the NFL questionnaire to be barred by the one-year statute of limitations in R.C. 2305.11(A).

{¶ 17} Appellant claims that the trial court made several impermissible findings of fact regarding whether Calland was providing medical care or was merely a layperson in completing the NFL questionnaire. However, even if we were to assume that these findings were incorrect, they had no bearing on the trial court's conclusion that appellant's claim sounds in defamation and was barred by R.C. 2305.11(A).

2. Second Cause of Action

{¶ 18} Next, appellant argues that the trial court "erred in its application of the statute of limitations" to his medical malpractice claim. (Appellant's Brief, 17.) In support of this argument, appellant seems to claim that Ohio law did not govern the

² Appellant later attempted, in his memorandum opposing the dismissal of his amended complaint, to recharacterize his negligence claim as one for "negligent misrepresentation." (Memorandum in Opposition, 4.) The trial court, after dismissing appellant's first two counts, went on to hold that any claim for negligent misrepresentation would be dismissed as well. Appellant does not appear to challenge this conclusion on appeal.

applicable limitations period and that, even if so, the limitations period was tolled by the discovery rule. However, we need not address these issues because the trial court did not find appellant's medical malpractice claim to be barred by any statute of limitations. Although the trial court did cite R.C. 2305.113, which includes a subdivision setting forth the statute of limitations for "medical claims," see R.C. 2305.113(A), it referred only to the subdivision defining "medical claims." See R.C. 2305.113(E)(3).

{¶ 19} The actual basis for the trial court's decision was its conclusion that appellant failed to allege the existence of a duty owed by Dr. Kaeding. Specifically, the trial court found it "clear from the allegations of the amended complaint that Dr. Kaeding was not providing a medical diagnosis, care, or treatment to plaintiff when he responded to the inquiry from plaintiff's counsel." (Sept. 10, 2010 Dismissal Entry, 4.) As explained below, we agree with this determination and find that appellant's amended complaint was insufficient to plead a claim of medical malpractice.

{¶ 20} Because Ohio is a notice-pleading state, "Ohio law does not ordinarily require a plaintiff to plead operative facts with particularity." *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, ¶ 29. Notice pleading under Civ.R. 8(A)(1) and (E) requires that a claim concisely set forth only those operative facts sufficient to give "fair notice of the nature of the action." *Ford v. Brooks*, 10th Dist. No. 11AP-664, 2012-Ohio-943, ¶ 13 (internal quotations omitted). "Nevertheless, to constitute fair notice, the complaint must allege sufficient underlying facts that relate to and support the alleged claim; the complaint may not simply state legal conclusions." *Allstate Ins. Co. v. Electrolux Home Prods.*, 8th Dist. No. 97065, 2012-Ohio-90, ¶ 9, citing *Clemens v. Katz*, 6th Dist. No. L-08-1274, 2009-Ohio-1461, ¶ 7.

{¶ 21} A medical malpractice claim is comprised of (1) a particular standard of care within the medical community, (2) the defendant's breach of that standard of care, and (3) proximate cause between the breach and the plaintiff's injuries. *Korreckt v. Ohio Health*, 10th Dist. No. 10AP-819, 2011-Ohio-3082, ¶ 11. "The existence of a duty is an essential element of proof in a medical malpractice claim." *Lounsbury v. VanBuren*, 94 Ohio St.3d 231, 235 (2002), citing *Littleton v. Good Samaritan Hosp. & Health Ctr.*, 39 Ohio St.3d 86, 92 (1988). The duty owed by a physician is predicated on the existence of a physician-patient relationship. *Id.*

{¶ 22} Other than the conclusory claim that Dr. Kaeding was negligent in making certain statements, appellant's amended complaint lacks any allegations of a duty owed to him by Dr. Kaeding or a corresponding breach of that duty. The amended complaint revealed that appellant had not been a student-athlete with OSU since 1999 and that appellant contacted Dr. Kaeding ten years later—not to seek a medical diagnosis or treatment—but to "see[k] correction" of the allegedly "false and misleading information contained in the NFL Questionnaire as completed by Douglas C. Calland and published by The Ohio State University." (Amended Complaint, ¶ 42.) Moreover, the amended complaint also failed to put OSU on notice of causation. While appellant alleged that *Calland's* completion of the NFL questionnaire in 1998 caused Dr. Hyman to erroneously apportion 50 percent of his heart disease to pre-NFL injuries for workers' compensation benefits, Dr. Kaeding's letter was written *after* Dr. Hyman had made his assessment. Nothing in the amended complaint alleges how Dr. Kaeding's 2009 letter furthered the injuries allegedly caused by Calland or how the letter caused new injuries. Accordingly, the amended complaint failed to provide the fair notice necessary for the medical malpractice claim to withstand dismissal pursuant to Civ.R. 12(B)(6).

{¶ 23} For the reasons stated above, appellant's first two causes of action failed to state a claim for which relief may be granted and dismissal was appropriate under Civ.R. 12(B)(6). Accordingly, appellant's first assignment of error is overruled.

B. Second Assignment of Error

{¶ 24} Appellant's second assignment of error challenges the trial court's decision awarding summary judgment to OSU on the remaining claim in the amended complaint: appellant's defamation claim based on Dr. Kaeding's 2009 letter.

{¶ 25} Appellate review of summary judgment is *de novo*. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, ¶ 8. To obtain summary judgment, the movant must show 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) it appears from the evidence that reasonable minds can come to but one conclusion when viewing evidence in favor of the nonmoving party and that conclusion is adverse to the nonmoving party. Civ.R. 56(C); *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-Ohio-2266, ¶ 24.

{¶ 26} The movant bears the initial burden of informing the trial court of the basis for the motion and of identifying those portions of the record demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). Once the moving party meets this initial burden, the nonmoving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Id.*

{¶ 27} In a defamation action, summary judgment is appropriately awarded to the defendant "if it appears, upon the uncontroverted facts of the record, that any one of the above critical elements of a defamation case cannot be established with convincing clarity." *Cruse* at ¶ 46, citing *Temethy v. Huntington Bancshares, Inc.*, 8th Dist. No. 83291, 2004-Ohio-1253. Here, the trial court awarded summary judgment to OSU on the grounds that appellant failed to establish that Dr. Kaeding's letter was false and defamatory. We agree.

{¶ 28} As explained in our response to appellant's first assignment of error, a plaintiff cannot prevail in a defamation action without establishing that the publication was false and defamatory. *Cruse* at ¶ 49. Appellant claims that Dr. Kaeding's letter was false and defamatory where Dr. Kaeding states, "the University does not believe that it [the 1998 NFL Questionnaire] is inaccurate." (Sept. 22, 2009 Kaeding Letter, 1.) According to appellant, this statement is an assertion of fact that confirms the "false diagnosis" contained in the NFL questionnaire. (Appellant's Brief, 29.) We disagree.

{¶ 29} Dr. Kaeding never referred to the NFL questionnaire as a "diagnosis" of high blood pressure. Indeed, he expressly stated that OSU "never" formally diagnosed appellant with hypertension. (Sept. 22, 2009 Kaeding Letter, 1.) Dr. Kaeding merely explained why OSU believed that Calland accurately checked the box on the NFL questionnaire indicating that appellant had a history of high blood pressure. Dr. Kaeding identified 11 blood pressure readings taken from appellant by OSU between March 1995 and August 1998 and pointed out that the majority of those readings (six) revealed "elevated and/or high blood pressure." (Kaeding Letter, 1-2.) Dr. Kaeding informed appellant that, because these readings indicated a history of high blood pressure readings, the NFL questionnaire was accurate in indicating that history. Because appellant failed to

present (or allege) that the blood pressure readings in the letter were inaccurate, there was no evidence establishing that Dr. Kaeding's statement was false and defamatory.

{¶ 30} Appellant also claims that Dr. Kaeding's statements were defamatory because he did not note whether appellant was under stress at the time of the readings. As explained above, however, Dr. Kaeding was asked only to explain whether the NFL questionnaire was accurate in indicating that appellant had a medical history of high blood pressure. That Dr. Kaeding listed the blood pressure readings without examining appellant's stress levels during those readings does not render the information in the NFL questionnaire, or Dr. Kaeding's description thereof, false or defamatory. Accordingly, appellant's second assignment of error is overruled.

III. Conclusion

{¶ 31} Having overruled appellant's first and second assignments of error, we affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed.

FRENCH and CONNOR, JJ., concur.
