

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**

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF
APPELLANT, JOSEPH D. MONTGOMERY**

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PROPOSITIONS OF LAW

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**EXPLANATION OF WHY THIS IS A CASE OF PUBLIC AND GREAT
GENERAL INTEREST**

This cause presents critical issues, of great public and general interest, impacting on the health and safety of all persons in the State of Ohio.

1. In this case, the court of appeals impairs the requirement that medical reports clearly and accurately articulate patient information; it substitutes a standard allowing of double negatives and obfuscation resulting in miscommunication of the patient's medical history.

It is axiomatic that accurate communication of patient medical history between physicians is critical to patient care.

“A medical history is essential in the continuous treatment of a patient's ailment. Hence, medical histories must be clear and comprehensive to ensure the accuracy and precision of medical information.” The Need for Clarity in Medical Histories by James Guertin

This need for accuracy and clarity in medical records is critical not only for patient care but also for the control of escalating costs of medical care. Wasted and inefficient treatment affects all of us as the cost of medical care escalates and is spread amongst the public through inflated insurance premiums and inflated costs of uninsured medical care. These are the driving forces mandating clear and accurate communication in medical records, a requirement which is nationally recognized:

The primary purpose of health record documentation is continuity of patient care, serving as a means of communication among all healthcare providers.

According to the Centers for Medicare and Medicaid Services and the Joint Commission, providers are expected to provide legible, complete, clear, consistent, precise, and reliable documentation of the patient's health history, present illness, and course of treatment. AHIMA. "Managing an Effective Query Process" Journal of AHIMA 79, no.10 (October 2008): 83-88.

In this case the court of appeals approves of a "medical report" written by a lawyer on doctor's letterhead, signed by a former attending physician, using the lawyer's tools of double negative and spinning of the issue addressed to serve a legal goal while ignoring the need for clarity and accuracy in a former patient's medical history. The result was, as sought by the lawyer, affirmation of a false perception of a former patient's actual medical history by a physician reviewing the patient's current conditions, to the detriment and damage of the former patient. By protecting the particular defendant, the court of appeals decision undermines not only the accuracy of Appellant's medical records, now a permanent part of his medical history, but also undermines, and runs counter to, the national goal of accuracy and clarity, and hence *reliability*, in medical documentation.

2. Additionally, the court of appeals decision distorts the nature of the "physician/patient relationship" by finding as a matter of law that a former attending physician, the patient's former chief surgeon, has no duty to that former patient when issuing a medical report after a lapse in time from actual treatment by that physician. The court of appeals held that a former patient, a student-athlete at the Ohio State University who sought correction of a false diagnosis from a former attending physician, was not seeking a "medical diagnosis." Consequently, the court of appeals found no duty existed between the former patient and former attending physician; and the court of appeals then held that without duty there can be no negligence. By holding that there was no duty of care when a former physician issued a medical report to former patient, the court of appeals emasculates the public's and subsequent health care providers' interest in and legitimate expectation that physicians will issue legible, complete, clear, consistent, precise, and reliable documentation of the patient's health history.

3. This case also addresses the proper characterization of claims arising from a false diagnosis made by a person unauthorized to practice medicine. The significance is that the characterization of the claim determines the applicable limitations period. In this case the court of appeals characterized the claim as defamation and applied ORC § 2305.11 (A) to a claim against an employer for damages resulting from its employee's unauthorized practice of medicine. Ohio courts have consistently held that claims arising from the unauthorized practice of medicine are governed by ORC § 2305.10. The court of claims characterization of the claim as defamation circumvents the established law in Ohio and creates a bar to actions historically subject to a two-year limitations and recasts them as protected by a one year limitations period. The result is uncertainty over which is the applicable limitations period governing a claim against an employer arising from an employee's unauthorized practice of medicine.

An answer to this issue will put all present and potential parties on notice as to the appropriate statute of limitations applicable in such cases.

The court of appeals focused on the employee's utterance of a false diagnosis and held that Appellant's claim sounded in defamation; therefore Appellant's claim was barred by the one year statute of limitation, i.e., ORC § 2305.11 (A).

Ohio has consistently held that a claim for false diagnosis, especially false diagnosis resulting in injury, made by a person unauthorized to make a diagnosis, is a negligence claim governed by ORC § 2305.10. See, *Richardson v. Doe*, 176 Ohio St. 370, 373 (Ohio 1964) (lack of due care by a nurse in caring for a hospital patient constitutes ordinary negligence and is not malpractice within the meaning of ORC § 2305.11.) Just as the claimed negligence of a nurse is governed by ORC § 2305.10, so too is the negligence of an athletic trainer, and so too is the liability of the employer for its employee's statutorily prohibited acts. Allowing the claim to be

characterized as sounding in defamation affords protections to which the Appellee is not entitled - a one-year as opposed to a two-year limitations period, without the additional protection of the discovery rule applicable to negligence actions governed by ORC § 2305.10.

In sum, this case presents questions of such great public interest, including questions important to the standards of health care in Ohio, such as warrant this Court's review. Plaintiff-Appellant Joseph D. Montgomery respectfully requests that his Court accept jurisdiction.

STATEMENT OF THE CASE AND FACTS

FACTS

Appellant, Joseph D. Montgomery ("Montgomery"), seeks review of the August 23, 2012, Tenth District Court of Appeals decision upholding two Ohio Court of Claims decisions. The first Court of Claims decision, entered September 10, 2010, granted Appellee's Motion to Dismiss Counts One (Negligence) and Two (Medical Malpractice) of Plaintiff's Amended Complaint. ("Decision, September 10, 2010") The second Court of Claims decision, entered November 8, 2011, granted Appellee's Motion for Summary Judgment dismissing Count Three (Defamation) of Plaintiff's Amended Complaint as a matter of law. ("Decision, November 8, 2011").

Joe Montgomery was a running back on the Appellee, the Ohio State University ("OSU"), football team from 1994 through 1998. During his senior year, 1998, in the process of preparing to participate in the NFL draft, the NFL requested that OSU complete a "Medical and Injury History Questionnaire ." (The "NFL Questionnaire .") As part of that process, Mr. Montgomery consented to the "team physician, athletic trainers, or other medical personnel of Ohio State to release his medical history, record of injury or surgery, record of *serious* illness and rehabilitation results" to the NFL and its affiliates.

OSU allowed an unsupervised athletic trainer to complete the NFL Questionnaire , which OSU then returned to the NFL. It was neither reviewed by nor copied to Mr. Montgomery.

In the section inquiring whether Mr. Montgomery had a history of serious illness, headed "Disease or Illness," the NFL specifically instructed that "if unsure, leave blank." It reads:

"Disease or Illness (if unsure, leave blank)"

In response, the athletic trainer marked that Mr. Montgomery had the diseases of "high blood pressure" and "hay fever." An athletic trainer is not qualified to make a *diagnosis of* "disease or illness." ORC § 4755.65.

It is undisputed that while at Ohio State University, Mr. Montgomery was never medically diagnosed as having hypertension; he was never on medication for high blood pressure and was never referred to see a specialist for hypertension (high blood pressure disease).

While at OSU, Mr. Montgomery sustained a game injury on November 3, 1996, to his right knee. He subsequently had ACL reconstruction at OSU performed by Dr. Christopher Kaeding. Dr. Kaeding was Mr. Montgomery's attending physician relative to his right knee injury throughout 1997 and 1998. Additionally, while at OSU, Mr. Montgomery had a number of blood pressure tests incident to physical injuries, however, his *last* blood pressure reading taken August 14, 1998, demonstrated that he had normal blood pressure, i.e., 120/70, *without the benefit of any medication or other treatment for "high blood pressure disease."*

After retiring from the NFL, Mr. Montgomery applied for worker's compensation benefits. In reviewing Mr. Montgomery's application, Dr. Mark Hyman, a licensed physician, on July 29, 2009 issued an "Agreed Medical Evaluation" for use in assessing Mr. Montgomery's medical conditions in connection with Mr. Montgomery's application for worker's compensation benefits. Relying on the NFL Questionnaire, Dr. Hyman found that "Record 40 in October 1998

first states a diagnosis of hypertension." Record 40 is the October 19, 1998, NFL Questionnaire . Accordingly, Dr. Hyman apportioned 50% of the responsibility for Mr. Montgomery's hypertensive heart disease to Mr. Montgomery's alleged pre-NFL high blood pressure as "diagnosed" by OSU in the October 1998 NFL Questionnaire .

Upon receipt of a copy of Dr. Hyman's report, Mr. Montgomery contacted OSU seeking correction of the false diagnosis set forth in the 1998 NFL Questionnaire . Knowing that the accuracy of Mr. Montgomery's medical records were at issue, and concerned about admitting a mistake in Mr. Montgomery's medical records, rather than acknowledge that the NFL Questionnaire was inaccurate and correct the same, Appellee published a September 2009 Medical Report on OSU Medical Center stationery, signed by Dr. Kaeding, but ghost written by an OSU attorney, that the "University does not believe that it [The October 19, 1998 NFL Questionnaire] is inaccurate" and then lists out a "number of episodes of elevated and/or high blood pressure" *without any indication that these "sporadic occurrences of elevated/high blood pressure" all occurred at times of stress and/or significant medical injury.*

By setting forth episodes of high blood pressure without *referencing the related and accompanying stress and/or trauma*, Appellee affirmed the initial false and unqualified diagnosis of high blood pressure disease- hence the conclusion that the NFL Questionnaire was "not inaccurate", and, Dr. Kaeding independently, but wrongfully and inaccurately, represented - diagnosed - in 2009, *based upon a fresh and independent review of Mr. Montgomery's medical records*, that Mr. Montgomery had high blood pressure *disease* as of 1998. Multiple episodes of high blood pressure alone, when not accompanied by other causative factors such as stress or trauma is a basis for a *diagnosis* of high blood pressure; *Mr. Montgomery's episodes were accompanied by stress and/or trauma and, thus, are not a basis for a diagnosis of high*

blood pressure disease. See, *Affidavit of Merit of Jacqueline Bardwell, M.D., attached to Plaintiff's First Amended Complaint*. Dr. Kaeding's letter, drafted by legal counsel, affirmatively represents that the diagnosis of high blood pressure disease in the NFL Questionnaire is not inaccurate. Dr. Kaeding then justifies that claim by setting forth an inaccurate/incomplete review of episodes of high blood pressure to justify that false diagnosis.

Appellee, particularly its legal counsel, knew that in releasing OSU's September 2009 Medical Report it was putting the September 2009 Medical Report into the pool of medical records which would have to be further released to third parties. Appellee knew that it can be considered insurance fraud to seek benefits while concealing medical records.

Appellee's 2009 Medical Report continues to cause Mr. Montgomery harm and damage as he continues "to have to explain that I am not lying when I claim that prior to my employment with the NFL I did not have high blood pressure disease or hay fever disease."

STATEMENT OF THE CASE

On January 8, 2010, Plaintiff/Appellant, Joseph D. Montgomery, filed his Complaint against Defendant/Appellee Ohio State University in the Ohio Court of Claims asserting one count of defamation arising from the false diagnosis published in the 1998 NFL Questionnaire .

On February 1, 2010, OSU filed its motion to dismiss pursuant to Civ. R. 12 (B) (6) asserting a statute limitations defense. On March 9, 2010, Mr. Montgomery filed his memorandum in opposition to the motion to dismiss raising a choice of law issue and contemporaneously filed a motion for leave to file an amended complaint. On March 23, 2010, OSU filed its agreement to Mr. Montgomery filing an Amended Complaint which was filed on April 13, 2010.

The Amended Complaint detailed that Mr. Montgomery did not learn of the false diagnosis made by OSU's athletic trainer, an individual not licensed to practice medicine in Ohio, until he received Dr. Hyman's assessment in August 2009, that when he sought clarification/correction from OSU, Dr. Kaeding confirmed the original false diagnosis as "not inaccurate" and supported this conclusion by reference to Mr. Montgomery's episodes of high blood pressure without however noting that those episodes of high blood pressure or taken at times of high stress and injury.

The Amended Complaint asserted three causes of action: the first against OSU for negligence, the second against OSU, supported by an Affidavit of Merit from qualified physician, for medical malpractice arising from its September 2009 negligent confirmation of the false diagnosis of high blood pressure disease, and the third against OSU for defamation arising from its publication of the false and misleading confirmation of the diagnosis of high blood pressure disease in its September 2009 medical report.

On May 12, 2010, OSU filed its Motion to Dismiss Counts One and Two of Plaintiff's Amended Complaint pursuant to Civ. R. 12 (B) (6), and for a more definite statement with regard to Count Three of Plaintiff's Amended Complaint.

On September 10, 2010, the Court of Claims granted Defendant's Motion to Dismiss Counts One (Negligence) and Two (Medical Malpractice) of Plaintiff's Amended Complaint, and denied OSU's motion for more definite statement with regard to Count Three (Defamation) of Plaintiff's Amended Complaint.

Rather than accept Count One of the Amended Complaint as asserting a negligence claim for OSU allowing a person not authorized to practice medicine to make a medical diagnosis which was false and undeniably injured Mr. Montgomery, the Court of Claims characterized

Count One of the Amended Complaint as alleging defamation, barred by the one-year limitations period set forth in ORC § 2305.11 (A).

The Court of Claims also dismissed the medical malpractice claim on the basis that in issuing the September 2009 medical report confirming the diagnosis of high blood pressure disease as “not inaccurate” Dr. Kaeding was not providing a medical diagnosis, care or treatment to plaintiff.”

On September 24, 2010, OSU filed its Answer to Plaintiff's Amended Complaint. On December 27 2010, the Court of Claims entered its order bifurcating the trial of liability from the trial of damages.

After discovery, on August 29, 2011, OSU filed its Motion for Summary Judgment with attached Affidavit of Defendant's legal counsel.

On September 19, 2011, Mr. Montgomery filed his Opposition to Motion for Summary Judgment with evidence supporting the facts Dr. Kaeding had been Mr. Montgomery's attending physician, that OSU's September 2009 Medical Report although signed by Dr. Kaeding's had been ghostwritten by OSU's counsel, that when OSU issued its September 2009 Medical Report it knew Mr. Montgomery was seeking clarification and correction of a false diagnosis of high blood pressure disease and that it's September 2009 Medical Report would become part of Mr. Montgomery's permanent medical history.

On November 8, 2011, the Court of Claims entered its Decision and judgment, granting OSU's Motion for Summary Judgment thereby dismissing Count Three of the Amended Complaint for defamation arising from September 2009 publication confirming the diagnosis of high blood pressure disease as “not inaccurate.”

On November 18, 2011, Mr. Montgomery, filed his Notice of Appeal of the Decision, September 10, 2011 and the Decision, November 8, 2011 in Tenth District Court of Appeals.

On August 23, 2012, after briefing and oral argument, the Tenth District Court of Appeals entered its Decision affirming the Court of Claims September 10, 2011 grant of motion to dismiss counts one (negligence) and two (medical malpractice) of Mr. Montgomery's Amended Complaint and the Court of Claims November 8, 2011 grant of summary judgment dismissing count three (defamation) of Mr. Montgomery's Amended Complaint.

While agreeing that its review of the Trial Court's decision is *de novo* and that the Amended Complaint could not be properly dismissed unless it appeared beyond doubt the plaintiff can prove no set of facts entitling it to recovery, the Appellate Court, without analysis of Appellants' claim of negligence against OSU for it allowing a person not authorized to practice medicine to make a medical diagnosis which was false and undeniably injured Mr. Montgomery, held that in Count One of the Amended Complaint, Appellant was seeking recovery for publication of false information to a third party, and, therefore, his first cause of action was for defamation; as such, it was barred by the one-year limitations period set forth in ORC § 2305.11 (A).

In upholding dismissal of Count Two (Medical Malpractice), the Appellate Court recognized that Ohio is a notice pleading state but held that the Amended Complaint "lacks any allegations of a duty owed by Dr. Kaeding to him or a corresponding breach of that duty. In support of its conclusion regarding lack of duty, the Appellate Court cites the time lapse between Mr. Montgomery being a student athlete at OSU and the 2009 request for correction of the false diagnosis. In support of its conclusion that amended complaint did not allege breach of duty, the Appellate Court wholly ignores Mr. Montgomery's claim that a physician owes a duty of care in

issuing a medical report concerning a patient's medical history; the Court holds that Mr. Montgomery was not seeking a medical diagnosis or treatment and therefore there could be no medical malpractice.

In upholding dismissal of Count Three (Defamation), the Appellate Court concluded that because Mr. Montgomery did have episodes of high blood pressure *readings*, publication of the September 2009 Medical Report confirming the diagnosis of high blood pressure disease as not inaccurate, is not defamatory.

On August 23, 2012, after briefing and oral argument, the Tenth District Court of Appeals entered its Decision affirming the Court of Claims September 10, 2011 grant of motion to dismiss counts one (negligence) and two (medical malpractice) of Mr. Montgomery's Amended Complaint and the Court of Claims November 8, 2011 grant of summary judgment dismissing count three (defamation) of Mr. Montgomery's Amended Complaint.

ARGUMENT

PROPOSITION OF LAW NO. 1: Medical practitioners (physicians and hospitals) who assume to act have a duty to act carefully, which includes the obligation to accurately communicate medical information.

The court of appeals never addressed the medical practitioner's obligation to accurately communicate medical information. The physician's duty to at all times act with care is recognized well-articulated in *Betesh v. United States* (D.D.C. 1974), 400 F. Supp. 238, 245) (even in the absence of the doctor-patient relationship or when a doctor acts primarily for the benefit of an employer a doctor who assumes to act must act carefully with respect to all aspects of his examination).

The Court of Appeals decision undermines this Court's delineation of the physician's duty to accurately communicate medical information expressed in *State ex rel. Woods v. Oak*

Hill Cmty. Med. Ctr., 91 Ohio St. 3d 459, 459-460 (Ohio 2001) (medical practitioners (physicians and hospitals) have duty to accurately communicate medical information.) This duty is recognized in Restatement (Second) of Torts § 324A (1965), imposing a duty on one "who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person." It provides that a person "is subject to liability to the third person . . . if (a) his failure to exercise reasonable care increases the risk of . . . harm, or . . . (c) the harm is suffered because of reliance of . . . the third person upon the undertaking."

The court's language is itself exemplary of the difference between legal argument and the clarity and precision demanded in medical reports. The appellate court ignores the fact that in the medical world a history of high blood pressure *readings* is a basis to confirm *diagnosis* of high blood pressure *disease*. By referencing the *readings* without explanation that they were accompanied by high stress and the injury, Dr. Kaeding was wrongfully supporting a false diagnosis of high blood pressure *disease*. He was wrongfully substantiating, by negligent omission, a false diagnosis and knowingly publishing that false and misleading information as part of Mr. Montgomery's permanent medical history. As stated by the appellate court, because these readings indicated a history of high blood pressure readings, the NFL Questionnaire was accurate in indicating that history.

The NFL Questionnaire did not ask for a history of high blood pressure readings; it specifically addressed serious illness, it requested the existence of **disease** or illness, *a finding which requires a diagnosis by a licensed medical practitioner*. As completed, the NFL Questionnaire was not accurate and Dr. Kaeding's assertion that it was accurate is false and misleading. The Court cannot ignore the language. The appellate court couches its reasoning in

terms of high blood pressure *readings*. The NFL Questionnaire does not ask for a history of readings; it specifically asks for finding, a diagnosis of disease, as established by the fact that Dr. Hyman, a licensed physician, read it and understood it to set forth a diagnosis of pre-existing high blood pressure disease; a diagnosis which is now confirmed by the September 2009 Medical Report and is a permanent, but false diagnosis in Mr. Montgomery's medical history.

For good reason, the physician's duty of care extends at all times to accurately communicating a patient's medical history. The result of ignoring or eroding that duty is the result experienced in this case, and inaccurate medical history resulting in harm suffered by the patient. That the harm in this case is only pecuniary is but fortuitous; had the failure to accurately communicate the patient's medical history led to error in treatment and physical harm, the damage would have been simply more graphic, devastating to the patient, and harmful to the public. The breach of duty, is however, the same. It cannot be ignored.

PROPOSITION OF LAW NO. 2: The duty of medical practitioners (physicians and hospitals) who assume to act have a duty to the patient to act carefully, which includes the obligation to accurately communicate medical information after cessation of active patient/physician relationship

This is not a case wherein the plaintiff is attempting to extend the one-year statute of limitations barring a medical malpractice claim based upon Ohio's discovery rule. This case involves the claim that when an accurate medical history is sought from a former attending physician, the physician best suited to express that past medical history, that former attending physician as an affirmative obligation to clearly and accurately communicate medical information. This duty is nationally recognized as imperative to proper patient care and medical cost containment.

Relying upon *Lownsbury v. VanBuren*, 94 Ohio St. 3d 231, 235 (Ohio 2002), the court of appeals ruled that since the physician at issue in this case was not Appellant's then attending

physician in September 2009, there could be no breach of duty predicated on the existence of a physician-patient relationship. This Court, however, in *Lownsbury* expressly recognized that: “The basic underlying concept in these cases [considering whether, and under what circumstances, to recognize a duty of care owed by a supervisory physician to a patient actually cared for by a hospital resident] is that a physician-patient relationship, and thus a duty of care, may arise from whatever circumstances evince the physician's consent to act for the patient's medical benefit.” *Lownsbury v. VanBuren, supra*, at 238.

The court of appeals in this case directly undermines the “underlying concept” for determination of the patient-physician relationship. By making existence of the patient-physician relationship dependent on the temporal setting rather than focusing on the physicians undertaking to act for the medical benefit of the patient, the court of appeals announces a new proposition of law directly at odds with this Court’s prior rulings. The court of appeals decision allows the former attending physician, the person expected to be in the best position to accurately express a patient’s medical history to circulate inaccurate, damaging medical information with impunity. For this reason alone, this court should accept jurisdiction to express clearly that when a physician undertakes to act, he must act carefully for the benefit of the patient regardless of the time at which he undertakes to so act.

PROPOSITION OF LAW NO. 3: Claims arising from the unauthorized practice of medicine are governed by ORC § 2305.10.

Appellant’s claim against the employer is that it, the employer, was negligent in allowing a non-physician, an athletic trainer, to issue a diagnosis, to engage in the unlicensed practice of medicine. By finding the employer’s independent negligence in allowing the unauthorized practice of medicine to be characterized as a defamation claim, the court of appeals used a

consequence of the act, the damage, to define the act. The essential character of the act at issue is the employer allowing the unauthorized practice of medicine resulting in damage to Appellant

“In Lawrence on Equity Jurisprudence, volume 2, page 1183, it is said: "Though equitable action is never predicated on the prevention of crime as such, it is also true that the fact that conduct is punishable criminally does not constitute an adequate remedy so as to bar equitable relief." We need cite no authority to sustain this well-established principle.” *Dworken v. Apartment House Owners Ass'n*, 38 Ohio App. 265, 273-275 (Ohio Ct. App., Cuyahoga County 1931.) “Negligence claims are controlled by a two-year statute of limitations as provided in R.C. 2305.10.” *Roberts v. Sadar*, 1987 Ohio App. LEXIS 6248, 7-8 (Ohio Ct. App., Lucas County Mar. 31, 1987).

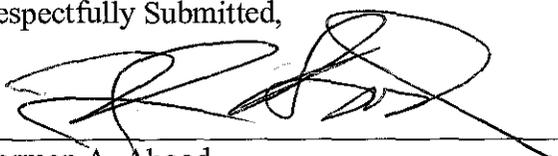
Characterizing issuance of a false diagnosis by one unauthorized to practice medicine, as defamation affords protection for negligence not warranted by the act. As this case demonstrates, the illegal act was not discovered until long after expiration of the one-year limitation for defamation claims; characterization as defamation unduly protects the proponent of a wrongful, in this case, illegal act, leaving the one harmed without a remedy. To remove this newly created but unjustified barrier, this Court should accept jurisdiction over this case.

CONCLUSION

For the foregoing reasons, this case involves matter of public and great general interest. The Court should accept jurisdiction and reverse the decision of the tenth District Court of Appeals.

Dated: October 9, 2012

Respectfully Submitted,



Norman A. Abood
Counsel for Appellant, Joseph D. Montgomery

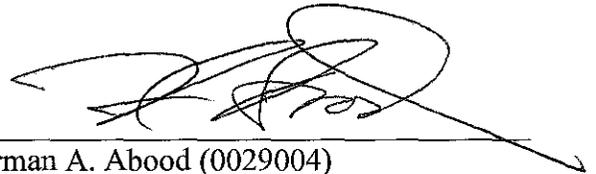
CERTIFICATE OF SERVICE

I certify that a copy of this *Memorandum in Support of Jurisdiction* 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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APPENDIX

T.G. Clark

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Joseph D. Montgomery,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 11AP-1024
v.	:	(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

The Law Office of Norman A. Abood, and Norman A. Abood,
for appellant.

Michael DeWine, Attorney General, Karl W. Schedler, and
Daniel R. Forsythe, for appellee.

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." *Lownsbury 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.

NATIONAL FOOTBALL LEAGUE
PROFESSIONAL FOOTBALL ATHLETIC TRAINERS SOCIETY

MEDICAL AND INJURY HISTORY QUESTIONNAIRE

Player's Name Joe Montgomery School Ohio state Position RB

Athletic Trainer BILL DAVIS Office Phone 292-1165

RELEASE OF INFORMATION AUTHORIZATION

I, JOE Montgomery, give my consent for the team physician,
(PLAYER'S NAME)
athletic trainers, or other medical personnel of Ohio State to release such
(NAME OF SCHOOL)
information regarding my medical history, record of injury or surgery, record of serious
illness, and rehabilitation results as may be requested by a representative of the National
Football League, any National Football League team's medical staff, National Football
Scouting, Inc., Blesto, Inc., or National Invitational Camp, Inc.

I understand that such representative has made representations to the team
physician, athletic trainers, or other medical personnel of Ohio state
(NAME OF SCHOOL)
that the purpose of this request for my medical information is to assist that organization
represented in making a determination as to offering me employment.

This information is normally confidential and, except as provided in this Release, will
not be otherwise released by any of the parties in charge of the information. This Release
remains valid until revoked by me in writing.

[Signature]
(PLAYER'S SIGNATURE)

10-19-98
(DATE)



Player's Name JOE MONTGOMERY School OHIO STATE

Has the aforementioned Player had any problems with the following anatomy?
- please indicate right or left where applicable -
- if yes, please explain giving dates and time loss -
- please give dates of most recent x-rays and pertinent findings -

1. History of Concussions? yes no
If yes, was he hospitalized? yes no
Tests performed N/A
10/95 concussion,

2. Neck or Pinched Nerves yes no

X-rays: _____
Scans/MRI/Other Tests: _____

3. Shoulder yes no

X-rays: _____
Surgeries: _____

4. Elbow or Wrist yes no

X-rays: _____
Surgeries: _____

5. Hands or Fingers yes no

X-rays: _____
Surgeries: _____

6. Back yes no

X-rays: _____
Scans/MRI/Other Tests: _____

Surgeries: _____

Player's Name JOE MONTGOMERY School OHIO STATE

7. Hip/Groin yes _____ no

8. Knee (please be specific) yes no _____

11/97 - (R) KNEE ACL/LCL 3 DEG SPRAIN VS MINNESOTA -
missed rest of season and limited during spring.

X-rays: _____

MRI/Other Tests: MRI (+) ACL/LCL TEARS

Surgeries: (R) KNEE 11/97 ACL/LCL REPAIR

9. Ankle yes _____ no

X-rays: _____

Surgeries: _____

10. Foot and Toe yes _____ no

X-rays: _____

Surgeries: _____

11. Muscle Strains yes _____ no

12. Calcium Deposits yes _____ no

13. Major Non-Orthopedic Problems or Surgeries yes no _____

(please explain) 10th grade 1/91, Testicular torsion / removed surgically

Player's Name JOE Montgomery School Ohio State

Has any immediate family member suffered sudden or unexplained death? NO

If yes, please explain _____

Any history of heat illness (cramps/exhaustion/stroke)? NO

If yes, please explain _____

Allergies (please list) Aspirin

Disease or Illness (if unsure, leave blank)

	yes	no		yes	no
Hay Fever	[x]	[]	Frequent Diarrhea	[]	[x]
Asthma	[]	[x]	Hemorrhoids	[]	[x]
<u>High</u> /Low Blood Pressure (please circle)	[x]	[]	Hernia	[]	[x]
Frequent Headaches	[]	[x]	Kidney Infection/Stones	[]	[x]
Migraine Headaches	[]	[x]	Bladder Infection/Stones	[]	[x]
Frequent Sore Throats	[]	[x]	Gout	[]	[x]
Hearing Problem	[]	[x]	Diabetes	[]	[x]
Heart Trouble	[]	[x]	Epileptic Attacks	[]	[x]
Heart Murmur	[]	[x]	Pneumonia	[]	[x]
Ulcer	[]	[x]	Frequent Skin Infections	[]	[x]
Nervous Stomach	[]	[x]	Frequent Colds	[]	[x]
Appendicitis	[]	[x]	Hepatitis	[]	[x]
			Infectious Mono or Glandular Fever	[]	[x]

List any medications taken regularly or occasionally (please specify):
N/A

Does Player need any surgery now or in the near future? yes _____ no ✓

If yes, please explain _____

Does Player wear contact lenses or glasses (please specify)? yes, contacts

L - 2.00
R - 2.50

Does Player have any dental problems? NO

Any special taping, braces, pads, etc. that this Player requires:
NO

Additional Comments: _____

Douglas C Calland
(ATHLETIC TRAINER'S SIGNATURE)

10/19/58
(DATE)

NATIONAL FOOTBALL LEAGUE
PROFESSIONAL FOOTBALL ATHLETIC TRAINERS SOCIETY

MEDICAL AND INJURY HISTORY UPDATE

Player's Name JOE MONTGOMERY School OHIO STATE Position RB

Athletic Trainer Doug Calland Office Phone (614) 292-1164

Has the above Player had any injuries/surgeries/illnesses or problems this past season?

YES NO

If yes, please explain (with dates, time loss, residual effects, etc.):

10/3/98 (R) Shoulder contusion / traumatic SA
bursitis, 0 time loss

10/11/98 (L) midfoot sprain, medial, Xrays negative.
Sore all season, no games missed.

Any other information of which we should be concerned:

Douglas C. Calland
(ATHLETIC TRAINER'S SIGNATURE)

1/7/99
(DATE)



OSU Sports Medicine

2050 Kenny Road
Suite 3100
Columbus, OH 43221
Phone: 614.293.3600
Fax: 614.293.4399
www.sportsmedicine.osu.edu

September 22, 2009
VIA ELECTRONIC MAIL
Joseph Montgomery
2605 Ivy Brook Lane
Buford, GA 30519

Dear Joe:

As you know, you have contacted The Ohio State University and explained that you are contesting Dr. Hyman's conclusion regarding your impairment rating for worker's compensation / disability purposes. You have further explained your belief that the National Football League's Medical and Injury History Update form (the "NFL Form") (completed at your request by Ohio State on October 19, 1998) is inaccurate. While the University does not believe that it is inaccurate, we are happy to clarify the basis upon which we completed the form.

Before discussing the records, it is important to note that the University no longer has your records because they have been destroyed in accordance with the University's records retention policy. When you learned this, you then sent us records which you represent contain your entire Ohio State record (records you assert that the New York Giants obtained from Ohio State shortly after you left Ohio State). Since we no longer have your original records in order to compare them to the records you sent us, we make the statements contained in this letter based upon the records that you have sent to us.

The Ohio State University never gave you a formal "diagnosis of hypertension," as Dr. Hyman represents in his medical evaluation report of July 29, 2009. Rather, the records you have sent us show a number of episodes of elevated and/or high blood pressure (highlighted in the following list of all blood pressure readings):

Blood Pressure	Date	Notes
120/70	8/14/1998	physical exam
130/100	8/7/1997	physical exam
138/78	8/16/1996	physical exam
126/84	8/2/1995	physical exam
120/90	8/3/1994	physical exam
148/110	11/11/1997	clinical notes
120/84	11/25/1994	progress notes



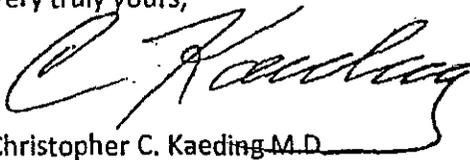
138/100	12/13/1994	progress notes
139/96	12/15/1994	pre stress test baseline
144/100	3/20/1995	
125/80	3/20/1995	

The records are confirmed by the personal recollections of involved University staff who remember that you had sporadic occurrences of elevated / high blood pressure. There were several readings that were in the normal range (normal blood pressure is 120/80). The records show that you were never on medication for high blood pressure and that we never referred you to see a specialist for hypertension.

It was based upon this history of episodes of elevated and/or high blood pressure that the University checked the box on the NFL Form that related to high blood pressure.

I trust that this clarifies the basis upon which the University completed the NFL form.

Very truly yours,



Christopher C. Kaeding M.D.
Judson Wilson Professor
Department of Orthopaedic Surgery
Co-Medical Director
Sports Medicine Center
Head Team Physician
Department of Athletics

Cc: Doug Calland
Janine Oman
Julie Vannatta