[Cite as *Nye v. Ellis*, 2010-Ohio-1462.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MELANIE S. NYE	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellant	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-0080
MATTHEW F. ELLIS, B.S., D.C., et al.	:	
	:	
	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas Case No. 07-CV-1462
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	March 25, 2010

APPEARANCES:

For Plaintiff-Appellant:

CHRISTOPHER R. MEYER
BRIAN C. REED
36 N. Second St.
P.O. Box 919
Newark, OH 43058-0919

For Appellee Matthew Ellis:

RUDOLPH A. PECKINPAUGH, JR.
One SeaGate, 24th Floor
P.O. Box 10032
Toledo, OH 43699-0032

For Appellee Jerry Mantonya:

CHARLES J. DAVIS
Textile Building, Suite 1280
205 W. Fourth St.
Cincinnati, OH 45202

Delaney, J.

{¶1} Plaintiff-Appellant, Melanie S. Nye appeals the March 4, 2009 and May 19, 2009 judgment entries of the Licking County Court of Common Pleas granting summary judgment in favor of Defendants-Appellees, Matthew F. Ellis, B.S., D.C. and Jerry A. Mantonya, D.C. For the reasons that follow, the judgment of the trial court is affirmed.

STATEMENT OF THE FACTS AND THE CASE

{¶2} On October 3, 2005, Nye went to the Mantonya Chiropractic Centers for neck and shoulder pain and numbness in her arm and hand. (Ney Depo., p. 121). Mantonya Chiropractic Centers is owned by Appellee, Dr. Jerry A. Mantonya. Nye began treating with Dr. Ellis, an employee of the Mantonya Chiropractic Centers.

{¶3} Nye went to the chiropractor three times a week as part of her treatment plan. (Nye Depo., p. 124). During her appointments with Dr. Ellis, Nye states that Dr. Ellis would discuss personal information with her, such as his dating habits and his recent move to the Columbus area. (Nye Depo., p. 132-133). As Nye progressed with her treatment, so did her relationship with Dr. Ellis. Nye gave Dr. Ellis her phone number so that he could call her to talk because Dr. Ellis said that he enjoyed speaking with her and she felt Dr. Ellis needed someone to talk to. (Nye Depo., p. 142). Dr. Ellis confided to Nye that his fiancée had committed suicide. He was also suffering from depression and was having suicidal thoughts.

{¶4} In mid-October 2005, Dr. Ellis called Nye and asked if he could come over to her home to watch a movie. Nye invited Dr. Ellis to her home and the two engaged in consensual sex. (Nye Depo., p. 143). In late October 2005, Nye and Dr. Ellis engaged

in a second consensual sexual encounter. (Nye Depo., p. 143-151). Nye stated that her relations with Dr. Ellis were not part of any chiropractic treatment, nor did Dr. Ellis force her. (Nye Depo., p. 155-156).

{¶5} Nye stated that while the sexual encounters occurred outside the doctor's office, Dr. Ellis made intimate gestures towards her during her treatment in October 2005. During one treatment while Nye laid on the adjustment table, Dr. Ellis leaned across her chest, laid his head on her shoulder, and whispered in her ear that he could stay there as long as it took for her to relax. (Nye Depo., p. 137). During another treatment, Dr. Ellis kissed Nye while he adjusted her neck. (Nye Depo., p. 138). Nye stated that Dr. Ellis made comments about her undergarments and massaged her back under her shirt during treatments. (Nye Depo., p. 141). During her treatments, Nye stated that she was competent, but had difficulty functioning due to her severe pain and her pain medication. (Nye Depo., p. 158).

{¶6} Nye admitted that she was flattered by Dr. Ellis's attention and thought she developed feelings for him, but came to realize in October 2005 that her relationship with Dr. Ellis was wrong. (Nye Depo., p. 150-151). On November 15, 2005, Nye was involved in a car accident. She resumed her treatment with Dr. Ellis for her injuries suffered in the car accident. It was not until December 16, 2005 that Nye terminated her personal and professional relationship with Dr. Ellis.

{¶7} In March of 2006, Nye experienced severe neck pain. (Nye Depo., p. 280). She called Dr. Ellis's cell phone to ask him for a referral to another chiropractor, but Dr Ellis never returned her phone call. Id. Nye contacted the Mantonya

Chiropractic Clinic directly and scheduled an appointment with Dr. Gregg Mantonya. Dr. Gregg Mantonya is the son of Dr. Jerry Mantonya.

{¶8} At her first or second appointment with Dr. Gregg Mantonya, Nye disclosed to Dr. Gregg Mantonya her relationship with Dr. Ellis. (Nye Depo., pp. 282-283). Nye understood that Dr. Gregg Mantonya agreed to meet with Dr. Ellis and her to discuss the relationship. (Nye Depo., p. 285). It was Nye's desire that Dr. Ellis admit ownership and take responsibility for what transpired between them; she wanted him to admit what he did was wrong and because she felt other women were at risk at getting personally involved with him. (Nye Depo., p. 174, 286). After indicating that he had spoken with his father, Dr. Gregg Mantonya asked Nye to meet directly with Dr. Ellis. (Nye Depo., p. 172). Nye met with Dr. Ellis at the Clinic, but Nye stated that he refused to accept any responsibility or acknowledge that what he did was wrong. Id.

{¶9} It was in March 2006 that Nye first contacted the Ohio State Chiropractic Board to ask how to file a complaint to report Dr. Ellis's behavior. (Nye Depo., p. 101).

{¶10} Nye stopped treating with Dr. Gregg Mantonya and the Mantonya Chiropractic Clinic on April 21, 2006.

{¶11} Nye filed a formal complaint with the Ohio State Chiropractic Board on August 18, 2006. She submitted a follow-up letter on October 10, 2006 detailing Dr. Ellis's conduct. (Nye Depo., p. 92). Nye later learned that another female patient of Dr. Ellis had filed a complaint against Dr. Ellis.

{¶12} On March 27, 2007, Nye mailed a 180-day letter to Dr. Ellis pursuant to R.C. 2305.113(B)(1). Nye filed her original complaint on September 11, 2007. Nye filed her second amended complaint on February 3, 2009 naming Dr. Ellis and Dr. Jerry

Mantonya as defendants. In Nye's complaint, she alleged negligence/chiropractic malpractice, intentional/negligent infliction of emotional distress, spoliation of evidence, tortious alteration of records, and negligent hiring/retention. Nye attached an affidavit of merit from Jay L. Blatnik, D.C., pursuant to Civ.R. 10(D)(2), which states in pertinent part:

{¶13} "Furthermore, based on my education, training and experience and based upon my review of the above mentioned records and materials, it is my opinion, to a reasonable degree of chiropractic probability, that Defendants were professionally negligent and fell below the acceptable standard of care by engaging in a consensual sexual relationship with Plaintiff Melanie S. Nye."

{¶14} Dr. Ellis and Dr. Mantonya filed motions for summary judgment on all of Nye's claims. The trial court granted the Appellees' motions for summary judgment in two entries on March 4, 2009 and May 19, 2009. It is from these decisions Nye now appeals.

ASSIGNMENT OF ERRORS

{¶15} Nye raises four Assignments of Error:

{¶16} "I. THE TRIAL COURT ERRED BY FINDING THAT APPELLANT'S CHIROPRACTIC MALPRACTICE CLAIM WAS BARRED BY THE STATUTE OF LIMITATIONS WHEN SHE MAINTAINED A PHYSICIAN-PATIENT RELATIONSHIP FOR THE SAME MEDICAL CONDITION.

{¶17} "II. THE TRIAL COURT ERRED BY FINDING THAT APPELLANT'S INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM WAS TIME BARRED.

{¶18} "III. THE TRIAL COURT ERRED BY FINDING THAT APPELLANT'S CLAIM FOR NEGLIGENT HIRING AND RETENTION WAS TIME BARRED.

{¶19} "IV. THE TRIAL COURT ERRED BY DISMISSING APPELLANT'S SPOLIATION OF EVIDENCE CLAIM."

{¶20} Appellee Dr. Ellis raises two Cross-Assignments of Error:

{¶21} "I. APPELLANT'S CLAIMS FOR CHIROPRACTIC MALPRACTICE AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS ARE REALLY CLAIMS BASED ON CONSENSUAL AMATORY ACTIVITIES AND ARE THUS BARRED BY R.C. 2305.29, THE STATUTE ABOLISHING AMATORY-RELATED CIVIL ACTIONS.

{¶22} "II. APPELLANT HAS FAILED TO SATISFY THE 'EXTREME AND OUTRAGEOUS' AND 'SEVERE AND DEBILITATING EMOTIONAL INJURY' COMPONENTS REQUIRED FOR A CLAIM BASED ON INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS."

STANDARD OF REVIEW

{¶23} This matter comes to us on appeal from the trial court's decision to grant summary judgment in favor of Appellees. Summary judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 663 N.E.2d 639, 1996-Ohio-211:

{¶24} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (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, and

viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

{¶25} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 506 N.E.2d 212. Accordingly, our review is de novo and we will not reverse an otherwise correct judgment merely because the trial utilized different or erroneous reasons as the basis for its determination. *Howard v. Chattahoochie's Bar*, 175 Ohio App.3d 578, 888 N.E.2d 462, 2008-Ohio-742, ¶ 11.

I.

{¶26} Nye argues in her first Assignment of Error that the trial court erred in granting summary judgment in favor of the Appellees because her malpractice action was time-barred by the statute of limitations. For the reasons that follow, which are different from those expressed by the trial court, the judgment entry granting summary judgment in favor of Appellees is affirmed.

{¶27} In their motions for summary judgment, Appellees raised several grounds as to why they were entitled to judgment as a matter of law. Appellees first argued the one-year statute of limitations governing malpractice actions against a chiropractor bars Nye's claim against Dr. Ellis. See R.C. 2305.113.

{¶28} Appellees argue that Nye admitted in her deposition that she terminated her professional and personal relationship with Dr. Ellis on December 16, 2005, therefore requiring her to file her malpractice claim or send her 180-day letter before December 16, 2006. Nye sent her 180-day letter on March 27, 2007 and she filed her complaint on September 11, 2007. Appellees argue that based on these dates, Nye filed her complaint beyond the statute of limitations pursuant to R.C. 2305.113.

{¶29} In opposition, Nye argues that under *Frysinger v. Leech* (1987), 32 Ohio St.3d 38, 41-42, 512 N.E.2d 337, the statute of limitations had not yet run for her claim against Appellees when she sent her 180-day letter. The Ohio Supreme Court held in *Frysinger* that a cause of action for medical malpractice accrues and the one-year statute of limitations commences to run (a) when the patient discovers or, in the exercise of reasonable care and diligence should have discovered, the resulting injury, or (b) when the physician-patient relationship for that condition terminates, whichever occurs later. Id. at paragraph one of syllabus.

{¶30} Nye relies upon the "termination rule" to argue that her patient-physician relationship with the Mantonya Chiropractor Clinic did not terminate until April 21, 2006. She states that while she stopped treating with Dr. Ellis in December 2005, she continued treating with Dr. Gregg Mantonya until April 21, 2006; therefore, the one-year statute of limitations did not end until April 21, 2007.

{¶31} In its March 4, 2009 judgment entry, the trial court granted Appellees' motions for summary judgment under the statute of limitations argument. The trial court found that while Nye was treating with Dr. Gregg Mantonya for her neck pain, the continued treatment was not "for the condition proximately resulting from the negligence

alleged." It found the cause of action accrued on December 16, 2005 when Nye terminated the physician-patient relationship with Dr. Ellis and therefore her claim was barred by the statute of limitations.

{¶32} While we find the trial court reached the correct decision in granting Appellees judgment as a matter of law, we reach the same conclusion on different legal grounds. Upon our de novo review, we find that Nye has failed to demonstrate that genuine issues of material fact exist to show that a medical malpractice occurred when this chiropractor engaged in a consensual relationship with his patient.

{¶33} The Ohio Supreme Court set forth the general definition of "malpractice" in *Strock v. Pressnell* (1988), 38 Ohio St.3d 207, 527 N.E.2d 1235, wherein it stated, "The term 'malpractice' refers to professional misconduct, i.e., the failure of one rendering services in the practice of a profession to exercise that degree of skill and learning normally applied by members of that profession in similar circumstances." Id. at 211, 527 N.E.2d 1235, citing 2 Restatement of the Law 2d, Torts (1965), Section 299A. It is well settled in Ohio that in order to prevail in a medical malpractice claim, a plaintiff must demonstrate through expert testimony that, among other things, the treatment provided did not meet the prevailing standard of care. *Ramage v. Central Ohio Emergency Services, Inc.* (1992), 64 Ohio St.3d 97, 102, 592 N.E.2d 828, 1992-Ohio-109. Proof of the recognized standards must necessarily be provided through expert testimony. This expert must be qualified to express an opinion concerning the specific standard of care that prevails in the medical community in which the alleged malpractice took place, according to the body of law that has developed in this area of evidence. *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, 131-132, 346 N.E.2d 673.

{¶34} In Nye's complaint for negligence/chiropractic malpractice, she states, "During the course of such treatment and services, Defendant Ellis exploited his position of trust for the purpose of taking advantage of Plaintiff and otherwise engaged in practices contrary to acceptable and prevailing standards of medical and chiropractic care and in gross violation of the code of ethics governing the conduct of doctors of chiropractic." (Plaintiff's Second Amended Complaint, Feb. 3, 2009). Nye's Civ.R. 10(D)(2) affidavit of merit, recited in the facts above, states that Dr. Ellis fell below the standard of care by engaging in a consensual sexual relationship with Nye. Nye makes no allegation in her complaint or deposition that the actual medical treatment rendered by Dr. Ellis for her neck pain fell below the standard of care and proximately caused her an injury.

{¶35} Absent from Nye's response to Appellees' motions for summary judgment is expert testimony through affidavit or deposition demonstrating the prevailing standard of care for chiropractors and how Dr. Ellis as a chiropractor fell below the standard of care by engaging in consensual sexual relationship with his patient. The only evidence submitted to the trial court in response to summary judgment was an unauthenticated newsletter article entitled, "Secrets in the Exam Room: Sexual Misconduct by Doctors."

{¶36} Nye mistakenly relies upon her affidavit of merit filed with her complaint to establish the standard of care and Dr. Ellis's breach of the standard of care. Civ.R. 10(D)(2) requires a plaintiff to file an affidavit to establish the adequacy of the complaint. However, as Civ.R. 10(D)(2)(d) explains, the affidavit of merit "shall not otherwise be admissible as evidence[.]" As the affidavit does not "set forth such facts as would be

admissible in evidence" under Civ.R. 56(E), we cannot consider it. *Braden v. Sinar*, Summit App. No. 24056, 2008-Ohio-4430, ¶20.

{¶37} Pursuant to Civ.R. 56(C), a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall,* 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing *Dresher v. Burt,* 75 Ohio St.3d 280, 1996-Ohio-207.

{¶38} We find that when this matter is examined beyond the statute of limitations argument, Nye has failed to meet her burden to demonstrate there is a genuine issue of material fact that Dr. Ellis's consensual relationship with Nye was in fact medical malpractice because Dr. Ellis breached the standard of care.[1] She has failed to submit any expert testimony to show the standard of care for a chiropractor and that Dr. Ellis breached the standard of care. Therefore, albeit for different reasons, we find the trial

[1] The Superior Court of New Jersey, Appellate Division, addressed the concept of medical malpractice against a physician accused of sexual assault against a patient. In *Zuidema v. Pedicano* (2004), 373 N.J.Super. 135, 860 A.2d 992, the court held that a patient could not utilize a medical malpractice type theory to support a claim based on an intentional act independent of a physician's practice. "A doctor's duty to refrain from sexual misconduct, a separate intentional act, does not give rise to a medical malpractice action…to conclude otherwise and allow a malpractice cause of action in such circumstances would essentially incorporate intentional sexual conduct as a part of a physician's professional service. And as an intentional act, it generally would not be covered by professional malpractice insurance."

court did not err in granting summary judgment as to Nye's complaint for chiropractic medical malpractice claim.

II.

{¶39} Nye argues in her second Assignment of Error that the trial court erred in granting summary judgment in favor of Appellees for her claim of intentional infliction of emotional distress. We disagree.

{¶40} The trial court found in its March 4, 2009, judgment entry that Nye's claim for intentional infliction of emotional distress arose from the alleged medical malpractice. Because the trial court found Nye's malpractice claim to be time-barred, the trial court found that Nye's claim for intentional infliction of emotional distress to also be barred. However, this Court will substantively analyze Nye's claim because we found above that Nye's malpractice claim failed as a matter of law on different legal grounds.

{¶41} To state a claim for intentional infliction of emotional distress, a plaintiff must be able to establish that: (1) the defendant either intended to cause emotional distress, or knew or should have known that its actions would result in serious emotional distress; (2) defendant's conduct was so extreme and outrageous as to go beyond all possible bounds of decency, and would be considered utterly intolerable in a civilized community; (3) defendant's actions proximately caused injury to plaintiff; and (4) the mental anguish plaintiff suffered is serious and of such a nature that no reasonable person could be expected to endure. *Ashcroft v. Mt. Sinai Medical Center* (1990), 68 Ohio App.3d 359, 588 N.E.2d 280.

{¶42} The Ohio Supreme Court has described the outrageous behavior that supports this type of claim as requiring something beyond a "tortious or even criminal"

intent to cause harm. Id. at ¶ 50 (quoting *Yeager v. Local Union 20,* 6 Ohio St.3d 369, 374-75, 453 N.E.2d 666 (1983), abrogated on other grounds by *Welling v. Weinfeld,* 113 Ohio St.3d 464, 2007-Ohio-2451). It is not sufficient for a plaintiff to set forth facts tending to prove that the defendant's "conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort." Id. (quoting *Yeager,* 6 Ohio St.3d at 374-75).

{¶43} A review of the record shows that Nye has failed to set forth any evidence in the record creating a genuine issue of material fact regarding whether Dr. Ellis "intended to cause emotional distress, or knew or should have known [his] actions would result in serious emotional distress" or whether Dr. Ellis's "conduct was so extreme and outrageous that it went beyond all possible bounds of decency, and can be considered completely intolerable in a civilized community." *Rigby v. Fallsway Equip. Co. Inc.,* 150 Ohio App.3d 155, 2002-Ohio-6120, at ¶ 48 (quoting *Jones v. White* (Oct. 15, 1997), 9th Dist. No. 18109.

{¶44} Nye testified that she was initially flattered by Dr. Ellis's attention during her appointments and that she voluntarily gave him her phone number. (Nye Depo., p. 142). She stated that her sexual encounters with Dr. Ellis were consensual and not as part of any medical treatment. (Nye Depo., p. 156). Nye realized that her relationship with Dr. Ellis was wrong to her, but she was unable to break it off because she felt sorry for Dr. Ellis. (Nye Depo., p. 151). She chose to end her professional and personal relationship with Dr. Ellis on December 16, 2005. (Nye Depo., p. 154).

{¶45} Upon review, we find no evidence in the record to support Nye's allegations that Dr. Ellis's consensual relationship with her rises to the level of "extreme and outrageous" conduct.

{¶46} We again find that upon our *de novo* review, the trial court reached the correct result in granting Appellees' motion for summary judgment on Nye's claim for intentional infliction of emotional distress. Nye's second Assignment of Error is overruled.

III.

{¶47} Nye argues in her third Assignment of Error the trial court erred in finding that her claim for negligent hiring and retention was time barred based on Nye's medical malpractice claim being filed beyond the statute of limitations. We again find the trial court reached the correct result, but for different reasons.

{¶48} In order to prevail on a claim of negligent retention, a plaintiff must establish "(1) the existence of an employment relationship; (2) the employee's incompetence; (3) the employer's actual or constructive knowledge of such incompetence; (4) the employee's act or omission causing the plaintiff's injuries; and (5) the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries." *DiPietro v. Lighthouse Ministries*, 159 Ohio App.3d 766, 2005-Ohio-639, 825 N.E.2d 630, ¶19 citing *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 69, 430 N.E.2d 935; *Essig v. Sara Lane Corp.* (Aug. 1, 2000), Franklin App. No. 99AP-1432, 2000 WL 1072463.

{¶49} The Tenth District had the opportunity to address similar causes of action in *DiPietro v. Lighthouse Ministries*, supra, where a pastor and a parishioner engaged in

a consensual sexual relationship. The parishioner sued the church for negligent hiring, retention and training of the pastor, among other torts. The Tenth District affirmed the judgment of the trial court to grant summary judgment in favor of the church on the issue of negligent hiring. Analyzing a similar fact pattern, the court stated:

{¶50} "In addition to the foregoing, 'an underlying requirement in actions for negligent supervision and negligent training is that the employee is individually liable for a tort or guilty of a claimed wrong against a third person, who then seeks recovery against the employer.' *Strock,* supra, 38 Ohio St.3d at 217, 527 N.E.2d 1235. In this case, it is undisputed that the lone sexual encounter between Ervin [pastor] and plaintiff was consensual. In that regard, '[i]t is a fundamental principle of the common law that volenti non fit injuria-to one who is willing, no wrong is done.' Prosser and Keeton, The Law of Torts (5th Ed.1984) 112, Section 18.

{¶51} "A case employing that principle, and factually similar to the case sub judice, is *Schieffer v. Catholic Archdiocese of Omaha* (1993), 244 Neb. 715, 508 N.W.2d 907. In that case, the plaintiff brought an action for damages against the Catholic Archdiocese of Omaha and her parish priest, with whom she had engaged in a consensual sexual affair. The plaintiff asserted that the archdiocese was negligent in failing to supervise the priest in connection with his pastoral duties when it knew or should have known of his prior sexual affairs and in failing to remove the priest from his position despite this knowledge.

{¶52} "The Supreme Court of Nebraska affirmed the dismissal of the plaintiff's claims upon demurrer. It held that the plaintiff's consent barred any recovery against

the priest, and as a result, plaintiff could have no cause of action against the archdiocese. In reaching that conclusion, the *Schieffer* court relied upon *Strock,* supra.

{¶53} "Applying *Schieffer* here, we reach the same result. The case at bar involves conduct between two consenting adults. Plaintiff testified in her deposition that Ervin did not use force, drugs, or threats to coerce her into having sex with him. And although plaintiff alleges that Ervin 'took sexual advantage' of her, '[t]his allegation falls far short of alleging that the plaintiff was incapable of consenting to what took place.' *Schieffer,* supra, 244 Neb. at 718, 508 N.W.2d 907. Therefore, if Ervin individually has no tort liability to the plaintiff, it follows that defendants cannot be held liable for his conduct." *DiPietro*, supra at ¶24-27.

{¶54} We find the same analysis applies to the present case because it is undisputed the sexual relationship between Nye and Ellis was consensual. As such, we overrule Nye's third Assignment of Error and find the trial court did not err in granting summary judgment in favor of Appellees on Nye's claim for negligent hiring and retention.

IV.

{¶55} Nye argues in her final Assignment of Error the trial court erred in granting summary judgment in favor of Appellees for her claim of spoliation of the evidence. On May 19, 2009, the trial court issued a second judgment entry finding that Nye's claim failed as a matter of law because Nye failed to show there was a genuine issue of fact that she was disrupted from bringing her claim based on Appellees alleged destruction of the evidence.

{¶56} In *Smith v. Howard Johnson Co. Inc.* (1993), 67 Ohio St.3d 28, 615 N.E.2d 1037, the Ohio Supreme Court recognized a cause of action for interference with or destruction of evidence:

{¶57} "A cause of action exists in tort for interference with or destruction of evidence; (2a) the elements of a claim for interference with or destruction of evidence are (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts; (2b) such a claim should be recognized between the parties to the primary action and against third parties; and (3) such a claim may be brought at the same time as the primary action."

{¶58} Upon our review of the record and supported by our above analyses, we can find no set of facts that would cause reasonable minds to disagree as to whether Appellees willful destruction of evidence caused a disruption to Nye's case for medical malpractice, intentional infliction of emotional distress, or negligent hiring and retention. Nye's spoliation of the evidence claim regarded records that she argued would establish the statute of limitations for which to bring her claims. Because we found that her claims failed as a matter of law regardless of the statue of limitations, we find that likewise her spoliation of the evidence claim must fail.

{¶59} Nye's fourth Assignment of Error is overruled.

{¶60} Further, based on our findings, we find Dr. Ellis's first and second Cross-Assignment of Error to be moot.

{¶61} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Delaney, J. and

Edwards, J. concur.

Hoffman, P.J., concurring separately.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. JULIE A. EDWARDS

PAD:kgb

Hoffman, P.J., concurring

{¶62} I concur in the majority's analysis and disposition of Appellant's second and third assignments of error and its conclusion Dr. Ellis's cross-appeal is moot.

{¶63} I further concur in the majority's decision to overrule Appellant's first assignment of error, but do so based upon the expiration of the statute of limitations.[2] To that extent, I agree with the trial court's application of the *Findlay* case as set forth on pages 3-4 of its March 4, 2009 Judgment Entry.

{¶64} Finally, I also concur in the majority's disposition of Appellant's fourth assignment of error. However, I do so for the reasons set forth at pages 2-3 of the trial court's May 19, 2009 Judgment Entry, which rationale is premised upon expiration of the statute of limitations as to the underlying claim.

_____

HON. WILLIAM B. HOFFMAN

[2] While I do not necessarily disagree with the majority's conclusion the case sub judice does not appear to be one for chiropractic malpractice, such challenge could/should be made via Civ.R. 12(B)(6). I note this issue was not briefed by the parties.

[Cite as *Nye v. Ellis*, 2010-Ohio-1462.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

MELANIE S. NYE	:	
	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
MATTHEW F. ELLIS, B.S., D.C., et al.	:	
	:	
	:	Case No. 09-CA-0080
Defendants-Appellees	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. JULIE A. EDWARDS