[Cite as *Garofolo v. Fairview Park*, 2009-Ohio-6456.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 92283 and 93021

RAYMOND GAROFOLO, ET AL.

PLAINTIFFS-APPELLANTS

vs.

CITY OF FAIRVIEW PARK, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-615489

BEFORE: Gallagher, J., Cooney, A.J., and Celebrezze, J.

RELEASED: December 10, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

SEAN C. GALLAGHER, J.:

{¶ 1} Appellants, Raymond Garofolo ("Garofolo") and Dorene Garofolo, appeal the rulings of the Cuyahoga County Court of Common Pleas that granted summary judgment in favor of appellees. For the reasons stated herein, we affirm the judgment of the trial court.

{¶ 2} The appellees in this action include (1) City of Fairview Park ("Fairview Park"), Mayor Eileen Ann Patton, James M. Kennedy, and Ted Kowalski (collectively "the Fairview Park defendants"); (2) Martina Moore, MA, LICDC, SAP, and Moore Counseling & Mediation Services, Inc. (collectively "Moore"); and (3) Weinstein & Associates, Inc. ("Weinstein"). Defendant Fairview Hospital was dismissed from the action and is not a party to this appeal.

{¶ 3} The following facts gave rise to this action. Garofolo is employed by Fairview Park as a "Laborer 1." His job activities include, in part, lifting and dispensing trash bags onto garbage trucks and driving such vehicles, for which a commercial driver's license is required. His position is considered "safety sensitive" by the Federal Department of Transportation ("DOT").

{¶ 4} On September 4, 2003, Garofolo injured his shoulder while at work when he lifted a garbage can. He reported the injury to his service foreman, but continued to work and did not seek immediate medical attention.

{¶ 5} On September 6, 2003, Garofolo informed his service foreman that his shoulder was still bothering him and that he was going to Fairview Hospital for medical treatment. No one from Fairview Park instructed Garofolo to go to the hospital, and Garofolo went on his own time.

{¶ 6} While at the hospital, Garofolo provided a urine sample that tested positive for cocaine. Garofolo claims that he informed the hospital that the injury was work related after the test was administered and that the hospital wrongfully disclosed the test result to Fairview Park. Because of his injury, Garofolo did not initially return to work, and he subsequently applied for and received workers' compensation benefits.

{¶ 7} Upon being informed of his positive test result, Garofolo contacted union officials in an effort to obtain assistance. Garofolo alleges that during a meeting with union representatives present, James Kennedy, the director of public service and development for Fairview Park, referred to Garofolo as a "cocaine user," "a liar," and "a drug user."

{¶ 8} Upon returning to work in February 2004, Garofolo was required to complete an authorized substance abuse program prior to returning to his safety-sensitive position. Fairview Park contacted Weinstein, who provided an employee assistance program utilized by Fairview Park. Because Weinstein did not offer a substance abuse program, Weinstein provided a referral to Moore, who on occasion utilizes office space at Weinstein.

{¶ 9} On February 16, 2004, Garofolo reported to Weinstein's office and met with Martina Moore, a licensed substance abuse professional ("SAP"), for a substance abuse assessment. After the initial assessment, Moore recommended that Garofolo not be returned to safety-sensitive duties until further notice. As part of the evaluation and recommendation process, Garofolo signed a form agreeing to attend three Alcoholics Anonymous/Narcotics Anonymous 12-step meetings. Initially, he did not attend these meetings. Garofolo attempted to tape-record his follow-up assessment upon the advice of counsel, and the session did not go forward. He was suspended for five days by Fairview Park for insubordination.

{¶ 10} Upon providing evidence of Garofolo's compliance with the recommendations of the SAP, Moore recommended that Fairview Park return Garofolo to his safety-sensitive position. Effective November 22, 2004, Garofolo was reclassified to the position of Laborer 1.

{¶ 11} Appellants filed this action on February 9, 2007 against Fairview Hospital, the Fairview Park defendants, Moore, and Weinstein. The complaint raises the following causes of action: (1) unlawful and negligent urine sample claim—Fairview Hospital; (2) invasion of privacy; (3) breach of duty of confidentiality; (4) defamation; (5) breach of contract—duty of good faith; (6) invasion of privacy—Fairview Hospital; (7) conspiracy; (7)[1] unlawful

[1] The complaint labeled two claims "seventh cause of action."

obtainment of privileged information; (8) intentional infliction of emotional distress; (9) breach of doctor-patient privilege; (10) loss of consortium.

{¶ 12} Appellants and Fairview Hospital reached a settlement, resulting in the dismissal of Fairview Hospital from the action. Ultimately, summary judgment was rendered in favor of the remaining defendants on all remaining claims.

{¶ 13} Appellants filed this appeal, raising four assignments of error for our review. Appellants challenge the trial court's decision to grant summary judgment to each of the appellees. They also challenge the trial court's decision to grant the Fairview Park defendants' motion for reconsideration after originally having granted only partial summary judgment.

{¶ 14} We begin by addressing appellants' fourth assignment of error. Appellants claim that the trial court's decision to grant reconsideration and award summary judgment on all claims to the Fairview Park defendants is a nullity.[2] The trial court's initial ruling awarded partial summary judgment in favor of Fairview Park. Upon remand from this court, the trial court had jurisdiction over the remaining claims and the court could properly reconsider interlocutory rulings or enter any lawful order as to those claims. We find no error in connection with the trial court's ruling in this regard, and the trial

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[2] Because the motion for reconsideration was filed while an appeal was pending, the case was remanded to the trial court and a nunc pro tunc order granting summary judgment to the Fairview Park defendants was entered.

court's actions did not prejudice either party. Accordingly, appellants' fourth assignment of error is overruled.

{¶ 15} We proceed to address appellants' first, second, and third assignments of error, which challenge the trial court's decision to grant summary judgment in favor of Moore, Weinstein, and the Fairview Park defendants. Appellate review of summary judgment is de novo, governed by the standard set forth in Civ.R. 56. *Comer v. Risko*, 106 Ohio St.3d 185, 186, 2005-Ohio-4559, 833 N.E.2d 712. Under Civ.R. 56(C), summary judgment is proper when the moving party establishes that "(1) no genuine issue of any material fact remains, (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 construing the 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. Duncan v. Mentor City Council*, 105 Ohio St.3d 372, 374, 2005-Ohio-2163, 826 N.E.2d 832, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 16} Appellants challenge the trial court's decision with respect to their various claims. We shall consider them in the order presented in their appellate brief.

DEFAMATION

{¶ 17} Garofolo argues that he established a claim for defamation against appellees. To prevail on his defamation claim, Garofolo must prove five elements: "1) a false statement; 2) about the plaintiff; 3) published to a third party; 4) with the required degree of fault by the defendant publisher; and 5) defamatory per se or defamatory per quod, causing special harm to the plaintiff." *Lynch v. Studebaker*, Cuyahoga App. No. 88117, 2007-Ohio-4014.

{¶ 18} Garofolo alleges that Martina Moore informed Fairview Park that he was a "liar." In support of this claim, he references the February 16, 2004 note, on Weinstein letterhead, from Martina Moore to Ted Kowalski regarding Garofolo's substance abuse assessment. The note contains an unverified handwritten statement at the bottom indicating that Garofolo was "not forthcoming— denying everything" and "he is 'lying.'" Martina Moore denied authoring this writing.

{¶ 19} A statement that someone is a liar is one that courts have considered to be defamatory on its face. *Dale v. Ohio Civ. Serv. Employees Assn.* (1991), 57 Ohio St.3d 112, 117, 567 N.E.2d 253, certiorari denied (1991), 501 U.S. 1231. However, truth is an absolute defense to a defamation claim. R.C. 2739.02. Further, there is a qualified-privilege defense to a claim of defamation in certain instances. See *Hahn v. Kotten* (1975), 43 Ohio St.2d 237, 331 N.E.2d 713.[3]

[3] "A qualified or conditionally privileged communication is one made in good

{¶ 20} In this case, a review of the record demonstrates that the handwritten notation was consistent with Garofolo's conduct during his assessment. The evidence reflects that the result of Garofolo's drug test was positive and Garofolo offered no credible evidence showing the positive test result was an error. Therefore, Garofolo has failed to show that the handwritten comments were false or substantially untrue. Further, because a SAP has a duty to provide a report highlighting her recommendations to the designated employer representative pursuant to 49 C.F.R. 40.923, we find that the statement was subject to a qualified privilege to which Garofolo has not shown any evidence of malice.

{¶ 21} Garofolo also references alleged comments made by James Kennedy referring to Garofolo as "a cocaine user," "a liar," and "a drug user." These statements were allegedly made at a union grievance meeting. Here again, Garofolo has failed to provide any evidence that the positive test result was invalid, inaccurate, or otherwise unreliable. Also, because the statements were made at a union grievance meeting, they were privileged communications. See *Gintert v. WCI Steel, Inc.*, Trumbull App. No.

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faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty of a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right or interest. The essential elements thereof are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only." Id., quoting 50 Am.Jur.2d 698, Libel and Slander, Section 195.

2002-T-0124, 2007-Ohio-6737. Further, no evidence of malice has been shown.

{¶ 22} Additionally, Garofolo's defamation claim appears to be time-barred. R.C. 2305.11 requires that a defamation claim be brought within one year after the cause of action accrued, which is the date of publication of the defamatory matter or at the time the words are spoken. See *Cramer v. Fairfield Med. Ctr.*, 182 Ohio App.3d 653, 667, 2009-Ohio-3338, 914 N.E.2d 447. In this case, the referenced statements were made more than a year before this action was filed.

{¶ 23} Because Garofolo's argument lacks specificity concerning any other communications, our review is limited accordingly. We find that the trial court properly granted summary judgment in favor of all appellees on the defamation claim.

SOVEREIGN IMMUNITY

{¶ 24} Appellants assert that their claims against the Fairview Park defendants are not precluded by the doctrine of sovereign immunity. We decline to address this argument as the remainder of our analysis is dispositive of the appeal.

CONSPIRACY

{¶ 25} Garofolo argues that summary judgment was improperly granted on his conspiracy claim. He argues that "the Fairview Park defendants

act[ed] in concert with the other named defendants, maliciously injured [Garofolo] by invading his privacy, by breaching the contract it had with [him], and by intentionally inflicting emotional distress upon [him]." He further states that Moore and Weinstein fraudulently misrepresented their qualifications and/or association.

{¶ 26} In order to establish the tort of civil conspiracy, a plaintiff must prove the following elements: (1) a malicious combination of two or more persons, (2) causing injury to another person or property, and (3) the existence of an unlawful act independent from the conspiracy itself. *Kenty v. TransAmerican Premium Ins. Co.*, 72 Ohio St.3d 415, 419, 1995-Ohio-61, 650 N.E.2d 863. A claim for civil conspiracy cannot be maintained unless an underlying unlawful act is committed. *Gosden v. Louis* (1996), 116 Ohio App.3d 195, 219, 687 N.E.2d 481.

{¶ 27} In this case, Garofolo makes vague and conclusory assertions regarding a conspiracy, he fails to point to any evidence in the record that supports his claim, he has not shown any evidence of a malicious combination, and the underlying causes of action are without merit. Insofar as Garofolo attempts to insert a fraud claim into his argument, no such claim was raised in his complaint and the record does not support such a claim. Accordingly, we find the trial court properly granted summary judgment to appellees on the conspiracy claim.

BREACH OF CONTRACT

{¶ 28} Garofolo argues that the Fairview Park defendants breached the collective bargaining agreement, as well as Fairview Park's drug and alcohol free workplace policy. Much of Garofolo's argument relates to the drug test administered to him. However, Garofolo concedes that he went to the hospital on his own accord, he was not ordered by the Fairview Park defendants to seek medical treatment or to take the drug test, and Fairview Hospital administered the drug test. Garofolo asserts that the appellees wrongfully utilized and acted upon the results of the drug test because there was no permissible testing, his injury was the result of heavy lifting, and there was no suspicion that he abused alcohol or drugs while on duty. Garofolo fails to show how the Fairview Park defendants' actions upon receiving the positive test result constituted a breach of contract or were otherwise unlawful. Simply stated, Garofolo has provided no basis for a breach of contract claim against the Fairview Park defendants.

{¶ 29} Additionally, we find no merit to Garofolo's argument that the actions of Moore and Weinstein amounted to a breach of contract. Neither Moore nor Weinstein were parties to the collective bargaining agreement. Insofar as Garofolo alleges a failure to comply with DOT requirements, he fails to show how any purported violation would constitute a breach of contract, and he never presented such a claim in the trial court.

{¶ 30} Accordingly, we find that the trial court properly granted summary judgment to appellees on the breach of contract claim.

INVASION OF PRIVACY

{¶ 31} The tort of invasion of privacy includes four distinct torts: (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity that places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness. *Killilea v. Sears, Roebuck & Co.* (1985), 27 Ohio App.3d 163, 166, 499 N.E. 1291.

{¶ 32} Garofolo alleges that the Fairview Park defendants received unauthorized and confidential test results, disseminated the information throughout the workplace, communicated with Weinstein and Moore regarding the matter, inappropriately labeled him a "cocaine user," "a liar," and "a drug user," and implemented a lengthy, humiliating, and open disciplinary process against him. Even if we were to presume that the claim was brought against all defendants, we find all the appellees were entitled to summary judgment on this claim.

{¶ 33} The record reflects that none of the appellees were involved with the drug test itself or the subsequent disclosure of the positive test result. Fairview Park was provided with the results of the drug test from Fairview

Hospital. Garofolo speculates that appellees handled the information in such a manner that lead to widespread knowledge in the workplace. While the results were disclosed to Weinstein and Moore, these parties had a legitimate basis to have such knowledge in connection with Fairview Park's employee assistance program and the substance abuse program to which Garofolo was referred.

{¶ 34} Further, Garofolo offers no legal basis for his argument that appellees should have ignored the disclosure of his positive drug test and that he should not have been subjected to the substance abuse program or other measures taken by appellees.[4] We find the argument that the appellees should not have acted upon the information to be disingenuous in light of Garofolo's safety-sensitive position and DOT requirements. Indeed, once provided with the information, Fairview Park had a clear interest in creating a safe working environment.

{¶ 35} We find no merit to the remainder of the arguments presented on this claim.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

{¶ 36} To establish a claim for intentional infliction of emotional

[4] The case of *Herman v. Kratche*, Cuyahoga App. No. 86697, 2006-Ohio-5938, relied upon by appellants, is distinguishable from this action because that opinion addressed only claims brought against a hospital in relation to the unauthorized disclosure of confidential medical information.

distress, a plaintiff must show that the defendant, through extreme and outrageous conduct, intentionally or recklessly caused the plaintiff severe emotional distress. *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 374, 453 N.E.2d 666, citing Restatement of the Law 2d, Torts (1965) 71, Section 46(1). In this matter, there is a lack of evidence demonstrating that appellees engaged in extreme and outrageous conduct. Further, Garofolo has failed to reference any evidence in the record to establish that any emotional distress he suffered rose to the level of severe and debilitating. Accordingly, we conclude that the trial court did not err in granting summary judgment on the claim for intentional infliction of emotional distress.

BREACH OF CONFIDENTIALITY

{¶ 37} Upon our review of the case, we find that Garofolo has failed to provide evidence that would establish an actionable claim for breach of confidentiality against appellees. As a result, summary judgment was properly granted on this claim.

LOSS OF CONSORTIUM

{¶ 38} Garofolo's wife asserted a claim for loss of consortium as a result of her husband's alleged injuries. "[A] claim for loss of consortium is derivative in that the claim is dependent upon the defendant's having committed a legally cognizable tort upon the spouse who suffers bodily injury." *Bowen v. Kil-Kare, Inc.* (1992), 63 Ohio St.3d 84, 93, 585 N.E.2d 384. Having determined that the trial court did not err in granting summary judgment on Garofolo's claims, his wife's loss of consortium claim also must fail.

{¶ 39} After considering each of the claims presented for this court's review, we find the trial court properly granted summary judgment to all appellees. Appellants' first, second, and third assignments of error are overruled.

Judgment affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

COLLEEN CONWAY COONEY, A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR