

[Cite as *Foy v. Trumbull Corr. Inst.*, 2011-Ohio-6298.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Raymond Foy, :
 :
 Plaintiff-Appellant, :
 :
 v. : No. 11AP-464
 : (C.C. No. 2010-10483)
 Trumbull Correctional Institution et al., : (ACCELERATED CALENDAR)
 :
 Defendants-Appellees. :

D E C I S I O N

Rendered on December 8, 2011

Raymond Foy, pro se.

Michael DeWine, Attorney General, and *Jennifer Anne Adair*,
for appellees.

APPEAL from the Court of Claims of Ohio.

BROWN, J.

{¶1} Raymond Foy, plaintiff-appellant, appeals from two entries of the Court of Claims of Ohio. In one entry, the trial court dismissed appellant's medical malpractice claim pursuant to the motion to dismiss filed by Trumbull Correctional Institution and Southern Ohio Correctional Facility, defendants-appellees. In the other entry, the trial court dismissed appellant's false imprisonment claims, pursuant to appellees' converted motion to dismiss. Appellant has also filed a motion for judicial notice.

{¶2} Appellant was an inmate in the custody of appellees at various times and is still incarcerated. On September 13, 2010, appellant filed a complaint in the Court of Claims alleging claims of false imprisonment and medical malpractice. In his medical claim appellant alleged appellees' medical doctor diagnosed him with a testicular mass but the doctor failed to implement a treatment plan. In the false imprisonment claims he alleged that appellees transported him to and from several criminal proceedings in another matter at the Trumbull County Court of Common Pleas instead of releasing him to the custody of the Trumbull County Sheriff, as required by R.C. 2941.41.

{¶3} On October 14, 2010, appellees filed a motion to dismiss appellant's medical claim and an answer to the false imprisonment claims. On November 29, 2010, the trial court granted appellees' motion to dismiss appellant's medical claim due to his failure to file an affidavit of merit pursuant to Civ.R. 10(D)(2). On December 7, 2010, appellant filed a Civ.R. 60(B) motion, claiming the trial court should not have dismissed his medical claim because appellees did not timely respond to his October 2010 discovery requests. Appellees countered that appellant had failed to serve the discovery requests electronically, as required by Civ.R. 33(A) and 36(A). Appellant then filed a motion to waive electronic filing, which the trial court granted on November 16, 2010. Appellees provided appellant discovery materials on December 14, 2010. On January 4, 2011, appellant filed a motion to compel discovery, which the trial court denied on January 25, 2011. The court denied appellant's Civ.R. 60(B) motion on January 18, 2011.

{¶4} On January 25, 2011, appellant filed a motion for summary judgment on the remaining false imprisonment claims. On February 7, 2011, appellees filed a cross-motion for summary judgment. On February 23, 2011, appellant filed another motion for

summary judgment. On May 3, 2011, the trial court issued a judgment, in which it converted appellees' motion for summary judgment into a motion to dismiss, and the court dismissed appellant's remaining false imprisonment claims. Appellant appeals the entries of the trial court, asserting the following assignments of error:

[I.] The court erred as a matter of law when it dismissed Plaintiff[s] medical claim for lack of expert testimony[.] The court ignored the exception to expert.

[II.] The court committed prejudicial error when it converted defendant[']s cross[-]motion for summary judgment to a motion to dismiss and granted the motion then denied plaintiff's motions for summary judgment.

[III.] The court committed prejudicial error when it fail[ed] to determine whether the named state employees conduct was outside the scope of their employment.

{¶5} Appellant argues in his first assignment of error that the trial court erred when it dismissed his medical claim for lack of expert testimony. The trial court granted appellant's motion to dismiss based upon his failure to comply with Civ.R. 10(D)(2). Civ.R. 10(D)(2) provides, in pertinent part:

Affidavit of merit; medical liability claim.

(a) Except as provided in division (D)(2)(b) of this rule, a complaint that contains a medical claim, dental claim, optometric claim, or chiropractic claim, as defined in section 2305.113 of the Revised Code, shall include one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. Affidavits of merit shall be provided by an expert witness pursuant to Rules 601(D) and 702 of the Ohio Rules of Evidence.

{¶6} The failure to file a Civ.R. 10(D)(2) affidavit is contested by way of a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted.

Fletcher v. Univ. Hosps. of Cleveland, 120 Ohio St.3d 167, 2008-Ohio-5379, ¶13. In deciding whether to dismiss a complaint, pursuant to Civ.R. 12(B)(6), for failure to state a claim upon which relief can be granted, the trial court must presume all factual allegations in the complaint are true and construe the complaint in the light most favorable to the plaintiff, drawing all reasonable inferences in favor of the plaintiff. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. Before the court may dismiss the complaint, it must appear beyond 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.* (1975), 42 Ohio St.2d 242, syllabus. We review de novo the dismissal of a complaint pursuant to Civ.R. 12(B)(6). *Shockey v. Wilkinson* (1994), 96 Ohio App.3d 91, 94.

{¶7} In the present case, it is undisputed that appellant's claim was a medical claim, and he failed to submit an affidavit of merit. However, appellant argues that the trial court should not have dismissed his medical claim because appellees filed both a motion to dismiss the medical claim and an answer to the medical claim, which is contrary to the requirement in Civ.R. 12(B) that "[a] motion making any of these defenses shall be made before pleading if a further pleading is permitted." We disagree. In their answer, appellees first answered appellant's false imprisonment claims, which were not the subject of appellees' motion to dismiss. In paragraph 44, appellees stated, with regard to the paragraphs related to the medical claim, "Defendant will hold response to paragraph 78-107 as they are subject of a pending motion to dismiss. If a response is required, all allegations contained in those paragraphs are denied." Thus, appellees did not answer the medical claim allegations from the complaint but deferred any answer until the motion

to dismiss was ruled upon. This is the proper procedure under Civ.R. 12(B). Therefore, this argument is without merit.

{¶8} Appellant also argues under this assignment of error that the trial court erred in dismissing his medical claim when appellees had not yet responded to his discovery requests relating to his medical claim. Appellees first counter that, because appellant failed to serve the discovery requests electronically, as required by Civ.R. 33(A) and 36(A), they had no duty to respond until 28 days after the trial court granted appellant's motion to waive electronic filing on November 16, 2010. We disagree with appellees' contention, as both Civ.R. 33(A)(3) and 36(A)(1) provide that failure to provide an electronic copy does not alter the designated period for response.

{¶9} However, both Civ.R. 33(A) and 36(A) do provide that failure to provide an electronic copy shall constitute good cause for the court to order the period enlarged. Appellees contend that the trial court did, in fact, enlarge the period for its responses during a November 19, 2010 status conference. There is some evidence in the record to support such. In a November 23, 2010 letter from appellees responding to appellant's questions about discovery, appellees reminded appellant that, during the status conference, the court told him that discovery would be due 28 days from the granting of the court's November 16, 2010 order. Appellees reiterated such in its December 13, 2010 memorandum contra appellant's motion for relief from judgment. However, in a December 2, 2010 entry in which the November 19, 2010 status conference and bifurcation were discussed, the trial court did not mention an enlargement of time for discovery.

{¶10} Notwithstanding, the trial court denied appellant's December 7, 2010 Civ.R. 60(B) motion, which was based upon appellees' failure to timely respond to appellant's October 2010 discovery requests. The trial court did not specifically indicate the basis for the denial, except to state that appellant's motion did not set forth with any particularity any grounds for relief pursuant to Civ.R. 60(B). Thus, in essence, appellant's current argument is that the trial court erred when it denied his motion for Civ.R. 60(B) relief. To prevail on a motion to vacate a judgment pursuant to Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and where the grounds of relief are Civ.R. 60(B)(1), (2), or (3), not more than one year after the judgment. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. Our standard of review of a court's decision as to whether to grant a Civ.R. 60(B) motion is an abuse of discretion. *Id.* at 148.

{¶11} In the present case, in his motion for relief from judgment, appellant specifically relied upon "mistake" under Civ.R. 60(B)(1). Appellant contended that the trial court made a mistake when it granted appellees' motion to dismiss because appellees had failed to respond to his prior discovery requests. However, a motion for relief from judgment cannot be predicated upon the argument that the trial court made a mistake in rendering its decision. *Chester Twp. v. Fraternal Order of Police, Ohio Labor Council, Inc.* (1995), 102 Ohio App.3d 404, 408. The type of mistake contemplated by Civ.R. 60(B)(1) is a mistake by a party or his legal representative, not a mistake by the trial court in its legal analysis. *Antonopoulos v. Eisner* (1972), 30 Ohio App.2d 187. To contest the trial

court's judgment dismissing his medical claim, appellant was required to directly appeal the judgment. It is well-established that a motion under Civ.R. 60(B) may not be used as a substitute for a direct appeal. *Doe v. Trumbull Cty. Children Servs. Bd.* (1986), 28 Ohio St.3d 128. Thus, we find the trial court did not err when it denied appellant's motion for Civ.R. 60(B) relief, in this respect. For these reasons, appellant's first assignment of error is overruled.

{¶12} Appellant argues in his second assignment of error that the trial court committed prejudicial error when it sua sponte, without notice to appellant, converted appellees' cross-motion for summary judgment to a motion to dismiss for failure to state a claim and granted the motion. We disagree. A trial court may convert a motion for summary judgment into a motion to dismiss for failure to state a claim. See *Grenga v. Bank One, N.A.*, 7th Dist. No. 04 MA 94, 2005-Ohio-4474, ¶80, citing *Salata v. Vallas*, 159 Ohio App.3d 108, 2004-Ohio-6037. See also *State ex rel. Finfrock v. Foley* (1994), 69 Ohio St.3d 1481 (on motion for summary judgment, motion treated as motion to dismiss). Furthermore, a trial court may sua sponte dismiss a cause of action for failure to state a claim. *Salata* at ¶13-14, citing *State ex rel. Kreps v. Christiansen* (2000), 88 Ohio St.3d 313 (sua sponte dismissal of a complaint for failure to state a claim upon which relief can be granted is appropriate if the complaint is frivolous or the claimant obviously cannot prevail on the facts alleged in the complaint). Additionally, the trial court did not "sua sponte" dismiss appellant's claims in the usual sense of the term. Appellant was given a full and fair opportunity to respond to appellees' contentions. Both parties filed motions for summary judgment on the false imprisonment claims, as well as memoranda contra the other party's motion. Thus, both parties had the opportunity to argue their

respective points on this issue and were on notice that the trial court would be ruling on the viability of appellant's false imprisonment allegations when they submitted their respective motions for summary judgment. For these reasons, appellant's second assignment of error is overruled.

{¶13} Appellant argues in his third assignment of error that the trial court erred when it failed to determine whether certain state employees were immune from liability in dismissing his false imprisonment claims. We first note that appellant fails to separately argue this assignment of error in his brief, as required by App.R. 16(A)(7). Instead, appellant has presented just one argument in support of both his second and third assignments of error. Under App.R. 12(A)(2), we may choose to disregard any assignment of error that an appellant fails to separately argue. Therefore, we could exercise our discretionary authority to summarily overrule appellant's third assignment of error. See *Newman v. Enriquez*, 171 Ohio App.3d 117, 2007-Ohio-1934, ¶18; *Mtge. Electronic Registrations Sys. v. Mullins*, 161 Ohio App.3d 12, 2005-Ohio-2303, ¶22, citing *Park v. Ambrose* (1993), 85 Ohio App.3d 179, 186. We will, however, address appellant's third assignment of error in the interest of justice.

{¶14} The specific contention raised in appellant's third assignment of error may be disposed of summarily. The trial court was not required to address immunity, as it found appellant had failed to state a claim for relief because R.C. 2941.41 does not create a right to monetary relief for a violation thereof, and no claim exists at common law based upon the conduct alleged in the complaint. Having concluded appellant had no claim for relief based upon R.C. 2941.41, the court never had to reach the immunity issue. Insofar as appellant may raise additional arguments intended to be included under this

assignment of error, we decline to address them. It is well-settled that appellate courts do not address mere arguments and instead only rule on assignments of error. *Olentangy Condominium Assn. v. Lusk*, 10th Dist. No. 09AP-568, 2010-Ohio-1023, ¶25, citing *In re Estate of Taris*, 10th Dist. No. 04AP-1264, 2005-Ohio-1516, ¶5. Therefore, we overrule appellant's third assignment of error.

{¶15} As for appellant's motion for judicial notice, he requests that we take judicial notice of Civ.R. 36(A)(1). We find appellant's motion unnecessary and deny such.

{¶16} Accordingly, appellant's motion for judicial notice is denied, appellant's assignments of error are overruled, and the judgment of the Court of Claims of Ohio is affirmed.

*Motion denied;
judgment affirmed.*

BRYANT, P.J., and TYACK, J., concur.
