VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 22nd day of September, 2016.

Donn Shumate, Appellant,

against Record No. 151285
Circuit Court No. CL14-8

City of Martinsville, et al., Appellees.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Martinsville.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that there is no reversible error in the judgment of the Circuit Court of the City of Martinsville.

In December, 2012, Donn Shumate ("Shumate"), an investigator with the City of Martinsville Police Department (the "police department"), was advised by his physician, Dr. Caren Tobin Aaron ("Dr. Aaron"), to take time off from work to address work-related, stress-induced hypertension. During his leave of absence, Shumate applied for workers' compensation benefits. As part of his application for workers' compensation benefits, Shumate delivered an attending physician's form to Dr. Aaron's office. In filling out Shumate's attending physician's form, Dr. Aaron, or someone in her office, included posttraumatic stress disorder ("PTSD") as one of Shumate's diagnoses.[1]

The attending physician's form was subsequently submitted to the insurance carrier. Upon noticing that Dr. Aaron had diagnosed Shumate with PTSD, the insurance carrier emailed the attending physician's form to officials in the police department, including Mike Rogers ("Rogers"), the Chief of Police at that time. Rogers, in turn, showed the attending physician's form to G. Edward Cassady ("Cassady"), a captain in the police department, and gave a copy to Danny R. Wimmer ("Wimmer"), a lieutenant in the police department. Rogers and Cassady also

[1] The attending physician's form also contained other diagnoses that are not relevant to the present case.

told other persons of Shumate's reported diagnosis of PTSD. Additionally, Wimmer made copies of the attending physician's form and distributed it to other individuals.

On January 9, 2014, Shumate brought an action for tortious dissemination of private health information and defamation against the City of Martinsville (the "City") and the police department[2], as well as against Rogers, Cassady and Wimmer (collectively, the "police defendants"). In his complaint, Shumate claimed that the information contained on the attending physician's form was private health information. He further alleged that Dr. Aaron's diagnosis of PTSD in the VACORP Form was a false statement, as he had never been diagnosed with PTSD. Indeed, according to Shumate, Dr. Aaron subsequently admitted that Shumate does not have PTSD and had not suffered a traumatic event that would allow for a diagnosis of PTSD.[3]

On April 18, 2014, the defendants filed a motion craving oyer seeking, among other things, to have the attending physician's form filed as an exhibit to the complaint.[4] Additionally, the defendants demurred, claiming that the cause of action for tortious dissemination of private health information could only be brought against healthcare providers, not individuals. They further asserted that Shumate's complaint failed to establish a prima facie claim of defamation. The police defendants also filed a plea in bar asserting that their actions were subject to a qualified privilege. Similarly, the City filed a plea in bar claiming Shumate's claims were barred by sovereign immunity.

After a hearing on the matter, the trial court sustained the demurrers. In a letter opinion, the trial court ruled that there is no cause of action for the tortious dissemination of private health information against individuals who are not health care providers. It also determined that Dr. Aaron's diagnosis was an expression of opinion and, therefore, could not form the basis for a claim of defamation. Additionally, the trial court determined that it was not bound by Shumate's

---

[2] Shumate subsequently conceded that the police department is non sui juris and, therefore, an action cannot be maintained against it.

[3] Shumate's allegations regarding the falsity of Dr. Aaron's diagnosis was the gravamen of a defamation action Shumate brought against Dr. Aaron in September, 2013. In that case, Dr. Aaron demurred on the basis that the diagnosis was an opinion and, therefore, not defamatory. The trial court sustained the demurrer. The trial court's decision in that case was reversed and remanded for further proceedings prior to the Court's decision to grant Shumate's appeal in the present case.

[4] Although the attending physician's form is not part of the record, it is apparent that, as a result of a joint stipulation, the form was considered by the trial court in rendering its decision.

allegations that the police defendants acted with common law malice. Moreover, the trial court granted the pleas in bar, holding that the police defendants enjoyed a qualified privilege and that sovereign immunity barred any action against the City.

On appeal, Shumate argues that the trial court erred in sustaining the demurrer with regard to his tortious dissemination of private health information claim because such a claim is not limited to health care providers. With regard to his defamation claim, Shumate contends that he alleged sufficient facts to survive a demurrer. Furthermore, Shumate asserts that his complaint sufficiently alleges that the police defendants acted with common law malice and, therefore, they are not protected by a qualified privilege. Finally, Shumate claims that the City is not entitled to sovereign immunity due to the fact that the police defendants' actions were not taken to effectuate a governmental function.

Shumate's first two assignments of error address the trial court's decision to sustain the defendants' demurrers. This Court has long recognized that "[t]he purpose of a demurrer is to determine whether a motion for judgment states a cause of action upon which the requested relief may be granted." Tronfeld v. Nationwide Mut. Ins. Co., 272 Va. 709, 712, 636 S.E.2d 447, 449 (2006). Accordingly, "[b]ecause the decision whether to grant a demurrer involves issues of law, we review the circuit court's judgment de novo." Dreher v. Budget Rent-A-Car Sys., 272 Va. 390, 395, 634 S.E.2d 324, 326-27 (2006).

In his first assignment of error, Shumate argues that the trial court erred in failing to recognize that a cause of action for tortious dissemination of private health information may be brought against a non-healthcare entity. In raising this argument, Shumate relies heavily on this Court's holding in Fairfax Hospital v. Curtis, 254 Va. 437, 492 S.E.2d 642 (1997), recognizing a cause of action for tortious dissemination of private health information against a healthcare provider. According to Shumate, by subsequently enacting Code § 32.1-127.1:03(A), the General Assembly expanded the duty recognized in Fairfax Hospital to apply not only to healthcare providers but also to any individual that comes into possession of another's medical health information.

It should be noted, however, that Code § 32.1-127.1:03 "does not expressly provide for any private right of action imposing civil liability," nor can a private right of action be implied. Vansant & Gusler, Inc. v. Washington, 245 Va. 356, 359, 429 S.E.2d 31, 33 (1993). Rather,

Code § 32.1-127.1:03 falls under Title 32.1, Chapter 5, of the Code, which provides guidelines for the promulgation of regulations for the licensure and inspection of hospitals and nursing homes by the Board of Health. See Code § 32.1-127; see also Cherrie v. Virginia Health Services, Inc., ___ Va. ___, ___, ___ S.E.2d ___. ___ (2016) ("Nothing in title 32.1, chapter 5, however, authorizes a private party to bring a civil action"). As such, the application of Code § 32.1-127.1:03 is expressly limited to entities licensed by the Board of Health (i.e., hospitals and nursing homes). Furthermore, the General Assembly has expressly codified the penalty for a violation of Code § 32.1-127.1:03: administrative sanction imposed by the Commissioner of the Board of Health. Code § 32.1-135. Thus, Shumate's reliance on Code § 32.1-127.1:03 is misplaced, as this code section cannot be interpreted as creating a private right of action where none previously existed. Accordingly, the decision of the trial court sustaining the demurrer with regard to Shumate's tortious dissemination of private health information claim is affirmed.

In his second assignment of error, Shumate argues that the trial court erred in sustaining the demurrers related to his defamation and defamation per se claims because the trial court failed to accept as true the facts pled in his complaint. Specifically, Shumate claims that, in sustaining the demurrer, "[t]he trial court failed to accept as true facts properly [pled], as required at the demurrer stage." However, this assignment of error merely addresses one of the bases for the trial court's ruling on Shumate's defamation claim. Notably, the trial court also determined that Dr. Aaron's diagnosis was "an expression of opinion" and, therefore, the diagnosis was not defamatory as a matter of law. "Whether a statement is an actionable statement of fact or non-actionable opinion is a matter of law to be determined by the court." Jordan v. Kollman, 269 Va. 569, 576, 612 S.E.2d 203, 206 07 (2005) (citing Chaves v. Johnson, 230 Va. 112, 119, 335 S.E.2d 97, 101 (1985)). Therefore, such a determination may be made independent of whether the trial accepted the facts pled by Shumate as true.

"It is well-settled that a party who challenges the ruling of a lower court must on appeal assign error to each articulated basis for that ruling." Manchester Oaks Homeowners Ass'n v. Batt, 284 Va. 409, 421, 732 S.E.2d 690, 698 (2012).

The mere fact that Shumate failed to assign error to each basis for the trial court's ruling does not end the Court's inquiry.

> [W]e still must satisfy ourselves that the alternative holding is indeed one that (when properly applied to the facts of a given case) would legally constitute a freestanding basis in support of the trial court's decision . . . . But, in making that [evaluation], we do not examine the underlying merits of the alternative holding — for that is the very thing being waived by the appellant as a result of his failure to [assign error to it] on appeal.

Id. (quoting Johnson v. Commonwealth, 45 Va. App. 113, 117, 609 S.E.2d 58, 60 (2005)).

Without considering the merits of the trial court's decision on the matter, we assume, without deciding, that the trial court was correct in its determination that Dr. Aaron's diagnosis was an expression of opinion. Such a determination would serve as an independent basis to affirm the trial court's ruling, as "[p]ure expressions of opinion . . . cannot form the basis of an action for defamation." Chaves, 230 Va. at 119, 335 S.E.2d at 102. Thus, Shumate's failure to assign error to this ruling "bar[s] any appellate relief that might otherwise [be] available" with regard to his defamation claim. United Leasing Corp. v. Thrift Ins. Corp., 247 Va. 299, 308, 440 S.E.2d 902, 907 (1994). Accordingly, the decision of the trial court sustaining the demurrer with regard to Shumate's defamation claims is affirmed.[5]

This order shall be certified to the Circuit Court of the City of Martinsville.

JUSTICE MIMS, concurring in part and dissenting in part.

I concur in the Court's holding on Shumate's first assignment of error that Code § 32.1-127.1:03(A) does not create a private right of action. However, I cannot join the Court's conclusion on his second assignment of error that he failed to challenge a basis for the circuit court's judgment, and I therefore dissent from that portion of the Court's ruling.

The Court today, like the circuit court below, states that Dr. Aaron diagnosed Shumate with PTSD. However, nothing in the record substantiates those statements. To the contrary, because this case was decided on demurrer, both this Court and the circuit court are required to consider as true all facts alleged in the plaintiff's complaint. *Ayers v. Shaffer*, 286 Va. 212, 216-17, 748 S.E.2d 83, 86 (2013).

---

[5] Having determined that the trial court did not err in sustaining the demurrers, Shumate's third and fourth assignments are necessarily rendered moot.

As in *Shumate v. Aaron*, Record No. 141381 (Sept. 11, 2015) (unpublished) ("*Shumate I*"), Shumate alleged that he "does not suffer from, nor has he ever been diagnosed with PTSD." As the Court held in that case, "'Never' includes the moment Dr. Aaron completed the form." *Id.* at *3. The Court ruled that although the circuit court may disregard an allegation contradicted by a document in the record, *id.* (citing *Ward's Equip. v. New Holland N. Am.*, 254 Va. 379, 382,493 S.E.2d 516, 518 (1997)), that rule did not apply in *Shumate I* because the form was not in the record to allow the circuit court to determine that what Dr. Aaron reported on it was a medical diagnosis. As the Court notes in its order today, the form is also not in the record of this case. *Supra*, at *2 n.4. Accordingly, neither the circuit court nor this Court may conclude, in contradiction of Shumate's allegation to the contrary, that Dr. Aaron diagnosed Shumate with PTSD.

The circuit court's determination that Dr. Aaron's statement was an expression of opinion was based on its improper characterization of her statement as a medical diagnosis. It wrote in its opinion letter that "[t]he plaintiff alleges that Dr. Aaron was mistaken in her diagnosis, but the court has ruled in a companion case that this diagnosis, however erroneous, is an expression of opinion by the plaintiff's treating physician." But, as stated above, the circuit court was just as incapable, based on the record before it, of characterizing Dr. Aaron's statement as a diagnosis in this case as it was in *Shumate I*. Because the court's ruling that the statement was an expression of opinion was predicated on its erroneous contradiction of Shumate's allegation that he had never been diagnosed with PTSD, Shumate's assignment of error that the court erred by failing to accept his allegations as true is sufficient to address both rulings. *Findlay v. Commonwealth*, 287 Va. 111, 115, 752 S.E.2d 868, 871 (2014) ("[I]t is the duty of an appellant's counsel to lay his finger on the error in his assignment of error." (internal quotation marks and alteration omitted)).

Nevertheless, I would affirm the circuit court's judgment based on its alternative ruling that even if Dr. Aaron's statement was defamatory, Rogers, Cassady, and Wimmer were protected by qualified privilege. Qualified privilege protects persons who make allegedly defamatory statements on a subject in which they have an interest or duty, unless the statements were made maliciously. *Fuste v. Riverside Healthcare Ass'n*, 265 Va. 127, 134, 575 S.E.2d 858, 862-63 (2003). The malice required is "common-law malice, that is, behavior actuated by

motives of personal spite, or ill-will, *independent of the occasion on which the communication was made*." *Gazette, Inc. v. Harris*, 229 Va. 1, 18, 325 S.E.2d 713, 727 (1985) (emphasis added).

Courts "are not bound to accept conclusory allegations made without any factual support." *Squire v. Virginia Hous. Dev. Auth.*, 287 Va. 507, 527, 758 S.E.2d 55, 66 (2014). Although Shumate alleged that the defendants acted with common law malice, he alleges no specific facts, such as an act or event, supporting that claim or providing a basis from which it could be inferred. The only events involving, or acts taken by, Rogers, Cassady, and Wimmer alleged in the complaint are those in which they republished Dr. Aaron's statements. These acts are not "independent of the occasion on which the communication was made" by them. *Gazette, Inc.*, 229 Va. at 18, 325 S.E.2d at 727. Accordingly, Shumate's allegations were insufficient to overcome their claim of qualified privilege. Because Rogers, Cassady, and Wimmer are protected by qualified privilege, I would not reach the question presented by Shumate's second assignment of error, i.e., whether the statements were in fact defamatory.

Finally, on Shumate's fourth assignment of error, I would affirm the circuit court's ruling that the City of Martinsville is immune from liability under *Niese v. City of Alexandria*, 264 Va. 230, 564 S.E.2d 127 (2002). Maintaining a police force, including integral administrative activities such as managing its human resources by making decisions about whether to retain a police officer or whether his or her medical conditions support a claim for workers' compensation, are part of the municipality's governmental function. *See id.* at 239, 564 S.E.2d at 132-33.

A Copy,

Teste: Patricia L Harrington

Clerk