

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 11th day of September, 2015.

Donn Shumate, Appellant,

against Record No. 141381
 Circuit Court No. CL13-212

Caren Tobin Aaron, Appellee.

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 opinion that there is reversible error in the judgment of the circuit court.

Donn Shumate is an investigator with the Martinsville Police Department. Caren Tobin Aaron, M.D. was his primary care physician. In December 2012, Dr. Aaron recommended that Shumate take a leave of absence from his job to address work-related, stress-induced hypertension.

Shumate applied to receive workers' compensation benefits during his leave of absence. He asked Dr. Aaron to complete a form stating her diagnoses and to submit it to the relevant workers' compensation insurance carrier. The form is not in the record. According to Shumate, Dr. Aaron stated on it that he had post-traumatic stress disorder ("PTSD"). However, also according to Shumate, he has never suffered from or been diagnosed with PTSD and her statement therefore was false.

Dr. Aaron submitted the form to the insurance carrier. Alarmed by her statement that Shumate had PTSD, the insurance carrier relayed it to Shumate's employer.

In September 2013, Shumate filed a complaint alleging that Dr. Aaron defamed him by falsely stating that he had PTSD. Dr. Aaron filed a demurrer in which she argued, among other things, that a medical diagnosis is a statement of opinion. She argued that statements of opinion are protected by the First Amendment and are not actionable in a suit for defamation.

Shumate filed a reply in which he argued that Dr. Aaron's statement was not itself a diagnosis but a report that she had diagnosed him with PTSD, which is a statement of fact capable of being proven true or false. He argued that his medical records prior to the statement can be examined, and they would show that he has never been diagnosed with PTSD. Shumate also argued that even if her statement is construed to be a medical diagnosis, whether the diagnosis is correct (i.e., whether he had PTSD) is a statement that can be proven true or false through expert testimony.

After a hearing, the circuit court ruled that Dr. Aaron's statement on the form was a current diagnosis that Shumate suffered from PTSD. It further ruled that a medical diagnosis is a statement of opinion that cannot be actionable in a suit for defamation as a matter of law. The court sustained Dr. Aaron's demurrer and dismissed Shumate's complaint with leave to amend.

Shumate thereafter filed an amended complaint adding new allegations that Dr. Aaron never diagnosed Shumate with PTSD, that she stated after completing the form that he did not have PTSD, and that she stated that he did not meet the criteria for such a diagnosis. Dr. Aaron filed a demurrer restating the arguments in her demurrer to the original complaint. Shumate responded that the amended complaint alleged that Dr. Aaron did not diagnose him with PTSD and did not believe he met the criteria for such a diagnosis.

At a hearing on the demurrer to the amended complaint, Dr. Aaron argued that the new allegations asserted only that she had changed her opinion (i.e., that she decided Shumate had PTSD as she completed the form). She also argued that the court's prior ruling that a medical diagnosis is non-actionable opinion was correct. In response, Shumate reiterated that the statement was not itself a medical diagnosis but a report that a diagnosis had been made, which was false because no such diagnosis had ever been made. He also argued again that even if the statement was a medical diagnosis, and even if a medical diagnosis is an opinion, it was an opinion Dr. Aaron never actually held.

The court again determined that the statement on the form was a current diagnosis, even if Dr. Aaron made it only at the time she completed the form. The court further ruled that a medical diagnosis is always non-actionable opinion as a matter of law. It therefore entered a final order sustaining Dr. Aaron's demurrer and dismissing Shumate's complaint with prejudice.

In his first assignment of error,* Shumate asserts that the circuit court erred by ruling that Dr. Aaron's statement on the form was a current diagnosis that he had PTSD. He argues that the amended complaint alleged that Dr. Aaron "never diagnosed [him] with PTSD, and she later stated that [he] does not have PTSD and has not suffered a traumatic event that would lead to a diagnosis for PTSD."

The Court "review[s] a circuit court's ruling on a demurrer de novo." Webb v. Virginian-Pilot Media Co., LLC, 287 Va. 84, 88, 752 S.E.2d 808, 811 (2014). "A demurrer tests the legal sufficiency of facts alleged in the pleadings, but not the strength of proof." Ayers v. Shaffer, 286 Va. 212, 217, 748 S.E.2d 83, 86 (2013) (internal quotation marks omitted). When deciding a demurrer, a trial court must consider as true all the facts "expressly alleged, those which fairly can be viewed as impliedly alleged, and those which may be fairly and justly inferred from the facts alleged." Id. at 216-17, 748 S.E.2d at 86.

The circuit court ruled that when Dr. Aaron completed the form, she was "stating what [Shumate's] current diagnosis is," meaning that she was stating her diagnosis at the moment she completed the form. This ruling is erroneous because the amended complaint expressly alleged that Dr. Aaron "never diagnosed [Shumate] with PTSD." (Emphasis added.) "Never" includes the moment Dr. Aaron completed the form. Accordingly, the court did not consider as true the facts as alleged in the amended complaint. Rather, the court based its ruling on an assumption of what information the form requested Dr. Aaron to supply when (1) that assumption was directly contradicted by the amended complaint's express allegations and (2) nothing in the record, such as the form itself, supported the assumption.

When deciding a demurrer, a trial court may disregard an allegation unambiguously contradicted by documents in the record, such as when the defendant has filed and the court has granted a motion craving oyer. Ward's Equip. v. New Holland N. Am., 254 Va. 379, 382, 493 S.E.2d 516, 518 (1997). However, the court in this case expressly observed that the form was not in the record and the defendant had not craved oyer of it. This rule therefore does not apply in this case and the court was bound to decide the demurrer solely upon the facts as Shumate

* The parties have reversed the order of the assignments of error in their briefs on the merits compared to the petition for appeal. The Court refers to the assignments of error in the order they appeared in the petition, upon which the appeal was granted.

alleged them in the amended complaint. According to his allegations, Dr. Aaron's statement on the form was not a medical diagnosis.

This Court therefore does not reach the question presented in Shumate's second assignment of error, specifically whether a medical diagnosis is a non-actionable statement of opinion as a matter of law. Since the amended complaint expressly alleged that Dr. Aaron never diagnosed Shumate with PTSD, the record at this stage does not establish that there has been such a medical diagnosis and that question is not presented in this appeal.

The Court reverses the judgment of the circuit court and remands the case for further proceedings consistent with this order.

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

A Copy,

Teste:

A handwritten signature in black ink that reads "Pat L Haminger". The signature is written in a cursive style with a long horizontal flourish at the end.

Clerk