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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2295

Corey Welchlin,
Appellant,

vs.

Fairmont Medical Center,
Respondent.

Filed July 25, 2011
Affirmed
Worke, Judge

Martin County District Court
File No. 46-CV-10-141

Norman J. Baer, Aaron R. Hartman, Anthony Ostlund Baer & Louwagie, P.A., Minneapolis, Minnesota (for appellant)

David T. Schultz, JoLynn M. Markison, Maslon Edelman Borman & Brand, LLP, Minneapolis, Minnesota; and

Joanne L. Martin, Mayo Clinic Legal Department, Rochester, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Schellhas, Judge; and Muehlberg, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Appellant challenges the summary-judgment dismissal of his breach-of-contract claim arising out of medical-peer-review proceedings, arguing that the district court erred in (1) determining that there was no material breach; (2) determining that respondent is immune from liability; and (3) denying appellant's discovery requests on relevance and attorney-client-privilege grounds. We affirm.

FACTS

Appellant Dr. Corey Welchlin is an orthopedic surgeon on staff at respondent Fairmont Medical Center. The parties have had an acrimonious relationship. In early April 2009, respondent's Chief of Staff, Dr. Daniel Peterson, met with appellant following two incidents of disruptive behavior. Dr. Peterson informed appellant that, due to the incidents and appellant's conduct, an additional complaint could result in suspension of appellant's hospital privileges. On April 22, 2009, appellant reacted to a delay in surgery by raising his voice and accusing staff of deliberately delaying him. Appellant grabbed a surgical drape from an individual with such force that it tore in half. Appellant's behavior caused staff to feel threatened and intimidated.

Pursuant to respondent's Medical Staff Review and Hearing Policy (policy), respondent's Chief Administrative Officer, Stephen Pribyl, referred the incident to the Medical Executive Committee (committee). On May 5, 2009, the committee voted to investigate further. On May 8, Pribyl advised appellant of the committee's investigation. The committee interviewed employees involved in the incident and inquired into

appellant's general behavior. The committee also interviewed appellant and informed him of the information obtained during the investigation.

On July 15, 2009, the committee recommended suspending appellant's privileges for two years and memorialized the recommendation in meeting minutes. The committee reconvened on July 21 because the committee chair had been absent from the initial meeting, and the committee wanted to further consider its decision and ensure the accuracy of the meeting minutes. The committee upheld its determination and notified appellant of the decision. Appellant then initiated his own investigation by obtaining more than 300 pages of documentation underlying the committee's recommendation before requesting a hearing.

On November 9, 2009, a three-member panel conducted a hearing. Appellant received notice of the place, time, date, and expected witnesses. Ten witnesses testified, including appellant, who admitted that his behavior violated respondent's policy. On December 11, the panel determined that appellant's behavior was disruptive and threatened to compromise the quality of patient care provided by staff. The panel recommended that appellant's privileges be suspended for one year, and appellant appealed. In mid-January 2010, the appellate panel conducted its review and determined that appellant's behavior was disruptive. The panel affirmed the one-year-suspension recommendation, and respondent suspended appellant's hospital privileges for one year on February 10.

On February 11, 2010, appellant filed a complaint, alleging that respondent breached the terms of its policy and seeking declaratory relief. Appellant moved to

compel discovery, specifically seeking communications between attorneys in respondent's legal department; the district court denied this request. The district court granted respondent's summary-judgment motion after concluding that respondent did not materially breach its policy and that it was entitled to immunity. This appeal follows.

D E C I S I O N

Summary Judgment

Appellant argues that the district court erred in granting summary judgment. We review the district court's decision to grant summary judgment to determine whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. Mere averments set forth in the pleadings are insufficient to defeat a motion for summary judgment. Minn. R. Civ. P. 56.05. A genuine issue of material fact does not exist when the party opposing summary judgment presents evidence that creates merely a metaphysical doubt as to a factual issue or evidence that is not sufficiently probative as to permit a reasonable person to draw a different conclusion regarding an essential element of the case. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). Rather, to defeat summary judgment there must be evidence sufficient to establish a genuine issue for trial as to the existence of an essential element. *Id.* Therefore, to successfully oppose a summary-judgment motion, a party is

required to "extract *specific,* admissible facts" from the record that demonstrate that a genuine issue of material fact exists. *Kletschka v. Abbott-Nw. Hosp., Inc.*, 417 N.W.2d 752, 754 (Minn. App. 1988), *review denied* (Minn. Mar. 30, 1988).

Breach of contract

First, appellant argues that respondent breached its policy, which the parties agree is a contract. Appellant claims that the policy required Pribyl to have a discussion with him prior to initiating an investigation. Under the policy, when a concern is raised, the chief of staff must "make a sufficient inquiry including discussion with the involved physician to satisfy himself that the concern raised requires further investigation." There is no dispute that there was e-mail communication between appellant and Pribyl. Appellant initiated the exchange to explain his side of the story. The policy requires Pribyl to make a sufficient inquiry to "satisfy [himself] that the concern raised requires further investigation." This requirement is not to afford appellant an opportunity to justify his behavior or redeem himself, but for Pribyl to determine whether an investigation is necessary. Pribyl was satisfied that an investigation was necessary. Thus, there is no genuine issue of material fact for a jury.

Next, appellant argues that respondent failed to provide him with a summary of the committee's interview with him. Under the policy, the committee is to interview the individual investigated. "This interview shall not constitute a hearing, and none of the procedural rules detailed in this . . . [p]olicy shall apply. A summary of such interview shall be made by the [] [c]ommittee." The policy's procedures and rules do not apply to the interview, which is not a formal hearing. The committee is to make a summary of the

interview, but there is no requirement that the summary be made available to appellant. The committee included the interview summary in its meeting minutes. Thus, there is no genuine issue of material fact for a jury.

Further, appellant argues that respondent failed to give him an opportunity to rebut the allegations against him. Under the policy, appellant was afforded an opportunity to meet with the committee. "At this meeting (but not, as a matter of right, in advance of it) the individual shall be informed of the general nature of the evidence supporting the concern . . . and shall be invited to discuss, explain, or refute it." Appellant does not claim to have been denied an opportunity to discuss, explain, or refute the April 22 incident; rather, he claims that he was not permitted to discuss "past conduct." But appellant was afforded an opportunity to contest the allegations of past conduct during the hearing. Thus, there is no genuine issue of material fact for a jury.

Appellant also argues that respondent violated the policy's confidentiality provision. Appellant claims that his suspension became a matter of public knowledge on the day it occurred. But, as the district court concluded, there is no rule in the policy regarding confidentiality. The policy states: "[a]ctions taken and recommendations made pursuant to this [p]olicy shall be treated as confidential *in accordance with applicable legal requirements and such policies regarding confidentiality as may be adopted by the Board*." (Emphasis added.) There is no evidence regarding the applicable legal requirements or whether there is a confidentiality policy adopted by the board. Thus, appellant cannot show any confidentiality breach.

Appellant additionally argues that the district court erred in concluding that he is not entitled to a trial on respondent's breach of the implied covenant of good faith and fair dealing. This argument relates to immunity, which is analyzed below.

Immunity

Health Care Quality Improvement Act

The district court determined that respondent was entitled to immunity by virtue of the Health Care Quality Improvement Act (HCQIA). 42 U.S.C.A. §§ 11101 to 11152 (2010). Under HCQIA, an entity is immune if the review body meets all of the necessary standards. 42 U.S.C.A. § 11111(a). The standards include: "the reasonable belief that the action was in furtherance of quality health care, the action is implemented "after a reasonable effort to obtain the facts of the matter," the action is taken "after adequate notice and hearing procedures," and there is a reasonable belief that the action is warranted based on the facts. 42 U.S.C.A. § 11112(a). "A professional review action shall be presumed to have met the preceding standards . . . unless the presumption is rebutted by a preponderance of the evidence." *Id.* Additionally, the HCQIA grants broad discretion to a medical center board with regard to a staff-privileges decision. *Bryan v. James E. Holmes Reg'l Med. Ctr.*, 33 F.3d 1318, 1337 (11th. Cir. 1994). On review we do not reweigh the evidence or substitute our judgment for that of the governing board. *Id.*

Here, respondent had a reasonable belief that appellant's hospital privileges should be suspended in furtherance of quality health care. Appellant agreed that he was disruptive, and staff was intimidated by appellant, which made it difficult for them to

provide quality health care. Respondent made a reasonable effort to obtain necessary facts. Efforts included: staff interviews, an interview with appellant, a committee recommendation that was forwarded to another committee, a hearing, review by an appellate panel, and board review. Respondent put forth sufficient effort to determine the facts. Appellant received notice of the initial concern, when the committee was established, when the committee met, and when the committee met a second time. Appellant was involved in the hearing, appealed, and received notice of the appeal date and process. Finally, respondent believed that suspending appellant's privileges for one year was reasonable considering his conduct, his admission that his conduct was disruptive, his disruption and intimidation of other staff, and because he was unaware of the effect he had on others. The facts are not in dispute, and respondent met the necessary standards and is, therefore, entitled to immunity, as a matter of law.

Minn. Stat. § 145.63 (2010)

The district court further determined that respondent was entitled to immunity under state law. Whether a party is entitled to statutory immunity is a question of law, which is subject to de novo review. *Conlin v. City of St. Paul*, 605 N.W.2d 396, 400 (Minn. 2000). Minnesota law provides immunity to medical centers from damages or other relief in any action brought by a person subject to a peer-review inquiry. Minn. Stat. § 145.63, subd. 1 (2010). A medical center forfeits its immunity if its peer-review process was motivated by malice toward the subject of a peer-review inquiry. *Id.* The Minnesota Supreme Court has defined malice in the context of statutory immunity as "nothing more than the intentional doing of a wrongful act without legal justification or

excuse, or, otherwise stated, the willful violation of a known right." *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991) (quotation omitted). Malice is an objective inquiry. *State by Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 571 (Minn. 1994). Thus, the issue is whether respondent's actions were such as to allow the district court to conclude that the peer review was motivated by malice. The conclusion of malice depends on factual findings. *Id.* at 572. Whether a district court's factual findings support its legal conclusion is a question of law, reviewed de novo. *All Parks Alliance for Change v. Uniprop Manufactured Hous. Cmtys. Income Fund*, 732 N.W.2d 189, 193 (Minn. 2007).

Appellant argues that he has shown malice by respondent because it conducted the review process outside of normal channels. But some of these issues—that Pribyl did not conduct a formal discussion with appellant or a sufficient investigation into the matter; respondent failed to abide by its policy; and respondent breached a confidentiality provision—were previously addressed and shown to be meritless. Appellant also contends that he was singled out and that this action against him was premeditated. However, appellant admitted that he acted disruptively in the operating room. He has failed to provide evidence that another surgeon acted similarly and was treated differently, and he has failed to show how any premeditation on respondent's part caused him to act disruptively around staff and patients. As such, appellant has failed to show malice and the district court did not err in determining that respondent was entitled to state-law immunity.

Discovery

Appellant also argues that the district court abused its discretion in denying access to evidence he sought. A district court "has wide discretion to issue discovery orders," and normally an order will not be overturned without clear abuse of that discretion. *Underdahl v. Comm'r of Pub. Safety (In re Comm'r of Pub. Safety)*, 735 N.W.2d 706, 711 (Minn. 2007) (quotation omitted).

Appellant sought discovery of communications between two attorneys from the same office where one represented respondent and the other represented the hearing and appellate panels. Appellant asserts that "back room communications between [the attorneys] may have lead to the discovery of further evidence of conflict or bias in this proceeding." The district court ruled that the information appellant sought was irrelevant.

Appellant fails to present any legal argument regarding the relevancy of the discovery request. He suggests that there may have been bias, but does not explain how that would produce relevant evidence. *See* Minn. R. Evid. 401 (stating that relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). Appellant fails to explain how any bias on the part of either attorney is of consequence.

Appellant also argues that the district court abused its discretion when it concluded that communications between non-lawyers were subject to attorney-client privilege. Appellant sought documents regarding communications between Pribyl and Dr. Roger Jacobson, who served as the chair of the review committee. The district court determined

that the communications did not exist independently of the attorney-client relationship, but rather came into existence as a communication between a client and the attorney because they were between persons entitled to seek legal advice on behalf of respondent.

The district court was within its discretion in denying appellant's discovery request. The communications appellant sought elicited legal advice related to the content of the committee's recommendation, and in preparation of the July 21 meeting. Dr. Jacobson and Pribyl communicated about these issues and Pribyl then communicated with the committee's counsel, requesting legal advice prior to the July 21 meeting. Further, this discovery is irrelevant because appellant fails to demonstrate how the evidence would "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See id.*

Affirmed.