IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 24, 2013 Session

JOHN R. ROBERTS, M.D. v. SAINT THOMAS HEALTH SERVICES d/b/a SAINT THOMAS HOSPITAL, ET AL.

Appeal from the Circuit Court for Davidson County
No. 08C3595 Hamilton V. Gayden, Jr., Judge

No. M2012-01717-COA-R3-CV - Filed October 17, 2013

St. Thomas Hospital suspended a surgeon's hospital privileges and restored them less than three months later, as part of a settlement in which the doctor also waived a "fair hearing," which was the next step in the hospital's procedures. The surgeon subsequently sued the hospital, contending that it had not properly followed its own bylaws in regard to the suspension of his privileges and that he was therefore entitled to damages for breach of contract, defamation of character, and tortious interference with business relations. The hospital denied that it had violated any of its bylaws and asserted that it was entitled to immunity for its actions under the Tennessee Peer Review Law of 1967 and the Federal Health Care Quality Improvement Act of 1986. The trial court granted summary judgment to the hospital. Because the surgeon failed to show that the hospital did not follow its bylaws, because of his settlement and waiver of a fair hearing, the hospital was entitled to the immunity granted to the peer review process. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ., joined.

David Randolph Smith, Nashville, Tennessee, for the appellant, John R. Roberts, M.D.

Robert Shepherd Patterson, Amy D. Hampton, Jeffrey L. Allen, Nashville, Tennessee, for the appellees, Saint Thomas Health Services d/b/a Saint Thomas Hospital; Ascension Health Inc.

OPINION

I. HOSPITAL PROCEEDINGS

Dr. John Roberts is a board-certified cardiothoracic surgeon who has been practicing medicine in Tennessee since 1997. He was granted clinical privileges at Nashville's St. Thomas Hospital in September of 2006. Hospital officials subsequently became concerned about some aspects of his professional performance. Informal attempts to address those concerns were unsuccessful.

On October 29, 2007, the hospital's Physician Performance Review Committee ("PPRC") met to consider the matter. They interviewed Dr. Roberts as well as other doctors, nurses, and other hospital associates. At the conclusion of the meeting, the committee recommended that Dr. Roberts' clinical privileges be suspended pending further counseling and evaluation by the Tennessee Medical Foundation's Physician Health Program.

The members of the Hospital's Medical Executive Committee ("MEC") met on November 2, 2007 to review the PPRC's recommendations, which they unanimously approved. The MEC's conclusions were conveyed to Dr. Roberts by a letter of the same date, signed by the hospital's Chief Medical Officer, E. Dale Batchelor, M.D. The letter declared that the MEC was taking action pursuant to its authority under Article 8.1-4 of the St. Thomas Medical Staff Bylaws and that it had approved the recommendation of the PPRC.[1]

According to the letter, the MEC agreed with the PPRC that "variation from the practice standard at Saint Thomas Hospital exists in the delivery of care to patients and your failure to comply with the requirements of the Saint Thomas Medical Staff Code of Conduct." It recommended that Dr. Roberts' clinical privileges be suspended for at least 31 days, pending further counseling and evaluation. The letter also explained Dr. Roberts' procedural rights under Section 8.1-6 and Article IX of the Medical Staff Bylaws, including the right to request a fair hearing within 30 days of the receipt of the letter.

[1]While the MEC's letter states that the MEC had "approved the following recommendations," thereby implying some finality, the documents in the record indicate that a decision by the MEC about staff privileges is deemed to itself be only a recommendation until the Hospital's Board of Directors takes final action. It appears, however, that the MEC's decision took immediate effect, and that it was ratified by the Hospital's Board of Directors only after Dr. Roberts waived his right to a hearing.

After receiving the MEC letter, Dr. Roberts obtained counsel and requested a fair hearing, which was scheduled for January 16, 2008. On the eve of the hearing, however, the parties reached an agreement whereby Dr. Roberts agreed to complete a counseling course and enroll in ongoing outpatient therapy, and St. Thomas agreed to restore his clinical privileges. A letter signed by Dr. Roberts on January 30, 2008 documented the agreement he had reached with the hospital. Among other things, it stated, "[p]lease consider this official notice that I waive my right to a Fair Hearing pursuant to Article 9(1)(B)(2) of the St. Thomas Hospital Medical Staff Rules and Regulations, related to the November 2, 2007 suspension."

On February 19, 2008, the hospital filed a three page "Adverse Action Report" with the National Practitioner Data Bank ("NPDB"), as is required by law when a practitioner's clinical privileges are suspended for more than thirty days. The report recounted the suspension proceedings involving Dr. Roberts, including the restoration of his clinical privileges, and specifically characterized the hospital's actions as "routine corrective action and not summary suspension." In the information line titled "Basis of Action," the report reads, "[f]ailure to maintain records or provide medical, financial or other required information." Dr. Roberts acknowledges on appeal that the language of the report was the result of negotiations between his attorney and counsel for St. Thomas.[2]

II. LEGAL PROCEEDINGS

On October 30, 2008 Dr. Roberts filed a complaint in the Circuit Court of Davidson County against St. Thomas Hospital and its parent company. He asserted that by summarily suspending his clinical privileges and reporting that suspension to the NPBD, the defendants had injured his reputation and that they were guilty of breach of contract, defamation of character, and tortious interference with business relations. He asked for monetary relief in the form of compensatory damages "in an amount determined as fair and just compensation for the Defendants' breach of contract," as well as punitive damages.

St. Thomas filed a timely answer to the complaint, asserting that it had properly followed its bylaws and denying that the action of the MEC constituted a summary suspension under those bylaws. The hospital also raised a number of defenses that were echoed in its motion for summary judgment, filed on January 26, 2012. The summary

[2]When Dr. Roberts was granted clinical privileges, he signed the "St. Thomas Medical Staff Code of Conduct." That Code makes explicit the standards of behavior the signatory is expected to observe, including treating patients, families and associates with respect, courtesy and dignity, following the Medical Staff Bylaws, Rules and Regulations, and making "appropriate and timely entries to the medical record."

judgment motion was accompanied by the affidavit of Dr. Batchelor, a copy of the St. Thomas Hospital Medical Staff Bylaws, and a memorandum of law. Dr. Batchelor's affidavit stated, among other things, that prior to his case being referred to the PPRC, "Dr. Roberts consistently failed to discharge his duties in accordance with Hospital Standards. St. Thomas notified Dr. Roberts of his deficiencies on numerous occasions, through face- to-face meetings and in writing."

The hospital also asserted that pursuant to its bylaws, the challenged suspension constituted a "routine corrective action" rather than a summary suspension, that Dr. Roberts received adequate notice of the MEC's action and of his appeal rights, and that he failed to exhaust his administrative remedies. St. Thomas also asserted that its peer review process was immune from liability under both State and Federal Law, and it asked the court for an award of attorney fees under 42 U.S.C. § 11113 of the Health Care Quality Improvement Act.

Dr. Roberts filed a response to the summary judgment motion and a memorandum of law accompanied by his own affidavit. He stated that he did not receive any notice of the possibility of suspension prior to November 2, 2007, and that Dr. Batchelor's affidavit testimony about the hospital notifying him of his deficiencies orally and in writing, ". . . is a vague and non-descript statement that sets forth no basis for the suspension." Dr. Roberts also challenged the hospital's characterization of his suspension as "routine corrective action," and denied that the hospital was entitled to immunity.

Dr. Batchelor then filed a supplemental affidavit that added some specificity to his previous assertions about Dr. Roberts' conduct prior to the intervention of the PPRC, which we need not itemize, but which covered conduct additional to the medical records failures.

The trial court heard arguments on the summary judgment motion on June 15, 2012, and ruled in favor of St. Thomas from the bench. The court's order, entered on July 2, 2012, stated that the hospital was entitled to the presumption of immunity from monetary damages afforded by 42 U.S.C. § 11111 of The Health Care Quality Improvement Act ("HCQIA") and also by the Tennessee Peer Review Law ("TPRL").

The court stated that it had considered Dr. Roberts' claim that the statutory presumption of immunity was negated by the hospital's failure to give him the benefit of adequate notice and hearing procedures prior to suspending him. But, the court found that by voluntarily waiving his fair hearing rights, Dr. Roberts had also waived any objections to the hospital's prior actions. The court accordingly granted the hospital's summary judgment motion and dismissed the complaint. It also taxed all court costs to Dr. Roberts, but reserved ruling on the hospital's claim for attorney fees, and declared its order final for purposes of

review pursuant to Tenn. R. Civ. P. 54.02, "there being no just reason for delay."

III. THE STANDARD OF REVIEW

The general requirements for a grant of summary judgment are that the filings supporting the motion show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Blair v. West Town Mall,* 130 S.W.3d 761, 764 (Tenn. 2004); *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn.1993). Summary judgment is proper in virtually any civil case that can be resolved on the basis of legal issues alone. *Byrd v. Hall*, 847 S.W.2d at 210. Where the facts are in dispute, the trial court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Stanfill v. Mountain*, 301 S.W.3d 179, 184 (Tenn. 2009); *Godfrey v. Ruiz,* 90 S.W.3d 692, 695 (Tenn. 2002); *Byrd v. Hall*, 847 S.W.2d at 215.

The HCQIA and the TPRL provide presumptions of immunity for decisions made by "peer review committees" or "professional review bodies" operated by hospitals and other healthcare provider organizations. Because of that presumption, the standard for decision on summary judgment in cases involving claims based upon the actions of such committees is different from the standard generally applicable to most other cases. *See Eluhu v. HCA Health Services Of Tennessee, Inc.*, M2008-01152-COA-R3-CV, 2009 WL 3460370 at *7 (Tenn. Ct. App. Oct. 27, 2009) (rule 11 perm. app. denied, April 23, 2010).

The party seeking summary judgment (in this case the defendant) normally bears the burden of demonstrating that no genuine dispute of material fact exists and that the party is entitled to judgment as a matter of law. But the presumption that a professional review action has met the standards of immunity set out in Tenn. Code Ann. § 63-6-219 and 42 U.S.C.A. § 11112(a) shifts the burden of production to the plaintiff to show that the hospital failed to meet the standards for HCQIA or TPRL immunity. *See Eluhu v. HCA Health Services of Tennessee, Inc*., 2009 WL 3460370 at *7; *Curtsinger v. HCA, Inc.*, No. M2006-00590-COA-R3-CV, 2007 WL 1241294, at *5 (Tenn. Ct. App. Apr. 27, 2007) (rule 11 perm. app. denied Sept. 17, 2007).

This court has characterized the standard for reviewing a grant of summary judgment under HCQIA and the Tennessee Peer Review Law as "unconventional." *Peyton v. Johnson City Medical Ctr.,* 101 S.W.3d 76, 83 (Tenn. Ct. App. 2002). We have held that "although the defendant is the moving party, we must examine the record to determine whether the plaintiff satisfied his burden of producing evidence that would allow a reasonable jury to conclude that the Hospital's peer review disciplinary process failed to meet the standards of HCQIA." *Peyton v. Johnson City Medical Ctr.,* 101 S.W.3d at 83 (citing *Brader v.*

Allegheny General Hospital., 167 F.3d 832, 839 (3rd Cir. 1999)). *See*, *also*, *Curtsinger v. HCA*, 2007 WL 1241294 at *5.

On appeal, we review the summary judgment decision as a question of law. We accord no presumption of correctness to the trial court's decision, but review the record *de novo* and make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been met. *Eadie v. Complete Co., Inc.*, 142 S.W.3d 288, 291 (Tenn. 2004); *Staples v. CBL & Assoc*., 15 S.W.3d 83, 88 (Tenn. 2000); *Finister v. Humboldt General Hospital, Inc*., 970 S.W.2d 435, 437 (Tenn. 1998); *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997).

IV. STATUTORY IMMUNITY AND THE QUESTION OF WAIVER

The presumption of immunity from money damages is the result of legislation enacted by the Congress of the United States and the Tennessee General Assembly to encourage physicians and hospitals to engage in meaningful and effective professional peer review in the interest of patient safety and the quality of patient care, by limiting their exposure to legal liability when they conduct such reviews. *Eluhu v. HCA Health Services Of Tennessee, Inc.*, 2009 WL 3460370 at *8. *Clark v. Columbia/HCA Info. Servs., Inc.*, 25 P.3d 215, 221 (Nev. 2001); *Bryan v. James E. Holmes Reg'l Med. Ctr.*, 33 F.3d 1318, 1321 (11th Cir. 1994).

The Tennessee Peer Review Law of 1967 ("TPRL"), Tenn. Code Ann. § 63-6-219, defines the meaning of "medical review committees" and "peer review committees" for the purposes of the Law and describes their functions. It states that such committees "should be granted certain immunities relating to their actions undertaken as part of their responsibility to review, discipline and educate the profession." Tenn. Code Ann. § 63-6-219(a)(2).[3] It is undisputed that the hospital's Medical Executive Committee meets the definition of an immune entity under the TPRL.

The Tennessee Peer Review Law declares that such committees, its members, and the institutions of which they are a part, are immune from liability

> . . . for damages resulting from any decision, opinions, actions and proceedings rendered, entered or acted upon by such committees undertaken or performed

[3]The Tennessee Peer Review Law of 1967 (TPRL), Tenn. Code Ann. § 63-6-219, was repealed by the Tennessee Patient Safety and Quality Improvement Act of 2011 (TPSQI). [Acts 2011, ch. 67 § 1]. The 2011 Act, now codified at Tenn. Code Ann. §§ 63-1-150 and 68-11-272, contains the same provisions for immunity that are applicable to this case. The TPSQI was made effective April 12, 2011, three and a half years after Dr. Roberts filed his complaint in this case. Some of the filings in this case refer to the earlier version of the law and some to the later version. For the sake of convenience, we will continue to cite to the TPRL in this opinion.

> within the scope or functions for such committees, if made or taken in good faith and without malice and on the basis of facts reasonably known or reasonably believed to exist.

Tenn. Code Ann. § 63-6-219(d)(1).

The provisions of the Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. § 11101 et seq, are "essentially identical" to those of the Tennessee Peer Review Law. *Eluhu v. HCA Health Services Of Tennessee, Inc.*, 2009 WL 3460370 at *8; *Ironside v. Simi Valley Hospital,* 188 F.3d 350, 353-54 (6th Circuit 1999). The HCQIA declares that when a "professional review body" takes a "professional review action," a member of such body or any person under contract or other formal agreement with such body "shall not be liable in damages under any law of the United States or any State (or political division thereof) with respect to the action." 42 U.S.C. § 11111(a)(1).[4]

For HCQIA immunity to apply, the Act requires that the professional review action be taken as follows:

> (1) in the reasonable belief that the action was in furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).
>
> A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

42 U.S.C.A. § 11112(a).

Dr. Roberts argues that the presumption of immunity does not apply in this case because he "was not provided notice or an opportunity for a hearing prior to his summary suspension and the procedures were unfair under the circumstances." We note that 42

[4]The statute makes an exception for damages "under any law of the United States or any State relating to the civil rights of any person or persons, including the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq. and the Civil Rights Acts, 42 U.S.C. 1981, et seq."

U.S.C.A. § 11112(b) states that "[a] health care entity is deemed to have met the adequate notice and hearing requirement of subsection (a)(3) of this section with respect to a physician if the following conditions are met (**or are waived voluntarily by the physician**)," followed by a detailed checklist of conditions related to notice and hearing procedures.[5]

For the purposes of summary judgment only, it is undisputed that the hospital did not meet those conditions prior to or during the MEC meeting of November 2, 2007. The hospital contends, however, that Dr. Roberts voluntarily waived any possible defects in the MEC's procedures by abandoning the scheduled fair hearing of January 16, 2008, and by officially announcing in his letter of January 30, 2008, ". . . that I waive my right to a Fair Hearing pursuant to Article 9(1)(B)(2) of the St. Thomas Hospital Medical Staff Rules and Regulations, related to the November 2, 2007 suspension."

Dr. Roberts admits that he did receive proper notice of his fair hearing rights. He argues, however, that the waiver of his right to that hearing did not cure the deficiencies of notice and hearing in the proceedings that led to his initial suspension. He complains that the report to the NPBD that was required by his 31 day suspension cannot be undone because it is "water under the bridge," and that the existence of such a report detrimentally affects his professional reputation and his prospects for appointment at other institutions.

The record shows, however, that the report to the NPDB was only made after Dr. Roberts waived his fair hearing rights. The rules found in the NPBD Guidebook, which has been made a part of the record, suggest that if a fair hearing had been conducted and had negated the recommendation of the MEC, no report to the NPDB would have been required. Even if such a report had been filed in error, the guidebook contains provisions for its correction, voiding, or revision (sections E-4-6). It thus appears that the reputational damages Dr. Roberts complains of cannot be separated from his decision to waive his right to a fair hearing to dispute the allegations.

If Dr. Roberts had not waived his fair hearing, and the ensuing proceeding resulted in findings that he had engaged in conduct aside from record-keeping deficiencies that was detrimental to patients, his reputation might have suffered still greater damage. By waiving the fair hearing, Dr. Roberts made a conscious and deliberate decision to avoid being judged

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[5]The statute goes on to state that "[a] professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3) of this section." 42 U.S.C.A. § 11112(b)(3). Also, "[f]or purposes of section 11111(a) of this title, nothing in this section shall be construed as . . . precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual." 42 U.S.C.A. § 11112(c)(2).

by his peers.

The record indicates that Dr. Roberts had the assistance of counsel. Both the terms of the restoration of his clinical privileges and the precise language in the NPDB report were the result of negotiation and compromise between his attorney and the hospital's attorney. Thus, there can be no doubt that the waiver of his fair hearing rights was a voluntary and knowing act. Dr. Roberts argues, however, that the due process rights connected to the hearing of November 2, 2007, were unrelated to and unimpaired by his waiver. We disagree.

The fair hearing was the place to challenge the procedures he now complains were insufficient. It was the place to dispute any allegations against him. We find that by executing an explicit waiver of his fair hearing rights, Dr. Roberts waived his objections to the MEC recommendations, or to the procedure that resulted in those recommendations, which would have been the subjects of the waived hearing.

We therefore conclude that the trial court correctly found that St. Thomas was entitled to the statutory presumption of immunity from money damages. We accordingly affirm the judgment of the trial court granting summary judgment to the hospital.

V.

The judgment of the trial court is affirmed. We remand this case to the Circuit Court of Davidson County for any further proceedings necessary, including a determination of whether St. Thomas is entitled to an award of attorney fees under 42 U.S.C. § 11113 of the Health Care Quality Improvement Act. Tax the costs on appeal to the appellant, John R. Roberts, M.D.

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PATRICIA J. COTTRELL, JUDGE