

RENDERED: OCTOBER 15, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000544-MR

MAHMOOD HOSSEINIPOUR, M.D.

AND

MAHMOOD HOSSEINIPOUR, M.D., P.S.C.

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VANMETER, JUDGE
ACTION NO. 97-CI-00091

APPALACHIAN REGIONAL HEALTH
CARE, INC., D/B/A
ARH REGIONAL MEDICAL CENTER,
THE PRENATAL CENTER,
AND
KENTUCKY RIVER DISTRICT HEALTH
DEPARTMENT

APPELLEES

OPINION
AFFIRMING

** **

BEFORE: BUCKINGHAM AND DYCHE, JUDGES; AND MILLER, SENIOR JUDGE.¹

BUCKINGHAM, JUDGE: The appellants (hereinafter referred to as

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Dr. Hosseinipour) appeal from separate summary judgments of the Fayette Circuit Court in favor of Appalachian Regional Health Care, Inc. ("ARH"), d/b/a ARH Regional Medical Center (the hospital"); the Prenatal Center; and Kentucky River District Health Department ("Health Department"). We affirm.

In 1985, there was a shortage of OB/GYN physicians in Perry County, Kentucky. Only two physicians were delivering babies at the hospital; one was an OB/GYN who was about to retire, and the other was a family practitioner who could not perform cesarean sections or gynecological surgery. At that time Dr. Hosseinipour was practicing as an OB/GYN physician in South Williamson, Kentucky.

ARH is a nonprofit charitable organization operating hospitals in eastern Kentucky, including the ARH Regional Medical Center in Hazard. ARH also operates an obstetrics and gynecology clinic in Hazard known as Family Health Services ("FHS"). FHS has full-time physician employees who are on the medical staff at the hospital.

Due to the shortage of OB/GYNs in Perry County in 1985, ARH was actively recruiting OB/GYNs to work full-time at the FHS. In connection with this recruitment effort, ARH met with Dr. Hosseinipour on December 11, 1985. It sent him a letter on December 16, 1985, formally inviting him to accept employment with FHS. The letter also stated that Dr.

Hosseini pour would be welcomed by ARH in the local medical community even if he decided to relocate to Perry County in a private practice setting rather than accepting employment with FHS.

The letter further indicated that should Dr. Hosseini pour decline the offer of employment with FHS but nonetheless relocate his practice in a private practice setting in Perry County, then ARH "will work with you in every possible way to assist you in developing your private practice." Dr. Hosseini pour turned down the job offer, but he did move his practice to Hazard in early 1986. At that time he was granted medical staff privileges at the hospital in obstetrics and gynecology.

ARH also indicated in its December 16, 1985, letter to Dr. Hosseini pour that it intended to recruit another OB/GYN physician to work with him should he accept the employment offer. In fact, ARH recruited another OB/GYN physician shortly after Dr. Hosseini pour declined employment with FHS. Dr. Elizabeth Shelly was successfully recruited, and she arrived in Hazard to begin her practice in the summer of 1986.

Dr. Hosseini pour practiced in Hazard from the spring of 1986 until his retirement in February 2001. He claims to have had a successful practice with increasing revenues from the time he started his practice in Hazard until 1993. He stated

that his practice was primarily in the area of prenatal care and delivery services for pregnant women, with the remainder of his practice based in gynecology.

Various events occurred in the early to mid-1990s that have significance to this litigation. The series of events begins with Dr. Hosseinipour being elected as chief of the OB/GYN service at the hospital in 1989. This position is one of several administrative positions within the medical staff created in the medical staff bylaws to further the goal of quality patient care within a particular service. A service chief is elected by fellow service members for a two-year term. The physician who is elected serves without financial compensation. Further, whether a physician holds or does not hold the chief position does not affect his or her medical staff privileges.

Dr. Hosseinipour was re-elected in 1991 as chief of the OB/GYN service. However, at the request of the Medical Staff Executive Committee, a special meeting of the service was called on January 9, 1992, at which time Dr. Hosseinipour was removed as chief of the OB/GYN service. By the summer of 1993, Dr. Hosseinipour was once again chief of the OB/GYN service. However, he was again removed from that position at a meeting of the service held on November 5, 1993. As with his removal from

the position in 1992, Dr. Hosseinipour's hospital privileges were not affected.

Another significant event occurring in 1993 was the formation of the Prenatal Center. Prior to that time, prenatal services for eligible pregnant women in the Kentucky River Area Development District were provided by the Health Department. The formation of the Prenatal Center was a joint project of the Health Department and ARH, for the purpose of providing a separate prenatal care facility. While the center did not provide any new or additional services from those previously offered at the Health Department, it did provide a more accessible and centralized location focusing solely on prenatal care and services.

Between 1993 and 1995, the gross receipts from Dr. Hosseinipour's practice declined significantly. In addition to the aforementioned events, successive OB/GYN physicians were added to FHS in addition to Dr. Shelly. Furthermore, Dr. Hosseinipour was seriously injured in an automobile accident in 1995 and was unable to see patients for some time thereafter. He eventually retired from his practice in 2001.

In January 1997, Dr. Hosseinipour filed a civil complaint in the Fayette Circuit Court against ARH. His complaint included claims for breach of contract, denial of due process, and tortious interference with a contract/prospective

contract. In an order entered on April 19, 1999, the circuit court granted ARH summary judgment as to the first two claims. Thereafter, Dr. Hosseinipour was permitted to file an amended complaint alleging tortious interference with a contract/prospective contract against the Prenatal Center and the Health Department. In an order entered on February 26, 2003, the circuit court awarded summary judgment in favor of ARH, the Prenatal Center, and the Health Department, effectively dismissing the remaining claims. This appeal by Dr. Hosseinipour followed.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR² 56.03. The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Stewart v. University of Louisville, Ky. App., 65 S.W.3d 536, 540 (2001), quoting Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996). The movant bears the initial burden of convincing the court by evidence of record that no genuine

² Kentucky Rules of Civil Procedure.

issue of fact is in dispute, and the burden then shifts to the party opposing summary judgment to present "at least some affirmative evidence showing the existence of a genuine issue of material fact for trial." See City of Florence, Ky. v. Chipman, Ky., 38 S.W.3d 387, 390 (2001). "The party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment." Wymer v. J.H. Properties, Inc., Ky., 50 S.W.3d 195, 199 (2001), citing Harker v. Federal Land Bank of Louisville, Ky., 679 S.W.2d 226 (1984). Finally, "[t]he record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., Ky., 807 S.W.2d 476, 480 (1991).

We will first address the claims Dr. Hosseinipour made against ARH that were dismissed by the circuit court in its first summary judgment. The first claim dismissed was Dr. Hosseinipour's claim against ARH for breach of contract. In support of this claim, Dr. Hosseinipour asserts that the December 16, 1985, letter from ARH to him constituted a valid and binding contract that ARH breached. In further support of this claim, Dr. Hosseinipour contends that the medical staff bylaws likewise constituted a valid and binding contract between ARH and him and that ARH likewise breached this contract.

Concerning the December 16, 1985, letter, Dr. Hosseinipour, points to the portion of the letter where ARH stated that it would "work with you in every possible way to assist you in developing your private practice" even if he declined the employment offer and relocated in a private practice setting in Hazard. Dr. Hosseinipour contends that ARH was bound to a contractual obligation with him once he decided to move his practice to Hazard. We conclude that the letter does not constitute an enforceable, valid, and binding contract for several reasons.

In order to create an enforceable contract, there must be a mutuality of obligations. See Kovacs v. Freeman, Ky., 957 S.W.2d 251, 254 (1997). While Dr. Hosseinipour argues that his obligation was to move his practice to Hazard, he does not attempt to define when such a move was to occur or how long he would be obligated to continue to practice in the area. In return, he asserts that ARH had the obligation to work with him in every possible way to develop his private practice. We conclude the letter is unenforceable as a contract due to lack of mutuality of obligations.

Further, in order for a contract to exist, there must be legal consideration that requires a benefit conferred upon the promisor and/or imposes a detriment on the promisee. See Moore v. Kuster, 238 Ky. 292, 37 S.W.2d 863, 865 (1931). There

is nothing in the letter that demonstrates a benefit conferred upon ARH or a detriment to Dr. Hosseinipour.

The letter also fails as an enforceable contract because it is not sufficiently definite and certain. Specificity in the promises and performances to be rendered by each party must be reasonably certain. See Fisher v. Long, 294 Ky. 751, 172 S.W.2d 545, 547 (1943). The letter clearly lacked in this regard.

Dr. Hosseinipour next argues that the circuit court erred in granting ARH summary judgment on his claim for breach of contract based on the medical staff bylaws. His arguments in this regard relate to his removal as chief of the OB/GYN service in 1992 and again in 1993. While Dr. Hosseinipour contends that the bylaws constituted a contract between ARH and him, ARH disagrees.

Dr. Hosseinipour argues that the majority rule is that medical staff bylaws are a contract between a hospital and the members of the medical staff. He cites numerous cases in his brief to support this position. On the other hand, ARH argues that many jurisdictions have held that medical staff bylaws do not constitute a contract between the hospital and the members of the medical staff. It has also cited cases from other jurisdictions to support its position. Case law in Kentucky has not addressed this issue.

Assuming for the sake of argument that the medical staff bylaws constituted a contract between the hospital and Dr. Hosseinipour, we nevertheless conclude that there was no fact issue concerning any breach by ARH. Concerning his removal as chief of the OB/GYN service in 1992, Dr. Hosseinipour alleges several breaches of the bylaws. These include Dr. Spencer's right to vote within the service, Dr. Wicker's role in presiding over the meeting, lack of notice of the meeting, and Dr. Wicker's election as the new chief of service. We have examined each of the alleged breaches and determine that Dr. Hosseinipour's arguments are without merit.

Concerning his removal as chief of the service in 1993, Dr. Hosseinipour has not cited a specific violation of the bylaws. Rather, he has questioned the reasons for his removal. He claims that the action taken against him was arbitrary and unreasonable. Having considered his arguments, we are not persuaded that the bylaws, even if they constituted a contract, were breached.

Dr. Hosseinipour's next argument is that the circuit court erred in granting summary judgment in favor of ARH on his due process claim. He claims in this regard that ARH violated his due process rights when it removed him from the position as chief of the OB/GYN service in 1992 and again in 1993. We have previously concluded that there was no breach of the process due

under the bylaws in connection with Dr. Hosseinipour's removal from the chief position in 1992 and 1993. In short, there were no fact issues in this regard, and ARH was entitled to summary judgment on the claim.

Dr. Hosseinipour next argues that the circuit court erred in granting summary judgment on his claim of tortious interference with a contract/prospective contract. He argues that the appellees interfered with his ability to develop his practice to the fullest extent. He asserts that there were two phases of this tortious interference.

In Cullen v. South East Coal Co., Ky. App., 685 S.W.2d 187, 189 (1983), this court recognized the validity of claims for the intentional and improper interference with prospective contractual relations of another. A claim of this nature is set forth in Restatement (Second) of Torts § 766B, Intentional Interference With Prospective Contractual Relation (1979). In order to overcome a summary judgment motion and have such a claim submitted to a jury, there must be "evidence of improper interference, after due consideration of the factors provided for determining such." National Collegiate Athletic Ass'n v. Hornung, Ky., 754 S.W.2d 855, 858 (1988). Likewise, the Cullen case recognized that the key to a claim for tortious interference with prospective contractual relation is the phrase "and improperly interferes." 685 S.W.2d at 190.

Under phase one of his theory, Dr. Hosseinipour claims that ARH harassed and embarrassed him, thereby precluding him from fully developing the potential of his practice. Specifically, he points to the fact that Dr. Shelly was allowed to have locum tenens physicians³ cover her patients when he was on staff, that a review of all his cesarean section procedures was conducted, that his equipment requests were singled out and denied while others were granted, that he was singled out for the assignment of inexperienced personnel, and that he was twice removed as chief of service. We have reviewed each of the issues raised by Dr. Hosseinipour and conclude that the proof that the actions were improper on the part of ARH was insufficient to raise a genuine issue of material fact to overcome ARH's summary judgment motion.

Under phase two of Dr. Hosseinipour's tortious interference argument, he asserts that ARH improperly interfered with his practice by participating in the development and operation of the Prenatal Center. Specifically, he argues that all appellees, including ARH, utilized the Prenatal Center to mislead patients as to his availability, to discourage patients from choosing him by making false statements as to his medical skills and competency, and by diverting patients to other

³ A local tenens physician is a physician granted privileges to attend to patients in the hospital for a period not to exceed 30 days. Such a physician need not obtain membership on the active medical staff.

medical providers. Having considered the facts surrounding this argument, we conclude that the circuit court properly awarded summary judgment in favor of ARH. Its staff had no ability to influence, much less mislead, a patient as to her choice of a delivering physician.

Dr. Hosseinipour also alleges that the circuit court erred in granting summary judgment in favor of the Prenatal Center and the Health Department on his claim of tortious interference with a contract/prospective contract. As we have noted, the Health Department created the Prenatal Center in coordination with ARH. The Prenatal Center was staffed and operated by the Health Department, and it provided a centralized location for prenatal and newborn services to residents in the seven-county area.

Dr. Hosseinipour claims that the Health Department and the Prenatal Center committed tortious interference with prospective contracts by misleading patients as to his availability, by discouraging patients from choosing him, by making false statements as to his medical skills and competency, and by diverting patients to other medical providers. He does concede that the purpose of the Prenatal Center and the services offered there were not improper.

There was no specific duty on the part of either the Health Department or the Prenatal Center to provide Dr.

Hosseini-pour's name or the name of any other provider to a prospective mother. Thus, the issue is whether these parties misled prospective mothers as to Dr. Hosseini-pour's availability or discouraged them from using him as a physician by making false statements about his skills. There was no evidence to suggest that the Health Department or the Prenatal Center personnel ever told anyone that Dr. Hosseini-pour did not provide delivery services.

Dr. Hosseini-pour argues that statements made by persons at the Prenatal Center were defamatory in nature and thus improper. While he notes that he did not make a claim for defamation, he asserts that such tortious conduct would provide a basis for finding improper interference under a tortious interference claim. The trial court concluded that the statements were not defamatory.

To support his argument, Dr. Hosseini-pour presented evidence from two witnesses, Ms. Haddix and Ms. Campbell. Ms. Haddix testified that she was told by a nurse practitioner at the Prenatal Center that Dr. Hosseini-pour had made mistakes, that he would not be the best choice, and that the Prenatal Center had had problems with him. Ms. Campbell testified that the nurse practitioner told her that Dr. Hosseini-pour was not a good doctor and that he had made several mistakes. Other witnesses testified that staff at the Health Department and at

the Prenatal Center had suggested other physicians, but none of these comments appeared to directly address Dr. Hosseinipour's skills as a physician.

Dr. Hosseinipour's own testimony indicates he had made errors in procedures performed at the hospital. These included leaving a surgical sponge in a patient, having a tubal ligation fail, and being unable to resolve the source of a patient's bleeding. He also acknowledged having been sued twice for malpractice in Hazard. As for his interaction with hospital staff, Dr. Hosseinipour acknowledged a suspension of his privileges for incomplete records, a matter he subsequently corrected. Dr. Hosseinipour also provided testimony concerning a letter of reprimand he had received for allegedly abandoning a patient after having directed the emergency room personnel to admit the patient.

In light of Dr. Hosseinipour's own testimony, we conclude that the statements concerning his having made mistakes or that the staff had problems with him were not false and defamatory. Whether the nurse practitioner felt Dr. Hosseinipour was a good physician or was a patient's best choice amounted only to personal opinion. Opinion cannot serve as a basis for defamation. See Yancey v. Hamilton, Ky., 786 S.W.2d 854, 857-58 (1989). Therefore, the circuit court did not err in granting summary judgment on these claims.

The judgments of the Fayette Circuit Court are affirmed.⁴

ALL CONCUR.

BRIEF FOR APPELLANT:

Jennifer F. Zeigler
Lexington, Kentucky

BRIEF FOR APPELLEE,
APPALACHIAN REGIONAL
HEALTHCARE, INC.:

Sarah Charles Wright
Lexington, Kentucky

BRIEF FOR APPELLEES, KENTUCKY
RIVER DISTRICT HEALTH
DEPARTMENT AND THE PRENATAL
CENTER:

David C. Trimble
Lexington, Kentucky

⁴ Dr. Hosseinipour also addressed arguments concerning causation and prospective patients as an identifiable group. These issues are now moot.