

RENDERED: SEPTEMBER 23, 2005; 2:00 P.M.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-000393-MR

UZMA UPPAL, M.D.

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT  
HONORABLE WILLIAM B. MAINS, JUDGE  
ACTION NO. 03-CI-90067

GATEWAY REGIONAL HEALTH SYSTEM, INC.  
D/B/A MARY CHILES HOSPITAL

APPELLEE

OPINION  
AFFIRMING IN PART,  
VACATING AND REMANDING IN PART

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BEFORE: McANULTY AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

McANULTY, JUDGE: Uzma Uppal, M.D. (Dr. Uppal) appeals from the summary judgment of the Montgomery Circuit Court in favor of Gateway Regional Health System, Inc. d/b/a Mary Chiles Hospital (the Hospital) on her claims of tortious interference with her independent contractor agreement and breach of contract. The

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

dispute between Dr. Uppal and the Hospital involves her removal from a schedule of physicians providing medical services in the Hospital's emergency services department (ER). In granting the Hospital's motion for summary judgment, the trial court found that there was no genuine issue as to any material fact. Because we conclude that Dr. Uppal waived any breach of contract claim in her independent contractor agreement, we affirm in part. Upon reviewing the facts of this case, however, we believe there are genuine issues of material fact on the tortious interference claim. Consequently, we vacate and remand in part.

The Hospital contracted with Sterling Miami, Inc. (Sterling) to recruit and manage qualified emergency physicians to staff its ER. That contract contained a provision stating that the Hospital could require that a certain physician not be assigned to the Hospital.

While the Hospital's contract with Sterling was in effect, Dr. Uppal entered into an arrangement as an independent contractor with Sterling under which Sterling scheduled her to work in the ER. The terms of her employment were governed by an Independent Contractor (Physician) Agreement with Sterling. That contract contained the following provision:

**5. Medical Staff Privileges and Other Obligations**

(a) *Medical Staff Privileges.* Physician shall apply for, obtain and maintain in good standing medical staff appointment and clinical privileges at the Hospital. Physician shall abide by the Bylaws, rules and regulations of the medical staff and policies of the Hospital. To the extent permitted under applicable law, Physician understands and agrees that such medical staff appointment and/or clinical privileges may be terminated or not renewed by the Hospital or its medical staff, in their discretion, without recourse to the hearing and appeal procedures set forth in the medical staff and/or Hospital bylaws upon: (a) the termination of this Agreement; (b) the reassignment of Physician from the Hospital; (c) the failure of Company to assign Physician to the Hospital for thirty (30) consecutive days; (d) the termination of the contract between Company and the Hospital; or (e) the termination of Physician's service at the Hospital for any other reason whatsoever. Company shall not request termination of Physician's medical staff privileges, and any action taken with respect thereto shall be solely within the prerogative of Hospital or its medical staff. Physician releases the Hospital and Company from any claim or liability whatsoever arising out of or related to any such transfer, termination, or loss of medical staff appointment and/or clinical privileges. Any such termination of privileges shall be deemed to be a voluntary resignation by Physician.

Initially, Dr. Uppal did not work in the ER because she was still in her residency. Instead, she began working in an urgent care center run by the Hospital. After a couple of months of working in urgent care, she began working shifts in

the ER. When she moved to the ER, her hourly rate of pay increased from around \$40-50 to \$80.

After working in the ER for a couple of months, the Hospital informed Dr. Uppal in September 2001 that it was reviewing her care of at least four patients. Not long after Dr. Uppal learned that the Hospital had concerns about her patient care, PhyAmerica (the company that had since acquired Sterling) informed Dr. Uppal that the Hospital had requested that she no longer be scheduled in the ER after October 2001. In removing Dr. Uppal from the schedule, the Hospital terminated her staff privileges.

About a year and a half after the Hospital terminated Dr. Uppal's staff privileges, Dr. Uppal brought two claims against the Hospital. The first claim was tortious interference with her agreement with Sterling. The second claim was breach of contract based on the Hospital's failure to follow its bylaws, which provided for a due process hearing before terminating a physician's staff privileges.

The parties engaged in discovery. Ultimately, the Hospital made a motion for summary judgment in which it argued that both of Dr. Uppal's claims should be dismissed.

As to the breach of contract claim, the Hospital contended that -- assuming for the sake of argument that the bylaws constituted a contract between Dr. Uppal and the Hospital

-- under the bylaws, the Hospital had only granted Dr. Uppal temporary privileges in Emergency Medicine. Temporary privileges expired after 180 days and could be rescinded without a due process hearing and appeal. In addition, the Hospital's termination of Dr. Uppal's staff privileges triggered the clause in her contract with Sterling in which she waived whatever hearing rights, if any, that she had.

As to the tortious interference claim, the Hospital argued that (1) Dr. Uppal had failed to present evidence that the Hospital had improperly interfered with her contractual relationship with Sterling; and (2) the Hospital acted in good faith in asserting its contractual right with Sterling to withdraw Dr. Uppal from providing physician emergency services to the Hospital.

In response to the Hospital's motion for summary judgment, Dr. Uppal presented the affidavit of Gregory C. Jones, M.D. In his affidavit, Dr. Jones stated that he reviewed four of Dr. Uppal's cases that the Hospital had reviewed due to quality of care issues. In Dr. Jones's opinion, Dr. Uppal had one narrow area of deficiency in her clinical skills -- care of hip injuries. In the other cases, Dr. Jones found fault with the review conducted by the Hospital.

In the end, the trial court granted the Hospital's motion for summary judgment as to all of Dr. Uppal's claims. This appeal followed.

On appeal, Dr. Uppal argues that the trial court erred in concluding that there were no genuine issues of material fact in this case. Dr. Uppal points to nine material facts that she believes are in issue: (1) was Dr. Uppal or the physician reviewer correct in analyzing her care; (2) was Dr. Jones or the physician reviewer correct in analyzing her care; (3) what type of staff privileges did Dr. Uppal have with the Hospital -- active, emergency, temporary or provisional; (4) was Dr. Uppal entitled to a due process hearing; (5) was the Hospital's physician reviewer qualified to review her care; (6) did the Hospital follow its peer review process in reviewing her care; (7) did the Hospital afford Dr. Uppal due process; (8) did the Hospital act reasonably in demanding Sterling to not schedule Dr. Uppal after October 2001; and (9) did the Hospital act with an improper purpose in directing Sterling to not schedule Dr. Uppal in the ER.

The standard of review of a trial court's granting of summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and the moving party was entitled to judgment as a matter of law." Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary

judgment is proper when it appears that it would be impossible for the adverse party to produce evidence at trial warranting a judgment in its favor. See James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Insurance Co., 814 S.W.2d 273, 276 (Ky. 1991). In considering a motion for summary judgment, the Court must view all the facts and inferences drawn therefrom in the light most favorable to the non-moving party and resolve all doubts in its favor. See Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991).

We begin with Dr. Uppal's breach of contract claim against the Hospital. We believe this issue is properly decided by Dr. Uppal's independent contractor agreement with Sterling. Thus, we will not discuss whatever privileges Dr. Uppal may have had prior to the Hospital's termination of those privileges.

To avoid the clause in her independent contractor agreement that states that her medical staff appointment and clinical privileges may be terminated by the Hospital in its discretion without recourse to the hearing and appeal procedures set forth in its bylaws, Dr. Uppal argues that her waiver was ineffective because her competency was at issue. She asserts that a physician facing charges of incompetence must be given an opportunity to defend against the charges.

In Boddie v. Connecticut, 401 U.S. 371, 378-379, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971), the United States Supreme

Court acknowledged that "the hearing required by due process is subject to waiver." In a case decided after Boddie, the Court discussed the standard for waiver in a corporate-property-right case. See D. H. Overmyer Co. Inc., of Ohio v. Frick Co., 405 U.S. 174, 185-186, 92 S. Ct. 775, 31 L. Ed. 2d 124 (1972). For purposes of that case, the Court assumed that the standard was the same standard applicable to waiver in a criminal proceeding, that is, that it be voluntarily, knowingly, and intelligently made. After considering the facts of the case, the Court concluded that that standard was fully satisfied. The Court went on to caution, however, that depending on the facts of a particular case, such a waiver might not be enforceable where the contract is one of adhesion, there is great disparity in bargaining power, or a party receives nothing in return for the waiver. See id. at 188.

Faced with the issue of whether a physician may waive by contract his due process right to a hearing, at least one other court has relied on D. H. Overmyer in concluding that he may. See Dillee v. Sisters of Charity of Incarnate Word Health Care System, 912 S.W.2d 307, 309 (Tex.App. 1995). Although the Dillee court did not state the reason for the physician's removal, we find the reasoning persuasive in deciding this case. In that case, the appellate court concluded that the trial court was correct in granting summary judgment when there was no



genuine issue of material fact that a physician voluntarily, knowingly and intelligently waived -- in his exclusive provider agreement -- due process notice, hearing, and review in the event of termination. See id.

In this case, Dr. Uppal never asserts that she did not understand this clause of her agreement with Sterling or its effect. Thus, there is no issue concerning a valid waiver of her right to a hearing. Her agreement was effective as a matter of law to waive the constitutional and contractual due process rights she claimed in her underlying complaint. The Hospital is entitled to enforce Dr. Uppal's waiver as a third party beneficiary. See Simpson v. JOC Coal, Inc., 677 S.W.2d 305, 307-308 (Ky. 1984).

Dr. Uppal next claims that the Hospital, in directing Sterling to remove her from the ER rotation, tortiously interfered with her contract with Sterling. We begin with the first hurdle to Dr. Uppal's claim -- the release that she signed which stated: "Physician releases the Hospital and Company from any claim or liability whatsoever arising out of or related to any such transfer, termination, or loss of medical staff appointment and/or clinical privileges."

Although Dr. Uppal acknowledges that her agreement with Sterling included the release, she argues that a release operates only on a present right as opposed to a future right or

claim, which we have in this case. Dr. Uppal asserts that at the time she signed her agreement, she had no way of knowing that she would have her rights terminated as a result of a faulty and improper review. Dr. Uppal distinguishes the cases cited by the Hospital in support of its position that she did release her tortious interference claim by arguing that those cases involved claims expressly foreseen and embraced by the terms employed in the release.

In Kentucky, the general rule on releases is that "[o]rdinarily a release operates only on a present right, the scope and intent of which depends generally upon the intent of the parties, which must be gathered from the terms of the release in the light of the particular facts and circumstances." Leitner v. Hawkins, 223 S.W.2d 988, 989 (Ky. 1949). In this case, neither party points to any testimony, language, facts or circumstances in the record that support its respective position. Because there is no evidence on the scope and intent of the release in this case, summary judgment was improper.

In the event the trial court granted summary judgment on the merits of the tortious interference claim as opposed to the legal effect of the release, we do not believe that it was correct in concluding that there were no genuine issues as to any material fact.

Kentucky has approved the Restatement 2d of Torts, Section 766 for the elements necessary to establish a claim of tortious interference with business contracts and relationships. See Carmichael-Lynch-Nolan Advertising Agency, Inc. v. Bennett & Associates, Inc., 561 S.W.2d 99, 102 (Ky. App. 1977). In its entirety, Sec. 766 is as follows:

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

To assist the trier of fact in determining whether the interference was improper, the Restatement 2d of Torts, Section 767 sets forth a number of factors that should be considered.

The factors are:

- (a) the nature of the actor's conduct,
- (b) the actor's motive,
- (c) the interests of the other with which the actor's conduct interferes,
- (d) the interests sought to be advanced by the actor,
- (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
- (f) the proximity or remoteness of the actor's conduct to the interference and
- (g) the relations between the parties.

In turn, the party whose interference is alleged to have been improper may escape liability by showing that it acted

in good faith to assert a legally protected interest of its own. See National Collegiate Athletic Ass'n v. Hornung, 754 S.W.2d 855, 858 (Ky. 1988).

Dr. Uppal argues that she has presented evidence, viz., Dr. Jones's affidavit, which demonstrates (1) that her cases were not properly reviewed, and (2) that the peer review that was conducted was essentially unfair. The Hospital asserts that it clearly established that it had good faith concerns about Dr. Uppal's ability to provide quality patient care before it exercised its contractual right to request that Sterling no longer assign her to the ER. And the Hospital argues that to the extent that Dr. Uppal argues that Dr. Jones's review shows that the internal and independent reviews were wrong, she misses the mark. The Hospital believes that Dr. Uppal's reliance is improper because the decision to no longer schedule her was made by the Hospital's vice president of operations. The vice president is not a physician, and was therefore ill-equipped to second guess the internal and independent reviews of her care.

Questions like "good faith," "improper purpose," and "motive" are fact questions properly decided by a jury. When faced with a motion for summary judgment, Dr. Uppal presented the affidavit of a local physician on the staff of the Hospital that was Board Certified in Emergency Medicine. We do not believe it is of any consequence that Dr. Jones reviewed Dr.

Uppal's cases after the fact. The jury is entitled to weigh his bias and involvement at trial. And we believe that it is for this purpose -- improper interference -- that the Hospital's failure to allow Dr. Uppal a fair opportunity to respond to the reviewer's comments is probative of the Hospital's good faith.

In short, genuine issues of material fact exist that preclude entry of summary judgment on Dr. Uppal's tort claim. Even though the trial court may believe that Dr. Uppal may not succeed at trial, it should not render summary judgment if there is any issue of material fact. See Steelvest, 807 S.W.2d at 480. Thus, we vacate and remand the trial court's summary judgment as to the enforceability of the release and on the claim of intentional interference with a contract.

ALL CONCUR.

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