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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4638-14T2

FREDERICK J. NAHAS, M.D.,

Plaintiff-Appellant,

v.

SHORE MEMORIAL HOSPITAL,

Defendant-Respondent,

and

ALBERT GUTIERREZ, DR. STEPHEN GOSIN,
DR. JEFFREY GOSIN, DR. LEONARD GALLER,
DR. JAMES JUNGBLUT, and RICHARD
MENGHETTI,

Defendants.

Argued September 20, 2016 – Decided December 7, 2016

Before Judges Messano, Espinosa, and
Guadagno.

On appeal from the Superior Court of New
Jersey, Chancery Division, Atlantic County,
Docket No. C-0082-14.

Jacqueline B. Bittner argued the cause for
appellant (F. Michael Daily, Jr., LLC, and
Ms. Bittner, attorneys; F. Michael Daily,
Jr. and Ms. Bittner, of counsel and on the
brief).

Natalie S. Watson argued the cause for respondent (McCarter & English, LLP, attorneys; Edward J. Fanning, Jr., of counsel and on the brief; Elizabeth K. Monahan, on the brief).

PER CURIAM

Plaintiff, Frederick J. Nahas, M.D., appeals from the May 7, 2015 order of Judge Raymond A. Batten granting summary judgment in favor of defendant Shore Memorial Hospital (SMH) and dismissing plaintiff's complaint against SMH with prejudice. Plaintiff challenges Judge Batten's conclusion that SMH was immune from liability under state and federal laws, and claims that Judge Batten was bound by a prior decision of a different judge under the law of the case doctrine. We reject these arguments and affirm substantially for the reasons set forth in Judge Batten's cogent and comprehensive written decision.

Plaintiff has been licensed to practice medicine in New Jersey since 1978, the same year he was granted attending staff privileges at SMH in general and vascular surgery. In 1990, SMH required surgeons to apply separately to perform endovascular procedures. That year plaintiff was granted endovascular privileges and his general, vascular, and endovascular privileges were renewed every two years. Plaintiff also served as the Director of the Department of Vascular Surgery at SMH from 2001 to 2003.

On June 5, 2002, plaintiff pled guilty in United States District Court for the District of New Jersey to a felony charge of preventing, obstructing, misleading, and delaying the communication of information and records relating to a health care investigation. On January 2, 2003, plaintiff was sentenced to a one-month term of imprisonment, a three-month term of home detention, and was required to reside in a community corrections facility on weekends for a period of two months. Plaintiff was also ordered to perform 100 hours of community service, pay a fine of \$20,000, and serve a three-year term of probation.

In April 2003, SMH suspended plaintiff's medical staff membership and clinical privileges for a period of three years.

In April 2005, the New Jersey State Board of Medical Examiners suspended plaintiff's license to practice medicine for a period of nine months. Plaintiff's license was reinstated on March 23, 2006.

In April 2006, plaintiff applied for reinstatement of his staff privileges at SMH, including privileges in general, vascular, and endovascular surgery. On July 5, 2006, the SMH Credentials Committee denied plaintiff's application. On July 11, 2006, the SMH Medical Executive Committee (MEC) voted to recommend that plaintiff's application for staff privileges be denied. On August 28, 2006, the MEC provided a statement of

reasons, explaining that plaintiff failed to prove exceptional circumstances required to avoid the automatic five-year suspension period required by SMH bylaws.

Plaintiff appealed the MEC's decision to a Fair Hearing Panel (FHP). On October 20, 2006, the FHP unanimously recommended reinstatement of plaintiff's general surgery and vascular privileges, and recommended that any reinstatement of endovascular privileges "be conditioned upon a proctoring process" whereby plaintiff would be supervised by another surgeon.

The MEC appealed the FHP's decision to the Appellate Review Panel (ARP) which reversed the FHP. As the ARP was unable to determine plaintiff's current clinical competence in all areas for which he sought privileges, it recommended that the matter be referred to an independent reviewer for recommendation.

The MEC Trustees adopted the ARP's recommendation and asked plaintiff to agree to a binding determination of reinstatement by an outside reviewer, selected by the hospital, and to execute a release relinquishing any right to judicial review. Plaintiff refused, and instead filed a complaint in the Chancery Division in 2007 seeking reinstatement or, in the alternative, submission of his credentials to an independent reviewer. Plaintiff filed an amended complaint seeking damages and naming individual

physicians and officials of SMH involved with his application as defendants.

On March 3, 2008, the SMH Trustees passed a formal resolution terminating consideration of plaintiff's privileges, citing failure to demonstrate satisfaction of all qualifications and conditions for membership, failure to cooperate with defendant's decision to refer the issue to an independent reviewer, and initiating proceedings in the New Jersey Superior Court in violation of the bylaws. Plaintiff then filed another amended complaint, adding allegations regarding the March 3, 2008 resolution.

Plaintiff moved for injunctive relief and defendants moved for summary judgment based on claims of immunity. During oral argument, Judge Steven P. Perskie suggested that the March 3, 2008 decision by the SMH Trustees could not stand and presented the parties with three alternatives: The first was for Judge Perskie to decide on plaintiff's qualifications; the second was to vacate the Board's decision, and remand the matter to the Board with directions to reconsider plaintiff's application; and the third was to appoint a qualified surgeon to opine on plaintiff's medical qualifications. The parties chose the third option and Judge Perskie appointed Jerome J. Vernick, M.D., to

conduct a review and assessment of plaintiff's medical qualifications and clinical competence.

Dr. Vernick concluded that plaintiff was a competent general and vascular surgeon and has had endovascular training, "but has not had enough recent volume in these procedures to assess his current comfort level." Dr. Vernick recommended granting plaintiff general surgery privileges, but suggested that proctoring be required for endovascular procedures until plaintiff demonstrated he was able to meet current standards.

On March 2, 2009, SMH granted plaintiff provisional privileges in general and vascular surgery, but denied his request for endovascular procedures. Specifically, plaintiff was not permitted to perform "endovascular laser surgery; endovascular surgery; aortic stent grafting; stents; angioplasty; and atherectomy."

Dr. Peter Jungblut, SMH Vice President of Medical Affairs, submitted a recommendation to the Trustees explaining that the hospital's policy did not permit proctoring until an applicant satisfied all criteria, and that he had concerns regarding plaintiff's eligibility for proctoring. Specifically, Dr. Jungblut noted that plaintiff had not had "the formal training in endovascular interventions required by the hospital's privileging criteria," and had not demonstrated "clinical

experience with an adequate number and variety of diagnostic and therapeutic endovascular procedures." Dr. Jungblut recommended granting plaintiff's request for clinical privileges for general and vascular surgery, but denying his request for clinical privileges in endovascular interventions.

On March 6, 2009, Judge Perskie determined that SMH's decision to act in accordance with Dr. Jungblut's recommendations was not arbitrary or capricious. Plaintiff was reinstated in accordance with Dr. Jungblut's recommendation.

On March 31, 2009, Judge Perskie entered an order dismissing without prejudice plaintiff's claims for damages against the individual defendants; dismissing with prejudice plaintiff's claims for punitive damages, legal fees, and emotional distress; and denying defendant's application to dismiss plaintiff's claims for loss of income and damage to reputation.

On May 28, 2009, Judge Perskie determined that "as a matter of law the provisions of the two statutory citations, the federal and state immunity sections, are both applicable here," but there was still a question as to whether "they operate to bar these claims." After dismissing all individual defendants, and granting defendant's motion for summary judgment as to legal fees, Judge Perskie determined that discovery on the issue of

damages should continue. He noted that there was a "possibility, remote as I perceive today that I believe that it is, that additional discovery could theoretically produce a factual basis."

By letter dated January 26, 2010, Dr. Vernick advised plaintiff that he "has now obtained enough recent training and experience to be allowed to practice this [endovascular] subspecialty after a period of on-site mentoring." On May 21, 2010, Peyton R. Dearborn, M.D., President of the Medical Staff, informed plaintiff that the Credentials Committee and the MEC determined he had "not satisfied the criteria . . . necessary for obtaining endovascular privileges." On May 26, 2010, plaintiff requested a Fair Hearing to appeal the MEC's decision.

On February 24, 2011, Steven P. Nachtigall, M.D., President of the SMH Medical Staff, accused plaintiff of performing four unauthorized endovascular techniques without the proper training or credentials. Plaintiff acknowledged performing the four procedures and planning to perform a fifth, but explained that "certain techniques are so basic to the practice of vascular surgery that they constitute an overlap with endovascular surgery."

SMH retained a consultant to determine whether these procedures were within plaintiff's privileges. The consultant

concluded that the procedures, which included the use of balloon angioplasty and stenting, were beyond the scope of plaintiff's clinical privileges.

On July 25, 2011, the MEC notified plaintiff that it would be monitoring his vascular procedure scheduling as it was concerned that plaintiff might again attempt to perform procedures for which he did not have privileges. On August 24, 2011, plaintiff was informed that because of his performance of endovascular procedures on patients when he had no privileges to do so, his clinical privileges would be suspended for fourteen days. Furthermore, the monitoring of his scheduling would continue, and he would be referred for a mental and behavioral health examination to determine his fitness to practice.

On August 31, 2011, plaintiff filed a new action in the Chancery Division seeking to enjoin the MEC from sanctioning him. Judge Perskie retired in 2010 and the 2007 action was assigned to Judge Nelson Johnson. Judge Johnson consolidated the new action with the 2007 action and denied plaintiff's motion for temporary restraints. Judge Johnson ordered that SMH would be permitted to continue monitoring plaintiff's procedures to ensure he reclaimed within the parameters of his privileges. On December 22, 2011, we denied plaintiff's motion for a stay and dismissed his appeal. Plaintiff served his suspension.

On August 27, 2012, a hearing officer concluded that plaintiff had not proven by clear and convincing evidence that the determinations of the MEC and the Board were arbitrary, capricious, or not supported by credible evidence. The hearing officer added that if the issue had been limited to plaintiff's competency to safely perform endovascular procedures, he would have reached a different result. He noted that hospital bylaws and New Jersey law "give wide deference to hospitals to determine to whom and under what circumstances they will grant privileges to physicians to practice in their institutions."

Plaintiff appealed the hearing officer's recommendation to the ARP. The ARP concluded that plaintiff failed to prove by clear and convincing evidence that the MEC and Board determination was arbitrary, capricious, or was not supported by credible evidence. On July 2, 2013, SMH informed plaintiff that it would be adopting the ARP's recommendation.

Judge Johnson designated October 15, 2013 as the discovery end date. In 2014, the matter was reassigned to Judge Batten. By this time, SMH was the only remaining defendant, and only plaintiff's claim of damages survived. SMH moved for summary judgment, claiming the immunity provisions of the Health Care Quality Improvement Act (HCQIA), 42 U.S.C.A. §§ 11111-12, barred plaintiff's litigation and his request for additional discovery.

Plaintiff argued that defendant could not claim immunity because it had not complied with the HCQIA requirements.

Judge Batten heard oral argument on defendant's motion on March 16, 2015. In his written decision, Judge Batten found that because plaintiff failed to present sufficient evidence to overcome the statutory immunities that "unquestionably" pertain to this case, SMH is statutorily immune from liability.

On appeal, plaintiff argues that SMH's conduct was unreasonable and its claim to immunity was waived; Judge Perskie's finding that SMH acted unreasonably was binding on Judge Batten; plaintiff was only required to rebut one of the four HCQIA prerequisites to defeat immunity; SMH's bylaws violate public policy; the "no litigation" policy as applied to physicians is an unconscionable contract term and violates public policy; summary judgment was improper as SMH offered false reasons for denying plaintiff's application; SMH failed to comply with any of the HCQIA's due process requirements; New Jersey law does not immunize defendants; and Judge Batten made erroneous factual findings.

On reviewing an order granting summary judgment, we employ the same legal standard as the trial judge under Rule 4:46-2(c), viewing the facts in a light most favorable to the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520,

539-40 (1995). Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment . . . as a matter of law." R. 4:46-2(c).

Plaintiff argues that Judge Perskie's May 2009 finding that SMH was unreasonable in refusing to consider plaintiff's application precluded Judge Batten's subsequent immunity determination under the law of the case doctrine. SMH responds that the doctrine does not apply because Judge Perskie's decision was made without prejudice and with the understanding that plaintiff was entitled to continue discovery. Judge Batten found that the law of the case doctrine did not apply and we agree.

The law of the case doctrine prevents relitigation of the same issue in the same suit. Messinger v. Anderson, 225 U.S. 436, 444, 32 S. Ct. 739, 740, 56 L. Ed. 1152, 1156 (1912). As Justice Holmes observed in Messinger, the phrase "merely expresses the practice of courts generally to refuse to reopen what has been decided." Ibid. Because a party is not obligated or even entitled to appeal from an adverse interlocutory order, such determinations cannot be dispositive as to whether that

order will have continuing effect. State v. Reldan, 100 N.J. 187, 205 (1985). Thus, the application of the law of the case doctrine to interlocutory orders is discretionary. Ibid.

Here, Judge Perskie's July 14, 2009 order denying SMH's motion to dismiss plaintiff's claims for loss of income and damages to reputation was entered without prejudice and was interlocutory, as it did not resolve all issues and remained "subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice." R. 4:42-2. "[A] denial of summary judgment is always interlocutory, and never precludes the entry of judgment for the moving party later in the case." Hart v. City of Jersey City, 308 N.J. Super. 487, 498 (App. Div. 1998). Moreover, "an order denying summary judgment is not subject to the law of the case doctrine because it decides nothing and merely reserves issues for future disposition." Gonzalez v. Ideal Tile Importing Co., 371 N.J. Super. 349, 356 (App. Div. 2004), aff'd, 184 N.J. 415 (2005), cert. denied sub nom., Gonzalez v. Komatsu Forklift, U.S.A., Inc., 546 U.S. 1092, 126 S. Ct. 1042, 163 L. Ed. 2d 857 (2006).

Plaintiff next challenges Judge Batten's conclusion that SMH was immune from liability under the federal and state immunities.

The federal immunities are part of the HCQIA which provides protection for a professional review action if the action is taken

(1) in the reasonable belief that the action was in the 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).

[42 U.S.C.A. § 11112(a)].

Defendant argues that plaintiff's claim for damages triggered the presumptive immunities of the HCQIA, and that it was then plaintiff's burden to disprove all four requirements. Plaintiff maintains that he only needs to disprove one of the four elements because it was defendant's burden to prove compliance with all four.

Judge Batten found that it was plaintiff's burden to rebut the presumption. We agree. Whenever an adverse professional review action is undertaken by a hospital, the HCQIA imposes a rebuttable presumption that the hospital is protected by immunity. Hurwitz v. AHS Hosp. Corp., 438 N.J. Super. 269, 289

(App. Div. 2014). The only specified qualification to this broad immunity coverage is if a plaintiff demonstrates, by a preponderance of the evidence, that the defendant took action without a reasonable belief in initiating the action, failed to provide adequate notice and hearing procedures, or otherwise took action without a reasonable belief it was warranted by the facts after a reasonable investigation. Ibid. (citing 42 U.S.C.A. § 11112(a)(1) to -(4)).

Similar to the federal statute, the New Jersey statute provides broad immunity for damages to qualified persons for actions taken as part of a hospital's peer review process.

N.J.S.A. 2A:84A-22.10 provides in pertinent part:

Any person who serves as a member of, is staff to, under a contract or other formal agreement with, participates with, or assists with respect to an action of:

. . . .

d. A hospital peer-review committee having the responsibility for the review . . . of matters concerning limiting the scope of hospital privileges . . .

e. shall not be liable in damages to any person for any action taken or recommendation made by him within the scope of his function with the committee, subcommittee or society in the performance of said peer-review, ethics, grievance, judicial, quality assurance or professional relations review function, if such action or recommendation was taken or made without malice and in the reasonable belief after reasonable investigation that

such action or recommendation was warranted upon the basis of facts disclosed.

Reviewing the four factors of 42 U.S.C.A. § 11111(a)(1), we are satisfied that SMH is entitled to immunity from damages under both the state and federal statutes, and plaintiff has failed to present sufficient evidence to overcome the presumption of immunity.

The internal review of plaintiff's performance by SMH was a "professional review activity" under 42 U.S.C.A. § 11151(10), and was conducted by "professional review bodies" within the meaning of 42 U.S.C.A. § 11151(11). The August 28, 2006 notice of hearing identifies the concerns of the SMH medical staff that plaintiff had failed to demonstrate sufficient clinical competency in vascular surgery. The December 14, 2006 letter from counsel for the medical staff notes that staff members were concerned that plaintiff did not possess "sufficient experience with, or expertise in, many of the new techniques, procedures and treatments now available to patients at the hospital."

We find no merit to plaintiff's claim that SMH did not reasonably believe that its actions furthered quality health care. Plaintiff has failed to rebut the presumption that SMH acted in the reasonable belief that it was doing so. Judge Batten's determination that plaintiff failed to rebut the presumption that SMH acted with a reasonable effort to obtain

the facts of this matter is adequately supported in the record. We are satisfied that federal immunity applies here as SMH proceeded in a fair and reasonable manner and with a reasonable belief that the actions taken were in furtherance of quality health care and warranted by the facts.

SMH is also protected under the state law immunity provided by N.J.S.A. 2A:84A-22.10. This provision applies if "such action or recommendation was taken or made without malice and in the reasonable belief after reasonable investigation that such action or recommendation was warranted upon the basis of facts disclosed." N.J.S.A. 2A:84A-22.10(e).

We note that plaintiff did not argue before Judge Batten that the actions of SMH were driven by malice. Rather, he maintained that the state immunity statute did not apply to hospitals. Although plaintiff continues to maintain that N.J.S.A. 2A:84A-22.10 only provides immunity to persons who participate in peer review actions and not the hospital itself, he now claims that "the record discloses abundant evidence of intentional falsification of facts and defamation sufficient to establish malice." We are not persuaded by either argument.

On the first point, Hurwitz is dispositive, noting that N.J.S.A. 2A:84A-22.10, New Jersey's analog to the HCQIA, "extends a similar form of immunity protection for hospitals,

peer reviewers, and decision-makers." Hurwitz, supra, 438 N.J. Super. at 299 (emphasis supplied).


To satisfy the "malice" requirement in N.J.S.A. 2A:84A-22.10, plaintiff must prove that SMH acted "either with ill will, without just cause, or with a reckless disregard of the truth of the facts regarding the physician's quality of care." Hurwitz, supra, 438 N.J. Super. at 299-300. Plaintiff raises several claims that SMH violated its bylaws including, failing to consider his experience; not implementing proctoring; failing to provide relevant documents; providing inadequate notice; considering false representations; imposing an elevated burden of proof; failing to file a timely appeal to the ARP; and appointing the MEC attorney as the hearing officer. We have considered each of these arguments and reject them for the reasons given by Judge Batten in his decision.

After plaintiff was convicted and served a prison term for obstructing a federal Medicare fraud investigation, SMH acted responsibly in carefully scrutinizing his application to restore his privileges and examining his clinical competency to perform endovascular surgery. Most troubling in this record is plaintiff's decision to perform four endovascular surgical procedures after SMH had unequivocally denied his application for privileges in that specialty.

We are satisfied that SMH conducted its review in a thorough and reasonable manner and plaintiff has failed to make any showing of the malice required to defeat the immunity which attached to its actions.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION