

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DEVENDRA SHARMA, M.D.,

Plaintiff-Appellant,

v

ASCENSION HEALTH, INC., d/b/a ST. JOSEPH  
HEALTH SYSTEM, PATRICK MURTHA,  
MICHAEL WAGNER, and CLARENCE DAVID  
WRIGHT,

Defendants-Appellees.

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UNPUBLISHED

June 12, 2012

No. 303913

Iosco Circuit Court

LC No. 09-005343-CZ

Before: BORRELLO, P.J., and O'CONNELL and TALBOT, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court's grant of summary disposition in favor of defendant Ascension Health, Inc. We affirm.

The underlying lawsuit arose from the suspension of plaintiff's clinical privileges at defendant's hospital ("defendant"). During the course of the investigation that led to the suspension, defendant's Medical Executive Committee instructed plaintiff to be evaluated by a psychologist. Plaintiff wrote to the committee acknowledging the instruction and requesting that he be responsible for paying for the evaluation. Defendant declined to allow plaintiff to pay for the evaluation. Plaintiff nonetheless attended the evaluation. Plaintiff later alleged that the evaluation breached a provision in the Medical Staff Bylaws that required the examination to be performed by a physician (rather than a psychologist). The trial court found that the undisputed facts demonstrated plaintiff had waived the Bylaw provision and granted summary disposition in favor of defendant.

"Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). This Court reviews de novo the trial court's ruling on the summary disposition motion. *Dancey v Travelers Prop Cas Co*, 288 Mich App 1, 7; 792 NW2d 372 (2010). The Court considers the pleadings and other the relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. *Id.*

In this case, the record supports the trial court's decision. Parties to a written contract may waive provisions in their contract. *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364-365; 666 NW2d 251 (2003). However, if the parties subsequently disagree about whether a waiver occurred, the burden is on the party alleging the waiver to establish by clear and convincing evidence that both parties intended to waive the provision at issue. *Id.* at 364-365, 372. Proof of waiver requires evidence of a knowing and intentional relinquishment of rights. *Angott v Chubb Group Ins*, 270 Mich App 465, 470; 717 NW2d 341 (2006). To prevail, the party asserting waiver must present "clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to waive the terms of the original contract." *Quality Prod*, 469 Mich at 373.

Defendant argues that the Bylaws are not a contract and that, accordingly, the Court need not analyze whether a waiver occurred. We need not resolve the issue of whether the Bylaws constitute an enforceable contract, because even if the Bylaws constitute a contract, the record contains clear and convincing evidence that the parties waived any provision that required plaintiff's examination to be conducted by a physician.

Proof of waiver requires evidence of a mutual agreement to dispense with a contractual provision. *Quality Prod*, 469 Mich at 374. By selecting a psychologist as the examiner, defendant plainly demonstrated its intent to waive any requirement that the examiner be a physician. Accordingly, the only potential issue precluding summary disposition was whether the waiver was mutual.

The record confirms that plaintiff waived any requirement concerning a physician-conducted examination. First, as the trial court found, plaintiff's letter to the Medical Executive Committee demonstrated plaintiff's willingness to be examined by the psychologist. In the letter, plaintiff stated that his "only concern" was whether the committee should pay the psychologist's fee. Plaintiff's letter indicates his preference that he pay the fee, but the letter contains nothing to establish that his willingness to attend the evaluation was conditioned on his payment of the fee. Plaintiff also expressly stated that the committee could reimburse him for the fee if the committee "feels strongly about paying for it." Plaintiff's letter indicated that he would attend the examination by the psychologist; thus, the letter is clear and convincing evidence of a waiver of the physician examination provision in the Bylaws.

In addition, plaintiff took the affirmative step of attending the evaluation. Plaintiff argues that his attendance at the evaluation cannot constitute a waiver of the physician requirement. According to plaintiff, his attendance was "mere silence" rather than an affirmative waiver. In support, plaintiff relies on *Quality Products*, 469 Mich 362, in which our Supreme Court explained that a party's silence does not necessarily constitute a waiver. Specifically, the Court decided that "mere silence" does not amount to a waiver, even if the silent party had knowledge that the other party was not abiding by the parties' contract. *Id.* at 377-378. In this case, however, plaintiff cannot reasonably claim that his conduct was "mere silence." Plaintiff took the affirmative steps of sending a letter to defendant's committee concerning payment for the upcoming examination and of attending the examination.

Plaintiff maintains that these steps cannot constitute a waiver, because defendant gave him an ultimatum to attend the examination or be suspended. This Court rejected a similar

argument in *Kelly-Stehney & Assoc, Inc v MacDonald's Indus Prod, Inc*, 265 Mich App 105; 693 NW2d 394 (2005). Applying the *Quality Products* analytical framework, this Court determined that despite the plaintiff's belief that the defendant had "dictated" the change in the parties' contract, the plaintiff had assented to the change. *Id.* at 119-121. Here, similarly, plaintiff's assertion that he had no choice concerning the examination does not alter the waiver brought about by his letter and by his submission to the examination.

Plaintiff next argues that the trial court erred by denying his motion for reconsideration of the summary disposition decision. We review the trial court's denial of the motion for reconsideration for an abuse of discretion. *In re Begliner Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997).

Plaintiff maintains that if the trial court had properly examined the *Quality Products* decision, the court would have granted plaintiff's motion for reconsideration. Plaintiff is mistaken on two grounds. First, plaintiff's argument on appeal assumes that the trial court did not examine the *Quality Products* decision in the motion for reconsideration. This assumption is unfounded. Plaintiff cited and discussed the *Quality Products* decision in support of his motion for reconsideration. Absent some indication that the trial court ignored plaintiff's citations, there is no basis to conclude that the court failed to review *Quality Products*.

Second, as we have discussed, the *Quality Products* decision does not control this case. Unlike the alleged waiver in *Quality Products*, the waiver in this case arose from plaintiff's affirmative conduct of requesting to pay for the psychologist's examination and from his conduct of attending the examination. Because the *Quality Products* decision does not support plaintiff's waiver argument, the trial court properly denied plaintiff's motion for reconsideration.

Given our conclusion that the record supports the trial court's summary disposition decision, we need not address the remaining arguments presented by defendant in further support of affirmance.

Affirmed.

/s/ Stephen L. Borrello  
/s/ Peter D. O'Connell  
/s/ Michael J. Talbot