

Court of Appeals, State of Michigan

ORDER

Brian Copeland MD v MidMichigan Regional Medical Center

Docket No. 314880

LC No. 11-007964-NZ

Amy Ronayne Krause
Presiding Judge

E. Thomas Fitzgerald

William C. Whitbeck
Judges

The Court orders that the motion for reconsideration is GRANTED for clarification purposes, and this Court's opinion issued April 1, 2014, is hereby VACATED. A new opinion is attached to this order.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

JUN 05 2014

Date

Jerome W. Zimmer Jr.
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

MARGARET COPELAND, Personal
Representative for the Estate of BRIAN
COPELAND, MD, and BRIAN COPELAND,
MD, PC,

UNPUBLISHED
April 1, 2014

Plaintiff-Appellants,

v

No. 314880
Midland Circuit Court
LC No. 11-007964-NZ

MIDMICHIGAN REGIONAL MEDICAL
CENTER,

Defendant-Appellee,

and

JOHN/JANE DOE and DONNA J. RAPP,

Defendants.

Before: RONAYNE KRAUSE, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

Plaintiffs, Brian M. Copeland, MD, and Brian M. Copeland, MD, PC (collectively, Dr. Copeland), appeal as of right the trial court's order granting summary disposition under MCR 2.116(C)(7) and (10) in favor of defendants MidMichigan Regional Medical Center, John/Jane Doe, and Donna J. Rapp (collectively, the hospital). Dr. Copeland sued the hospital after the hospital's summarily suspended his medical privileges on February 14, 2011, asserting claims of breach of contract, disability discrimination, defamation, and tortious interference with a business relationship. Because the trial court properly determined that release and immunity barred Dr. Copeland's claims, we affirm.

I. FACTS

A. THE RELEASE

Dr. Copeland, now deceased, was a board-certified neurosurgeon who had full, unlimited medical staff privileges to perform neurosurgical procedures at the hospital. As part of his application for clinical privileges in 2000, Dr. Copeland signed a release agreement. The release

provided that Dr. Copeland extended absolute immunity to the hospital for claims related to summary suspensions or matters of professional competence:

1. I extend absolute immunity to, and release from any and all liability, and agree not to sue the hospital . . . for any actions, recommendation, reports, statements, communication, or disclosures involving me, which are made, taken, or received by this hospital or its authorized representatives relating, but not limited[,] to the following:

* * *

c. proceedings for suspension or reduction of clinical privileges or for denial or revocation of appointment, or any other disciplinary action;

d. summary suspensions;

* * *

I. matters or inquiries concerning professional qualifications, credentials, clinical competence, character, mental or

j. any other matter that might directly or indirectly have an effect on my competence, on patient care

B. DR. COPELAND'S PREVIOUS LEAVE OF ABSENCE

Dr. Copeland contracted Hepatitis C during his residency. Dr. Copeland asserted that he suffered an exacerbation of his Hepatitis C during the spring of 2010, and he took a leave of absence from the hospital. Dr. Copeland notified Dr. James Bicknell, a member of the hospital's Medical Executive Committee, that he would be discontinuing his exercise of neurosurgical privileges until June 4, 2010. On Dr. Copeland's return, the hospital reinstated him with full medical privileges.

C. THE FEBRUARY 14, 2011 SUSPENSION

According to Dr. Copeland's complaint, on February 14, 2011, Dr. Copeland had five neurosurgeries scheduled. After his second surgery, Dr. James Shepich, the Secretary-Treasurer of the Medical Executive Committee, approached Dr. Copeland and asked Dr. Copeland to meet with Shelly Wood, a Vice-President of the hospital. Wood informed Dr. Copeland that the hospital was summarily suspending his full medical staff privileges because an unidentified person or persons alleged that he was slurring his speech and acting erratically during the two surgeries.

The Medical Executive Committee consists of the officers of the medical staff, and its purposes include to receive and act on reports, to implement policies, to enforce the rules of the hospital "in the best interests of patient care," to be responsible for the general quality of medical care, and to refer situations involving issues of professional competence to the Credentials Committee.

According to Dr. Copeland's complaint, Dr. Shepich advised the Medical Executive Committee on February 22, 2011, that when he interacted with Dr. Copeland on February 14, 2011, he did not perceive Dr. Copeland to have slurred speech, erratic behavior, or an unsteady gait. However, Wood testified at an evidentiary hearing that Dr. Shepich decided to issue a precautionary suspension.

The hospital subsequently required Dr. Copeland to participate in counseling at the Professional Renewal Center in Lawrence, Kansas, an institution providing substance abuse counseling and treatment. After Dr. Copeland participated in testing, the Professional Renewal Center reported that the allegations against Dr. Copeland were unsupported and that he was healthy and fit to perform the duties of a neurosurgeon. After Dr. Copeland successfully performed several supervised surgeries, the hospital provisionally reinstated Dr. Copeland's medical privileges, but limited him to three surgical procedures a day.

D. PROCEDURAL HISTORY

In August 2011, Dr. Copeland sued the hospital, asserting that (1) the hospital breached its contracts with him, (2) the anonymous employee defamed him and tortiously interfered in his business relationship with the hospital, (3) the hospital defamed him, and (4) the hospital discriminated against him in a place of public accommodation under the Persons With Disabilities Act.¹

Dr. Copeland sought to discover the identity of the person or persons who provided the hospital with the information that led to his suspension. The hospital responded that this information was privileged under Michigan's peer review privilege.² Dr. Copeland moved to compel discovery, and the trial court eventually ruled that the employee's identity and communications were not privileged until the point that the hospital's Medical Executive Committee convened, because they were background factual material.

In June 2012, the hospital moved for summary disposition under MCR 2.116(C)(7) and (10). The hospital asserted that Dr. Copeland's release barred his suit because his claims involved actions and communications regarding his clinical competence. The hospital also asserted that the Health Care Quality Improvement Act³ and Michigan's peer review immunity statute⁴ barred Dr. Copeland's claims. The hospital further asserted that it was entitled to summary disposition on Dr. Copeland's discrimination claim because he could not show that his disability was not related to his ability to exercise his medical privileges.

Dr. Copeland responded that summary disposition would be premature because the hospital had not yet disclosed the underlying information to him. Dr. Copeland attached the

¹ MCL 37.1101 *et seq.*

² MCL 331.533.

³ 42 USC 11101 *et seq.*

⁴ MCL 331.531(3).

affidavit of his attorney, John A. Decker, to his motion. Decker asserted that Dr. Copeland could demonstrate that the hospital's actions were not reasonable, and that the hospital solely possessed information relating to that claim.

Dr. Copeland also asserted that his release did not bar his claims for defamation and tortious interference because those claims involved gross negligence and a jury could reasonably conclude that the individual's conduct was reckless. Dr. Copeland additionally asserted that he did not have to prove that his disability was not related to his ability to exercise his privileges because the hospital perceived him as being disabled.

The trial court heard arguments on the motion and held an evidentiary hearing, at which the parties questioned Wood concerning the bylaws and purposes of the hospital's Medical Executive Committee.

E. THE TRIAL COURT'S OPINION AND ORDER

Ultimately, the trial court granted the hospital's motion for summary disposition. The trial court concluded that Dr. Copeland's release barred his defamation and tortious interference claims because the claims arose out of matters of professional competence and did not rise to the level of gross negligence.

The trial court also concluded immunity barred Dr. Copeland's suit because he had neither rebutted the hospital's presumption of immunity under the Health Care Quality Improvement Act nor supported his accusations of malice. The trial court further concluded that Dr. Copeland could not assert a claim under the Persons With Disabilities Act, reasoning that no reasonable person could conclude his Hepatitis C condition was not related to his ability to utilize and benefit from his medical privileges since the condition had previously required him to take a leave of absence.

Finally, the trial court rejected Dr. Copeland's assertion that summary disposition was premature because discovery was ongoing. The trial court concluded that Dr. Copeland had failed to identify a disputed issue and support it with independent evidence. The trial court also noted that Dr. Copeland had failed to avail himself of discovery.

F. DR. COPELAND'S MOTION FOR RECONSIDERATION

Dr. Copeland moved the trial court for reconsideration, asserting in pertinent part that the release, when combined with the hospital's bylaws, served to create an illusory contract and rendered the bylaws "void for lack of mutuality of obligation[.]"

II. RELEASE

A. STANDARD OF REVIEW

This Court reviews de novo the trial court's ruling on a motion for summary disposition.⁵ Under MCR 2.116(C)(7), summary disposition is appropriate "because of release[.]" The moving party may support its motion with affidavits, depositions, admissions, or other documentary evidence that would be admissible at trial.⁶ This Court considers the contents of the plaintiff's complaint to be true, unless contradicted by the documentary evidence.⁷ If there is no factual dispute, whether a plaintiff's claim is barred is a question of law.⁸

B. ILLUSORY CONTRACTS

1. ISSUE PRESERVATION

An issue is preserved if it is raised before, addressed, or decided by the trial court.⁹ An issue is not preserved if it is presented to the trial court for the first time in a motion for reconsideration.¹⁰ Additionally, raising an issue on one ground is not sufficient to preserve it on another ground.¹¹

Here, Dr. Copeland raised for the first time in his motion for reconsideration his argument that the interplay between the release and the bylaws resulted in no mutual obligation between the parties. Therefore, we conclude that this issue is not preserved.

"Michigan generally follows the 'raise or waive' rule of appellate review."¹² We will exercise our discretion to review unpreserved issues only under compelling circumstances.¹³ We will generally decline to address unpreserved issues unless "a miscarriage of justice will result from a failure to pass on them, or if the question is one of law and all the facts necessary for its resolution have been presented, or where necessary for a proper determination of the case."¹⁴

⁵ *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2000).

⁶ *Id.*; MCR 2.116(G)(5), (6).

⁷ *Odom*, 482 Mich at 466.

⁸ *Snead v John Carlo, Inc*, 294 Mich App 343, 354; 813 NW2d 294 (2011).

⁹ *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005).

¹⁰ *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009).

¹¹ *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004).

¹² *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008).

¹³ *Napier v Jacobs*, 429 Mich 222, 233; 414 NW2d 862 (1987); *Walters*, 481 Mich at 387 n 21.

¹⁴ *Heydon v MediaOne of Southeast Mich, Inc*, 275 Mich App 267, 278; 739 NW2d 373 (2007) (quotation marks and citations omitted).

We decline to review this issue. We are not convinced that our decision will result in a miscarriage of justice.¹⁵

C. GROSS NEGLIGENCE EXCEPTION

Dr. Copeland contends that the trial court improperly granted summary disposition on his claims of defamation and tortious interference because the claims' assertions rose to the level of gross negligence. We disagree.

A party's release waives claims of ordinary negligence, but not gross negligence.¹⁶ A person's conduct is grossly negligent if the person engages in "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."¹⁷

Here, Dr. Copeland asserted that Doe's statements were "made negligently or alternatively, were made intentionally with malice[.]" Dr. Copeland also asserted that the hospital then also communicated the false information, and "was either negligent, or did so intentionally or was malicious in doing so [sic][.]" Finally, Dr. Copeland asserted that the "malicious, untrue, libelous, and slanderous accusations by Defendant John/Jane Doe" tortiously interfered with his contractual relationship with the hospital.

Taking these assertions as true, we conclude that the trial court correctly determined that Dr. Copeland's claims did not rise to the level of gross negligence. Dr. Copeland pleaded that the defamation and accusations were malicious. In terms of defamation, "[a]ctual malice exists when the defendant knowingly makes a false statement or makes a false statement in reckless disregard of the truth."¹⁸ In comparison, gross negligence concerns a person's reckless disregard for whether an injury resulted.¹⁹

Though both definitions contain the word "reckless," the conduct involved and the focus of that conduct are not the same. The actual malice standard for defamation does not incorporate a requirement that the person who made the statement acted with reckless disregard for whether injury would result from the statement. The standard merely requires that the person who made the statement did so in reckless disregard to the statement's truth. Thus, even taking Dr. Copeland's pleaded assertions as true, Dr. Copeland's assertions did not rise to the level of gross negligence. We conclude that the trial court did not err when it determined that Dr. Copeland's pleadings did not allege conduct that constituted gross negligence.

¹⁵ See *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005) (Michigan courts typically enforce contracts as written).

¹⁶ *Xu v Gay*, 257 Mich App 263, 269; 668 NW2d 166 (2003).

¹⁷ *Maiden v Rozwood*, 461 Mich 109, 123; 597 NW2d 817 (1999); *Xu*, 257 Mich App at 269.

¹⁸ *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 114; 793 NW2d 533 (2010) (quotation marks omitted).

¹⁹ *Maiden*, 461 Mich at 123.

D. ENTITLEMENT TO FURTHER DISCOVERY

Dr. Copeland contends that the trial court erred by granting the hospital's motion for summary disposition while discovery was pending. We disagree. To survive a motion for summary disposition, once the nonmoving party has identified issues in which there are no disputed issues of material fact, the burden is on the plaintiff to show that disputed issues exist.²⁰ Summary disposition is premature before the completion of discovery if further discovery "stands a fair chance of uncovering factual support for the opposing party's position."²¹

Dr. Copeland has not shown that the further discovery would support his defamation claim at the level of gross negligence. For the reasons stated above, Dr. Copeland cannot prevail on his defamation and tortious interference claims even when this Court takes his assertions as true. Thus, even if Dr. Copeland uncovered factual support for those assertions through further discovery, Dr. Copeland would still be unable to prevail on the merits of his claims. We conclude that the trial court properly granted summary disposition even though discovery was still pending.

III. THE HEALTH CARE QUALITY IMPROVEMENT ACT AND MICHIGAN'S PEER REVIEW PRIVILEGE

A. STANDARD OF REVIEW AND ISSUE PRESERVATION

Generally, this Court reviews de novo issues of the interpretation and application of statutes.²² However, an issue is not preserved if it is not raised before, addressed, or decided by the trial court.²³ Here, the parties raised the application of Michigan's peer review privilege during their discovery motions. Thus, the application of this privilege is preserved.

However, neither party addressed whether Michigan's peer review statute prevents a plaintiff from meeting his or her burden under the Health Care Quality Improvement Act, nor did the trial court address this issue. Thus, we conclude that this issue is unpreserved.

This Court may consider an unpreserved issue if it is an issue of law for which all the necessary facts have been presented, or if the issue is necessary to a proper resolution of the legal issues.²⁴ We will address this issue because it is an issue of law that is strongly related to Dr. Copeland's preserved arguments regarding Michigan's peer review privilege.

²⁰ MCR 2.116(G)(4); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

²¹ *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009).

²² *Adair v Michigan*, 486 Mich 468, 477; 785 NW2d 119 (2010).

²³ *Polkton Charter Twp*, 265 Mich App at 95.

²⁴ *Heydon*, 275 Mich App at 278.

B. LEGAL STANDARDS

The Health Care Quality Improvement Act provides that “no person . . . providing information to a professional review body regarding the competence or professional conduct of a physician shall be held, by reason of having provided such information, to be liable for damages under any law of . . . any State . . . unless such information is false and the person providing it knew such information was false.”²⁵ The professional review body may also be immune from damages.²⁶ To be immune, a professional review body must have acted reasonably:

For the purposes of the protection set forth in section 11111(a) [regarding immunity], a professional review action must be 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).

Courts presume that the professional review body acted reasonably unless the plaintiff rebuts the presumption by a preponderance of the evidence.²⁷ The plaintiff must show that a reasonable jury, viewing the facts in the best light for the plaintiff, could conclude by a preponderance of the evidence that the review process was not reasonable.²⁸

Similarly, Michigan law provides that a peer review entity or a person providing information to a peer review entity “is not civilly or criminally liable,” unless the review organization or person acts with malice.²⁹ Michigan also provides that data collected by or for a peer review entity are not discoverable for most purposes:

²⁵ 42 USC 11111(a)(2).

²⁶ 42 USC 11112(a)(1).

²⁷ 42 USC 11111(a); *Meyers v Columbia/HCA Healthcare Corp*, 341 F3d 461, 467-468 (CA 6, 2003).

²⁸ *Meyers*, 341 F3d at 468.

²⁹ MCL 331.531(3) and (4).

Except as otherwise provided in [MCL 331.532], the record of a proceeding and the reports, findings, and conclusions of a review entity and data collected by or for a review entity under this act are confidential . . . and are not discoverable and shall not be used as evidence in a civil action^[30]

C. APPLYING THE STANDARDS

Dr. Copeland asserts that the trial court correctly interpreted the scope of Michigan’s peer review privilege to exclude factual background information, but that the Health Care Quality Improvement Act interacts with Michigan’s peer review privilege in such a way that plaintiffs will be unable to overcome the act’s statutory presumption. We disagree.

The peer review privilege “is designed to assure that honest assessment and review of performance is undertaken in peer review committees.”³¹ However, “the Legislature has defined the scope of the privilege in terms of the *function* of a peer review committee.”³² “[I]t is not the facts themselves that are at the heart of the peer review process.”³³ Thus, basic factual material is discoverable, but “material concerning the internal deliberative process of a peer review committee” is not.³⁴ As detailed above, under the privilege, a party may discover the background facts leading up to the peer review body’s investigation and subsequent process. The plaintiff is therefore capable of contending that, on the basis of the background facts available, the peer review body’s actions were not reasonable under the Health Care Quality Improvement Act or were malicious under Michigan’s peer review immunity statute. The trial court thus did not plainly err by applying the immunity of the Health Care Quality Improvement Act to Dr. Copeland’s claims.

IV. DR. COPELAND’S DISABILITY CLAIM

A. STANDARD OF REVIEW

This Court reviews de novo the trial court’s determination on a motion for summary disposition.³⁵ A party is entitled to summary disposition under MCR 2.116(C)(10) if “there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a

³⁰ MCL 331.533.

³¹ *Centennial Healthcare Mgt Corp v Dep’t of Consumer & Indus Servs*, 254 Mich App 275, 288; 657 NW2d 746 (2002).

³² *Id.* at 297 (emphasis supplied).

³³ *Id.* at 290.

³⁴ *Id.* at 291.

³⁵ *Maiden*, 461 Mich at 118.

matter of law.” A genuine issue of material fact exists if, when viewing the record in the light most favorable to the nonmoving party, reasonable minds could differ on the issue.³⁶

B. LEGAL STANDARDS

MCL 37.1102 provides that “[t]he opportunity to obtain . . . full and equal utilization of public accommodations . . . without discrimination because of a disability is . . . a civil right.” MCL 37.1302 provides that a place of public accommodation shall not deny a person facilities, privileges, or advantages that are unrelated to that person’s ability to utilize those facilities, privileges, or advantages:

[A] person shall not:

(a) Deny an individual the full and equal enjoyment of . . . facilities, privileges, advantages, and accommodations of a place of public accommodation or public service because of a disability that is unrelated to the individual’s ability to utilize and benefit from the . . . facilities, privileges, advantages, or accommodations

C. APPLYING THE STANDARDS

Dr. Copeland asserts that the trial court erred when it determined that his disability was unrelated to his ability to utilize public accommodations. We agree, but conclude that this error was harmless.

An individual’s disability is not related to his or her ability to benefit from a public accommodation if the disability, properly accommodated, would not prevent the person from using and enjoying the accommodation.³⁷

Here, the trial court determined that the Dr. Copeland’s prior leave of absence on account of his Hepatitis C meant that no reasonable mind could differ concerning whether his Hepatitis C condition was related to his ability to perform surgeries. However, Dr. Copeland’s admission that he took a leave of absence on account of his illness on one instance does not necessarily prevent him from showing that his disability, when properly accommodated, would prevent him from utilizing his medical privileges by performing surgeries in other instances. Specifically, Dr. Copeland also asserted that when he returned from his absence, the hospital reinstated him with full medical privileges. We thus agree that the trial court erred when concluding that no reasonable minds could differ concerning whether Dr. Copeland’s disability was related to his ability to utilize his privileges.

³⁶ *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

³⁷ *Cebreco v Music Hall Ctr for the Performing Arts, Inc*, 219 Mich App 353, 358; 555 NW2d 862 (1996).

However, we conclude that this error was harmless. This Court will not reverse or vacate a trial court's order unless doing so appears to this Court that failing to do so would be inconsistent with substantial justice.³⁸

We decline to reverse the trial court's order in this case. Even when presuming—without deciding—that Dr. Copeland is disabled, he cannot prevail on a claim of public accommodation discrimination.

A “place of public accommodation” includes a health facility whose “privileges, advantages, or accommodations are extended, offered, sold, or otherwise *made available to the public.*”³⁹ In this instance, there is no indication that the hospital made available to the public the privilege that it denied Dr. Copeland: the privilege to perform surgery in its facilities. Thus, Dr. Copeland cannot prevail on his claim that the hospital discriminated against him by denying him a public accommodation, and we decline to reverse the trial court's order dismissing his claim of public accommodation discrimination.

V. CONCLUSION

We conclude that the trial court did not err by dismissing Dr. Copeland's breach of contract, defamation, and tortious interference claims because release and immunity barred those claims. To the extent that the trial court erred when it dismissed Dr. Copeland's discrimination claim after it determined that no reasonable minds could conclude that Dr. Copeland's Hepatitis C was unrelated to his ability to perform surgeries, we conclude that this error was harmless.

We affirm.

/s/ Amy Ronayne Krause
/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck

³⁸ MCL 2.613(A).

³⁹ MCL 37.1301(a).