

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 24, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 01-1821
01-2539**

Cir. Ct. No. 99-CV-1729

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

APPEAL NO. 01-1821

**RADIOLOGY CONSULTANTS, S.C., KENNETH E. CLARK,
M.D., EDGAR L. KOCH, M.D., DONALD J. KASH,
M.D., JOHN S. PALLIN, M.D., J. CARY PALLIN, M.D.,
JAMES C. ACETO, M.D., MARY BETH BARR, M.D.
GREGORY J. GULLO, M.D., AND ROBERT J. SWOBODA,
M.D.**

PLAINTIFFS-APPELLANTS,

V.

**LEE H. HUBERTY, M.D., UNITED HOSPITAL MEDICAL
CENTER, KENOSHA HOSPITAL MEDICAL CENTER AND
ST. CATHERINE'S HOSPITAL,**

DEFENDANTS-RESPONDENTS.

APPEAL NO. 01-2539

**RADIOLOGY CONSULTANTS, S.C., KENNETH E. CLARK,
M.D., ROBERT J. SWOBODA, M.D., EDGAR L. KOCH,
M.D., DONALD J. KASH, M.D., JOHN S. PALLIN,
M.D., J. CARY PALLIN, M.D., JAMES C. ACETO,**

**M.D., MARY BETH BARR, M.D. AND GREGORY J.
GULLO,**

PLAINTIFFS-APPELLANTS,

v.

**LEE H. HUBERTY, M.D., UNITED HOSPITAL SYSTEM,
INC., KENOSHA HOSPITAL AND MEDICAL CENTER, INC.
AND ST. CATHERINE'S HOSPITAL,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Racine County:
RICHARD J. KREUL, Judge. *Affirmed.*

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Radiology Consultants, S.C., and nine of its individual shareholders (collectively, RC) appeal from a judgment dismissing their claims that Dr. Lee H. Huberty and United Hospital System, Inc. (UHS) caused the termination of RC's contract to provide services to UHS's Kenosha hospitals. The issue is whether summary judgment was appropriate to resolve RC's breach of contract, breach of fiduciary and loyalty duties, and breach of medical staff bylaws claims. RC also argues that claims against Richard Schmidt, a nonparty to the action, should not have been dismissed with prejudice. We affirm the judgment.

¶2 For more than thirty years, physicians/shareholders/employees of RC have exclusively provided radiology services at Kenosha Hospital and Medical Center (KHMC) and St. Catherine's Hospital. Since 1998 the hospitals have been

under the joint and integrated management of UHS. An earlier consent decree with the State of Wisconsin regarding the legality of the consolidation of the two hospitals under antitrust laws prohibited the combined entities from entering into exclusive contracts for hospital-based services with radiologists unless contracts were competitively rebid by March 31, 1997, or at least once every three years.

¶3 Huberty, an RC physician/shareholder/employee, served as the medical director of radiology at KHMC from 1987 to January 1999. RC relied on Huberty as its “chief liaison” in communicating with the hospitals and to assure continuation of the exclusive arrangement. In 1998, as the hospital consolidation was being completed, Huberty advised RC that a new exclusive radiology contract would be required through a request for proposal process. Huberty explained that it was UHS’s intent to contract with one individual radiologist who would be solely responsible for the staffing, administration, standards and scheduling needs of the hospitals. In January 1999, Huberty resigned as an officer and director of RC, candidly admitting his intent to respond individually to UHS’s request for a proposal. However, when UHS solicited proposals in February 1999, Huberty was persuaded to join as a signatory to RC’s proposal. Later, Huberty advised UHS officers that he withdrew his support for the RC proposal.

¶4 RC took the position that Huberty was in violation of his Master Employment Agreement in which he agreed “[n]ot to engage in, or work for, any individual, firm or corporation engaged in the same or similar activities now or hereafter carried on by the Employer.” After a March 2, 1999 board of directors meeting, RC issued directives to Huberty prohibiting him from responding to the solicitation for proposals and from further communications with UHS without

RC's prior approval, and requiring him to provide a detailed report on all communications to date. Huberty did not comply with these directives.

¶5 In response to RC's proposal, UHS began negotiations with RC over the appointment of a medical director. RC's proposal was that it be allowed to designate a medical director but that a committee would have ultimate authority with respect to the services rendered. UHS wanted authority to designate the medical director, specifically Huberty. In late May 1999, UHS appointed Huberty as interim medical director of radiology. On May 24, Huberty submitted his resignation from employment with RC, effective August 21, 1999. On May 26, UHS notified RC that RC's exclusive contract to provide radiology services would terminate the next day. RC physicians continued to provide services at the hospitals.

¶6 UHS made a second request for proposals in August 1999. Only Huberty and RC responded. In November 1999, the exclusive service contract was awarded on Huberty's proposal and he was named medical director of radiology. Huberty offered employment to all RC physicians but none of the individual plaintiffs to this action accepted. RC physicians were foreclosed from exercising hospital privileges when the new exclusive contract took effect.

¶7 RC's complaint alleges that Huberty and UHS conspired to oust RC as the exclusive provider of radiology services at the hospitals. RC initially sought an injunction to prevent the termination of the right of its physicians to exercise privileges at the hospitals when the new exclusive contract took effect. Injunctive relief was denied. Four claims remained after the filing of a second amended complaint: that Huberty breached his Master Employment Agreement; that Huberty breached a duty of loyalty to RC; that Huberty breached his fiduciary

duty as a director and officer of RC; and that the hospitals breached medical staff bylaws by the appointment of Huberty as medical director and termination of hospital privileges. Huberty and UHS moved for summary judgment on all the claims. RC opposed the motion with respect to the fiduciary duty and bylaws claims but made a cross-motion for summary judgment on the employment contract and loyalty claims.

¶8 The circuit court granted summary judgment dismissing all claims. The circuit court wrote a fifty-two page decision which demonstrates the court's complete grasp of the facts, issues and law in this matter. We commend the circuit court for the care and completeness demonstrated in its opinion. Therefore, pursuant to WIS. CT. APP. IOP VI(5)(a), we adopt the circuit court's opinion as to the ultimate resolution of the issues by summary judgment. We only address the specific attacks on that decision.

¶9 RC argues that the circuit court adopted too narrow a view of RC's "activities" in concluding that Huberty's stated objective to submit a proposal was not a breach of the employment contract's prohibition against engaging in the same or similar activities as RC. We do not agree. The stated purpose in the employment agreement is to provide medical radiology services to hospitals and patients. Huberty did not engage in this type of work for any other employer. His thoughts were still his own so while he may have entertained the thought of making a proposal, he did not violate his employment contract because no actual work was done outside of RC. The circuit court's determination was not based, as RC contends, on the resolution of disputed facts. It was based on the plain language of the contract.

¶10 RC cannot maintain a contract claim on Huberty's failure to comply with the March directives not to communicate with the hospital or submit a proposal. As the circuit court noted, the directives were overbroad and not related to the activity of providing radiology services. The directives were an attempt to unilaterally amend the employment contract.

¶11 RC claims that the circuit court's finding that Huberty did not submit his proposal until after his employment ceased on August 21, 1999, is clearly erroneous because UHS imposed an August 20, 1999 deadline. Huberty testified that he got an extension. The circuit court relied upon correspondence indicating that Huberty's proposal was received on August 25, 1999. Even if a dispute of fact exists, it is of no consequence. Huberty's submission of a proposal was not an activity for which he was employed. There was no violation of the employment contract.

¶12 RC points out that in granting summary judgment a circuit court may not decide issues of credibility or weigh the evidence. *Fortier v. Flambeau Plastics Co.*, 164 Wis. 2d 639, 665, 476 N.W.2d 593 (Ct. App. 1991). It argues that in dismissing its breach of loyalty claim the circuit court "found facts" with respect to Huberty's intent. Even if disputed facts exist regarding Huberty's perception of where his loyalties should be directed, it is not a material fact precluding summary judgment. There is no factual basis to conclude that Huberty's conflicted loyalties caused the termination of RC's exclusive service contract. UHS had indicated its intent to contract with an individual or, at a minimum, require one individual to be responsible to it for overseeing the delivery of services. It was looking for managerial accountability. RC was not willing to satisfy UHS on this requirement. By its unyielding perception of how to deliver

services, RC could not avail itself of the corporate opportunity it claims Huberty usurped.

¶13 For this same reason, we also reject RC's contention that the circuit court improperly made factual determinations on disputed facts with regard to its breach of fiduciary duty claim. The disputed facts that RC tries to interject are not material. *Modern Materials, Inc., v. Advanced Tooling*, 206 Wis. 2d 435, 447, 557 N.W.2d 835 (Ct. App. 1996), confirms that without violating a fiduciary obligation an employee may plan and develop a competitive enterprise during the course of his or her employment provided the particular activity engaged in is not against the best interests of the employer.

¶14 Huberty did not undermine RC's ability to submit an acceptable proposal to UHS. In fact, Huberty informed RC of exactly what UHS was looking for. RC was simply unwilling to deliver it. Given Huberty's disclosure of UHS's desire, any acts which RC claims Huberty did "in secret" are not material. There is no suggestion that Huberty knew something that RC was not informed of. The allegation that Huberty recruited RC employees is not material because no employees left RC prior to its loss of the contract.

¶15 Undoubtedly Huberty developed a close personal relationship with UHS's president, Richard Schmidt, by years of service as the medical director. Again, it was not Huberty's personal relationship with Schmidt that caused RC to lose its exclusive contract. Although Huberty withdrew his support from RC's first service proposal, there is no evidence that his withdrawal caused rejection of RC's proposal. UHS entered into negotiations with RC after the submission of the first proposal and later solicited a second proposal. Finally, Huberty's utilization of facts and figures that "he could only have gotten as a shareholder" is not

actionable absent any claim of trade secret. The circuit court's conclusion that there was no breach of a fiduciary duty does not rest on fact-finding on disputed material facts. Summary judgment was proper.

¶16 RC contends that summary judgment was improper because the hospitals failed to comply with discovery demands for minutes from board meetings held in 1995-97 and, therefore, it was unable to obtain facts in opposition. RC wanted these minutes to examine whether Huberty was actually reporting the discussions and actions of the hospital board. Although the circuit court did not specifically rule on RC's motion to compel discovery, implicit in its decision is a finding that the additional discovery would not have precluded summary judgment. We agree. We first note that RC moved for summary judgment on the breach of contract and breach of loyalty claims. Apparently it was satisfied with discovery on those claims. The breach of fiduciary duty claim was not so vastly different to require additional discovery. Further, the record established that Huberty's conduct did not preclude RC from submitting an acceptable proposal or cause loss of the exclusive contract. Even if RC found that Huberty had not accurately reported board actions, it would not have changed the controlling fact that RC could not meet UHS's proposal requirements. In other words, additional discovery was directed at facts not material to summary judgment.

¶17 RC's claim that the failure to provide the board minutes made summary judgment on its bylaws claim premature also fails. RC argues that there was not sufficient proof that the bylaws were properly adopted by the medical staff and governing bodies. It thinks the minutes may shed light on the genesis of the bylaws. RC's complaint asserts that the bylaws were breached, thereby

implicitly asserting the validity of the bylaws. RC cannot now be heard to challenge the validity of the bylaws. Judicial estoppel prevents a party from asserting a position in a legal proceeding which is inconsistent with a position previously asserted. *Coconate v. Schwanz*, 165 Wis. 2d 226, 231, 477 N.W.2d 74 (Ct. App. 1991).

¶18 We need not address the merits of RC's appellate argument that the bylaws were violated by the termination of RC's contract. As we have already found, the circuit court's opinion adequately addresses the claim. It is sufficient to state that we agree with the circuit court's conclusion that the physicians' privileges have not been terminated and that the right to actually render services at the hospital is governed by an exclusive contract that UHS was free to enter into under the bylaws.

¶19 Richard Schmidt, UHS president and chief executive officer, and former president of KHMC, was named as a party in RC's first amended complaint. RC's second amended complaint did not name Schmidt as a party. RC argues that the circuit court should not have entered an order dismissing claims against Schmidt with prejudice because he was really not a party to the action after the filing of the second amended complaint. The argument is not adequately briefed and we will not consider it. *Fryer v. Conant*, 159 Wis. 2d 739, 746 n.4, 465 N.W.2d 517 (Ct. App. 1990). The record suggests uncertainty about whether claims against Schmidt continued or had been abandoned. A court order is appropriate to effectuate the voluntary dismissal of claims. See WIS. STAT. § 805.04(2) (1999-2000). There is no basis to conclude that the circuit court erroneously exercised its discretion in entering an order dismissing Schmidt.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5 (1999-2000).

