COURT OF APPEALS
DECISION
DATED AND RELEASED

September 7, 1995

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

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2905

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

JOHN A. AUSTIN, M.D.,
THOMAS R. BERENTSEN, M.D.,
F. WARD BLAIR, M.D.,
WILLIAM N. BRANDT, M.D.,
MARK D. CANTY, M.D.,
WILLIAM K. CLANFIELD, M.D.,
SAMUEL L. FRAZER, M.D.,
A. NICHOLAS GIANITSOS, M.D.,
STANLEY W. GRUHN, M.D.,
DAVID M. HUIBREGTSE, M.D.,
RONALD P. KARZEL, M.D.,
MARK E. LANSER, M.D.,
ERIC R. LYERLA, M.D.,
THOMAS G. MCCALL, M.D.,
PATRICK D. MEYER, M.D.,
DALE E. MILLER, M.D.,
BRUCE K. NAGLE, MD.,
N. ROBERT NEWCOMB, M.D.,
JAMES N. O'BRIEN, M.D.,
DANIEL T. PETERSON, M.D.,
MICHAEL L. RAINIERO, M.D.,
NANCY C. RAINIERO, M.D.,
HARRY R. RAMSEY, M.D.,
DALE E. ROZEBOOM, M.D.,
WILLIAM H. SQUIRES, M.D.,
MARIA E. TAVERAS, M.D.,

JAMES G. VOGEL, M.D.,
GREGORY H. WLODARSKI, M.D.,
JOHN M. ZIEGLER, M.D.,

Plaintiffs-Appellants,

v.

MERCY HEALTH SYSTEM CORPORATION, A/K/A MERCY HOSPITAL OF JANESVILLE, WISCONSIN, INC.,
KERRY H. HENRICKSON, M.D.,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Rock County: WILLIAM G. CALLOW, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Gartzke, P.J., Dykman and Sundby, JJ.

DYKMAN, J. Appellants are physicians employed by Mercy Hospital. They appeal from a summary judgment in which the trial court dismissed their action against Mercy Health System Corporation, A/K/A Mercy Hospital of Janesville, Wisconsin, Inc., and Kerry H. Henrickson, M.D. The physicians contend that: (1) the trial court should have concluded that the Hospital and the physicians have a contractual relationship which the Hospital breached; (2) the trial court should not have dismissed their promissory estoppel claim because genuine issues of material fact exist with respect to whether the Hospital made promises to the physicians which they relied upon when they became members of the Hospital's medical staff; and (3) the trial court should not have dismissed their tortious interference with business and contractual rights claim because genuine issues of material fact exist with respect to whether Dr. Henrickson and the Hospital interfered with the physicians' contractual and business relationships with the Hospital and their patients.

We conclude that: (1) the Bylaws establish a contract between the Hospital and the medical staff and that portions of a new critical care policy breach that contract; (2) the promissory estoppel claim must be dismissed because of our conclusion that a contract, embodying all of the alleged promises, exists between the parties; and (3) genuine issues of material fact exist with regard to the physicians' tortious interference with contractual and business relationships claim. Thus, summary judgment was inappropriately granted as to the first and third claims. Accordingly, we affirm in part and reverse in part.

BACKGROUND

The appellants are physicians who work in the intensive care unit (ICU) and special care unit (SCU) at Mercy Hospital. Several documents set forth the procedures for the management of the Hospital's personnel, including the Rules and Regulations, Bylaws and Fair Hearing Plan of the Medical Staff (Medical Staff Bylaws) enacted February 24, 1993, and the Amended and Restated Bylaws of Mercy Hospital of Janesville, Wisconsin, Inc. (Hospital Bylaws).

In March 1994, upon the recommendation of Dr. Henrickson, the medical director of the Hospital's critical care units, the Hospital's Board of Directors adopted a new critical care policy, effective May 1, 1994. According to the Hospital, the new policy "establishes criteria for credentialing physicians to manage critically ill patients and a method for ensuring the ongoing competency of critical care physicians." The new policy changed the credentials required for a physician wishing to practice in the ICU and SCU, thereby restricting the privileges of those physicians who had previously practiced in those units.

The physicians commenced an action for damages based upon theories of breach of contract, promissory estoppel and tortious interference with business and contractual relationships. They obtained an *ex parte* restraining order preventing the Hospital from implementing the new policy. After a temporary injunction hearing, the trial court vacated the *ex parte* restraining order, denied the physicians' motion for a temporary injunction and set the case for trial. The Hospital moved for summary judgment and, after a

hearing on the matter, the trial court granted the motion and dismissed the complaint. This appeal followed.

STANDARD OF REVIEW

An appeal from a grant of summary judgment raises an issue of law which we review *de novo*, by applying the same standards employed by the trial court. ***Brownelli v. McCaughtry***, 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994). We initially examine the complaint and answer to determine whether a claim has been stated and whether material issues of fact have been raised. ***Id.*** We then consider the documents offered by the moving party to determine whether a *prima facie* case has been established. ***Id.*** If they do, we then look to the documents offered by the party opposing the motion to determine if any material facts remain in dispute entitling the opposing party to a trial. ***Id***. at 372-73, 514 N.W.2d at 49-50.

BREACH OF CONTRACT

The physicians argue that the trial court erred when it dismissed their breach of contract claim. According to the physicians, the Medical Staff and Hospital Bylaws establish a contractual relationship between the Hospital and the physicians. They argue that the Hospital breached this contract because provisions of the new policy conflict with the Bylaws and have caused them to suffer damages.

1. Existence of a Contract

The construction of bylaws and their application to undisputed facts present questions of law which we review *de novo*. ***Keane v. St. Francis Hosp.***, 186 Wis.2d 637, 649, 522 N.W.2d 517, 521 (Ct. App. 1994). Hospital bylaws can constitute a contract between a hospital and its medical staff. ***Id.*** at 651, 522 N.W.2d at 522; ***Bass v. Ambrosius***, 185 Wis.2d 879, 884-888, 520 N.W.2d 625, 627-29 (Ct. App. 1994). If a hospital's bylaws were not binding upon a board of directors, the bylaws

would, of course, [be] render[ed] ... essentially meaningless. They would then be a catalogue of rules, which, although binding on the medical staff, were merely hortatory as to [the hospital]—much "sound and fury, signifying nothing."

Id. at 885, 520 N.W.2d at 627 (citation and footnote omitted).

In ***Bass***, we looked at the following factors as evidencing the contractual nature of the bylaws: (1) the bylaws stated that they governed the medical staff; (2) the medical staff was required to meet the qualifications set forth in the bylaws; (3) members of the medical staff received only those privileges provided by appointment letter and the bylaws; (4) an applicant was required to sign an acknowledgment that he or she would become familiar with the bylaws; and (5) an applicant was required to read and agree to be bound by the bylaws. ***Id.*** at 886-87, 520 N.W.2d at 628. We described the last factor as significant. ***Id.*** at 887, 520 N.W.2d at 628.

The same factors are present in the instant case. First, the portion of the preamble of the Medical Staff Bylaws stating that "the physicians and dentists practicing in Mercy Hospital ... shall carry out the functions delegated to the Medical Staff by the Board in conformity with these Bylaws," demonstrates that the Bylaws govern the medical staff. Second, § 4.01 of the Medical Staff Bylaws provides that membership on the medical staff "is a privilege which shall be extended only to professionally competent physicians and dentists who continuously meet the qualifications, standards and requirements set forth in these Bylaws." Third, § 4.04-3 of the Medical Staff Bylaws provides that appointments to the medical staff confer "only such clinical privileges as have been granted by the Board of Directors in accordance with these Bylaws." Fourth, § 4.05-3(i) of the Medical Staff Bylaws provides that an applicant must sign a statement acknowledging that he or she has received and read the Hospital and Medical Staff Bylaws and that the applicant agrees to be bound by the terms contained therein if offered a position. Fifth, article VI of the Hospital Bylaws provides:

> *Section 3. Medical Staff Bylaws*. The medical staff shall be responsible for developing, adopting and periodically reviewing Medical Staff Bylaws and

> Rules and Regulations which are consistent with the Hospital's policy and with any applicable legal or other requirements. *Medical Staff Bylaws and Rules and Regulations shall be subject to and effective upon approval by the Board of Directors and shall be binding upon both the medical staff and the Board of Directors.*

(Emphasis added.) The existence of factors identical to those set forth in ***Bass*** coupled with the plain language of article VI, § 3 of the Hospital Bylaws can only mean that once the Medical Staff Bylaws were adopted by the Board, those provisions were binding upon the Hospital and the medical staff. Accordingly, we conclude that the Medical Staff and Hospital Bylaws establish a contractual relationship between the Hospital and the medical staff.

The Hospital contends that ***Keane*** and ***Bass*** are inapposite because those cases dealt with actions directed towards one physician in violation of the Bylaws but in the instant case, the new policy affects many physicians. This distinction, however, is irrelevant for the purposes of determining whether a contract exists between the medical staff and the Hospital. This issue does not turn on whether the Board's actions affected one or one hundred physicians. Instead, we must look at the actual provisions of the Bylaws to make this determination, as was done in ***Keane*** and ***Bass***. There is nothing in the Medical Staff or Hospital Bylaws suggesting that their provisions are not applicable when a Hospital decision affects more than one physician. Thus, the trial court erred when it concluded that these cases were not controlling.

The Hospital also argues that the Bylaws do not bind the Hospital and that the Board may act unilaterally to effectuate hospital policy without first obtaining medical staff approval. The Hospital points to a portion of the preamble of the Medical Staff Bylaws which provides that "the Medical Staff must work with and is subject to the ultimate authority of the Board of Directors of Mercy Hospital."

There is no merit to the Hospital's argument. Article VI, § 3 of the Hospital Bylaws expressly provides that the Medical Staff Bylaws are binding upon the Board of Directors. Additionally, the remaining part of the preamble provides:

the cooperative efforts of the Medical Staff, management and the Board are necessary to fulfill the objective of providing quality patient care to its patients, the physicians and dentists practicing in Mercy Hospital ... shall carry out the functions delegated to the Medical Staff by the Board in conformity with these Bylaws.

Thus, we conclude that the Board does have the ultimate authority to take action provided such action conforms with the provisions set forth in the Bylaws.

2. Breach

The physicians next argue that the provisions of the new policy breach several sections of the Bylaws. They contend that the Bylaws are implicated because their ICU and SCU privileges have been reduced contrary to procedures set forth in the Bylaws. Prior to the enactment of the new policy, the physicians could admit and care for their patients in the ICU and SCU. The new policy prevents them from making decisions about patient care in the ICU and SCU unless the physician obtains new credentials. We address each alleged breach in turn.

First, the physicians claim that by enacting the new policy, the Board unilaterally reduced the physicians' ICU clinical privileges without first obtaining a recommendation from the medical staff.[1] The physicians argue that the Hospital breached its obligations under the Hospital and Medical Staff Bylaws. Article VI, § 1 of the Hospital Bylaws provides:

> The terms of medical staff appointment shall be approved by the Board of Directors upon recommendation from the medical staff. The medical staff shall make recommendations to the

[1] The Hospital concedes that the Board enacted this new policy without first having it reviewed by various medical staff committees because it believed that there was a sense of urgency in improving the ICU care which medical staff review would delay.

> Board concerning ... granting of clinical privileges ... and on such other specific matters as may be referred to it by the Board of Directors. When it has been proposed not to grant or renew an appointment or when clinical privileges are proposed to be denied, reduced, suspended or terminated, the medical staff applicant or appointee shall be afforded the opportunity for a hearing and appellate review as provided in the Medical Staff Bylaws and Rules and Regulations.

The physicians also claim that the reduction in clinical privileges contravenes § 5.02 of the Medical Staff Bylaws which governs the procedures for requesting changes in clinical privileges. That section provides:

> Requests to modify clinical privileges or to obtain additional clinical privileges shall be made in writing to the Chief of the respective department. The Chief of the department shall then submit the Appointee's written request and any related information, together with his/her assessment, to the Credentials Committee. The Credentials Committee shall consider the request and formulate a recommendation which it will forward to the Executive Committee. The Executive Committee will make a written recommendation to the Board of Directors, through the President. Should the Executive Committee recommend against the requested change, the Appointee will be notified of the adverse recommendation and of the right to a hearing in accordance with the Fair Hearing Plan ....

Further, under § 6 of the Medical Staff Bylaws, a physician's clinical privileges may be reduced as a disciplinary measure after a request has been forwarded through the Executive Committee to the Chief of the department where the medical staff member has such privileges.

The Hospital's response is that the Bylaws do not limit its authority to unilaterally set policy for patient care and that such policies may affect the physicians' privileges. In any event, the Hospital argues that such arguments are moot because it received staff input after the new policy was adopted.

While we agree that the Hospital and Medical Staff Bylaws do not prohibit the Hospital from setting patient care policy, new policies cannot conflict with the provisions set forth in the Bylaws. The new policy limits the physicians' ICU and SCU privileges. Changes in privileges are governed by specific provisions of the Bylaws providing for medical staff input *before* such changes are implemented. Accordingly, we conclude that the Hospital breached the Bylaws with regard to ICU and SCU privileges.

Second, the physicians take issue with the portion of the new policy which sets forth new criteria for those physicians wishing to admit and care for patients in the ICU and SCU. The new policy requires that physicians obtain critical care management credentials to write orders and directly manage their patient's care while in the ICU and SCU. Otherwise, a critical care management physician will work with the primary care physician and all care decisions must be approved by the critical care management physician.

The physicians argue that this change violates § 1.2 of the Medical Staff Rules and Regulations which provides:

> Patients may be admitted only by a member of the Medical Staff of Mercy Hospital. That practitioner shall be responsible for the medical care of the patient or indicate the name of the responsible physician, unless transfer of the care is recorded by chart notation and patient acceptance of request. The care of the patient should not be terminated until there is mutual agreement between the relinquishing physician and the physician assuming care.

The physicians also argue that the establishment of new credentials and a new credentials committee also violates the Bylaws because it usurps the power of the ICU committee whose function under § 10.09 is to "[r]eview and evaluate

the quality, safety and appropriateness of patient care within the [ICU] and take action appropriate to the findings of the review and evaluation process." The ICU committee also "[r]eview[s] and recommend[s] policies for the operation and utilization of the [ICU]."

While the new policy does not appear to terminate patient care without the involvement of the admitting physician, it does prevent an admitting physician without critical care management credentials from being responsible for the medical care of his or her patient in the ICU or SCU because only a critical care management physician may make decisions for a patient in those units. Additionally, by establishing new credentials required for practice in the ICU and SCU, the Hospital usurped the function of the ICU Committee whose responsibilities include reviewing medical staff credentials and patient care in the ICU. Consequently, we conclude that this portion of the new policy breached the Bylaws.

Third, the physicians argue that because the new policy reduced clinical privileges for more than fourteen days, they were entitled to, but were refused, a hearing pursuant to the Fair Hearing Plan. The Hospital disagrees, arguing that there is no adverse decision requiring a hearing because the changes in privileges resulted from a policy directed towards improving patient care.

Article VI, § 1 of the Hospital Bylaws provides that when clinical privileges are reduced, a medical staff member shall be afforded a hearing. Further, § 5.02 of the Medical Staff Bylaws provides that requests made to the Board to modify a medical staff member's privileges entitle a medical staff member to a hearing in accordance with the Fair Hearing Plan. Under §§ 1.1(f) and 1.2(c) of the Fair Hearing Plan, a medical staff member is entitled to a hearing when the Board unilaterally denies, reduces, suspends or revokes requested clinical privileges for longer than a fourteen-day investigative period. We conclude that this language provides that when a physician's privileges are reduced for more than fourteen days by any unilateral action by the Board, that physician is entitled to a hearing. The Fair Hearing Plan does not exclude a reduction in privileges caused by a policy change. Accordingly, we conclude that the portion of the policy which reduced privileges without providing a hearing pursuant to the Fair Hearing Plan breached the Medical Staff Bylaws.

Fourth, relying upon § 4.01 of the Medical Staff Bylaws, the physicians argue that the Hospital breached the Bylaws when it refused to permit an applicant to obtain medical staff privileges. Section 4.01 provides:

> Membership on the Medical Staff of Mercy Hospital of Janesville is a privilege which shall be extended only to professionally competent physicians and dentists who continuously meet the qualifications, standards and requirements set forth in these Bylaws; who have the skills and training necessary to provide quality care; who have specific training and/or specialty expertise in areas in which the Hospital has determined there is a need for additional practitioners to meet its development plans, and for whom the Hospital is able to provide adequate facilities and supportive services.

The physicians argue that the Hospital agreed that § 4.01 would not be used to permit the Hospital to prevent applicants from being hired in areas in which the Hospital did not have specialties thereby forcing the Hospital to make substantial investments in equipment or personnel unless the Hospital made a decision to expand into a new area.

The Hospital asserts that it refused to send a physician an application for privileges because the Hospital determined that it did not have a need for that physician's particular specialty. The Hospital contends that this decision was made in accordance with a Medical Manpower planning study.

The evidence does not show that the Hospital violated § 4.01 when it refused to send a physician an application. Rather, it shows that the Hospital acted consistently with the Bylaws which provide that membership need only be extended to those physicians practicing in an area in which the Hospital has a need for that particular specialty. There was no need for this physician's specialty. Accordingly, the Hospital did not breach § 4.01 of the Bylaws.

In summary, the Hospital granted the physicians specific privileges enabling them to practice in the ICU and SCU. The new policy reduced such privileges contrary to the Bylaws. The physicians have a

contractual right to insist that the Hospital follows its Bylaws which the Hospital failed to do when it enacted the new policy. By not doing so, the Hospital breached its contract. Accordingly, we remand the case to the trial court for a determination of damages sustained by the physicians for breach of contract.

PROMISSORY ESTOPPEL

The physicians argue that the trial court erred when it dismissed its promissory estoppel claim. According to the physicians, they have raised genuine issues of material fact with regard to promises made by the Hospital upon which the physicians relied when they became members of the medical staff. The physicians argue that by adopting the Medical Staff Bylaws and agreeing to be bound by them, the Hospital promised not to deprive the physicians of their privileges except through the procedures set forth in the Bylaws.

While a promissory estoppel claim may be independent of a breach of contract claim, in the instant case the promises upon which the physicians claim they relied are embodied in the Medical Staff and Hospital Bylaws which we have determined constitute a contract between the Hospital and the physicians. Accordingly, this alternative claim of recovery was properly dismissed.

TORTIOUS INTERFERENCE WITH BUSINESS AND CONTRACTUAL RIGHTS

The physicians argue that the trial court erred when it dismissed their tortious interference with contractual and business relationships claim. According to the physicians, Dr. Henrickson induced the Board to adopt a policy which he knew interfered with the terms of the Bylaws. The physicians also argue that the Hospital interfered with their business relationships with present and future patients by adopting the new policy.

Tortious interference with contractual relations is defined as "conduct which induces or otherwise intentionally causes a third person not to perform a contract." ***Combined Investigative Servs., Inc. v. Scottsdale Ins. Co.***,

165 Wis.2d 262, 271, 477 N.W.2d 82, 85 (Ct. App. 1991). Liability under this theory will only be found when the actor intentionally causes the nonperformance and acts in such a manner and for such purpose that the actor "knew that the interference was `certain, or substantially certain, to occur.'" ***Augustine v. Anti-Defamation League of B'Nai B'Rith***, 75 Wis.2d 207, 220-21, 249 N.W.2d 547, 554 (1977) (quoting RESTATEMENT (SECOND) OF TORTS § 766 cmt. j (1979)). Generally, intent is a factual issue for the jury and only when the facts are such that no other reasonable inference may be drawn may the trial court find intent or lack of intent as a matter of law. ***Harman v. La Crosse Tribune***, 117 Wis.2d 448, 457, 344 N.W.2d 536, 541 (Ct. App.), *cert. denied*, 469 U.S. 803 (1984).

The physicians have presented facts from which a reasonable jury could conclude that Dr. Henrickson intended to interfere with the physicians' contractual and prospective business relationships with the Hospital and their patients and that his conduct caused the physicians to suffer monetary damages. Dr. Henrickson deposed that when he was hired, he reviewed and signed the Bylaws. He also admitted that he drafted the proposal, on his own initiative, outlining suggestions as to how the ICU should be restructured. Dr. William K. Clanfield deposed that Dr. Henrickson wanted to change the ICU so that only a small number of physicians would care for the ICU patients. Dr. Henrickson deposed that the physicians who previously performed procedures on their patients in the ICU and SCU could no longer do so unless they either obtained permission from the critical care case manager or the physician obtained critical care credentials. From these facts, a reasonable jury could conclude that Dr. Henrickson's actions were a substantial factor in the Hospital's adopting the new policy and in the physicians' reduced access to the ICU and SCU. The jury could also infer that Dr. Henrickson knew that provisions of the Bylaws governing the physicians' privileges and credentials would be violated.

The Hospital argues that even if Dr. Henrickson intended to interfere with the physicians' contract, he is immune from liability under the good faith defense provided in the peer review statute, § 146.37, STATS. We disagree. This suit did not arise out of a peer review "in connection with any program organized and operated to help improve the quality of health care." Section 146.37(1g).[2] Rather, this suit arose because the Hospital reduced the

[2] Section 146.37(1g), STATS., provides in part:

[N]o person acting in good faith who participates in the review or

physicians' privileges upon the suggestion of Dr. Henrickson in violation of the Bylaws. Thus, the peer review immunity statute is inapplicable.

The Hospital also argues that Dr. Henrickson was privileged to interfere because he gave honest advice to the Board. *See* RESTATEMENT (SECOND) OF TORTS § 772 cmt. c (1979). Dr. Henrickson's motive for submitting the new policy, however, is disputed. The Hospital argues that Dr. Henrickson's suggestions were based upon his experience and medical experience. However, Dr. Clanfield deposed that Dr. Henrickson was often not busy and he speculated that Dr. Henrickson wanted to increase his workload and income. Further Dr. Henrickson deposed that he drafted the proposal on his own accord. Whether Dr. Henrickson's advice was an attempt by one physician to increase his power and income is for the jury.

The physicians also argue that the Hospital interfered with their existing and prospective relationships with their patients. A plaintiff may have a cause of action for the intentional interference with another's prospective contractual relations. ***Cudd v. Crownhart***, 122 Wis.2d 656, 658-59, 364 N.W.2d 158, 160 (Ct. App. 1985). The following factors are relevant to this issue:

> (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 interest sought to be advanced by the actor;
>
> (e) The social interests in protecting the freedom of action of the actor and the contractual interest of the other;

(..continued)

> evaluation of the services of health care providers or facilities or the charges for such services conducted in connection with any program organized and operated to help improve the quality of health care ... is liable for any civil damages as a result of any act or omission by such person in the course of such review or evaluation.

> (f) The proximity or remoteness of the actor's conduct to the interference; and
>
> (g) The relations between the parties.

Id. at 660-61, 364 N.W.2d at 161.

Whether the Hospital intended to interfere with the physicians' existing and prospective business relationship with their patients is an issue for the jury. Dr. Clanfield testified that as a result of the new policy, his patients view him as less able to care for them because he cannot write orders for them when they are in the ICU and SCU. Dr. Clanfield also deposed that he is losing income because he is no longer able to perform procedures for which he previously charged his patients. Thus, whether the Hospital caused the physicians to suffer monetary damages is also for the jury.

The trial court dismissed this claim reasoning that no contract existed between the parties. However, because we have concluded that the Medical Staff and Hospital Bylaws establish a contractual relationship between the Hospital and the medical staff and the physicians have presented facts from which a reasonable jury could infer that Dr. Henrickson and the Hospital interfered with these relationships, we must reverse and remand for a trial on this claim.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.