

IN THE CIRCUIT COURT OF JUSTICE OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

Martin Goldman, M.D.,)
Plaintiff,)
) Case No. CV97-31606
v.)
) Division 16
TRUMAN MEDICAL CENTER,)
INCORPORATED,)
)
Defendant.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, having heard extensive testimony and reviewed the briefs of counsel makes the following Findings of Fact and Conclusions of Law in the above cause:

FINDINGS OF FACT

1. Martin Goldman, M.D. is the Radiology Department Chair at Truman Medical Center, Incorporated ("TMC"), and has been in that position since July of 1996.
2. Dr. Goldman has a distinguished background and was heavily recruited to come to Truman Medical Center. In the course of the recruitment process, Dr. Goldman inquired of the Search Committee as to whether he would have job security.
3. Dr. Goldman was assured by agents of TMC, acting within the scope and course of their authority, that TMC would provide job security for Department Chairs, and Department Chairs, could not be removed except for serious misconduct.
4. TMC was the result of efforts by community leaders to improve the image and quality of the old Kansas City General Hospital, the City's public, indigent care hospital. TMC was born to succeed General Hospital and to provide a teaching hospital for the new Medical School formed by the University of Missouri at Kansas City ("UMKC"). The founders believed that affiliation with UMKC Medical School would benefit the indigent care mission of the hospital by attracting high quality doctors who were willing to accept lower pay in exchange for the opportunity to teach medicine. Integral to this process was the work of Department Chairs who serve in both an academic function, as academic Chairs at the Medical School, and a clinical function, as Clinical Department Chairs at TMC.. In order to assure attraction of good physicians and Department Chairs, UMKC and TMC formed a third not-for-profit corporation called Hospital Hill Health Services Corporation ("HHHSC") whose function was to recruit and employ faculty and staff members, including Department Chairs, for UMKC and TMC. Acting on behalf of UMKC and TMC, HHHSC entered into contracts with doctors, including Plaintiff, that provided those doctors with the degree of job security necessary to attract good doctors for less money.

Although UMKC did not provide medical School faculty with tenure the HHHSC contract was the functional equivalent of tenure.

5. In November of 1996, Dr. E. Ratcliffe Anderson, Jr. became Executive Director of TMC and Dean of the Medical School at the University of Missouri at Kansas City. Dr. Anderson had been a career Air Force officer.

6. During the time that he was Chair of the Radiology Department, Plaintiff accomplished a number of significant improvements in the Department.

7. Much of the testimony heard by the Court on the quality of work done by Dr. Goldman in his Clinical Department Chair role was that his performance was excellent.

8. Although Defendant claims that Dr. Goldman was a poor leader of the residency program in his capacity as Academic Department Chair, Defendant presented no competent and substantial evidence to verify that allegation.

9. After Dr. Anderson became Executive Director and Dean of the Medical School, existing problems deteriorated rapidly. For example, there was substantial evidence that the Medical Records Department was in crisis because inadequate resources were devoted to filing of loose records. The Chair of the Medical Records Committee at the Hospital testified that there were over 31.5 feet of loose filings in December of 1997.

10. Dr. Anderson failed to provide proper leadership in the Medical School at the time of an LCME review in the Spring of 1997 for which reason the Medical School was in danger of being placed on probation. The consequences of such probation would be disastrous to the future of the Medical School.

11. As a result of the problems in the administration by Dr. Anderson, both as Executive Director of the Hospital and Dean of the Medical School, five Department Chairs including the three original Plaintiffs to this cause, Drs. Kragel, Hamburger, and Goldman, signed a letter on October 12, 1997, calling for Dr. Anderson's removal as Dean of the Medical School and Executive Director of the Hospital.

12. Dr. Anderson thereafter began proceedings to remove Dr. Hamburger as Chair of the Department of Medicine.

13. Although Dr. Anderson initially rescinded his attempt to remove Dr. Hamburger, after November 6, 1997, when Anderson was removed as Dean of the Medical School, he resumed proceedings to remove Drs. Kragel, Hamburger, and Goldman.

14. No specific charges were ever made against Drs. Kragel, Hamburger, or Goldman. At the meeting of the Executive Committee of the Board of Directors at TMC on December 2, 1997, Dr. Anderson was requested to state reasons why he was seeking the removal of the three Department Chairs. He stood mute. Dr. Anderson refused to describe to the TMC Executive

Committee any factual basis for his action against the Department Chairs. The TMC Executive Committee thereafter voted to initiate proceedings to remove Drs. Kragel, Hamburger, and Goldman from their positions as Chairs of their respective Departments.

15. on December 3, 1997, pursuant to the TMC Medical-Dental Staff Bylaws, the removal proceedings were brought before the Executive Committee of the Medical-Dental Staff. At that meeting Dr. Anderson appeared and reiterated that he refused to discuss why he sought the removal of the three Department Chairs. Grover Wilcher stated at that Committee meeting that it was not required that Department Chairs be apprised of the specific charges against them. The Executive Committee of the Medical-Dental Staff voted overwhelmingly to retain all three Department Chairs and found that they did exemplary work in their positions as Department Chairs at the Hospital.

16. Later that same day, Dr. Anderson again presented the resolution to remove the three Department Chairs to the Professional Standards Committee, a committee which he chaired. Once again, Dr. Anderson did not say why he was seeking the removal of the Department Chairs and did not comment as to specific reasons for removal. The Professional Standards Committee voted overwhelmingly to retain the three Department Chairs.

17. In spite of the overwhelming votes by the Executive Committee of the Medical-Dental Staff and the Professional Standards Committee, Dr. Anderson indicated that he intended to go forward with seeking removal of Dr. Goldman on December 23, 1997, at a meeting of the Executive Committee of the TMC Board. At trial Dr. Anderson testified under oath that he had sufficient votes on the Executive Committee of the Board of Directors at Truman Medical Center to remove Drs. Kragel, Hamburgers and Goldman. Counsel for the Hospital announced that the Executive Committee of the Board of Directors was free under the Bylaws to disregard the recommendations of the Executive Committee of the Medical-Dental Staff and the Professional Standards Committee. He also testified that the Executive Committee of the TMC Board was free to remove Department Chairs for any reason.

18. On December 22, 1997, Plaintiffs, Kragel and Goldman, filed their Petition seeking a Temporary Restraining Order which Judge Kramer entered on December 22, 1997, preventing TMC from removing Plaintiffs on December 23, 1997. Subsequently, Dr. Hamburger intervened as a Party Plaintiff to this cause. TMC took a change of judge from Judge Kramer. It also sought a writ of prohibition from the Court of Appeals which was summarily denied. TMC also tried to remove this cause to the United States District Court for the Western District of Missouri despite the absence of any basis for that Court's jurisdiction. The District Court summarily remanded the case to this Court.

19. This Court began hearing evidence in February of 1998 and concluded its hearing in November of 1998. Defendant had a full opportunity to present whatever evidence or witnesses it chose to present.

20. Subsequently, Drs. Kragel and Hamburger have settled their cause with TMC which has consented to the refund of the bond monies posted by Drs. Hamburger and Kragel.

21. The Court specifically finds that Plaintiff was not granted due process, that there was no good cause established to remove him as Department Chair, and that neither the Executive Committee of the Medical-Dental Staff nor the Professional Standards Committee recommended his removal.

22. The Court further finds that the Bylaws, by using the word "tenure" in describing the status of the Department Chairs, intended to protect Department Chairs from arbitrary removal for speaking out on issues involving patient welfare. The Court finds that, according to the face of the Bylaws, one of their purposes is to provide a mechanism whereby issues of concern to the hospital may be freely discussed. The Bylaws also impose an affirmative duty on Department Chairs to safeguard the welfare of TMC's patients, which is inconsistent with TMC's position that Department Chairs may be removed for any reason.

CONCLUSIONS OF LAW

1. In order for Plaintiff to be entitled to an injunction, the relief sought on Count I, he must show that he has a legally protectible interest, R.S.Mo. § 526.030 (1994).

2. A legally protectible interest includes protection of a person's occupation, *Clarkson v. Laiblan*, 178 Mo. App. 708, 161 S.W. 660, 663 (1913), and to compel performance of a fiduciary

duty, *Opie Brush Company v. Bland*. 409 S.W.2d 752, 757 (Mo. App. 1966).

3. Although Medical-Dental Staff Bylaws do not constitute a contract, *Zipper v. Health Midwest*, 978 S.W.2d 398 (Mo. App. 1998), a hospital has "a duty to obey its bylaws," *Gianetti v. Norwalk Hospital*, 211 Conn. 51, 557 A.2d 1249, 1255 (1989) . The duty to obey medical staff bylaws arises out of state regulations which compel their adoption, *Ibid.*, a fiduciary obligation which the hospital owes to members of its medical staff, *Ibid.*, and the public's substantial interest in the operation of hospitals, public or private, *Balkissoon v. Capitol Hill Hospital*, 558 A.2d 304, 308 (D.C. App. 1989). "By requiring hospitals to adhere to their bylaws, the risk of arbitrary decision is reduced." *Ibid.*

4. Although *Gianetti* and *Balkissoon* are foreign decisions, not binding on this Court, they were cited with approval by the Missouri Court of Appeals, Western District, in *Zipper supra*, 978 S.W.2d at 415-416. Indeed, the *Zipper* court expressly embraced the approach taken in *Gianetti* and *Balkissoon*, 978 S.W.2d at 416. *Zipper* specifically held that, although a physician may not sue a hospital for damages for breach of contract when it violates its own bylaws, a doctor "may seek judicial review and request injunctive relief to force the hospital to comply with the procedures adopted in its bylaws," *Zipper, supra*, 978 S.W.2d at 416. This was the same approach advocated in a Missouri Bar Journal article prominently cited in *Zipper, viz., Hulston, Jones & Gammon, Do Medical Staff Bylaws Create a Contract?*, 51 J.Mo.Bar 352, 355 (1995).

5. Having determined that TMCs Bylaws created a legally protectible interest, the Court must next determine whether the actions of Defendant threatened to violate Plaintiff's legally protectible interest to see to it that the Bylaws are followed.

6. The actions of TMC violate Plaintiff's right under the Bylaws to be removed only for good cause, and certainly not to be removed for a reason that is contrary to the stated purposes of the Bylaws.

7. That no good cause was established to remove Plaintiff from his position as Department Chair, and Defendant thereby threatened a legally protectible interest of the Plaintiff.

8. Additionally, the Court finds that the Bylaws impose a duty to afford members of the Medical Staff, including Department Chairs, a fair hearing at which they are apprised of the charges against them, given the opportunity to rebut those charges, and confront the persons making those charges. The Court finds that this right arises out of the standards of the Joint Commission on Accreditation of Health Care Organizations, which Defendant has agreed to follow, the ethical standards of the American Medical Association, which are binding on members of the Medical Staff and the Hospital, and on Missouri Department of Health Regulations which require fair hearings. Because TMC did not provide a hearing to Plaintiff, it thereby threatened to violate a legally protectible interest of Plaintiff.

9. Finally, the Court finds that the actions of the Defendant violated Article XII, 5 d(4) of the Bylaws which provides the procedure for removing Department Chairs during tenure. Specifically, the Court finds that the removal procedures are both patently and latently ambiguous.

10. An ambiguity arises when there is more than one reasonable interpretation which can be gleaned from contract language, *Parker v. Pulitzer Publishing Company*, 882 S.W.2d 245, 250 (Mo. App. 1994). Additionally, an ambiguity arises when there is duplicity, indistinctness, Or, uncertainty in the meaning of the words used in an instrument or vagueness of meaning, *Alack v. Vic Tanny International of Missouri, Inc.*, 923 S.W.2d 330, 337 (Mo. en banc: 1996), and *Speciality Restaurants Corporation v. Gaebler*, 956 S.W.2d 391, 394 (Mo. App. 1997). To determine whether an instrument is ambiguous, this Court must consider the whole instrument and give its words their natural meanings, *Jake C. Byers, Inc. v. J.B.C. Investments*, 834 S.W.2d 806, 816 (Mo. App. 1992). The question of whether or not the language of an instrument is ambiguous is a question of law for the Court, *Bergmann v. Bergmann*, 740 S.W.2d 215, 216 (Mo. App. 1987).

11. Section d(4) is patently ambiguous because it requires "approval" of removal by the Executive Committee of the Board of Directors of Truman Medical Center after obtaining the recommendations of the Medical-Dental Staff Executive Committee and the Professional Standards Committee. Defendant argues this means that the recommendations are in no way binding and may be ignored by the Executive Committee of the Board in taking action. But that interpretation fails to consider what it is that is being approved. Is it the decision of the Executive Committee of the Board of Directors to remove a Department Chair? If so, why must the Executive Committee approve its own decision? Or, as Plaintiff argues, is it the recommendation of the two Committees identified in 5 d(4)? The latter reading is, at the very least, reasonable. A contrary reading would violate the principle of law that this Court must not interpret instruments so as to reach an absurd or unreasonable result, *CB, Commercial Real Estate Group, Inc. v. Equity Partnerships Corporation* Ibid.

12. The Court believes that the position of TMC would render the process of requiring recommendations by the Professional Standards Committee and the Executive Committee of the Medical-Dental Staff illusory. Moreover, it would be contrary to the concept of medical staff self-governance which is required by Missouri Department of Health Regulations, 19 C.S.R. § 2030.021(C)(1). Those state regulations are, by their nature, a part of the Bylaws, *Lux v. Milwaukee Mechanical Ins*, 221 Mo. App. 99, 295 S.W. 847, 850 (1927); 17 Am.Jur.2d Contracts § 381 (1991). It is inconsistent with principles of medical staff self-governance to hold, as Defendant argues, that TMC is free to disregard the input of the Medical Staff in deciding to remove Department Chairs and to remove such Chairs unilaterally.

13. In addition to the patent ambiguity of § d(4), it is latently ambiguous as well. An instrument is latently ambiguous if "some collateral matter makes the meaning uncertain." *Allack, supra*, 923 S.W.2d at 337. The collateral matter which may make the meaning uncertain can include the context of the law which governs the parties' relationship, *Ibid.*, as well as other instruments entered into by the parties *Royal Banks of Missouri v. Fridkin*, 819 S.W.2d 3S90 362 (Mo. App. 1991).

14. Because Missouri Department of Health Regulations require medical staffs to adopt bylaws governing their professional activities in the hospital, 19 C.S.R. § 30-20.021(C) (1), and because TMC has agreed to abide by JCAHO Standards, which also require medical staff self-governance, it follows that, even if d(4) clearly provided the Executive Committee of the TMC Board with the authority to act unilaterally, such unilateral action is eschewed by other instruments, namely state regulations and JCAHO Standards. It follows that these collateral matters make the meaning of § d(4) uncertain.

15. Once the Court determines that § d(4) is either latently or patently ambiguous, the Court is required to construe that section to "avoid an effect which renders other terms meaningless." *Rainstreet Northcrest, Inc. v. Bisanz*, 890 S.W.2d 713, 718 (Mo. App. 1995). A construction which attributes a reasonable meaning to all the provisions of the Bylaws is preferred to one which leaves some of the provisions without function or sense, *Rainstreet, supra* 890 S.W.2d at 718. Thus, this Court must avoid a construction which produces a redundant, illusory, and therefore unreasonable result, *Rouggly v. Whitman*, 592 S.W.2d 516, 521 (Mo. App. 1979). In construing ambiguous instruments, the objective is to ascertain and render effective the mutual intent of the parties; and to achieve this objective the Court must consider the entire instrument, subsidiary agreements, the relationship of the parties, the subject matter of the instrument, the facts and circumstances surrounding the execution of the instrument, the practical construction the parties themselves have placed on the instrument by their acts and deeds, and other external circumstances which cast light on the intent of the parties. *Grantham v. Rockhurst University*, 563 S.W.2d 1470 150 (Mo. App. 1978).

16. In considering all of the Bylaws, it is apparent to the Court that the members of the Medical Staff, charged with adopting the Bylaws, intended that they have meaningful input, rather than the illusory involvement claimed by Defendant, in the decision to remove a Department Chair. Such meaningful input is consistent with the portion of the Bylaws found in Article III, §, 4 that says one of their purposes is to initiate and maintain rules for self-government of the Medical-Dental

Staff. This purpose is congruent with the aforementioned JCAHO Standards and Missouri Department of Health Regulations which require medical staffs to adopt bylaws promoting self-governance.

17. In construing the Bylaws, the Court also considers the intent of the parties. Specifically, the Court considers testimony by Drs. Dimond and Noback, as well as Jerry Stolov, that the Bylaws were intended to provide job security to Department Chairs in order to attract competent and qualified positions. The construction of the Defendant, which allows unilateral and arbitrary action by Defendant, would run counter to this purpose.

19. The Court also considers the practical construction the parties themselves have placed on the instrument by their acts and deeds. Two of the early founders of Truman Medical Center and the Medical School testified that it was universally understood that there needed to be concurrence by the Medical Staff in removing a Department Chair because of the serious nature of such a decision.

19. Finally, inasmuch as the Bylaws were drafted by counsel for Defendant, they are construed against TMC, Specialty Restaurants, supra, 956 S.W.2d at 395.

20. In addition to a finding that Plaintiff has a legally protectible interest, he must also prove that he will suffer irreparable injury if Defendant is not enjoined. Plaintiff has adequately proven that fact with repeated testimony, including that of Dr. Anderson, that removal during tenure will constitute an indelible black mark on his record. Moreover, in Zipper, supra, the Court held that a doctor has no right to recover damages for a breach of contract when a hospital fails to abide by its own bylaws, 978 S.W.2d at 416. The fact that any claim for damages by Plaintiff would not be cognizable demonstrates the inadequacy of his remedy at law.

21. Plaintiff's Second Amended Petition also pleads in Count II for a continuing injunction against Plaintiff's removal as Department of Radiology Chair at the end of his term on April 30, 1999. The Court finds that this request is moot, given the decision of Hospital Hill Health Services Corporation not to renew its contract with Plaintiff, a condition precedent to Plaintiff's continuity of tenure.

22. In Count IV of his Second Amended Petition Plaintiff claims, alternatively, that if this Court determines that the Bylaws provide him no protection against arbitrary removal, and that he can be removed without cause, representations made to him by Defendant's agents constituted fraud. However, since the Court has determined that there must be good cause to remove Plaintiff, it follows that the representations made to him during the process of recruitment were not false and the Court finds against Plaintiff on Count IV of his Second Amended Petition. However, should an appellate court determine that there is no good cause requirement in the Bylaws in order to remove Plaintiff, then said Count IV will again be taken up by the Court.

23. In Count III of his Second Amended Petition Plaintiff pleads a cause of action for interference with a prospective economic relationship between Plaintiff and HHHSC. Specifically, Plaintiff claims that members of the TMC's Executive committee and its former Executive

Director, Dr. Anderson, conspired to induce the Board of Directors of HHHSC to not renew his contract. Said Count III was pleaded in the alternative. The Court declines to rule on Count III because it is premature. Specifically, the uncontroverted evidence is that Plaintiff's current contract with HHHSC will not expire until April 30, 1999. For that reason Plaintiff cannot have yet sustained damage, an essential prerequisite to a claim for interference with a prospective economic relationship, 86 C.J.S. Torts § 49 at 679 (1997). "Thus, the tort of interference with another's business relations or prospective economic advantage is not complete absent some actual damage" Ibid. It is conceivable that TMC might decide to acquiesce in the rehiring of Dr. Goldman by HHHSC in which case there would be no cause of action because there has not yet been an interference with his economic relationships. Hence, Plaintiff's Count III is premature., The Court has the alternative of either dismissing said count without prejudice or holding it in abeyance until it ripens on May 1, 1999. In the interests of judicial economy, and to avoid the necessity of filing a new lawsuit, the Court chooses to do the latter.

24. Defendant has cited the case of Swanger v. National Juvenile Law Center, 714 S.W.2d 170 (Mo. App. 1986), which did not involve medical staff bylaws required by law. That fact, in and of itself, makes Swanger inapposite. Moreover, the Court finds that the specific statute authorizing the Department of Health to adopt rules necessary to carry out the duties assigned to it, R.S.Mo. § 192.006 (1998 Cum. Supp.), and the consequent regulations adopted thereunder, distinguish this case from Swanger.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. Plaintiff's Count I of his Second Amended Petition is found in his favor and it is adjudged that a Permanent Injunction issue, enjoining Defendant from further proceedings to remove Plaintiff from his position as Department Chair of the Radiology Department during his current term which will expire on April 30, 1999.
2. it is further adjudged that Plaintiff's bond be refunded to him.
3. it is further adjudged and decreed that Count II of Plaintiff's Second Amended Petition is ruled against him as being moot.
4. It is further adjudged that Count III of Plaintiff's Second Amended Petition be held in abeyance until May 1, 1999, at which time Plaintiff may choose to proceed thereon in the event that Hospital Hill Health Services Corporation does not renew his contract.
5. It is further ordered, adjudged, and decreed that Count IV of Plaintiff's Second Amended Petition is dismissed. However, should Defendant appeal this judgment, and should the Missouri Court of Appeals or the Missouri Supreme Court reverse the judgment of this Court, said Count IV shall be reinstated.
6. It is further ordered, adjudged, and decreed that costs are assessed against Defendant, for which let execution issue.

April 13, 1999

THE HONORABLE JOHN I. MORAN