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**KENTUCKY SUPREME COURT GRANTED DISCRETIONARY REVIEW:
APRIL 16, 2008
(FILE NO. 2007-SC-0573-DG)**

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000395-MR

ASHLAND HOSPITAL CORPORATION, d/b/a KING'S DAUGHTERS MEDICAL CENTER AND PAUL McDOWELL — APPELLANTS

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE MARC I. ROSEN, JUDGE
ACTION NO. 02-CI-01131

MARY BETH CALOR, M.D. — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ABRAMSON AND TAYLOR, JUDGES; KNOPF,[1] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: The dispositive issues in this appeal are whether appellants, King's Daughters Medical Center and its chief financial officer, Paul McDowell, were entitled to judgment as a matter of law on Dr. Mary Beth Calor's claims of defamation

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

and tortious interference with contractual relations which she based upon communications appellants made to Staff Care, Inc. concerning her billing practices. A jury trial resulted in an award to Dr. Calor in the amount of $175,000.00 for emotional and mental distress, $59,050.00 in lost wages, and $300,000.00 in punitive damages. Because there is no dispute as to the nature of the appellants' statements or the context in which they were communicated to Staff Care, appellants were entitled to application of a qualified privilege as a matter of law on the defamation claim and a verdict in their favor on the tortious interference claim. The judgment must therefore be reversed.

King's Daughters Medical Center contracted with Staff Care, Inc., a national temporary physician staffing agency, to provide the hospital with *locum tenens* physicians in the area of general anesthesia. In October 2001, Staff Care placed one of its physicians, Dr. Mary Beth Calor, to provide those services at King's Daughters. Under its agreement with Staff Care, King's Daughters paid an hourly rate for Dr. Calor's services based upon a form known as a physician work record ("PWR"), supplied by and submitted to Staff Care. Staff Care utilized the PWR to prepare an invoice for the purpose of billing King's Daughters for Dr. Calor's services and in calculating the amount of her medical malpractice insurance premium which it paid. Prior to submitting the form to Staff Care, Dr. Calor was required to obtain the signature of either Dr. Siriam Iyer or Dr. Standford Prescott as "verification" of her claimed hours; however, they both testified by deposition that they could not be present at all times, *locum tenens* physicians

worked at the hospital, and that they operated under an “honor system” in signing off on the forms.

In December 2001, the quality assurance department at Staff Care became concerned about the number of hours Dr. Calor was claiming. Michelle VonLuckner, who was Staff Care's scheduling consultant for Dr. Calor, initially contacted Dr. Calor's husband, who was also her business manager, concerning the accuracy of the hours claimed. He assured Ms. VonLuckner that the hours claimed on the PWR were accurate. Nevertheless, Staff Care's concerns over the number of hours Dr. Calor was claiming continued, based primarily on the fact that they were paying “outrageous malpractice premiums” due to the extraordinary amount of actual patient contact she was claiming on the forms. Because her malpractice premiums were calculated on the basis of actual patient contact hours, several of her PWR's were red-flagged by Staff Care as involving a questionable number of hours. Of particular concern were PWRs on which Dr. Calor claimed to have worked five consecutive 24-hour days in December 2001; three consecutive 24-hour days in January 2002; and three consecutive 24-hour days in May 2002. Over the eight months that Dr. Calor worked at King's Daughters, she claimed to have worked a total of fifty-six 24-hour days.

The concerns of the quality assurance department at Staff Care prompted Ms. VonLuckner to contact King's Daughters as early as January 2002. In a conversation with Kathy Lee, a King's Daughters' employee, VonLuckner was assured that, in addition to having a staff physician sign off on the PWRs, a new logging system would be

instituted to ensure more accurate reporting of hours worked, as well as patient contact hours. Although Staff Care continued to be concerned with the number of patient contact hours Dr. Calor was claiming, there was no further inquiry by Staff Care.

King's Daughters subsequently initiated its own investigation into the accuracy of Dr. Calor's hours. David Layne, then Director of Budgeting and Business Management at King's Daughters and a C.P.A., focused his investigation upon the three principal areas of service performed by anesthesiologists at the hospital—the operating rooms, the obstetrics floor, and pre-admission testing. He then obtained documents from each of these three areas in an attempt to determine whether and what types of services Dr. Calor had been performing in each area for the hours she was claiming to have worked. In a report submitted to Paul McDowell at the end of his investigation, Layne concluded that there were 670 hours reported by Calor that he was unable to substantiate, amounting to $163,000 in over-billings for the period from January 16, 2002 through June 21, 2002.

McDowell terminated Dr. Calor on June 21, 2002, after she refused to meet with him without her business manager-husband being present. McDowell subsequently contacted Brian Lund of Staff Care and notified him that he had dismissed Dr. Calor based upon suspicion that she had been over-billing. He also told Lund that the hospital's investigation of her billing records was in progress. The hospital withheld payment to Staff Care for the amount it believed it had overpaid for her services and Staff Care in turn withheld payment from Dr. Calor for her final PWRs. She thereafter instituted an

action against King's Daughters and McDowell alleging defamation and slander, interference with contractual relations, breach of contract, breach of implied covenant of good faith and fair dealing, and intentional infliction of emotional distress (outrageous conduct).

At a pretrial conference, the trial court heard appellants' motion for summary judgment on each of these claims and concluded that only the defamation/slander and interference with contractual relations claims should be presented to the jury. We agree with appellants that the trial court erred in failing to grant their motions for summary judgment and directed verdict on these claims as well.

As to the defamation claim, we are convinced that upon the undisputed facts of this case appellants were protected by a qualified privilege in reporting the results of their investigation into Dr. Calor's billable hours to Staff Care. Under the "common interest" theory, as explained by the Supreme Court of Kentucky in *Stringer v. Wal-Mart Stores, Inc*., 151 S.W.3d 781, 796 (Ky. 2004), appellants clearly had the right, if not the duty, to investigate and convey their concerns about Dr. Calor 's billing to Staff Care which had a corresponding interest in the accuracy of her hours:

> . . . we have recognized a series of qualified or conditional privileges, including "where 'the communication is one in which the party has an interest and it is made to another having a corresponding interest, the communication is privileged if made in good faith and without actual malice.'" "The determination of the existence of privilege is a matter of law," and **because of the common interests implicated in the employment context, Kentucky courts have recognized a qualified privilege for defamatory statements relating to**

> **the conduct of employees**. [Footnotes omitted, emphasis added.]

The Court in *Stringer* also provides guidance as to the conditional nature of qualified privileges and the circumstances under which the right to claim the privilege may be lost:

> The condition attached to all such qualified privileges is that they must be exercised *in a reasonable manner and for a proper purpose.* The immunity is forfeited if the defendant steps outside the scope of the privilege, or abuses the occasion. The qualified privilege does not extend . . . to the publication of irrelevant defamatory matter with no bearing upon the public or private interest which is entitled to protection.

151 S.W.3d at 797 (emphasis original). Here, there is no question that King's Daughters' communications to Staff Care concerning its investigation into Dr. Calor's hours fall squarely within the *Stringer* rationale. There was a common interest in the accuracy of Dr. Calor's billable hours as they were a source of income to Staff Care and payment by King's Daughters, as well as being the basis for Staff Care's calculation and payment of her malpractice insurance premiums. Furthermore, we are convinced that McDowell properly apprised Staff Care of the basis upon which King's Daughters' decided to discontinue Dr. Calor's services. Review of the record discloses nothing from which one might conclude that appellants' communications to Staff Care were motivated by malice or were exercised other than "in a reasonable manner and for a proper purpose." Nor is there any suggestion that the communications to Staff Care included matters irrelevant to either party's financial interest or that they were published in a reckless or excessive manner.

Furthermore, Kentucky caselaw is clear beyond dispute that the existence of a qualified privilege and its application to the facts are questions to be resolved by the trial court as a matter of law. Dr. Calor insists, however, that the application of the privilege to a particular factual situation is a matter for jury consideration. That precise contention has been repeatedly rejected in a long line of Kentucky cases. For example, in *Landrum v. Braun*, 978 S.W.2d 756, 757 -758 (Ky.App. 1998), a case involving a factually similar scenario, this Court reiterated the well-settled principle that the court, not the jury, is the sole arbiter as to application of a privilege:

> Landrum challenges this finding of privilege and asserts that the question of whether this constituted a "necessary communication" within the workplace is only properly determined by a jury. We disagree. "[T]he question of privilege is a matter of law for the court's determination." *Caslin v. General Electric Company*, Ky.App., 608 S.W.2d 69, 70 (1980) ([internal]citation omitted). Having found the existence of privilege, the trial court properly dismissed Landrum's cause of action.

Based upon these factors, appellants were entitled to judgment on Dr. Calor's defamation claims as a matter of law.

Finally, on the issue of entitlement to assert privilege as a defense, Dr. Calor cites *Pitman v. Drown*, 176 Ky. 263, 195 S.W. 815 (1917), and *Vanover v. Wells*, 264 Ky. 461, 94 S.W.2d 999 (1936), for the proposition that "privilege and fair comment are regarded as affirmative defenses which must ordinarily be pleaded in order to be available." She maintains that appellants' failure to timely raise the issue as an affirmative defense forecloses that avenue of relief to them. We disagree.

In *Columbia Sussex Corp., Inc. v. Hay*, 627 S.W.2d 270, 275 (Ky. App. 1981), this Court rejected a similar argument regarding the timeliness of an assertion of the defense of privilege:

> Appellants argue that even were the elements of slander established and Mrs. Hay given standing, they were protected under a theory of privilege. Urging that at least qualified privilege attaches to dealings within the employment relationship, they assert that the court below erred in failing to instruct on the defense of privilege. Appellee responds that privilege is an affirmative defense which under CR 8.03 must be pled or lost. This argument would have merit, for such was not specifically included in appellants' Answer, **but for the fact that the record reveals that both the court and appellee were aware that appellants were establishing privilege as a line of defense.**
>
> In chambers during the course of supporting their motion for a directed verdict appellants spoke to both absolute and qualified privilege and asked assurances from the court that such an instruction would be given. The court was noncommittal; however, appellee's response was not an objection that such defense had not been raised by the pleadings but rather that such a defense could be defeated by a showing of over-publication or malice. **In view of this exchange, we cannot hold that appellants lost their opportunity to raise on appeal the issue of failure to instruct on privilege. CR 15.02.** [Emphasis added.]

The record in this case confirms that both the trial court and Dr. Calor were fully apprised that appellants "were establishing privilege as a line of defense" *Id.* In both their pre-trial questionnaire and motion for summary judgment filed well before trial, appellants clearly and fully set out their claim of privilege, as well as the factual underpinnings for that defense. Thus, as was the case in *Columbia Sussex*, we are convinced that appellants

did not forfeit their opportunity to rely upon the defense of privilege or to assert that issue in this appeal.

Appellants were similarly entitled to judgment on the intentional interference with contractual relations claim. Our Supreme Court in *National Collegiate Athletic Association v. Hornung*, 754 S.W.2d 855 (Ky. 1988), explained that absent evidence of **improper** interference, the case should not be presented to the jury:

> Our law is clear that a party may not recover under the theory presented in the absence of proof that the opposing party "**improperly**" interfered with his prospective contractual relation. . . . Unless there is evidence of improper interference, after due consideration of the factors provided for determining such, the case should not be submitted to the jury. Even if evidence is presented which would otherwise make a submissible case, **the party whose interference is alleged to have been improper may escape liability by showing that he acted in good faith to assert a legally protected interest of his own.**

754 S.W.2d at 858 (emphasis added). The *Hornung* Court also emphasized that a showing of malice or wrongful conduct is essential to an intentional interference claim:

> From these authorities, it is clear that to prevail a party seeking recovery must show malice or some significantly wrongful conduct. In *Prosser and Keeton on Torts* § 130 (W.P. Keeton ed. 5th ed. 1984), this is stated as follows:
>
> [T]he [interference] cases have turned almost entirely upon the defendant's motive or purpose, and the means by which he has sought to accomplish it. . . .
>
> [S]ome element of ill will is seldom absent from intentional interference; and **if the defendant has a legitimate interest to protect, the addition of a spite motive usually is not regarded as sufficient to result in liability.**

Id. at 859. As explained in our discussion of the defamation claim, it is plain that appellants were advancing a legitimate business interest in communicating with Staff Care concerning Dr. Calor's billing practices and thus, like the defendant in *Cullen v. South East Coal Company*, 685 S.W.2d 187 (Ky.App. 1983), were entitled to a directed verdict on the intentional interference claim. We find the rationale applied to the intentional interference claim in *Cullen* to be dispositive of Dr. Calor's similar claim in this appeal:

> The key to the above [*Restatement (Second) of Torts*, §766B, Intentional Interference with Prospective Contractual Relation] is the phrase, "**and improperly interferes.**" It is our conclusion that Dr. Cullen failed to prove the element of improper interference. . . . In order to arrive at an improper interference conclusion we must consider South East Coal Company's motive, the interest that it is trying to advance or protect, the nature of its conduct, the means used to interfere, and whether or not the interference was based upon malice.
>
> Using the criteria just mentioned, we know that **South East Coal had an interest in seeking that its totally subsidized health plan was not abused or taken advantage of. Its interest was self-protection and its conduct was not libelous per se, or violent.** The means used by the coal company of advising its employees was that which was most reasonable, namely, by memorandum, and we cannot say that any malice was shown or proven by Dr. Cullen after the completion of his proof. So, in this regard, we conclude that the trial court was correct in granting a directed verdict.

685 S.W.2d at 189-90 (emphasis added). Dr. Calor's proof having failed to demonstrate that appellants' actions were undertaken for reasons other than proper economic interest, appellants were entitled to a directed verdict on her claim that they had tortiously interfered in her relationship with Staff Care.

We are thus convinced that the trial court erred in allowing either the defamation claim or the tortious interference claim to be resolved by a jury. Accordingly, the judgment in her favor is reversed and the case remanded for entry of an order dismissing those claims.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Carl D. Edwards, Jr.
Leigh Gross Latherow
VanAntwerp, Monge, Jones & Edwards
Ashland, Kentucky

BRIEF FOR APPELLEE:

William C. Rambicure
Christopher D. Miller
Rambicure & Miller, P.S.C.
Lexington, Kentucky