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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002098-MR

SUDHIDEB MUKHERJEE, M.D.

APPELLANT

v. APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE WILLIAM TRUDE, JR., SPECIAL JUDGE
ACTION NO. 97-CI-00019

HOSPITAL CORPORATION OF KENTUCKY, INC.,
D/B/A COLUMBIA HOSPITAL GEORGETOWN

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BUCKINGHAM, HUDDLESTON AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Sudhideb Mukherjee, M.D., has appealed from an order of the Scott Circuit Court entered on August 31, 2001, which granted summary judgment to the appellee, Hospital Corporation of Kentucky, Inc., d/b/a Columbia Hospital Georgetown formerly d/b/a Scott General Hospital's (hereinafter Hospital). Having concluded that there was no genuine issue as to any

material fact and that the Hospital was entitled to judgment as a matter of law,¹ we affirm.

Dr. Mukherjee, a general surgeon, began working at the Hospital in 1972. During his next 23 years at the Hospital, Dr. Mukherjee served as chief of the medical staff and as chief of surgery; he also served on the Hospital's Board of Trustees and on various other committees. In 1991 Dr. Mukherjee commenced training to become qualified as a laparoscopic surgeon.² After Dr. Mukherjee received extensive training, the Hospital granted him laparoscopic surgery privileges.

In June 1995 Ken Unger, the chief executive officer for the Hospital, began to receive complaints from the staff concerning Dr. Mukherjee's laparoscopic surgeries.³ Specifically, the complaints alleged that Dr. Mukherjee was experiencing an unusually high conversion rate, i.e., a high number of his laparoscopic surgeries had to be "converted" during the operation into conventional surgeries. According to Dr. Mukherjee, conversions could be the result of any number of complications such as excess bleeding, equipment failure, excessive disease, and in some cases, poor technique by the

¹Kentucky Rules of Civil Procedure (CR) 56.02.

²Laparoscopic surgery is a procedure used for various types of surgery within the abdominal cavity. One of its principal benefits is that it allows for smaller incisions as compared to conventional surgeries, and many times it is better for the patient.

³Unger told Dr. Mukherjee that an operating room nurse and staff members from the medical records department had complained to him regarding Dr. Mukherjee's laparoscopic surgeries.

surgeon. When Unger approached Dr. Mukherjee regarding these complaints, Dr. Mukherjee suggested that his charts be sent to the University of Louisville School of Medicine for review. Unger agreed and Dr. Mukherjee's charts were in fact sent for review.

Dr. Hiram Polk, a professor and chairman of the Department of Surgery at the University of Louisville School of Medicine, reviewed Dr. Mukherjee's charts. In a letter dated July 3, 1995, Dr. Polk opined that the number of conversions for a surgeon with Dr. Mukherjee's experience was "reasonable." Dr. Polk suggested that Dr. Mukherjee take additional laparoscopic surgery courses and that he be supervised during at least his next 10 laparoscopic surgeries. Both Dr. Mukherjee and Unger had doubts as to the thoroughness of Dr. Polk's review. In fact, Dr. Mukherjee claims that Dr. Polk told him that he did not review all of the charts that had been sent to him. Dr. Mukherjee subsequently requested that another investigation be conducted by the Hospital's Medical Executive Committee (MEC). Unger agreed that further investigation was warranted.

In a letter dated July 25, 1995, Unger asked that the MEC "initiate an investigation of Dr. Sudhideb Mukherjee's laparoscopic surgery abilities and complications in order to determine if any modification of his privileges is required." Unger stated that he was not requesting that Dr. Mukherjee's privileges be suspended. He did state, however, that if Dr. Mukherjee scheduled a laparoscopic surgery, he would request that

his privileges be summarily suspended. According to Dr. Mukherjee, Unger asked him if he would voluntarily relinquish his hospital privileges to perform laparoscopic surgeries until the MEC's investigation was complete. Dr. Mukherjee stated that he agreed to refrain from scheduling any laparoscopic surgeries during this time period in order to avoid causing any potential hardships to his patients.⁴ In addition, Dr. Mukherjee wanted to avoid any blemishes on his permanent record which would have occurred if his hospital privileges had been summarily suspended.⁵

Following its investigation, the MEC voted on January 12, 1996, to recommend that "no sanctions or limitations of privileges be rendered in regard to Dr. Mukherjee's laparoscopic surgery abilities or complications." On January 23, 1996, the Hospital's Board of Trustees adopted the MEC's recommendations, and Dr. Mukherjee was cleared to resume performing laparoscopic surgeries.

Approximately one year later, on January 15, 1997, Dr. Mukherjee filed his complaint in Scott Circuit Court. In his complaint Dr. Mukherjee alleged (1) that the Hospital violated a covenant of good faith by arbitrarily suspending his hospital

⁴Dr. Mukherjee stated that he did not want to schedule a laparoscopic surgery and then be forced to cancel should his hospital privileges be suspended.

⁵If Dr. Mukherjee's laparoscopic hospital privileges had been suspended, his name would have been placed in the National Practitioner Data Base, which is designed to prevent incompetent doctors from moving from state-to-state in an attempt to conceal past problems.

privileges to perform laparoscopic surgeries; (2) that the Hospital failed to act in good faith by sending medical reviewers incomplete information regarding Dr. Mukherjee's past laparoscopic surgeries; (3) that by arbitrarily suspending his hospital privileges, the Hospital improperly interfered with Dr. Mukherjee's existing and prospective contractual relationships; and (4) that the Hospital breached an implied contract by failing to follow its Bylaws. In his complaint Dr. Mukherjee sought damages to compensate him for, inter alia, loss of past and future income, and harm to his reputation as a surgeon. In its answer the Hospital claimed that it was entitled to immunity under both state and federal peer review statutes.

Subsequently, in early 1997, Dr. Mukherjee filed several discovery requests, seeking both documents and other information related to the peer review conducted by Dr. Polk and the MEC. On May 27, 1997, the Hospital filed a motion for a protective order, claiming that pursuant to KRS⁶ 311.377(2), the information Dr. Mukherjee sought was protected from discovery by the peer review privilege. In addition, on August 13, 1997, the Hospital filed a motion for summary judgment, and asserted that it was immune from liability on Dr. Mukherjee's damage claims under both the Health Care Quality Improvement Act of 1986 (HCQIA)⁷ and KRS 311.377.⁸ In response Dr. Mukherjee argued that

⁶Kentucky Revised Statutes.

⁷See 42 U.S.C. § 11101, et seq. (2000). The HCQIA provides immunity from damages for covered participants in a "professional (continued...)"

KRS 311.377(2) was unconstitutional under § 28 and § 116 of the Kentucky Constitution. The trial court agreed with Dr. Mukherjee that KRS 311.377 was unconstitutional and on November 19, 1997, it entered an order denying both the Hospital's motion for a protective order and its motion for summary judgment.⁹

The Hospital then filed a petition for a writ of prohibition¹⁰ and a writ of mandamus¹¹ with this Court, seeking to prohibit Judge Trude from requiring discovery of the information related to the peer review of Dr. Mukherjee. On March 19, 1998, this Court denied the requested relief, holding that the Hospital had "failed to demonstrate its entitlement to the extraordinary relief of prohibition."¹² On February 18, 1999, the Supreme Court of Kentucky reversed the decision of this Court and granted the relief sought by the Hospital. In so doing the Supreme Court held that KRS 311.377(2) did not violate § 28 or § 116 of the Kentucky Constitution, and it stated that the information sought by Dr. Mukherjee fell "squarely within the privilege afforded by

⁷(...continued)
review action" if certain conditions of the statute are met.

⁸KRS 311.377(1) also provides immunity from damages for any "good faith action" taken by covered participants in a peer review procedure.

⁹The Hon. William W. Trude, Special Judge, presided over this case in Scott Circuit Court.

¹⁰See CR 81.

¹¹Id.

¹²Hospital Corp. of Kentucky, Inc. v. William W. Trude, Jr., No. 98-CA-0226-OA.

KRS 311.377.”¹³ The Court declined to consider Dr. Mukherjee’s arguments that the Hospital had either waived the privilege or consented to discovery, since the trial court had not yet had an opportunity to address those issues.

On remand to the trial court, both parties presented arguments regarding the discoverability of the documents pertaining to the peer review of Dr. Mukherjee. On August 9, 2000, the trial court ruled that all of the documents sought by Dr. Mukherjee were not discoverable and that the Hospital had not waived its privilege. Subsequently, on February 16, 2001, the Hospital filed a renewed motion for summary judgment. After initially denying this motion, the trial court granted the Hospital’s motion for summary judgment on August 31, 2001.¹⁴ This appeal followed.

Dr. Mukherjee raises three claims of error in his appeal: (1) that genuine issues of material fact exist which preclude a summary judgment on the Hospital’s claim of entitlement to immunity under KRS 311.377; (2) that genuine issues of material fact exist which preclude a summary judgment on the Hospital’s claim of entitlement to immunity under the HCQIA; and (3) that KRS 311.377 is unconstitutional under § 14 and § 54 of the Kentucky Constitution.

¹³Case Nos. 98-SC-000321-MR and 98-SC-000389-MR.

¹⁴In its order granting the Hospital’s motion for summary judgment, the trial court did not state the grounds upon which summary judgment was granted.

In support of his argument that genuine issues of material fact exist which preclude a summary judgment on the Hospital's claim of entitlement to immunity under KRS 311.377, Dr. Mukherjee argues:

KRS 311.377 grants the Hospital immunity from lawsuits when it conducts a physician's peer review if, and only if, the review is conducted in good faith. The issue of "good faith" is a material fact which must be decided by a jury because it is an essential element of the case.

In Steelvest, Inc. v. Scansteel Service Center, Inc.,¹⁵ our Supreme Court discussed the proper procedure for reviewing a trial court's granting of a motion for summary judgment:

The relevant Kentucky rule relating to summary judgment, CR 56.03, authorizes such a judgment "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The benchmark case of Paintsville Hospital v. Rose,¹⁶ specifically held that the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor [emphasis added].

In the case at bar, we believe that it would be impossible for Dr. Mukherjee to produce evidence at trial warranting a judgment

¹⁵Ky., 807 S.W.2d 476, 480 (1991).

¹⁶Ky., 683 S.W.2d 255 (1985).

in his favor. Thus, we hold that summary judgment in favor of the Hospital was properly granted.

In its order entered on August 9, 2000, the trial court ruled that pursuant to KRS 311.377(2), "none of the documents requested by [Dr. Mukherjee] pertaining to the peer review of [Dr. Mukherjee] are discoverable. . . ." In this appeal, Dr. Mukherjee has failed to challenge the trial court's discovery ruling. Dr. Mukherjee argues that "[t]he primary issue of a material fact is whether the Hospital conducted the peer review of Dr. Mukherjee's laparoscopic skills in good faith." Then, Dr. Mukherjee identifies what he considers "are the facts which the jury would consider to determine whether the Hospital acted in 'good faith' [.]" He lists four broad categories of alleged factual issues:

(1) Dr. Mukherjee was summarily suspended from doing laparoscopy surgeries contrary to Medical Staff Bylaws . . . [which provide that] a physician's privileges "may be summarily suspended or modified prior to or during an investigation . . . if it reasonably appears that failure to do so may result in imminent danger to the health or safety of any individual."

(2) [N]o one ever made any finding that any of Dr. Mukherjee's patients were in "imminent danger." This is a necessary finding before there can be a summary suspension.

(3) [T]he Hospital did not follow the time limitations set out in the Medical Staff Bylaws for when a physician is summarily suspended.

(4) [T]he Hospital did not send the Reviewers, Dr. Polk and Dr. Warshaw[,] all of the medical records for them to review.

We note that in arguing the evidence favorable to him as to these issues of fact, Dr. Mukherjee relies almost exclusively upon the documents which the trial court ruled were privileged and not discoverable. According to Dr. Mukherjee, these documents show "bad faith" action on the part of the Hospital. However, we simply do not see how Dr. Mukherjee could possibly "produce evidence at trial warranting a judgment in his favor," when the very evidence he relies upon to prove bad faith action has been held to be non-discoverable, and hence, inadmissible at trial. Without these non-discoverable documents, there is no genuine issue as to any material fact, and pursuant to KRS 311.377, the Hospital was entitled to summary judgment as a matter of law.

Dr. Mukherjee also argues that genuine issues of material fact exist which preclude a summary judgment on the Hospital's claim of entitlement to immunity under the HCQIA. However, in light of our previous holding, we need not address the merits of this argument, since we have already determined that the Hospital was entitled to summary judgment pursuant to KRS 311.377. Accordingly, this issue is moot and will not be considered.¹⁷

¹⁷See Benton v. Clay, 192 Ky. 497, 499, 233 S.W. 1041 (1921) (holding that "it is a firmly settled rule in this and all other courts that it will not assume jurisdiction to determine abstract or moot questions and thereby consume and appropriate its time in academic discussion, since courts are created for the purpose of trying cases rather than questions").

Finally, Dr. Mukherjee argues that KRS 311.377 violates both § 14 and § 54 of the Kentucky Constitution. First, we note that our review of the record shows that Dr. Mukherjee never argued before the trial court that KRS 311.377 violates § 54 of the Kentucky Constitution. It is well-settled that arguments not presented to the trial court cannot be argued for the first time on appeal.¹⁸ Moreover, Dr. Mukherjee has presented no arguments in support of this proposition, beyond his bare assertion that KRS 311.377 violates § 54 of the Kentucky Constitution. He claims in one of the headings in his brief that § 54 has been violated, but does not thereafter offer any basis for this argument. Accordingly, we decline to address this issue.

In addition, Dr. Mukherjee is precluded from arguing that KRS 311.377 violates § 14 of the Kentucky Constitution under the doctrine of res judicata. In Burkett v. Board of Education,¹⁹ this Court stated:

The record herein indicates that appellee conducted a hearing in 1973 which resulted in appellant's loss of employment and Burkett appealed to the circuit court which reversed the board because it was of the opinion that the termination process was a denial of due process. That judgment was reversed by the Court on May 23, 1975. Burkett pitches the present appeal upon denial of due process occasioned by an alleged actual bias of some board members using as the basis for his argument the evidence adduced upon voir dire examination of the board prior to the hearing in 1973.

¹⁸Hutchings v. Louisville Trust Co., Ky., 276 S.W.2d 461, 466 (1954).

¹⁹Ky.App., 558 S.W.2d 626, 627-28 (1977).

Since denial of due process is the issue in both appeals and since the evidentiary support for the contention was available prior to the Court's opinion, we believe the doctrine of *res judicata* prevents the relitigation of the same issues in a subsequent appeal and includes every matter belonging to the subject of the litigation which could have been, as well as those which were, introduced in support of the contention of the parties on the first appeal [emphasis original].

In the case at bar, Dr. Mukherjee previously argued before the trial court that KRS 311.377 violates § 28 and § 116 of the Kentucky Constitution. The issue was heard in an interlocutory appeal by our Supreme Court, which disagreed with Dr. Mukherjee and upheld the constitutionality of KRS 311.377.²⁰ Subsequent to this ruling from the Supreme Court, Dr. Mukherjee argued before the trial court that KRS 311.377 violates § 14 of the Kentucky Constitution. This kind of piecemeal litigation is exactly what the doctrine of res judicata is intended to prohibit. Therefore, Dr. Mukherjee's current argument that KRS 311.377 violates § 14 of the Kentucky Constitution could have been raised and should have been raised in his first argument before the trial court, and thereafter in his prior appeal. Accordingly, we decline to address the merits of this argument on this appeal.

For the foregoing reasons, the summary judgment of the Scott Circuit Court is affirmed.

ALL CONCUR.

²⁰Hospital Corporation of Kentucky, Inc. v. Trude, No. 98-SC-0321-MR, 98-SC-0389-MR (February 18, 1999).

BRIEF AND ORAL ARGUMENT FOR
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ORAL ARGUMENT FOR APPELLEE:

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