

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-001117-MR

LOREN NICHOLS, M.D.

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE EDDY COLEMAN, JUDGE  
ACTION NO. 00-CI-00794

PIKEVILLE UNITED METHODIST HOSPITAL  
OF KENTUCKY, INC.

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JOHNSON, SCHRODER AND TACKETT, JUDGES.

JOHNSON, JUDGE: Loren Nichols, M.D. has appealed from an order of the Pike Circuit Court entered on April 24, 2002, which granted Pikeville United Methodist Hospital's (PMH) motion for summary judgment. Having concluded that there is no genuine issue as to any material fact and that PMH was entitled to judgment as a matter of law, we affirm.

On February 26, 1996, Dr. Nichols and PMH entered into an agreement whereby Dr. Nichols would begin practicing orthopedic surgery in the Pikeville, Kentucky, area, including the service area of PMH. According to the contract, there was an insufficient number of orthopedic surgeons in the Pikeville area to meet the needs of the community. In exchange for Dr. Nichols agreeing to practice in the Pikeville area for three years, PMH agreed to, inter alia, loan Dr. Nichols \$57,000.00, which would be forgiven if Dr. Nichols fulfilled his three-year obligation.<sup>1</sup> In late July 1997, Dr. Nichols moved to Pikeville and began his practice at PMH.

During the fall of 1998, Dr. Nichols developed a boil or pimple on his forearm that was slow in healing. Tests on the boil revealed that it was a bacterial infection known as Methicillin Resistant Staphylococcus Aureus (MRSA). As a result, Dr. Nichols immediately ceased performing surgeries until the infection had been given time to heal. According to Dr. Nichols's deposition testimony, he refrained from performing surgeries for approximately six days until the boil had healed and he was cleared by Dr. Tamara Musgrave<sup>2</sup> to resume performing surgical procedures.

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<sup>1</sup> PMH also agreed to pay Dr. Nichols \$25,000.00 as compensation under the agreement.

<sup>2</sup> Dr. Musgrave was an Infectious Disease Specialist at PMH during this time period.

At some point prior to June 1999, several of Dr. Nichols's former patients complained that he had infected them during treatment.<sup>3</sup> At around the same time, three other doctors at PMH, Dr. Lela Maynard, Dr. Debbie Bailey, and Dr. Glenn Irwin, also complained to hospital administrators regarding Dr. Nichols's response time to emergency room calls and his decision to transfer patients that may have been properly treated locally.

In June 1999 the Office of Inspector General for the Kentucky Cabinet for Health Services investigated MRSA infections in Dr. Nichols's patients at PMH. The Investigation Report "substantiated" the allegations that PMH and Dr. Nichols had "failed to protect patients from infections."<sup>4</sup> The report concluded by recommending that Dr. Nichols be reported to the Medical Licensure Board.<sup>5</sup>

On June 18, 1999, after reviewing information contained in the Investigative Report, the Executive Committee

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<sup>3</sup> Dr. Nichols testified in his deposition that eight people had brought suit against him alleging that he had infected them when they received treatment as his patients.

<sup>4</sup> Specifically, the report found that PMH "permitted a surgeon [Dr. Nichols] with a positive culture for MRSA to return to the practice of surgery, prior to obtaining a negative culture as recommended by the Infectious Disease Specialist."

<sup>5</sup> Dr. Nichols stated in his deposition that he was reported to the Medical Licensure Board, but that he never received any kind of official complaint or notification from the Board. Dr. Nichols also stated that he believed one of his former patient's attorneys reported him to the Board.

of the Medical Staff of PMH notified Dr. Nichols by letter that "[his] surgical infection rate [was] significantly higher than [his] peers at this hospital," and that "[his] past activities [had] raised questions regarding [his] judgment." The Executive Committee further stated in this letter that Dr. Nichols would be required to receive additional training from the hospital's Infection Control Officer, and that there would be "close monitoring" during his surgical cases. Following receipt of this letter, Dr. Nichols immediately resigned from his staff privileges at PMH.<sup>6</sup>

During this same time period, Dr. Nichols began applying for surgical privileges at two other hospitals, Three Rivers Medical Center and Paul B. Hall Regional Medical Center. On July 7, 1999, Dr. Nichols signed a release form authorizing Three Rivers to consult with other hospitals or institutions regarding his professional competence as an orthopedic surgeon. This release form also authorized PMH to release documents to Three Rivers that might be relevant to its investigation of Dr. Nichols's credentials. On July 8, 1999, Dr. Nichols signed a similar written release form with Paul B. Hall.

As part of the investigative process, copies of the letter sent by the Executive Committee to Dr. Nichols, wherein he was notified of the results of the Investigative Report, were

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<sup>6</sup> Dr. Nichols's resignation letter was dated June 21, 1999.

sent by PMH to both Three Rivers and Paul B. Hall. Prior to this however, Dr. Nichols testified that he personally gave both hospitals a copy of the letter. According to Dr. Nichols's testimony, he did not want either hospital to be surprised by the contents of the letter, and he wanted a chance to explain the situation. Three Rivers eventually granted surgical privileges to Dr. Nichols, but Paul B. Hall did not.

On November 3, 1999, PMH filed suit in Pike Circuit Court, seeking to collect the amount owed under its loan agreement with Dr. Nichols. PMH claimed that Dr. Nichols had failed to fulfill the last two years of his three-year obligation.<sup>7</sup> On June 16, 2000, Dr. Nichols filed a separate suit in Pike Circuit Court, asserting a wrongful termination of employment claim and a defamation claim against PMH. In an order dated August 12, 2000, the trial court consolidated the two cases.<sup>8</sup>

On September 10, 2001, PMH filed a motion for summary judgment, arguing that Dr. Nichols was not an employee of PMH, and hence, could not have been "wrongfully terminated." PMH further argued that the release forms signed by Dr. Nichols barred his defamation claim against PMH. After a hearing was

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<sup>7</sup> PMH sought \$79,078.43, plus applicable interest charges in damages.

<sup>8</sup> According to PMH's brief, its claims against Dr. Nichols are still pending before the trial court.

held on the matter, the trial court granted PMH's motion for summary judgment on April 24, 2002. This appeal followed.

Dr. Nichols argues that summary judgment was improper on the grounds that a genuine issue of material fact existed as to whether PMH released copies of the letter in question to Three Rivers and Paul B. Hall "in good faith." Specifically, Dr. Nichols argues:

Certainly, the dispute between PMH and Dr. Nichols as to the truth or falsity of the matters asserted in its letter of June 18, 1999, and its subsequent publication to prospective employers, is such a dispute as to [preclude summary judgment].

We disagree and hold that there was no genuine issue as to any material fact and that PMH was entitled to judgment as a matter of law.

Summary judgment is only proper "where the movant shows that the adverse party could not prevail under any circumstances."<sup>9</sup> The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."<sup>10</sup> This Court has previously stated that "[t]he standard of review on appeal of a summary judgment is whether the trial

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<sup>9</sup> Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991) (citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985)).

<sup>10</sup> Steelvest, supra, (citing Dossett v. New York Mining & Manufacturing Co., Ky., 451 S.W.2d 843 (1970)).

court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue" [citations omitted].<sup>11</sup>

Section 583 of the Restatement (Second) of Torts states in part that "the consent of another to the publication of defamatory matter concerning him is a complete defense to his action for defamation."<sup>12</sup> Comment d to Section 583 explains what is necessary for a consent to be valid:

It is not necessary that the other know that the matter to the publication of which he consents is defamatory in character. It is enough that he knows the exact language of the publication or that he has reason to know that it may be defamatory. In such a case, by consent to its publication, he takes the risk that it may be defamatory.<sup>13</sup>

In the case at bar, it is not disputed that Dr. Nichols knew the exact contents of the letter which he now claims contained defamatory statements. It is also not disputed that Dr. Nichols expressly signed written release forms authorizing PMH to release, among other things, copies of the letter in question to Three Rivers and Paul B. Hall. By signing

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<sup>11</sup> Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

<sup>12</sup> Restatement (Second) of Torts § 583 (1977). See also William S. Haynes, Kentucky Jurisprudence, Torts § 8-7, p. 184 (1987) (stating that "[i]t is also generally recognized that an absolute privilege exists where the plaintiff has given his consent to the defamation").

<sup>13</sup> Id. at comment d.

these release forms, Dr. Nichols knew that Three Rivers and Paul B. Hall would have access to this letter. Indeed, Dr. Nichols admitted in his own testimony that he personally delivered copies of the letter to both hospitals so that neither would be surprised by the contents of the letter and so he would have a chance to explain the situation. Thus, since Dr. Nichols consented to the publication of this alleged defamatory letter, PMH is afforded a complete defense against Dr. Nichols's defamation action.

In his brief to this Court, Dr. Nichols has devoted much of his time attempting to point out facts which he contends indicate "bad faith" conduct on the part of PMH in releasing copies of the letter to Three Rivers and Paul B. Hall. However, where the person alleging defamation has consented to the publication of the statements in question, the presence or absence of good faith is immaterial in determining whether the defense of consent is available. We return once again to Section 583, where comment f states:

The privilege conferred by the consent of the person about whom the defamatory matter is published is absolute. The protection given by it is complete, and it is not affected by the ill will or personal hostility of the publisher or by any improper purpose for which he may make the publication, unless the consent is to its publication for a particular purpose, in which case the publication for any other

purpose is not within the scope of the consent.<sup>14</sup>

Dr. Nichols does not argue that the publication of the letter in question was for a purpose that was not intended by the release. Dr. Nichols intended for PMH to provide Three Rivers and Paul B. Hall with documents concerning his employment at PMH and the letter in question constituted such a document. Hence, PMH was absolutely privileged in releasing copies of the letter to Three Rivers and Paul B. Hall, regardless of any alleged "bad faith" conduct on the part of PMH. Accordingly, since there is no genuine issue as to any material fact, PMH was entitled to judgment as a matter of law on Dr. Nichols's defamation claim.<sup>15</sup>

Finally, we note that Dr. Nichols has made no argument on this appeal that the trial court erred by granting PMH's motion for summary judgment on his wrongful termination claim. Therefore, we will not discuss this issue on appeal.

Based on the foregoing, the order of the Pike Circuit Court is affirmed.

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<sup>14</sup> Id. at comment f.

<sup>15</sup> For similar cases from other jurisdictions, see, e.g., Baker v. Lafayette College, 504 A.2d 247 (Pa.Super.Ct. 1986)(holding that a college was absolutely privileged in publishing a professor's evaluation where that professor had consented to such publication); Litman v. Massachusetts Mutual Life Insurance Co., 739 F.2d 1549 (11th Cir. 1984)(holding that the defendant was entitled to a complete defense where the plaintiff consented to the release of statements regarding his financial situation); and Cox v. Nasche, 70 F.3d 1030 (9th Cir. 1995)(holding that a former employer was absolutely privileged in releasing a former employee's work history to a prospective employer where the employee had signed written release form authorizing such a release).

ALL CONCUR.

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