STATE OF MICHIGAN

COURT OF APPEALS

SAMI ABU-FARHA, Plaintiff-Appellant,	UNPUBLISHED June 14, 2002
v	No. 229279 Oakland Circuit Court
PROVIDENCE HOSPITAL, Defendant-Appellee.	LC No. 99-015890-CZ

Before: Murphy, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(4) (lack of subject matter jurisdiction). We affirm.

I. Basic Facts and Procedural History

Plaintiff, a licensed medical doctor and board certified internist, was accepted by defendant as a first year resident in its cardiovascular disease program. His duties included admitting and treating patients while in the program. The program requires three years of residency and provides the training necessary to become a cardiologist. Although the program is for three years, participation in the program after the first year is not guaranteed. Fellows must be accepted for the second and third year after demonstrating, in the previous year, certain skills and abilities required for successful completion of the program.

A. The Agreement

Plaintiff signed a resident agreement, which covered the first year of the program, from July 1, 1998, to June 30, 1999. According to the resident agreement signed by plaintiff, the hospital offered and plaintiff accepted "appointment as a PGY IV year resident in the Department of Cardiovascular Disease for the period beginning 7/1/98 and ending 6/30/99 under the terms and conditions of this Agreement". The pertinent paragraphs of the agreement state:

, provides:

Hospital agrees to provide a training program that meets the standards of the Accreditation Council for Graduate Medical Education's "Essential of Accredited Residencies" and applicable "Special Requirements" and to maintain its staff and facilities in compliance with said standards.[1] Hospital will furnish Resident with an evaluation of Resident's performance. (Paragraph 2: "Hospital's Duties").

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Should Hospital decide not to enter into a resident agreement with Resident for the year immediately following expiration of this Agreement, Hospital shall furnish Resident with written notice of this decision a minimum of one hundred twenty (120) days prior to expiration of this Agreement, provided Resident is not in the final year of his or her residency program at Hospital. Resident shall not be entitled to appeal a decision by the Hospital not to enter into a subsequent agreement with Resident. (Paragraph 13, "Nonrenewal").

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This Agreement (including the Attachments) constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes any and all other agreements, either oral or in writing, between the parties with respect to this subject matter. (Paragraph 15).

One such attachment was a "RESIDENT APPEAL PROCESS," which provided:

Should Hospital notify Resident of adverse actions such as *the necessity to repeat a clinical rotation, probation, summary suspension, or termination of a residency agreement prior to its expiration date,* Resident has the right, within ten (10) working days after the date of such notice, to request, in writing, a hearing before an Appeal Committee of the Hospital's Graduate Medical Education Committee. Resident's written request for such a hearing must be presented to the Chairman of the Graduate Medical Education Committee. Proper exercise of the right to an appeal hearing shall stay probation, repetition of a clinical rotation

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[1] Specifically, plaintiff points to § VI(A)(1) of the Revised Institutional Requirements Approved by ACGME, which requires semiannual feedback on performance, "including appropriate counseling and other necessary remedial effort," and § VI(A)(2),"Evaluation," which provides, in pertinent part:

> In the event of an adverse annual evaluation, residents must be offered the opportunity to address judgments of academic deficiencies or misconduct before an independent, appropriately constituted clinical competence committee. Academic due process provides fundamental fairness to the resident and protects the institution by insuring accurate, proper, and definitive resolution of disputed evaluations.

and termination of this Agreement until completion of the hearing process, but shall not stay summary suspension.

B. Nonrenewal

On December 14, 1998, after receiving his evaluation, plaintiff was placed on probation. On March 18, 1999, plaintiff was notified that the evaluations committee decided that "we cannot offer you a contract for a second year fellowship. It is the unanimous consensus that you have failed to live up to the admittedly high expectations placed on the Cardiovascular Fellowship at Providence Hospital." On April 21, 1999, plaintiff wrote a memorandum to Tom Gentile, the director of medical affairs, requesting an appeal of the "termination of agreement."

Gentile responded by informing plaintiff that he did not have a right to appeal the decision not to renew his contract for a second year in the fellowship under the terms of the residency agreement, and further that an appeal process must be invoked by a resident within ten days after the date of notice. However, because the residency agreement had not been terminated prior to the expiration of the first-year term, plaintiff did not have this right to appeal. Gentile noted that because defendant's decision for nonrenewal was not made within 120 days before the expiration of the first year, plaintiff would be paid through July 16, 1999.

Plaintiff subsequently commenced this action, alleging claims for breach of contract, specific performance, discharge against public policy (interference with the legitimate expectation of just-cause employment), intentional infliction of emotional distress, and violation of the Employee Right to Know Act, MCL 423.501 *et seq.* Additionally, plaintiff requested a preliminary injunction reinstating him into the residency program. The trial court denied plaintiff's request for a preliminary injunction, and then subsequently granted defendant's motion for summary disposition under MCR 2.116(C)(4), agreeing with defendant that it did not have jurisdiction to review defendant's medical staffing decision.

II. Standard of Review

This Court reviews a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Whether the trial court had subject matter jurisdiction is a question of law, which we also review de novo. *Cherry Growers, Inc v Agricultural Marketing and Bargaining Bd*, 240 Mich App 153, 160; 610 NW2d 613 (2000); *Todd v Dep't of Corrections*, 232 Mich App 623, 627; 591 NW2d 375 (1998).

III. Subject Matter Jurisdiction

A. Judicial Intervention in Medical Personnel Decisions

Michigan has long held that courts may not interfere with the personnel decisions of private hospitals.[2] In *Hoffman v Garden City Hospital-Osteopathic*, 115 Mich App 773, 778-

[2] Plaintiff's reliance on decisions from other states is misplaced where, as here, there is controlling Michigan law on this issue. *People v Kirby*, 440 Mich 485, 495; 487 NW2d 404 (1992); *Stackhouse v Stackhouse*, 193 Mich App 437, 441; 484 NW2d 723 (1992).

779; 321 NW2d 810 (1982), this Court adopted the rule from *Shulman v Washington Hospital Center*, 222 F Supp 59, 63 (D DC, 1963), wherein that Court stated:

> We now reach the specific question involved in the case at bar, namely, whether a private hospital has power to appoint and remove members of its medical staff at will, and whether it has authority to exclude in its discretion members of the medical profession from practising [*sic*] in the hospital. The overwhelming weight of authority, almost approaching unanimity, is to the effect that such power and authority exist. The rule is well established that a private hospital has a right to exclude any physician from practising [*sic*] therein. The action of hospital authorities in refusing to appoint a physician or surgeon to its medical staff, or declining to renew an appointment that has expired, or excluding any physician or surgeon from practising [*sic*] in the hospital, is not subject to judicial review. The decision of the hospital authorities in such matters is final.

In *Veldhuis v Central Mich Community Hospital*, 142 Mich App 243; 369 NW2d 478 (1985), the Court, relying on *Hoffman*, held that a private hospital has the power to appoint and remove members at will without judicial intervention. Thus, the defendant hospital's decision to suspend the plaintiff's staff privileges was not subject to review by the circuit court. *Id.* at 245-246. Further, this Court stated that the *Hoffman* rule precluded not only judicial review of a private hospital's decision on staff privileges, but also the method by which the hospital personnel reached that decision. *Id.* at 247.

In *Sarin v Samaritan Health Center*, 176 Mich App 790; 440 NW2d 80 (1989), the defendant, a private hospital, denied the plaintiff, a medical doctor, his medical staff privileges. The trial court granted the defendant summary disposition on the basis that judicial intervention was not permitted with regard to a private hospital's decision to terminate a doctor such as the plaintiff. *Id*. at 791-792. This Court stated, in pertinent part:

> In *Hoffman*, we held that there can be no judicial review of a private hospital's decision to terminate medical staff privileges even to ensure that it was not arbitrary, capricious or unreasonable, or of the methods by which the hospital personnel reached the decision to terminate.
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> Plaintiff argues that his contract with the hospital included the hospital's bylaws and that defendants' failure to follow the bylaws establishes a breach of contract claim which the court can review without interfering with the medical staffing decisions of the hospital. We do not agree. Plaintiff does not specifically or separately address the tortious interference with contract or advantageous relationship claims on appeal.
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> Although plaintiff contends that he is not asking for review of whether there was a violation of due process or fair procedure, we believe consideration of his breach of contract claim would necessarily involve a review of the decision to terminate and the methods or reasons behind that decision, thus making a mockery of the rule that prohibits judicial review of such decisions by private hospitals. [*Sarin, supra* at 793-794.]

In *Long v Chelsea Community Hospital*, 219 Mich App 578, 586; 557 NW2d 157 (1996), this Court, citing *Sarin* and *Hoffman*, held that "[a] private hospital is empowered to appoint and remove its members at will without judicial intervention," and added that "[a] private hospital has the right to exclude any doctor from practicing within it." The Court further explained, however:

> The above law is limited to disputes that are contractual in nature. We decline to articulate a broad principle that a private hospital's staffing decisions may *never* be judicially reviewed. Indeed, in doing so, we reiterate the proposition from *Sarin* that, under some circumstances, a court may consider a hospital's decisions without violating the nonreviewability principle. *Sarin, supra* at 795. Private hospitals do not have carte blanche to violate the public policy of our state as contained in its laws. Had plaintiff in this case asserted that defendants violated state or federal law, we may have chosen to review his claim. In this case, however, plaintiff did not assert a violation of civil rights or a violation of a state statute. [*Id.* at 586-587. Emphasis in original.]

In *Samuel v Herrick Memorial Hospital*, 201 F3d 830 (CA 6, 2000), the court, relying in part on *Long*, *Sarin*, *Veldhuis*, and *Hoffman* stated:

> Michigan law is very clear that claims arising from the peer review process are not judicially reviewable. . . . Under Michigan law, a private hospital is empowered to appoint and remove its members at will without judicial intervention and has the right to exclude any doctor from practicing therein . . . .
>
> The only exception to this nonreviewability rule arises when defendants have been accused of violating state or federal law, such as state or federal discrimination laws. The district court was . . . without jurisdiction to review plaintiff's claim of tortious interference with contractual relations and business relationships, as we are, because it would necessarily involve a review of the decision to suspend plaintiff and the methods or reasons behind that action, which is clearly prohibited under Michigan law as improper interference with the hospital's decisions and the peer review process. . . . Although plaintiff does not allege that the hospital breached its contract with him and he is not asking for a specific review of whether the hospital followed its own procedures in suspending him, he is actually seeking judicial intervention into the decision of a private hospital to suspend his staff privileges. A decision of this nature is not proper matter for judicial intervention and consideration of his claim would make a "mockery of the rule that prohibits judicial review of such decisions by private hospitals." [*Id.*, at 834-835. Citations omitted.]

The Court found that Michigan follows the more stringent rule that does "not allow any review, even to ensure that the methods put forth by hospital for peer review are followed." *Samuel, supra* at 835, citing *Sarin, supra* at 795. The Court referred to it as "Michigan's flat rule against judicial intervention." *Id*. at 836.

B. Plaintiff's Claim

Plaintiff argues that the trial court erred in holding that it did not have jurisdiction to consider his contractual claims involving his nonrenewal. We disagree. Applying the foregoing to the case at bar, we reject plaintiff's argument that rule prohibiting judicial review of staffing decisions of private hospitals does not apply to him because he was only a resident, and not a staff physician with staff privileges. The plaintiff's argument is simply a distinction without a difference.

We believe the rationale for this rule applies equally to decisions concerning physicians in resident training programs. Moreover, in *Hoffman, supra* at 779, this Court stated that a hospital has the right to exclude "any physician" from practicing there. The Court did not distinguish between staff physicians and physicians in resident programs. Similarly, in *Veldhuis, supra* at 245-246, the Court stated that a private hospital may appoint and remove "members" at will, without judicial intervention. And, in *Long, supra* at 586, the Court stated that a private hospital has the right to exclude "any doctor" from practicing within it. To make an exception for doctors in a "resident" program would "make a mockery of the rule that prohibits judicial review." *Sarin, supra.* Certainly, supervising doctors who oversee the training programs in hospitals have the right to evaluate the residents, make decisions about their performance and determine whether they should be permitted to continue without judicial intervention.

Additionally, we find plaintiff's situation completely inapposite to a student in an higher education institution. Here, plaintiff was actively admitting, evaluating, treating and medicating patients. He acted as a medical supervisor in other situations. The decision not to renew his residency program clearly falls within the rule prohibiting judicial intervention in medical personnel decisions.

Accordingly, the trial court did not err in granting defendant summary disposition under MCR 2.116(C)(4).

IV. Malice

In the alternative, plaintiff argues his action is not foreclosed because the hospital acted with malice. Plaintiff relies on MCL 331.531 as support for his argument that a private cause of action for intentional infliction of emotional distress may be brought when it is supported by allegations of malice. We find no merit to this issue.

MCL 331.531(3)(b) and (4) provides, in pertinent part:

> (3) A person, organization, or entity is not civilly or criminally liable:
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> * * *
>
> (b) For an act or communication within its scope as a review entity.
>
> (4) The immunity from liability provided under subsection (3) does not apply to a person, organization, or entity that acts with malice.

In *Long*, *supra*, this Court addressed whether MCL 331.531 creates a private cause of action for malice. The Court held:

> If the common law provides no right to relief, and the right to such relief is instead provided by statute, then plaintiffs have *no* private cause of action for enforcement of the right *unless*: (1) the statute expressly creates a private cause of action or (2) a cause of action can be inferred from the fact that the statute provides no adequate means of enforcement of its provisions. *Bell v League Life Ins Co*, 149 Mich App 481, 482-483; 387 NW2d 154 (1986). It follows that courts must dismiss a private cause of action under a statute creating a new right unless the statute expressly created the private cause of action or the cause of action may be inferred because the statute does not provide adequate means to enforce its provisions. *Forster v Delton School Dist*, 176 Mich App 582, 585; 440 NW2d 421 (1989).
>
> The statute does not expressly create a private cause of action for malice. Accordingly, the second condition is in question here; whether a private cause of action may be inferred because the statute does not provide adequate means to enforce its provisions. As evidenced by the statutory language, § 531 provides immunity to entities unless they act with malice. The statute's implicit purpose is to protect the participants in the peer review process. Indeed, the statute offers immunity to entities for their actions involving peer review. The statute is not designed to provide a comprehensive scheme of enforcement of the rights and duties it creates for the simple reason that it creates no right of action for malice. The statute is designed to protect entities from liability, not to create a new right of a private cause of action for malice. Accordingly, whether the statute provides adequate means to enforce its provisions regarding malice is not at issue here.
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> Moreover, recognition of a private cause of action for malice under the statute would frustrate and undermine the legislative purpose of providing immunity. A court's decision regarding private rights of action must be consistent with legislative intent while further the Legislature's purpose in enacting the statute. *Garner v Wood*, 429 Mich 290, 301; 414 NW2d 706 (1987). The Legislature plainly did not intend to create a private cause of action. Its intent to confer certain immunities would be frustrated if this Court distorted its careful choice of language by recognizing a private cause of action for malice. We decline to recognize such a private cause of action under the statute. Accordingly, plaintiff has no cause of action for malice, and the circuit court correctly granted summary disposition to defendants. [*Long, supra* at 583-584. Emphasis in original.]

Furthermore. as the court stated in *Samuel, supra* at 834-835, "[t]he only exception to this nonreviewability rule arises when defendants have been accused of violating state or federal law, such as state or federal discrimination laws. Not only is judicial review of a private hospital's decision to appoint and remove members at will precluded, but also the *method* by which the hospital personnel reached that decision. *Veldhuis, supra* at 245-247.

Plaintiff argues that *Long* does not preclude "other causes of action, such as intentional infliction of emotional distress which are supported by allegations of malice and accompanying offers of sufficient proof." He also claims that *Long* does not limit the exception outlined in *Sarin* to claims alleging a violation of state or federal law. Plaintiff claims that *Long* left the door open to allowing judicial review of claims based on the hospital's bylaws. We again disagree.

Just as a private cause of action for malice under the statute "would frustrate and undermine the legislative purpose of providing immunity," *Id*., at 584, so to would a private cause of action for intentional infliction of emotional distress. Indeed, if the statute, which provides that "immunity from liability . . . does not apply to a person, organization, or entity that acts with malice," does not create a private cause of action for malice, it certainly would not create a private cause of action for intentional infliction of emotional distress.

V. Breach of Contract

Plaintiff alleges that defendant failed to comply with the ACGME standards for graduate school education, specifically referenced in his agreement. However, we need not consider plaintiff's claim that the trial court erred in failing to find that there was a genuine issue of material fact as to whether defendant breached the resident agreement. Where the court lacks subject matter jurisdiction to decide an issue, any action with respect to that issue, other than to dismiss it, is void. *Steiner School v Ann Arbor Twp*, 237 Mich App 721, 739; 605 NW2d 18 (1999). Thus, it is clear that factual disputes relating to a breach of contract claim may not be reviewed. *Sarin, supra* at 793-794. As this Court stated in *Bhogaonker v Metropolitan Hospital*, 164 Mich App 563, 566; 417 NW2d 501 (1987):

> [W]e also agree with the trial court's determination that it lacked subject matter jurisdiction in this case. Although plaintiff alleged breach of contract in this case, it is clear beyond peradventure that plaintiff is actually seeking judicial intervention into a decision of a hospital to terminate his employment. . . . Such a decision is not subject to review by the circuit court.

VI. Injunctive Relief

Finally, plaintiff argues that the trial court erred in denying his request for a preliminary injunction requiring his reinstatement into the cardiovascular disease program. We disagree.

We review a trial court's decision on a request for an injunction for an abuse of discretion. The decision must not be arbitrary and must be based on the facts of the particular case. *Michigan Coalition of State Employee Unions v Civil Service Comm*, 465 Mich 212, 217; ___ NW2d ___ (2001). As this Court stated in *Addison Township v Department of State Police*, 220 Mich App 550, 554; 560 NW2d 67 (1996):

> Whether a preliminary injunction should issue is determined under a four-part analysis: (1) harm to the public interest if an injunction issues; (2) whether the harm to the applicant in the absence of a stay outweighs the harm to the opposing party if a stay is granted; (3) the strength of the applicant's demonstration that the applicant is likely to prevail on the merits; and (4) a

> demonstration that the applicant will suffer irreparable injury if a preliminary injunction is not granted. . . . Whether an injunction should issue will often also include consideration of whether an adequate legal remedy is available to the applicant. [Citations omitted.]

In light of our disposition of the foregoing issues, we conclude that the trial court did not abuse its discretion in denying plaintiff's request for an injunction. Plaintiff failed to demonstrate a likelihood of prevailing on the merits. Additionally, we agree with the trial court that plaintiff failed to demonstrate that he would suffer irreparable harm if an injunction was not granted. *MSEA v Dep't of Mental Health*, 421 Mich 152, 167-168; 365 NW2d 93 (1984); *Davies v Treasury Dep't*, 199 Mich App 437, 439-440; 502 NW2d 693 (1993); *Employment Security Comm v Powell*, 141 Mich App 644, 649; 367 NW2d 435 (1985).

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly