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Case Number 292,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT C. VILLARE, M.D. and DELAWARE VALLEY PHYSICIANS & SURGEONS, P.A.,	:	
Plaintiffs Below, Appellants	:	No. 292,2014
v.	:	C.A. No. Below: 08C-10-189 (JRJ)
BEEBE MEDICAL CENTER, INC.,	:	
Defendant Below, Appellee	:	

Appeal from the Superior Court of the State of Delaware,
In and For New Castle County, C.A. No. 08C-10-189 (JRJ)

APPELLANT'S OPENING BRIEF

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Dated: July 17, 2014

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NATURE AND STAGE OF PROCEEDINGS

This civil case was filed on October 20, 2008 against Appellee Beebe Medical Center, Inc. (hereafter "Beebe" or "Defendant") and other parties. The gist of the multi-count complaint was that Appellant, Robert C. Villare, M.D. (hereafter "Villare" or "Plaintiff"), a general surgeon, had been wrongfully deprived of his surgical privileges as a hospital staff physician by Beebe in November, 2005 and suffered harm as a result. (D.I. 1). After protracted litigation and substitutions of counsel[1], the remaining issue has been distilled to the question of Villare's legal rights and remedies under the Medical Staff Policy on Appointment of Beebe Medical Center (hereafter referred to as "Policy"). (A26). More specifically, whether the doctor was wrongfully denied "reappointment" to the staff in 2005.[2]

The issue raised here is of first impression in Delaware. (Exhibit A at 6). Beebe filed a renewed motion for summary judgment on October 8, 2012 (D.I. 179) contending that Villare had no contractual rights under the Policy, and was not entitled to the benefits of the covenant of good faith and fair dealing or due process.[3] Beebe also contended that there was insufficient evidence of damage to place before the jury. (D.I. 200). Villare opposed the motion (D.I. 201), which was argued before

[1] Current counsel entered his appearance on February 13, 2012 (D.I. 97)
[2] The named corporate Plaintiff is Dr. Villare's wholly-owned professional corporation and is not asserting a claim on this appeal.
[3] At the outset of the litigation, Beebe filed a motion to dismiss these claims (D.I. 17) which was denied (D.I. 45).

the court on December 16, 2013 (D.I. 207). Order granting the Motion for Summary Judgment was entered on March 19, 2014. (Ex. A, D.I. 208). Villare moved for reargument (D.I. 210), and that was denied on May 21, 2014 (Exhibit B, D.I. 213).

This is Appellant Villare's Opening Brief in support of his appeal, which was docketed in this Court on June 19, 2014.

SUMMARY OF ARGUMENT

I. Appointment to Beebe Medical Center Medical Staff establishes an enforceable contract under the terms of the Beebe Policy on Appointment. Both the hospital and the staff physician secure rights and undertake obligations under the terms of the Policy. When considering a physician application for staff reappointment the hospital is bound by the covenant of good faith and fair dealing and must accord the applicant due process. The grant of summary judgment to the Defendant on the record in this case was erroneous as a matter of law.

II. The denial of reappointment to a staff physician without due process in violation of the contract and the covenant of good faith and fair dealing harms the applicant, and exposes the hospital to damages for the harm caused.

STATEMENT OF FACTS

Dr. Villare is a general surgeon who applied for and was granted Medical Staff Privileges at Beebe in 1999. (A57). He had an impeccable professional record at that time, and was licensed to practice medicine in Pennsylvania, New Jersey and Delaware. (A285). In accordance with Beebe Policy procedures (and as required by the Joint Commission) he sought renewal of the privileges at two-year intervals in 2001, 2003 and 2005 (A58). The privileges were renewed without incident in 2001 and 2003 (A239), but denied in 2005. (A78).

Under the Beebe Policy structure, the chief of surgical services makes a first recommendation for staff reappointment to a Credentials Committee, which in turn forwards "written findings, and recommendations to the Medical Executive Committee." (A43).

Pertinent portions of the 73-page Beebe Medical Staff Appointment Policy are included at A26 of the Appendix. The Policy took effect in September, 2002 and governs the conduct at issue here. (*Id*.).

A. Initial Appointment To Staff

The Policy spells out in Article II the procedures to be followed for initial appointment to the Medical Staff and the Conditions of Appointment. (A30). Article II, Part B: Conditions of Appointment spells out the Duties of Appointees stating that acceptance of membership to the Medical Staff "shall constitute specific

agreement to: abide by the Bylaws, Rules and Regulations of the Medical Staff ...", and then enumerates fourteen (14) separate obligations. (A31). Article II, Part C describes the initial application procedure and states that the "Applicant's signature shall constitute agreement", and then enumerates six (6) separate commitments, including a grant of immunity "to the System". (A35). Section 2C.04 of Article II states that every accepted applicant "shall specifically agree to:" and then enumerates seventeen (17) "Basic Responsibilities and Requirements of ... Appointees". (A36-37). Dr. Villare referred to these mutual rights and duties as a "quid pro quo." (A259).

B. <u>Reappointment To Staff</u>

Article III, Part A sets out the Procedures for Reappointment. (A39). This procedure was applicable to Dr. Villare in 2005, whose 2003 reappointment was scheduled to expire on July 31, 2005.

The typical reappointment process at Beebe, and other hospitals, is uneventful and handled as an administrative matter. (A127). The physician credentialing experts for both parties likened it to "rubber stamping,"[4] barring some unusual development

[4] The term rubberstamping is not used here in any pejorative sense but rather as a fact of hospital life. Since the Joint Commission requires biennial evaluations and hospitals typically have a large number of staff physicians, the credentialing committees that act on reappointment applications consider several at one session, and absent unexpected issues concerning a particular applicant, act quickly. This is especially the case in smaller hospitals where the committee members know the doctors involved. For instance, Dr. Donze, Beebe's credentialing expert witness, testified that at his hospital, The Chester County Hospital, the Credentialing Committee will act on 250 reappointment applications in a single meeting lasting two to three hours. (A82). Dr. Marvel's

in the physician's practice or personal life. (A121-23, 223, 259-60, 263). Dr. Stancofski, one of Villare's surgical colleagues at Beebe, testified as a fact witness that he typically spent 10-15 minutes on his reappointment application which was handled by his office staff. (A164). In 2012, the President of Beebe, Jeffrey Fried, and the credentialing expert witnesses, Dr. Manion for the Plaintiff and Dr. Donze for the Defense, all testified that the credentialing process had to be fair, non-arbitrary and comport with "due process". (A154, 227-28, 83).

In 2005, Dr. Villare's privileges were not renewed following a stalled and tedious review process. (A222). This occurred despite the fact that Dr. Stancofski, the chief of staff surgeon who first reviewed his performance during the two-year period, endorsed Villare's reappointment. (A69, 182). He was not aware of any criticism of Dr. Villare's competence or professionalism. (A199). Nobody at the higher levels of review ever discussed Dr. Stancofski's reappointment recommendation that he can "remember". (A198). Dr. Villare was never provided any opportunity to meet with any of the committees during the credentialing process. (A268).

account of his fifteen (15) reappointments at Beebe over thirty (30) years describes a perfunctory process. (A127). He was the chairman of the Credentials Committee. (A73).

C. Dr. Villare's 2005 Reappointment Application

1. Dr. Villare's Work Environment in 2005

Between 2002 and 2005 Dr. Villare became embroiled in a dispute with an orthopedic surgeon, James Marvel, M.D., who was the longstanding Director of the Beebe Emergency Department Trauma Center. Dr. Marvel filled a prominent role at Beebe. He was on staff for over thirty (30) years, served on the Credentials Committee for twenty-five (25) years, and was a member of the Board of Directors at the time of his deposition. (A126, 128, 135).

The dispute started when Dr. Villare, a general surgeon, suggested it was more appropriate for the Trauma Center to be headed by a general surgeon rather than an orthopedic surgeon, a view shared by Dr. Donze. (A108). Dr. Marvel resisted this suggestion, and developed an open dislike for Dr. Villare, which led to a defamation suit that was filed by Dr. Villare against Dr. Marvel on December 31, 2003[5]. This dispute was "common knowledge around the hospital". (A248, 196). Dr. Marvel said their relationship was "not amicable" at the time Dr. Villare applied for reappointment in 2005. (A137).

Another byproduct of Villare's dispute with Dr. Marvel was Villare's elimination from the Trauma Call rotation, an event that led to litigation. In that case, filed on October 4, 2005, Dr. Villare alleged that Beebe had wrongfully removed

[5] That case was settled on March 9, 2009. (A79).

him from the trauma rotation. That case, referred to as the "Trauma Case", resulted in summary judgment in favor of Beebe on October 22, 2008. (D.I.195).[6]

2. Dr. Villare's Application

An applicant for reappointment must complete a reappointment application form which the hospital must send by certified mail, return receipt requested, "at least five (5) months prior to the expiration ..." of the current appointment period. (A39). The completed application form must be submitted to the Medical Staff Office at least three (3) months prior to the expiration of the current appointment. (A39). Failure to do so, without just cause, results in "automatic expiration" without a right of appeal. (*Id.*) Dr. Villare's application form was sent by Beebe to the wrong address (A239), and he was prevented from meeting the three (3) month requirement (A267). Dr. Villare's application was submitted to the Medical Staff Office on June 28, 2005 (A60), and Beebe extended Dr. Villare's 2003 appointment (A239).

According to the Policy, receipt of the application and notification to the Chief of the Department, the Chief will provide "the Credentials Committee with a written reappointment evaluation." (A42). Dr. Stancofski, a general surgeon and Acting Chief of the Department of Surgery for purposes of evaluating Dr. Villare's reappointment application in 2005 (A175), reviewed Dr. Villare's "file", reviewed

[6] In the instant litigation Beebe contended, unsuccessfully, that the Trauma Case was *res judicata* as to the claims asserted here. (D.I. 195).

the application and approved the reappointment on September 22, 2005. (A69). He had not received any complaints or criticisms directed at Dr. Villare during this process. (A199).

Dr. Villare was then required for the first time to provide a list of procedures he had performed before and since his 2003 reappointment, a demand that had "never" been asked for before by the Credentials Committee. (A239). He and his staff complied under time pressures. (A270, 222). The request for a list of procedures was made after the initial approval by the acting chair of the surgical department. There is evidence that this supplemental information was not reviewed by the persons who considered the reappointment application (A253-56). In the meantime, there were exchanges between Drs. Villare and Wenner, acting on behalf of the Credentialing Committee, concerning the supplemental information the Committee was requesting. (A70, 72, 74).

Dr. William J. Wenner, a gastroenterologist, was hired by Beebe on May 15, 2005 as a Vice-President of Medical Affairs (A71), and reported directly to the President of Beebe, Jeffrey Fried. He participated in "a number of" the Credentials Committee meetings when Dr. Villare's application was considered. (A208). He testified that there was one surgical procedure performed by Dr. Villare, an operation performed on a Mr. Cain that was a "critical portion of the process of Dr. Villare's credentialing." (A213) He said: "we had serious concerns that the procedure was not

within his scope of privileges ..." (A213). There was no discussion of the Cain procedure with Dr. Villare and there is no mention of the Cain procedure in the minutes of the two Committee meetings that considered Dr. Villare's application. (A73, 76). The Cain operation on the esophagus was performed in February, 2003, and was duly reported to Beebe at that time in accordance with standard practice. (A36-7). When Dr. Villare's reappointment application was approved in the summer of 2003, there was no reference to any issue involving any surgical procedure, including the Cain operation.

The Cain operation precipitated a lawsuit against Beebe and Villare that was settled without any contribution on Villare's behalf. (A271). Nevertheless, Dr. Wenner testified: "… I do recall speaking with Mr. Fried about the law suit because I had concerns about our credentialing process and our oversight of that process." (A212). Mr. Fried did not recall any such discussion (A156), and further testified that a medical negligence lawsuit would not be the basis for denial of reappointment privileges. (A151-52). He further said that lawsuit would not play any role in Dr. Villare's loss of reappointment privileges. (A152). Dr. Donze said the same. (A93). Dr. Villare testified that he was never asked any questions about the Cain matter at any layer of the reappointment procedure. (A268).

Mr. Fried was not aware of any other physician who had been denied reappointment between 1995 and 2005 for the reasons assigned to Dr. Villare.

(A143, 244). Dr. Wenner told Dr. Villare in a phone conversation that denial of his reappointment was "very unusual." (A245). Dr. Marvel, a 25-year member of the Credentials Committee (A128), could not recall a single other instance when reappointment privileges had been denied for the reason Dr. Villare's were. (A131). He did not know "exactly" why Dr. Villare was denied reappointment. (A129). There was evidence that Dr. Marvel was "involved" in the processing of Dr. Villare's application. (A247-48).

The Credentials Committee made its recommendation to deny reappointment on October 3, 2005. (A73). The decision reads:

> Reappointment to Staff:
> - Villare, Robert, MD – Surgery – Active
>
> Following the three month extension of privileges to allow Dr. Villare to provide further evidence supporting his request for reappointment, the Committee considered his application. Dr. Marvel, citing a potential conflict of interest and vocalizing a desire for no question as to the fairness of the decision, recused himself from the discussion and left the room. Dr. Shreeve assumed the chair for this action.
>
> The Committee first took notice of the recommendation of Dr. Stancofski, Vice Chief of the Surgery Service. An extensive review of the reappointment file, the documentation provided by Dr. Villare and cases performed at Beebe Medical Center was done. The Committee determined that there was insufficient evidence of clinical competence to permit reappointment with general surgery core privileges. Special privileges are not granted without core privileges. Time of discussion: >1 hour.

(A73).

This decision was repeated by the Medical Executive Committee on October 14, 2005 (A76), and by the Board of Directors on October 28, 2005 (A77). Dr. Villare's privileges were terminated on October 31, 2005. Dr. Villare was never told that he had provided "insufficient information." (A276, 289).

Dr. Villare, through counsel, then requested an administrative hearing which was never scheduled by Beebe. (A278). Counsel for Beebe said that Beebe would not set a date for a hearing, and that "Beebe Hospital doesn't want to go through a hearing. End of story. You're done." (A279-80, 287-88)[7].

D. <u>Damages Caused By Denial of Reappointment</u>

After reappointment privileges were denied effective October 31, 2005, Dr. Villare was no longer allowed to perform surgeries at Beebe. (A238). Nor was he allowed to operate at a nearby surgicenter as a consequence. (A240). His only source of meaningful income was his surgical practice. (A269). Everyone at the hospital knew he had been branded. (A309). Dr. Villare described the denial of the reappointment as an "intentional and hurtful act." (A274). More specific facts pertinent to this issue will be developed in the course of the argument.

[7] Dr. Donze testified he was never informed about this statement (A114), but he did recall reading in the Wenner deposition that another gastroenterologist had told Villare during the reapplication process that they were "out to get him." (A114-15, 238-39).

ARGUMENT

I. A PRIVATE HOSPITAL STAFF PHYSICIAN HAS AN ENFORCEABLE CONTRACT RIGHT TO OBTAIN REAPPOINTMENT TO THE STAFF IN ACCORDANCE WITH THE HOSPITAL'S WRITTEN POLICY AND PROCEDURES. THE PHYSICIAN SEEKING REAPPOINTMENT IS ENTITLED TO THE BENEFITS OF DUE PROCESS AND THE COVENANT OF GOOD FAITH AND FAIR DEALING.

A. QUESTION PRESENTED

Did the trial court err as a matter of law when it held that a private hospital medical staff physician did not have an enforceable contract right to be reappointed to the medical staff in accordance with the hospital's Policy and procedures governing reappointment? This question was preserved in the trial court's order granting Defendant's Motion for Summary Judgment. (Ex. A).

B. SCOPE OF REVIEW

Whether a private hospital medical staff physician has an enforceable contract right to staff reappointment in compliance with hospital policy and procedures that require the hospital to act in good faith, deal fairly and accord due process to the physician is a legal question. This court's review of this issue of first impression on appeal is *de novo*. *Kahn v. M&F Worldwide Corp.*, 88 A.3d 625 (Del. 2014)

C. MERITS OF ARGUMENT

This is a case of first impression in Delaware. (Ex. A at 6); *Yatco v. Nanticoke Mem'l. Hosp., Inc.*, 2010 Del. Super. LEXIS 233. Thus far, Delaware law does not preclude a determination that a private hospital staff physician has enforceable contract rights vis-à-vis the hospital, and is entitled to the benefits of the covenant of good faith and fair dealing as well as due process. In *Lipson v. Anesthesia Servs., P.A.*, 790 A.2d 1261, 1284 n.68 (Del. Super. 2001) (citing *Dworkin v. St. Francis Hosp., Inc.*, 517 A.2d 302, n.5 (Del. 1986)), the Superior Court noted that "in certain circumstances" a hospital's bylaws can give rise to contractual rights and obligations.

The Restatement (Second) of Contracts, §1 defines a contract. "A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."

The Beebe Policy spells out mutual rights, obligations, and promises for itself and its staff members creating such a "circumstance" as mentioned in *Lipson*, 790 A.2d at 1284 n.68. A physician's acceptance of appointment to the Beebe Medical Staff establishes an enforceable contract.

Citing older cases from Pennsylvania and South Dakota, The Court of Special Appeals of Maryland in 1981 noted: "It is well settled that hospital bylaws have the force and effect of an enforceable contract". *The Anne Arundel Gen. Hosp., Inc., v.*

David S. O'Brien, 432 A.2d 483 (Md. Ct. Spec. App. 1981) (citing *Berberian v. Lancaster Osteopathic Hosp. Assn., Inc.*, 149 A.2d 456 (Pa. 1959); *St. John's Hosp. Med. Staff v. St. John Reg'l Med. Ctr., Inc.*, 245 N.W. 472 (S.D. 1976)). The rule in New Jersey is the same. *See Joseph v. Passaic Hosp. Assn.*, 25 N.J. 557 (N.J. 1958).

Granger v. Christus Health Cent. La., 2013 La. LEXIS 1539, involved both federal and Louisiana law touching on physician rights and privileges in a hospital medical staff setting, including the question whether the staff by-laws and their acceptance by the physician embraced a contract under Louisiana law.[8] In this recent analysis of the relationship between physician and hospital following a jury verdict in favor of a surgeon, the Louisiana Supreme Court described a relationship that parallels the arrangement between Beebe and its staff surgeons.

> In this case, under Louisiana contract law, a contract was formed that contemplated mutual obligations and mutual benefits to the parties. Obviously, Cabrini [hospital] had an interest in having local physicians join its medical staff and make use of its facilities, so that it could charge fees for the services and facilities provided. Just as apparent was Dr. Granger's interest, as a surgeon, in joining Cabrini's medical staff so that he could have access to one of the only two hospitals in his area, as potential patients might have a preference and/or be limited by their insurance coverage in their choice between the two hospitals. The relationship presented mutual advantages to both parties; Cabrini would provide the facilities and staff that would enable Dr. Granger to conduct surgery for his patients, and both parties could bill

[8] Louisiana, under its Civil Code, provides that the requirements for a valid contract are capacity, consent, a lawful cause and a valid object. LSA-CC cuts. 1918, 1927, 1966, 1971. *Ibid.* p.23.

> fees for the services and/or facilities provided. Further, Cabrini made it known, through its Bylaws that membership in the medical staff could be obtained through the application procedure described therein and by the physician's agreement to abide by the Bylaws. In promulgating the Bylaws and in accepting the applications of the physicians who sought membership in their medical staff pursuant to those Bylaws, Cabrini obviously intended to be bound by the provisions set forth therein. We conclude that the offer and acceptance between Cabrini and Dr. Granger, via the exchange of written correspondence relative to the application for and the granting of medical staff membership, viewed along with the commencement of Dr. Granger's practice at Cabrini, established a contractual relationship between Cabrini and Dr. Granger. Further, the parties clearly intended that the Bylaws would govern their relationship.

Id. at *67-8 (footnotes omitted).

The *Granger* Court also listed the jurisdictions that have held hospital bylaws do create binding enforceable contracts between a hospital and its medical staff. *Id.* at *62-3, n.27.[9]

[9] The following jurisdictions have held that bylaws are binding enforceable contracts between a hospital and its medical staff: *Virmani v. Presbyterian Health Services Corp.*, 127 N.C. App. 71, 77, 488 S.E.2d 284, 288 (N.C. App. 1997); *Houston v. Intermountain Health Care, Inc.*, 933 P.2d 403, 407-08 (Utah Ct. App. 1997); *Gonzalez v. San Jacinto Methodist Hospital*, 880 S.W.2d 436, 439 (Tex. App. Texarkana 1994); *Lewisburg Community Hospital v. Alfredson*, 805 S.W.2d 756, 759 (Tenn. 1991); *Balkissoon v. Capitol Hill Hospital*, 558 A.2d 304, 308 (D.C. 1989); *Pariser v. Christian Health Care Systems, Inc.*, 816 F.2d 1248, 1251 (8th Cir. 1987); *Lawler v. Eugene Wuesthoff Memorial Hospital Association*, 497 So.2d 1261, 1264 (Fla. Dist. Ct. App. 1986); *Munoz v. Flower Hospital*, 30 Ohio App.3d 162, 30 Ohio B. 303, 507 N.E.2d 360, 364-65 (1985); *Anne Arundel General Hospital, Inc. v. O'Brien*, 49 Md. App. 362, 370, 432 A.2d 483, 488 (1981); *Miller v. Indiana Hospital*, 277 Pa.Super. 370, 375, 419 A.2d 1191, 1193 (1980); *McElhinney v. William Booth Memorial Hospital*, 544 S.W.2d 216, 218 (Ky. 1976); *St. John's Hospital Medical Staff v. St. John Regional Medical Center, Inc.*, 90 S.D. 674, 680-81, 245 N.W.2d 472, 475 (1976); *Berberian v. Lancaster Osteopathic Hospital Association, Inc.*, 395 Pa. 257, 262, 149 A.2d 456, 458 (1959).

The trial court here concluded that Dr. Villare does not have an enforceable contract right because the Policy expressly states that "[a]ppointment to the Medical Staff is a privilege and not a right." (Ex. A at 7-8). Dr. Villare has never claimed that he has a "right" to reappointment. He does claim that he has an enforceable right to have his reappointment application considered in full compliance with the Beebe Policy and standards of fair dealing and due process. He further claims those standards were not obeyed by Beebe in 2005.

After holding that Dr. Villare has no contractual right, the court below disposed of the due process argument based on the defense assertion that it is a litigation afterthought on the part of Plaintiff. The only afterthought originates with the Defense. As pointed out in the Statement of Facts, the President of Beebe and both credentialing experts used the term "due process" in 2012 while describing the reappointment process. The phrase simply means: "fundamental fairness." Black's Law Dictionary, 5th Ed., p. 449. It was not considered controversial at the time, and only became so when the Defense complained that it should not be considered in opposition to its motion for summary judgment filed on July 25, 2013 (D.I. 200) because not explicitly pled in the complaint.

Even assuming there is merit to the claim that a denial of due process is a separate and distinct claim that should be pled, there is no reason that could not be dealt with under the broad powers of Super. Ct. Civ. R. 15(c). The lateness assertion

also rings hollow considering that (1) the Defendant's own witnesses said it applied to the reappointment process long before a motion for summary judgment was filed, and (2), a trial date had not been set. Plaintiff submits it was erroneous for the trial court to eliminate a denial of due process argument from the Plaintiff's case on procedural grounds.

While the Defense and the trial court treated the arguments based on the covenant of fair dealing and due process as separate claims that should be pled and addressed separately, neither of the experts took that approach. The claims are all part and parcel of the same loaf. If they are different, then what are the separate elements of proof? The experts made it clear that the reappointment process has to be fair, non-arbitrary, non-capricious, even-handed and objective. This is made clear in the language of The Policy and comports with common sense as well as the universal practice in hospital credentialing procedures approved by The Joint Commission. Referring to hospital bylaws applicable to peer review proceedings, the *Lipson* court stated that Anesthesia Department Policy requires that when taking disciplinary action, the Department Chairman "must be guided by the due process protection codified ..." in the hospital's bylaws. *Lipson*, 790 A.2d at 1274. Any attempt to legally splice the concepts of fair dealing and due process in the framework of credentialing and hospital staff appointment procedures calls to mind The Myth of Sisyphus.

This Court addressed the implied covenant of good faith and fair dealing in *Nemec v. Shrader*, 991 A.2d. 1120 (Del. 2010). The Court described its use in a "narrow context", which requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct that prevents the other party from receiving the benefits of the bargain. *Id.* at 1126. This case fits easily into that rubric and was so described by the competing experts. The only remaining question was (is) factual: did Beebe act in accordance with those terms or not? The trial court's disposition of this issue raised late by the Defense legal team was erroneous.

The court below followed *Mason v. Cent. Suffolk Hosp.*, 819 N.E.2d 1029 (N.Y. App. Div. 2004), a case that was not briefed by either party when the motion for summary judgment was considered. Although *Mason* concluded that the hospital bylaws did not establish a contract in that instance, which involved flawed surgical judgment and skills, it also stressed the importance of having hospital administrators and physicians deal with questions of skill and judgment. These issues are not involved in this case.[10]

[10]While the gastroenterologist, Dr. Wenner, tried to inject those issues into this case at his deposition, there is no other mention of the 2003 Cain Surgery in the record. Plaintiff submits the Wenner testimony is an invented makeweight that exposes the improper motives Plaintiff alleges. At a minimum, the discrepancy between the published Credentials Committee minutes of October 3, 2005 (A73), and Dr. Wenner's testimony about the influence of the Cain procedure (A207, 213–15), establish a triable issue of fact under either due process standards or, if different, good faith and fair dealing standards. What did the Committee decide and what was its rationale?

In *Mason*, the physician had gone through a full administrative process as required by New York law, Public Health Law §2801-b, and the Public Health Council had rejected his complaint. That law afforded an aggrieved staff physician a remedy outside the internal structures of the hospital.

Unlike New York, Delaware does not provide a remedy for an aggrieved hospital staff physician to pursue outside the terms of his appointment rights to the staff. The physician is consigned to the hospital internal processes which may be misused by persons in positions of power and influence, as Plaintiff alleges here.

The *Mason* court went on to say:

> This does not mean, of course, that the hospital may not expose itself to such liability if it chooses to do so. A clearly written contract, *granting privileges to a doctor for a fixed period of time, and agreeing not to withdraw those privileges except for specified cause*, will be enforced. But the bylaws in this case are not such a contract.

Id. at 1032 (emphasis added). In this case the bylaws (Policy), establish such a contract.

Without recourse to the court system, a Delaware hospital staff physician is left defenseless if the hospital reappointment procedure is abused. The Michigan Supreme Court faced a related question in *Feyz v. Mem'l Hosp.*, 719 N.W.2d 1 (Mich. 2006). There, a hospital staff physician was terminated and the court was asked to follow a common law judicial nonintervention doctrine, founded in part on the belief that courts are ill-equipped to review hospital staffing disputes because

courts lack the specialized knowledge and skills required to adjudicate such disputes. The court rejected the argument that courts are incompetent to review hospital staffing decisions, pointing out that such a claim:

> ... overlooks the reality that courts routinely review complex claims of all kinds. Forgoing review of valid legal claims, simply because those claims arise from hospital staffing decisions, amounts to a grant of unfettered discretion to private hospitals to disregard the legal rights of those who are the subject of a staffing decision ...

Id. at 11. To disallow Dr. Villare's claim here is the equivalent of leaving him, and all others similarly situated, at the mercy of a process that could become arbitrary and meaningless in a particular circumstance.

II. THE TRIAL COURT ERRED WHEN IT HELD THAT PLAINTIFF DID NOT HAVE PROVABLE ECONOMIC AND GENERAL DAMAGES SUFFICIENT TO SUPPORT A JURY VERDICT IN HIS FAVOR. THE DENIAL OF MEDICAL STAFF REAPPOINTMENT TO A PHYSICIAN IN VIOLATION OF HIS ENFORCEABLE CONTRACT RIGHT TO REAPPOINTMENT IN ACCORDANCE WITH HOSPITAL POLICY AND PROCEDURES CAUSES HARM AND DAMAGE TO THE PHYSICIAN.

A. QUESTION PRESENTED

Did the trial court err as a matter of law when it held that the Plaintiff did not present sufficient evidence of economic and general damages to support a jury verdict in his favor? This question was preserved in the trial court's order granting Defendant's Motion for Summary Judgment. (Ex. A).

B. SCOPE OF REVIEW

This Court reviews *de novo* a trial court's grant of summary judgment based on Plaintiff's failure to present *prima facie* evidence of damages. *Kardos v. Harrison*, 980 A.2d 1014, 1016 (Del. 2009) (citing *Brown v. Liberty Mut. Ins. Co.*, 774 A.2d 232, 245 (Del. 2001)); *913 North Mkt. St. Pshp., L.P. v. Davis*, 1998 Del. LEXIS 493.

C. MERITS OF ARGUMENT

The second prong of the trial court's grant of summary judgment is the Defense-asserted lack of specificity through a retained expert witness. The provable reality in this case is that a respected, qualified surgeon was removed from a staff position in a small hospital in a small community. Word travels fast and persons close to the event did not know why. Even Dr. Marvel, arguably the most influential and prominent physician at Beebe, said he did not know why. (A129). Dr. Stancofski, the acting chief of the surgical staff, said he did not know of any other situation where the Credentials Committee denied reappointment after the department chief approved it. (A198). Defense expert, Dr. Donze, referring to the Credentials Committee, said: "I don't know exactly why they felt they needed to make the decision they did based on my review." (A102-03). Dr. Villare, when deposed, described the impact on him in these words:

> That number I gave you is -- could be a starting point. I don't know how you -- you know, sometimes it's hard to put numbers on things. Everything that counts can't always be measured, and my reputation, above all, is very, very important and dear to me. You are asking me to put a number on that. That's my entire career, 25 years of practice. That's important to me. You can take my car, take things I have, take my clothes, steal things from me. Don't hurt my reputation. Don't mar my profession, something I have worked so arduously through college, medical school, getting to know more people.

(A309-10).

In measurable economic loss consequences due to staff removal, Dr. Villare has offered testimony from the accountant who prepares his personal and corporate tax returns.[11] The Defense has not deposed the accountant nor demonstrated any reason why that evidence would not be one measure of damages.

The Defense "economic expert" is also an accountant (A322), who has relied on the Villare tax returns and other data to conclude that his economic loss is $135,603.00 (A328). Whatever conflicts and inconsistencies exist over the claimed economic loss are matters of weight, not admissibility, and should be left to the jury.

In real life terms, Beebe's removal of Dr. Villare from its staff caused him damages, both in economic consequences, and intangible personal harm. The law should provide a remedy under these facts.

The *Granger* court "upheld the trial court's award of general damages to Dr. Granger for breach of that contract and for negligent misrepresentation by [hospital] officials." *Granger*, 2013 La. LEXIS 1539 at *95. The jury had awarded damages for lost income, which was reversed on appeal, and, separately, $1,000,000 in general damages, which the Supreme Court found "no error in the jury's determination that an award of damages ... was warranted." *Id.* at *77.

In *Brader v. Allegheny Gen. Hosp.*, 64 F.3d 869, 878-79 (3rd Cir. 1995) the court reversed dismissal of a breach of contract action brought by a hospital staff

[11] Dr. Villare's only source of income is from his surgical practice. (A269).

physician and noted: "The plaintiff's complaint adequately alleged a causal connection between the breach of contract and damages 'such as the loss of income that he would have had at Allegheny General, loss of personal and professional reputation, emotional distress, expenses for a new job search, and the costs of appeals.'"

Plaintiff submits there is sufficient evidence of damages sustained to submit this issue to a jury.

CONCLUSION

For the reasons stated here, Plaintiff-Appellant, Dr. Villare, respectfully requests the Court to reverse the decisions of the trial court dated March 19, 2014 and May 21, 2014 and remand for trial.

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Dated: July 17, 2014

Exhibit A

Trial Court Opinion Granting
Defendant's Motion For Summary Judgment

Dated March 19, 2014

(D.I. 208)

EFiled: Mar 19 2014 02:14PM EDT
Transaction ID 55172677
Case No. 08C-10-189 JRJ

IN THE SUPERIOR COURT OF THE STATE OF DELAWWARE
IN AN FOR NEW CASTLE COUNTY

ROBERT C. VILLARE, M.D. and DELAWARE VALLEY PHYSICIANS & SURGEONS, PA, Plaintiffs, v. BEEBE MEDICAL CENTER, INC.; CAPE SURGICAL ASSOCIATES, PA; ERIK STANCOFSKI, MD; SOUTHERN DELAWARE SURGERY CENTER, LLC; JAMES SPELLMAN, MD; and JAMES SPELLMAN, MD, LLC, Defendants.	)	C.A. No.: 08C-10-189 JRJ

Submitted: December 16, 2013
Decided: March 19, 2014

Upon Defendants' Motion for Summary Judgment – **GRANTED**

ORDER

AND NOW, TO WIT, this 18th day of March, 2014, the Court having duly considered Defendant Beebe's Motion for Summary Judgment Addressing Plaintiffs' Breach of Contract Claim and Proffered Damages, Plaintiffs' opposition thereto, and oral argument, it is hereby determined that:

1. The facts of this case have been recited in detail in prior opinions.[1] In 1999, Robert Villare, M.D. ("Villare"), was appointed to Beebe Medical Center, Inc.'s ("Beebe") medical staff and given surgical privileges.[2] Villare's surgical privileges had to be renewed biannually, a process known as "credentialing."[3] Around this time, Villare began his own surgical practice, Plaintiff Delaware Valley Physicians & Surgeons, PA ("DVPS"), which relied upon Villare's continued privileges at Beebe.[4]

2. Since his appointment in 1999, Villare completed the credentialing process without incident.[5] For the pertinent period, Villare's privileges were set to expire on July 30, 2005.[6] According to Beebe's Medical Staff Policy on Appointment (the "Appointment Policy" or "Bylaws"),[7] Beebe was to forward Villare a reappointment application five months prior to his current privileges expiration date.[8] Villare alleges Beebe mailed the application to an incorrect

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[1] *See Villare v. Beebe Med. Ctr., Inc.*, 630 F. Supp. 2d 418 (D. Del. 2009); *Beebe Med. Ctr., Inc. v. Villare*, 950 A.2d 658, 2008 WL 2137860, at *1 (Del. May 20, 2008) (TABLE); *Villare v. Beebe Med. Ctr., Inc.*, 2013 WL 2296312, at *1 (Del. Super. May 21, 2013) (Jurden, J.); *see also*, *Villare v. Beebe Med. Ctr., Inc.*, C.A. No.: 05C-10-023 CLS, Mem. Op., Trans. ID 18945342 (Del. Super. Mar. 11, 2008) (Scott, J.)
[2] *Villare*, 2013 WL 2296312, at *1.
[3] *Id.*
[4] Compl., Trans. ID 22038299, at ¶ 13, 15, 19.
[5] *Id.* ¶ 12.
[6] *Id.* ¶ 16
[7] The parties use "Appointment Policy" and "Bylaws" interchangeably. Because the parties consider the Appointment Policy as Bylaws, so will the Court.
[8] *Id.* ¶ 20.

address, resulting in his delayed application process.[9] Beebe acknowledged receipt of Villare's application on June 20, 2005.[10] Villare alleges Beebe then made "unprecedented requests" for more information, to which Villare promptly responded.[11] Villare's privileges were not renewed and ultimately expired on November 1, 2005.[12] Although Villare initially demanded an appeal hearing regarding his lost privileges, he voluntarily withdrew the demand.[13] As a result of his lost surgical privileges, Villare closed DVPS.[14]

3. Villare filed this case on October 20, 2008, alleging, among other things, "breach of contract and breach of duty of good faith and fair dealing,"[15] intentional interference with contractual relations,[16] and civil conspiracy.[17]

4. On August 16, 2012, the Court signed a Stipulation and Proposed Order, dismissing all of Villare's claims except Count I, "breach of contract and breach of duty of good faith and fair dealing" against Beebe.[18]

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[9] *See id.* ¶¶21-30.
[10] *Id.* ¶ 29.
[11] *Id.* ¶ 30.
[12] *Villare*, 2013 WL 2296312, at *1.
[13] Villare Aff. ("Aff"), March 31, 2010, at ¶¶ 8-12.
[14] Compl. ¶ 39.
[15] *Id.* ¶¶ 54-72. Villare asserts that Beebe's Appointment Policy created a contract between Villare and Beebe.
[16] *Id.* ¶¶ 73-78.
[17] *Id.* ¶¶ 114-136. Villare also made federal Sherman Act claims, which prompted the removal of this case to the United States District Court in the District of Delaware. Trans. ID 22966955. District Judge Robinson dismissed the federal claims and remanded the case here for the matter's conclusion. *See Villare v. Beebe Med. Ctr., Inc.*, 630 F. Supp. 2d 418 (D. Del. 2009); Order of Remand, Trans. ID 27832650.
[18] Trans. ID 45941553.

5. On May 21, 2013, the Court granted, in part, Beebe's Motion for Summary Judgment on the Grounds of *Res Judicata*.[19]

6. On December 16, 2013, the Court held oral argument on the instant motion, Beebe's Motion for Summary Judgment as to Breach of Contract and Proffered Damages.

7. Beebe moves for summary judgment on the basis that there is no enforceable contract between the parties and, even if there were, Villare cannot prove damages.[20] Beebe asserts that the plain and unambiguous language of the Appointment Policy explicitly disclaims any right to reappointment:

> Appointment to the Medical Staff is a privilege and not a right. No individual shall be entitled to appointment to the Medical Staff or to exercise particular clinical privileges in the Hospital merely by virtue of the fact that such individual: [...] 3. Has had in the past, or currently has, Medical Staff appointment or privileges at this or any Hospital or health care facility [....][21]

Beebe further asserts that when the credentialing committee requires additional information to consider an application, the applicant bears the burden of supplying the information or risks relinquishment of privileges:

> If at any time an Appointee fails to provide required information pursuant to a formal request by [the credentialing committees], the Appointee's clinical privileges shall be deemed to be voluntarily relinquished until the required

[19] *Villare,* 2013 WL 2296312, at *1.
[20] Deft. Mtn. for Summ. J. ("Op. Br."), Trans. ID 53327660, at 3-10.
[21] Op. Br., Ex. A § 2A.03.

information is provided to the satisfaction of the requesting party.[22]

8. Beebe further argues that Villare cannot articulate a sufficient basis for his alleged breach of contract damages.[23] First, Beebe points out that Villare voluntarily withdrew his expert witness and an expert is required to prove lost profits.[24] Second, Beebe argues that Villare's damage disclosure sets forth the incorrect damages model of gross revenue rather than lost profits and, by Villare's own admission, the damages are "guestimates."[25]

9. Villare responds that the Appointment Policy constitutes a valid, enforceable contract.[26] Villare also asserts a new claim for Due Process, arguing that his hospital privileges are a fundamentally vested property right which cannot be denied without a hearing.[27] As to Beebe's damages argument, Villare counters that damages are inappropriate for summary judgment consideration and asserts that his accountant will testify regarding his pre-breach tax returns.

10. The standard for summary judgment is well known. Summary judgment must be granted if the moving party establishes that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of

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[22] *Id.* at § 3F.05.
[23] Op. Br. 6-10.
[24] *Id.* 7-8.
[25] *Id.* 7-8, Ex. E.
[26] Pltf. Ans. Br. in Opp. ("Ans. Br."), Trans. ID 53517163, at 2-5. Indeed the question of whether the Hospital's bylaws/Appointment Policy creates a contract is an issue of first impression.
[27] *Id.* 5-6.

law.[28] The non-movant cannot genuine factual issues with bare assertions, but must produce facts which would sustain a verdict in its favor.[29] The Court considers the facts in the light most favorable to the non-moving party.[30]

11. The Court will not consider Villare's Due Process claim. Villare's complaint, filed in 2008, does not set forth a Due Process violation claim and he cannot raise it now, six years later, in the posture of a summary judgment opposition. Even if the claim were allowed, to the extent such a basis has been established, the claim is meritless because Villare himself admitted that he demanded a hearing (without the advice of counsel), but subsequently withdrew the request (after being advised by counsel).[31]

12. As to the enforceability of the Appointment Policy as a contract between the parties, jurisdictions are split and Delaware has yet to decide the issue.[32] In *Mason v. Central Suffolk Hospital*, the New York Court of Appeals set

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[28] *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043, 1050 (Del. Super. 2001).
[29] *Atamian v. Hawk*, 842 A.2d 654, 658 (Del. Super. 2003).
[30] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[31] Aff. ¶¶ 8-12.
[32] *See, e.g., Kaufman v. Columbia Mem'l Hosp.*, --- F.Supp.2d ---, 2014 WL 652886, at *14 (N.D. N.Y. Feb. 19, 2014) (finding no contract in most circumstances) (discussing *Mason v. Cent. Suffolk Hosp.*, 819 N.E.2d 1029 (N.Y. 2004)); *Brintley v. St. Mary Mercy Hosp.*, 2013 WL 6038227, at *1 (6th Cir. Nov. 15, 2013); *Medical Staff of Avera Marshall Reg'l Med. Ctr.*, 836 N.W.2d 549 (Minn. Ct. App. 2013) (the court analyzed the issue under Minnesota's contract formation law and found the parties had a preexisting duty, therefore, the bylaws did not create a contract) (also finding that under the bylaws' plain language, the hospital could unilaterally amend the bylaws, which emphasized the hospital's ultimate control); *Granger v. Christus Health Cent. Louisiana*, 2013 WL 3287128, at *1 (La. Aug. 30, 2013) (finding bylaws create a contract if Louisiana's contract requirements are fulfilled: capacity, consent, a lawful cause, and a valid object); *Hildyard v. Citizens Med. Cent.*, 286 P.3d 239 (Kan. Ct. App. 2013) (finding no

forth the general policy reasons that deter enforcing bylaws as a contract.[33] Even with the policy considerations, the *Mason* court concluded that in certain instances, hospitals cannot avoid liability, for instance, "[a] clearly written contract, granting privileges to a doctor for a fixed period of time, and agreeing not to withdraw those privileges except for specified cause, will be enforced."[34] The *Mason* court did not find the bylaws at issue to be such a contract.[35]

13. The Court finds *Mason* persuasive, which is supported by Delaware's own case law addressing that "[l]ike Delaware, New York follows traditional contract law principles."[36] An enforceable contract under Delaware law requires "an offer, an acceptance, and consideration."[37] Similar to *Mason*, the Court finds the Bylaws here do not create an enforceable contract because the Bylaws expressly state that "[a]ppointment to the Medical Staff is a privilege and not a

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contract, the court stated "Kansas law requires an intent to be bound and a meeting of the minds on all essential terms of a contract); *Kessel v. Monongalia Cnty. Gen. Hosp.*, 600 S.e.2d 321 (W.Va. 2004) (holding bylaws are not a contract between hospital and staff physician); *Houston v. Intermountain Health Care, Inc.*, 933 P.2d 403 (Utah Ct. App. 1997) (bylaws are "a contract between the hospital and physician"); *Macomb Hosp. Centr. Med. Staff v. Detroit-Macomb Hosp.*, 1996 WL 33347517, at *1 (Mich. Ct. App. Dec. 20, 1996) (bylaws do not constitute enforceable contract); *Terra Haute Reg'l Hosp. v. El-Issa*, 470 N.E.2d 1371 (Ind. Ct. App. 1984) (finding bylaws created a contract based, in part, on mutuality of obligation); *Anne Arundel Gen. Hosp., Inc. v. O'Brien*, 432 A.2d 483 (Md. Ct. Spec. App. 1981) (bylaws have force and effect of an enforceable contract).

[33] 819 N.E.2d 1029, 1031-32 ("It is preferable for hospital administrators who decide whether to grant or deny staff privileges to make those decisions free from the threat of a damages action against the hospital. It is not just in a hospital's interest, but in the public interest, that no doctor whose skill and judgment are substandard be allowed to treat or operate on patients.").

[34] *Id.* at 1032.

[35] *Id.*

[36] *In re IBP, Inc. Shareholders Litigation*, 789 A.2d 14, 54-55 (Del. Ch. 2001) (citing several Delaware cases).

[37] *Patel v. Patel*, 2009 WL 427977, at *3 (Del. Super. Feb. 20, 2009) (Cooch, R.J.).

right"[38] and otherwise set forth the process to acquire Medical Staff privileges.[39] In other words, the Bylaws provisions at issue are not written to provide a basis for breach of contract, but to set forth a procedural process. There is no express intent to be bound by the provisions at issue or any indicia of a promise.[40] Moreover, it seems Villare violated the procedures when he failed to complete the administrative appeal process by withdrawing his demand for a hearing.

14. Even if the Appointment Policy were a contract, Villare's breach of contract claim still fails because he is unable to prove damages. In a breach of contract claim, damages are intended to "restore the injured party to the position it would have been in had the breach not occurred."[41] Villare does not contest that the proper measure of damages is lost profits and that an expert is necessary.[42] Indeed, "no recovery can be had for loss of profits which are determined to be uncertain, contingent, conjectural or speculative."[43] The law requires "a sufficient evidentiary basis for making a fair and reasonable estimate of damages."[44]

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[38] Op. Br., Ex. A

[39] The Court points out that Villare failed to exhaust the underlying remedies. Although he demanded an appeal after failing to renew his privileges, he voluntarily withdrew his demand for a hearing. *See Mason*, 819 N.E.2d at 1032 (finding the "relevant provisions of the bylaws are procedural, not substantive").

[40] Villare's act of simply completing the application and credentialing process in accord with the Bylaws does not create a contract or a property right.

[41] *Frontier Oil Corp. v. Holly Corp.*, 2005 WL 1039027, at *39 (Del. Ch. Apr. 25, 2005) (Noble, V.C.).

[42] *See* Ans. Br. 7; Deft. Reply Br. 5.

[43] *Pharmathene, Inc. v. Siga Technologies, Inc.*, 2011 WL 4390726, at * 31 (Del. Ch. Sept. 22, 2011) (Parsons, V.C.)

[44] *Id.*

15. After six years of litigation, Villare does not have an expert to prove damages, and admits that he only has "guesstimates." Further, Villare has submitted a damages disclosure not related to lost profits.[45] All Villare has are his tax returns to show "gross receipts" and personal income. Villare claims that his personal accountant will testify, but the accountant was not timely disclosed as an expert and, at this point, the Court is not going to permit it. In the end, Villare is unable to present a "sufficient basis" upon which a jury could find a "fair and reasonable estimate" of his lost profit damages.[46]

For the foregoing reasons, Defendant Beebe's Motion for Summary Judgment Addressing Plaintiffs' Breach of Contract Claim and Proffered Damages is **GRANTED**.

IT IS SO ORDERED.

Jan R. Jurden, Judge

Cc: All counsel via LexisNexis

[45] Op. Br., Ex. E.
[46] *Pharmathene, Inc.*, 2011 WL 4390726, at *31.

Exhibit B

Trial Court Opinion Denying
Plaintiff's Motion For Reargument

Dated May 21, 2014

(D.I. 213)

IN THE SUPERIOR COURT OF THE STATE OF DELAWWARE
IN AN FOR NEW CASTLE COUNTY

Robert C. Villare, M.D. and Delaware Valley Physicians & Surgeons, P.A.,	)	
Plaintiffs,	)	C.A. No.: 08C-10-189 JRJ
v.	)	
Beebe Medical Center, Inc.; Cape Surgical Associates, PA; Erik Stancofski, M.D.; Southern Delaware Surgery Center, LLC; James Spellman, M.D.; and James Spellman, M.D., LLC,	)	
Defendants.	)	

ORDER

AND NOW, TO WIT, this 21ST day of May, 2014, the Court having duly considered Plaintiff's Motion for Reargument and Defendant Beebe Medical Center, Inc.'s Opposition thereto,

IT IS HEREBY ORDERED THAT the motion is **DENIED**. The Court does not find that it has overlooked a precedent or legal principle that would have controlling effect, or that it has misapprehended the law or facts such as would affect the outcome of the decision.[1]

Jan R. Jurden, Judge

[1] *See Lovett v. Chenney*, 2007 WL 1175049, at * 1 (Del. Super. April 4, 2007).