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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 REPLY BRIEF

HUDSON & CASTLE LAW, LLC

/s/ Ben T. Castle
Ben T. Castle, Esq. (#520)
2 Mill Road Suite 202
Wilmington, DE 19806
(302) 428-8800
Attorney for Appellant

Dated: September 2, 2014

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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 REPLY TO APPELLEE'S CONTRARY CONTENTION.

Appellee Beebe's reliance on the "no right to reappointment" language in the Policy overlooks the several mutual rights and obligations spelled out in the Policy which bind both physician and hospital. Dr. Villare has maintained throughout this litigation that the hospital Policy accords him an enforceable right to be reappointed in accordance with the procedures embraced in the Policy. Stated differently, the hospital cannot deny a staff physician reappointment without demonstrated good cause.

Beebe cites *Weichert Co. of Pa. v. Young*, 2007 Del. Ch. LEXIS 170 (Del. Ch., Dec. 7, 2007) (See p.11), a case involving a claim of breach of a restrictive covenant by a real estate agent. The agent had signed the covenant when he was an at-will employee and disputed that he was bound by the alleged contract for lack of consideration. The court ruled as a "matter of law" that employment or continued employment serves as consideration to support an at-will employee's agreement to a restrictive covenant. *Id.* at *9 (citations omitted). The situation here is analogous. Though not an employee of Beebe, Dr. Villare served as a hospital staff physician,

had obligations that run to Beebe and vice versa. His continued performance of these duties constituted consideration to require Beebe to follow its Policy provisions governing reappointment of staff physicians.

Beebe contends that this "Court should not attempt to create new case law or a new cause of action under the guise of interpreting the policy." (Appellee's Answering Br. at p.21). But the obverse of that proposition is the untenable conclusion that a satisfactorily performing hospital staff physician is constantly in the line-of-fire of a capricious and vindictive bureaucracy. With regard to the admonition against creating "new case law," Beebe studiously avoids mention of the "unbroken line of decisions dating back several generations" holding that corporate bylaws are contractually enforceable. *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934, 955 (Del. Ch., 2013).[1] To hold that the Beebe Policy does not establish enforceable contract rights would indeed chart a new and potentially confusing path.

Beebe's public policy argument is basically an *in terrorem* claim that if the Beebe Policy is held to be an enforceable contract, the "floodgates to claims from disgruntled physicians" will be opened. (Appellee's Answering Br. at p.25). There is no evidence to support such a remark. Any physician resisting arbitrary hospital

[1] This argument was advanced in the Brief of *Amicus Curiae* Association of American Physicians & Surgeons at p. 12, which Beebe does not deign to mention, much less address.

decision-making will always have an uphill climb, hardly the equivalent of a floodgate.

Beebe embraces the trial court's reliance on *Mason v. Cent. Suffolk Hosp.*, 819 N.E.2d 1029 (N.Y. App. Div. 2004)[2] without coming to grips with the New York statutory provision of an outside-the-hospital protection of physician staff privileges. That is a cardinal difference from Delaware's lack of any insulation from hospital administration action, other than our court remedies. As the *Amicus* brief aptly observes (*Amicus* Br. at p.4), Pennsylvania, New Jersey and Maryland all have concluded that a staff physician's protection resides in the contractually enforceable bylaws. Nowhere does the Answering Brief address these decisions.

Beebe's Answering Brief reduces Dr. Villare's due process argument to a footnote on Constitutional 14th Amendment law (Appellant's Answering Br. at p.20), and nowhere acknowledges that its CEO, Mr. Fried, and credentialing expert witness, Dr. Donze, both recognized that procedural due process was an inherent right to which Dr. Villare was entitled. And these points were made without controversy long before Beebe ever filed its motion for summary judgment. (A154, 227-8, 83). For Beebe to advance a claim that Dr. Villare's due process argument

[2] It bears repeating that the *Mason* holding was never raised by Beebe in its motion for summary judgment.

was concocted to defeat its motion for summary judgment is simply not supported by the record.

Likewise, Beebe does not attempt to unravel the shambles of the Credentialing Committee's considerations of Dr. Villare's reappointment application. How many "hearings" were there? What role did the outdated Cain procedure play in those meetings? How did a committee composed of non-surgeons determine that Dr. Villare lacked "clinical competence," especially in the face of Dr. Stancofski's approval? How much influence did Dr. Wenner, a non-member, have? Why was Dr. Villare never interviewed? No matter how viewed, the description of the proceedings before this Committee does not approach any level of basic fairness. *Frontier Oil Corp. v. Holly Corp.*, 2005 Del. Ch. LEXIS 57 (Del. Ch., Apr. 29, 2005) reiterated that the covenant of good faith, and fair dealing is implied in any Delaware contract, and arises from "fundamental notions of fairness." It "is a judicial convention designed to protect the spirit of an agreement when, without violating an express term of the agreement, one side uses oppressive or underhanded tactics to deny the other side the fruits of the parties' bargain." *Id.* at *105-6 (citations omitted). In a summary judgment setting, the record clearly identifies questions of unfair conduct and underhanded tactics at the Credentials Committee level, a critical step in the reappointment process, which is then perpetuated in the following approval steps, previously described as perfunctory rubber-stamping. (Appellant's Opening Br. at

pp.5-6). At a minimum, there is a question of material fact about the fairness of the entire process.

Appellant's Answering Brief concludes (at p.26) that Dr. Villare "declined to take advantage of [the administrative hearing] process." There is no citation to any part of the record that substantiates this assertion which is tantamount to euphemism abuse. The record only reveals that Dr. Villare never had a hearing scheduled, and that the attorney for Beebe advised that it would be a meaningless formality because he was "done." (A279-80, 287-8).

For these reasons, and those stated in his Opening Brief, Plaintiff, Robert C. Villare, M.D., respectfully requests the Court to reverse the decision of the trial court and remand the matter for trial on the merits.

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 REPLY TO APPELLEE'S CONTRARY CONTENTION.

While arguing for a tightly restricted evidence window for Plaintiff's proof of damages, Beebe fails to admit that its own damages witness, an accountant at Santora & Co. (A322), established the monetary value of the loss at $135,603.00 (A328). The Santora report, dated July 9, 2012, is based on Dr. Villare's tax returns and number of performed surgical procedures. The tax returns and surgical history are fact, and tax returns after 2011 are available. Beebe does not advance a plausible reason why Dr. Villare's own accountant, David Hellburg, is ineligible to testify, as both a fact witness and accounting expert that there was a decline in Dr. Villare's income after his loss of staff privileges when he could no longer perform surgery. This is not a complicated scenario that requires anything more than Dr. Villare's testimony that he could no longer operate coupled with his personal tax return evidence.

Beebe asserts that the damages model for Dr. Villare's breach of contract claim is "lost profits," citing *American Original Corp. v. Legend, Inc.*, 689 F. Supp. 372 (D. Del., June 8, 1988). (Appellant's Answering Br. at p.12). That case involved

a dispute between commercial fishing companies that harvested and sold surf clams and quahogs. The parties there stipulated that loss of profits was the appropriate measure of damages. Here, the drop in Dr. Villare's personal earned income as reflected in his tax returns is the equivalent of lost profit.

In *Fletcher Int'l, Ltd. v. ION Geophysical Corp.*, 2013 Del. Ch. LEXIS 295 (Del. Ch., Dec. 4, 2013), the court determined "expectation damages," stating that "[d]amages for breach of contract are determined by the reasonable expectations of the parties before the breach occurred." *Id.* at *67 (citing *Duncan v. TheraTx, Inc.*, 775 A.2d 1019 (Del. 2001)). There, the court constructed a "hypothetical negotiation" between the contracting parties to ascertain a monetary damage award. Here, absent Beebe's breach of its reappointment Policy, Dr. Villare had the expectation that his operating privileges would remain intact, that his surgical practice would continue as before, and that he would be held in professional esteem by his colleagues and patients.

The other aspect of Dr. Villare's claim for "general damages," as allowed in *Granger v. Christus Health Cent. La.*, 2013 La. LEXIS 1539 and *Brader v. Allegheny Gen. Hosp.*, 64 F.3d 869 (3rd Cir. 1995), admittedly, is more involved. The reality is that a breach of the hospital Policy causing a surgeon to lose his privileges is a professional and personal infliction of reputational and economic harm. A path to allow provable damages in a breach-of-contract context entails a

fresh approach to this specific factual situation. Beebe argues that these cases are inapposite and that there is no "compelling reason" that warrants an allowance of "tort-based damages" in a breach of contract claim. However, punitive damages are recoverable under Delaware law in "egregious cases where the breach of contract is willful and malicious." In order to be willful or wanton, the conduct must be designed to injure the other party. *American Original Corp. v. Legend, Inc.*, 689 F. Supp. 372, 380 (D. Del., June 8, 1988) (citations omitted). The propriety of submitting Dr. Villare's punitive damages claim to the jury has been reserved by Beebe in the draft pre-trial stipulation. (B289). The trial court did not address this aspect of Dr. Villare's claim.

Plaintiff respectfully submits that Delaware contract damages law is sufficiently flexible to allow an award of non-economic and punitive damages to a hospital staff physician denied staff reappointment (and thus his livelihood) under circumstances that are proved to be willful and vindictive without any provable cause.

CONCLUSION

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

HUDSON & CASTLE LAW, LLC

/s/ Ben T. Castle
Ben T. Castle, Esq. (#520)
2 Mill Road Suite 202
Wilmington, DE 19806
(302) 428-8800
Attorney for Appellant

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