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NO. 20-CI-6143

JEFFERSON CIRCUIT COURT
DIVISION TWELVE (12)
HON. SUSAN SCHULTZ GIBSON, JUDGE

MEDIA 5022

ELECTRONICALLY FILED

JOHN MITCHELL FARMER, M.D.

PLAINTIFF

v.

DEFENDANTS' TRIAL MEMORANDUM

BAPTIST HEALTH MEDICAL GROUP, INC. and
BAPTIST HEALTH MADISONVILLE, INC.

DEFENDANTS

*** **

Defendants Baptist Health Madisonville, Inc. (BHM) and Baptist Health Medical Group, Inc. (BHMG), by counsel, and pursuant to the Court's standing Civil Jury Trial Order, hereby submit the following trial memorandum:

I. Factual Situation

Plaintiff John Mitchell Farmer, Jr., M.D. was a resident in the Family Medicine Residency Program at Baptist Health Madisonville from late summer 2017 until early September 2020. On November 4, 2019, during Dr. Farmer's third year of residency, the mother of two minor patients presented a verbal complaint regarding Dr. Farmer's behavior during her children's appointment at the residency clinic that day. She expressed concern for him, that he was moving from side to side and picking at his arms and face, and said she thought he "might be on something." Upon receiving the complaint, BHM's Residency Director, Dr. Diana Nims called the Human Resources director who told her which policy to apply, and then convened a meeting with Dr. Wayne Lipson, the hospital's Chief Medical Officer; Dr. James Armstrong, the Medical Staff president; and the hospital president; and Rhonda Florida with the Medical Staff to discuss next steps. As it was the end of the day, Dr.

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Nims also confirmed that the mother was Farmer's last patient of the day and he had no other clinical responsibilities that evening

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The evidence in the record reflects that those in the meeting considered a number of factors, including Dr. Farmer's history regarding alcohol abuse – specifically, that he had a DUI in 2013 and that he had previously been evaluated by the Kentucky Physician Health Foundation (“KPHF”) but had failed to follow the KPHF's recommendation that he complete a 96-hour inpatient program. After careful consideration, the group agreed in the best interest of patient safety as well as Dr. Farmer's welfare to refer him for evaluation to the KPHF in accordance with KRS 311.616 – 311.6191. Dr. Lipson attempted to contact the KPHF but as it was after hours and the office was closed, he sent an email to Dr. Greg Jones, the KPHF's Medical Director summarizing the concern regarding Dr. Farmer and the patient complaint. The group also discussed whether to suspend Dr. Farmer's Medical Staff privileges but decided instead to inform him the next morning about the decision to have a KPHF evaluation.

On November 5, 2019, Dr. Farmer was evaluated by the KPHF. On November 12, 2019, Dr. Jones informed BHM (via email to Dr. Lipson) that the results of the KPHF-ordered testing raised serious concerns about Dr. Farmer's ability to safely practice until he completed a 96-hour recommended inpatient program and further evaluation. Dr. Jones also informed Dr. Lipson that because of Dr. Farmer's concerning test results, the KPHF was legally obligated to inform the Kentucky Board of Medical Licensure (“KBML”) of the KPHF's assessment and recommendation, and he recommended that Dr. Lipson likewise do the same, as required by KRS 311.606. The KBML then opened an investigation, and required Dr. Farmer to sign an Interim Agreed Order that prevented him from practicing medicine until approved to do so by the KBML. Likewise, the KBML also filed a National Practitioner's Databank Report (“NPDB Report”), as required under federal law based on the circumstances.

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In early December 2019, Dr. Farmer completed a 96-hour comprehensive inpatient evaluation at the MARR Program in Georgia, as recommended by the KPHF. The MARR program diagnosed him with an alcohol use disorder, "mild." That diagnosis, and a summary of related findings, were presented to the KBML Inquiry Panel, along with the KPHF's recommendations. Upon deliberation, the KBML offered to remove the restrictions on Dr. Farmer's medical license if he agreed to sign a Letter of Agreement which included a five-year monitoring contract with the KPHF. Dr. Farmer initially refused to sign the associated contract until February 18, 2020, and therefore could not legally return to clinical care until after that date. Ultimately, Dr. Farmer completed his residency program on September 3, 2020, just over two months past his previously expected completion date of June 30, 2020.

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II. Plaintiff's Allegations Against the Defendants

Dr. Farmer has brought two causes of action against the hospital (BHM) – one claim for breach of contract (specifically, that BHM breached Dr. Farmer's residency agreement by referring him to the KPHF), and one claim for tortious interference with prospective business advantage (also based on the November 4, 2019 KPHF referral). The Amended Complaint also alleges the tortious interference claim against Baptist Health Medical Group (BHM), based solely on vicarious liability due to Dr. Nims' and Dr. Lipson's employment with BHM. Dr. Farmer further seeks damages for: lost wages, under-employment at a lower-paying job than he expected, the fees related to the MARR assessment and compliance with the KPHF monitoring contract, the KPHF and TN Medical Foundation Fees, legal fees related to the KBML matter, and also special damages for humiliation, mental and emotional distress. Defendants dispute both claims, and further dispute that the KPHF referral caused any of the damages alleged.

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III. Anticipated Issues of Law and Fact

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Defendants have asserted a statutory defense under KRS § 311.6191 which protects all those “who furnish information to the [KPHF] in good faith and without actual malice” from liability for any claims or damages resulting “from any statement, decision, opinion, investigation, or action” taken by the KPHF. This Court has determined that KRS § 311.6191 is a qualified privilege. The existence of a privilege, and its application, is a question of law for the court. *Harstad v. Whiteman*, 338 S.W.3d 804 (Ky. App. 2011); *Cline v. T. J. Samson Cmty. Hosp.*, Ky. App. Unpub. LEXIS 380, at *20 (Ky. App. June 3, 2016) (citations omitted). The plaintiff has the burden of showing abuse of privilege by showing defendants acted maliciously, and if the plaintiff fails to do so, the question of a qualified privilege remains “purely a question of law.” *Toler v. Süid-Chemie, Inc.*, 458 S.W.3d 276, 284-85 (Ky. 2014). Therefore, if Dr. Farmer fails to show that BHM acted with actual malice when referring Dr. Farmer to the KPHF on November 4, 2019, Defendants cannot be held liable for his claims or alleged damages.

As noted above, Dr. Farmer has asserted a breach of contract claim and an intentional tort claim. The parties do not appear to dispute that Dr. Farmer and BHM entered into a Residency Agreement on June 28, 2019. Plaintiff has asserted several ways in which that agreement was breached, based on the actions of Dr. Nims and Dr. Lipson. To prevail on this claim, Dr. Farmer must establish: 1) existence of a contract; 2) breach of that contract; and 3) damages flowing from the breach of contract. *Barnett v. Mercy Health Partners-Lourdes, Inc.*, 233 S.W.3d 723, 727 (Ky. App. 2007). Even if the evidence presented at trial sufficiently establishes all the elements of the contract claim, Dr. Farmer must properly link his alleged damages to that claim. A party claiming damages for breach of contract is obligated to use reasonable efforts to mitigate those damages, and must act reasonably so as not to enhance the damages caused by the breach. *Deskins v. Estep*, 314 S.W.3d 300 (Ky. App. 2010); *Jones v. Marquis Terminal, Inc.*, 454 S.W.3d 849 (Ky. App. 2014) (citation omitted). In Kentucky,

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the general “measure of damages for breach of contract is ‘that sum which will put the injured party into the same position he would have been in had the contract been performed.’” *Ford Contracting, Inc. v. Ky. Transp. Cabinet*, 429 S.W.3d 397, 407 (Ky. Ct. App. 2014) (quoting *Hogan v. Long*, 922 S.W.2d 368, 371 (Ky. 1995)). Here, Dr. Farmer has claimed damages related to the KPHF Contract and the Letter of Agreement, both of which he agreed to and did not challenge at the time through the administrative process provided for doing so.

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To prevail on a claim for tortious interference with a prospective business advantage, Dr. Farmer must establish the following elements: (1) the existence of a valid business relationship or expectancy; (2) that the defendant was aware of this relationship or expectancy; (3) that the defendant intentionally interfered; (4) that the motive behind the interference was improper; (5) causation; and (6) special damages. *PBI Bank, Inc. v. Signature Point Condos. LLC*, 535 S.W.3d 700, 715 (Ky. App. 2016). To prevail on this claim, the plaintiff “must show malice or some significantly wrongful conduct.” *Id.* (quoting *Nat’l Collegiate Athletic Ass’n By & Through Bellarmine Coll. v. Hornung*, 754 S.W.2d 855, 859 (Ky. 1988)). “[M]ere supposition and speculation [as to defendants’ motive] is insufficient” to meet this standard. *Snow Pallet, Inc. v. Monticello Banking Co.*, 367 S.W.3d 1, 6 (Ky. App. 2012). Whether Dr. Farmer can meet his burden of establishing each of these elements will be a key issue in this trial.

Defendants dispute that they breached any portion of the Residency Agreement, that Plaintiff has identified a valid business expectancy with any prospective employer, that Defendants knew of any valid prospective business relationship when referring Plaintiff to the KPHF, and that Defendants intentionally interfered with any such prospective business relationship. Defendants also dispute that their motive in making the KPHF referral was improper or malicious. The question of motive, and particularly whether Plaintiff can produce sufficient evidence of malice on the part of Defendants is a key issue of fact given the nature of the claims. The issue of damages is also an important issue of

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fact. Defendants dispute that they caused any of Plaintiff's alleged damages, while Plaintiff asserts that the November 4, 2019 referral set into motion a string of events that caused all of his alleged damages. To recover, Plaintiff will have to prove that such damages were a direct result of the referral and were reasonably foreseeable.

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The relevancy of evidence is a question of law that lies within the discretion of the trial court. *Reece v. Nationwide Mut. Ins. Co.*, 217 S.W.3d 226, 232 (Ky. 2007). Defendants have filed several motions *in limine* regarding relevance. Several are related to anticipated arguments Plaintiff may make at trial that are have no relevance to the elements of the causes of action discussed above. Defendants have filed several other motions *in limine* raising various issues of law and evidence. The Court's rulings on several of those motions indicate the issue may come up again at trial depending on the evidence presented. Defendants adopt and incorporate by reference as if fully set forth herein its previously filed Motions *in Limine*, in the event that Plaintiff opens the door at trial to their renewal. Additionally, Defendants have filed a motion to compel Plaintiff's evaluation/treatment records from the KPHF and MARR evaluations. This Court has denied that motion, but to the extent Plaintiff has placed his mental and emotional health at issue in this trial, he has made them relevant, and it is prejudicial to Defendants to defend themselves without that information. Defendants also have asserted that they did not cause all of Plaintiff's alleged damages, yet Defendants have been prevented from acquiring the information they need in fully defending themselves on causation. Defendants also have sought the testimony of Dr. Greg Jones, the former Medical Director of the KPHF, and have taken the deposition of the current director, Dr. Tina Simpson. The Court has ruled that, with respect to either of them testifying, certain topics directly related to Dr. Farmer are privileged. The portions of their testimony that are not so privileged, however, are admissible at trial, it will be prejudicial to Defendants if such testimony is excluded.

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Accordingly, Defendants reserve the right to object to and assert additional evidentiary issues that may arise prior to and during trial.

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Respectfully submitted,

/s/ Robert J. Benvenuti III

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CERTIFICATE OF SERVICE

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I hereby certify that a true and correct copy of the foregoing was filed with the Clerk of the Jefferson Circuit Court electronically by the Kentucky Courtnet 2.0 e-filing system on this 18th day of April, 2023, which will send electronic notice of filing to ECF counsel of record as follows.

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