NO. 20-CI-006143

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

JOHN MITCHELL FARMER, M.D. PLAINTIFF

V.

MEMORANDUM AND ORDER

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

* * * * *

This matter is before the Court on the Motion of Defendant's, Baptist Health Medical Group, Inc. ("BHMG") and Baptist Health Madisonville, Inc. ("BHM") (collectively, "Defendants"), for Summary Judgment. The Court, for the following reasons, does **deny** the motion.

FACTS

This case involves a situation wherein Plaintiff, John M. Farmer, M.D. ("Dr. Farmer" or "Plaintiff"), asserted tort claims based on BHM's providing information about him to the Kentucky Physicians' Health Foundation ("KPHF"), while he was a resident in BHM's Family Medicine Residency Program. Defendants have asserted an affirmative defense under KRS 311.6191 and contend that the statute provides them with complete immunity from Plaintiff's claims.

Dr. Farmer attended medical school at the University of Kentucky School of Medicine and graduated in June 2017. Dr. Farmer "matched" with BHM's residency program in family medicine in Madisonville, Kentucky and began his residency with BHM in July 2017. Diana Nims, M.D., Program Director, supervised Dr. Farmer. Wayne Lipson, M.D., was the Chief Medical Officer of BHM. James Armstrong, M.D., was the President of the BHM Medical Staff.

Late in the afternoon of November 4, 2019, during Dr. Farmer's third year of his residency, the mother of two minor patients presented a verbal complaint to the office manager of BHM's residency clinic regarding Dr. Farmer's alleged behavior during her children's appointment that same afternoon. The mother expressed concern because Dr. Farmer was behaving differently than in past office visits, appearing jittery and picking at places on his arm and nose – she thought that he "was on something."[1] The office manager reported the concern of the patients' mother to Dr. Nims, who confirmed that Dr. Farmer had no further clinical duties for the next morning.[2]

Dr. Nims then called the Human Resources Director and Designated Institute Official, Lorie Oglesby, to inquire about how to handle the complaint. Dr. Nims also spoke with two physicians who were supervising the residents that day, though they did not recall anything unusual about Dr. Farmer. Pursuant to applicable policy, Dr. Nims and Dr. Lipson then met with Dr. Armstrong to discuss the situation.

Drs. Lipson, Armstrong and Nims were not in the position to make an independent determination on the evening of November 4, 2019, with respect to whether Dr. Farmer was, in fact, impaired that day in a manner that would affect his ability to safely provide patient care, in that they could not tell specifically from the complaint of the patients' mother what, if anything, could have caused Dr. Farmer to behave in a way that led the patients' mother to express the concern. When discussing what, if any, steps should be taken to better discern whether Dr. Farmer may have some physical or mental condition that could impair his ability to safely practice medicine, they were concerned about Dr.

[1] (See, Dr. Nims's letter to Dr. Armstrong, dated November 4, 2019, reporting the mother's complaint).

[2] According to Dr. Farmer, he had left the clinic and went home as soon as the appointment ended. (Am. Compl. at ¶ 15).

Farmer's past history of alcohol abuse – specifically, his past DUI and the fact that he previously had been evaluated by the KPHF while he was in medical school, wherein he failed to follow the KPHF's recommendation that he complete a 96-hour inpatient evaluation.[3]

None of the doctors at the meeting had, or were required to have, specialized training in addiction or other kinds of impairment. They did not know from the circumstances how best to evaluate Dr. Farmer, given his history and the nature of the concerns. Dr. Nims disclosed during the meeting that she had previously received a report that Dr. Farmer had made comments indicating he may have suicidal thoughts.[4] It also appears that they knew, or learned during the meeting, that Dr. Farmer often appeared rather "jittery" with somewhat unusual gestures, and at least one of them knew he had an ADHD diagnosis.[5] They also considered that the patients' mother had seen Dr. Farmer several times before, yet she thought his behavior was different on the afternoon of November 4, 2019.

Ultimately, it was decided that KPHF would be contacted for assistance in evaluating Dr. Farmer. It was understood that the applicable internal policy gave them

[3] In 2013, while Dr. Farmer was in medical school, he was arrested for driving under the influence. In 2016, Dr. Farmer disclosed the DUI on his residency applications, which triggered a meeting with two of the medical school deans, Todd Cheever, M.D. and Brian Adkins, M.D., who asked him to contact the KPHF. After being contacted, the KPHF recommended that Dr. Farmer complete a 96-hour inpatient evaluation. Dr. Farmer planned to complete the evaluation in June 2017 between his graduation from medical school and the beginning of his residency. However, Dr. Farmer was required to do an extra month of an autopsy rotation during that time in order to graduate from medical school. Dr. Farmer discussed the conflict with Dr. Atkins, who advised him to complete the autopsy rotation since it was required for graduation. Dr. Farmer disclosed his DUI to BHM when he applied for its residency program. Neither Dr. Farmer's DUI nor his inability to complete the evaluation prevented him from graduating medical school or stopped BHM from hiring him as a resident.

[4] At some point during Dr. Farmer's residency, he joked to another resident that he would rather kill himself then round with a certain physician, which prompted a referral to a mental health physician, Richard Land, M.D. After Dr. Farmer explained to Dr. Land that it was just a joke, Dr. Land required no further counseling or treatment.

[5] Dr. Farmer was diagnosed with ADHD in 2005, which he managed through prescribed medicine and regular appointments with his doctor.

broad discretion with respect to conducting an investigation under such circumstances, including the option of referring a physician to an outside party such as KPHF for an evaluation.[6] In accordance with KRS 311.616 through KRS 311.6191, it was decided that KPHF's expertise would be utilized to render an independent evaluation of the situation to best ensure the safety of patients and out of concern for Dr. Farmer.

By email message, dated November 9, 2019, from Dr. Lipson to Greg Jones, M.D., the then-Director of the KPHF, Dr. Jones was informed of the concern raised and was provided a general description of Dr. Farmer's relevant history as known to them, without disclosing Dr. Farmer's identity, and requesting his "assistance ASAP in regards [sic] to referral to the program and appropriate testing." (Dr. Lipson 11/4/2019 email). Dr. Jones responded by email approximately an hour later, noting that the individual described sounded like someone the KPHF "ought to be working with" and advising BHM to take

[6] Baptist Health has a "Fitness for Duty & Drug Testing" Policy ("Drug Testing Policy"), wherein, upon an employee is suspected of being under the influence of alcohol or drugs, a manager must observe the employee and/or engage in conversation "in order to deduce whether there is a reasonable suspicion that the employee is presently under the influence of any substance which may impair the employee's judgment, coordination, skill or alertness." (Drug Testing Policy at p. 3). "If there is a reasonable suspicion … then the manager will remove the employee from the immediate work area to a private place and inform the employee of the concerns. (*Ibid.*). The manager will then escort the employee to Employee Health, the appropriate medical office, the Emergency Department, or other designated location, and must obtain the employee's consent for an alcohol or drug test and a specimen will be collected by a healthcare professional. (*Ibid.*). The employee "may refuse to consent" to a screening exam, but the employee's refusal "will be considered insubordination and may result in disciplinary action up to, and including, immediate termination." (*Ibid.*). The results are reported to Human Resources for "appropriate action and follow-up." (*Ibid.*).

Baptist Health also has a "Medical Staff/Allied Health Practitioner Policy" ("Medical Staff Policy"), wherein "Physicians and Hospital personnel who have a reasonable suspicion that a Physician appointed to a Medical Staff is impaired" must report that reasonable suspicion of impairment; that, if the physician is providing care to patients in the hospital while impaired, the person making the report "shall immediately report the suspected impairment to Hospital Administration, the Hospital Manager, or a Medical Staff Officer[;]" and that, "[a]ny of these individuals may take such action as deemed reasonably necessary," including, but not limited to, "requesting the physician to voluntary submit to alcohol and/or drug testing[.]" (Medical Staff Policy at p. 2). "If, after discussing the incident(s) with the person who makes a report of suspected impairment, the Hospital President or President of the Medical Staff believes there is enough information to warrant an investigation," he "shall direct an investigation be conducted and that a report thereof be made to the Hospital President and Medical Staff President." (*Id.* at p. 3). The Investigation and report may be made by "an outside consultant." (*Ibid.*).

him off further clinical duty "until we can figure this out." (Dr. Jones 11/4/2019 email). Since it was after hours when the correspondence took place, Dr. Jones expressed urgency about moving quickly the next day. (*Ibid.*). The meeting participants agreed that Dr. Nims and Dr. Lipson would meet with Dr. Farmer the next morning to inform him of the patient complaint and request that he go to the KPHF for an evaluation.

The next morning, on November 5, 2019, a meeting took place with Dr. Farmer as planned and Dr. Farmer agreed to go that day to the KPHF for an evaluation, as Dr. Nims and Dr. Lipson requested. Dr. Farmer stated that he was not impaired the day before and asked to go to the lab near Dr. Nims's office to get drug tested immediately. Dr. Nims denied Dr. Farmer's request, citing concerns about privacy and that he wanted to go to the lab. Dr. Farmer asked to be drug tested at the BHM facility at least five times during that meeting and each request was denied. Dr. Lipson and Dr. Nims told Dr. Farmer that he had an appointment with the KPHF. Dr. Farmer drove himself from BHM in Madisonville to KPHF in Louisville that day – a drive that took over two hours. Dr. Farmer had an energy drink during his drive. When he arrived at the KPHF, the administrative assistant at the facility brought him a bottle of water. Dr. Farmer met with Dr. Jones, answered his questions, and assured Dr. Jones he was not impaired the day before. Dr. Farmer then took urine and blood tests at an outside lab. Dr. Farmer was of the belief that he would be cleared and allowed to resume his residency.

Dr. Farmer's urine test was diluted and unusable. The "alcohol metabolic marker" on the blood test was "very high." Therefore, Dr. Jones recommended a comprehensive evaluation for alcohol use disorder and anticipated that it would result in a treatment recommendation. Later that day, Dr. Jones informed Dr. Lipson that, after interviewing Dr. Farmer, the KPHF recommended he not engage in patient care until the test results

came back, which would likely take a week.[7] As part of Dr. Farmer's evaluation, the KPHF ordered PEth testing. Unlike a simple urine drug screen, a PEth test analyzes an individual's alcohol consumption over a long period of time – the window of detection is typically 2 to 4 weeks, or even longer for those who excessively consume alcohol. (ARUP Laboratories Test Information).

By email, dated November 12, 2019, Dr. Jones informed Dr. Lipson that the results of the KPHF ordered PEth testing raised concerns about Dr. Farmer's ability to safely practice, and that Dr. Jones therefore could not "advocate" Dr. Farmer's return to clinical duties, at least, until he had completed a 96-hour comprehensive evaluation, which, in turn, would likely generate a treatment recommendation. (Dr. Jones 11/12 2019 email). Dr. Jones also informed Dr. Lipson that because of Dr. Farmer's concerning test results, the KPHF would be contacting the Kentucky Board of Medical Licensure ("KBML") about the KPHF's current recommendation,[8] and advised Dr. Lipson that he (Dr. Lipson) was required to also report the incident to the KBML, under KRS 311.611, which Dr. Lipson did by letter, dated November 15, 2019.[9]

The KBML then opened an investigation on or about November 22, 2019, and asked Dr. Farmer to sign an Interim Agreed Order not to practice medicine until approved to do so by the KBML's Inquiry Panel. The KBML investigator told Dr. Farmer that he needed to sign the Interim Agreed Order or the KBML would take emergency action

[7] (See, emails between Dr. Jones and Dr. Lipson, dated November 5, 2019).

[8] Although termed a "recommendation," the reality for licensed physicians in Kentucky is that, if they do not comply with the so-called recommendation, they stand to face licensure action up to and including suspension from the KBML. The only reason Dr. Farmer was able to not complete the evaluation in compliance with the KPHF's prior recommendation in 2016 was because he was a medical student at the time instead of a licensed physician.

[9] Dr. Lipson testified that he drafted the letter to the KBML after being advised to do so by Dr. Jones and after consulting with Baptist Health counsel, Cheryl Harrison. (Dr. Lipson Dep. at p. 112).

against him. Dr. Lipson advised Dr. Farmer to sign the Interim Agreed Order. Dr. Farmer signed the Interim Agreed Order.

The KBML investigator asked Dr. Farmer questions about the events of November 4, 2019, with Dr. Lipson present. The investigator asked Dr. Farmer if there was anyone that he wanted the investigator to speak with and Dr. Farmer said "yes," but Dr. Lipson allegedly cut him off and would not let Dr. Farmer provide the investigator with the names of witnesses. Dr. Farmer wanted the investigator to speak with the attending physicians, Dr. Hargrove and Dr. Hatler, and others who worked with him that day, who could purportedly corroborate that he was not impaired.

The KBML also filed a NPDB Report, as they are purportedly required to do under federal law based on the circumstances. As a result of the KPHF's recommendation and pursuant to the corresponding Interim Agreed Order, Dr. Farmer was not legally able to engage in clinical care at least until further KBML action occurred.

During that time, BHM did not suspend Dr. Farmer from its residency program or otherwise discipline him in any way. Instead, while nothing required her to do so, Dr. Nims, as Director of BHM's residency program, exercised her discretionary authority to substitute a research elective for as many of the required clinical hours as she was permitted to under the American Board of Family Medicine ("ABFM") guidelines in order to keep him from having to finish residency later than expected.

In early December 2019, Dr. Farmer completed the 96-hour comprehensive, inpatient evaluation at the Metro Atlanta Recovery Residences ("MARR") Program in Georgia that was recommended by the KPHF and which he agreed to do. After the evaluation, MARR sent him back to the KPHF with a recommendation that he be

monitored for two years.[10] The KPHF then determined that it would designate Dr. Farmer safe to continue practicing medicine through his residency program only if he entered into and complied with a contractual monitoring relationship with the KPHF. (Am. Compl. at ¶ 37).

On December 11, 2019, Dr. Farmer and Dr. Jones of the KPHF executed a two-year "Contract Letter." The Contract Letter required Dr. Farmer to completely abstain from alcohol and mood-altering drugs, and submit to random drug screens, individual and group therapy, and appointments with a psychiatrist. Any "relapse" or other noncompliance would result in a report to the KBML. Since Dr. Farmer needed the support and advocacy of KPHF to return to his residency program, he had no choice but to execute the Contract Letter in order to return to work.

The recommendation from the KPHF, as well as Dr. Farmer's diagnosis and a summary report of the findings it was based upon, were presented to the KBML Inquiry Panel which met in late December 2019. The KBML considered all the factors communicated to it by the KPHF, among other things. Upon deliberation, the KBML followed the KPHF's recommendation to remove the restrictions on Dr. Farmer's medical license set forth in the Interim Agreed Order so long as he agreed to sign a five-year monitoring contract with a KPHF, and the KBML proposed a Letter of Agreement reflecting the same.[11]

Dr. Farmer, however, did not sign the Letter of Agreement and the related KPHF Contract until February 18, 2020, and therefore he could not legally return to clinical care

[10] At the end of the evaluation, Dr. Farmer received the diagnosis of an alcohol use disorder, mild. (MARR Report at p. 11).

[11] It is typical for the KBML to rely heavily on the KPHF's recommendation in such situations.

until after that date.[12] Dr. Farmer then also had to be reinstated as a billing provider with Kentucky Medicaid, which did not occur until approximately April 10, 2020. Ultimately, Dr. Farmer completed his residency program on September 3, 2020, a little over two months past his previously expected completion date of June 30, 2020.

On or about October 23, 2020, Plaintiff filed the Complaint in this action,[13] alleging breach of his residency contract by referring him to KPHF without first conducting a more thorough internal investigation and testing at BHM's own facility, and tortious interference with his prospective business/employment opportunities through the agents of BHM and BHMG referring him to the KPHF, which allegedly caused him to finish residency later than anticipated and permanently damaged his relationship with the KBML and with future employers. Defendants timely filed an Answer. Discovery ensued.

Defendants make a Motion for Summary Judgment, contending that BHM is entitled to immunity under KRS 311.6191, which applies to Dr. Farmer's claims against BHM; and that, because the record contains no evidence of bad faith or actual malice, BHM is entitled to immunity under KRS 311.6191. Defendants argue that BHMG, which is a separate entity from BHM, is also entitled to summary judgment, since the only individuals mentioned in the Amended Complaint which have caused him damage are Drs. Nims, Lipson, and Armstrong; that the record to date contains no evidence that any of them were acting as agents for BHMG rather than BHM such that Dr. Farmer has not stated a claim upon which relief can be granted against BHMG. Defendants assert that, even if, for the sake of argument, agency did exist between those doctors and BHMG, for

[12] Dr. Farmer had exhausted his potential leave from the residency program and entered a leave of absence on January 28, 2020.

[13] By Agreed Order, entered January 6, 2021, the parties agreed to the filing of the Verified First Amended Complaint, which was filed in the record on or about January 13, 2021.

the reasons explained above, the same immunity under KRS 311.6191 would apply to BHMG.

Dr. Farmer responds that KRS 311.6191 does not bar Dr. Farmer's claims and does not confer immunity upon Defendants; that KRS 311.6191 affords only a qualified privilege and protects only communications made in good faith and without actual malice; and that KRS 311.6191 does not provide Defendants a shield of immunity because their agents, Drs. Nims, Lipson, and/or Armstrong acted in bad faith, or with actual malice, in reporting Dr. Farmer to the KPHF. Dr. Farmer argues that BHMG is vicariously liable to him (Dr. Farmer) because Dr. Lipson held titles in both BHM (as CMO) and BHMG (as medical lead) at the same time; that Drs. Nims and Armstrong were BHMG employees; and that, since all three doctors were agents of both BHM and BHMG during the events in question, both entities may be held vicariously liable such that BHMG is not entitled summary judgment.

Defendants filed a reply responding to Dr. Farmer's assertions and further setting forth arguments in support of their position. The parties presented oral argument by hearing before this Court on March 2, 2023. The matter now stands submitted for this Court's determination.

CONCLUSIONS

A summary judgment is utilized "… to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985), quoting *Robertson v. Lampton*, 516 S.W.2d 838, 840 (Ky. 1974). The Court must view the record in a light most favorable to the party opposing the motion and all doubts are to be resolved in her favor. *Steelvest v. Scansteel*

Serv. Ctr., Inc., 807 S.W.2d 476, 480 (Ky. 1991). "The trial judge must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists. It clearly is not the purpose of the summary judgment rule … to cut litigants off from their right of trial if they have issues to try." *Id.*

The party making the motion for summary judgment should not succeed "unless his right to judgment is shown with such clarity that there is no room left for controversy." *Id.* at 482 (citation omitted). "The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial." *Welch v. Am. Publ'g Co. of Ky.*, 3 S.W.3d 724, 730 (Ky. 1999).

"Summary judgment is proper when it is manifest that the opposing party could not strengthen his case at trial and the moving party would be entitled ultimately and inevitably to a directed verdict." *Old Mason's House v. Mitchell*, 892 S.W.2d 304, 307 (Ky. App. 1995). The non-moving party "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Humana of Ky., Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990).

KRS 311.6191, entitled, "Nonliability of persons who furnish information to program," provides:

> ***Any member*** of the impaired physicians program created under KRS 311.616, as well as any administrator, staff member, consultant, agent, or employee of the program ***acting within the scope of his or her duties and without actual malice***, and all other persons ***who furnish information to the program in good faith and without actual malice***, ***shall not be liable for any claim or damages*** as a result of any statement, decision, opinion, investigation, or action taken by the program, or by any individual member of the program.

(Emphasis added).

"[W]hat the legislature meant is the very heart of statutory interpretation in this Commonwealth." *Jefferson Cnty. Bd. of Educ. v. Fell,* 391 S.W.3d 713, 726 (Ky. 2012) (footnote omitted). "Legislative intent can only be determined in context." *Id.* at 727. "[T]he intention of the legislature should be ascertained and given effect." *Allstate Insurance Company v. Smith*, 487 S.W.3d 857, 861 (Ky. 2016) (citing, *Fell*, 391 S.W.3d at 719).

> Discerning legislative intent requires a focus on the words chosen by the legislature. If those words, given their common understanding and meaning, are clear or unambiguous, our task is complete—we simply apply the will of the legislature. Only when a statute is ambiguous do we reach for more extensive interpretative aids. This case calls for nothing more than reading the words of the statute at issue.

Ibid. (citations omitted). The language of the legislature in KRS 311.6191 is clear and unambiguous and requires nothing more than a reading of the words of the statute.

The Court will note that KRS 311.6191 expressly states that it covers the "nonliability of persons." There is no reference to immunity in the statute. Had the legislature intended to confer immunity, it could easily have said so. The Supreme Court of Kentucky explained in *Maggard v. Kinney*, 576 S.W.3d 559 (Ky. 2019), "a privilege is not the same as immunity." *Id.* at 566. The Court then discussed the "judicial statements privilege," as follows:

> The judicial statements privilege, described in *Schmitt v. Mann*, 291 Ky. 80, 163 S.W.2d 281, 283 (1942), as the "prevailing rule" in Kentucky and this country, provides that statements "in judicial proceedings are absolutely privileged when material, pertinent, and relevant to the subject under inquiry, though it is claimed that they are false and alleged with malice." (Citations omitted). The privilege encompasses written statements in pleadings as well as the statements of witnesses in judicial proceedings. *Id.* If the statements are not pertinent and material to the matter at issue, they are only qualifiedly privileged, i.e., they are privileged only if made in good faith. *Id.* Derived from caselaw, as opposed to a statute or rule of evidence, the judicial statements privilege "rests

> upon public policy 'which looks to the free and unfettered administration of justice.'" *Id.* at 284.

Id. at 567. The judicial statements privilege is applicable under the circumstances in this case.[14]

"The determination of the existence of privilege is a matter of law." *Harstad v. Whiteman*, 338 S.W.3d 804, 810-11 (Ky.App. 2011), citing *Columbia Sussex Corp., Inc. v. Hay*, 627 S.W.2d 270, 276 (Ky. App. 1981). "Once a privilege has been placed in issue, 'it thereupon falls upon plaintiff to defeat this defense by a showing that either there was no privilege under the circumstances or that it had been abused." *Id.* "If the plaintiff fails to adduce such evidence sufficient to create a genuine issue of fact, qualified privilege remains purely a question of law under the summary judgment standard." *Id.*, citing *Cargill v. Greater Salem Baptist Church*, 215 S.W.3d 63, 68 (Ky.App.2006). "[A] qualified privilege applies only if the communication was 'made in good faith and without actual malice.'" *Ballard v. 1400 Willow Council of Co-Owners, Inc.*, 430 S.W.3d 229, 239 (Ky.

[14] The Court will note that the judicial statements privilege has been held to apply to proceedings before the KBML and the Kentucky Bar Association ("KBA"). See, *Maggard*, supra.; *Morgan & Pottinger, Attorneys, P.S.C. v. Botts*, 348 S.W.3d 599 (Ky. 2011), as modified on denial of reh'g (Oct. 27, 2011), overruled by *Maggard*, supra., since the judicial statements privilege does not qualify for an interlocutory appeal, an issue not applicable in this case. "[T]he judicial statements privilege cover statements that have already been made in a public manner, such as pleadings and witness testimony, but, like other more common testimonial privilege is, it's legal significance is to preclude use of those statements in a subsequent legal action in support of a cause of action or defense." *Maggard*, 576 S.W.3d at 567. '

> A communication must fulfill two requirements in order to fall within the ambit of the judicial statements privilege. First, the communication must have been made "preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as part of a judicial proceeding." *General Elec. Co. v. Sargent & Lundy*, 916 F.2d 1119, 1127 (6th Cir.1990) (citing Restatement (Second) of Torts § 587 (1977)). Second, the communication must be material, pertinent, and relevant to the judicial proceeding. [*Smith v. Hodges*, 199 S.W.3d 185, 193 (Ky.App. 2005)] (citing *Lisanby v. Illinois Cent. R. Co*., 209 Ky. 325, 272 S.W. 753, 754 (1925)).

Botts, 348 S.W.3d at 602, as modified on denial of reh'g (Oct. 27, 2011), overruled on other grounds by *Maggard*, supra. .

2013). "Such a determination is a question for the jury." *Id.* See *Harstad*, 338 S.W.3d at 811. The assertion of the privilege in this case is tantamount to an affirmative defense.

Defendants cite cases which analyze situations in which the party claiming immunity has a legal duty to report information under a statute that provides qualified immunity, rather than qualified privilege. Specifically, in *Norton Hosps., Inc. v. Peyton*, 381 S.W.3d 286 (Ky. 2012), it is argued "that KRS 620.050(1)[15] requires only 'good faith' on the part of the reporter for immunity to apply." *Id.* at 292 (footnote added). Interpreting the statute, the Supreme Court of Kentucky notes:

> KRS 620.050(1) clearly states that a reporter (of dependency, neglect, or abuse) has immunity in either of two situations: where the reporter is acting upon *reasonable cause*, or where the reporter is acting in *good faith* under KRS 620.030 to 620.050. The second situation in which a reporter is granted immunity (acting in good faith under KRS 620.030 to 620.050) incorporates by reference the knowledge or reasonable cause requirement of KRS 620.030(1), but it also grants immunity where there is a *good faith belief that* the reporter knows, or a *good faith belief that* the reporter has reasonable cause to believe that a child is dependent, neglected, or abused.

Ibid. (italics in original). Even when immunity applies, a finding of summary judgment may be inappropriate if the facts are in dispute. As further noted by the Court:

> The decision of whether immunity applies in a given situation involves the determination of the material facts; however, the question of immunity is one of law and is to be determined by the trial court. In addition, "[b]ecause immunity *is designed to relieve a defendant from the burdens of litigation, it is obvious that a defendant should be able to invoke [an immunity statute] at the earliest stage of the proceeding." Therefore, a motion for summary judgment is generally an appropriate method for the trial court to determine whether immunity applies. Nevertheless, even in cases involving immunity, summary judgment may not be granted unless the record

[15] KRS 620.050 provides civil and criminal immunity to the reporters of suspected child dependency, neglect, and abuse.

> contains sufficient facts to determine that the defendant was entitled to immunity as a matter of law.

Id. at 290-91 (footnotes omitted).

KRS 311.6191 does not provide immunity and does not require reporting at all, much less immediate reporting. Nor does it make any failure to report a crime. Instead, the statute merely exempts from liability those who voluntarily "furnish information to the program in good faith and without actual malice." KRS 311.6191. As noted above, once the defense is asserted, i.e., a privilege has been placed in issue, it falls upon Plaintiff to defeat this defense by a showing that either there was no privilege under the circumstances or that it had been abused. *Harstad*, 338 S.W.3d at 810-11. As noted earlier, "a qualified privilege applies only if the communication was 'made in good faith and without actual malice.'" *Ballard*, 430 S.W.3d at 239. Such a determination is a question for the jury. *Ibid.*

At this point, there remain genuine issues of material fact in dispute with respect to whether the privilege and affirmative defense applies. Plaintiff asserts that neither Dr. Nims, Dr. Lipson, nor Dr. Armstrong immediately sought to have a drug or alcohol screen performed on Dr. Farmer after they received the complaint against him. Likewise, no one spoke with Dr. Farmer that evening or informed him of the accusation of him being impaired. Furthermore, as was noted by Dr. Farmer during his deposition, had he been promptly notified of the complaint, he would have wanted to return to the hospital to get tested immediately. (Farmer Dep. at p. 183). Additionally, Dr. Farmer asserts that Dr. Nims disclosed during the meeting with Dr. Lipson and Dr. Armstrong that Dr. Farmer had a DUI arrest, even though it occurred in 2013, and disclosed that Dr. Farmer had expressed suicidal thoughts, even though the counselor to whom he was referred found that no further treatment was necessary after Dr. Farmer explained to the counselor that

he was just joking when he made the comment. Further, Dr. Lipson allegedly prevented Dr. Farmer from providing the KBML investigator with the names of witnesses Dr. Farmer wanted the investigator to speak with who could purportedly corroborate that he was not impaired on the day in question, including the attending physicians, Dr. Hargrove and Dr. Hatler, and others who worked with him that day. Accordingly, there remain genuine issues of material fact in dispute with respect to whether Defendants meet the requirements to obtain the qualified privilege and assert the defense under KRS 311.6191 which preclude summary judgment.

Defendants next argue that BHMG is a separate entity from BHM and is entitled to summary judgment, since the only individuals mentioned in the Amended Complaint which have caused Dr. Farmer damage are Drs. Nims, Lipson, and Armstrong; that the record contains no evidence that either Dr. Nims, Dr. Lipson, or Dr. Armstrong were acting as agents for BHMG rather than BHM such that Dr. Farmer has not stated a claim upon which relief can be granted against BHMG. Under the common law doctrine of *respondeat superior*, "a principal is vicariously liable for damages caused by torts of … an agent or subagent, other than an independent contractor, acting on behalf of and pursuant to the authority of the principal." *Williams v. Kentucky Dep't of Educ*., 113 S.W.3d 145, 151 (Ky. 2003). "Agency is a legal conclusion to be reached only after analyzing the relevant facts…" *CSX Transp., Inc. v. First Nat. Bank of Grayson*, 14 S.W.3d 563, 566 (Ky.App. 1999), as modified (Feb. 11, 2000). "Where the facts are in dispute and the evidence is contradictory or conflicting, the question of agency, like other questions of fact, is to be determined by a jury. However, where the facts are undisputed, the question becomes one of law for the court." *Wolford v. Scott Nichols Bus Co*., 257 S.W.2d 594, 595 (Ky. 1953).

The record reflects that Dr. Lipson held titles with both BHM, as CMO, and BHMG, as medical lead, at the same time. The record also reflects that Dr. Nims and Dr. Armstrong were BHMG employees at the time of the events in this action occurred. Since all three were agents of both BHM and BHMG during the events in question, both entities may be held vicariously liable for their actions. Thus, it does not presently appear that BHMG is entitled to judgment as a matter of law. At this point, there remain genuine issues of material fact which preclude summary judgment.

ORDER

WHEREFORE IT IS HEREBY ORDERED AND ADJUDGED that the Motion of Defendants for Summary Judgment is **denied.**

/s/ HON. SUSAN GIBSON
electronically signed
3/6/2023 9:45:38 AM ET

SUSAN SCHULTZ GIBSON, JUDGE

cc: Counsel of Record