[Cite as *Bansal v. Mt. Carmel Health Sys.*, 2011-Ohio-3827.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Girraj K. Bansal, M.D.,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-1207 (C.P.C. No. 07CVH- 03-4421)
Mount Carmel Health Systems et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on August 4, 2011

James H. Banks, for appellant.

Vorys, Sater, Seymour & Pease LLP, *William J. Pohlman* and *Michael J. Hendershot*, for appellees.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} This is the second appeal of Girraj K. Bansal, M.D., from rulings of the Franklin County Court of Common Pleas. In the first appeal, we reversed the trial court's granting of summary judgment based upon issues related to the information withheld during discovery proceedings. We remanded the case to the trial court for discovery to

be completed and for the trial court to then revisit the issue of whether summary judgment was appropriate.

{¶2} Following our remand, the trial court revisited issues related to discovery, determined that no additional documents needed to be provided in discovery and, thus, once again, granted summary judgment.

{¶3} On this appeal, counsel for Dr. Bansal has assigned six errors for our consideration:

> I. THE TRIAL COURT ERRED IN DENYING PLAINTIFF-APPELLANT'S MOTIONS TO COMPEL DISCOVERY.
>
> II. THE TRIAL COURT'S CONCLUSIONS OF LAW ON THE FACTUAL ISSUES BELOW ARE CONTRARY TO LAW AND THE RULES OF EVIDENCE AND CIVIL PROCEDURE, SUCH THAT THE JUDGMENT BELOW MUST BE REVERSED.
>
> III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON PLAINTIFF-APPELLANT'S CLAIM FOR INTERFERENCE WITH BUSINESS RELATIONSHIPS.
>
> IV. THE TRIAL COURT ERRED IN ITS ANALYSIS OF PLAINTIFF-APPELLANT'S DEFAMATION CLAIM.
>
> V. THE TRIAL COURT ERRED IN FINDING NO FIRST AMENDMENT VIOLATION.
>
> VI. THE TRIAL COURT ERRED IN DENYING PLAINTIFF-APPELLANT'S MOTION FOR RECUSAL WITHOUT HEARING AND WITHOUT CONSIDERATION FOR OR EXPLANATION OF ITS POLITICAL CONTRIBUTIONS FROM APPELLEES' COUNSEL AND/OR LAWFIRM.

{¶4} Dr. Bansal filed suit against defendants, Mt. Carmel Health System and various doctors, alleging claims for race, color, national origin, and/or age discrimination; tortious interference with business and contractual relationships; defamation; and

violation of the First Amendment to the United States Constitution. Dr. Bansal is an internal medicine physician. From 1987 until 2005, Mt. Carmel East Hospital included Dr. Bansal on its internal medicine call schedule for unassigned emergency room patients. If a patient who did not already have a physician arrived at Mt. Carmel's emergency room ("ER"), hospital personnel would contact Dr. Bansal or another physician on the call schedule to provide the patient with internal medical care. After Mt. Carmel removed Dr. Bansal from the call schedule in May 2005, Dr. Bansal brought the instant lawsuit.

{¶5} The first assignment of error asserts that the trial court never did what we told it to do as a result of the first appeal. The assignment of error also argues that the trial court was wrong to fail to compel the named defendants to divulge and make available a wide range of documents requested on behalf of Dr. Bansal. We will address these discovery issues first.

{¶6} The trial court's resolution of the discovery issues is contained in a brief decision and entry journalized September 21, 2010. The decision and entry reads:

> This matter is before this Court on Plaintiff's Renewed Motion to Compel Discovery, filed July 12, 2010. Defendants filed their Memorandum Contra on July 26, 2010. After being granted an extension of time, Plaintiff filed his Reply Memorandum on September 1, 2010. This motion is now ripe for decision.
>
> The Court will make this short and sweet. As it did once before, the Court must deny Plaintiff's motion. The Court has reviewed the interrogatories and document requests that Plaintiff wishes Defendants to respond to. This review has revealed that Plaintiff's discovery requests are unreasonable. Plaintiff's discovery requests suffer from the following problems: (1) they are overly broad (requests #6, 9, 13, 22, 24, 25, 31, 34); (2) the information they seek is not relevant to this case (requests #13, 22, 31); (3) they seek information

> that is covered by privilege, and not just the peer-review privilege (requests #13, 22, 24, 25, 34); (4) they constitute a "fishing expedition" and are not reasonably calculated to lead to the discovery of relevant evidence (requests #6, 9, 13, 22, 24, 25, 31, 34); (5) they have already been complied with (requests #11, 24, 29, 31); and (6) they are almost impossible to comply with (requests #6, 9, 13, 22, 25, 29, 31, 34). For all of these reasons the Court cannot grant Plaintiff's motion. (Footnotes omitted.)
>
> After review and consideration, the Court finds Plaintiff's motion to be not well-taken, and is hereby DENIED.

{¶7} We note that the trial court summarily finds that some of the information is privileged, but once again fails to follow the appropriate procedures for determining whether a privilege applies. However, each of the documents for which privilege is found were also found by the trial court to be justifiably withheld for other reasons. We, therefore, will address the other reasons to determine if the documents were justifiably withheld and/or the trial court was within its discretion to refuse to compel their disclosure.

{¶8} Appellate courts generally apply the abuse of discretion standard when reviewing discovery rulings. *State ex rel. Sawyer v. Cuyahoga Cty. Dept. of Children and Family Servs.*, 110 Ohio St.3d 343, 2006-Ohio-4574, ¶9.

{¶9} "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion connotes more than an error of judgment; it implies a decision that is arbitrary or capricious, one that is without a reasonable basis or clearly wrong. *Pembaur v. Leis* (1982), 1 Ohio St.3d 89.

{¶10} As noted in the trial court's decision, the discovery requests in issue are in interrogatory Nos. 6, 9, 11, 13, 22, 24, 25, 29, 31, and 34. In turn, they read:

> 6. Produce all documents which reflect any of the information set forth in your answers to interrogatory numbers 4 and/or 5.
>
> [Interrogatory No. 4 reads:]
>
> State each and every date which you had contact with plaintiff Girraj K. Bansal.
>
> [Interrogatory No. 5 reads:]
>
> For each date set forth in [interrogatory No. 4], state the following:
>
> A) The type of contact (i.e. in person, by telephone, etc.)
> B) Who initiated the contact
> C) The reason for the contact
>
> 9. Produce all documents which reflect any of the information set forth in your answers to interrogatory numbers 7 and/or 8 and/or which relate to your contact with and/or statements to the individual/entities identified.
>
> [Interrogatory No. 7 reads:]
>
> State each and every date which you had contact with anyone regarding plaintiff Girraj K. Bansal.
>
> [Interrogatory No. 8 reads:]
>
> For each date set forth in [interrogatory number 7], state the following:
>
> A. The type of contact (i.e. in person, by telephone, etc.)
> B. Who initiated the contact
> C. The reason for the contact

11. Produce all documents which reflect any of the information set forth in your answer to interrogatory numbers 10, including but not limited to notes, calendars, etc.

[Interrogatory No. 10 reads:]

State in detail the basis for your demand that Dr. Bansal seek psychological help * * *.

13. Produce all documents which reflect any of the information set forth in your answer to interrogatory numbers 12.

[Interrogatory No. 12 reads:]

Identify each employee or physician affiliated with Mt. Carmel whom you have referred for psychological help at any time from January, 2001 to the present and state the race and national origin of each.

22. Produce all documents which reflect any of the information set forth in your answer to interrogatory number 21.

[Interrogatory No. 21 reads:]

Identify each physician affiliated with Mt. Carmel who you required and/or suggested see another doctor or health care provider and state for each:

A. The date
B. The race and age of the physician
C. The reason for the suggestion or requirement
D. The result

24. Produce all documents which reflect any of the information set forth in your answer to interrogatory number 23

[Interrogatory No. 23 reads:]

For each occasion when Dr. Bansal was discussed at a committee or group meeting involving Mt. Carmel, its managers and/or directors, state the following:

A) The date
B) The identity of persons at the meeting
C) The reason for the meeting

25. Produce all documents which relate to plaintiff Girraj K. Bansal, including but not limited to any personnel file, memo and/or any document in which Dr. Bansal was the subject.

29. Produce all documents which reflect any of the information set forth in your answer to interrogatory number 28

[Interrogatory No. 28 reads:]

State in detail the circumstances which resulted in the suggestion that Dr. Bansal was a terrorist. * * *

31. Produce all documents which reflect the procedure described in your answer to interrogatory number 30

[Interrogatory No. 30 reads:]

State the procedure used for nurses to contact doctors at any time from January, 2000 to the present.

34. Produce all documents which reflect any of the information set forth in your answer to interrogatory number 33

[Interrogatory No. 33 reads:]

Identify each doctor who has been suspended from Emergency Room call duties at any time from January, 2000 to the present and state for each:

A) The date
B) The reason for the suspension
C) The term of the suspension

{¶11} The trial court cites many reasons to justify the withholding of documents of interrogatory Nos. 6, 9, 13, 22, 24, 25, 31, and 34. One reason is that the interrogatories are overly broad. Civ.R. 26(B)(4)(d) has the trial court consider whether the burden or expense of the proposed discovery outweighs the likely benefit. Examining these eight interrogatories, it is reasonable to conclude that all of them are overly broad that would produce a great burden on defendants that is not outweighed by the likely benefit to Dr. Bansal. The trial court did not abuse its discretion in failing to compel the defendants to answer these interrogatories.

{¶12} Interrogatory Nos. 6, 9, 13, 22, 24, 25, 31, and 34 were also found by the trial court to not be reasonably calculated to lead to the discovery of relevant evidence. Civ.R. 26(B)(1), which defines the scope of discovery, requires that information sought appears reasonably calculated to lead to the discovery of admissible evidence. We find that the trial court did not abuse its discretion coming to this conclusion.

{¶13} The trial court also found that interrogatory Nos. 6, 9, 13, 22, 25, 31, and 34 are almost impossible to comply with. This is a reasonable conclusion when looking at the broad scope of these interrogatories. For example, interrogatory No. 6 essentially asks for all documents which reflect the date, type, and reason for any contact between Dr. Bansal and defendant doctors and Mt. Carmel. This reflects the 20-year period Dr. Bansal had admitting privileges at Mt. Carmel which undoubtedly produced innumerable contacts. The trial court did not abuse its discretion coming to this conclusion.

{¶14} The trial court also finds that interrogatory Nos. 13, 22, and 31 are not relevant to the case. In exercising its discretion in a discovery matter, the court

balances the relevancy of the discovery request, the requesting party's need for the discovery, and the hardship upon the party from whom the discovery was requested. *Stegawski v. Cleveland Anesthesia Group, Inc.* (1987), 37 Ohio App.3d 78, 85. It is reasonable to believe that these three interrogatories would create an undue hardship on defendants that would not balance against the possible relevancy of Dr. Bansal's request. The trial court did not abuse its discretion in finding that interrogatory Nos. 13, 22, and 31 are not relevant to the case.

{¶15} Interrogatory Nos. 13, 22, 24, 25, and 34 were found by the trial court to seek information that is covered by privilege, and not just peer-review privilege. Since the trial court did not conduct a peer-review analysis, we will examine its reasoning for finding other types of privilege. It is reasonable to conclude that interrogatory Nos. 13, 22, and 34 seek information that is covered by privilege other than peer review. However, it is not reasonable to conclude that interrogatory Nos. 24 and 25 seek information covered by privilege other than peer-review privilege. This is harmless error as interrogatory Nos. 24 and 25 were reasonably found by the trial court to also be overly broad.

{¶16} The trial court also found that defendants have already complied with interrogatory Nos. 11, 24, 29, and 31. Interrogatory Nos. 24 and 31 were already found to be overly broad and need not be addressed

{¶17} The trial court ruled that defendants already complied with interrogatory Nos. 11 and 29, in that there was no documentation. Appellate courts generally apply the abuse of discretion standard when reviewing discovery rulings. *Sawyer* at ¶9. It is

reasonable that there was no documentation leading defendants to suggest that Dr. Bansal seek physiological help or that he is a terrorist. The trial court did not abuse their discretion coming to this conclusion.

{¶18} Having found that the trial court did not abuse its discretion when refusing to compel disclosure, the first assignment of error is overruled.

{¶19} Dr. Bansal's second assignment of error asserts there is a genuine issue of material fact to overcome the trial court's summary judgment: that Dr. Bansal is either an employee or has a contractual relationship with Mt. Carmel; that Ohio and/or federal prohibition against discrimination applies to Dr. Bansal; and that Mt. Carmel is a place of public accommodation.

{¶20} Accordingly, summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629.

{¶21} Appellate review of summary judgments is de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588; *Midwest Specialties, Inc. v. Firestone Tire & Rubber Co.* (1988), 42 Ohio App.3d 6, 8. We stand in the shoes of the trial court and conduct an independent review of the record. As such, we must affirm the trial court's judgment if any of the grounds raised by the moving party, at the trial court, are found to

support it, even if the trial court failed to consider those grounds. See *Dresher*; *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶22} Dr. Bansal claims that his status as an admitting physician is as an employee of Mt. Carmel and, thus, is protected from discriminatory practices under R.C. 4112.02. The Sixth Circuit case *Shah v. Deaconess Hosp.* (C.A.6, 2004), 355 F.3d 496, rejected this argument holding that a physician with staff privileges is not a hospital employee for R.C. 4112.02 purposes. Ohio law also supports this conclusion. See *Gureasko v. Bethesda Hosp.* (1996), 116 Ohio App.3d 724.

{¶23} Dr. Bansal argues that this court should employ an "economic realities" test to determine if he is an employee. This argument has been rejected by the Sixth Circuit (*Shah* at 499) and Ohio law also does not support it. See *Perron v. Hood Industries, Inc.*, 6th Dist. No. L-06-1396, 2007-Ohio-4478, ¶33. We also do not agree with the test and find that Dr. Bansal was not an employee of Mt. Carmel.

{¶24} Dr. Bansal also argues that he is an independent contractor and entitled to protection from discrimination under 42 U.S.C. 1981. Any claim under Section 1981 must initially identify an impaired contractual relationship. *Domino's Pizza, Inc. v. McDonald* (2006), 546 U.S. 470, 476, 126 S.Ct. 1246. There is no contract of employment between Dr. Bansal and any defendant. (June 2, 2008 Deposition of Dr. Bansal, at 62-64.) Lacking a contract relationship, there is no Section1981 claim.

{¶25} Dr. Bansal also argues that Mt. Carmel is a place of public accommodation and thus prevented from discriminating under R.C. 4112.02(G). This is true as it relates to the patients of the hospital as they are Mt. Carmel's customers. See, e.g., *Meyers v.*

Hot Bagels Factory, Inc. (1999), 131 Ohio App.3d 82, 104 (statute assures rights to customers). R.C. 4112.02 is not applicable here as Dr. Bansal has not been denied any services or products offered by Mt. Carmel.

{¶26} Since Dr. Bansal was not in a contractual relationship with an employee of, or denied any services by Mt. Carmel, therefore, he has failed to establish a prima facie case of discrimination.

{¶27} The second assignment of error is overruled.

{¶28} The third assignment of error asserts that defendants tortuously interfered with Dr. Bansal's business and contractual relationships.

{¶29} In order to recover a claim for tortious interference with a contractual relationship, one must prove: (1) the existence of a contract; (2) the wrongdoer's knowledge of the contract; (3) the wrongdoer's intentional procurement of the contract's breach; (4) the lack of justification; and (5) resulting damages. *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 1995-Ohio-61.

{¶30} The main distinction between tortious interference with a contractual relationship and tortious interference with a business relationship is that interference with a business relationship includes intentional interference with prospective contractual relations not yet reduced to a contract. *Diamond Wine & Spirits, Inc. v. Dayton Heidelberg Distrib. Co., Inc.*, 148 Ohio App.3d 596, 604, 2002-Ohio-3932.

{¶31} This claim fails in respect to relationships with defendants as there is no contractual relationship between Dr. Bansal and the defendants.

{¶32} This claim also fails in respect to relationships with patients. Dr. Bansal offers no evidence of any existing contract or potential future contract with a patient that defendants have interfered with. (June 2, 2008 Deposition of Dr. Bansal, at 178-79, 181-83; August 1, 2008 Deposition of Dr. Bansal, at 150-61.)

{¶33} Dr. Bansal's claim that defendants interfered with his contractual relationship with other doctors also fails. Dr. Bansal claims that other doctors now refuse to refer patients to him or work with him. Dr. Bansal does not offer any proof of any existing contractual or with a prospective contractual relationship that was interfered with by defendants. Further, merely refusing to deal with a party cannot support a claim for interference with a contractual relationship. *Khoury v. Trumbull Physician Hosp. Org.* (Dec. 8, 2000), 11th Dist. No. 99-T-0138.

{¶34} Since Dr. Bansal shows no evidence of any contractual relationships that was interfered with, his claim of tortious interference with a contractual relationship must fail.

{¶35} The third assignment of error is overruled.

{¶36} The fourth assignment of error asserts that the trial court was mistaken in granting summary judgment against Dr. Bansal's defamation claims based on the statute of limitations. Dr. Bansal argues that the savings statute, R.C. 2305.19, preserved his defamation claims.

{¶37} R.C. 2305.11(A) states "[a]n action for libel slander * * * shall be commenced within one year after the cause of action accrued." The original complaint in this case was filed on June, 1 2006. This precludes any claim based on a statement

that was made prior to June 1, 2005. This original complaint was voluntarily dismissed by Dr. Bansal on August 21, 2006. Dr. Bansal then filed the present lawsuit on March 29, 2007.

{¶38} Dr. Bansal alleges seven defamatory statements that were made after June 1, 2005: (1) June 3 and 24, 2005 and January 25, 2006 letters from Dr. Larry Swanner to Dr. Bansal regarding the decision to terminate his participation in the ER call program; (2) a comment about foreigners and minorities made by Dr. Ronald Whiteside at a 2005 meeting; (3) a statement in 2006 that Dr. Bansal "suffered from emotional disturbances"; (4) continuing statements that Dr. Bansal was "unreachable when needed"; (5) continuing statements that Dr. Bansal "has caused substantial risk management activity"; (6) continuing statements regarding Dr. Bansal's "prowess as a physician"; and (7) a "terrorist issue" which arose in August 2006.

{¶39} Whether a new action is substantially the same as an original action for purposes of the savings statute, R.C. 2305.19 does not always depend on whether the original action set forth the same legal theories as those asserted in the new complaint. Instead, the question largely turns on whether the original complaint and the new complaint contain similar factual allegations so that it can reasonably be said that the party or parties were put on fair notice of the type of claims that could be asserted. *Lanthorn v. Cincinnati Ins. Co.*, 4th Dist. No. 02CA743, 2002-Ohio-6798, ¶27.

{¶40} We look to the original June 1, 2006 complaint to see what the defamation factual allegations are. A defamation complaint must allege the substance of the

allegedly defamatory statements although they need not be set out verbatim. *Hedrick v. Center for Comprehensive Alcoholism Treatment* (1982), 7 Ohio App.3d 211, 215.

{¶41} The only alleged defamatory statement in Dr. Bansal's original complaint was in a May 18, 2005 letter. This statement is time barred as of the filing of the original lawsuit on June 1, 2006.

{¶42} Therefore, there are no defamation claims from the original June 1, 2006 complaint that have been saved for Dr. Bansal's March 29, 2007 complaint. All defamation allegations predating March 29, 2006 must fail.

{¶43} Other defamation claims are too ambiguous. Dr. Bansal does not give enough specificity about the substance of a claim to bring a cause of action. The statements that lack substance are: that in 2006, Dr. Bansal "suffered from emotional disturbances"; continuing statements that Dr. Bansal was "unreachable when needed"; continuing statements that Dr. Bansal "has caused substantial risk management activity"; and continuing statements regarding Dr. Bansal's "prowess as a physician."

{¶44} The remaining defamation claim allegedly arose in 2006 when someone called Dr. Bansal a "terrorist." The record shows that the word terrorist was not used by any defendant nor does Dr. Bansal present evidence of an incident when this word was used by any defendant. This last claim of defamation must also fail.

{¶45} Dr. Bansal's defamation claim does not survive defendant's motion for summary judgment.

{¶46} The fourth assignment of error is overruled.

{¶47} The fifth assignment of error asserts that the trial court erred in finding there was no First Amendment violation of Dr. Bansal's right to free speech. The constitutional right to free speech protects against the government. The acts of a private party are fairly attributable to the state on certain occasions when the private party acted in concert with state actors. *Rendell-Baker v. Kohn* (1982), 457 U.S. 830, 102 S.Ct. 2764.

{¶48} Private hospitals have generally held not to be in concert with state actors when having been accused of violating federally-protected free speech. *Mitchell v. Mid-Ohio Emergency Servs., L.L.C.*, 10th Dist. No. 03AP-981, 2004-Ohio-5264, ¶23, fn. 4. There is no evidence that Mt. Carmel or the other defendants acted in concert with state actors.

{¶49} The fifth assignment of error is overruled.

{¶50} The sixth assignment of error asserts that the trial court erred in denying Dr. Bansal's motion for recusal without a hearing or an explanation of political contributions from defendant's law firm.

{¶51} Judges are generally not required to recuse themselves from cases in which a party is represented by an attorney who has contributed to or has raised money for the judge's election campaign. *In re Disqualification of Burnside*, 113 Ohio St.3d 1211, 2006-Ohio-7223.

{¶52} Further, this motion for recusal was filed October 12, 2010 after the trial court rendered its September 21, 2010 decision denying Dr. Bansal's motion to compel discovery. This is extremely late in the proceeding considering that this case was filed in 2007 and the campaign contribution took place in 2006 and the records have been

publically available since that time. The Ohio Supreme Court addressed both these situations being reluctant to disqualify a judge after lengthy proceedings or "from a case upon an affidavit filed, not soon after the judge was assigned the case but soon after an unfavorable ruling to affiant, under these circumstances would encourage judge-shopping." *In re Disqualification of Ney* (1995), 74 Ohio St.3d 1271, 1273. The trial court did not abuse its discretion in not recusing itself.

{¶53} The sixth assignment of error is overruled.

{¶54} Having overruled all assignments of error, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and CONNOR, JJ., concur.

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