

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

RICHARD M. THOMAS, D.C.

Plaintiff/Counter Defendant

v.

OHIO BUREAU OF WORKERS' COMPENSATION

Defendant/Counter Plaintiff
Case No. 2000-02810

Judge Joseph T. Clark

DECISION

{¶ 1} Plaintiff/counter defendant, Richard M. Thomas, D.C. (Thomas), brought this action alleging tortious interference with his chiropractic practice, intentional infliction of emotional distress, and violations of his constitutional right to due process. In its counterclaim, defendant/counter plaintiff, the Ohio Bureau of Workers' Compensation (OBWC), alleges that Thomas owes OBWC \$473,388.51 as a result of Thomas' "inappropriate billings."

{¶ 2} OBWC's claims against Thomas were tried to a jury which returned a verdict in favor of OBWC in the amount of \$473,388.51. The case was subsequently set for trial to the court on Thomas' claims against OBWC.

{¶ 3} In 1980, Thomas, a licensed chiropractor, opened his practice in Dayton, Ohio. Thereafter, Thomas hired a business consultant who advised him to establish a multi-disciplinary practice offering both chiropractic and medical services. In 1996, Thomas formed Physicians Med One Management Company (PMO) which performed billing and collecting services for the practice. The testimony and evidence established

that the business functions performed by PMO were primarily accomplished by Thomas, his wife, and his daughter.

{¶ 4} In or about September 1996, Thomas hired Rogel Belmonte, M.D. to assist him in his practice. According to Dr. Belmonte, he received an annual salary of \$50,000 and PMO billed for his services. The medical services provided by Dr. Belmonte included injections of steroids and pain medications.

{¶ 5} In the fall of 1997, OBWC's employees noticed a significant increase in the "billing" that Thomas submitted to OBWC. Patricia Phillips, the chief of OBWC's medical cost management section, testified that she supervised OBWC's provider credentialing unit and that she served as a liaison for private managed care organizations (MCOs). On December 3, 1997, Phillips sent a letter to Thomas informing him that OBWC had initiated "actions" to remove Thomas from OBWC's "certified provider list" because he had failed to respond to numerous requests for medical documentation to support his claims for reimbursement. (Thomas' Exhibit 110.) Phillips testified that she never received the requested documents. According to Phillips, a "peer review" was conducted by an independent chiropractor after employees in OBWC's medical claims section became concerned about "extensive amounts of chiropractic treatment rendered" in another case in which Thomas had not provided sufficient medical documentation.

{¶ 6} In December 1997, Phillips placed the bills that Thomas had submitted on a "411 edit," a status she described as a "full review" that required Thomas to document any claim for reimbursement before it would be paid by OBWC. Phillips explained that OBWC's claim services were restructured so that all provider bills submitted after January 1, 1998, were reviewed by MCOs. According to Phillips, the 411 edit status did not affect any decision made by MCOs in processing provider bills and OBWC continued to process bills that were received prior to 1998.

INVESTIGATIONS

{¶ 7} Phillips also contacted OBWC's fraud department after she became concerned about Thomas' irregular billing practices. Mark Bentley, an investigation supervisor for OBWC, testified that he first became aware of an investigation of Thomas in October 1997 when he received a call from an OBWC nurse who had observed a "spike" in payments that had been made to Thomas. After reviewing OBWC's records that documented payments to Thomas and interviewing Thomas' staff and patients, Bentley consulted with the Ohio Attorney General's health care fraud section. During his investigation, Bentley became aware that some of Thomas' patients were receiving steroid injections. Gregory Jewel, M.D., OBWC's medical director, advised Bentley that patients who had received steroid injections for an extended period of time were at risk of experiencing serious medical complications if such treatment was ended abruptly.

{¶ 8} Monica Tenney, a fraud analyst employed by OBWC, testified regarding OBWC's investigation of Thomas. Tenney prepared affidavits that were used by the Attorney General's Office to obtain the search warrants that were executed at Thomas' billing and treatment offices. On March 11, 1998, employees from OBWC and the Montgomery County Sheriff's Office conducted raids at both offices.¹ OBWC nurses and medical board representatives were present during the raid to retrieve and inventory patient charts for injured workers who had filed claims for treatment with OBWC. Tenney explained that an "evidence log" was created during the search.

{¶ 9} Tenney testified regarding her knowledge of OBWC's custody and control of the seized records. According to Tenney, all of the seized records were returned to Thomas after the investigation was completed, with the exception of "a very few" documents that were photocopied before the original records were provided to the grand jury. Tenney testified that some of the records were released as a result of a public records request and that Mary Sambol, an attorney who represented several of

Thomas' patients in a civil action, also requested copies of the records. Bentley testified that Thomas and his counsel were provided access to all seized documents within a few days after the raid and that they did view the documents at OBWC's office.

{¶ 10} Patricia Brewer, a nurse who was employed by OBWC, testified that she was provided with a list of the names of injured workers who were treated by Thomas and that she and other members of OBWC's staff were directed by both her supervisor, Jean Siler, and Phillips to contact the patients by telephone. During her conversations with the patients, Brewer referred to a "script" that had been provided by Siler. Brewer testified that the purpose of her calls was to determine whether the patients had received steroid injections and to warn them of the consequences of abruptly discontinuing such treatment. The patients who were being treated with steroid injections were also advised that OBWC would not make payments to Thomas until its investigation was completed and that Kettering Workers Care had agreed to provide alternative care.

{¶ 11} OBWC's fraud investigators reviewed Thomas' patient records and concluded that he had over-billed in the amount of \$473,388.51.

TORTIOUS INTERFERENCE

{¶ 12} The elements of the tort of tortious interference with contract "are (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) lack of justification, and (5) resulting damages." *Fred Siegel Co., L.P.A. v. Arter & Hadden* (1999), 85 Ohio St.3d 171, 176, 1999-Ohio-260. "The elements of tortious interference with a business relationship are (1) a business relationship; (2) the tortfeasor's knowledge thereof; (3) an intentional interference causing a breach or termination of the relationship; and (4)

¹On September 12, 2005, the court conducted an oral hearing to resolve the issues raised by Thomas' motion in limine to exclude evidence and motion to suppress evidence. On October 11, 2005,

damages resulting therefrom.” *Diamond Wine & Spirits v. Dayton Heidelberg Distributing Co., Inc.*, 148 Ohio App.3d 596, 2002-Ohio-3932, at ¶23, citing *Geo-Pro Serv. Inc. v. Solar Testing Laboratories, Inc.* (2001), 145 Ohio App.3d 514, 525. The main difference between tortious interference with a contract 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. Such interference must be intentional because Ohio does not recognize negligent interference with a business relationship.” *Diamond Wine & Spirits v. Dayton Heidelberg Distrib. Co.* (2002), 148 Ohio App.3d 596, 604. (Citations omitted.)

{¶ 13} “[I]n determining whether an actor has acted improperly in intentionally interfering with a contract or prospective contract of another, consideration should be given to the following factors: (a) the nature of the actor’s conduct, (b) the actor’s motive, (c) the interests of the other with which the actor’s conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor’s conduct to the interference, and (g) the relations between the parties.” *Fred Siegel Co.*, *supra*, at 178-179.

{¶ 14} At trial, the parties submitted voluminous evidence documenting Thomas’ treatment records and billing practices. As noted above, OBWC’s investigation began after its employees became concerned about a significant increase in the bills that Thomas had submitted for payment. The evidence established that OBWC attempted to verify the services that were allegedly provided by Thomas and whether those services were medically necessary.

CONTRACT TERMS

the court issued an entry denying the motions.

{¶ 15} The contract between the parties contains a detailed agreement that sets forth the parties' expectations and duties regarding the documentation and verification of services that were provided to injured workers. On June 3, 1996, Thomas signed a provider agreement which states that "[t]he purpose of this agreement is to define the relationship between the Ohio Bureau of Workers' Compensation (BWC) and Richard M. Thomas, DC. * * *." The contract specified that Thomas agreed to: 1) abide by OBWC's billing policies, procedures and criteria set forth in OBWC's billing manual; 2) "maintain such records as are necessary to fully disclose the extent of services provided to injured workers"; 3) "furnish, upon receipt of written request, and within 5 business days" to OBWC appropriate information "including nature, extent and date and time of service, concerning treatments, services rendered and goods provided"; 4) "make records of billed treatments, services and good available for review within 30 days"; 5) respond to requests for information by OBWC and MCOs and otherwise cooperate fully with case management; 6) bill OBWC and MCOs only for services that were actually performed or provided and were medically necessary; 7) assume responsibility for the accuracy of all bills submitted; and, 8) refund overpayments to OBWC upon discovery of incorrect payments. (OBWC's Exhibit JJ.)

{¶ 16} The parties further agreed that either OBWC or any MCO could "engage in profiling and credentialing by which BWC may deem the provider not eligible to participate in the workers' compensation system." Additionally, the contract specified that any and all information required to be provided under the agreement could be used to investigate alleged instances of fraud or to determine whether Thomas was eligible to participate as a provider.

{¶ 17} It is undisputed that the parties executed the contract and that a business relationship existed between them. The issue before the court is whether OBWC was justified in the actions it took as a result of its investigation.

{¶ 18} Thomas' claim for tortious interference is based upon his assertion that OBWC unlawfully and without justification harmed his chiropractic practice in the

following ways: 1) suspending payments by instituting a 411 edit; 2) improperly advising his patients; 3) providing confidential patient records to attorney Mary Sambol; 4) seizing patient records, and; 5) “constructively decertifying him.” OBWC contends that its employees were justified in acting to protect Thomas’ patients and to investigate suspicions of fraud.

411 Edit Review

{¶ 19} With regard to Thomas’ assertion that OBWC unlawfully suspended his payments and applied a “411 edit” to his billings, the testimony and evidence established that the procedure was instituted by OBWC as a result of Thomas’ failure to furnish appropriate information in response to requests that were made in accordance with the terms of the provider agreement. In September 1997, Thomas was sent two separate notifications inquiring about his failure to provide medical documentation for a patient. On December 3, 1997, Phillips sent Thomas a letter wherein she stated that Thomas had failed to submit medical documentation to support his bills after promising to provide such information. In her letter, Phillips warned Thomas that “actions have begun to remove you from the OBWC certified provider list. This could result in your termination as a provider and any further reimbursement for services rendered by you * * * will cease.” (Thomas’ Exhibit 110.) On December 23, 1997, Phillips notified Thomas that his “provider number” had been “put in a suspend status” and that “[n]o reimbursement for ANY medical services rendered” by Thomas would “take place until the documentation requested has been submitted.” (Thomas’ Exhibit 111.) Phillips continued to send Thomas written demands for documentation as late as January 15, 1998. Nevertheless, Thomas continued to submit bills without documentation.

{¶ 20} Considering the terms of the contract, the court finds that Thomas had an obligation to maintain records and to respond to requests for information regarding services rendered and that OBWC was justified both in investigating Thomas and in placing him on “411 edit” review status. Furthermore, OBWC has a statutory duty to “[d]o all things convenient and necessary” to administer the workers’ compensation

program, including a duty to “[i]nvestigate all cases of fraud or other illegalities pertaining to the operation of the workers’ compensation system and its several insurance funds * * *.” R.C. 4121.13(F) and (G).

Calls Made to Patients

{¶ 21} As discussed above, during the investigation OBWC nurses learned that several of Thomas’ patients were receiving daily steroid injections. Several of Thomas’ former patients testified regarding symptoms they experienced after receiving steroid treatments. Brenda Barger testified that she gained 118 pounds in seven months after she began steroid treatment. Barger further testified that she consulted her family doctor about her weight gain and other adverse symptoms and that she was advised that she had to be hospitalized because she “was dying” as a result of the steroid treatments.

{¶ 22} Theodor Herwig, M.D., reviewed the medical records of several of Thomas’ patients. The parties stipulated to the admission of Dr. Herwig’s expert report wherein Dr. Herwig commented on the use of the medications Nubain, an injectable DEA Class II narcotic, and Dexamethasone, an “extremely powerful” corticosteroid drug. According to Dr. Herwig, the records he reviewed showed that Thomas’ patients, including Brenda Barger, “received numerous and frequent injections of both Nubain and Dexamethasone, often on a daily basis and usually in dosages significantly above the normal dosages for these medications.” (OBWC’s Exhibit BBBB.) Dr. Herwig opined that the use of Nubain and Dexamethasone that was documented in the records was “a deviation from the standard of care so egregious that * * * it should come to the attention of the Medical Board of Ohio and might indeed even merit criminal prosecution.” *Id.*

{¶ 23} The court notes that Dr. Herwig was the only medical expert to opine in this case. The court finds that Dr. Herwig’s opinions support Dr. Jewel’s decision to warn OBWC nurses about the consequences of abruptly discontinuing steroid treatment. In light of the medical evidence, the court finds that OBWC investigators

acted reasonably in both communicating with Dr. Thomas' patients and obtaining the search warrants. The court concludes that OBWC's employees were justified in their actions to protect Thomas' patients from the risks associated with steroid treatments.

{¶ 24} Furthermore, "the doctrine of 'qualified privilege' is applicable to tortious interference cases, and acts performed within a business relationship are considered subject to a qualified privilege." *Chandler & Assoc., Inc. v. America's Healthcare Alliance, Inc.* (1997), 125 Ohio App.3d 572, 583. To overcome a qualified privilege, a party must establish that the wrongdoer acted with actual malice, which denotes an unjustified or improper interference with the business relationship rather than ill-will or spite. *Id.*

{¶ 25} In short, Thomas and OBWC had a business relationship and OBWC was justified in its decision to investigate Thomas, to initiate a heightened review of his billings, and to notify his patients of the serious health consequences associated with discontinuing steroid treatment. The court finds that Thomas has not demonstrated any malice or reckless disregard concerning OBWC's actions. Accordingly, the court concludes that OBWC's employees were privileged in their investigation and processing of Thomas' billing, and in their interactions with Thomas' patients. Thomas' self-serving allegations do not overcome the privilege.

Records provided to attorney Mary Sambol

{¶ 26} Thomas further asserts that OBWC interfered with his business by unlawfully releasing his patients' records to attorney Mary Sambol. According to Thomas, Sambol used the records both as evidence in malpractice actions against Thomas and as a means to contact other patients who subsequently sued Thomas. Kristina Roush, Sambol's former secretary, testified that she became aware that Sambol used the records she received from OBWC to question other patients who had been treated by Thomas, some of whom later retained Sambol to represent them. On cross-examination, Roush conceded that she was not aware whether the records that Sambol acquired from OBWC were either privileged or public records.

{¶ 27} Peter Mihaly, an assistant law director for OBWC, testified that his duties included responding to requests for bureau records and public documents. Mihaly summarized OBWC's policy regarding the release of public records and he explained that OBWC considered medical records generated in the course of treatment to be confidential and not available for release to the public. Mihaly testified that he received a subpoena from Sambol's office requesting provider files and that he provided "credentialing files" for both PMO and Thomas. The evidence shows that the subpoena that was received by OBWC requested medical records for seven patients and that Sambol provided OBWC's special investigation with copies of the medical releases that had been executed by those patients. (OBWC's Exhibit KK.) According to Mihaly, the records that were provided to Sambol did not include any confidential information.

{¶ 28} Based upon the testimony and evidence, the court finds that the records that were released by OBWC were either public records or records for which Sambol had obtained authorizations for release that were signed by the patients. Accordingly, the court finds that Thomas has failed to prove that OBWC acted in a tortious or otherwise unlawful manner in releasing patient records to Sambol.

Seizure of patient records

{¶ 29} Thomas alleges that OBWC unlawfully seized his patients' records, including records that were not related to the OBWC program. However, on October 11, 2005, following an evidentiary hearing to resolve the issues raised by Thomas' motions to exclude and to suppress evidence that was obtained during the raid, the court announced its decision to deny Thomas' motions. The court found that the records were obtained pursuant to valid search warrants.

{¶ 30} Furthermore, OBWC had authority to conduct an audit of Thomas' patient and billing related records. Ohio Adm.Code 4123-6-45 (A) provides that "[p]roviders' patient and billing related records, including but not limited to those records described in rule 4123-6-45.1 of the Administrative Code, may be reviewed by the

bureau or the MCO to ensure workers are receiving proper and necessary medical care, and to ensure compliance with the bureau's statutes, rules, policies, and procedures.”

{¶ 31} Nevertheless, Thomas maintains that the records that were seized during the raid included “private” patient files that OBWC was not entitled to review. It is undisputed that the patient records that were obtained from Thomas’ offices were disorganized. Indeed, Thomas testified that his staff “had difficulty filing because of the volume of files they were dealing with” and that they “had difficulty putting charts away.” (Transcript II, Pages 750-752.) As discussed above, OBWC nurses and investigation personnel reviewed and inventoried patient records during the search. Tenney testified that the records obtained during the raid included “some papers,” “routing slips,” and “fee slips” for “non-OBWC” patients that were intermingled in the patient files that were subject to the warrant.

{¶ 32} The testimony and evidence established that Thomas’ disorganized record filing system contributed to the inadvertent seizure of “non-OBWC” patient records. Inasmuch as Thomas was allowed access to all of the patient records that were obtained in the raid, Thomas failed to prove that OBWC tortiously interfered with his practice by unlawfully seizing patient files.

Constructive decertification

{¶ 33} Thomas asserts that OBWC’s review process “constructively and effectively suspended” his ability to participate in the workers’ compensation program. Specifically, Thomas contends that pursuant to former Ohio Adm.Code 4123-7-40, OBWC was required to hold an administrative hearing before it initiated its review procedure and suspended payments.² The court disagrees.

{¶ 34} Former Ohio Adm.Code 4123-7-40 provides, in relevant part:

{¶ 35} “(A) The administrator of workers’ compensation may sanction, suspend, or exclude a health care provider from participation in the

workers' compensation system and from participation in the treatment of workers' compensation claimants where the health care provider has misrepresented the amount or cost or services or supplies rendered or provided to a claimant, has been convicted of a criminal offense related to involvement in the provision of services or supplies under the workers' compensation system, or has failed to comply with the workers' compensation statutes or rules governing health care providers.

{¶ 36} “(B) The bureau medical services division shall investigate allegations of misconduct on the part of health care providers, and may participate with other state or federal agencies or law enforcement authorities in gathering evidence for such matters. * * *

{¶ 37} “(C) Prior to the administrator issuing an adjudication order sanctioning, excluding, or suspending the health care provider from participation in the workers' compensation system, the administrator shall afford the health care provider an opportunity for a hearing in accordance with the provisions of Chapter 119 of the Revised Code and as provided in this rule.”

{¶ 38} Although the testimony established that OBWC instituted a heightened review for the bills that were submitted by Thomas after September 1997, OBWC did not issue an adjudication order sanctioning, excluding, or suspending Thomas as a provider in the workers' compensation system. Accordingly, OBWC was not required to follow the notice and hearing procedures set forth in Ohio Adm.Code 4123-7-40. Rather, Ohio Adm.Code 4123-7-40(B) required OBWC to investigate allegations of misconduct and to work with law enforcement agencies to gather evidence for such investigations.

{¶ 39} Thomas' allegation that OBWC constructively decertified him as a OBWC provider is premised on his assertion that the OBWC suspended all payments on the bills he submitted after the investigation began. However, Tenney testified that

²Former Ohio Adm.Code 4123-7-40 was rescinded effective February 14, 2005.

Thomas did receive payment for bills that were submitted after the raid and supported by medical documentation. According to Tenney's calculations, payments in the amount of \$31,707 were made to Thomas between March 11, 1998, the date of the raid, and the spring of 2000. (OBWC's Exhibit DDDD.) Tenney testified that Thomas retained approximately 15 OBWC patients after the raid. Furthermore, inasmuch as MCOs were responsible for payment decisions regarding bills that Thomas submitted after March 1, 1998, OBWC cannot be held liable for those decisions.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

{¶ 40} In order to prove a claim of intentional infliction of emotional distress Thomas must show, among other things, that OBWC's agents intended to cause emotional distress or that it was known or should have been known that the actions taken would result in serious and debilitating emotional distress. See *Burkes v. Stidham* (1995), 107 Ohio App.3d 363, 375. Given that Thomas has failed to prove that there was any misconduct on the part of OBWC employees, it follows that he cannot prevail on a claim of intentional misconduct.

DUE PROCESS

{¶ 41} In paragraph 27 of his complaint, Thomas raises constitutional claims regarding his right to due process under both the Ohio and United States Constitution. However, it has been consistently held that this court is without jurisdiction to consider claims for relief premised upon alleged violations of either the Ohio or United States Constitution. See, e.g., *Graham v. Ohio Bd. of Bar Examiners* (1994), 98 Ohio App.3d 620; *Burkey v. Southern Ohio Correctional Facility* (1988), 38 Ohio App.3d 170. Accordingly, Thomas' claim alleging violations of his constitutional rights cannot be addressed in this forum.

CONCLUSION

{¶ 42} In conclusion, the court finds that OBWC's employees had a duty to investigate Thomas once they became suspicious of his billing practices. Plaintiff has failed to prove that the conduct of OBWC's employees was either malicious or otherwise outside the scope of their statutory authority. Rather, the evidence established that OBWC's employees acted in the best interest of the injured workers who were treated by Thomas and that the employees were justified in communicating directly with Thomas' patients in an attempt to avoid potentially life-threatening complications associated with steroid treatment. Furthermore, the court is convinced that the decline in Thomas' practice is attributable to his own mismanagement and unprofessional conduct rather than any conduct of OBWC's employees.

{¶ 43} For the foregoing reasons, the court finds that Thomas has failed to prove any of his claims by a preponderance of the evidence and accordingly, judgment shall be rendered in favor of OBWC.



Case No. 2000-02810

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DECISION

[Cite as *Thomas v. Ohio Bur. of Workers' Comp.*, 2008-Ohio-3396.]

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RICHARD M. THOMAS, D.C.

Case No. 2000-02810

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Judge Joseph T. Clark

v.

JUDGMENT ENTRY

OHIO BUREAU OF WORKERS'
COMPENSATION

Defendant/Counter Plaintiff

[Cite as *Thomas v. Ohio Bur. of Workers' Comp.*, 2008-Ohio-3396.]

{¶ 44} The court conducted a jury trial on the claims of defendant/counter plaintiff, the Ohio Bureau of Workers' Compensation, against plaintiff/counter defendant Richard M. Thomas, D.C. The jury returned a verdict in favor of defendant/counter plaintiff, the Ohio Bureau of Workers' Compensation, in the amount of \$473,388.51. Accordingly, judgment is rendered in favor of defendant/counter plaintiff, the Ohio Bureau of Workers' Compensation, in the amount of \$473,388.51.

{¶ 45} This case was subsequently tried to the court on the claims of plaintiff/counter defendant Richard M. Thomas, D.C. against defendant/counter plaintiff, the Ohio Bureau of Workers' Compensation. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant/counter plaintiff, the Ohio Bureau of Workers' Compensation. Court costs are assessed against plaintiff/counter defendant Richard M. Thomas, D.C. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

JOSEPH T. CLARK
Judge

[Cite as *Thomas v. Ohio Bur. of Workers' Comp.*, 2008-Ohio-3396.]

cc:

David M. Deutsch 800 Performance Place 109 North Main Street Dayton, Ohio 45402-1290	Matthew J. Lampke Assistant Attorney General Executive Agencies 30 E. Broad St., 26th Floor Columbus, Ohio 43215-4220
Peter E. DeMarco Susan M. Sullivan Assistant Attorneys General 150 East Gay Street, 23rd Floor Columbus, Ohio 43215-3130	

AMR/cmd

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