

[Cite as *Gen. Medicine, P.C. v. Morning View Care Ctr.*, 2004-Ohio-4669.]

COURT OF APPEALS  
TUSCARAWAS COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

GENERAL MEDICINE, P.C.

Plaintiff-Appellant/Cross-Appellee

-vs-

MORNING VIEW CARE CENTER -  
NEW PHILADELPHIA, INC.

Defendant-Appellee/Cross-  
Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.  
Hon. William B. Hoffman, J.  
Hon. Sheila G. Farmer, J.

Case No. 2003AP12-0088

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Tuscarawas County Court  
of Common Pleas, Case No. 2003CV04-  
0234

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

August 31, 2004

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

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*Hoffman, J.*

{¶1} Plaintiff-appellant/cross-appellee General Medicine P.C. (“General Medicine”) appeals the November 14, 2003 Judgment Entry entered by the Tuscarawas County Court of Common Pleas, memorializing the jury’s verdict in favor of defendant-appellee/cross-appellant Morning View Care Center (“Morning View”) on General Medicine’s breach of contract claim. Morning View cross-appeals from the same judgment entry with respect to the jury’s verdict in favor of General Medicine on Morning View’s counterclaim for breach of contract.

#### STATEMENT OF THE FACTS AND CASE

{¶2} Morning View operates a long-term care facility in New Philadelphia, Ohio. General Medicine, a Michigan corporation, provides management for medical treatment and care in skilled nursing home facilities throughout the Midwest. On June 8, 1998, Morning View and General Medicine executed a Facility Medical Management Agreement whereby General Medicine would implement a management system at Morning View.

{¶3} Pursuant to the terms of the agreement, General Medicine would act as the exclusive medical director of Morning View and oversee all professional medical services. As such, General Medicine would provide twenty-four hour, seven day a week physician coverage for the facility; assure the consistency, the delivery, quality, and safety of professional services performed at the facility; appoint an individual to serve as the medical director; and establish and manage a staff of physicians and nurse practitioners. As part of the implementation of the management system, General Medicine imposed a credentialing requirement for physicians and professional staff who wished to join the Morning View staff. General Medicine required each member of the existing medical staff at Morning View to

undergo the credentialing process, and if the physician was not selected by General Medicine to be on the Morning View staff, he/she did not have staff privileges at the facility.

{¶4} On April 17, 2003, General Medicine filed a Complaint in the Tuscarawas County Court of Common Pleas, asserting a breach of contract claim against Morning View. Morning View filed a timely answer and counterclaim for breach of contract, tortious interference with contract, and fraud. General Medicine filed a Motion for Partial Summary Judgment on the issue of liability. Via Judgment Entry filed November 3, 2003, the trial court overruled General Medicine's motion. The matter proceeded to jury trial on November 5, 2003.

{¶5} During the General Medicine's case-in-chief, Dr. Thomas Prose, the sole owner of General Medicine, testified Glenn Dearth, Morning View's president, met with him in early 1998, to discuss implementing the General Medicine program at Morning View. Dr. Prose stated Dearth expressed concerns over a variety of the issues and problems he was having at Morning View. These issues included problems with the then-medical director and his treatment of women; problems with physicians who were too busy to visit patients at the facility and Morning View's receipt of citations for failing to comply with state and/or federal laws.

{¶6} Dr. Prose detailed General Medicine's system with Dearth, including the credentialing process. Over the course of several months, Dr. Prose and Dearth, who was represented by counsel, negotiated the contract, which was ultimately executed in June, 1998. Dr. Prose stated General Medicine began to provide services to the facility in March, 1999, after an extensive search for a medical director. General Medicine appointed Dr. Lai Tan as the medical director. Dr. Prose testified he relied on Pat Warther, the then

administrator of Morning View, to inform families and patients about the changes at the facility and the new medical director. Dr. Prose stated, during the Spring and Summer of 1999, Morning View cooperated with General Medicine in credentialing physicians. Dr. Prose noted, from the start, nine out of twelve physicians informed General Medicine and Morning View they were not interested in becoming credentialed. Several other physicians, who expressed interest, never completed applications.

{¶7} In April, 2000, Pat Warther expressed several concerns to Dr. Prose, including General Medicine's incorporation of a care plan review; the frequency with which General Medicine physicians examined and treated patients; the issue of patients' right to chose community physicians; and waiver of the credentialing process. Warther was not happy with Dr. Prose's explanations. Dr. Prose received a correspondence dated May 12, 2000, from Warther, in which she asked the doctor to confirm, in writing, residents could see physicians of their choice. Dr. Prose denied ever waiving the credentialing process. Dr. Prose subsequently learned Warther had in October, 1999, written to a local hospital, advising Morning View was waiving the credentialing process.

{¶8} Rebecca Coccia, a nurse practitioner and clinical coordinator for General Medicine, testified she worked with Dr. Tan, the medical director appointed by General Medicine, in the care of the residence as well as assisting the doctor in learning the facility systems and General Medicine systems. During the first month of Dr. Tan's tenure with Morning View, Coccia spent five days a week with her. Coccia was concerned Morning View did not have a sufficient number of nurses or aides to care for their patients. She discussed her concerns with the director of nursing and Pat Warther. During her last visit to the facility in 2001, Coccia did not believe the conditions had changed. Coccia explained

the variable comp benefit General Benefit offered its employees as commission. As an example, Coccia stated she may see twenty-five or more patients per day, and, at the end of the month, she received reimbursement for each patient above a daily average of twenty-five. On cross-examination, Coccia could not recall whether Morning View had ever been specifically cited for inadequate staffing.

{¶9} At the end of the General Medicine's case-in-chief, Morning View made an oral motion for directed verdict, which the trial court denied. Morning View proceeded with its case-in-chief.

{¶10} Glen Dearth testified he learned of General Medicine at the Ohio Health Care Association Convention sometime in the 1990s. The Ohio Health Care Association is the trade association of the long term care industry in the State of Ohio. Dearth spoke with Scott Sansovich at the convention, and met with him the following day. Because Morning View was having problems with its Medical Director, Dr. Oza, the whole concept of General Medicine seemed "fantastic." Dearth spoke with Sansovich regarding the methodology employed by General Medicine in terms of implementing the program as well as the credentialing process. Dearth stated he expressed concerns to Sansovich about the credentialing process and wanted to make sure General Medicine would commit to credentialing local physicians prior to Morning View's committing to General Medicine. Sansovich assured Dearth if a local physician timely submitted his packet and complied with the requirements, said physician would be credentialed without a problem. Dearth explained, once General Medicine initiated the credentialing process for the facility, every local physician who applied was rejected. Dearth testified he felt the denials were due to minute and unimportant things, such as an application being a day or two late.

{¶11} Dearth testified he contacted Dr. Prose during the “ensuing few weeks and months after all of our local physicians got turned down” because those physicians were no longer referring patients to Morning View, and, as a result, the census in the facility plummeted. Dearth testified, during his conversation with Dr. Prose, Dr. Prose acknowledged the need to bypass the credentialing process from a business standpoint, and told him [Dearth] it was okay to do so.

{¶12} Pat Warther testified she sent a correspondence to Dr. Prose dated April 20, 2000, expressing her concerns regarding assessment forms being utilized by General Medicine. Warther believed the assessment was intended merely to create another reason to see a patient each month. Warther requested Dr. Prose stop the use of the assessment forms. Warther stated she had several conversations with Dr. Prose and members of the General Medicine staff in attempts to resolve her concerns. Dr. Prose sent Warther a copy of the letter he received from the Health Care Financing Administration in response to his inquiry about the use of the form. The Health Care Financing Administration informed Dr. Prose the form was not required and not needed. Warther explained this was precisely the reason she disagreed with the use of the form as it merely created another visit for which to bill the residents.

{¶13} Warther sent a second correspondence to Dr. Prose on May 12, 2000, again raising concerns about the use of General Medicine’s assessment forms, which she felt would lead to discrepancies and possible citations to the facility. In the letter, Warther also asked Dr. Prose to instruct the physicians to visit residents only when medically necessary. The remainder of Warther testimony addressed General Medicine’s failure to comply with the quality assurance provision of the Facility Medical Management Agreement. Warther

also stated General Medical did not provide twenty-four hour, seven day a week physician coverage as provided for in the agreement.

{¶14} The testimony also established on October 6, 1999, with the approval of Morning View's President Dearth, Warther wrote to William Harding, the Administrator of Union Hospital, stating, "I have therefore decided to waive the credentialing process for any physicians that are interested in continuing to care for their patients when they are admitted to Morning View Care Center. Further, any physicians who previously applied for credentialing will receive a refund from Morning View Care Center of any fees paid to General Medicine." Approximately one week later, Warther sent a letter to the residents of Morning View and their families, advising them of the decision to waive the credentialing process.

{¶15} Dr. Lai Tan testified via deposition. Dr. Tan testified she was verbally encouraged by Dr. Prose, Warther, and Rebecca Coccia to see twenty-five patients per day. Dr. Tan recalled, during her initial interview with General Medicine, she was informed of the compensation package, which was based upon seeing twenty-five patients per day. Dr. Tan testified she expressed concerns to Coccia regarding General Medicine's policy for generating a patient visit every time an order was written. Dr. Tan explained she did not believe a patient visit was necessary to write an order, for example, for Tylenol when a patient had a headache. According to Dr. Tan, Coccia repeatedly brought up the subject of the number of resident visits Dr. Tan was and should be making. Dr. Tan stated she would receive an incentive of additional monies for every visit above twenty-five she made. With respect to the General Medicine assessment forms, Dr. Tan stated she was instructed to fill out these forms on a monthly basis. Dr. Tan did not feel the completion of the forms on a

monthly basis was necessary. Dr. Tan testified she resigned from her position with General Medicine because, "I did not agree with their kind of practice, the way they practice medicine." Tr., Vol. III at 697.

{¶16} At the close of Morning View's evidence, General Medicine made an oral motion for a directed verdict as to Morning View's claims of tortious interference with contract and fraud, which the trial court granted. The matter was given to the jury on General Medicine's breach of contract claim and Morning View's counterclaim for breach of contract. After hearing all the evidence and deliberations, the jury found in favor of Morning View on General Medicine's claim for breach of contract, and in favor of General Medicine on Morning View's counterclaim for breach of contract. The trial court entered final judgment on the jury's verdict on November 14, 2003.

{¶17} General Medicine raises the following assignments of error:

{¶18} "I. THE TRIAL COURT ERRED WHEN IT FAILED TO INSTRUCT THE JURY THAT ONE PARTY'S MATERIAL BREACH OF A CONTRACT EXCUSES PERFORMANCE OF THE CONTRACT BY THE NON-BREACHING PARTY.

{¶19} "II. THE TRIAL COURT ERRED WHEN IT DENIED GENERAL MEDICINE'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION FOR DIRECTED VERDICT, WHICH SOUGHT TO APPLY THE PRINCIPLE THAT MORNING VIEW CARE CENTER'S UNDISPUTED BREACH OF CONTRACT EXCUSED GENERAL MEDICINE FROM HAVING TO PERFORM UNDER THE CONTRACT.

{¶20} "III. THE TRIAL COURT ERRED WHEN IT PERMITTED THE JURY TO CONSIDER MORNING VIEW'S BREACH OF CONTRACT CLAIM WHEN MORNING VIEW FAILED TO PRESENT ANY EVIDENCE OF DAMAGES."

{¶21} Morning View cross-appeals, raising the following assignments of error:

{¶22} “I. THE LOWER COURT ERRED AS A MATTER OF LAW IN FAILING TO FIND THE CONTRACT ILLEGAL AND UNENFORCEABLE BECAUSE THE CONTRACT SPECIFIES ONLY AN APPROVED GENERAL MEDICINE PHYSICIAN COULD SERVE RESIDENTS IN THE FACILITY, CONTRARY TO LAW.

{¶23} “II. THE LOWER COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO ADMIT EVIDENCE CONTAINED IN PRE-SUIT CORRESPONDENCE BETWEEN THE PARTIES’ COUNSEL.

{¶24} “III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING A DIRECTED VERDICT ON CROSS-APPELLANT’S FRAUD AND TORTIOUS INTERFERENCE CLAIMS.

{¶25} “IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PROHIBITING EXAMINATION OF WITNESSES ON THE ISSUE OF ILLEGALITY OF THE CONTRACT AT ISSUE.

{¶26} “V. THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO STRIKE THE TESTIMONY OF MICHAEL NESSER, APPELLANT-CROSS-APPELLEE’S DAMAGES EXPERT.”

APPEAL  
I, II

{¶27} Because General Medicine’s first and second assignments of error are interrelated, we shall address said assignments together. In its first assignment of error, General Medicine maintains the trial court erred in failing to instruct the jury one party’s material breach of a contract excuses the performance of the contract by the non-breaching party. In its second assignment of error, General Medicine submits the trial court erred in

denying General Medicine's motion for partial summary judgment and motion for directed verdict, based upon the aforementioned principle of law.

{¶28} Assuming, arguendo, the trial court erred in not giving General Medicine's requested instruction, and the trial court erred in denying its motion for partial summary judgment and motion for directed verdict, we find General Medicine has failed to establish how such errors were prejudicial as the jury ultimately found General Medicine did not breach its contract with Morning View.

{¶29} General Medicine's first and second assignments of error are overruled.

### III

{¶30} In its third assignment of error, General Medicine contends the trial court erred in permitting the jury to consider Morning View's breach of contract claim when Morning View failed to present evidence of damages.

{¶31} Even if the trial court erred in allowing the jury to consider Morning View's contract claim, we find General Medicine was not prejudiced thereby as the jury ultimately found in its favor.

{¶32} General Medicine's third assignment of error is overruled.

### CROSS-APPEAL

#### I

{¶33} In its first assignment of error, Morning View argues the trial court erred in failing to find the Facility Medical Management Agreement to be illegal and unenforceable. Morning View explains the contract only allowed an approved General Medicine physician serve residents in the Morning View facility, and such limitation is contrary to law. Morning View continues, under Federal and Ohio law, a patient has the right to choose a personal attending physician.

{¶34} R.C. 3721.13, which addresses the rights of nursing home residents, reads, in part, , “(A)(7) The rights of residents of a home shall include \* \* \* the right, upon request, to be assigned within the capacity of the home to make the assignment, to the staff physician of the resident’s choice, and the right, in accordance with the rules and written policies and procedures of the home, to select as the attending physician a physician who is not on the staff of the home.”

{¶35} The plain language of the statute clearly contemplates a facility’s ability to place limitations upon a patient’s right of choice. Likewise, while federal law guarantees a resident “the right to choose a personal attending physician,” 42 CFR 483.10(d)(1), the legislative history recognizes this right must be “balanced by a facility’s right to grant or withdraw staff privileges to physicians.” Preamble, Federal Register 48834, Vol. 56, No. 187.

{¶36} We further find there is no reason to distinguish between a hospital’s right to credential physicians from nursing home’s right to do the same. *Ferraro v. Bd. of Trustees of Labette Cty Med. Center* (10<sup>th</sup> Cir. 2001), 28 Fed. App. 899, 902. The reasons which justify a hospital’s utilizing a credentialing procedure apply with equal force in a nursing home setting.

{¶37} Morning View’s first assignment of error is overruled.

## II

{¶38} In its second assignment of error, Morning View maintains the trial court erred in failing to admit evidence of pre-suit correspondences between the parties’ counsel.

{¶39} The standard of review for the admission of evidence is abuse of discretion. *State v. Sage* (1987), 31 Ohio St.3d 173. In order to find an abuse of discretion, we must

determine that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d. 217.

{¶40} The trial court excluded the correspondences, finding the letters were not authenticated, were hearsay, and were statements in the course of settlement discussions. After review, we find the trial court did not abuse its discretion in excluding such from evidence on the basis they were not authenticated and were statements made in the course of settlement discussions.

{¶41} Morning View's second assignment of error is overruled.

### III

{¶42} In its third assignment of error, Morning View argues the trial court erred in granting General Medicine's motion for directed verdict on Morning View's fraud and tortious interference claims.

{¶43} Civ.R. 50(A)(4) establishes the procedure for a court to follow in granting a directed verdict, and reads "When a motion for a directed verdict has properly been made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon a determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

{¶44} "[I]f all the evidence relating to an essential issue is sufficient to permit only a conclusion by reasonable minds against a party, after construing the evidence most favorably to that party, it is the duty of the trial court to instruct a finding or direct a verdict on that issue against that party." *O'Day v. Webb* (1972), 29 Ohio St.2d 215, 220. If there is

substantial competent evidence to support the party against whom a motion for directed verdict is made, upon which evidence reasonable minds might reach different conclusions, the motion must be denied. *Wagner v. Roche Labs.* (1996), 77 Ohio St.3d 116, 119. "A motion for directed verdict \* \* \* does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence." *Id.* A court cannot weigh the evidence or evaluate the credibility of the witnesses in determining such a motion. *Id.*

{¶45} We shall address each claim in turn. In order to prove fraud, a plaintiff must demonstrate the following six elements: (1) a representation or concealment, (2) material to the transaction, (3) the falsity of the representation or of the impression created by concealment, (4) intended by the defendant to mislead, (5) justifiable reliance by the plaintiff, and (6) an injury suffered as the proximate result of reliance. *Gaiver v. Preterm-Cleveland, Inc.*, (1987), 33 Ohio St.3d 54,55.

{¶46} Morning View submits General Medicine falsely misrepresented itself as authorized to practice medicine in the State of Ohio. Morning View notes Ohio law forbids a corporation from engaging in the practice of medicine unless it is formed under the laws of the State of Ohio.

{¶47} The first sentence of the Facility Medical Management Agreement reads, "This agreement is made this 8<sup>th</sup> day of June, 1998 \* \* \* by and between General Medicine, P.C. a Michigan professional corporation \* \* \* and Morning View Care Center \* \* \*." The clear and unambiguous language of the contract establishes General Medicine never hid its identity as a Michigan professional corporation. Furthermore, the evidence presented at trial established General Medicine is registered with the Ohio Secretary of State as a

foreign corporation and has received approval to conduct business in the State of Ohio. The actual physicians providing medical services and acting as medical director are all licensed by the State of Ohio. The evidence presented by Morning View fails to establish it acted in reasonable reliance on any misrepresentation made by General Medicine or was injured in any way by such misrepresentation. Accordingly, we find the trial court properly directed the verdict in favor of General Medicine on Morning View's fraud claim.

{¶48} The tort of interference with business relationships occurs when a person, without privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relationship with another, or not to perform a contract with another. *Abell Elevator Co. v. Columbus/Central Ohio Building & Constr. Trades Council* (1995), 73 Ohio St.3d 1, 14. 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) damages resulting therefrom. *Diamond Wine & Spirits, Inc. v. Dayton Heidelberg Distrib. Co., Inc.*, 148 Ohio App.3d 596, 2002-Ohio-3932, at para. 23.

{¶49} Morning View maintains General Medicine's refusal to credential local physicians resulted in a termination of those relationships and, as a consequence thereof, Morning View lost those physicians' referrals which were necessary for its successful operation.

{¶50} We find the evidence presented at trial did not support Morning View's claim. Morning View's expert witness, Stephen Stanisa, testified he could not attribute any economic loss suffered by Morning View to be the result of any actions of General Medicine. Additionally, Morning View, by agreeing to the Facility Medical Management

Agreement bestowed a privilege upon General Medicine to implement a credentialing program. Accordingly, we find the trial court properly directed a verdict on this claim.

{¶51} Morning View's third assignment of error is overruled.

#### IV

{¶52} In its fourth assignment of error, Morning View asserts the trial court erred in precluding evidence on the issue of the legality of the contract. The determination of the the legality of the contract is for the trial court to make. Once the trial court made that determination, we find no abuse of discretion in the trial court's prohibiting testimony contrary to that conclusion.

{¶53} Morning View's fourth assignment of error is overruled.

#### V

{¶54} In its final assignment of error, Morning View submits the trial court erred in failing to strike the testimony of General Medicine's damages expert. Assuming, arguendo, such was error, we find Morning View cannot establish it was prejudiced thereby as the jury found in its favor on General Medicine's claim.

{¶55} Morning View's fifth assignment of error is overruled.

{¶56} The judgment of the Tuscarawas County Court of Common Pleas is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Farmer, J. concur

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JUDGES

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

GENERAL MEDICINE, P.C.	:	
	:	
Plaintiff-Appellant/Cross-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
MORNING VIEW CARE CENTER -	:	
NEW PHILADELPHIA, INC.	:	
	:	
Defendant-Appellee/Cross-Appellant :	:	Case No. 2003AP12-0088

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Tuscarawas County Court of Common Pleas is affirmed. Costs assessed equally.

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JUDGES