IN THE SUPREME COURT OF THE STATE OF NEVADA

HARRISTON LEE BASS, JR.,
Appellant,
vs.
WOMEN'S HEALTH CARE, INC., A NEVADA CORPORATION; LYING IN HOSPITAL PARTNERSHIP, A NEVADA PARTNERSHIP; HARRISON H. SHELD, M.D.; AND WILLIAM G. WIXTED, M.D.,
Respondents.

No. 38918

ORDER AFFIRMING IN PART AND REVERSING IN PART

Appeal from a district court order granting summary judgment and from post-judgment orders awarding costs. Eighth Judicial District Court, Clark County; Nancy M. Saitta, Judge.

This is an appeal from a district court order granting summary judgment in favor of respondents, Women's Health Care, Inc., Lying in Hospital Partnership, Harrison H. Sheld and William G. Wixted, and an appeal from post-judgment orders awarding costs to Wixted, Sheld, and Women's Health. Appellant, Harriston Lee Bass, Jr., argues that the district court improperly granted respondents' motion for summary judgment because genuine issues of material fact exist in the case. However, Bass fails to identify any specific material fact to assist this court in reviewing the appeal. Bass did submit several affidavits, which he claims support his position. However, Bass failed to indicate how these documents raise issues of fact and which causes of action were improperly dismissed because of the existence of issues of fact.

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Our review of the summary judgment order is de novo.[1] Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to summary judgment as a matter of law.[2] In determining whether summary judgment is warranted, the court must view all evidence and reasonable inferences in the light most favorable to the nonmoving party.[3] The non-moving party must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him.[4] A genuine issue of material fact exists if sufficient evidence exists such that a reasonable jury could return a verdict for the non-moving party.[5] If an essential claim for relief is absent, the facts, disputed or otherwise, as to the other elements are rendered immaterial and summary judgment is proper.[6] The non-moving party "is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture."[7]

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[1]Nevada Contract Servs. v. Squirrel Cos., 119 Nev. 157, 160, 68 P.3d 896, 899, (2003).

[2]Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993); see also NRCP 56(c).

[3]Posadas, 109 Nev. at 452, 851 P.2d at 441-42.

[4]Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992).

[5]Id. at 110, 825 P.2d at 591.

[6]Id. at 111, 825 P.2d at 592.

[7]Collins v. Union Fed. Savings & Loan, 99 Nev. 284, 302, 662 P.2d 610, 618-619 (1983) (quoting Hahn v. Sargent, 523 F.2d 461, 467 (1st Cir.1975), cert. denied, 425 U.S. 904 (1976)).

Bass summarily contends that the admission by Women's' Health and Lying in Hospital that the lease agreement between them was not formally written until February 1993, creates a genuine issue of material fact as to the nature of the relationship between the parties and their respective obligations to one another. Bass fails to state how this creates a genuine issue of material fact. Nevada law dictates that a lessor of property cannot be liable for the actions of his lessee without the existence of some other factor; for example, tortious actions by the lessor, himself, or contractual obligations which give rise to liability.[8] Here, Bass simply offers no admissible evidence to demonstrate that Lying participated in the operation of the hospital on or after August 25, 1992, nor does Bass cite applicable law in support of his argument. Lying, on the other hand, did offer evidence that it did not participate in the operational or administrative decisions of the hospital. To the contrary, Women's Health was the entity solely responsible for the operation of the hospital. Therefore, we find that it was not error for the district court to grant summary judgment in favor of Lying in Hospital.

In addition, Lying, Wixted, and Sheld contend that they are immune from suit under the Health Care Quality Improvement Act (HCQIA). We agree. In Meyer v. Sunrise Hospital, a physician challenged a hospital's decision to suspend her staff privileges after she was afforded a peer review assessment and the right to a fair hearing in accord with the hospital's by-laws.[9] We held that the hospital was immune from damages

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[8]See Wright v. Schum, 105 Nev. 611, 612, 781 P.2d 1142, 1142 (1989).

[9]117 Nev. 313, 321, 22 P.3d 1142, 1148 (2001).

under the HCQIA.[10] To be immune from damages under HCQIA, a hospital must satisfy four requirements in order to ensure that due process and fairness requirements are met.[11] Pursuant to 42 U.S.C. § 11112(a), a peer review action is immune from damages as long as the action was made: "(1) in furtherance of quality healthcare; (2) after a reasonable effort to obtain the facts in the matter; (3) after adequate notice and hearing; and (4) in the reasonable belief that the action was warranted based on the facts known."[12] Importantly, review of summary judgment under the HCQIA begins with a rebuttable presumption that the peer review action met the requirements listed above.[13] It is the challenger's burden to overcome this presumption.[14]

In the instant case, viewing the facts in a light most favorable to Bass, we find that no reasonable juror could conclude that the hospital's actions fell outside the protections afforded under section 11112(a). At the outset we note that Bass failed to provide any evidence to the district court to overcome the presumption that the peer review committee's actions fell outside the scope of HCQIA protection. Bass presented two affidavits, his own, and O'Carrol's, neither of which is sufficient to overcome the presumption of reasonableness. Bass' affidavit merely asserts that the ad hoc committee failed to invite several key witnesses and failed to obtain

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[10]Id. at 317, 329, 22 P.3d at 1146, 1153.

[11]Id. at 322, 22 P.3d at 1149.

[12]Id.

[13]Id.

[14]Id.

independent expert review. In O'Carrol's affidavit she opines that the ad hoc committee failed to behave objectively and that their review fell beneath acceptable standards. Taken together, these affidavits fail to show that the ad hoc committee acted unreasonably.

On the contrary, the evidence submitted by Lying, Wixted, and Sheld shows that respondents carried out the administration of the peer review board in accord with the provisions of the HCQIA. First, the minutes from the ad hoc committee and the MEC demonstrate that the committees focused on the determination of whether Tryon received sub-standard treatment. The record shows that after an extensive review of the facts the MEC and the ad hoc committee found that Bass' sub-standard care of Tryon warranted his suspension. The record shows that the peer review board acted with a reasonable belief under this set of facts and that the board carried out its actions in the furtherance of quality health care. Moreover, respondents provided Bass with ample notice of the peer review. The only reason a hearing did not take place was because Bass cancelled the hearing twice, and then ultimately failed to reschedule the hearing. Therefore, this court finds that the district court properly granted summary judgment because the conduct complained of was subject to immunity under the HCQIA.

As a result, we find it unnecessary to address Bass' claims against respondents, other than to note that Bass failed to provide sufficient evidence to establish claims for breach of contract, intentional interference with contractual relations, and defamation. Moreover, it should be noted that we previously rejected recognizing a tort for spoliation of evidence in Timber Tech Engineered Building Products v. The Home Insurance Co., after determining that the recognition of such a

tort was outweighed by the burden to litigants, witnesses, and the judicial system.[15]

Additionally, Bass argues that the district court erred both in awarding costs to respondents because the memorandum of costs was filed untimely and that a portion of the costs was unreasonable. Bass argues that the district court's award of an expert witness fee for an expert witness who did not make an appearance at a deposition, a pre-trial hearing, or at trial was unreasonable. We have considered Bass' arguments regarding the timeliness of Sheld and Wixted, and Women's memorandum of costs and find that they are without merit.

However, we agree with Bass that Sheld and Wixted are not entitled to an award for costs for expert witnesses who never testified at any official court proceedings. NRS 18.005(4) defines costs as "[f]ees for witnesses at trial, pretrial hearings and deposing witnesses, unless the court finds that the witness was called at the instance of the prevailing party without reason or necessity." In addition, NRS 18.110(2) states that "[i]ssuance or service of subpoena shall not be necessary to entitle a prevailing party to tax, as costs, witness fees and mileage provided that such witnesses be sworn and testify in the cause." Here, it appears that Sheld and Wixted's witnesses were never sworn and never testified. Therefore, pursuant to NRS 18.005(4) and 18.110, Sheld and Wixted are not entitled to costs.

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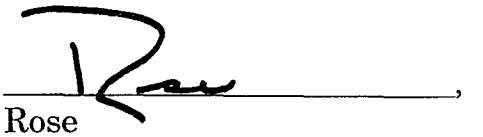
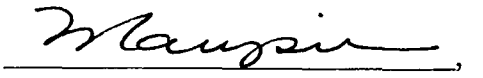
[15]118 Nev. 630, 631-32, 55 P.3d 952, 953 (2002).

Accordingly we,

Order the district court's judgment AFFIRMED in part and REVERSED in part.


, C.J.
Shearing


, J.
Rose


, J.
Maupin

cc: Hon. Nancy M. Saitta, District Judge
David Lee Phillips
R. Paul Sorenson
Mandelbaum Gentile & D`Olio
Pico & Mitchell
Schuering Zimmerman & Scully
Clark County Clerk