

**State of West Virginia
Supreme Court of Appeals**

**Nabil Guirguis, M.D.,
Plaintiff below, Petitioner**

FILED

vs) No. 101230 (Marion County 08-C-371)

February 11, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**United Hospital Center, Inc., West Virginia
United Health System, Inc., and James DeMarco, M.D.,
Defendants below, Respondents**

MEMORANDUM DECISION

Plaintiff below, Nabil Guirguis, M.D., appeals the Circuit Court of Marion County's April 16, 2010, "Order Granting Motion to Dismiss." The order dismissed one co-defendant, James DeMarco, M.D., pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure for failure to state a claim upon which relief can be granted. The order on appeal did not resolve claims against the other defendants. Because the Order is final against one but fewer than all of the parties, and there is no just reason for delay, the circuit court certified the Order as immediately appealable pursuant to Rule 54(b) of the Rules of Civil Procedure.

This Court has carefully considered the parties' arguments and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Dr. Guirguis is a nephrologist who formerly worked for Fresnius Medical Care and who now operates a competing dialysis center, the Gentle Dialysis Clinic. Dr. DeMarco is employed at Fresnius Medical Care. Dr. Guirguis's clinic primarily provides peritoneal or "home dialysis," while the Fresnius Clinic and Dr. DeMarco primarily provide a different form of dialysis called hemodialysis. Dr. Guirguis asserts that United Hospital Center, Inc., West Virginia United Health System, Inc., and Dr. DeMarco engaged in a monopolistic scheme intended to restrict Dr.

Guirguis's ability to compete against them in the provision of nephrological care to patients.¹ Dr. Guirguis essentially asserts that the hospital defendants and Dr. DeMarco work together to refer patients to Dr. DeMarco instead of Dr. Guirguis.

The claims against Dr. DeMarco are in Count II of the Plaintiff's Second Amended Complaint, where Dr. Guirguis alleges that all defendants violated the West Virginia Antitrust Act, West Virginia Code § 47-18-1 *et seq.* In granting the Rule 12(b)(6) motion to dismiss, the circuit court analyzed the allegations in light of the elements of a restraint of trade, West Virginia Code § 47-18-3, and the elements of a monopoly or attempted monopoly, West Virginia Code § 47-18-4.

This Court's standard for reviewing a circuit court's order dismissing a complaint pursuant to Rule 12(b)(6) is *de novo*. Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995).

As to a restraint of trade, the circuit court found that Dr. Guirguis made insufficient allegations against Dr. DeMarco to support two of the required elements: that Dr. DeMarco's actions either "produced anticompetitive effects within the relevant product and geographic markets" or "that the concerted actions were illegal." *E.g., Princeton Insurance Agency, Inc. v. Erie Insurance Company*, 225 W.Va. 178, 690 S.E.2d 587 (2009) (*per curiam*). Upon a careful consideration of the parties' briefs and the record on appeal, we agree with the circuit court's conclusion that Dr. Guirguis did not allege facts that, if true, would establish these elements. There is no legal duty not to harm a competitor by way of legitimate competition. A doctor who is providing his preferred method of treatment and accepting patients from hospitals is not restraining the trade of another doctor who provides a different form of treatment and is not receiving patient referrals.

As to a monopoly or attempt to create a monopoly, the circuit court found that Dr. Guirguis made insufficient allegations to support that Dr. DeMarco either "possesses monopoly power in the relevant market," *e.g., Cavalier Telephone, LLC v. Verizon Virginia, Inc.*, 330 F.3d 176, 183 (4th Cir. 2003), or "engaged in predatory or anticompetitive conduct." *E.g., In re Microsoft Corporation Antitrust Litigation*, 333 F.3d 517, 534 (4th Cir. 2003). Upon a careful consideration of the parties' briefs and the record on appeal, we agree with the circuit court's conclusion that Dr. Guirguis did not allege facts that, if true, would establish these elements. The circuit court found that Dr. DeMarco does not have a monopoly on the provision of nephrological care in the relevant market. Dr. DeMarco is not alleged to have actually engaged in predatory or anticompetitive conduct. The practice of treating

¹Fresnius Medical Care is not named as a defendant.

patients, some of whom are referred by other defendants, in a preferred style of dialysis is not illegal conduct.

For the foregoing reasons, we affirm the circuit court's dismissal of all claims against Dr. DeMarco.

Affirmed.

ISSUED: February 11, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh