STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

James H. Henick,
Plaintiff Below, Petitioner

vs) No. 11-1145 (Berkeley County 10-C-193)

Fast-Track Anesthesia Associates, LLC;
Jessica Palumbo-Peretin, Individually
and as owner and director of
Fast-Track Anesthesia Associates, LLC,
Defendants Below, Respondents

FILED
November 26, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner James H. Henick, M.D., by counsel, P. Todd Phillips, appeals an order of the Circuit Court of Berkeley County entered on July 11, 2011, that dismissed his complaint against respondents, Fast-Track Anesthesia Associates, LLC ("Fast-Track") and Jessica Palumbo-Peretin, M.D. ("Dr. Palumbo"), individually and as sole owner and director of Fast-Track. Petitioner claimed that respondents breached his employment contract by terminating his employment and by failing to reimburse his accrued, unused vacation leave in violation of the Wage Payment and Collection Act ("WPCA"), West Virginia Code §21-5-1 to -18. The circuit court also found in favor of respondents on their counterclaims against petitioner for defamation per se and breach of contract. Respondents appear by counsel, Kenneth J. Barton Jr. and Jerald J. Oppel.

This Court has considered the parties' briefs and the record on appeal. The facts and the legal arguments are adequately presented and would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

On April 4, 2008, petitioner, an anesthesiologist and pain management specialist, entered into an employment contract with respondents under which petitioner agreed to work from July 1, 2008, to June 30, 2009. The contract could be renewed annually if neither party objected. Petitioner was to receive four weeks of vacation for each calendar year of employment under the contract, which was drafted by petitioner's wife, a Virginia attorney. The contract was silent regarding reimbursement of accrued, unused vacation leave upon termination.

Petitioner received a copy of respondents' "Employee Handbook" ("Handbook") on his first day of work. Respondents' agent placed a handwritten note in the "Benefits" section of petitioner's copy of the Handbook that stated, "Individual terms stated in contract." In regard to

fringe benefits, the Handbook stated that accrued, unused vacation leave was reimbursable where an employee resigned with notice.

Petitioner's employment was renewed on July 1, 2009. However, the parties orally agreed to modify the contract so that petitioner's employment would end on December 31, 2009.

A dispute arose between the parties in August of 2009, when Dr. Palumbo learned that petitioner had pre-signed fifty-four blank prescription forms ("signed blank script") and left them with his pain management nurse before he left for vacation. When petitioner returned to the office on August 31, 2009, Dr. Palumbo met with petitioner to discuss the signed blank script and then placed petitioner on a paid suspension pending further investigation.

On September 2, 2009, petitioner discussed his suspension with Martinsburg surgeon, Dr. Joseph Cincinnati, who owned Tri-State Surgical Center ("Tri-State"). During their conversation, *petitioner told Dr. Cincinnati that Dr. Palumbo had asked petitioner to pre-sign blank script before he left for vacation.* Tri-State and Fast-Track were located in the same office building. Fast-Track was the exclusive provider of anesthesia services to Tri-State's patients, and Tri-State was Fast-Track's only client.

Dr. Palumbo terminated petitioner's employment with Fast Track in mid-September of 2009, and reported petitioner's actions to the West Virginia Board of Medicine. On April 1, 2011, the Board of Medicine issued it decision which found as follows:

> The evidence presented shows that there is a violation of the provision of the Medical Practice Act and Rules of the Board and that probable cause exists to substantiate disqualification of [petitioner] from the practice of medicine and surgery in this State….

Because petitioner had let his medical license lapse in West Virginia, the Board of Medicine found that it did not have jurisdiction to discipline petitioner for his conduct. Petitioner, in turn, filed a report with the West Virginia Board of Medicine against Dr. Palumbo. The Board dismissed petitioner's report with a finding that Dr. Palumbo had not violated the Board's rules.

In March of 2010, petitioner filed an action against respondents for breach of contract; for failure to reimburse accrued, unused vacation leave in violation of the WPCA; and for three other claims that were subsequently dismissed. Respondents counterclaimed for breach of contract, defamation per se, and insulting words, but later dismissed the insulting words claim.

Following a bench trial on June 6 through 8, 2011, the circuit court entered its order that dismissed petitioner's breach of contract and WPCA claims. The circuit court concluded that when petitioner pre-signed the blank script, he violated the Board of Medicine's rules and, therefore, breached his contract with respondents. The circuit court also concluded that because petitioner had been terminated, he was not entitled to reimbursement for his accrued, unused vacation leave under the terms of the Handbook. In regard to respondents' counterclaim for defamation per se, the circuit court found that petitioner's statement to Dr. Cincinnati was defamatory per se because it imputed incapacity in Dr. Palumbo's profession. The circuit court

awarded respondents $100,000 in general damages but specifically denied a separate award of punitive damages. The circuit court also awarded respondents $87,167 in damages on their counterclaim for breach of contract. Most of respondents' damages came from the added expense of hiring per diem anesthesiologists to fill in for petitioner until a permanent anesthesiologist/employee could be hired. Petitioner now appeals the circuit court's order.

In Syllabus Point 1 of *Public Citizen, Inc. v. First Nat'l. Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996), we stated,

> [i]n reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

With this standard in mind, we turn to petitioner's first assignment of error. Petitioner asserts that the circuit court erred in finding that he was not entitled to reimbursement of accrued, unused vacation leave because it considered the language in both his employment contract and in the Handbook. Petitioner argues that his employment contract alone governed the terms and conditions of his employment because respondents' agent wrote "Individual terms stated in the contract" on the "Benefits" page of petitioner's copy of the Handbook. Petitioner also argues that because his employment contract did not specifically deny payment of such benefits upon termination of employment, any ambiguity in the contract should be resolved in his favor.

We note first that petitioner's wife drafted petitioner's employment contract. Thus, any ambiguity in the contract should be construed against petitioner. Second, we find that the circuit court did not abuse its discretion in considering both petitioner's employment contract and the Handbook in resolving petitioner's WPCA claim. The Handbook states that "occasionally [respondents'] hire an individual into a particular position pursuant to an employment contract." Therefore, the Handbook recognized a dichotomy between at-will and contract employees but applied its terms to both types of employees. Furthermore, petitioner expressly agreed to abide by the terms of the Handbook when he signed the Handbook's acknowledgement page. Therefore, petitioner accepted the Handbook's terms as part his employment contract and agreed to be bound by them. As such, both petitioner's employment contract and the Handbook governed whether petitioner was eligible to receive reimbursement of accrued, unused vacation leave. We look first to petitioner's employment contract and find it to be silent regarding the reimbursement of accrued, unused vacation leave. However, the Handbook provides that "an employee that resigns with the proper notice shall be reimbursed for any accrued, unused vacation at the time of resignation." This phrase makes it clear that only an employee who resigns with notice can receive reimbursement of accrued, unused vacation leave. Because petitioner did not resign with notice, the circuit court correctly found petitioner to be ineligible for reimbursement.

Petitioner's second assignment of error is that the circuit court failed to adopt the Restatement (Second) of Torts "single mistake" rule that states, in part, as follows (with emphasis added):

> A statement imputing a single mistake or act of misconduct in office or in the conduct of a business or profession is actionable under the rule stated in this Section only if the act fairly implies an habitual course of similar conduct, *or the want of qualities or skill that the public is reasonably entitled to expect of persons engaged in such a calling*.

§573 cmt. d (1977). Petitioner contends that courts applying the single mistake rule have reasoned (with emphasis added) that:

> "[L]anguage imputing to a business or professional man ignorance or mistake on a single occasion and not *accusing him of general ignorance or lack of skill* is not actionable per se." This is because "a charge that plaintiff in a single instance was guilty of a mistake, impropriety or other unprofessional conduct does not imply that he is generally unfit."

Crown Andersen, Inc. v. Georgia Gulf Corp., 554 S.E.2d 518, 521 (Ga.App.2001) (internal footnotes omitted). Petitioner argues that respondents' counterclaim for defamation per se is based on a single mistake, not a habitual course of conduct, and does not imply any lack of skill on the part of Dr. Palumbo. As such, respondents' counterclaim for defamation per se is not actionable against petitioner under the single mistake rule.

Pursuant to the Restatement (Second) of Torts, §573 cmt. d (1977), the public should be reasonably entitled to expect that a physician would not instruct their physician-employee to pre-sign blank script. Pursuant to *Crown Andersen, Inc*., petitioner's statement to Dr. Cincinnati is actionable per se because petitioner essentially accused Dr. Palumbo of a general ignorance of laws regarding pre-signing of blank script. Petitioner's statement to Dr. Cincinnati could have had devastating effects on Dr. Palumbo's medical career. If the Board of Medicine had believed that Dr. Palumbo told petitioner to pre-sign blank script, Dr. Palumbo could have been sanctioned by the Board or lost her medical license. Additionally, if Dr. Cincinnati had believed petitioner's statement, Dr. Palumbo could have lost her only client and her reputation in the medical community. Accordingly, we find no error by the circuit court.

Petitioner's third assignment of error is that the circuit court erred in finding petitioner's statement to Dr. Cincinnati to be defamatory on its face. Petitioner argues that a statement is actionable per se only if it is defamatory on its face to a person of common understanding without the use of innuendo or extrinsic evidence. *See Spouse v. Clay Communication, Inc*., 158 W.Va. 427, 433, 211 S.E.2d 674, 680 (1975), and *Sutherland v. Kroger Co*., 144 W.Va. 673, 682, 110 S.E.2d 716, 723 (1959). Petitioner argues that in contravention of that standard, the circuit court found that petitioner's statement "probably would not mean much at Wal-Mart," but was actionable based upon the profession and specialized knowledge of Dr. Cincinnati and given Dr. Cincinnati's relationship with the parties. Petitioner contends that the circuit court ruled that extrinsic evidence–in this case, a physician's knowledge of rules regarding the practice of medicine–was necessary for petitioner's statement to be defamatory.

The circuit court did not abuse its discretion in finding petitioner's statement to Dr. Cincinnati to be defamatory on its face. Dr. Cincinnati is a fellow physician who, without explanation, understood the inflammatory nature of petitioner's statement.

Petitioner's fourth assignment of error is that the circuit court erred in awarding damages in favor of Fast-Track because petitioner's statement to Dr. Cincinnati related only to Dr. Palumbo. As such, petitioner asserts that Fast-Track could not meet the elements of a defamation action against petitioner pursuant to Syllabus Point 7 in *Greenfield v. Schmidt Baking Co., Inc.*, 199 W.Va. 447, 485 S.E.2d 391 (1997), wherein the Court stated (with emphasis added),

> "[t]he essential elements for a successful defamation action by a private individual are (1) defamatory statements; (2) a nonprivileged communication to a third party; (3) falsity; (4) *reference to the plaintiff*; (5) at least negligence on the part of the publisher; and (6) resulting injury." Syllabus point 1, *Crump v. Beckley Newspapers, Inc.*, 173 W.Va. 699, 320 S.E.2d 70 (1983).

The circuit court did not abuse its discretion in finding in favor of Fast-Track. Dr. Palumbo was Fast-Track's sole owner and director and, as such, any claim against Dr. Palumbo would be imputed against Fast-Track.

Petitioner's fifth assignment of error is that the circuit court erred in ruling in favor of respondents' counterclaim for defamation per se because respondents' failed to allege petitioner's exact defamatory words. Petitioner argues that exact words are required pursuant to the following language in *Porter v. Mack*, 50 W.Va. 581, 586, 40 S.E. 459, 461 (1901) (internal citation omitted): "In Pennsylvania and Massachusetts, and probably some other states, in a charge for slander it is held unnecessary to set out the exact words, the substance being deemed sufficient, but in this State the words spoken must be set out, and not their substance."

Dr. Cincinnati testified at trial that "[petitioner] told me that Dr. Palumbo told him to pre-sign the prescriptions." The words are not exact but the import is clear. Moreover, petitioner admitted on the stand that he made such a statement to Dr. Cincinnati. Finally, petitioner's reliance on *Porter* is misplaced. In *Porter*, the speaker making the defamatory statement was unknown or ambiguous. In the instant case, the speaker is known. Therefore, the court did not abuse its discretion in finding that Dr. Cincinnati's testimony provided the necessary basis to support respondents' defamation per se action.

Petitioner's sixth assignment of error is that the circuit court erred in awarding punitive damages where respondents did not allege or prove an actual injury and where the circuit court failed to perform any one of the proportionality tests required for an award of punitive damages. *See, e.g., Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991). Petitioner contends that respondents suffered no actual damages because Dr. Cincinnati did not believe petitioner's statement. Specifically, when petitioner uttered the statement, Dr. Cincinnati replied that petitioner must have been confused about Dr. Palumbo's instructions because she would not have asked petitioner to violate the law. Thus, the circuit court's award of punitive damages was disproportionate to any harm.

The circuit court's order specifically stated that it was awarding "general damages" and that "[s]eparate punitive damages [were] not awarded." Therefore, petitioner's allegation is without support. Moreover, where words are actionable per se, the person defamed need not aver or prove special damages or a resulting injury. *See generally Milan v. Long*, 78 W.Va. 102, 88 S.E. 618 (1916), and *Stewart v. Riley*, 114 W.Va. 578, 172 S.E. 791 (1934).

Petitioner's seventh and final assignment of error is that the circuit court erred in failing to dismiss respondents' claim for breach of contract because respondents failed to prove that their damages resulted from petitioner's pre-signing blank script. Petitioner argues that he was not terminated for breaching his contract by pre-signing blank script, but was in fact fired for his statement to Dr. Cincinnati. Petitioner argues that the circuit court failed to link petitioner's statement to Dr. Cincinnati with respondents' loss of income.

The circuit court established a causal connection between petitioner's termination and respondents' damages. In its July 11, 2011, order, the circuit court concluded that petitioner both breached his contract and violated the law when he pre-signed blank script. Furthermore, Dr. Palumbo testified at trial that she terminated petitioner's employment because he illegally signed blank script. Therefore, the circuit court did not abuse its discretion in failing to dismiss respondents' breach of contract claim.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 26, 2012

CONCURRED IN BY:

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