

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

KANDEL V. NEBRASKA MED. CTR.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
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LAURENCE B. KANDEL, APPELLANT,
V.
THE NEBRASKA MEDICAL CENTER, APPELLEE.

Filed October 12, 2010. No. A-09-1241.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Robert J. Becker and John S. Stalnaker, of Stalnaker, Becker & Buresh, P.C., and E. Terry Sibbersen, of Sibbersen & Strigenz, P.C., for appellant.

Howard Fredrick Hahn and L. Steven Grasz, of Husch, Blackwell & Sanders, L.L.P., for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

Dr. Laurence B. Kandel appeals the order of the Douglas County District Court which granted the motion for summary judgment filed by The Nebraska Medical Center (NMC) and dismissed Kandel's amended complaint and NMC's counterclaim. For the following reasons, we affirm.

STATEMENT OF FACTS

Background Information.

Kandel is a board-certified urologist, licensed to practice medicine in several states, including Nebraska. In 2003, Kandel entered into an employment agreement with the University of Nebraska Medical Center Physicians (UNMC Physicians). In addition to providing physician services for NMC, Kandel was also granted medical staff membership and clinical privileges. Kandel's contract with NMC was a 1-year contract which terminated on June 30 of each year,

subject to renewal by Kandel. Kandel was also contractually bound by the NMC Credentials Policy and medical staff bylaws.

Prior to June 2007, a complaint was filed with the Medical Staff Executive Committee (Committee) against Kandel, which complaint alleged that Kandel refused to allow another physician to use a laser for a procedure for fear that the usage would delay his own usage of the laser and compromised the safety of that physician's patient. The Committee met on June 12, at which time the complaint was presented for consideration and the Committee made a formal determination to open an investigation into Kandel's conduct with employees, patients, and staff members.

On June 15, 2007, a letter was drafted and, on June 21, sent to Kandel by the NMC vice-chief-of-staff, which letter indicated that pursuant to the NMC Credentials Policy, the Committee had met on June 12 and a formal determination was made to open an investigation regarding his conduct. Just before that letter was sent to Kandel, on June 19, Kandel sent a letter to the chairman of the NMC Department of Surgery which explained that he had been offered an employment opportunity with another university medical center and would not renew his contract with NMC and UNMC Physicians and further offered his resignation as of June 30, 2007.

On June 20, 2007, a NMC credentialing specialist sent a letter to Kandel to confirm his resignation and further requested that he indicate whether he wished to retain his medical staff membership and clinical privileges at NMC. On June 25, Kandel responded that he wished to resign from the medical staff and "did not wish to retain" membership and clinical privileges as of June 30. Also on June 25, Kandel sent a letter to NMC which alleged that the investigation was a "malicious attack" against his career and demanded that the investigation be terminated immediately. On July 10, the Committee accepted Kandel's resignation, and Kandel's request to relinquish his medical staff privileges was accepted by the board of directors on July 16.

On July 23, 2007, NMC filed an "adverse action report" with the National Practitioner Data Bank (NPDB), pursuant to the Health Care Quality Improvement Act of 1986 (HCQIA). 42 U.S.C. § 11101 et seq. (2000). The NPDB is an information clearinghouse mandated by HCQIA to collect and disseminate information relating to professional competence or conduct of physicians and other health care professionals. HCQIA requires health care entities to report information regarding physicians when the entity accepts the "surrender of clinical privileges" of a physician "while the physician is under an investigation by the entity relating to possible incompetence or improper professional conduct." 42 U.S.C. § 11133(a)(1)(B)(i). In the adverse action report filed regarding Kandel, NMC reported that Kandel had surrendered his privileges while under an investigation of his professional competence or conduct. No further actions or communications were taken or made by Kandel, who, on July 1, relocated to Tennessee to later begin employment with Marshall University School of Medicine in West Virginia, effective October 1.

On December 4, 2007, Marshall University School of Medicine rescinded its offer of employment to Kandel citing the NPDB report, Kandel's failure to disclose the existence of the report during conversations with the university, and Kandel's failure to obtain his West Virginia medical license and hospital credentials despite being given an October 1 start date.

Procedural History.

On June 16, 2008, Kandel filed a complaint against NMC in Douglas County District Court alleging defamation, invasion of privacy, and tortious interference with a business relationship and requested special damages arising from loss of employment, presumed damages for loss of reputation, employment opportunity and emotional distress, in addition to costs and attorney fees. On July 17, NMC filed an answer denying Kandel's allegations and raising several affirmative defenses.

On September 22, 2008, NMC also filed a counterclaim which claimed that Kandel had agreed to be bound by the conditions and regulations contained within the NMC Credentials Policy which specifically granted NMC immunity from such a suit and further alleged breach of contract and requested declaratory relief. Kandel filed an answer, generally denying the counterclaim, in addition to an amended complaint which generally alleged the same causes of actions as filed in the first complaint.

On December 1, 2008, NMC filed a motion for summary judgment which asserted that NMC was entitled to summary judgment because there was no genuine issue of fact that the adverse action report filed with the NPDB on July 23, 2007, was true; that NMC had a statutory duty to file the adverse action report and was entitled to immunity for the action; and that the adverse action report was filed without malice.

A hearing was held on the matter, and on July 9, 2009, the district court entered a lengthy order granting NMC's motion for summary judgment and dismissing Kandel's amended complaint. The district court found that Kandel was barred from bringing suit against NMC for filing the adverse action report pursuant to the NMC Credentials Policy and was limited to the remedies provided therein. The district court also made findings in a second section entitled "[s]ubstantive arguments" concerning the three causes of action pled by Kandel.

On July 26, 2009, Kandel filed a motion to alter or amend the district court's order granting summary judgment in favor of NMC. On October 19, the parties filed a stipulation which indicated that the district court's order granting summary judgment failed to address NMC's counterclaim which the parties stipulated be dismissed by the court without prejudice. Kandel also filed a second motion to alter or amend the judgment which requested that several portions of the district court's July 9 order be stricken because the district court had previously limited the summary judgment hearing to the issue of waiver due to issues with a pending motion to compel.

On November 20, 2009, the district court entered an order on Kandel's motion to alter or amend and an amended order on NMC's motion for summary judgment. The district court found that the substantive grounds for Kandel's claims for defamation, invasion of privacy, and tortious interference were not before the court; therefore, the court vacated that portion of the order and granted that portion of Kandel's motion to alter or amend. The district court also ordered that NMC's motion for summary judgment be granted, and pursuant to the parties' stipulation, NMC's counterclaim was dismissed without prejudice. It is from this order that Kandel has timely appealed.

ASSIGNMENT OF ERROR

Kandel asserts, rephrased and consolidated, that the district court erred in granting NMC's motion for summary judgment.

STANDARD OF REVIEW

Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. In reviewing a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment is granted and give such party the benefit of all reasonable inferences deducible from the evidence. *Erickson v. U-Haul Internat.*, 274 Neb. 236, 738 N.W.2d 453 (2007).

ANALYSIS

Kandel asserts that the district court erred in various respects when it granted NMC's motion for summary judgment. Specifically, Kandel argues that the district court erred in finding that the "immunity" language contained in the NMC Credentials Policy applied to the filing of an adverse action with the NPDB, in finding that the immunity provision of the NMC Credentials Policy was enforceable because there existed an appeal and hearing procedure, in finding that the immunity provision of the NMC Credentials Policy was not contrary to Nebraska public policy and/or not unconscionable, and by failing to properly consider the evidence in a light most favorable to Kandel.

NMC Credentials Policy.

Kandel first argues that the district court erred by finding that the "Grant of Immunity" clause within the NMC Credentials Policy applied to filing an adverse action report with the NPDB.

The district court determined that the NMC Credentials Policy and the medical staff bylaws constituted a contract, a finding which was not assigned as error by Kandel. The pleadings in this case further indicate that Kandel admitted that he was subject to the rules and regulations of NMC, including the NMC Credentials Policy, and that on April 8, 2004, he signed a "Statement of Application" which set forth that Kandel had received, read, and agreed to comply with NMC's bylaws, applicable policies, and rules and regulations.

The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. *Albert v. Heritage Admin. Servs.*, 277 Neb. 404, 763 N.W.2d 373 (2009). When the terms of a contract are clear, a court may not resort to rules of construction, and terms are accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them. *Renter v. Siedenbug*, 15 Neb. App. 884, 739 N.W.2d 216 (2007). In such a case, a court shall seek to ascertain the intention of the parties from the plain language of the contract. *Id.*

The NMC Credentials Policy, § 2.C.2, states in pertinent part:

By applying for appointment, reappointment, or clinical privileges, the applicant expressly accepts the following conditions during the processing and consideration of the application, whether or not appointment or clinical privileges are granted, and throughout the term of any appointment or reappointment.

(a) Immunity:

To the fullest extent permitted by law, the individual releases from any and all liability, extends absolute immunity to, and agrees not to sue the Hospital, any Appointee of the Medical Staff, their authorized representatives, and appropriate third parties for any matter relating to appointment, reappointment, clinical privileges, or the individual's qualifications for the same. This includes any actions, recommendations, reports, statements, communications, or disclosures involving the individual which are made, taken, or received by the Hospital, its authorized agents, or appropriate third parties.

The NMC Credentials Policy further contains a provision in § 2.C.2(d) which provides that “the individual agrees that the hearing and appeal procedures set forth in this Policy shall be the sole and exclusive remedy with respect to any professional review action taken by the Hospital.”

The NMC Credentials Policy clearly and unambiguously provides that Kandel would not sue NMC for “any matter relating to appointment, reappointment, clinical privileges, or the individual's qualifications [which] includes any actions, recommendations, reports, statements, communications, or disclosures.” NMC filed a report with the NPDB pursuant to HCQIA regarding Kandel's qualifications as a physician who had surrendered his clinical privileges while under investigation and the plain language of the NMC Credentials Policy prohibits Kandel from filing suit for such report. Kandel argues that he did not “surrender” his clinical privileges; rather, he chose “not to retain” his clinical privileges. We find that this is a difference without distinction. “Surrender” means “the giving up of a right or claim.” Black's Law Dictionary 1581 (9th ed. 2009). By choosing “not to retain” his clinical privileges, Kandel was giving up his right to such privileges under the contract. This argument is without merit.

Therefore, viewing the evidence in a light most favorable to Kandel and giving him the benefit of all reasonable inferences deducible from the evidence, according to the clear and plain language of the NMC Credentials Policy, we determine that Kandel agreed not to sue NMC for any reports made regarding his qualifications and that thus, the district court did not err in entering summary judgment in NMC's favor and dismissing Kandel's complaint. For those reasons, we affirm the district court's order and find that Kandel's assignment of error is without merit.

Public Policy.

Kandel contends that the immunity provision found within the NMC Credentials Policy is void because the provision is contrary to Nebraska public policy and is unconscionable.

A careful review of the record indicates that Kandel first raised this issue in his motion to alter or amend the judgment, wherein Kandel asserts:

If nonetheless, the Court believes the “immunity paragraph” extends beyond a “matter relating to appointment, reappointment, clinical privileges or the individual's

qualifications for same” - to wit: the deliberate filing of an Adverse Action Report, then [Kandel] submits the Court’s ruling is erroneous because such interpretation would make the provision void as against public policy in that it bars the [Kandel’s] rights to sue for willful and intentional misconduct.

The district court, in its final order, determined that the immunity provision prevented Kandel from bringing suit but did not specifically address Kandel’s new assertion regarding public policy or unconscionability. Nevertheless, we find that, by implication, the district court rejected this argument.

Contracts against public policy are those which tend to be injurious to the public, or against the public good. *Beaver Lake Assn. v. Beaver Lake Corp.*, 200 Neb. 685, 264 N.W.2d 871 (1978). Courts should be cautious in holding contracts void on the ground of public policy, and before they do so, prejudice to the public interest should clearly appear. *Id.* When considering whether an agreement is unconscionable, the Nebraska Supreme Court has stated that the term “unconscionable” means manifestly unfair or inequitable. See *Myers v. Nebraska Inv. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006); *Weber v. Weber*, 200 Neb. 659, 265 N.W.2d 436 (1978). A contract is not substantively unconscionable unless the terms are grossly unfair under the circumstances that existed when the parties entered into the contract. *Myers v. Nebraska Inv. Council, supra*; *Adams v. American Cyanamid Co.*, 1 Neb. App. 337, 498 N.W.2d 577 (1992).

Upon our review of the record, we find that Kandel has failed to show that the “immunity” provision at issue in this case was injurious to the public, against the public good, or grossly unfair under the circumstances. To the contrary, the clause, when considered with the entire contract, is designed to ensure the competency of the physician for the protection of the public. This assignment of error is without merit.

Remaining Assignments of Error.

Having made the above determinations, it is unnecessary for us to address Kandel’s remaining assignments of error. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006).

CONCLUSION

Upon a careful review of the record, viewing the evidence in a light most favorable to Kandel and giving him the benefit of all reasonable inferences deducible from the evidence, we find that the district court did not err in granting summary judgment in favor of NMC and dismissing Kandel’s complaint. Therefore, we affirm.

AFFIRMED.