IN THE SUPREME COURT OF MISSISSIPPI
NO: 2007-TS-00764

HAZEM BARMADA — APPELLANT

VERSUS

ARA K. PRIDJIAN — APPELLEE

BRIEF OF THE APPELLEE ARA K. PRIDJIAN

Oral Argument Not Requested

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CERTIFICATE OF INTERESTED PERSONS

The following persons may have an interest in the outcome of this case:

1. Hazem Barmada, Appellant/Plaintiff

2. Ara K. Pridjian, Appellee/Defendant

3. Honorable Roger T. Clark, Judge
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Mississippi Cases

Other Sources

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COMES NOW Ara K. Pridjian, by and through counsel and files the Brief of Appellee, thus:

I. STATEMENT OF THE CASE

A. Course of the proceedings and disposition in the court below.

This case is before the Court on appeal by Plaintiff/Appellant, Dr. Hazem Barmada of the grant of summary judgment to the Defendant/Appellee, Dr. Ara K. Pridjian, from Barmada's suit for defamation arising out of their working relationship as heart surgeons at Memorial Hospital at Gulfport.

Dr. Barmada, in his Statement of the Case, first informs the Court of early activity in the trial court regarding the disqualification of the Dr. Pridjian's, first attorney, Joe Sam Owen. This took place over four years ago and has not a scintilla of relevance to this appeal. While these early motions have absolutely nothing to do with the issues before this Court, they cannot be allowed to stand as presented without comment, as they are misleading by their implication that the Circuit Court has mistreated Dr.

Barmada:

Dr. Pridjian's former attorney was not consulted by Dr. Barmada about Dr. Pridjian; rather, he was consulted about suing a Profusionist, Brad Bruce, and about suing Memorial Hospital at Gulfport because of an "unsubstantiated belief that there would be a nonspecific attempt on the part of Memorial Hospital Gulfport to terminate his hospital privileges." see CP, pp.25-26. The record before the Court reveals that Dr. Barmada has sued at least three doctors and threatened suit against many others. He is litigious.

Dr. Barmada implies that the Circuit Court has some animus against him. It should be noted that the Honorable Roger Clark, the Circuit Judge who granted summary judgment, was not the Circuit Judge who was reversed by the Supreme Court and in fact was not even a sitting Judge at that time. The trial Judge who refused to disqualify original counsel, Joe Sam Owen, was the Honorable Robert Walker. see CP, p. 28-29. This was an honest judgment call by Judge Walker, now one of our Federal Magistrate Judges on the Gulf Coast, and the implication that he treated Dr. Barmada unfairly should be recognized as meritless and irrelevant for consideration of the issues before the Court.

B. Statement of the facts.

In over five years of litigation, Dr. Barmada has not yet produced one specific statement which he attributes to Dr. Pridjian that would remotely stand as defamatory. Reference to Barmada's answers to discovery reveal that he swore he had over sixty witnesses who could testify on his behalf, see CP, p. 48-49, yet the Affidavit of David

Kutlina stands alone as the proof he brought forward to prevent entry of summary judgment.

According to Mr. Kutlina, a part time nurse, over the course of twenty-two months, he heard Dr. Pridjian, "wrongfully slander and defame" Dr. Barmada, "countless times" yet he cannot identify even one specific statement, one specific recipient of such a statement, nor one set of circumstance giving rise to such a statement. In the end, Barmada's one lonely witness had nothing to say.

The truth is that Dr. Barmada's record at Memorial Hospital was of legitimate concern to the entire heart team. Morale was low, some nurses threatened to quit, and more than one anesthesiologist refused or avoided working with Dr. Barmada because when they interceded to correct a dangerous situation, Dr. Barmada would write or make complaints against them seeking to cover his own ineptitude. C.P. pp. 180-184; C.P. pp.116, 122. There were seven or eight letters that went to the hospital asking for an outside review of his competency. see CP 161-162, 182-184, 263-267. Dr. Pridjian, as the Medical Director of Cardiac Surgery at Memorial Hospital, was necessarily the recipient of many complaints by his team.

Dr. Barmada's mortality rate for 2001 was 11.8%, when the average of the cardiovascular program was 4.9%. His percentage of complications was 38.2%, significantly higher than that of the cardiovascular program which was 28.4%. C.P. pp. 129-131(These statistics are from "the important STS data basis" as referenced by the external reviewer, Dr. Robison). Thus, his mortality rate was well over twice the

program rate, and the program rate itself would have been much lower without Dr. Barmada's influence on the numbers.

According to Dr. Milton Concannon, the Chief of Cardiovascular Science of Gulfport Memorial Hospital during the time frame relevant to this case, the complaints about Barmada from various members of the operating room staff and anesthesiologists occurred, "pretty much daily."

Dr. Pridjian actually declined to participate in an evaluation of Dr. Barmada when requested to by Dr. Concannon because he felt, as a competitor heart surgeon, that it would be inappropriate. The review of Dr. Barmada was undertaken solely because of Dr. Barmada's excessive morbidity rates, mortality rates, and the multiple concerns voiced by the operating room staff. It should be noted that other heart surgeons, to include, Dr. Pridjian, had been subjected to identical reviews at previous points in time.

When Dr. Barmada learned that he would be reviewed, he threatened to sue the Chief of Cardiovascular Services, the Hospital, and all the other cardiovascular surgeons. (Affidavit of Dr. Milton Concannon, Chief of Cardiovascular Sciences at Gulfport Memorial Hospital, CP p.263-266)

In Barmada's Statement of the facts, it is telling that there is not one defamatory statement alleged to have been uttered by Dr. Pridjian referenced. Rather, Dr. Pridjian is quoted as admitting when questioned under oath that he found Dr. Barmada to be a "problem surgeon" which is certainly born out by the independent review which documents his excessive morbidity and mortality rate. He also admits that he engaged in conversations in the doctor's lounge and surgeon's lounge from time to time about Dr. Barmada's skills and interpersonal relationships. As noted by Dr. Concannon, the

operating room staff and anesthesiologists were upset and fearful of being associated with Dr. Barmada, and it is all together appropriate that they would voice these concerns to Dr. Pridjian, the Medical Director of Cardiac Surgery .

It is respectfully submitted that Barmada overstates the facts when he claims that his competency was "completely vindicated by the external reviewer." The external reviewer, obviously sympathetic to Dr. Barmada, made comments extraneous to the scope of his review which was limited to the review of the charts and a conversation with Dr. Barmada and the Chief Medical Officer at the time. (CP pp. 264-265) In fact the independent review confirmed Barmada's higher mortality rate; rated his work as "average;" and actually documents an excessive clamp-time which "negatively impacted the patient," i.e. he died.

It is respectfully submitted that the report of the reviewer is not before this Court for consideration. Although Dr. Pridjian has cited it as a statement against its sponsor's (Barmada's) interest in the Trial Court . Its Author has never verified nor sworn to its content, and it remains hearsay for Barmada's purposes.

II. SUMMARY OF THE ARGUMENT

The final judgment and opinion entered by the Circuit Court granting Dr. Pridjian's Motion for Summary Judgment is soundly reasoned and completely supported by legal precedent cited by the Circuit Judge. The record before the Court contained absolutely no proof of any statements, slanderous or other, that were made to anyone outside the cardiac and associated healthcare community who worked with Dr. Barmada and Dr. Pridjian.

The record is replete with evidence expressing criticism of Dr. Barmada by individuals from this healthcare community establishing that they were persons having "an interest" in the subject matter such as would operate inside a qualified privilege as established in ***Young v. Jackson,*** 572 So. 2d 378, 383 (Miss. 1990) and cases cited therein. The trial court carefully considered the one affidavit produced by Dr. Barmada, out of the sixty witnesses he claimed to have in his answers to discovery, and found that the affidavit was so vague and generalized as to be of no evidentiary value for purposes of determining malice. This is entirely consistent with the standard set in ***Jacox v. Circus Circus Mississippi, Inc.*** 907 So.2d 181, 184, (Miss. Ct. App. 2005).

The fact that Dr. Pridjian was privy to heart team discussions of Dr. Barmada which were less than complimentary and which may have included strong words, does not evidence malice. see ***Jacox*** *supra.*

One vague, conclusory affidavit after five years of litigation is simply not sufficient nor competent evidence so as to preclude entry of judgment, and the Trial Judge was correct in his evaluation of the affidavit.

The summarized testimony referenced in Dr. Barmada's brief,(p. 6), cited to R.E. 17-19, corresponds only to questions asked at a deposition by counsel for Barmada from a hearsay document which has no evidentiary value before this Court. Barmada declined to produce the author of the report by deposition or affidavit and thus the hearsay report was appropriately rejected as evidence by the Trial Court.

Dr. Pridjian referenced the report merely to note that there were statements against Dr. Barmada's interest in the report which he was attempting to sponsor, i.e. it confirmed his higher than average mortality rate, and the death of his patient due to his

excessive clamp-time. The deficiencies of the investigation undertaken by the independent examiner were addressed by Dr. Concannon in his affidavit, see CP p.263-266.

III. ARGUMENT

ISSUE I: QUALIFIED PRIVILEGE

Although Dr. Barmada's brief on qualified immunity makes repeated accusations of defamation and slander against Dr. Pridjian, there is not one statement set forth for the Court to examine as to whether or not it constitutes slander. The fact that Dr. Pridjian had a negative impression of Dr. Barmada, which he appears to share with the opinion of every other member of the heart team with the exception of part time nurse Kutlina, does not constitute an act of slander by him.

In order to constitute slander, the remarks at issue must not only be disparaging, they must be false. see ***Franklin v. Thompson*** 722 So.2d 688 (Miss. 1998). A qualified privilege exists between those directly interested in the same matter and, in the absence of malice, no cause of action lies. see ***Hooks v. McCall*** 272 So.2d 925 (Miss. 1973). Our Supreme Court has explained qualified privilege as:

> A communication made in good faith and on a subject matter in which the person making it has an interest, or in reference to which he has a duty, is privileged if made to a person or persons having a corresponding interest or duty, even though it contains matter with without this privilege would be slanderous.

Young v. Jackson, 572 So.2d 378, 383 (Miss. 1990); see also ***Benson v. Hall*** 339 So.2d 570 (Miss. 1976).

ISSUE II: MALICE, BAD FAITH, OR ABUSE SUCH AS TO OVERCOME A QUALIFIED PRIVILEGE

When qualified privilege is established, statements or written communications are not actionable as slanderous or libelous absent bad faith or malice if communications are limited to those persons who have a legitimate and direct interest in the subject matter.

Our law also finds that one who has established the existence of a qualified privilege is cloaked with a presumption of good faith. see ***Benson*** at 570.

When analyzing defamation claims, our Courts employ a bifurcated process. First, they determine whether the occasion calls for a qualified privilege. If a qualified privilege does exist, then the Court must determine whether the privilege is overcome by malice, bad faith, or abuse. see ***Eckman v. Cooper Tire and Rubber Company***, 893 So.2d 1049, 1052 (Miss. 2005). A showing of actual malice is required to overcome the privilege:

> Actual or express malice, as distinguished from malice in law in its ordinary sense denotes ill will, a sentiment of hate or spite, especially when harbored by one person towards another, exists in one with a sedate, deliberate mind and formed designed injures another, as where the person is actuated by ill will in what he does and says, with the design to willfully and wantonly injure another.

Hayden v. Foryt, 407 So.2d 535, 539 (Miss.1982).

And:

> In Newell on Slander and Libel §292, it is stated that, "If the defendant honestly believed that the plaintiff's conduct to be such as he described it, the mere fact that the used strong words in describing it is no evidence of malice. The fact that the expressions are angry and intemperate is not enough; the proof must go further and show that they are malicious."

> The following rule is announced in Newell on Slander and Libel, 3d Ed., § 397: "If the evidence adduced is equally consistent with either the existence or the nonexistence of malice, there can be no recovery, for there is nothing to rebut the presumption which has arisen in favor of the defendant from the privileged communication." *Gust v. Montgomery Ward & Co.*, 229 Mo. App. 371, 80 S.W.2d 286; *Rosenberg v. Mason*, 157 Va. 215, 160 S.E. 190, 202. In the *Rosenburg* Case the court in dealing with a privileged occasion, said: "It is not sufficient in a case such as this that the evidence be consistent with the existence of actual malice, or a doubt as to his good faith. It must affirmatively prove the existence of actual malice, and to do so it must be more consistent with the existence of actual malice that with its nonexistence." (181 Miss. At 507-508, 177 So. at 771-772)

Hayden at 540.

If the Respondent fails to present any evidence of malice and/or bad faith, then summary judgment is appropriate on a case where a qualified privilege is found to exists. see ***Grice v. Fed Ex Ground Package System, Inc.***, 2006 So.2d (2005-CA-00029-COA). see also ***Raiola v. Chevron U.S.A. Inc***. 872 So.2d 79 (Miss. 2004).

To prove abuse of a qualified privilege, a statement must be examined to see if the language used exceeds what was necessary in the communication made. ***McCrory Court v. Istre,*** 252 Miss. 679, 173 So.2d 640, 646 (1965). In the case at bar, we have no statement to examine. The fact that Dr. Barmada cannot isolate one single statement to attribute to Dr. Pridjian in proof of his claim of slander should be enough to end his legal assault against Dr. Pridjian. At best, we have a vague reference to strong words from a man who had an absolute entitlement to feel strongly about deficiencies in the heart team he was in charge of. Strong words are not evidence of malice. If nurse Kutlina was so outraged by Dr. Pridjian's comments about Dr. Barmada, why can he not remember one specific statement before a named witness or witnesses and place it in

time? Clearly, according to Kutlina's affidavit, any statement made was within the circle of the heart team at the hospital.

Hayden v. Foryt *supra.* is controlling and rightfully was recognized as precedent in the Trial Court's consideration of this case. ***Hayden*** involved a hospital situation much like the case at bar full of charges, countercharges, and bickering over the course of a number of years. Statements challenged were very similar to the ones at bar, accusations of arrogance, disruptive conduct, lacking qualities, and personality problems were explored. These accusations were published to all but one of the hospital medical surgical staff. In the case at bar, to Dr. Pridjian's credit, when invited by Dr. Concannon to take part in the medical review of Dr. Barmada, he declined to do so because of a possible perception of bias due to the competition for similarly situated patients.

The facts before the Court reveal that the entire medical team, surgical staff, and anesthesiologist, were all complaining about Dr. Barmada, and Dr. Pridjian as Medical Director of Cardiac Surgery, would obviously be a recipient of many of these complaints. The fact that they were not in a formal meeting does not make them any less legitimate. As Barmada does not bring forth one specific statement to be examined for malice, he cannot overcome the presumption of good faith existing in a group with such a direct interest in his perceived incompetence.

Barmada persists in trying to argue the hearsay report of Dr. Robison knowing full well that it is incompetent as evidence as it is not accompanied by an affidavit or deposition to give it evidentiary quality. The excerpts from that report, even if considered, are again conclusory and based upon a conversation Dr. Robison had with

Dr. Barmada. Furthermore, there is no testimony of any adverse statements by Dr. Pridjian following the medical review.

Barmada simply cannot rely upon unsupported, conclusory allegations to defeat a Motion for Summary Judgment where there are no issues of material facts. ***Jacox v. Circus Circus Mississippi, Inc.*** 908 So.2d 181, 184 (Miss. Ct. App. 205).

IV. CONCLUSION

Hazem Barmada uses the legal system to intimidate his peers and to try to cover his own deficiencies within his profession.

This short record before the Court evidences an attempt on his part to sue a Profusionist; his employer hospital, (CP p. 25-26); his partner Dr. Deese, (CP p. 87); anesthesiologist, Dr. Jeff Milam (CP p. 87); Dr. Concannon, and his partners; and all of the "cardiovascular surgeons" (CP pp. 260-267).

It is respectfully submitted that if Dr. Pridjian, as Medical Director of Cardiac Surgery, had not been concerned about a surgeon operating on his heart team with a mortality rate 200% higher than the average of the team as a whole, he might then had been guilty of negligence arising to an intentional tort. Dr. Pridjian has endured five years of litigation without a material fact being produced sufficient to allow this litigation to proceed any further. The Trial Judge recognized this in his Opinion, and upon review de novo by this Court he should be affirmed.

Respectfully submitted on this the 20th day of December, 2007.

BY: Gail D. Nicholson

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CERTIFICATE OF SERVICE

I, GAIL D. NICHOLSON, do hereby certify that I have mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of the Appellee Ara K. Pridjian to the Honorable Roger T. Clark, Harrison County Circuit Court Judge, at his usual mailing address of Post Office Box 1461, Gulfport, Mississippi 39502; Wendy C. Hollingsworth, Esquire, at her usual mailing address of Post Office Box 1622, Pascagoula, Mississippi 39568; and to Earl L. Denham, Esquire, at his usual mailing address of Post Office Drawer 580, Ocean Springs, Mississippi 39566.

This the 20th day of December, 2007.

GAIL D. NICHOLSON