IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JAY J. SCHINDLER,

Plaintiff,

OPINION AND ORDER

v.

05-C-521-C

JOSEPH C. SEILER and
SYNTHES SPINE COMPANY, L.P.,

Defendants.

- -

This is a civil action for monetary relief brought under 28 U.S.C. § 1332. Plaintiff Jay Schindler is a neurosurgeon formerly employed at Luther Hospital-Mayo Health System and Midelfort Clinic, Ltd. (Luther Midelfort) in Eau Claire, Wisconsin. In this lawsuit, he contends that defendant Joseph Seiler, an employee of defendant Synthes Spine Company, L.P., defamed him by reporting falsely to Dr. Kerry White, Luther Midelfort's chief of neurosurgery, that he had paralyzed four patients.

Now before the court is defendants' motion for summary judgment. Plaintiff's sole evidence of defendant Seiler's allegedly defamatory comments is his averment that Dr. White told plaintiff that defendant Seiler made the allegedly defamatory remarks. Because

plaintiff's testimonial evidence is inadmissible, defendants' motion for summary judgment will be granted.

From the parties' proposed findings of fact, I find the following to be material and undisputed.

UNDISPUTED FACTS

A. Parties

From August 2002 to summer 2004, plaintiff Jay J. Schindler was a resident and citizen of Wisconsin. At the time he commenced this lawsuit in July 2005, plaintiff was a resident and citizen of South Dakota.

Defendant Synthes Spine Company (Synthes) is a Delaware limited partnership with its principal place of business in Pennsylvania. All of defendant Synthes's partners are citizens of Pennsylvania or Delaware. Defendant Synthes manufactures and sells orthopedic implant devices, instruments and biomedical products for orthopedic surgery, including long bone, spinal and cervical surgery.

Defendant Joseph Seiler is a citizen of Stillwater, Minnesota. For more than ten years, Defendant Seiler has worked as a sales consultant for defendant Synthes. As a sales consultant, defendant Seiler provides product support and technical guidance to surgeons as they perform operations.

B. Plaintiff's Employment at the Marshfield Clinic

In August 2002, plaintiff began working as a surgeon at the Marshfield Clinic in Marshfield, Wisconsin. On December 3, 2003, plaintiff performed surgery on a patient who became temporarily paralyzed and suffered permanent "deficits" as a result of the operation. On December 4, 2003, the Marshfield Clinic suspended plaintiff from all clinical and hospital practice and initiated a peer review of plaintiff's performance.

On December 17, 2003, several doctors on the clinic's Professional Review Committee met with plaintiff to discuss four patients for whom plaintiff had provided treatment. The following day Dr. Paul Liss, Chief Medical Officer of the Marshfield Clinic, submitted a memorandum describing the Professional Review Committee's findings. According to the memorandum, in one of the cases studied, plaintiff had pushed a surgical device into a patient's spinal column using a "suspect" surgical technique. In another case, the committee found that plaintiff had operated in a situation where other physicians would not have operated and that the patient had required several follow-up surgeries because of complications other physicians at the clinic did not commonly encounter. In the third case, the committee found that an elderly patient had suffered severe blood loss as a result of surgery for a condition that might have been treated more conservatively. Finally, the committee concluded that in the fourth case, a patient had suffered serious blood loss and had received inadequate anaesthesia as a result of an error plaintiff made. The committee's

> unanimous opinion was that Dr. Schindler was too aggressive in his decision to take at least three of the[] patients to the o[perating] r[oom], that his operative technique with regard to the cervical fusions was suspect, and that his insight into his deficiencies and contribution to these adverse outcomes was minimal if [sic] nonexistent.

Reed Decl., dkt. #38, Ex. N, at 2. The memorandum recommended that plaintiff's employment be terminated. Plaintiff was fired immediately.

Plaintiff appealed the Professional Review Committee's findings to Marshfield Clinic's Executive Board. On February 18, 2004, Dr. Liss circulated a report to members of the Executive Committee. In the report, Liss reported that other clinic medical staff members were "concerned" about excessive blood loss that had occurred during a number of surgeries performed by plaintiff. The report raised a number of questions regarding plaintiff's judgment, surgical technique and honesty with his patients regarding the cause of their post-surgical complications.

On March 2, 2004, an appeal hearing was held at which plaintiff and his attorney appeared before the Executive Committee. Plaintiff called witnesses to testify on his behalf and presented the opinions of three experts who stated that the surgical outcomes and complication rates plaintiff had achieved while working at the Marshfield Clinic were superior to published, national surgical data. The Marshfield Clinic gave its testimony to the Committee also and presented its case for plaintiff's termination.

On March 22, 2004, the Executive Committee affirmed the decision of the

Professional Review Committee and voted unanimously to uphold plaintiff's termination. In its written decision, the committee stated that plaintiff had "poor, and even misleading" documentation; "failed to report adverse outcomes, or even to document some of them;" "deal[t] with errors and complications by denial, evasion, and blaming others, accepting no responsibility for himself;" and was "very aggressive" as a surgeon.

On June 22, 2004, plaintiff appealed the Executive Committee's decision to the Marshfield Clinic's Board of Directors. After the board affirmed the decision to terminate plaintiff's employment, the Marshfield Clinic filed an Adverse Action Report with the National Practitioner Data Bank, summarizing the decisions of the clinic's Professional Review Committee, Executive Board and Board of Directors.

The National Practitioner Data Bank is an alert system designed to facilitate review of health care practitioners' professional credentials. The data bank contains information relating to licensure, membership in professional societies, history of clinical privileges and malpractice payment history. The Marshfield Clinic's adverse action report indicated that plaintiff was fired because of his "substandard or inadequate skill level," and that the termination of his clinical and surgical privileges was "deemed necessary and required in the best interests of patients."

Between the time of his termination in December 2003 and his first appeal hearing in March 2004, plaintiff was the subject of rumors at the Marshfield Clinic. According to

plaintiff, a number of Marshfield staff members stated that plaintiff was a dangerous surgeon who had paralyzed four patients and that he had been fired because of "wound infections" and because he "operated too quickly."

C. Plaintiff's Employment with Luther-Middelfort

On February 16, 2004, plaintiff began working as a surgeon at Luther Hospital-Mayo Health System and Midelfort Clinic, Ltd. (Luther Midelfort) in Eau Claire, Wisconsin. Before plaintiff was hired by Luther Midelfort, Dr. Mike Ebersbold, a Luther Midelfort surgeon, reviewed the four cases on which the Marshfield Clinic had based its decision to fire plaintiff. During the interview process, plaintiff discussed the cases and his experiences at the Marshfield Clinic with Dr. Ebersold, Dr. Terrence Borman, Luther Midelfort's Medical Director, and Dr. Kerry White, Chairman of the Luther Midelfort Department of Neurosurgery. In addition, plaintiff gave Luther Midelfort access to all documents produced in connection with his appeal.

Because of the high number of surgical complications plaintiff's patients at the Marshfield Clinic experienced and because of the allegations that had been made against plaintiff regarding his medical judgment, Luther Midelfort decided to monitor plaintiff's cases closely. On February 24, 2004, Dr. White placed a memorandum in plaintiff's personnel file, that stated:

> Every two weeks Dr. Schindler will review, either with myself, Dr. White, or Dr. Ebersold, all of his cases over the preceding 2 weeks. In addition, he is expected to review challenging or potentially controversial cases with at least one of us at the time they arise. Finally, we will have an event-based review, wherein unusual or potentially adverse clinical or interpersonal developments are addressed with us, again at their inception.

Reed Decl., dkt. #38, Ex. T. Approximately one week after plaintiff began working at Luther Midelfort, a member of the Credentials Committee placed a note in plaintiff's personnel file stating that the committee recommended that the hospital provide plaintiff with a mentor to monitor and guide his professional development.

Before he began working at Luther Midelfort, plaintiff contacted Kurt Birchler, defendant Synthes's Vice President of Sales, to request that a particular Synthes's sales consultant, William Sukow, be assigned as plaintiff's consultant. Plaintiff had worked with Sukow at the Marshfield Clinic and wanted to continue working with him because he had confidence in Sukow. Plaintiff was worried that defendant Seiler might spread rumors about plaintiff's experiences at the Marshfield Clinic to Synthes's clients at other hospitals in the area.

Birchler agreed to grant plaintiff's request temporarily. Birchler told Sukow and Seiler that Sukow would be assigned to work with plaintiff for four to six months. He did not communicate to plaintiff that the arrangement would be temporary. Birchler planned to assign defendant Seiler to be plaintiff's sales consultant after four to six months.

Initially, defendant Seiler was upset with Birchler's decision. It was Seiler's understanding that sales consultants were assigned to cover an exclusive geographical area and Luther Midelfort was located in Seiler's consulting area. Birchler agreed that although Sukow would receive a commission on all sales he made to plaintiff, Seiler would continue to receive credit for the sales.

One day in early March 2004, plaintiff encountered Sukow and defendant Seiler in a hallway at Luther Midelfort. Plaintiff told both men his version of the events that had led to his dismissal at the Marshfield Clinic. Plaintiff told defendant Seiler that the Marshfield Clinic had reviewed four of his cases and had second-guessed his surgical judgment. Plaintiff reported that in one case a surgical instrument had "slipped" and he had bumped the patient's spinal cord and paralyzed the patient. Plaintiff said that none of the other three patients whose files were reviewed had filed a complaint against him. Plaintiff told defendant Seiler that he believed rumors were circulating about why he had been fired and said he wanted to "squelch" them. Plaintiff told defendant Seiler to ignore the rumors about him because they were "big" and "ugly." Some time later, Dr. Ebersold phoned defendant Seiler to express support for plaintiff and to tell Seiler that plaintiff had been "cleared" of wrongdoing in relation to the events that had occurred at the Marshfield Clinic.

On March 25, 2004, while Sukow was on vacation, defendant Seiler provided technical assistance to surgeons at the Wausau Hospital Center in Wausau, Wisconsin. As

the surgeons operated, Seiler overheard Steve Foelker, a sales representative from another medical supply company, say that plaintiff was a dangerous surgeon who had paralyzed four patients and severed a patient's spinal cord. When Sukow returned to work, defendant Seiler reported to him what Foelker had said about plaintiff.

During the time plaintiff worked at Luther Midelfort, defendant Seiler had one or two conversations with Dr. White in which Seiler mentioned that sales representatives at other hospitals had made derogatory comments about plaintiff. Defendant Seiler did not relay to Dr. White the details of the allegations made by the sales representatives, comment on plaintiff's surgical capabilities or make derogatory remarks about plaintiff to Dr. White. White does not recall the specifics of the conversations he had with defendant Seiler, all of which were held outside plaintiff's presence.

Dr. White told plaintiff that defendant Seiler had approached White and reported that people at other hospitals were making derogatory comments about plaintiff. (White did not give this information to anyone other than plaintiff.) White spoke with plaintiff because he supported plaintiff and was concerned about the effect the rumors would have on plaintiff's reputation at other hospitals. Several months later, when the Marshfield Clinic distributed plaintiff's appeal information to several hundred doctors on its Board of Directors, Dr. White told plaintiff again that he was concerned about plaintiff's public reputation. Despite Dr. White's concerns, he has supported plaintiff consistently by

recommending him "without reservation" for clinical and surgical privileges and providing him with letters of reference.

In addition to the restrictions noted in White's February 24, 2004 memorandum, beginning in April 2004, Luther Midelfort began imposing additional restrictions on plaintiff's surgical practice. Following an incident in late April 2004, in which plaintiff operated on a patient at the wrong surgical site, Luther Midelfort held a meeting to discuss the seriousness of the mistake and to decide how to proceed with plaintiff's employment. Additional restrictions were placed on plaintiff and he was permitted to operate only when White or Ebersold was present in the operating room. In addition, plaintiff was referred for a "behavioral health" evaluation.

In May 2004, Dr. Borman had several conversations with plaintiff in which he asked plaintiff to resign from Luther Midelfort. As a result of these conversations, plaintiff tendered his resignation on June 2, 2004.

OPINION

In his complaint, plaintiff alleged that defendant Seiler made two false statements to Dr. White: that plaintiff was "a bad doctor" and had "paralyzed four patients." Under Wisconsin law, a plaintiff alleging that he has been slandered must prove four elements: that the allegedly defamatory statement (1) was spoken to someone other than the person

defamed, (2) is false, (3) is unprivileged and (4) tends to harm the defamed person's reputation so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Torgerson v. Journal/Sentinel, Inc., 210 Wis. 2d 524, 534, 563 N.W.2d 472, 477 (1997); Hart v. Bennet, 2003 WI App 231, ¶ 21, 267 Wis. 2d 919, 941, 672 N.W.2d 306, 317. Defendants contend that the statements plaintiff attributes to defendant Seiler were never spoken and that even if they had been made, they would have been true, privileged and would not have caused plaintiff any harm in light of the irreparable damage his reputation had already suffered as a result of his discharge from the Marshfield Clinic. The court's inquiry begins and ends with the first question: Can plaintiff prove that the alleged statements were made at all?

In order to state a claim for defamation under Wisconsin law, a plaintiff must include in his complaint "the particular words" of which he is complaining. Wis. Stat. § 802.03(6). Once a plaintiff has pleaded "particular words," he will be held to proving that those exact words were spoken by the defendant and were false. Mach v. Allison, 2003 WI App 11, ¶ 15, 259 Wis. 2d 686, 656 N.W.2d 766 (on summary judgment court confines its analysis to "specific implication that is alleged to be false").

It is undisputed that defendant Seiler told Dr. White that sales representatives at other hospitals were making derogatory remarks about plaintiff. However, the question is whether plaintiff can prove that defendant Seiler said specifically that plaintiff was "a bad

doctor" who had "paralyzed four patients." In support of his claim that defendant Seiler made these statements, plaintiff proposed as fact that Dr. White told plaintiff that defendant Seiler told White that plaintiff was "a bad doctor" who had "paralyzed four patients." Plaintiff's only evidence in support of this fact was his own deposition testimony. As defendants are quick to point out, plaintiff's testimony on this point is inadmissible under Fed. R. Evid. 802, which prohibits the admission of hearsay evidence.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). Plaintiff asserts that his testimony is not hearsay, because the "matter being asserted" is that he is a bad doctor who paralyzed four patients. Plaintiff believes that he is a skilled surgeon and admits only to having temporarily paralyzed one patient; therefore, he contends that his averment that White told him that Seiler called him a "bad doctor" who "paralyzed four patients" is not hearsay at all. Plaintiff is mistaken.

Obviously, plaintiff is not averring that he is a bad doctor or that he paralyzed four patients. Those are not the facts he wants the court to believe. Instead, plaintiff's testimony is offered as proof of two matters: (1) that defendant Seiler made the allegedly defamatory statements to Dr. White and (2) that Dr. White relayed the specific content of those statements to plaintiff. As to those two matters, plaintiff's testimony *is* hearsay. Plaintiff needs independent evidence that those statements were made, but neither of the alleged

declarants has admitted making the statements plaintiff attributes to him and there were no witnesses to either conversation.

Defendant Seiler has testified that he told Dr. White that other sales representatives were making derogatory remarks about plaintiff, but that he did not convey to White the content of those remarks. Dr. White has testified that he does not remember defendant Seiler providing him with any specific details of the rumors being spread about plaintiff and furthermore has testified that he did not tell plaintiff that defendant Seiler had called him a "bad doctor" who had "paralyzed four patients."

A motion for summary judgment does not invite the court to weigh the evidence or determine the truth of the matters in dispute. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). However, summary judgment is the moment in a lawsuit when a party must show what evidence it has that would convince a trier of fact to accept its version of the events. Schacht v. Wisconsin Dept. of Corrections, 175 F.3d 497, 504 (7th Cir. 1999). To avoid summary judgment, the nonmoving party must "produce more than a scintilla of evidence to support his position." Pugh v. City of Attica, Indiana, 259 F.3d 619, 625 (7th Cir. 2001).

The hearsay upon hearsay testimony plaintiff wishes to offer is both self-serving and inadmissible. E.g., Haywood v. Lucent Technologies, Inc., 323 F.3d 524, 533 (7th Cir. 2003). Without it, plaintiff has produced no evidence from which a reasonable jury could

find by a preponderance of the evidence that defendant Seiler published the statements that plaintiff was "a bad doctor" who had "paralyzed four people." Therefore, because he cannot show that defendant Seiler made any statement about him, slanderous or not, defendants' motion for summary judgment must be granted.

ORDER

IT IS ORDERED that the motion for summary judgment of defendants Joseph C. Seiler and Synthes Spine Company, L.P. is GRANTED. The clerk of court is directed to enter judgment in favor of defendants and close the case.

Entered this 6th day of April, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge