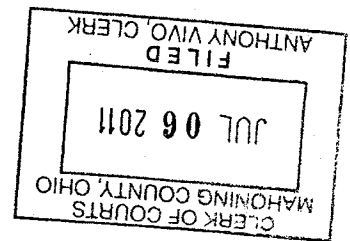


IN THE COMMON PLEAS COURT
MAHONING COUNTY, OHIO



LEON JACOB, M.D.

PLAINTIFF,

VS.

YOUNGSTOWN OHIO HOSPITAL
COMPANY, LLC, *et al.*,

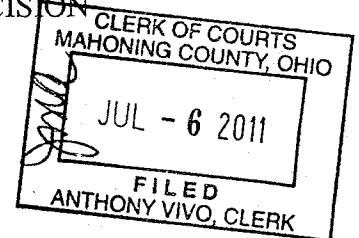
DEFENDANTS.

CASE NO. 11 CV 1568

JUDGE JAMES C. EVANS

MAGISTRATE'S DECISION

Findings of Fact and
Conclusions of Law



Plaintiff's motion for a preliminary injunction is respectfully denied.

On May 18 2011 Plaintiff Leon Jacob, M.D. a 4th Year Surgical Resident at Youngstown Ohio Hospital Company, LLC [the Hospital] commenced this action against the Hospital and Peter M. DeVito, M.D., the Program Director for the Hospital's Department of Surgery Training Program. Dr. Jacob generally alleged that the Hospital breached the residency contract and implied covenants of good faith and fair dealing by failing to allow him to remediate any deficiencies before termination from the surgical residency program and by failing to accord him due process. In his fourth cause of action, Dr. Jacob alleged that Dr. DeVito tortiously interfered with the residency contract. Dr. Jacob's complaint requested monetary damages and injunctive relief.

On June 14, 15 and 27, testimony was heard upon Plaintiff's motion for a preliminary injunction. The following witnesses testified: [REDACTED] Dept. of Surgery Residency Program Coordinator; Dr. Daniel Laufman, M.D., Chairman of the Due Process Committee impaneled to consider the termination of Dr. Jacob from the Surgical Residency Program; Dr. Abdul Ghani, M.D.; Dr. Leon Jacob; Dr. Michael Cicchillo, M.D., Assistant Program Director for the Hospital's Department of Surgery Training Program; Dr. Kimberly Howe, Ph.D., Director of Academic Affairs, Department of Graduate Medical Education; and Dr. DeVito. The depositions of Dr. Douglas J. Smith, M.D., and Gregg L. Bogen were considered by agreement of the parties.

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Dr. Jacob commenced his 4th year surgical residency at the Hospital in July of 2010. During the latter part of July, Dr. Michael Cicchillo, a vascular surgeon and the Assistant Surgical Training Program Director, documented Dr. Jacob's deficiencies in the ACGME Competencies: Patient Care, Practice-Based Learning and Improvement, Interpersonal & Communication Skills and Professionalism. Despite noting deficiencies, Dr. Cicchillo evaluated Dr. Jacob as marginally meeting competency standards. In Dr. Jacob's August evaluation, Dr. Cicchillo noted that Dr. Jacob did not meet standards for "respectful, altruistic, ethical" skills. Dr. Cicchillo related an incident in which Dr. Jacobs failed to attend to a post-surgery patient, who required re-intubation during Dr. Jacob's absence. When questioned about the matter, Dr. Jacobs lied to Dr. Cicchillo about his actions. Later in August of 2010, Dr. Jacob argued with Dr. Cicchillo about a patient and then abruptly left the assigned surgical service despite Dr. Cicchillo's directive to the contrary.

Also in August, Dr. DeVito discussed with Dr. Jacob a letter from Dr. Langenberg, M.D. describing specific examples of Dr. Jacob's lack of medical knowledge and more generally complaining about his lack of professional behavior during July, 2010.

Dr. DeVito placed Dr. Jacob on probation for 30 days on August 20 2010. During a meeting with Dr. DeVito, Dr. Cicchillo, and [REDACTED] Program Coordinator, Dr. Jacob was required to attend the Employee Assistance Program for evaluation. Dr. DeVito requested that Dr. Jacob seek psychiatric evaluation and that he review his "actions with the residents to regain their confidence and support". Dr. Jacob was evaluated by EAP, but declined psychiatric assistance.

On October 28 2010, Dr. DeVito met with the surgical residents at Dr. Jacob's request. Dr. Jacob did not attend the meeting. Following the meeting, Dr. DeVito discussed with Dr. Jacob's the residents' concerns about his unavailability, tardiness, lack of communication and misrepresentations.

On November 4 2010 Dr. Jacob's reviewed his July 1 – October 30, 2010 evaluations. In summary, the evaluations showed Dr. Jacob met each of the six core competencies. However, Dr. Jacobs was encouraged to improve upon his self-assessment

and team leadership skills.

Dr. DeVito discussed Dr. Jacob's test scores with him from the beginning, advising him that at least a 50 percentile score was expected. Dr. Jacob's advised that he had trouble with the format of the tests. Dr. DeVito referred him to clinicalreviews.com for assistance. The Department of Surgery generally scheduled educational lectures once a week from 7:00 a.m.-2:00 p.m. Dr. DeVito observed that Dr. Jacob never stayed for the lectures more than an hour. When asked about it, Dr. Jacob advised that he already knew the material. During the last part of 2010 and the first part of 2011, Dr. DeVito and Dr. Cicchillo both directed Dr. Jacob to spend less time in the operating room and more time preparing for the upcoming American Board of Surgery 2011 In-Training Senior-level Examination [ABSITE]. Dr. Jacob had previously recorded more surgical procedures than other residents, including surgical experience prior to his residency in Youngstown.

On February 23 2011 Dr. DeVito gave Dr. Jacob a verbal warning for an incident earlier in February involving a patient of Dr. Gregg Bogen, M.D., who developed a gangrenous bowel. Although Dr. DeVito was highly critical of Dr. Jacob's role in ordering an expensive mesh utilized during the patient's surgery and delaying surgery on the patient, it appeared that Dr. Jacob was acting at all times according to the instructions of Dr. Bogen. Likewise, the criticism of Dr. Jacob relating to a traffic stop seemed unwarranted if Dr. Jacob was truthfully just answering the officer's questions.

On February 25 2011 Dr. DeVito and Dr. Cicchillo met with Dr. Jacob to discuss a complaint by nurses about a recent loss of emotional control by Dr. Jacob and his ABSITE score. Dr. Jacob was advised that his ABSITE score in the 7th percentile was unacceptable. Dr. Jacob was further advised he was failing 5 out of the 6 core competencies. Dr. Jacob was asked to resign from the program. On February 28 2011, Dr. Jacob was given a written warning that he was in danger of being terminated due to failing 5 of the 6 core competencies.

During this time, Dr. DeVito provided Kim Howe, Ph.D., Director of Academic Affairs, Department of Graduate Medical Education, with his file relating to Dr. Jacob. Dr. Geoffrey Mendelsohn, Director of the Pathology Residency Program, was also provided a copy of the file for review. After consultation with Dr. Howe and Dr.

Mendelsohn, Dr. Devito developed an educational plan designed to remediate Dr. Jacob's deficiencies.

On March 7 2011 Dr. DeVito and Dr. Cicchillo met with Dr. Jacob to discuss the March 7 2011 letter placing Dr. Jacob on a period of ninety (90) days probation. Twenty-one conditions of probation and a detailed Individual Educational Plan were outlined.

On March 17 2011 Dr. Jacob reviewed his November 1, 2010-February 28, 2011 8-month Resident Evaluation. He did not receive a written copy of the evaluation and the overall letter grades within the summary were omitted.

On March 18 2011 delivered to Dr. Jacob a written Notice of Employment Separation and Resident Dismissal [Notice]. The Program Director's Advisory Committee, consisting of Dr. Ghani, Dr. DeVito, Dr. Cicchillo and Dr. Kimberly Howe, unanimously determined that Dr. Jacob had "not demonstrated an acceptable level of clinical and academic performance." The Notice further advised Dr. Jacob:

Despite our attempts to help you successfully complete your medical residency program, we have concluded that based on your conduct, behavior, and poor medical competency/proficiency, you are an immediate threat to patient safety. As a result, let this serve as your Notice of Employment Separation and Resident Dismissal, effective today.

Significantly, the Notice referenced two incidents described in a March 15 2011 letter from Dr. Cicchillo to Dr. Devito involving Dr. Jacob's behavior during his probationary period. Dr. Jacob was assigned to assist Dr. Cicchillo and Dr. d'Amato in a carotid artery surgery the next day. The day of the surgery, when asked about the exposure of the carotid artery, Dr. Jacobs did not recite the proper sequential procedure. Dr. Cicchillo opined: "[Dr. Jacobs] should known at least basic anatomy exposure principles of carotid surgery." Both Dr. Devito and Dr. Cicchillo had counseled Dr. Jacobs countless times from the beginning of his residency on the importance of improving his medical knowledge and self-assessment skills. Despite the advice from the Program Director and Assistant Program Director and despite his low ABSITE score, Dr. Jacob apparently did not prepare for the carotid artery surgery by reviewing medical resources relating to the procedure.

Secondly, Dr. Cicchillo cited an incident during a rounding in the Intensive Care Unit with Dr. Jacob. Dr. Cicchillo asked Dr. Jacob whether a patient examined earlier by

Dr. Jacob had flow in the bypass graft. Initially, Dr. Jacob said the patient had flow in the graft. Dr. Cicchillo then advised that no flow was observed during Dr. Cicchillo's recent examination of the patient. Later, Dr. Jacob told Dr. Cicchillo that the patient's "graft has been down for days". Dr. Cicchillo knew the graft had flow and a pulse the night before, because he had examined the patient. Dr. Jacob lied to Dr. Cicchillo about the patient and continued through his testimony in court to deny any responsibility for wrongdoing with respect to his failure to notice the lack of flow in the graft or his lack of candor in discussing the matter with Dr. Cicchillo.

Frequently, residents, and especially upper level residents, are the eyes and ears of the attending physicians. It is a matter of patient safety, when a resident is dishonest with the attending physician about the condition and care of a patient.

On March 22 2011 Dr. Jacob requested details from the Hospital regarding commencing the due process appeal outlined in the Resident House Manual; the scheduling of the hearing; the procedure for obtaining evidence; and the procedure for conducting the hearing. On March 30 2011 Counsel for Dr. Jacob requested a copy of any written due process policies, and all information about the time-frame for the hearing; "before whom the hearing will occur"; "what provisions are made for interviewing witnesses and obtaining relevant documentation before the hearing" and "how the hearing itself will be conducted."

On April 7 Counsel for Dr. Jacob acknowledged an April 5 2011 conversation with Counsel for the Hospital wherein the Hospital agreed to provide Dr. Jacob with all documents pertaining to his residency. It appeared that inadvertently thirteen documents may not have been provided to Dr. Jacob before the due process hearing. Several of the documents not provided were reviewed by Dr. Jacob on March 17 2011 during his 8th-month Residency Evaluation. Counsel for Dr. Jacob also requested an opportunity to review Hospital documents relating to other residents and an opportunity to interview nine specific persons who had knowledge of Dr. Jacob, including Dr. Devito, Dr. Cicchillo, Dr. Howe, [REDACTED] and five other attending physicians who had worked with Dr. Jacob. Lastly, Counsel for Dr. Jacob requested the names of those individuals who would serve on the due process panel.

Between April 7 and April 28, the date scheduled for the due process hearing, Counsel for the parties exchanged a series of e-mails and letters. The Hospital did not agree to provide depositions or documents relating to other residents. A prospective due process panel was identified in a letter dated to Counsel for Dr. Jacob dated April 21 2011. The panel was comprised of individuals who did not have personal knowledge of Dr. Jacob and included a peer (resident) member. The procedure identified in the April 21 letter indicated that Dr. Jacob would have any documents provided to the panel. Dr. Jacob and the Hospital were permitted to have counsel present during the hearing, but counsel would not participate. Dr. Jacob could address the panel and submit documents to the panel and answer any questions from the panel. The panel would not permit the parties to present witnesses during the hearing. Counsel for Dr. Jacob objected to Michael Seelman serving on the panel and it appears he was replaced as a panelist.

David Fiske, the CEO at the Hospital suggested Dr. Daniel Laufman, M.D., as Chairman. Dr. Devito provided Dr. Laughman two binders of documents pertaining to Dr. Jacob. Several of the pages among the documents provided Dr. Laughman had yellow tabs placed by Dr. Howe during her review. (The documents provided to the panel the day of the hearing did not have tabs.) Dr. Devito and Dr. Cicchillo mentioned Dr. Jacob to Dr. Laughlin in brief encounters at the Hospital before the due process hearing. Dr. Devito merely indicated there had been many complaints about Dr. Jacob. Dr. Cicchillo similarly related that there had been many complaints. Dr. Cicchillo did relate to Dr. Laughlin that he had an incident with Dr. Jacob concerning a graft. Dr. Laughlin did not relate these comments to other members of the panel.

On April 7 2011 a five member due process panel heard from Dr. Jacob. Each member of the panel had been provided a binder of documents pertaining to Dr. Jacob. Following Dr. Jacob's statements to the panel and after Dr. Jacob answered a few questions from the panel, the panel recessed to discuss and consider the termination. During the discussions, the panel sent for Dr. Cicchillo for the sole purpose of verifying that events described in his March 15 letter happened during the probation period. The panel also sent for Scott Dimmick from Human Relations, who was asked a question about the paperwork. After deliberating, the panel unanimously sustained the decision of the Surgical Residency Program and the Department of Medical Education/Academic

Affairs to terminate the residency contract between Dr. Jacob and the Hospital. Dr. Laufman advised Dr. Jacob of the panel's decision in a letter dated April 28 2011. In that letter, Dr. Laughlin advised Dr. Jacob that the panel had sustained the termination decision and further concluded that Dr. Jacob had received due process.

The Seventh District Court of Appeals described the moving party's obligation when requesting a preliminary injunction as follows:

[*P13] The purpose behind a preliminary injunction is to preserve the status quo between the parties pending a trial on the merits. *Proctor & Gamble Co. v. Stoneham* (2000), 140 Ohio App.3d 260, 267, 747 N.E.2d 268. The party requesting the preliminary injunction must show, by clear and convincing evidence, that "(1) there is a substantial likelihood that the plaintiff will prevail on the merits, (2) the plaintiff will suffer irreparable injury if the injunction is not granted, (3) no third parties will be unjustifiably harmed if the injunction is granted, and (4) the public interest will be served by the injunction." *Id.* at 267-68. However, no [**6] single factor is dispositive. "When there is a strong likelihood of success on the merits, preliminary injunctive relief may be justified even though a plaintiff's case of irreparable injury may be weak. In other words, what plaintiff must show as to the degree of irreparable harm varies inversely with what plaintiff demonstrates as to its likelihood of success on the merits." *Cleveland v. Cleveland Elec. Illum. Co.* (1996), 115 Ohio App.3d 1, 14, 684 N.E.2d 343.

King's Welding & Fabricating, Inc. v. King, 2006 Ohio 5231 (7th App. Dist. 2006).

Dr. Jacob failed to demonstrate, with clear and convincing evidence that there is a substantial likelihood he will prevail on the merits of his complaint. There is not clear and convincing evidence that the Hospital breached its contract with Dr. Jacob. On the contrary, Dr. Jacob failed to abide by the conditions of his probation. Specifically, Dr. Jacob failed to adequately prepare for a carotid artery surgery in violation of conditions #5 and #17 of the March 7 2011 conditions of probation. Requirement #5 states, in pertinent part: "Read about operations * * *." Requirement #17 states: "Cautiously and appropriately use judgments commensurate with PGY 4 level." In failing to review the scheduled surgery, Dr. Jacob again failed to have the self-awarement skills to realize that he lacked the medical knowledge to properly perform the assigned surgical procedure. When Dr. Jacob was dishonest with Dr. Cicchillo about checking the flow in the bypass graft, he violated conditions of probation #5, #7 and #20. Requirement #5 states, in pertinent part: "* * * know details of patients." Requirement #7 states: "Communicate

appropriate, accurate, and concise information to peers, and faculty. Requirement #20 states: "Be TRUTHFUL in ALL communications."

It is a specious argument that no patient was ever in immediate danger by reason of Dr. Jacob's his lack of knowledge or preparation or false communications, because attending physicians are ultimately responsible for patient care. Despite Dr. Bogan's presence during surgery and his instructions as to the proper procedure for freeing the bowel during a surgery to repair a Richter's hernia, Dr. Jacob perforated the bowel.¹ Dr. Bogan recalled: "* * * while we were doing the dissection I directed Dr. Jacob to not push on it with a finger, and I could not stop him before he pushed his finger into it and we perforated the bowel."² Perhaps this "typical" mistake would have been avoided if Dr. Jacob had prepared for the surgery or attended more hours of lectures or had the self-awarement to know he did not know how to avoid the perforation. Perhaps it could have been avoided if he had simply listened to the attending physician. Again, Dr. Bogan recalled saying: "Being careful, no, you don't want to do this. You want to do this way. No, stop, be careful about it and we got—well, Leon got into the bowel anyway."³ This mistake was remedied. However, it is illustrative of the concerns frequently voiced by Dr. Devito and Dr. Cicchillo to Dr. Jacob. The Hospital should not have to wait until Dr. Jacob's lack of preparation or knowledge or attentiveness causes harm to a patient. Likewise, the Hospital should not have to wait until Dr. Jacob's dishonesty about the condition of a patient communicated to the attending physician causes harm to a patient. Attending physicians frequently rely upon an upper level resident's communications about a patient. When Dr. Jacob violated the requirements of his probation as related by Dr. Cicchillo, he *was* a threat to patient safety.

Significantly, the Program Director's Advisory Committee, consisting of Dr. Ghani, Dr. DeVito, Dr. Cicchillo and Dr. Kimberly Howe, unanimously determined that Dr. Jacob had violated the requirements of his probation, and by his actions, was an immediate threat to patient safety. Five members of the due process panel unanimously agreed with the decision of the Committee.

¹ This surgery occurred prior to the probation leading to the termination.

² Deposition of Gregg L. Bogen, M.D. p. 33.

³ *Id.*

Dr. Jacob argued that his probation period was unfairly short in duration and that he was denied due process. Many of the Hospital's efforts to remediate Dr. Jacob's deficiencies have been referenced above. Dr. Devito and Dr. Cicchillo spent countless hours counseling Dr. Jacob. Both doctors finally decided that Dr. Jacob "just doesn't listen." The Hospital provided Dr. Jacob with adequate notice of his deficiencies and opportunity to correct these deficiencies. The due process procedure was fundamentally fair. Dr. Jacob was provided essentially all of the documents considered by the panel before his due process hearing. He was permitted unlimited time to address the panel. He was permitted to provide documents to the panel. Dr. Jacob addressed the panel specifically about the events described in Dr. Cicchillo's letter, which contributed to his dismissal from the residency program.

The Hospital's decision is entitled to deference. *Nemazee v. Mt. Sinai Med. Ctr.* (1990), 56 Ohio St. 3d 109, 113 ("Ohio courts have long held that we should defer to the judgment of hospital administrators in matters relating to staffing privileges.")

The court in *Khan v. Suburban Community Hosp.* (1976), 45 Ohio St. 2d 39, 44, stated that "[t]he great weight of case authority in the United States is that a [*114] board of trustees of a private hospital has the authority to appoint and remove members of the medical staff of the hospital and to exclude members of the medical profession in its discretion from practicing in the hospital. And, the action of hospital trustees in refusing to appoint a physician to its medical or surgical staff, or declining to renew an appointment that has expired or changing the requirements for staff privileges, is not subject to judicial review. * * *"
(Citations omitted.)

We have recently reaffirmed this position in *Bouquett v. St. Elizabeth Corp.* (1989), 43 Ohio St. 3d 50. Therein, we stated at paragraph one of the syllabus:

"The board of trustees of a private hospital has broad discretion in determining who shall be [***14] permitted to have staff privileges. Courts should not interfere with the exercise of this discretion unless the hospital has acted in an arbitrary, capricious, or unreasonable manner or, in other words, has abused its discretion. * * *"

Nemazee, 56 Ohio St. 3d at 113-114. Dr. Jacob failed to demonstrate that the Hospital acted in an arbitrary, capricious, or unreasonable manner.

In considering the remaining factors relevant to determining whether to afford a party injunctive relief, it appears that Dr. Jacob's termination from the residency program

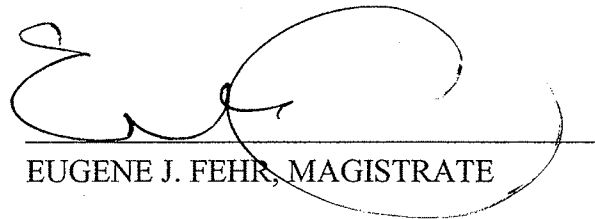
will cause him irreparable harm. Dr. Jacob's surgical residency contract was not renewed previously at the University of Texas. His termination from the Hospital's surgical residency program will negatively impact his professional career, especially in the near future. Dr. Jacob's has always dreamed of being a surgeon like his father. Although Dr. Jacob may find employment as a doctor, his quest to be a board certified surgeon has suffered a setback for which economic damages are inadequate.

The likelihood of injury to third-parties in the event injunctive relief is granted and whether such relief is in the public's interest has been discussed. The Hospital decided that Dr. Jacob was an immediate threat to patient safety. The Hospital's decision is supported by the evidence and Dr. Jacob failed to demonstrate by clear and convincing evidence that he did not violate the requirements of his probation and that he was not an immediate threat to patient safety.

Balancing the various factors to be considered in whether to afford injunctive relief, Plaintiff has failed to demonstrate by clear and convincing evidence that he is entitled to injunctive relief. Dr. Jacob's likelihood of success on the merits is slight. The likelihood of harm to the Hospital's patients is significant if Dr. Jacob is restored to his previous employment. Likewise, it is not in the public's interest to return Dr. Jacob to the residency program by reason of his deficiencies and apparent inability to acknowledge or correct these deficiencies. Dr. Jacob's slight likelihood of success on the merits of his complaint and the potential harm to patients inherent in returning Dr. Jacob to the 4th-year surgical residency program outweighs the irreparable harm to Dr. Jacob.

Plaintiff's motion for a preliminary injunction is respectfully denied.

Dated: July 6th 2011



EUGENE J. FEHR, MAGISTRATE

The parties shall have fourteen (14) days from the filing of this Decision to file written objections with the Clerk of this Court. Any such objections shall be served upon all parties to this action and a copy must be provided to the Court. Except for a claim of plain error, a party shall not assign as error on appeal of the Court's adoption of any finding of fact or conclusion of law, whether or not specifically designated as a finding of fact or conclusion of law, under Civ. R. 53(D)(3)(a)(ii), unless the party, as required by Civil Rule 53(E)(3)(b), timely and

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specifically objects to that finding or conclusion and supports any objection to a factual finding with a transcript of all evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. Any party may request the magistrate to provide written findings of fact and conclusions of law. In accordance with Civ. R. 53(D)(3)(a)(ii), this request must be made within seven (7) days from the filing of this Decision.

This is an appealable order and the Clerk of Courts shall serve copies of this Decision upon Counsel of record and all unrepresented parties, within three (3) days of the filing hereof.

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