

CASE NO. A07-1869

State of Minnesota
In Court of Appeals

KELLEN KARNWIE-TUAH,

Appellant,

vs.

JILLYNE FRAZIER AND RELINDIS MOFFOR,

Respondents.

APPELLANT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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I. SUMMARY OF FACTS

In this case, two senior management staff, Jillyne Frazier, Director of Nursing and Ms. Relindis Moffor, Nursing Supervisor, HealthEast Care Systems, for no reasons other than arrogance and personal vendetta and malice embarked on a path to terminate a long-term employee with no previous record of disciplinary actions by maliciously fabricating lies of misconduct, patient abuse, and deprivation of medication to a patient.

Within the period of two months, and patient with a pristine record had racked up two disciplinary write-ups and was on the way to receiving the third one that would qualified her for summary termination but for the initiation of this lawsuit. Surprisingly, since the lawsuit was filed in July 2006 there have neither been any such accusations and write-ups. In the process of concocting their accusations and conducting bogus investigations, the Plaintiff's professional reputation and good name was defamed. Her relationship with her employer was interfered with and threatened. As a result, she suffered damages in the form of emotional trauma and distress, mental anguish, and pain and suffering.

II. SUMMARY OF ISSUES

This case offered an opportunity to explore an issue of first instant in this jurisdiction. I.e. the application of Sec. 301 of the Labor Management Relations Act to state law claims against non-signatories to a CBA. This case raised the issue of adequate remedy for state tort claims not covered under a Collective Bargaining Agreement. The Court erroneously analyzed and inadequately explored that issue in its ruling. The issue of defamation per se was raised and fully briefed. The Court neither acknowledged nor

discussed it in its ruling. On the issues of qualified privilege and malice, the court improperly ignored the extrinsic and intrinsic evidence supported by several affidavits and deposition testimonies and documentary evidence in the record as a whole. In error, the Court spent most of its time rationalizing and reconciling inconsistent testimonies, and unfounded accounts of events divulge in the records.

The Plaintiff concedes the court's determination that Plaintiff's Count III, disparagement, is not sustainable in this case, and hence does not seek a review of the order dismissing that Claim.

This appeal seeks review of the court's order dismissing Counts I and II of the plaintiff complaint for the legal and factual reasons that follow.

III. STATEMENT OF THE CASE

This cause of action originated in Hennepin county district on July 25, 2006 when Appellant's Complaint Plaintiff's Complaint - July 25, 2006 and the case was assigned to Judge Thomas Wexler. Appellant alleged the Respondents engaged in willful defamation, defamation per se, tortious interference with contract and disparagement of her professional services. On August 30, 2006 the Respondent filed a motion to dismiss Counts II and III of the Complaint. On November 14, 2006 the Court entered an Order granting the motion to dismiss Count III of the Motion and denied the Motion to dismiss Count II. The Court referred Count II to Hennepin County Arbitration for ADR to be completed by September 10, 2007; Trial was set for dates between October 15, 2007 and November 16, 2007. Defendants filed there joint and sever Answers to Complaint on December 14, 2006.

Defendants filed a motion for summary Judgment on Count I of Plaintiff's complaint, on May 14, 2007. The hearing on the motion was had on June 18, 2007. The Court entered its order granting summary judgment on August 7, 2007 in which it rescinded its order referring Plaintiff's Count II to arbitration and dismissed Count II the Court entered its order granting summary judgment on August 7, 2007.

It is from that final order granting summary judgment Plaintiff seeks a review.

IV. STATEMENTS OF FACTS IN DISPUTE

On May 14, 2006 Plaintiff reported for work on the night shift and embarked on her normal duties and routines. At one time Plaintiff was in the break/report room listening to reports from the PM shift while having a snack. The break room is where staff members go to have snacks during break. Reports from previous shifts are also given in that room. Staff members and nurses always use this room for snacks and it is not uncommon for nurses to have their snacks while listening to reports. (*Ex. "D", Plaintiff's Aff. Pg.2 ¶ 13, Plaintiff's depo. Vol 1, Pg. 47-48, Moffor depo. Pg. 23-30, Plaintiff Ex. "G" Okose Aff. Pg.1-2.*

On this day, Plaintiff was interrupted by Ms. Relindis Moffor when she boorishly asked her about eating while doing reports. Plaintiff was totally stunned by her tone and mannerism. It was as if she was angry. Plaintiff politely told her that she was having a snack and did not believe that she was breaking any rule or procedure. Further, as she already knew, it was not uncommon for nurses to use the time to do reports to take their snacks. (*Plaintiff's Aff. Pg. 2 ¶ 14, Plaintiff's depo. Vol 1, Pg. 47-52, Moffor depo. Pg. 30-32) Okose Aff. Pg. 1-2*

Ms. Moffor did not like the response. She became indecorous, began to speak in a loud voice threatening and warning her about her attitude. An argument ensued as Plaintiff try to tell Ms. Moffor that this is common and there were no rule or practice that she knew of that prohibits snacking in the break room while doing reports. (Plaintiff's *Aff. Pg.3 ¶ 15; Plaintiff's depo. Vol 1, Pg. 53-57; Moffor depo. Pg. 29*)

Two days later, i.e., May 16, 2006 Plaintiff had worked the night shift and picked up a morning shift. That means that she would work two shifts simultaneously or back to back. After the night shift ended Plaintiff began the morning shift. The assignments were prepared by Ms. Moffor. Plaintiff discovered that she had arbitrarily switched the assignments to give her the heaviest assignment on that shift. Plaintiff registered her objection indicating that she could not be effective carrying out that assignment without an extra RT, especially where there was new admittance, a diabetic patient in critical condition, and several patients that needed specialized care. Plaintiff requested help to no avail. It was a terrible experience. Plaintiff barely got through the shift without incident though there were close calls including a hypoglycemia episode. (*Plaintiff's Aff. Pg.2 ¶ 16 Plaintiff's depo. Vol 1, Pg. 61-68 Moffor depo. Pg.33*)

This was a setup. Ms. Moffor knew full well that the assignment could not be done by one nurse without assistance but went ahead to set it up that way to ensure that something went wrong that would jeopardize her license and employment with Health East Care System. It was clear after the incident in the break room that Plaintiff was targeted by Ms. Moffor. Using her friendship with the director of nursing, Ms. Frazier, they conspired not only to have her employment with Health East Care System

terminated, but also to bring into disrepute her professional character, cast doubt on her professional responsibility and jeopardize the practice of her profession. *(Plaintiff's Aff. Pg.3 ¶ 17;*

The assignment on May 16, 2006 was the first attempt. When that did not work, Ms. Frazier and Ms. Moffor adopted plan B. Plan B consisted of fabricating patient's complaints of verbal and physical abuses that would lead to verbal warnings, than written warnings, and termination within a period of a month. Plaintiff was warned about this and took extra care not to be caught in their diabolical plot. *(Plaintiff's Aff. Pg.3 ¶ 18)*

The Plaintiff signed up for an afternoon shift in addition to her regularly assigned night shift on June 6, 2006. While she was in the room with a patient that was receiving blood, the patient started complaining and was very agitated. The patient was also on a respirator. The patient was very agitated and complaining of severe pain in his kidney area Pain in that area during blood transfusion may indicate a reaction to the blood transfusion. The patient requested pain medication. The Plaintiff left the room to get the medication (a narcotic) for the patient.

While on her way to get the medication, the nursing assistant with her other patient, a quadriplegic but in stable condition, was trying to get her ready for bed. The nursing assistant could not do it alone, so she asked the plaintiff to assist her boost the patient up. The plaintiff went into the room and helped to boost the patient up. The patient was already upset because the nursing assistant was trying to do her alone and he tore her gown.

The plaintiff left to get the pain medication for the critical patient. But before leaving, she instructed the nursing assistant to call somebody else if the situation did not need a registered nurse attention, because she had a critical patient down the hall that needed her attention.

Mrs. Moffor reported to work at 11:30 p.m. the night of June 6, 2006 and worked as supervisor with the plaintiff for the third shift.

The next day, June 7, 2006 Ms. Frazier called the Plaintiff into her office to inform her that a patient had lodged a complaint against her and that a patient advocate told her about the complaint. That the patient had complained that she was nasty, abrupt, and in a hurry with her on the night of June 5th 2006. Further, that the plaintiff did not give her pain medication from 12 midnight to 7:30 a. m June 6, 2006. *Plaintiff's depo. Vol 1, Pg. 74 -77*)

On June 7, 2006 the Plaintiff got a call from HR informing her that they had received a patient grievance alleging that she was short, abrupt, nasty, and sharp while providing care for a patient. Further, angry words were exchanged between the nurse and the patient. Also, that the incident was witnessed by another staff person who reported the event to the ANS. *Frazier depo. Vol.1 Pg.43:13*. An investigative meeting was scheduled for June 9th 2006. *(Plaintiff's Aff. Pg.3, ¶ 19; Frazier depo. Vol.1 Pg.64*

At the investigative meeting a Union Rep was present. The plaintiff informed the meeting that the allegations were false. That a staff person called Kuba (CNA) was in the room with her and he can attest to the fact that the allegations were false. Plaintiff mentioned that it was Ms. Moffor that had made up the allegation because Plaintiff was

told that she found out that Plaintiff was assigned to the patient the night before and she used that to fabricate a patient's complaint. That at the time the Plaintiff was in the room with the patient, the only staff persons there was Mr. Kuba. There was no other staff person that would have made the report. *Frazier depo. Vol. 1 Pg. 63-65; Plaintiff's depo. Vol. 1, Pg. 77-79*)

When Plaintiff mentioned that Mr. Kuba was in the room when Plaintiff attended the patient, Ms Frazier abruptly interrupted saying that "Plaintiff has spoken to Mr. Kuba and he confirms that allegation". (*Plaintiff's Aff. Pg. 4; Plaintiff's depo. Vol 1, Pg. 79; Frazier depo. Vol. 1 Pg. 66-73; Plaintiff's Ex. "C", Woode Aff. Pg 2 ¶ 12-16*). It was later discovered by Union Rep. Ms. Woode that Ms. Frazier had told a lie when she said that she had already spoken to Mr. Kuba on this matter. Mr. Kuba who is willing and ready to testify stated that Ms. Frazier never spoke to him about any incident in room 404 on June 6, 2006. Further that he was in the room and there was no such incident of verbal or physical abuse of the patient by her. He further explained that everyone knew that this patient usually makes such complaints but no one pays heed to them. He was surprise that Ms. Frazier would implicate him in this way when she knew that she had not spoken to him on the matter. *Woode Aff. Pg. 3, ¶ 16) Plaintiff's Aff. Pg. 4; Plaintiff's depo. Vol 1, Pg. 79; Frazier depo. Vol. 1 Pg. 66-73*

It was clear that Ms. Frazier had not done any investigation neither had she made any effort to verify statements of facts she made in her defense. To the contrary, Ms. Frazier deliberately lied that she had spoken to the only witness that would have seen and could have provided the required corroboration of the allegations made against the

Plaintiff by Ms. Moffor. She did not ask Mr. Kuba, because she already knew that the complaint was fabricated and Mr. Kuba could not have confirmed that the events did occurred. (*Plaintiff's Aff. Pg. 4; Plaintiff's depo. Vol 1, Pg.79-95; Frazier depo.Vol.1 Pg.66-73; Woode Aff. Pg 2 ¶ 12-16*)

Nonetheless, with full knowledge that the alleged allegations were baseless and fabricated at the end of the meeting Ms. Frazier proceeded to take disciplinary action against plaintiff by issuing a verbal warning dated June 9, 2006. (See copy of warning marked Plaintiff Ex. G)

In just one month later, on July 11, 2006, Plaintiff got another call from HR informing her that another complaint had been lodged against her by a patient in Room 417. This time Plaintiff was immediately taken of the schedule for two (2) days on the grounds that this was the second complaint. *Plaintiff's Aff. Pg 3 ¶ 17. Woode Aff. Pg 3 ¶ 17, Plaintiff's depo. Vol 1, Pg 83.* This was hardly one month since the first alleged complaint and the issuance of a verbal warning. Ms. Frazier scheduled a meeting to be held two days later. At the meeting it was disclosed that the patient had alleged that Plaintiff was rude and nasty to him when attending him. Plaintiff decided that she had to do something to protect herself. She informed Ms. Frazier that she needed to be represented by an attorney. Ms Frazier objected to an attorney citing that the meeting was an investigatory meeting. Nonetheless, Plaintiff refused to speak to the question, but informed the meeting that a witness, Ms. Dennita (CNA) was in the room with her and will attest to the fact that the allegations were false. *Plaintiff's Aff. Pg 3 ¶ 18. Frazier depo.Vol.1 Pg 73 – 79. Also Plaintiff Ex. "E", Dennita Aff. Pg. 1-2, ¶ 1-9.*

However, after the Union Rep vigorously questioned the credibility of the allegations, pointing to the lack of a thorough investigation, the sudden indiscretions of Ms. Frazier in dealing with matters involving the Plaintiff, the failure to have contacted Ms Dennita Shackelford (CNA), who the Plaintiff mentioned was in the room with her when the alleged violations allegedly occurred, and the refusal of Ms. Frazier to disclose the individual that reported the matter, HR decided to dismiss the complaint as baseless. *Woode Aff. Pg3, ¶ 19, Frazier depo. Vol.1 Pg78 – 80.*

On July 14, 2006 exactly two days after the dismissal of the second alleged complaint, and just before the expiration of the two-day suspension, HR called the Plaintiff the third time informing her that a third complaint had been lodged against her by a patient in Room 430. They also informed her that her suspension was extended for eight days pending an investigation. A meeting was scheduled for July 21, 2006. *Frazier depo. Vol.1 Pg 86, Woode Aff. Pg 3, Plaintiff's Aff. Pg 6, ¶ 31-38*

At the meeting the Union Rep was present. Ms Frazier and HR were also present. Ms Frazier, the Director of Nursing, disclosed that the patient in room 430 had accused Plaintiff of shoving or hitting his hand into the bed mattress on July 12, 2006. A meeting was scheduled for July 21, 2006. *Id. Frazier depo. Vol.1 Pg 86, Woode Aff. Pg 3, Plaintiff's Aff. Pg 6, ¶ 31-38*

At this meeting, Plaintiff became overwhelmed with emotions. She broke down and wept. Plaintiff denied the allegations up front and asserted that the accusations defied common sense and logic. That she had to be insane; knowing the repercussion of such actions on her reputation as a professional registered nurse as well as on her license to

practice professional nursing, to embark on a patient abuse rampage as Ms. Frazier and Ms. Moffor would want her to appear. *Frazier depo. Vol. 1 Pg 86, Woode Aff. Pg 3, Plaintiff's Aff. Pg 6, ¶ 31-38*

Plaintiff informed the meeting that she was never in the room alone with this patient. That because of the apparent witch hunt that was ongoing, Plaintiff took precaution by making sure that there was someone in the room with her when she attended patients. Plaintiff informed Ms. Frazier that on the night in question another professional nurse, Ms. Nkem Okose, was with her each and every time she went into the patients' rooms. *Okose Aff. Pg. 1-2 ¶ 1-13. Woode Aff. Pg6-7, ¶ 31-38, Okose Aff. Pg.1-3, ¶ 9-13, Plaintiff's Aff. Pg 6-7, Plaintiff's Aff. Pg ¶ 31-38*

Ms. Frazier again abruptly stated that she had contacted Ms. Nkem Okose and Ms. Okose had confirmed that the allegations were true. This was later found to be another lie. Upon investigation by the Union Rep. it was discovered that neither HR nor Ms. Frazier confronted the Ms. Okose about the specific allegations, but instead deliberately lied on the witness at the meeting indicating that the witness had said she could not remember anything about what happened that night. *Woode Aff. Pg6-7, ¶ 31-38, Okose Aff. Pg.1-3, ¶ 9-13, Plaintiff's Aff. Pg 6-7, Plaintiff's Aff. Pg ¶ 31-38*

In spite of all the information, evidence and common sense reasoning pointing to the fact that it was highly unlikely that the allegations were true, Ms. Frazier, proceeded to issue a written warning citing three complaints. See Plaintiff's Ex "I". The alleged three complaints includes the second complaint that was dismissed as baseless nonetheless, it was cited as the reason for the elevated disciplinary action.

Plaintiff further protested the adverse action contending that the charges were not true, and that there had been no investigation to ascertain the facts irrespective of her request to do so and of witnesses named in her defense. That she was the victim of a plan to wrongfully hurt her professionally, emotionally, and economically. Nothing was done and the verbal and written warnings containing known false allegations of patient abuse and professional misconduct remain in her file. She is being defamed each and everyday those warnings remain in her file.

This experience has costs Plaintiff emotional distressed, mental anguish, pain, and suffering and lost of esteem amongst her professional colleagues. Since the investigatory meeting on the second alleged complaint, Plaintiff has experienced sporadic anxiety attacks when she is alone with patients and lost of confidence in herself. She has sought and received faith and religious counseling.

A. Incident No. 1

Notice of Employee Corrective Action, June 9, 2006”

Verbal Warning (Checked):

Description of Issue:

“ Received patient grievance related to patient defining Ellen as short, abrupt and nasty and sharp while providing care for her. According to the patient complaint, angry words were exchanged between the nurse and the patient. This was witnessed by another staff person who reported the event to the ANS. This resulted in a change of assignment for the nurse in question at the patient’s request.”

“Ellen continues to state that she does not believe that she was in any way sharp, discourteous, or nasty to this patient. Again it seems difficult for Ellen to see the entire situation from the patient’s perspective.” “This type of response from a Registered Nurse does not support the vision of professional excellence, patient centered, compassionate caring, and interdependent teaming.”

See Plaintiff’s Ex “B”, also see Frazier Depo. T. at 43:5, 44:9, 87:12

Excerpts from District Court’s Finding of Facts:

1. “On June 6, 2006 Human Resources (hereinafter “HR”) informed plaintiff that they had received a patient complaint alleging that plaintiff was short, abrupt, nasty and sharp while providing care for the patient. (*Plaintiff’s Affidavit*, ¶ 19; *Tuah Depo*, pg. 76).

HR scheduled an investigatory meeting for June 9, 2006. (*Plaintiff’s Affidavit*, ¶ 19)”.

2. “Plaintiff contends that Frazier learned of the patient complaint from Moffor. (*Plaintiff’s Affidavit*, ¶ 21). This contention is false: Rogosheske submitted a patient grievance form to Frazier after she personally spoke with the patient about the specifics of his complaint. (*Rogosheske Affidavit*, ¶ 3 and *Ex. 1*; *Rogosheske Depo*, pgs. 27).”

See Plaintiff’s Appendix 1, -Ct Memo In Support of Order Pg. 4-5

The reference to page 27, ln. 15 of Rogosheske depo does not state the time of the referral of the information to Jill. As a matter of fact Lisa lhnken had already circulated a memo to everyone including Ms Frazier and had also informed Ms. Relindis See note to Frazier dated June 7th, 2006. *Plaintiff’s Ex “B, Pg. 6”* Ms. Frazier testified that she found out from checking the scheduling record. This of course is the least reliable way to determine who was in the patient’s room where there were several registered nurses,

licensed practical nurses, and certified nursing assistants on the floor attending the same patients during a shift. Anyone could have been in the room especially where the patient did not name a specific nurse in her complaint. *Rogosheske depo Pg. 47 – 5, Frazier depo. Vol.1 Pg 47 – 49*

3. “Plaintiffs union representative was present during the meeting on June 9, 2006. (*Plaintiff’s Affidavit, ¶ 22; Tuah Depo, pgs. 138, 191*). During the meeting Frazier told Plaintiff that Plaintiff was impatient, abrupt and nasty to a patient and that she let the patient lie in pain the entire night during her night shift on June 5th-6th. (*Tuah Depo, pgs. 76-77, 93-94, 140, 143, 145, 191; Wood Affidavit, ¶ 13*). Plaintiff denied both allegations. Plaintiff told Frazier that Plaintiff was not working the night of June 5th-6th.¹”

See Plaintiff’s Appendix 1 -Ct Memo In Support of Order Pg. 5

The court’s apparent confusion of the actual date the Plaintiff was off work, June 5, 2006 is remarkable. The record is crystal clear that the Plaintiff was not assigned to work on June 5, 2006 the day the patient advocate cited as the day the alleged abuse took place. (*Tuah Depo, pgs. 77-78, 95, 145-146, 152, 160, 163*). A review of the Tuah Depo Page 77-78 shows that Ms. Tuah stated in no uncertain terms that she was not in the building on June 5, 2006. The same is true for references to June 5, 2006 on page 145. The Court cites Pg. 95, 143 and 146 of Ms Tuah’s depo to support its apparent confusion of the actual date the Plaintiff was off work, June 5, 2006 or June 6, 2006. However,

¹ It appears that the way Rogosheske wrote up the report; there was some confusion about the date(s) some of the conduct occurred.

pages 95, 143 & 146 of the depo are void of any reference to either June 5 or 6, 2006.

Plaintiff also told Ms. Frazier that Mr. Kuba, a certified nursing assistant, (CNA) was in the room with her at the time the alleged acts occurred and can confirm that she was not abrupt or nasty to the patient. (*Plaintiff's Affidavit*, ¶ 22; *Wood Affidavit*, ¶ 14; *Tuah Depo*, pgs. 77-78). Frazier told plaintiff that she had spoken with Kuba to confirm the allegations. (*Plaintiff Affidavit*, ¶ 23; *Wood Affidavit*, ¶ 14). But that was a lie, It was later discovered by Frazier had lied when she said she had spoken Mr. Kuba, See *Woode Aff. Pg 2-3*, ¶ 14-16 *Plaintiff's Aff. Pg. 4*; *Plaintiff's depo. Vol 1, Pg. 79*; During her deposition Frazier was given an opportunity to admit or deny speaking to Mr. Kuba, but elected to have a remarkable lapse of memory stating over and over "I Can't recall. (*Plaintiff's Aff. Pg. 4*; *Plaintiff's depo. Vol 1, Pg. 79*; *Frazier depo. Vol. 1 Pg. 66-73*; *Woode Aff. Pg 2* ¶ 12-16).

4. Frazier issued a verbal warning regarding the allegations discussed at the June 9, 2006 meeting. The verbal warning was confirmed in writing and placed in plaintiff's file.

Plaintiff contends the write-up of the verbal warning contains the following defamatory statements:

"Received patient grievance related to patient defining [plaintiff] as short, abrupt and nasty and sharp while providing care for her. According to the patient complaint, angry words were exchanged between the nurse and the patient. This was witnessed by another staff person who reported the event to the ANS. . . . [Plaintiff] continues to state that she does not believe that she was in any way sharp, discourteous, or nasty to this patient.

Again, it seems difficult for [plaintiff] to see the entire situation from the patient's

perspective. This type of response from a Registered Nurse does not support the vision of professional excellence, patient centered, compassionate caring, and interdependent teaming. (Ex. B).”

See Plaintiff's Appendix 1 -Ct Memo In Support of Order Pg. 5

The court here is again misrepresenting the facts in its findings of facts. The plaintiff does not contend that the entire context of the verbal warning is defamatory. To the contrary, she specifically contends that the allegations of patient abuse, i.e. accused of being short, abrupt and nasty and sharp while providing care and the further allegations of exchanging angry words with the patient under her care. This assertion has no support in the records before the court and should not have been included in the courts finding of facts.

5. “Frazier did not include the June 5th-6th allegation. It appears that Frazier confirmed plaintiff was not in the building the night of the incident”

See Plaintiff's Appendix 1 -Ct Memo In Support of Order Pg. 5

As a matter of fact, the Plaintiff was not in the building on June 5th 2006 the night the alleged incident occurred. So what was the basis for the verbal warring?

6. “It should be noted that Rogosheske’s patient grievance form named plaintiff as the nurse on call during the night 5th-6th.”

See Plaintiff's Appendix 1 -Ct Memo In Support of Order Pg. 5

This is not true. The grievance form names Ellen as the nurse on duty on June 5, 2006 there is no mention in the grievance of June 6, 2006, it is strange that the Court insist on creating a confusion of the dates where none exist. . (See Plaintiff’s Exhibit “B” Pg. 3)

7. “However, the form does not specifically name plaintiff as being short and abrupt. Rather the grievance form states “Patient reports that the night staff is at times short and abrupt”. (Rogosheske Affidavit, Ex. 1). Frazier testified that she determined Plaintiff had acted short, abrupt, and nasty by looking at the schedule and seeing who took care of the patient on that shift. (Frazier Depo dated February 19, 2006, pg. 46)”.

See Plaintiff's Appendix 1 -Ct Memo In Support of Order Pg. 6

This statement has been rendered moot because on the night of the alleged incident, June 5, 2006, the Plaintiff was not on the schedule to work and was definitely not in the building. Ms. Frazier knew that, but went ahead to accused the Plaintiff of patient abuse on June 5, 2006 and acted upon those false accusations.

8. “Frazier could not recall the name of the staff person who had witnessed the event at the time of her deposition: Frazier testified that the staff person relayed the complaint to Shernbeck, the administrative nursing supervisor, who changed the nursing assignment. (Frazier Depo dated February 19, 2006, pgs. 53-57)”.

See Plaintiff's Appendix 1, -Ct Memo In Support of Order Pg. 6

This statement is not true. Mr. Shernbeck denied any knowledge of the alleged incident or having knowledge of any staff reporting to him any incident during the entire month of June 2006. Shernbeck depo Pg. 21-26.

9. “After the meeting the union representative contacted Kuba to inquire about the incident. Kuba informed the union representative that Frazier had not contacted him or questioned him on about the incident. (Wood Affidavit, ¶ 1 6)”.

10. Plaintiff filed a grievance regarding the verbal warning and write-up. (*Tuah Affidavit,*

¶26; *Tuah Depo*, pgs. 79, 136, 185-186, 287-288). The grievance states that the information is false and requests Bethesda to do a proper investigation into the matter as well as remove the verbal written warning from plaintiff's records." (Plaintiffs Ex. B). (Tuah Depo, pg. 136). It appears as though the outcome of the arbitration is still pending."

See Plaintiff's Appendix 1, -Ct Memo In Support of Order Pg. 6

The court seems to be cherry picking the facts and assertions in the affidavits, depo transcripts, and documentary evidences to attain a desired conclusion. The fact is Part 1 of the form states that

"On June 9, 2006, Plaintiff was given a verbal warning that was based on false information that was formulated by another nurse collaborating with patient and her family. There was not proper investigation done write up was based on falsified information."

See Plaintiff's Ex "B", Frazier depo.Vol.1 Pg 56 - 73

Part 2 of the form requires a description of the type of violation allegedly committed by the hospital. There are five types of violations to choose from. (1) Contract's Section and Number, (2) Established Hospital Practice, (3) Hospital Policy, (4) State or federal law, (5) Others explain.

The plaintiff checked numbers 3, 4, & 5. She did not check number 1 meaning a CBA violation as the basis for her grievance. Nonetheless the Court makes it appears that the plaintiff was seeking relief from a breach of the CBA. *Plaintiff's Ex. "B", Pg. 4*

Also there is no basis for the assertion by the Court that arbitration was ongoing

based on the grievance filed about the June 5th, 2006 incident. The court cites Plaintiff depo testimony as the basis of its finding. But a review of the testimony cited in the transcript shows no definite statement from the plaintiff that she knew that arbitration had commenced on this issue and that it was pending. The fact is there has been no arbitration on any of the grievances filed by the plaintiff with the MNA. *See Plaintiff depo Pg. 136.*

11. “Plaintiff claims that one of the incidents happened on June 5, 2006, and that she was not working that night. However, the patient advocate, Marnie Rogosheske, testified in her deposition that other incidents were occurring over a period of time, that the grievance first came to her attention on May 31, and that she followed up with the patient afterwards on another occasion to see how things were going. *(See Rogosheske Depo pp. 34, lines 12-19, and 25, line 24— 26, line 4)*”.

See Plaintiff's Appendix 1 -Ct Memo In Support of Order Pg. 7

This statement is part true and part false. As presented by the court here it would appear that the patient had been accusing the Plaintiff of abusing her since May 31, 2006. This is absolutely not the case. No one had accused the plaintiff of abusing the patient before the alleged June 5, 2006 accusation. Ms. Rogosheske statement is purposely taken out of context. Ms. Rogosheske made this statement in an effort to explain the inconsistency between the dates shown as the receive date² on the form and the actual date of the alleged incident. The receive date on the form shows May 31, 2006 and the actual date of the incident on the form is June 5, 2006, meaning the report was received

² Meaning the date the Patient Advocate received the grievance from the patient.

before the incident occurred on June 5, 2006. This was made clear in the transcript but the court elected to reference the testimony out of context to justify its intent to grant the motion for summary judgment.

B. Incident # 2: No Disciplinary Action

1. Excerpts from District Court's Finding of Facts:

12. "On July 11, 2006, Human Resources informed plaintiff that another complaint had been lodged against her. (*Plaintiff's Affidavit*, ¶ 28; *Wood Affidavit*, ¶ 17; *Tuah Depo*, pg. 83). Plaintiff was placed on administrative leave for two days, over the weekend, until administration had a chance to investigate on the following Monday. (*Plaintiff's Affidavit*, ¶28; *Wood Affidavit*, ¶ 17; *Frazier Depo* pp. 98-104). Human Resources scheduled an investigatory meeting on July 13, 2006". (*Wood Affidavit*, ¶ 17).

13. "Plaintiffs union representative was present at the July 13, 2006 investigatory meeting. (*Tuah Depo*, pg. 84). During the meeting Frazier stated a patient had complained that plaintiff was rude and nasty to the patient. (*Wood Affidavit*, ¶ 17). Plaintiff informed Frazier that the allegations were false and that Dennita, a certified nursing assistant, was in the room with her and will confirm the allegations were false. (*Plaintiff's Affidavit*, ¶ 29 *Woode Aff. Pg 3*, ¶ 17-18)."

See Plaintiff's Appendix 1 -Ct Memo In Support of Order Pg. 7 ¶ 1-2

The court did not dwell on the process leading to the resolution of this incident because it confirms the plaintiff's assertions of fabrications followed by bogus investigations. See *Plaintiff Aff. Pg. 6*, ¶ 30, *Woode Aff. Pg 1-4*, *Frazier depo Pg. 81 ln 20* where Frazier states emphatically that she never spoke to the Witness Dennita. The

fact is there was no investigation into this matter. See Rogosheske depo Pg. 49, where she states that from the response she received from Ms. Frazier, Ms Frazier did not conduct an investigation into this grievance. *See Plaintiff's Ex. "I"* The court did not take note of this fact in its findings because it disputes Ms_Frazier's contention that she investigated the complaint.

The complaint was dismissed because it was embarrassing in two ways. First, the complaint cited a different patient victim but alleged the identical charge -. Nasty, abrupt, short, and sharp, a typical boiler plate scenario. *Frazier depo. Vol.1 Pg76-77*. Secondly, the timing. An identical complaint against a staff heretofore with pristine record over a period of three years suddenly becomes a monster on a rampage of patient abuse and deprivation of medications to her patients. It is worth noting that as of the month of July 2006 when this lawsuit was filed, there has not been a single accusation of whatever type, no write-ups and no disciplinary actions taken against the plaintiff for a period of more than a year. Isn't that amazing?

The facts and circumstances allegedly attending the complaint of Incident # 2 were identical to the facts and circumstances attending the complaint of incident #1. Incident #2 was dismissed as baseless and Incident #1 was acted upon by disciplinary action. The distinction in the resolutions of similar complaints based on similar accusations and similar bogus investigations is suspect and leads to the question of whether these were complaints of actual occurrences or just bogus complaints. This is a question for the jury. Any jury will see through this. Nonetheless the court elected to ignore the obvious dichotomy of inconsistencies in actions and punishments for similar offenses.

C. Incident # 3

On July 21, 2006, Ms. Jillyne Frazier prepared, signed and placed in the Plaintiff's Personnel file, a "Notice of Employee Corrective Action", dated July 21, 2006." The document contains the following statements:

HealthEast Notice of Employee Corrective Action

Written Warning (Check)

Description of Issue:

"On July 14, 2006 the DON was made aware that during a family conference with a patient, in MPLS the patient described an experience with a RN who during the night of 7/12, on three occasions entered his room in response to the IV alarm and "flopped" his arm and "shove" it into the bed and told him "keep it straight" – the third time she did not speak – "shove" his arm into the mattress with some force." He felt "like a child".

Plaintiff's Ex "F" also see Frazier Depo. At 86:15, 126:18."

Further,

"The RN assigned to this patient that night was Ellen on Friday, July 14, 2006. Ellen was placed on Administrative Leave in order for a thorough investigation to be completed."

Plaintiff Ex "F".

"In essence there are a number of inconsistencies and discrepancies in the events. Some parts of Ellen's explanation are, in fact false. According to the patient medical

record, the patient did not receive Dilauded³ on the shift in question. He received a dose at 20:45 (or 9:45 p.m.) on 7/12/06 and the next recorded dose is recorded at 0900 or 9:00 a.m. on 7/13/2006.”

Id.

“For the 48 to 72 hours period to this incident and 24 hours past, there is not pattern of Dilauded used by this patient in access of every 3-4 hours. There is no indication in the Medical Record (Medical Admin. Record or MAR) or any reported episodes from the staff interviewed, of confusion or hallucinations experienced by this patient.”

Id.

“Ellen’s behavior, during this investigation and during the two previous episodes of investigating a patient concerns, was loud, resistive to meet with us, (Stated she refused to talk without her attorney present on 7/11) argumentative and accusatory in nature. She accused the patient of being manipulative, the leadership of targeting her, and individuals of setting her up). This is consistent in part with some of the behaviors being described by the patients who brought forth complaints.” Id.

“A pattern of negative behaviors is emerging that is inconsistent with the Core Behaviors of HealthEast and Bethesda Hospital.” Id.

Excerpts from District Court’s Finding of Facts:

³ A prescription pain medication to be administer every two hours while the patient was awake.

15. On July 14, 2006, Human Resources informed plaintiff that a third complaint had been lodged against her. (Plaintiff's Affidavit, ¶ 31; Wood Affidavit, ¶ 20). Plaintiff was placed on administrative leave for eight days pending investigation. Human Resources scheduled an investigatory meeting on July 21, 2006 (Plaintiff's Affidavit, ¶ 31).

16. Plaintiff contends that Relindis Moffor told another nurse and Frazier about the incident that led to the complaint. (*Tuah Depo*, pgs. 96, 113-114, 117, 173, 176-182; *Plaintiff's Affidavit*, ¶ 21). This contention is false: Rogosheske submitted a patient grievance form to Frazier after she personally spoke with the patient about the specifics of his complaint. (*Rogosheske Affidavit*, ¶ 5; see also *patient grievance form attached as Ex. 3*). Rogosheske testified that she learned of the incident from Lori Ackerson.

(*Rogosheske Depo*, pgs. 53, 57)

See *Plaintiff's Appendix 1-Ct Memo In Support of Order Pg. 8, ¶ 1&2*

How the Court concluded that this statement was false in the wake of affidavits, deposition testimonies and the record submitted by the Plaintiff's in opposition to summary judgment that pacifically contradicts Ms. Rogosheske testimonies is remarkable. This clearly is the function of the jury co-opted by the Judge. The Court's attention is called to Plaintiff's Ex. "F" entitled "Communication to Leadership Team". This document is dated July 12, 2006 but miraculously reports the outcome of a patient care conference allegedly held on July 13, 2006. (Emphasis). This type of reporting is also noted in the Patient's Advocate Grievance Report. *Marked Plaintiff's Ex "I" Pg. 3, where the grievance report is dated May 31, 2006 reporting an incident that allegedly occurred June 5, 2006 almost one week into the future.* (Emphasis added.) *Rogosheske's*

depo Pg. 25-26

The reality is the reports, grievances forms and notes referenced in the Court's findings of facts were prepared after the fact in preparation for litigation. See Plaintiff's Ex. "F" dated July 12, 2006, Pg. HE00001, ¶ 1, a note written and circulated by Ms. Lisa Ihnken that clearly demonstrates that the information was brought to the attention of Ms. Frazier before the patient advocate grievance report was ever written i.e., July 13, 2006. Further Ms. Ihnken does not work night shifts. The incident allegedly occurred the night of July 11, 2006 when Ms. Moffor and Ms. Karnwie-Tuah worked. Ms Ihnken could not have prepared a report by noon of the 12th, 2006 unless someone from the night shift of the June 11th, 2006 told her. However, to shift attention from the real source of the information, she claims the information came from a family conference that happened a day into the future, July 13, 2006; see Plaintiff's Ex. "K" Pg. marked HE00016, ¶ 3, showing Ms. Frazier restating this impossibility in what appears to be notes of her investigation with Ms. Lisa Ihnken. How intriguing?

It is hard to imagine how the Court could have looked at all this information and decide that the Plaintiff contention was false. (Again a function of a jury). Considering the bad blood and expressed dislike of Ms. Moffor for Ms. Karnwie-Tuah, it is not unreasonable to conclude that Ms. Moffor had communicated with Ms. Ihnken the morning of the 12th when her night shift ended. Ms Ihnken, also a RN did communicate this to Ms Frazier June 12, 2006 by her note found on the first page of Plaintiff's Ex. "F", Pg. 1, and Pg. HE00015 ¶, last sentence, where the Plaintiff informed Ms. Ihnken that another nurse had seen Ms. Relindis Moffor talking to Ms. Ihnken the morning of July,

12, 2006.

17. Plaintiffs union representative was present at the July 21, 2006 investigatory meeting. (Plaintiff's Affidavit, ¶ 32; Tuah Depo, pg. 200). During the meeting Frazier stated that a patient accused plaintiff of shoving and hitting his hand into the bed mattress on the night of June 12th. (Plaintiff's Affidavit, ¶ 32; Wood Affidavit, ¶ 21). Plaintiff denied the allegations. Plaintiff told Frazier "I gave [the patient] Dilauded at midnight. He gets it every two hours. The patient was confused and hallucinating." (Frazier Depo dated February 19, 2006, pgs. 114-115). Plaintiff also informed Frazier that Okose, another professional nurse, was with plaintiff every time she entered the patient's room. (Plaintiff's Affidavit, ¶ 33; Wood Affidavit, ¶ 23). Frazier told plaintiff that she had contacted Okose and that Okose had confirmed the allegations were true. (Plaintiff's Affidavit, ¶ 34).

See Plaintiff's *Appendix 1*, -Ct Memo In Support of Order Pg. 8 ¶ 3

The problem here is this was a lie by Ms. Frazier. The Court had before it affidavits, Depo testimonies including the depo statement of Ms Frazier all attesting to the fact the Ms. Frazier did not speak to Ms. Okose on the specific allegations. Plaintiff's Aff Pg. 6, ¶ 34, Woode Aff Pg. 4, ¶ 23 & 24, Okose's Aff. Pg. 1-2, ¶ 1-13. Plaintiff's depo Pg. 10, 96-97.

18. "Frazier testified that she checked the medical records after the meeting to verify whether or not plaintiff had given the patient Dilauded. (Frazier Depo dated February 19, 2006, pgs. 112, 114-115)."

The court spent a lot of time restating the defendant's depo testimonies as facts in

complete disregard of the record as a whole that was before it.

Regarding the administering of the drug dilauded, this is what the Defendant stated in the “Notice of Employee Corrective Action; Plaintiff’s Ex “F”

“According to the patient medical record, the patient did not receive Dilauded⁴ on the shift in question. He received a dose at 20:45 (or 9:45 p.m.) or 7/12/06 and the next recorded dose is recorded at 0900 or 9:00 a.m. on 7/13/2006.”

Id.

See Plaintiff Ex “F” Pg. 3 ¶ 1, 3.

The question is whether the statements in the corrective action notice are true or false. And not what the defendants testified to after the fact. In the first place the Doctor’s instruction for the administration of the drug, “dilauded” to the patient in question is “PRN”. PRN means administer “as needed” See Plaintiff Ex. “F”, Pg. 10, marked 1 of 8 in the upper right hand corner entitled Medical Administration Record (MAR). Lay judges and attorneys are not expected to know what PRN means and the lower court obviously did not know. But this is important to dispel the notion that the Plaintiff should have given the patient a specific dose at specific intervals through the night. The records in this case are fraught with such important factual acronyms that had to be understood to determine whether there was a dispute with important material facts. That is why this case should have gone to the jury where the court, the attorneys, and the jury would have the benefit of the testimonies of witnesses, including expert witness to decipher and

⁴ A prescription pain medication to be administer every two hours while the patient was awake.

interpret the many medical acronyms in the records.

The Doctor's prescription for dilaudid to the patient was PRN as needed, i.e. give to the patient only when it is necessary. The Plaintiff stated that she gave the patient one dose of the medication at midnight and the patient slept through the night. On page HE00002, ¶ 2, of plaintiff's Ex. "F", a note entitled "Investigation 7/14/06" signed "JFrazier", DON, Ms. Frazier made the following record confirming the Plaintiff's assertion of what happened the night of July 11 thru the morning of July 12, 2006

"Pt. reported incident on 7/13/06 during family care conference. Alleged incident occurred during the night shift beginning 23000, 7/12\06. No significant documentation of patient events during the night. TPN/LiPids in at 1800 7/12/06. Seems thorough, noc"

Id. Plaintiff's Ex. "K", Pg. HE00002. ¶ 2

There were no set required dosages as the Defendant states in her depo testimony. (Frazier Depo dated February 19, 2006, pgs. 114-115) There is no excuse for Ms. Frazier, a practicing registered nurse for over twenty five years to make untruthful statement under oath. Ms. Frazier cannot say she does not know what PRN means. It is clearly written in the doctor's order and on the very Medical Administration Record (MAR) she testified she consulted to see whether the patient had received his medication. (Frazier Depo dated February 19, 2006, pgs. 114-115). To say that the patient did not receive his required medication on the night of July 11 2006 thru the morning of July 12 2006, is malicious.

Ms Frazier also asserts in the Notice of Employee Corrective Action, the following:

According to the patient medical record, the patient did not receive Dilaudid on the shift in question. He received a dose at 20:45 (or 9:45 p.m.) on 7/12/06 and the next recorded dose is recorded at 0900 or 9:00 a.m. on 7/13/2006.”

See Plaintiff’s Ex. “K” Pg. 3, ¶ 1.

This is equally malicious. Even a certified nursing assistant knows that the first place to look for reliable information regarding the administration of narcotics in a hospital or nursing home is the “Pixies”. This is a tamper proof computerized system that records the date and time every control drug is dispense for use on a particular patient. It is amazing to hear Ms. Frazier with a master degree in nursing, experience as a consultant, working as a director of nursing with over 25 years of experience in the field say that she did not check the Pixies before exacting disciplinary action against a RN for not administering a drug. That statement is a fallacy intended for an idiot. But, again, the court did not have the benefits of witness’s testimonies under examination when all of these technical jargons and acronyms would have been deciphered for the benefit of the court and the jury.

19. Ms. Frazier’s reports, that Plaintiff failed to administer pain medication to the patient as claimed, was allegedly due to a failure to record the act in the pain medication record. However, Ms. Frazier did later learn that a dose had been checked out of the pharmacy at about the time that it was to be administered, and thus Frazier corrected the personnel record accordingly to reflect that part of the complaint to be incorrect.

Apparently someone also later corrected the hospital chart. It cannot be believed that even after the Plaintiff had insisted that she did administer the medication, Ms. Frazier, when ahead with the disciplinary action without checking the pixies.

See Plaintiff's Appendix 1, -Ct Memo In Support of Order Pg. 8 ¶ 4

Frazier's depo testimony that she later checked the Pixies to find out that the Plaintiff was telling truth comes too late and after the fact. It is a fabrication in preparation for litigation. As the jury will see, the correction was never placed in the Plaintiff's personnel file. The Plaintiff continues to be defamed as long as those false statements remain in her file.

V. STATEMENT OF ISSUES

1. Whether an Employee's State Law Claims against non-signatories to a Collective Bargaining Agreement (CBA) are preempted by Federal Labor Law, LMRA, § 301.
2. Whether the Plaintiff set forth a prima facie case of defamation and defamation per se and if so, whether there are sufficient disagreements of material facts to warrant the claim going to a jury.
3. Whether the Defendants' affirmative defenses of preemption and qualified privilege to the claim of defamation and defamation per se is sustainable.
4. Whether the Plaintiff's set forth a prima facie case of Tortious Interference with Contract Relations, and if so, whether there are sufficient disagreements of material facts to warrant the claim going to the jury.

5. Whether the Plaintiff's affirmative defenses of preemption to the claim of Tortious Interference with Contract is sustainable.

VI. ARGUMENTS

A. Summary Judgment Standard

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. Summary judgment is appropriate only where the evidence is such that no reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is not appropriate when reasonable people might draw different conclusions from the evidence presented. *DHL, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

The moving party bears the burden of proffering sufficient evidence to establish that there are no genuine issues of material fact. *Celotex Corporation v. Catrett*, 477 U.S. 317, 322 (1986). However the non-moving party must not rely on the allegations or denials of its pleadings; rather, it must set forth specific facts to make a sufficient showing on each element of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Wilson v. Southwestern Bell Telephone Company*, 55 F.3d 399, 405 (8th Cir. 1995).

In considering a motion for summary judgment, the court must review all evidence in the record, drawing all reasonable inferences in favor of the non-moving party. See *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 149-150 (2000).

B. An Employee's State Law Claim against a Non-Signatory to a CBA is not preempted by § 301 of the LMRA

A review of the Court's memorandum Plaintiff's *Ex. Appendix 1* in support of the Court's Order granting summary judgment show that even though the question of § 301 preemption of state law claims against non-signatories to CBA was raised in the plaintiff's brief and argued during the hearing the court elected not to deal with it in considering whether summary judgment was appropriate.

There are some cases in this jurisdiction that deals with non-signatory rights and obligations under a contract. However, these cases were decided on general principle of contract laws and not within the context of § 301 preemption. In one such case the court held: A litigant lacks standing to seek relief, assert a right, or claim a benefit under a contract because he is not a party to the contract. See Northern Nat' Bank v. Northern Minn. National Bank, 2454 Minn. 202, 208, 70 N.W.2d 118, 123 (1955) In Anderson v. First Northtown National Bank, 361 N.W.2d 116 (Minn. App. 1985), the court held that a stranger to a contract has no right under the contract. *Id.*

If this case was about applying general principles of contract common law, this would be easy. However, we are not dealing with common law here; instead we are dealing with a federal law designed for a specific purpose; that is to develop a body of common law unique to labor management and the resolution of labor disputes.

Our investigations into the question of § 301 preemption of state law claims against a nonsignatory lead us to assume with confidence that this case does present a question of first in this jurisdiction. In this case, the Defendants, Ms Jillyne Frazier and

Relindis Moffor are not parties to the HealthEast/MNA Collective Bargain Contract because they are not qualified under the National Labor Relations Act. (See § 2(11) of the National Labor Relation Act; NLRB v. Kentucky River community Care, Inc. 532 U.S. 706 (2001); Beverly Enterprises v. NLRB, 266 F.3d 786 (8th Cir. (2001)). As a result, it can be safely argued that they are not contractually obligated to submit to arbitration as required by § 301 of the LMRA, as well as be compelled to comply with its terms and conditions of the CBA.

The parties to this litigation are the Plaintiff, Ms Ellen Karnwie-Tuah in her own name and the Defendants, Ms. Jillyne Frazier and Relindis Moffor individually and severely in their respective names. Neither the MNA nor Health East Care system, the actual parties to the CBA, is a party to this litigation. Nonetheless, the defendants are asserting the affirmative defense of preemption under § 301 of the LMRA in their response to the Plaintiff's Claims of defamation, defamation per se and tortious interference with contract.

The question presented is whether the defense of preemption of a state law claim against non-signatories to a CBA can be sustained pursuant to § 301? In answering this question the lower court, in error, relied on cases that are distinctively different than the case at bar in respect to the factual scenarios, the parties and the issues. In those cases the parties to the disputes are members of a CBA. Not one of the cases relied on by the court involves nonsignatory third parties which, in fact is the case here.

Because there is no Minnesota case law dealing with this question we will explore persuasive authorities including case law from other jurisdictions including the federal jurisdiction.

Recently circuit courts have reached conflicting results as to whether employees' state law claims for tortious interference with a contract against nonsignatories are preempted by the federal labor laws. The general problem that arises with preemption of the of state law claims is that if courts find that the claims are preempted, the claims are either dismissed, subjected to the exclusive jurisdiction of the National Labor Relations Board ("NLRB"), or subjected to the binding arbitration provided for in the collective bargaining agreement. However, when the claim is against a nonsignatory, these alternatives to judicial resolution may not be viable or satisfactory. In fact, preemption may leave the employee without any compensation for the harm, while effectively granting immunity to the alleged interfering nonsignatory.

Section 301 explicitly states that "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations," may be brought in federal district court. There is no mention of claims against third parties. In fact the main theme of the federal labor laws is to promote harmony in the relations between the employer and employee, not to enforce employees' rights against the world. Judge Gilmore in *Dougherty v. Parsec* 178 824 F.2d 1477 (6th Cir. 1987), vacated by *Dougherty v. Parsec*, 486 U.S. 1049, rev'd, 872 F.2d 766 (6th Cir. 1989) corroborated this interpretation of section 301: "The Sixth Circuit has held that a non-signatory cannot be

ordered to arbitrate a labor dispute absent a specific finding that the relationship between it and the party bound by the contract is such that it too is bound to arbitrate." Id. at 1482 (Gilmore, J., dissenting) (citation omitted). Thus, he found that "[i]t would not further the policies of either the Congress, in enacting the federal labor statutes, or the Supreme Court in Lueck, to give to a third party who has allegedly interfered with a labor contract what effectively amounts to immunity." Furthermore, Gilmore pointed out, other cases that found that the claims for tortious interference against a nonsignatory were preempted by federal labor law, See *Wilkes-Barre Publishing v. Newspaper Guild*, 647 F.2d 372 (3d Cir. 1981), cert. denied, 454 U.S. 1143 (1982); *International Union, UMWA v. Eastover Mining Co.*, 623 F. Supp. 1141 (W.D. Va. 1985). But cf. *Baylis v. Marriott Corp. (Baylis II)*, 906 F.2d 874 (2d Cir. 1990)"allowed the claims to be brought under Section 301." Dougherty, 824 F.2d at 1483 (Gilmore, J., dissenting).

The other side of the problem of defendant immunity is that the employee plaintiff is left without a remedy. The federal labor laws were enacted to promote and protect unionization by "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their choosing". The right to a remedy for a harm is not only implicit to the national labor laws, but to justice in general. It seems contrary to the intention of the federal labor laws to deny basic rights to union members that nonunion members may enjoy.

In his case, the Court cites the *Allis Chalmers Corp v. Lueck* but did not explore the single most important issue of the case; the impact of CBA on nonsignatory. The

Allis-Chalmers opinion presupposes that the arbitration procedures, the integrity of which they are eager to maintain, are a viable alternative for the parties. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220 (1985). Assuming that the nonsignatory defendant can be subjected to binding arbitration, it is not clear that the arbitration forum would adequately serve the purposes of the employee's claim. More importantly, where the claim of tortious interference with a contract is against a nonsignatory, this presupposition that the established procedures are a viable alternative may not be valid." Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220 (1985). The problem with Arbitration generally is it is not clear that arbitration would sufficiently enforce the employee's state rights. First, in order to go to arbitration the union must decide whether or not to support the claim. Even where the claim is valid, the union may decide not to pursue it. This is so because the union may (appropriately) be more concerned with the collective rights of employees than with the employees' individual rights. If one believes that an employee's rights protected by the state tort are significant, then such a delegation to the union may not be satisfactory.

In this case, to entertain the affirmative defense of preemption under § 301 would amount to setting a precedence of immunizing the tortfeasor against taking responsibility for his/her action and further victimizing the victim simply because he/she is a member of a CBA. This approach will amount to pitching the baby out with the bath water.

Plaintiff, pray that this court will adopt the wisdom of the growing number of progressive jurisdictions that have seen the dichotomy presented by and have acted to

make the distinction between a dispute of breach of CBA and an independent state tort action against the nonsignatory.

The District Court struggle with this issue is manifest when it sua sponte rescinded its own order sending Plaintiff's tortious interference with contract claim to Arbitration and when it cites the plaintiff's defamation claim as "mostly preempted by § 01 of the LMRA." See Plaintiff's Appendix 1 Pg. 12 ¶ 4

C. Plaintiff did set forth a prima facie case of Defamation and Defamation per se and there are sufficient disagreements of material facts to warrant the claim going to a jury.

Defamation

A statement is defamatory if it "tends to injure the plaintiff's reputation and expose the plaintiff to public hatred, contempt, ridicule, or degradation." Phipps v. Clark Oil & Ref. Corp., 408 N.W.2d 569, 573 (Minn. 1987). When the defamatory meaning is not apparent on its face, the plaintiff has the burden of pleading and proving such extrinsic facts. Anderson v. Kammeier, 262 N.W.2d 366, 371 (Minn. 1977).

The tort of defamation is established and the plaintiff is entitled to damages from the defendant by showing, by the preponderance of credible evidence, that the defendants communicated to a person other than the plaintiff a false and defamatory statement of fact concerning the plaintiff and that the defendant had actual knowledge that the statements were false, or acted in reckless disregard of its truth or falsity, or acted negligently in failing to ascertain the falsity of the statement. The element that the plaintiff must prove to establish defamation and damage are; (1) that the defendant actually knew the

statement was false when he/she communicated it, or (2) defendant communicated the statement with reckless disregard of its truth or falsity, or (3) defendant acted negligently in failing to ascertain the falsity of the statement before communicating it.

In determining if the defendant acted negligently in failing to ascertain the falsity of the statement the standard to apply is whether the defendant failed to act as a reasonably prudent person would have acted under like circumstances. You are to consider whether the defendant had reasonable grounds for believing that the statement was true, and whether the defendant acted reasonably in checking on the truth or falsity of the statement before communicating it.

Factors which may play a role in reaching a determination as to the truth or falsity of the statement includes, but are not limited to, defendant's investigation or lack of investigation of the accuracy of the statement, the thoroughness of the investigation, the nature of the interest of the persons to whom the statement was communicated, the extent of damages that would be produced if the communication proved to be false, and whether the defendant had an honest but nonetheless mistaken belief in the truth of the statement. (See Restatement (Second) of Torts, § 580B, comments g and h.)

In this case, the defendants defamed the plaintiff on two occasions June 9, 2006 and July 14, 2006 when they without investigating knowingly printed and published false statements of patient abuses and deprivation of medication to a patient. Those statements are still in her personnel file. See Plaintiff's Ex. B and I.

In considering a motion for summary judgment, the court must review all evidence in the record, drawing all reasonable inferences in favor of the non-moving party. See

Reeves v. Sanderson Plumbing Prods, 530 U.S. 133, 149-150 (2000). Summary judgment is not appropriate when reasonable people might draw different conclusions from the evidence presented. DHL, Inc. v. Russ, 566 N.W.2d 60, 69 (Minn. 1997).

In this case, summary judgment is not appropriate. The Plaintiff has met her burden of establishing a prima facie case for defamation. Considering the records as a whole, there are sufficient disagreements of material facts to warrant a jury trial. The court below took note of the overwhelming issues of disputed material facts presented by the records before it, but in error, elected to co-opt the function reserved for the jury.

Defamation per se

The plaintiff is claiming defamation per se because the false statements and patient abuse published by the defendants accuse the plaintiff of committing a crime that reflects on her professional and ethical conduct.

Some statements are so defamatory that they are considered defamation per se; and the plaintiff does not have to prove that the statements harmed his reputation. When a plaintiff is able to prove defamation per se, damages are presumed, but the presumption is rebuttable.

The Plaintiff is a RN subject to the Minnesota Board of Nursing rules of professional conduct, and the Minnesota Dept of Health and Social Services regulations governing the professional conduct of health care providers to vulnerable adults and minors.

According Minn. Stat. entitled "Criminal Abuse Statues. § 609.2325, Subd. 1 Crimes (a).

“A caregiver who, with intent to produce physical or mental pain or injury to a vulnerable adult, subjects a vulnerable adult to any aversive or deprivation procedure, unreasonable confinement, or involuntary seclusion, is guilty of criminal abuse and may be sustained as provided in subdivision. “

In this case the Defendants knowingly printed false statements of patient abuse and deprivation of medication to a patient. The plaintiff denied the accusations and gave the defendants good reasons to doubt the allegations and therefore the need to conduct an investigation. The Plaintiff's denials of the allegations were sufficiently good reasons for the defendant to have doubted the truthfulness of the statements before printing them. The defendants elected not to do so out of sheer malice and bad faith. The defendants published the false statement of criminal conduct by placing the printed false statements in the Plaintiff's personnel file. These actions of the defendants satisfy all the elements for a claim of defamation per se. Defamation per se will be sustained where the allegations are of serious criminal misbehavior as in this case. See Becker v. Alloy Hardfacing & Eng'g Co., 401 N.W. 2d 655, 661 (Minn. 1987)

The plaintiff contends that it actually does not matter how or when the information came to the defendant's attention or whether she restated the information to others in the process of conducting an investigation of the charges, what does matter is what the defendant did with the information after she was warned that the information could more likely than not be false. Also after the Plaintiff had denied the allegations and pointed defendant in the direction of exculpatory evidence. It was at this point that the Defendant had the option to either do the honorable thing by checking out the veracity of the

accusations' before acting on them or act in reckless disregard for the truth.

Unfortunately she chose the later.

D. The Defendants' Affirmative Defenses Of Preemption And Qualified Privilege Are Unsustainable.

LMRA § 301 Preemption:

“Suits for violation of contracts between an employer and a labor organization representing employees . . . , or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard of the citizenship of the parties.”

Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), governs claims founded directly on rights created by collective-bargaining agreements, and also claims substantially dependent on analysis of a collective-bargaining agreement.

It would be inconsistent with congressional intent under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C.S. § 185(a), to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract. Judges can determine questions of state law involving labor-management relations only if such questions do not require construing collective-bargaining agreements.

In the instant case, the claims are in torts and not breach or violation of a CBA. To resolve claims of defamation, defamation per se and tortious interferences with contract, does not require the interpretation of a CBA, or the analysis of it's the terms and conditions. The Plaintiff claims that the actions of the defendants, who are neither employers nor CBA members, amount to defamation, defamation per se and tortious

interference with contractual relations. A collective bargaining agreement does not provide remedies for such independent individual state law claims. CBA purpose is to protect the collective interest of its members. Employees that are members of CBA are entitled remedies like everyone else for their state law tort claims against nonsignatory third party actors. To deprive them of this right would amount to immunization of third party tortfeasors from the consequences of their actions and further victimizing the victims because he or she happened to be a member of a CBA.

Qualified Privilege

In cases of defamation per se, damages are presumed and need not be proved. Rich v. Paramount Pictures, Corp., 554 N.W.2d 21, 25 n.3 (Minn. 1996). The Defendants have proffered the affirmative defense that the statements are protected by conditional privilege. In cases of defamation per se, statements may be protected by conditional privilege, unless the privilege is abused. Stuempges v. Parke, Davis & co, 297 N.W.2d, 255 (Minn. 1980). Whether a particular communication is conditionally privileged is a question of law. See Singleton v. Christ the Servant Evangelical Lutheran Church, 541 N.W.2d 606, 615 (Minn. App. 1996) , Keenan v. Computer Assoc. Int'l Inc., 13 F.3d 1266, 1270 (8th Cir. 1994); the factual basis for any reasonable and proper grounds for the statement is a jury question. Id.

A defamatory statement is protected by a qualified privilege if made upon a proper occasion, from a proper motive, and based upon reasonable or probable cause. Brooks v. Doherty Rumble & Butler, 481 N.W. 2d 120, 124-25 (Minn. App. 1992) (Citing Steumpges v. Park, Davis & Co., supra.) If conditional privilege is claimed, the Plaintiff

must show an abuse of the privilege. *Id.* Singleton *supra*. Abuse is established by proving malice, which requires a showing that the statement were made "from ill will and improper motives, or causelessly and wantonly for the purpose of injuring the subject. See *Id.* This may be shown by extrinsic evidence of personal ill feeling, or by intrinsic evidence such as the exaggerated language of the statement, the character of the language used, the mode and extent of the publication, and other matters in excess of the privilege.

In this case, the records, affidavits, depo transcripts etc., etc. clearly establish malice on the part of the defendants. For example, the Minnesota Supreme Court has held: We hold that a private individual may recover actual damages for a defamatory publication upon proof that the defendant knew or in the exercise of reasonable care should have known that the defamatory statement was false. The conduct of defendants will be judged on whether the conduct was that of a reasonable person under the circumstances. *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 491 (Minn. 1985). Other cases follow this reasoning. See *LeDoux v. Northwest Publications, Inc.*, 521 N.W.2d 59, 67 (Minn. App. 1994) ("In order for a statement to be defamatory . . . it must be false."); *Janklow v. Newsweek, Inc.*, 759 F.2d 644, 648 (8th Cir. 1985), cert. den., 479 U.S. 883 (1987) ("Libel, by definition, consists of publication of a false and unprivileged fact.").

Obviously, the conduct of the defendants in this case cannot by a long stretch be considered reasonable by any standard. The defendants demonstrated a wanton reckless disregard for the truth when she had reasons to doubt the truth of the allegations but

elected not to investigate before acting upon them and publishing the false statement by placing them in the Plaintiff's personnel file.

The conditional privilege was lost when the defendants acting jointly or separately wantonly and without regard for the truth or falsity of the allegations elected to communicate false statements of patient abuse and of deprivation of medication to a patient to third parties by placing the statements in the Plaintiff's personnel file without first investigating even though the plaintiff had denied the allegations.

The records before the Court below as well as excerpts from the defendants' deposition transcripts contained in the brief, establish by clear and convincing evidence that the defendants' defamatory statements were made upon an improper occasion, from an improper motive and most importantly were based on irrational and improbable causes. A simple investigation into each of the charges against the plaintiff would have established the falsity of the allegations leading any reasonable person to oppose publications known the serious implication such false statement would have on the image, reputation and professional career of the plaintiff.

E. The Plaintiff Sets Forth A Prima Facie Case of Tortious Interference With Contract and There Are Sufficient Disagreement Of Material Facts To Warrant The Claim Going To The Jury.

A cause of action for wrongful interference with a contractual relationship requires (1) a contract, (2) knowledge of that contract by the wrongdoer, (3) intentional interference with the contract, (4) without justification, and (5) damages. *Kjesbo v. Ricks*, 517 N.W.2d 585, 588 (Minn. 1994); *Furlev Sales & Assocs., Inc. v. North Am.*

Automotive Warehouse, Inc., 325 N.W.2d 20, 25 (Minn. 1982). To establish the third element of the cause of action, a plaintiff may show that the defendant induced a third party to breach the contract or that the defendant intentionally interfered with the plaintiff's contractual rights by committing an independent tort. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 129, at 992 & n.54 (5th ed. 1984) (citing Wild v. Rarig, 302 Minn. 419, 234 N.W.2d 775 (1975)). A party may be held liable for interference with a contract even if the contract is terminable at will. Michaelson v. Minnesota Mining & Mfg. Co., 474 N.W.2d 174, 181 (Minn. App. 1991), aff'd mem., 479 N.W.2d 58 (Minn. 1992).

In the instant case the five elements for a prima facie cause of action for tortious interference with contractual relationship are satisfied. (1) There is a CBA that governs the terms and conditions of the plaintiff's employment. (2) The defendants had knowledge of the contract and of its terms and conditions because the defendants were in managerial and supervisory positions that brought them into direct contact with the union, MNA. (3) The defendants, nonsignatories to the contract, intentionally interfered with the Plaintiff contractual relationship when they intentionally and knowingly committed the tort of defamation and defamation per se by knowingly publishing false statements of patient abuse and deprivation of medication to a patient on more than one occasion with the intent to establish cause for her termination.

In so doing, the defendants, had the plaintiff suspended on more than one occasions, issued her verbal and written warnings with in the period of two months whereas, before than, the plaintiff had a three-year pristine record and was an exemplary

employee. The intentional interference with the plaintiff's contract with intent to cause her termination amounts to tortious interference with contract.

F. Defendants Affirmative Defense of Justification or Privilege is Unsustainable:

Even though the defendants have not raised the defense of justification or privileged, it is important to explore that issue in the wake of their motion to dismiss or in the alternative, motion for summary judgment.

The Minnesota Supreme court in Gale K. Nordling vs. Northern States Power Company, et al, 478 N.W.2d 49, discussed in details the question of justification and privilege as a defense to tortuous interference with contract rights and arrived at the following ruling:

Justification is a defense to an action for tortuous interference Johnson v. Radde, 293 Minn. 409, 411, 196 N.W.2d 478, 480 (1972), and justification is lost if bad motive is present. "Id.

The court further stated that company's officer, agent or employee is privileged to interfere with or cause breach of another employee's employment contract with company, if that person acts in good faith, believing that those actions are in furtherance of company's business, but privilege is lost if action are predominantly motivated by malice and bad faith, that is by personal ill-will, spite, hostility, or a deliberate intent to harm the plaintiff employee. Id. Also See Sorrells v. Garfinckle's, 565 A.2d 285, 290-91 (D.C.App. 1989) The Court also stated that where the agent or officer's conduct is subject to conflicting inferences motives is critical; and the question of motive and malice

become a fact question that precludes summary judgment in tortious contract interference action. *Id.*, Nordling.

Here, the facts are clear regarding motive and malice. The defendants conspired to intentionally interfere with the plaintiff's contractual rights with intent to cause her termination when they fabricated, lied concocted and leveled false allegations of patient abuses and deprivation of medication to a patient against the plaintiff solely for the purpose of having the plaintiff suspended and ultimately terminated. At the point where this litigation was commenced the plaintiff had had two disciplinary actions taken against her in one month and two suspensions. Meaning the third incident would be summary termination. As it appears the plaintiff was on a fast track for termination. The plaintiff has not received any warnings, write-ups or disciplinary actions. This lawsuit served to abort their plans.

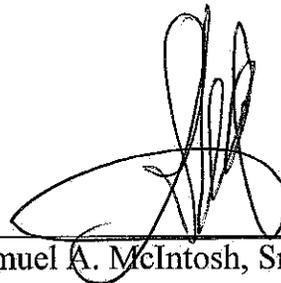
To the point where this action was filed, the plaintiff had been unjustifiably written-up and suspended on charges unsupported by evidence and fabricated by the defendants. The defendants were responsible to investigate all charges before acting on them. In this case, because the defendants were both the arbiters and the culprits, the plaintiff had no where to go for justice, she was left at the mercy of their whimsical and capricious devices without recourse for redress. This is the very abuse the courts in action for interferences with contractual rights recognize and guide against. *Farmer v. Carpenters*, 430 U.S. 290 (1977).

VII. CONCLUSION

WHEREFORE, Plaintiff prays that this Court reverses the lower's Court Order granting summary judgment and remand the case for trial on Counts I and II of the Plaintiff's complaint.

Dated this 18th day of December 2007.

By:



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**STATE OF MINNESOTA
IN COURT OF APPEALS
CASE NO. A07-1869**

ELLEN KARNWIE-TUAH

APPELLANT

vs.

**CERTIFICATION OF
BRIEF LENGTH**

JILLYNE FRAZIER & RELINDIS MOFFOR.

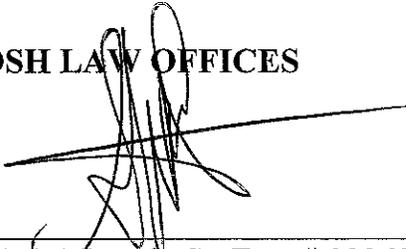
RESPONDENTS

I hereby certify that this Motion and Memorandum in Support thereof conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds.1 and 3, for a brief produced with a double paced, 13-point font. The length of this Brief is 13,935 (Thirteen Thousand Nine Hundred and Thirty Five) words. I certified that the word processing program, Microsoft Word 2003, has been applied specifically to include all text, including headings, footnotes, and quotations. This Brief was prepared using Microsoft Office Word 2003.

Dated 19, 2007

MCINTOSH LAW OFFICES

By: _____


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