UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Keith D. Wilkey,	:	Case No. 1:07-cv-160
	:	
Plaintiff,	:	
	:	
vs.	:	
	:	
Greg Hull, Esq., and Millikin & Fitton, LPA,	:	
	:	
Defendants.	:	

AMENDED ORDER[1]

Before the Court is Defendants' motion to dismiss Plaintiff's Complaint. (Doc. 7) Plaintiff has responded (Doc. 11), and Defendants have replied. (Doc. 12) Plaintiff also requested the Court to delay ruling on his motion until a trial in a related case was complete. (See Doc. 13) Defendants opposed that motion by moving to strike it. (See Doc. 14)

For the following reasons, the motion to dismiss is granted in part and denied in part. The motion to delay a ruling is denied as moot, and the motion to strike is denied.

FACTUAL BACKGROUND

Keith Wilkey is a board certified orthopaedic surgeon. He currently resides in Missouri. Greg Hull is an attorney licensed in Ohio, and a partner at the law firm of Millikin & Fitton, LPA.

[1] This Amended Order is entered solely to correct a typographical error on page 17 of the December 28, 2007 Order (Doc. 17). The ninth cause of action(tortious interference) **is** dismissed, as fully discussed on pps. 12-14 of that Order.

Hull and his firm represented McCullough Hyde Memorial Hospital in Hamilton, Ohio during the hospital's professional review proceedings concerning the suspension, and later proposed revocation, of Wilkey's hospital surgical privileges. Wilkey alleges he discovered the facts supporting his claims against Hull and his law firm during discovery in a related case, Wilkey v. McCullough Hyde Memorial Hospital, Case No. 1:04-cv-768 (S.D. Ohio, Barrett, J.).

According to Wilkey's complaint, MHMH requested an external quality review of two of Wilkey's cases after an in-house review raised questions about the care he provided. A written external report from a Dr. Seasons was critical of Wilkey's treatment. Dr. Seasons' report was read by various members of the Hospital's review committees, and Wilkey's privileges were summarily but temporarily suspended in February 2003. Due to concerns about Dr. Seasons' qualifications to render an opinion, MHMH sought a second opinion from a Dr. Ricciardi. This second report was received after Wilkey's initial suspension, but prior to a final review hearing by the hospital's Medical Executive Committee. Wilkey alleges that Dr. Ricciardi's report was far more favorable to him than Dr. Seasons' report, but that Dr. Ricciardi's report was not shared with the Committee members who ultimately approved Wilkey's suspension. After several different hospital committees reviewed both the temporary suspension and proposed permanent

revocation, and after two evidentiary hearings (during which Wilkey was represented by counsel), Wilkey voluntarily resigned in April 2004. Because of his resignation, MHMH took no final action on revocation of Wilkey's privileges.

Wilkey then sued MHMH and several individual hospital physicians; see Wilkey v. McCullough Hyde Memorial Hospital, Case No. 1:04-cv-768 (S.D. Ohio, Barrett, J.). Several of Wilkey's claims in that case survived defense summary judgment motions, and a jury trial began on November 5. The parties reached a settlement during the trial, and that case has been dismissed.

Wilkey alleges that during discovery in his case against the hospital, he learned that Hull participated in what Wilkey describes as a "coverup" of Dr. Ricciardi's report. Wilkey claims that Hull assembled the "exhibit books" used by the Medical Review Committee members, and that he deliberately omitted Dr. Ricciardi's report from those books.

When these facts came to light, Wilkey sought leave to amend his complaint in his action against MHMH, in order to add Hull as a defendant. After that motion was denied, Wilkey filed this action on March 1, 2007 against Hull and his law firm. The complaint contains a panoply of claims, all premised upon Hull's alleged concealment of Dr. Ricciardi's favorable report.

Wilkey's motion to delay a ruling on Defendants' motion to dismiss requested additional time to file trial exhibits and

excerpts of trial testimony from the hospital case. Wilkey filed several of those exhibits, and a transcript of Hull's trial testimony on November 29. (See Doc. 15) For reasons discussed below, the Court concludes that the motion to dismiss can be decided on the record submitted to date, and further delay is not warranted.

ANALYSIS

1. Standard of Review.

A Rule 12(b)(6) motion operates to test the sufficiency of the complaint. In considering such a motion, the court is required to construe the complaint in the light most favorable to the Plaintiff, and accept as true all well-pleaded factual allegations. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), and Roth Steel Products v. Sharon Steel Corp., 705 F.2d 134, 155 (6th Cir. 1983). The court need not accept as true legal conclusions or unwarranted factual inferences. Lewis v. ACB Business Servs., Inc., 135 F.3d 389, 405 (6th Cir. 1998). A court will, though, accept all reasonable inferences that might be drawn from the complaint. Fitzke v. Shappell, 468 F.2d 1072, 1076-77 at n.6 (6th Cir. 1972).

As noted in Mayer v. Mylod, 988 F.2d 635, 637 (6th Cir. 1993):

> The purpose of Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the

> complaint is true. ... As the court stated in *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957), '[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'

The Supreme Court's recent decision in Bell Atlantic Corp. v. Twombly, ___ U.S. ___, 127 S.Ct. 1955 (2007) casts some doubt on the continued vitality of the pleading requirements enunciated in Conley v. Gibson and its progeny. Twombly requires factual allegations "plausibly suggesting" the existence of a cognizable claim. Id. at 1964. The Court concludes that under either Conley or the arguably higher Twombly standard, most of Wilkey's claims are properly dismissed at the pleading stage.

(1) The first claim for "tortuous interference with evidence" [sic] fails to state a claim. Wilkey has not alleged that the failure to disclose Dr. Ricciardi's report prevented him from defending himself, or from prosecuting a lawsuit following his resignation. A tort claim based on spoliation of evidence requires plaintiff to show that the evidence destruction made it impossible to pursue litigation, and that the evidence was so critical that plaintiff would have prevailed if it had been available. See, e.g., Smith v. Howard Johnson Co., Inc., 67 Ohio St.3d 28, 29, 615 N.E.2d 1037 (Ohio Sup. Ct. 1993). Wilkey's allegations simply do not rise to that level, especially in view of his apparent ability to litigate this case and his case

against the hospital.

2) The second cause of action, for a purported violation of Fed. R. Civ. P. 60(b)(3) fails on its face. There is no private right of action that arises from this federal procedural rule.

3) Wilkey's third and fourth claims, brought under two Ohio criminal statutes forbidding tampering with evidence (Ohio Rev. Code §§2921.12 and 2913.42) fail to state a claim against Defendants. Wilkey has no private civil cause of action based on these statutes, which criminalize the intentional destruction of evidence in a criminal proceeding.

4) The fifth cause of action against Millikin and Fitton, alleging "vicarious liability for tortuous conduct of employee" [sic], must be dismissed. Hull is a partner of the firm, not an employee. Even if he was an employee, an employer is not vicariously liable for the intentional torts of its employees when such conduct is outside the course and scope of employment. See, e.g., Groob v. Keybank, 108 Ohio St.3d 348 (2006), rejecting employer liability based upon the unauthorized tortious conduct of a bank employee who misappropriated a bank customer's business opportunity. Wilkey alleges that Hull fraudulently and intentionally concealed the favorable report. Wilkey does not allege any facts suggesting that the law firm ratified or knew about that conduct. The claim for vicarious liability is therefore dismissed.

5) Wilkey's sixth cause of action for "conspiracy to conceal evidence" fails for the same reason as the spoliation of evidence claim.

6) The seventh cause of action is premised upon Hull's alleged failure to follow MHMH's internal medical staff rules and regulations. There is no basis upon which the hospital's outside counsel might be liable for the hospital's failure to adhere to its own rules. See, e.g., Munoz v. Flower, 30 Ohio App.3d 162, 166 (Ohio 1985) (quoted in Judge Barrett's Order granting summary judgment to MHMH on Wilkey's similar claim against the hospital in Case No. 04-cv-768. Dkt. #136), which notes: "The most enlightened reasoning seems to be that staff by-laws can form a binding contract between the doctors and hospital but only where there can be found in the by-laws an intent by both parties to be bound." Wilkey does not allege that Hull participated in drafting the by-laws, or allege any basis upon which the hospital's outside counsel would be bound by such medical staff by-laws. This claim is therefore dismissed.

7) The tenth cause of action for "denial of due process" fails as a matter of law. Hull and his law firm are not state actors, and there is no allegation that anyone acted under color of state law in the administrative process surrounding Wilkey's suspension.

8) The twelfth cause of action alleges a "civil

conspiracy." Wilkey alleges the "Defendants" conspired with co-conspirators to injure him. It is doubtful that Hull could "conspire" with his law firm. The only other potential "co-conspirator" identified is Ms. Pohl, a hospital employee who assisted Hull during the administrative proceedings. But Wilkey alleges that Pohl acted only at Hull's direction, and not as an independent actor. A civil conspiracy requires a "malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages." Kenty v. Transamerica Premium Ins. Co., 72 Ohio St.3d 415, 650 N.E.2d 863 (Ohio 1995). Wilkey has not alleged such a combination. Nor does his complaint allege that Hull conspired with anyone else to do anything that Hull could not have done alone. The civil conspiracy claim is therefore dismissed.

9) Wilkey's complaint (¶5) alleges jurisdiction arising under the Sherman Act and Ohio's Valentine Act. However, the complaint contains no antitrust claims, and the Court cannot discern the basis for such a claim. Those allegations are stricken from the complaint.

The only claims that merit further discussion, therefore, are Wilkey's eleventh claim for negligence, his eighth claim for common law fraud, and his ninth claim for tortious interference. Defendants also raise two specific defenses which they argue bar

all of Wilkey's claims.

2. Negligence Claim.

Defendants argue that Wilkey cannot bring a professional negligence action because Hull and his firm represented the hospital, not Wilkey, in contested proceedings. Defendants rely on the doctrine set forth in Scholler v. Scholler, 10 Ohio St.3d 98, 462 N.E.2d 158 (Ohio 1984): "It is well-established in Ohio that an attorney may not be held liable by third parties as a result of having performed services on behalf of a client, in good faith, unless the third party is in privity with the client for whom the legal services were performed, or unless the attorney acts with malice." Wilkey must therefore show that privity existed between him and Hull's client (the hospital), OR establish that Hull acted with malice.

Wilkey suggests that he was in privity with the hospital because they were both parties to Wilkey's professional services contract. An ordinary contractual relationship between two parties is insufficient to establish privity under the Scholler doctrine. Otherwise, an attorney would be subject to third-party negligence claims stemming from any contract dispute in which the attorney represented one of the contracting parties.

"Privity" in the Scholler context requires a mutuality of interest in the context in which the legal advice is rendered. For example, in Arpadi v. First MSP Corp., 68 Ohio St.3d 453, 628

N.E.2d 1335 (1993), the Ohio Supreme Court held that the fiduciary relationship between a general and the limited partners created privity between them, such that an attorney retained by the general partner to act on behalf of the partnership could be sued by the limited partners. And in Scholler, the Ohio Supreme Court concluded that a mother and her minor child were **not** in privity, in a case arising out of divorce, because the mother's interests may have diverged from her child's concerning alimony and child support issues. In the absence of any suggestion of malicious conduct by the attorney, the minor child was precluded from bringing an action against the attorney who represented his mother.

In view of these authorities, the Court rejects Wilkey's suggestion that the shared but amorphous goal of "good patient care" is enough to establish the requisite mutuality of interest between Wilkey and the hospital. Their interests were antagonistic at the time Hull represented the hospital, and no suggestion of privity arises in that context.

Alternatively, Wilkey alleges that Hull acted with malice. The contours of "malice" required to overcome Scholler immunity are not well defined. In Simon v. Zipperstein, 32 Ohio St.3d 74, 76-77, 512 N.E.2d 636 (Ohio 1987), the Ohio Supreme Court suggested that an attorney acts maliciously when special circumstances suggest fraud, bad faith, or collusion. More

recently, the Supreme Court reversed the dismissal of third-party claims against an attorney, finding that malice had been sufficiently alleged to avoid Rule 12(b)(6) dismissal. See LeRoy v. Allen, Yurasek & Merlin, 114 Ohio St.3d 323, 330-331, 872 N.E.2d 254 (2007). The Supreme Court reaffirmed the immunity doctrine discussed in Scholler and Simon. But the court held that allegations of collusion and conflict of interest on the part of an attorney representing a majority shareholder of a closely held corporation were sufficient to plead malice under the Scholler immunity exception.

Fed. R. Civ. P. 9(b) permits general averments of malice, as it is difficult to allege such states of mind with factual specificity. See, e.g., Vector Research v. Howard & Howard, P.C., 76 F.3d 692, 700 (6th Cir. 1996). Wilkey alleges that Hull knew about Dr. Ricciardi's report, that Wilkey's counsel asked Hull to produce copies of "all" outside review reports, and that Hull intentionally refused to produce the report. Wilkey alleges that Hull's motive was to hide Dr. Ricciardi's favorable opinion. Under the Ohio authorities discussed above, the Court concludes that these allegations are sufficient to survive Defendants' challenge under Rule 12(b)(6).

3. Common Law Fraud.

Wilkey's eighth cause of action alleges that Hull fraudulently withheld disclosure of the favorable report from

Wilkey, his lawyer, and from members of the MHMH Medical Review Committee. (Compl. ¶88)

The elements of a common law fraud claims are: (1) a representation of fact, or concealment when a duty to disclose exists, (2) that is material, (3) that is false and made with knowledge of its falsity, or made with such disregard for its truth that knowledge of the falsity is inferred, (4) that is made with intent to mislead, (5) that induces justifiable reliance on the representation, and (6) that proximately causes damages. See, e.g., Gaines v. Preterm-Cleveland, Inc., 33 Ohio St.3d 54, 55, 514 N.E.2d 709 (1987).

Defendants argue that none of these elements are satisfied by Wilkey's allegations. They suggest that Hull had no duty to disclose the report; that Wilkey could not have justifiably relied on anything Hull did or failed to do; and that Wilkey's damages are the result of his own behavior and not the result of Defendants' conduct. These arguments raise issues of fact that are not amenable to resolution at this stage. Under Twombly, the allegations must "plausibly suggest" the existence of an actionable claim. On the record established to date, the Court concludes that Wilkey's allegations of fraud are plausible enough to withstand Defendants' motion to dismiss.

4. Tortious Interference Claim.

Wilkey's ninth cause of action alleges "tortuous

interference with business relationships" [sic]. He alleges that Hull interfered with his business relationships with patients, referring physicians, and insurers. "The elements essential to recovery for a tortious interference with a business relationship are: (1) a business relationship; (2) the wrongdoer's knowledge thereof; (3) an intentional interference causing a breach or termination of the relationship; and (4) damages resulting therefrom. ... The basic principle of a tortious interference action is that one, who without privilege, induces or purposely causes a third party to discontinue a business relationship with another is liable to the other for the harm caused thereby." Chandler & Assocs. v. America's Healthcare Alliance, 125 Ohio App. 3d 572 (Ohio App. 1997) (internal citations and quotations omitted). Chandler cited Wolf v. McCullough-Hyde Memorial Hosp., 67 Ohio App. 3d 349, 355, 586 N.E.2d 1204 (1990), where the Ohio court of appeals reversed a summary judgment in favor of the defendant hospital on a physician's tortious interference claim. The hospital had suspended the physician's privileges, which led to his termination by his employer (an emergency specialist group). The appellate court found that the trial court impermissibly construed disputed evidence in favor of the hospital in finding that its suspension of the physician-plaintiff was reasonable, and failed to address the specific elements of the physician's tort claim.

Defendants argue that Wilkey has not alleged facts supporting the elements of his claim. They note it was the hospital who suspended Wilkey's privileges, not the lawyers, and that Wilkey's suspension took effect before Hull was retained to represent the hospital. Moreover, Hull did not "participate" in the decision, as he was not a member of the Committee, but was simply its legal representative. In addition, Wilkey does not allege that Hull interfered in his relationship with the hospital. Rather he alleges that Hull's actions harmed relationships with unidentified patients or insurers. Wilkey fails to allege Hull's knowledge of any such relationships, or that Hull's work during the administrative proceedings, after his initial suspension and before his voluntary resignation, proximately caused him any damages. The Court therefore concludes that Wilkey has not stated a claim for tortious interference against the Defendants, and the ninth cause of action is dismissed.

5. Medical Review Proceedings Immunity.

Defendants argue that they are entitled to absolute statutory immunity from all of Wilkey's claims, because Hull participated in MHMH's professional review of Plaintiff. The Health Care Quality Improvement Act (HCQIA), 42 U.S.C. §11111(a)(1), provides immunity to a professional review body, its members and staff, anyone contracting with the body, and "any

person who participates with or assists the body with respect to the action." The First Circuit concluded that an auditor, acting on behalf of an insurance company that terminated a physician's contract, was immune under the participation/assistance prong of the statute. See Singh v. Blue Cross/Blue Shield of Mass., 308 F.3d 25 (1st Cir. 2002). The Court has found no authority suggesting that an attorney who "assists" a hospital's professional review committee would not be entitled to claim immunity.

However, in order to establish that the statutory immunity applies, the committee must be acting out of a "reasonable belief" that quality of health care was in jeopardy, that "reasonable efforts" were made to obtain all the facts, and that adequate notice and hearing procedures were afforded to the physician. See 42 U.S.C. §11112(a). Wilkey's essential allegation is that the proceedings were not reasonable, and were unfair to him, because a favorable report was concealed from him during the proceedings. The Court concludes that Wilkey's allegations are sufficient to avoid the statutory immunity, at least for purposes of Rule 12(b)(6). This question may be revisited, if warranted, after further discovery.

6. Res Judicata and Collateral Estoppel.

Defendants also suggest that all of Wilkey's claims are barred by res judicata and/or collateral estoppel. Defendants

argue that Wilkey should have brought these claims in the prior litigation between Wilkey and the hospital, or in Wilkey's state court action seeking injunctive relief against the hospital's administrative review process, or even in the hospital's subsequent breach of contract action and Wilkey's counterclaim in that case. His failure to do so, Defendants argue, means that his claims are now barred.

These other lawsuits did not involve these Defendants. Wilkey's first action sought an injunction to stop the hospital review proceedings. The hospital later brought a breach of contract action to recover funds it advanced to Wilkey, and Wilkey counterclaimed for breach of contract. The state court granted summary judgment to the hospital, and Wilkey dismissed his counterclaim - but only after he had filed the lawsuit in Case No. 1:04-cv-768. (See Judge Barrett's October 18, 2007 Order, Dkt. #136, denying the hospital's summary judgment motion on res judicata grounds, and reviewing the history of these lawsuits.) In addition, Wilkey specifically alleges that he first discovered Hull's purported involvement in concealing Dr. Ricciardi's report during discovery in the federal case against the hospital. Defendants do not argue that Wilkey's claims are time-barred, and the Court must accept Wilkey's discovery allegations at this juncture.

The Court therefore concludes that Wilkey's remaining claims

are not barred by res judicata or collateral estoppel as a matter of law.

CONCLUSION

For all of the foregoing reasons, Defendants' motion to dismiss (Doc. 7) is granted with respect to all of Plaintiff's claims **except** the eighth cause of action (fraud), and the eleventh cause of action (negligence). Paragraph 5 of Plaintiff's complaint is stricken. Plaintiff's motion to delay a ruling (Doc. 13) is denied as moot. Defendants' motion to strike (Doc. 14) is denied.

SO ORDERED.

Dated: January 3, 2008

s/Sandra S. Beckwith
Sandra S. Beckwith, Chief Judge
United States District Court