

IN THE COURT OF APPEALS OF MARYLAND

NO. 32

SEPTEMBER TERM, 1994

MEDICAL MUTUAL LIABILITY SOCIETY
OF MARYLAND et al.

v.

B. DIXON EVANDER AND ASSOCIATES,
INC. et al.

Murphy, C.J.
Eldridge
Rodowsky
Chasanow
Bell
Raker
*McAuliffe, John F. (Retired,
specially assigned)

JJ.

DISSENTING OPINION BY Bell, J., in
which Chasanow, J., joins.

FILED: June 28, 1995

Before reading the majority opinion, I did not know that the causative relationship between a plaintiff's injuries and a defendant's tortious interference with business relationships had to be proven by direct, as opposed to circumstantial, evidence. In fact, I believed, and, indeed, case law supports that, under Maryland law, circumstantial evidence is as competent and as admissible as, Hebron v. State, 331 Md. 219, 226, 627 A.2d 1029, 1032-33 (1993); Wiggins v. State, 324 Md. 551, 567, 597 A.2d 1359, 1367 (1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1765, 118 L.E.2d 427 (1992); Wilson v. State, 319 Md. 530, 537, 573 A.2d 831, 834 (1990); West v. State, 312 Md. 197, 211-12, 539 A.2d 231, 238 (1988); Nalee, Inc. v. Jacobs, 228 Md. 525, 531, 228 A.2d 677, 680 (1962); Ambassador Apartment Corporation v. McCauley, 182 Md. 275, 279, 34 A.2d 333, 334 (1943); Baltimore American Underwriters of Baltimore American Insurance Co. v. Beckley, 173 Md. 202, 207, 195 A. 550, 552 (1937); Burke v. City of Baltimore, 127 Md. 554, 562, 96 A. 693, 696 (1916); Owens-Illinois v. Armstrong, 87 Md. App. 699, 717, 591 A.2d 544, 552 (1991), aff'd in part, rev'd in part, 326 Md. 107, 604 A.2d 47, cert. denied, ___ U.S. ___, 113 S.Ct. 204, 121 L.Ed.2d 145 (1992); McSlarrow v. Walker, 56 Md. App. 151, 159, 467 A.2d 196, 200, cert. denied, 299 Md. 137, 472 A.2d 1000 (1984), and in some instances is more persuasive than, direct evidence. See Henderson v. Maryland National Bank, 278 Md. 514, 522-23, 366 A.2d 1, 6 (1976); Board of County Commissioners of Frederick County v. Dorcus, 247 Md. 251, 259, 230 A.2d 656, 661

(1967); Steinla v. Steinla, 178 Md. 367, 373, 13 A.2d 534, 536 (1940). This is true even when the burden of proof is greater than by a preponderance of the evidence. See Steinla, 178 Md. at 373, 13 A.2d at 536; Lussier v. Maryland Racing Commission, 100 Md. App. 190, 217-19, 640 A.2d 259, 273-74, cert. granted, 336 Md. 405, 648 A.2d 991 (1994). Therefore, I was surprised, to say the least, when the majority held that the evidence of causation proffered by Evander in this case was insufficient as a matter of law. More to the point, since the majority does not purport to change Maryland law, I was, and remain, convinced, that the majority is just plain wrong.

There is no dispute as to the causation evidence. Evander and his employees testified at some length to being inundated with telephone calls and letters from physicians who asked what he had done to deserve Medical Mutual's characterization of his services as "inadequate." They also testified that the physicians declined to do further business with Evander because they did not believe Medical Mutual was simply upset that Evander was marketing its competition. Evander's evidence further showed that Medical Mutual received no complaints from any physician concerning Evander's "inadequacy." He also established, through several of Medical Mutual's officers, that Evander was terminated because of his association with Medical Mutual's competitor.

Characterizing Evander's testimony as "general," Majority Op. at 19, and noting that Evander neither identified nor called even

one of the inquiring doctors to testify as to why he or she ceased using Evander's services, the majority rejects Evander's "imprecise hearsay testimony," finding it insufficient to support the jury's verdict. Statements of the doctors' then existing state of mind and motive offered to prove the doctors' future action may be hearsay, but those statements are a well recognized exception to the rule prohibiting hearsay and are admissible as substantive evidence. See Maryland Rule 5-803 which states in pertinent part:

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(b) Other Exceptions

(3) Then Existing Mental, Emotional, or Physical Condition

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the declarant's future action...." (Emphasis added).

Moreover, the Court of Special Appeals, responding to the identical argument, reached what I believe is a correct conclusion. It pointed out that the testimony offered by Evander "was certainly competent evidence of injury caused by [Medical Mutual's] wrongful act," Medical Mutual Liability Insurance Society of Maryland v. Evander & Associates, Inc., 92 Md. App. 551, 575, 609 A.2d 353, 364 (1992), and that the failure to produce direct evidence as to the reason that his services were no longer used by certain physicians

"provided [Medical Mutual] with material for cross-examination and jury argument." Id. at 574, 609 A.2d at 364.

What we are here faced with is a question of the sufficiency of the evidence to prove causation. It is well established in Maryland that the test of sufficiency is whether there is any evidence in the case, no matter how slight, legally sufficiently as tending to be probative of the proposition at issue. See Cavacos v. Sarwar, 313 Md. 248, 258, 545 A.2d 46, 51 (1988); Beahm v. Shortall, 279 Md. 321, 341-42, 368 A.2d 1005, 1017 (1977); Curley v. General Valet Service, Inc., 270 Md. 248, 264, 311 A.2d 231, 239-40 (1973); Perlin Packing Company, Inc. v. Price, 247 Md. 475, 483, 231 A.2d 702, 707 (1967); Fowler v. Smith, 240 Md. 240, 246-47, 213 A.2d 549, 553-54 (1965); McSlarrow v. Walker, supra, 56 Md. App. at 159, 467 A.2d at 200; Brock v. Sorrell, 15 Md. App. 1, 6-7, 288 A.2d 640, 643-44 (1972). Indeed "Maryland has gone almost as far as any jurisdiction that we know of in holding that meager evidence [of causation] is sufficient to carry the case to the jury." Fowler, 240 Md. at 246, 213 A.2d at 554. Certainly, albeit circumstantial, the receipt by Evander of a number of letters and telephone calls inquiring as to what Evander had done wrong, coupled with the subsequent non-renewal by many of the inquiring physicians, of the business relationship with Evander, is some evidence, however one might characterize it or assess its weight, that a wrongful act caused Evander actual damages. To be sure, that same proposition could be proven by more direct

evidence, i.e., the testimony of one or more of the physicians who refused to continue the use of Evander's services. That Evander did not choose to proceed in that fashion affects the weight, rather than the admissibility, of the evidence; it is such as to provide the proponent with material for cross-examination and jury argument. Medical Mutual v. Evander, 92 Md. App. at 574, 609 A.2d at 364. Characterizing the evidence as "imprecise hearsay" does not change its essential nature; it remains probative of the proposition for which it was offered. Unless circumstantial evidence is not probative of causation at all, a fact which by no means is so under Maryland law, finding the evidence of causation insufficient requires that there be no such evidence in the record. Because that clearly is not the case here, I dissent.

In a concurring opinion, Judge Eldridge suggests that the tort of wrongful interference with business relationship may not lie under the circumstances of the instant case. I disagree. Judge Eldridge attempts to expand unduly two doctrines precluding tortious interference claims. The first is the well-settled principle that if two parties have a contract and one breaches the contract, the other contracting party cannot convert a breach of contract action into a tort action and sue for tortious interference with contract. See K & K Management v. Lee, 316 Md. 137, 557 A.2d 965 (1989), in which Judge Rodowsky, writing for the Court, explained that "[t]ortious interference with business relationships arises only out of the relationships between three

parties, the parties to a contract or other economic relationship (P and T) and the interferer (D)." 316 Md. at 154, 557 A.2d at 973. Judge Eldridge, quoting dicta from that case, emphasized the point as follows:

"`A two party situation is entirely different. If D interferes with D's own contract with P, D does not, on that ground alone, commit tortious interference, and P's remedy is for breach of the contract between P and D. This Court has "never permitted recovery for the tort of intentional interference with a contract when both the defendant and the plaintiff were parties to the contract." Wilmington Trust Co. v. Clark, 289 Md. 313, 329, 424 A.2d 744, 754 (1981). ... See also W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser & Keeton on The Law of Torts 990 (5th ed. 1984) ("The defendant's breach of his own contract with the plaintiff is of course not a basis for the tort").'"

___ Md. at ___, ___ A.2d at ___ (Concurring Op. at 2-3)(quoting K & K Management, 316 Md. at 155-56, 557 A.2d at 974).

The second principle unduly expanded is the rule that where a corporation has a contract with the plaintiff, and a corporate officer or employee, acting to serve the interests of the corporation, interferes with the contract, the officer or employee is not personally liable for tortious interference because when acting within the scope of authority and in the interest of the corporation, the agent or employee is the alter ego of the corporation. The cases, however, make clear that, generally, if the corporate officer or employee is acting outside the scope of authority or to serve his or her own interests or with malice, then

the corporate officer or employee is no longer acting as the alter ego of the corporation and is personally liable. See generally THOMAS G. FISCHER, LIABILITY OF CORPORATE DIRECTOR, OFFICER, OR EMPLOYEE FOR TORTIOUS INTERFERENCE WITH CORPORATION'S CONTRACT WITH ANOTHER, 72 A.L.R. 4th 492 (1989 & 1994 Supp.).

These two principles should not be expanded into the doctrine Judge Eldridge suggests, i.e., that "neither party to a specific economic relationship is liable for the wrongful interference tort in connection with its conduct of that relationship." ___ Md. at ___, ___ A.2d at ___ (Concurring Op. at 6-7). As applied in the instant case, Judge Eldridge's suggested rule of law is "[i]f Medical Mutual was a party to the business relationships between the plaintiffs and their clients insured with Medical Mutual, it may be doubtful, as a matter of law, that it could be held liable for tortiously interfering with business relationships between the plaintiffs and their Medical Mutual insureds." ___ Md. at ___, ___ A.2d at ___ (Concurring Op. at 8).

There are several Maryland cases on the tort of interference with economic relations that are not cited in the concurring opinion, but may be relevant to the issue. See Sharrow v. State Farm Mutual, 306 Md. 754, 511 A.2d 492 (1986); Knickerbocker Co. v. Gardiner Co., 107 Md. 556, 69 A. 405 (1908); Lucke v. Clothing C'T'RS' Assembly, 77 Md. 396, 26 A. 505 (1893). See also WADE R. HABEEB, LIABILITY OF ONE WHO INDUCES TERMINATION OF EMPLOYMENT OF ANOTHER BY THREATENING TO END OWN CONTRACTUAL RELATIONSHIP WITH EMPLOYER, 79 A.L.R.3d 672

(1977); in which the author observes:

"it has been held in a number of cases that one who maliciously or without lawful right threatens to end his own contractual relationship with an employer for the purpose of procuring the termination of employment of another is liable to the employee....

Concomitantly, in some cases the courts have held that one who in the justifiable exercise of his lawful rights threatens to end his own contractual relationship with an employer and thus induces the termination of employment of another is not liable to the employee." (Emphasis added)(footnotes omitted).

79 A.L.R.3d at 675.

It is interesting to note that the cases go quite far in protecting even employment-at-will contracts from malicious wrongful interference by parties contracting with employers. Citing almost a dozen cases, the A.L.R. annotation concludes:

"It has been generally held that the fact that the employment is at will and that the employer is free from liability for discharging an employee does not carry immunity to a person who, without justification, induces the discharge of the employee by threatening to end his own contractual relationship with the employer."

79 A.L.R. at 679.

There simply is nothing in the circumstances of the instant case which would insulate Medical Mutual from liability for wrongful interference with business relationship. In this case, all of the elements of the tort have been proven.

Judge Chasanow joins in this opinion.