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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0120-12T1

DEREK Q. CHAPMAN, M.D.,

Plaintiff-Appellant,

v.

LOURDES MEDICAL CENTER OF BURLINGTON COUNTY, LOURDES HEALTH SYSTEM, CATHOLIC HEALTH EAST, THE MEDICAL STAFF OF LOURDES MEDICAL CENTER OF BURLINGTON COUNTY, MICHAEL HORN, M.D., DANIEL ROSENBAUM, M.D., JOHN PETERSON, M.D., DENNIS ALESSI, ESQ. and MANDELBAUM SALSBURG GOLD LAZRIS & DISCENZA, P.C.,

Defendants-Respondents.

Telephonically argued January 8, 2014 – Decided September 10, 2014

Before Judges Alvarez, Ostrer and Carroll.

On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-1900-10.

Robert J. Conroy argued the cause for appellant (Kern Augustine Conroy & Schoppmann, P.C., attorneys; Mr. Conroy, of counsel; R. Bruce Crelin, on the briefs).

William M. Honan argued the cause for respondents Lourdes Medical Center of Burlington County, Lourdes Health System, Catholic Health East, The Medical Staff of

Lourdes Medical Center of Burlington County, Michael Horn, M.D., Daniel Rosenbaum, M.D. and John Peterson, M.D. (Fox Rothschild LLP, attorneys; Mr. Honan, of counsel; Jacob Perskie, on the brief).

Maureen Mahoney argued the cause for respondent Dennis J. Alessi, Esq. (James B. Sharp & Associates LLC, attorneys; Ms. Mahoney, of counsel and on the brief).

Yale I. Lazris argued the cause for respondents Dennis J. Alessi, Esq. and Mandelbaum, Salzburg, Gold, Lazris & Discenza, P.C. (Mandelbaum, Salzburg, Gold, Lazris & Discenza, P.C., attorneys; Mr. Lazris, of counsel; Alix R. Rubin, on the brief).

PER CURIAM

Plaintiff Derek Q. Chapman, M.D., appeals from two trial court orders granting summary judgment dismissal of his claims against a hospital and various physicians of race-based discrimination under the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, tortious interference with prospective economic advantage, breach of implied contract, and civil conspiracy. He also appeals from the trial court's dismissal, for failure to state a claim, the same counts against the defendants' attorney and law firm. Having reviewed plaintiff's arguments in light of the record and applicable principles of law, we affirm.

I.

Plaintiff is an African-American physician, board certified in obstetrics and gynecology. He completed his residency in

1995, and from 2000 until July 2008, he held full staff privileges in his specialty at defendant Lourdes Medical Center of Burlington County (Lourdes or the hospital). This appeal arises out of the July 7, 2008 decision, ultimately approved by the Lourdes board, to revoke plaintiff's privileges to practice obstetrics at the hospital. The revocation was based on plaintiff's performance in four cases that resulted in two maternal deaths, two fetal deaths, and one severe maternal injury. Medical malpractice settlements exceeding $1 million were paid on plaintiff's behalf in connection with three of the cases. In one case, the New Jersey Board of Medical Examiners found plaintiff grossly negligent, and issued a consent order reprimanding and fining him.

R.P. was a twenty-year-old woman who died of a ruptured, undiagnosed ectopic pregnancy. She arrived at the emergency room of Virtua Memorial Hospital (Virtua) in Mount Holly on November 13, 2000, a month after having an abortion. She complained of abdominal pain, nausea, and other symptoms. Plaintiff was the Ob/Gyn house officer and was asked to rule out a possible ectopic pregnancy.[1] Plaintiff performed a limited examination in the ultrasound suite, discussed the ultrasound with the technician, and indicated that he saw an empty

[1] Plaintiff had staff privileges at Virtua, as well as Lourdes.

gestational sac in the uterus. He did not diagnose an ectopic pregnancy. The patient was discharged, and several hours later suffered the fatal event.

A medical malpractice claim against plaintiff was settled for $275,000 on August 10, 2005. The Medical Practitioner Review Panel (Panel) of the New Jersey State Board of Medical Examiners (BME) thereafter investigated the case, and received testimony from plaintiff. The Panel concluded that plaintiff was grossly negligent in his care of R.P. The BME adopted all the Panel's findings and recommendations. Those findings included the following: plaintiff was grossly negligent in failing to obtain R.P.'s vital signs, and failing to adequately review R.P.'s record; plaintiff was also negligent in failing to consult with the radiologist who stated in a report, which plaintiff did not obtain, that ectopic pregnancy was certainly a possibility. Plaintiff consented to entry of an order filed November 7, 2007, reprimanding him for engaging in gross negligence, and assessing a civil penalty of $5000.[2]

[2] See N.J.S.A. 45:1-21(c) (stating that the BME is empowered to suspend a practitioner's license if he engages in gross negligence), and N.J.S.A. 45:1-22 (stating that the BME, in the alternative, may issue a reprimand and impose a civil penalty). See also In re Kim, 403 N.J. Super. 378, 385-86 (App. Div. 2008) (discussing BME powers).

Plaintiff's patient L.K. suffered the loss of her fetus on January 31, 2001. L.K. had a history of fetal demise. She received weekly testing of her fetus as she approached term. After two "non-reassuring" tests in a row, plaintiff determined labor would have to be induced, but he did not immediately admit L.K. Plaintiff's partner, Michael Minoff, M.D., who is Caucasian, also examined L.K. and reviewed the test results. Although plaintiff later wrote that "we [referring to himself and Dr. Minoff] discharged the patient," plaintiff and Dr. Minoff both asserted that Dr. Minoff was solely responsible for the decision, reached after plaintiff left the hospital, that L.K. could leave and return later that evening for delivery. By the time L.K. returned to Lourdes, the fetus had expired. To settle a medical malpractice claim, $67,500 payments were made on behalf of each partner, for a total $135,000 recovery.

On July 8, 2003, plaintiff's repeated attempt to deliver H.B.'s baby with forceps resulted in fetal death and maternal injury. H.B. had been pushing for two hours and was fatigued, so plaintiff attempted to perform a forceps delivery. The forceps became detached twice. He then attempted a vacuum delivery, and ultimately performed a cesarean section. The baby suffered fatal neurological injuries from the forceps. The forceps also caused a tear through H.B.'s anterior and posterior

rectal walls, extending into the midline of her buttock. Despite subsequent surgeries, H.B. was left with continence problems. A $750,000 settlement was reached in July 2004 to settle the malpractice claim arising out of H.B.'s care at Lourdes.

D.M. died after multiple surgeries on July 15, 2007, at Lourdes. She was thirty-seven years old and in her third pregnancy. A resident informed plaintiff, who was on call at home, that D.M. appeared to have a placental abruption and was being prepped for an emergency cesarean section. Plaintiff arrived at the hospital in the early morning hours and performed the cesarean section, but the fetus had already expired. Plaintiff then performed a uterine artery ligation, attempted to perform a B-Lynch suture, and ultimately performed a hysterectomy. D.M. continued to bleed. D.M. experienced disseminated intravascular coagulation (DIC). Later that morning, plaintiff performed another surgery, assisted by Dr. Minoff and another physician, in an attempt to address the problem. The surgery was unsuccessful. D.M. died shortly thereafter.

In April 2008, defendant Michael Horn, M.D., initiated the process that ultimately led to plaintiff's revocation. Dr. Horn had become chair of the hospital's department of obstetrics and

gynecology in 2006. Dr. Horn was in his mid-sixties, and had begun practicing obstetrics in the 1970s. He was one of several physicians in an Ob/Gyn group. His practice had shifted mainly to gynecology. He had not taken a call in over ten years and performed about one or two deliveries a month.

As department chair, Dr. Horn was already aware of D.M.'s 2007 case when, in February or March 2008, he happened upon the BME consent decree while on the BME website. Shortly thereafter, Dr. Horn received a copy of an undated letter plaintiff addressed to the Lourdes Medical Staff, in which he discussed R.P.'s case and the BME reprimand, as well as L.K.'s and H.B.'s cases.

In his letter, plaintiff did not expressly admit that his care was substandard, stating, "I do not necessarily agree with all of the findings of the [BME]." However, he described remedial steps he had taken in the wake of the three cases he addressed. He stated that he had excluded forceps from his practice; had been supervised for two months for vacuum deliveries; and instituted a policy of insisting on receiving an official radiology report before even seeing a patient in cases of possible ectopic pregnancy. He also stated that it was "now [his] practice to [e]nsure that all of a patient's vital signs are reviewed and recorded as part of every patient examination."

Although the malpractice settlements in the first three cases had been reported to the hospital through the National Practitioner Data Bank shortly after the payments, Dr. Horn stated he did not receive copies of those reports. Aware for the first time in early 2008 of the four cases, Dr. Horn was concerned that there was a pattern. He was also dissatisfied with various aspects of plaintiff's letter.[3] Citing the BME's action, plaintiff's letter, and the D.M. case,[4] Dr. Horn wrote to the hospital's Medical Executive Committee (MEC) on April 10, 2008, "requesting an Investigation, as per our by[]laws," of plaintiff's activities and actions. Defendants Daniel Rosenbaum, M.D., and John Peterson, M.D., were members of the MEC. They were, respectively, president and vice-president of the medical staff.

The hospital's bylaws empowered the MEC to determine whether to initiate an investigation, and to appoint an Ad Hoc Investigating Committee (AHC) to undertake the task. In response to Dr. Horn's letter, the MEC appointed an AHC, with

[3] For example, Dr. Horn stated that awaiting a radiology report before even seeing a patient with a possible ectopic pregnancy was poor practice. He explained that in some cases, the Ob/Gyn physician must first examine the patient before requesting the radiologist's report.

[4] The letter apparently referred to D.M.'s case, although it did not identify it by name.

Dr. Horn as chair, on April 28, 2008. Dr. Rosenbaum advised plaintiff of the decision that day.

The AHC reviewed the files of the cases of D.M., R.P. and H.B. It received an opinion from Louis Weinstein, M.D., professor and chair of the Obstetrics and Gynecology Department at Thomas Jefferson University in Philadelphia. Dr. Weinstein's written report was critical of plaintiff's performance. Among his findings, Dr. Weinstein concluded there was inadequate evaluation and poor decision making in R.P.'s case; the overall care to H.B. was substandard, involved medically unnecessary procedures and lack of knowledge about forceps use; and in D.M.'s case, plaintiff unnecessarily performed procedures, and he apparently did not know how to do a B-Lynch suture.

The committee also considered the opinion of Dr. Ronald M. Jaffe, professor of Obstetrics and Gynecology at the Robert Wood Johnson Medical School in Camden. Dr. Jaffe stated that if plaintiff had been practicing at Cooper Hospital, where Dr. Jaffe taught, Dr. Jaffe may have recommended monitoring plaintiff in-house for one year for all of his hospital patients. This would be followed by a reevaluation. Alternatively, Dr. Jaffe suggested a six-month additional residency training, but when asked if he could accept Chapman, he stated his program at Cooper was full.

While the AHC's investigation proceeded, Dr. Horn was required to consider plaintiff's credentialing for the two-year period commencing in 2007. There had been a backlog in the credentialing process. Faced with the pending but incomplete investigation, Dr. Horn approved plaintiff's privileges, cognizant that they might be revoked later.

In its June 23, 2008, report, the AHC concluded that "in certain instances, [plaintiff's] obstetrical care and treatment rendered was below the standard of care. Difficulty in providing leadership and judgment in complicated obstetrical cases was demonstrated in our review." The AHC recommended the following corrective action: a minimum six-month program, approved by the Accreditation Council for Graduate Medical Education, providing extensive training in complex obstetrical care; and mandatory certification of plaintiff's satisfactory completion of the training.

The MEC rejected the AHC's recommendation. Dr. Horn reported that he was unable to find a program that would conform to the AHC's recommendation. The MEC instead voted thirteen to two, with one abstention, to revoke plaintiff's obstetrical privileges. The MEC's July 16, 2008, decision letter addressed to the plaintiff reviewed the four cases and concluded that plaintiff's care "deviated from the standard of care in

obstetrics." The revocation was effective immediately upon plaintiff's receipt.

However, the decision was not final. The hospital's bylaws provided that "[r]ecommended adverse actions . . . shall become final only after the Fair Hearing and appeal rights . . . have either been exhausted or waived, and only upon being adopted as final actions by the Board." The MEC notified plaintiff that pursuant to the hospital's bylaws, he was entitled to request a fair hearing by a Fair Hearing Committee (FHC), if requested within thirty days. Plaintiff requested a hearing on August 6, 2008. The fair hearing began on December 2, 2008.

Plaintiff unsuccessfully sought an injunction from the General Equity Part restraining defendants from taking action against his medical privileges pending the hearing. Plaintiff asserted that the pre-hearing revocation violated the bylaws. However, Judge Michael Hogan did grant plaintiff relief regarding discovery issues, compulsion of witnesses, and disclosure of a root cause analysis[5] of the D.M. case.

The fair hearing resumed in February 2009, and continued in a disjointed fashion over several days during March, April, and

[5] A "root cause analysis" is an internal effort to identify the cause of a bad event or outcome, and to determine "whether systems can be modified to prevent the likelihood of similar events occurring in the future." Reyes v. Meadowlands Hosp. Med. Ctr., 355 N.J. Super. 226, 230 (Law Div. 2001).

May, when it finally concluded. The FHC consisted of five physicians, two unaffiliated with Lourdes. Early in the proceedings, the hearing officer determined that the hospital would bear the burden of persuasion by a preponderance of the evidence on the issue of whether revocation was warranted, notwithstanding a by-law that allocated to a petitioner the burden to show the MEC action was "not based on substantial credible evidence." The hearing officer also determined that evidence that the AHC or MEC was motivated by "racial animus, economic competition, and the like will not be permitted unless such evidence specifically relates to a witness actually testifying in the Fair Hearing and that witness offers an opinion or conclusion regarding [plaintiff] having obstetrical privileges."

The Medical Staff was represented by defendant Dennis Alessi of the firm Mandelbaum Salsburg Gold Lazris & Discenza, P.C. The FHC heard testimony generally supportive of revocation from Dr. Horn, Dr. Rosenbaum, and Dr. Anthony C. Quartell, the Director of Minimally Invasive Gynecologic Surgery at Saint Barnabas Medical Center in Livingston. Dr. Quartell also issued two reports addressing the care plaintiff rendered to the four patients. Plaintiff testified on his own behalf and also relied on the testimony of Dr. Minoff, his partner in practice, and

Harish M. Sehdev, M.D., a fellow of the American Congress of Obstetricians and Gynecologists, who also issued multiple reports. In addition to the relevant medical records, the FHC also considered, among other exhibits, the reports of Dr. Weinstein and Ronald J. Librizzi, D.O., a Voorhees physician.

We shall not review the hearing record in detail, as plaintiff has himself declined "to belabor the clinical evidence submitted by both sides in connection with" defendants' motion for summary judgment. Plaintiff instead concedes that there was expert testimony both for, and against, the MEC's revocation decision.

The FHC recommended plaintiff's conditional reinstatement in a July 31, 2009, report and recommendation.[6] The FHC defined its task as not to determine whether plaintiff had committed malpractice in the four cases – although that is how, the FHC stated, the cases were presented – but whether his conduct and actions currently jeopardized patient safety and interests, and whether there was "reasonable concern as to [his] reasonable ability and skill to provide patient care."

After reviewing the facts of the four cases, the FHC concurred with the BME that plaintiff committed gross

[6] Although the report did not disclose a vote of the panel members, all five signed the report.

malpractice in R.P.'s case, but "this occurred in the year 2000[,] . . . was in a very different clinical setting than that which [plaintiff] is working in at [Lourdes] . . . [and] [h]e has matured since that incident many years ago . . . ." The FHC concluded that plaintiff bore no responsibility for the result in L.K.'s case. While plaintiff was involved in L.K.'s care, Dr. Minoff alone decided to discharge the patient.

With respect to H.B.'s case, the FHC noted that the testimony "was markedly lacking in any attempt on behalf of [plaintiff] to defend the care provided to this patient." Although plaintiff misapplied the use of forceps in H.B.'s case, the FHC concluded the case more significantly involved an error of judgment. Plaintiff "was unable to recognize when it was time to stop with the instruments that he was using." The FHC found that plaintiff's decision to forego using forceps and secure additional training in vacuum delivery was a "responsible step," and rejected Dr. Quartell's view that the ability to use forceps was an essential part of obstetric practice. The FHC found that the lack of "untoward incidents" since 2003 supported the conclusion that his ability to provide an acceptable quality of care was unimpaired.

The FHC concluded that D.M.'s case involved "multiple failures of the health care system," and plaintiff was "part of

that." Nonetheless, the FHC concluded that plaintiff could reasonably assume that certain testing was done before his arrival at the hospital, although it turned out it had not. The FHC rejected the MEC's theory that the cesarean was unnecessary — given the fetus's condition — and caused the DIC and other complications. The FHC lauded plaintiff for seeking input from other physicians — including Dr. Minoff — before deciding to perform the last surgery, which preceded the patient's demise.

The FHC also found no bad faith on the part of the MEC or Dr. Horn. The four cases raised "legitimate concerns for starting the investigation of [plaintiff]." With regard to the L.K. case, the "MEC did not understand . . . and . . . it did not clearly emerge until after the fair hearing process . . . that [plaintiff] was involved with the patient's management earlier . . . [but he] had left and was not aware that Dr. Minoff was discharging the patient . . . ." The FHC determined that plaintiff was not present at the critical point of the patient's care. Finally, the FHC concluded that "the evidence presented does not support the claims of bias or competition with regard to Dr. Horn in particular as factors precipitating the investigation with resulting corruption or flaws in the process."

The FHC recommended reinstatement of plaintiff's obstetrical privileges, subject to two conditions: (1) plaintiff be permanently restricted from the use of forceps in connection with the delivery of obstetrical patients at the Hospital; and (2) "[plaintiff] shall not make any clinical decision regarding patient care based upon, or involving interpretation of an ultrasound study without having first obtained the formal report or interpretation of a qualified radiologist until such time as [plaintiff] demonstrates" to an appropriate credentialing body of the hospital "that he has acquired a competence in the interpretation of diagnostic ultrasound and sonography."

As authorized by the by-laws, the MEC appealed to an Appeal Board consisting of three non-physician members of the Lourdes Board. After hearing oral argument by the parties' counsel and reviewing the FHC's report and the record below, the Appeal Board, on October 14, 2009, reversed the FHC and reinstated the revocation. The Appeal Board concluded the FHC's decision was not supported by substantial credible evidence.

> The one common thread throughout these four cases is that [plaintiff] was intimately involved in the management of each of these patients. In some of the cases he was the only physician involved and in others, he was one of several but ultimately, the one with the primary responsibility for the care, treatment and

> management of that particular patient. Each of these four cases involved [plaintiff's] response to urgent situations and all of them seemed to have occurred during the evening or early morning hours.

The Appeal Board highlighted the medical malpractice settlements in three of the four cases. It found compelling the BME's finding of gross negligence. The Appeal Board rejected the FHC's finding that Dr. Minoff alone decided to discharge L.K., relying on plaintiff's written statement that "we decided not to admit the patient," and that a settlement was paid on behalf of both physicians.

Recounting the results of H.B.'s care, the Appeal Board noted that even plaintiff's expert could not defend plaintiff's actions. Regarding D.M., the Appeal Board acknowledged that plaintiff did not bear sole responsibility, but found that he was "extensively involved." Plaintiff's own expert "conceded . . . there were a number of items that [plaintiff] should have checked on . . . prior to commencing the C-Section." The Appeal Board rejected the FHC's conclusion that plaintiff was reasonable to assume testing was completed, and found inadequate support for plaintiff's decision to perform the cesarean. The Appeal Board rejected the FHC's finding that plaintiff's actions in D.M.'s case demonstrated professional growth, despite the result.

II.

Plaintiff filed his initial complaint in January 2010 against Lourdes,[7] Drs. Horn, Rosenbaum and Peterson, as well as Alessi and his law firm. Plaintiff alleged that the three named physicians and Alessi discriminated against plaintiff on the basis of his race "[b]y summarily revoking [his] obstetrical privileges," and the remaining defendants were vicariously liable.

Plaintiff further alleged that the various business entities and the medical staff, at the individuals' direction, breached an implied contract formed by the by-laws by summarily revoking plaintiff's privileges, failing to afford him a timely hearing, and depriving him of due process. He asserted that Dr. Horn was "a direct economic competitor" of plaintiff and tortiously interfered with plaintiff's prospective economic advantage by maliciously initiating and controlling the investigation against plaintiff, recommending revocation, and participating in the hearing. The other defendants were liable because they consented to Horn's actions or were vicariously liable.

[7] Plaintiff also named Lourdes Health System, Catholic Health East. In an amended complaint, plaintiff added "The Medical Staff of Lourdes Medical Center of Burlington County."

Lastly, plaintiff asserted that the individuals engaged in a civil conspiracy to act unlawfully. Plaintiff sought compensatory and punitive damages, attorney's fees and other relief, but did not seek reinstatement of his privileges. Counsel explained in October 2010 that the hospital closed its obstetrics department.

In an answer dated March 9, 2010, defendants Lourdes, and Drs. Horn, Rosenbaum, and Peterson denied these allegations and raised twenty affirmative defenses. In lieu of an answer, Alessi and his firm moved for dismissal for failure to state a claim. In July, Lourdes and Drs. Horn, Rosenbaum and Peterson moved for summary judgment on all counts against them.

Judge Karen L. Suter granted the attorney-defendants' motion, concluding that plaintiff's claims were barred by the absolute litigation privilege. She later granted summary judgment to the remaining defendants, dismissing all but the LAD count. The judge concluded that the hospital's decision followed fundamentally fair proceedings and was supported by sufficient reliable evidence; consequently, under Zoneraich v. Overlook Hospital, 212 N.J. Super. 83 (App. Div.), certif. denied, 107 N.J. 32 (1986), plaintiff's tort and contract claims were precluded. Judge Suter held that the race discrimination

claim was not litigated during the hospital proceedings, and plaintiff did not waive his right to bring the LAD claim.[8]

After the close of discovery, which included the deposition only of plaintiff, Judge Marc M. Baldwin granted the remaining defendants' motion for summary judgment dismissal of the LAD count. Judge Baldwin concluded that plaintiff presented nothing more than speculation in support of his claim of racial animus. This appeal followed.

> Point II[9]
>
> Genuine Issues of Material Fact Exist With Respect to Dr. Chapman's Claim Under the New Jersey Law Against Discrimination, Which are in Dispute and Must be Resolved by a Jury.
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> Point III
>
> The Trial Court Erred in Granting Summary Judgment to the Hospital Defendants on Dr. Chapman's Claim of Breach of Implied Contract.
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> Point IV
>
> The Trial Court Erred in Granting Summary Judgment to the Hospital Defendants on Dr. Chapman's Claim of Tortious Interference With Prospective Economic Advantage.

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[8] Judge Suter denied defendants' subsequent motion for reconsideration.

[9] Plaintiff's first point addresses the standard of review.

Point V

The Trial Court Erred in Granting Summary Judgment to the Hospital Defendants on Dr. Chapman's Claim of Civil Conspiracy.

Point VI

The Trial Court Erred In Dismissing Dr. Chapman's Claims in Counts I, III and IV Against the Alessi Defendants.

III.

In considering plaintiff's appeal from the trial court's orders, we exercise de novo review, and apply the same standard as the trial court. Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010) (summary judgment); Rezem Family Assocs. v. Borough of Millstone, 423 N.J. Super. 103, 113-14 (App. Div.) (motion to dismiss for failure to state a claim), certif. denied, 208 N.J. 366 (2011). Regarding the summary judgment orders, we "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). "[W]hen the evidence 'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Ibid. (citation omitted). Regarding the order to dismiss for failure to state a

claim, we limit our inquiry "'to examining the legal sufficiency of the facts alleged on the face of the complaint.'" Nostrame v. Santiago, 213 N.J. 109, 127 (2013) (quoting Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989)).

A.

We first consider plaintiff's LAD claim. Plaintiff argues that he has established a prima facie case of discrimination based on circumstantial evidence. See Bergen Commercial Bank v. Sisler, 157 N.J. 188, 208 (1999) (stating that a prima facie case may be established by direct or circumstantial evidence). He conceded in deposition that he could point to no direct evidence of racial animus by Dr. Horn or anyone else at Lourdes.

Our Court has adopted variations of the four-pronged McDonnell Douglas test, whereby a plaintiff may establish, through circumstantial evidence, a prima facie case of discrimination, or a "presumption" of discrimination. Id. at 209-10 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)). To satisfy the first three elements, a plaintiff must establish (1) he is in a protected class; (2) he was otherwise qualified and performing the essential functions of the job; and (3) he suffered an adverse employment action. See, e.g., Victor v. State, 203 N.J. 383, 409 (2010). As for the fourth prong, in a discriminatory

discharge case, a plaintiff must show that either another person outside the protected class was hired to perform the plaintiff's duties, ibid., or "others not within the protected class did not suffer similar adverse employment actions." El-Sioufi v. Saint Peter's Univ. Hosp., 382 N.J. Super. 145, 167 (App. Div. 2005).

Plaintiff unquestionably has satisfied prongs one and three. We may, for purposes of our analysis, assume there is a genuine issue of material fact regarding whether plaintiff satisfied prong two, notwithstanding the substantial evidence that plaintiff had failed to perform the essential functions of the job.

Nonetheless, we are unpersuaded that plaintiff satisfied prong four. He argues that defendants' failure even to investigate the fitness of plaintiff's partner, Dr. Minoff, demonstrated the disparate treatment required by the fourth prong. We disagree.

In support of his argument, plaintiff mischaracterizes a statement by Alessi in oral argument before the Board. Responding to plaintiff's argument that others, particularly Dr. Minoff, were responsible for the bad results in the cases, Alessi stated, "In every one of the cases, [plaintiff] was a key person." Apparently turning to the L.K. case, Alessi stated, "We agreed that it was he with Dr. Minoff. But our point was

that [plaintiff] was as culpable as Dr. Minoff . . . ." That was far from an admission that Dr. Minoff was similarly situated with plaintiff. See Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 84-86 (1978) (finding plaintiff was not similarly situated according to various criteria, including "the quality of work performed"); see also Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992) (rejecting plaintiff's disparate treatment claim because alleged comparators did not engage "in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it"); Brintly v. Saint Mary Mercy Hosp., 904 F. Supp. 2d 699, 728-29 (E.D. Mich. 2012) (finding physician-plaintiff failed to show asserted comparables were similarly-situated).

We recognize that the fourth prong is flexible, and that ultimately, the court must determine whether the surrounding circumstances of the adverse employment action gives rise to an inference of unlawful discrimination. Williams v. Pemberton Twp. Pub. Sch., 323 N.J. Super. 490, 502 (App. Div. 1999). In this case, the differences between Dr. Minoff and plaintiff are too pronounced to create an inference of discrimination.

Only plaintiff was involved in four cases with apparent substandard care over a seven-year period, which led to three

medical malpractice settlements in a twenty-five-month span. Only plaintiff was found to have committed gross negligence by the BME — a finding in which the FHC, as well as the Appeal Board concurred. And, only plaintiff provided the substandard care in H.B.'s case that even plaintiff's expert could not defend. Although a malpractice settlement is not an admission of liability, the number of settlements in close proximity to each other, and the BME finding, placed plaintiff in a class by himself. Plaintiff presented no evidence that any other physician at Lourdes — in his or any other specialty — had a similar experience but received more favorable treatment.

Even were we to assume that plaintiff established a prima facie case, defendants have met their "burden of rebutting that presumption [of discrimination] by articulating a legitimate and non-discriminatory reason for the termination." Zive v. Stanley Roberts, Inc., 182 N.J. 436, 458 (2005); see also Bergen Commercial Bank, supra, 157 N.J. at 210. The findings of the AHC, Appeal Board, and even the FHC, all support the conclusion that the MEC's immediate revocation of plaintiff's privileges was for a non-discriminatory reason — the nature of the care plaintiff provided in the four cases.

Plaintiff has failed to present sufficient evidence to create a genuine issue of material fact that the reasons for

defendants' actions not only were false or pretextual, but that defendants were motivated by discriminatory intent. See Zive, supra, 182 N.J. at 449. Plaintiff was required to discredit the proffered reasons for the adverse employment action, or present evidence that "'discrimination was more likely than not a motivating or determinative cause'" of the action. DeWees v. RCN Corp., 380 N.J. Super. 511, 528 (App. Div. 2005) (quoting Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994)).

To discredit the proffered reason, a "plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence.'" Ibid. (emphasis omitted) (quoting Fuentes, supra, 32 F.3d at 765). See also El-Sioufi, supra, 382 N.J. Super. at 173-74. To establish that a physician acted out of racial animus or other wrongful motive, a plaintiff must also overcome the fact that a physician is ethically obliged to act in the face of what he or she perceives as substandard care that threatens patient safety. It is "a moral duty of each physician" to freely express himself or herself "openly and without fear of reprisal" on matters implicating a fellow physician's competence and affecting the quality of health care. Bainhauer v. Manoukian, 215 N.J. Super.

9, 38 (App. Div. 1987) (discussing scope of common law conditional special-interest privilege in case of communications about fellow physician's performance).[10]

Plaintiff has failed to meet his burden. It is of no moment that the hospital did not act, despite plaintiff's malpractice settlements in the first three cases, until Dr. Horn requested the investigation in 2008. The November 2007 BME reprimand was a singular event. Coupled with the D.M. case that same year, the hospital's prior inaction hardly creates a reasonable inference of racial animus on the part of Dr. Horn and other defendants. Even the FHC found that Dr. Horn and the MEC acted reasonably in commencing an investigation in light of the evidence before them.

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[10] Federal and state statutes also reflect a public policy designed to encourage physicians to candidly evaluate the competence of fellow physicians, and to participate in reviews of their qualifications and credentials with the goal of enhancing patient care. N.J.S.A. 2A:84A-22.10(d) (providing immunity to persons who participate in, or assist a hospital peer-review committee responsible for reviewing a physician's qualifications for appointment or reappointment, if within the scope of the person's function, and made without malice and in the reasonable belief that actions or recommendations were warranted); 42 U.S.C.A. §§ 11101-11152 (recognizing the need for professional peer review and the good faith reporting of incompetent physicians and offering protection to physicians who provide information on the competence and conduct of their peers). As defendants do not rely on common law or statutory privileges, we shall not address their applicability to this case.

Nor does plaintiff meet his burden by pointing to Virtua's decision to re-credential plaintiff in 2009 and 2011. In response to defendants' proof of non-discriminatory reasons for its actions, plaintiff was obliged to establish that defendants acted with racial intent, or that they applied the hospital's standards in a racially biased way. Whether plaintiff met another hospital's standards is not probative.[11]

In sum, we discern no error in the trial court's order granting summary judgment dismissal of plaintiff's LAD complaint.

B.

We consider next the dismissal of plaintiff's tortious interference and breach of contract claims. We observe at the outset that our Supreme Court has limited the scope of judicial review of a non-public hospital's staffing decision. "The test for judicial review of such a decision is whether it is

[11] We note that while Virtua apparently did not seek to revoke plaintiff's privileges, the BME's reprimand prompted the New Jersey Division of Medical Assistance and Health Services to seek to debar plaintiff for five years from treating Medicaid patients. The division director ultimately adopted an initial decision of an Administrative Law Judge "finding that [the Division] lacked sufficient justification to impose a five-year debarment." Chapman v. Div. of Med. Assistance & Health Servs., HMA 6522-08, (June 18, 2010), adopted, Director of Div. (September 10, 2010) (2010 N.J. AGEN LEXIS 788). Nonetheless, the administrative action counters the inference that Dr. Horn's initiative, and the hospital's actions, must have been prompted by racial animus.

supported by 'sufficient reliable evidence, even though of a hearsay nature, to justify the result.'" Nanavati v. Burdette Tomlin Mem'l Hosp., 107 N.J. 240, 249 (1987) (quoting Garrow v. Elizabeth Gen. Hosp. & Dispensary, 79 N.J. 549, 565 (1979)).

The "relaxed standard" is a product of the Court's "growing awareness that courts should allow hospitals, as long as they proceed fairly, to run their own business," and the Court's "recognition that doctors need staff privileges to serve their patients . . . ." Nanavati, supra, 107 N.J. at 249-50. At the same time, a "physician is entitled to fundamentally fair procedures," including notice, a limited right to discovery, a right to a hearing, and the right to counsel. Zoneraich, supra, 212 N.J. Super. at 91. Procedural rights may be satisfied by resort to internal hospital tribunals, even if consisting of personnel who initiated or investigated charges. Ende v. Cohen, 296 N.J. Super. 350, 361-62 (App. Div. 1997).

Plaintiff does not directly challenge the correctness of the board's decision. Applying the standard of review in light of the record we have described at length, there is no question that the board's determination, although perhaps debatable, was supported by sufficient reliable evidence after affording plaintiff fundamentally fair procedures.

Instead, plaintiff asserts a collateral challenge to the proceedings. He contends that Dr. Horn's initiation of the investigation, and subsequent actions — assisted by others — constituted tortious interference with plaintiff's prospective economic advantage with patients. He does not argue that the procedures afforded him were fundamentally unfair; rather, he asserts generally they deviated from those required by the hospital bylaws, and therefore constituted a breach of implied contract. He argues that various defendants conspired to inflict these wrongs upon him.

The trial court properly dismissed these claims. Plaintiff's tortious interference and related conspiracy claim are precluded by the unchallenged final determination of the board that revocation was warranted. "[J]udicial affirmation of the reasonableness and propriety of the hospital's actions toward plaintiff establishes the justifiability and lawfulness of defendants' actions, determines an essential part of each of plaintiff's conspiracy, malicious interference and antitrust claims against [defendant], and therefore collaterally estops plaintiff from relitigating those matters." Zoneraich, supra, 212 N.J. Super. at 93.

Even if plaintiff's tort and related conspiracy claims were not precluded by the hospital's determination, the record

presents nothing but speculation in support of plaintiff's claims. To prove tortious interference with economic advantage, plaintiff was obliged to show he was in "'pursuit' of business"; "the interference was done intentionally and with 'malice'"; "the interference caused the loss of the prospective gain"; and "the injury caused damage." Printing Mart-Morristown, supra, 116 N.J. at 751-52. "[M]alice is defined to mean that the harm was inflicted intentionally and without justification or excuse." Id. at 751.

Dr. Horn had ceased taking calls for years and rarely delivered babies. He generally tended to long-standing patients. Some witnesses conceded the theoretical point that all obstetricians in the community near Lourdes competed with each other, including active obstetricians in Dr. Horn's group. However, that could not persuade a reasonable jury to find malice on the part of a physician who was, as we have noted, dutibound to investigate a colleague whose actions raised questions of competence and the ability to treat patients safely.

Plaintiff himself could point to no more than a handful of lost patients, as he shifted his obstetrical patients to Virtua. Even when our Court has reversed a hospital's staffing decision because it failed to afford the physician a hearing, it affirmed

the dismissal of related tort claims of malicious interference and civil conspiracy because they rested, as here, on "pure conjecture." Joseph v. Passaic Hosp. Ass'n, 26 N.J. 557, 574 (1958).

Plaintiff's contract claim fares no better. Even assuming the by-laws have the force of a mutual contract, we shall not review the language of the governing provisions in detail, because plaintiff has not done so. Plaintiff instead has referred to his brief's statement of facts in its entirety and asserts conclusorily "the defendants did not follow the by-laws, in any respect."

Suffice it to say that we discern no material breach of the by-laws. We recognize the by-laws provided that a revocation was not "final" until exhaustion of the fair hearing and exhaustion of internal appeals. However, that provision's plain language did not bar the hospital from revoking plaintiff's privileges pending completion of that process.[12]

[12] We also do not view the MEC's action as a "summary suspension" under the by-laws, which may be ordered, without even an investigation, by a department chair with the president's concurrence, in the case of an imminent threat to patient safety. A summary suspension may remain in effect "during Investigation and, if requested, Fair Hearing . . . and pending any appeal to the Board." By contrast, plaintiff's revocation became effective only after the AHC completed its investigation, and the MEC reviewed the findings, and rendered its own decision.

In any event, plaintiff has failed to establish that any procedural infirmities caused him damage. Breach of contract requires a plaintiff "to show that the parties entered into a valid contract, that the defendant failed to perform his obligations under the contract and that the plaintiff sustained damages as a result." Murphy v. Implicito, 392 N.J. Super. 245, 265 (App. Div. 2007) (internal quotation marks and citation omitted). Inasmuch as the Board ultimately determined that the revocation was justified, and the MEC was entitled to order that the revocation take effect immediately in June 2013, any subsequent procedural infirmities, such as hearing delays, were harmless. See Vosough v. Kierce, __ N.J. Super. __, __ (App. Div. Aug. 27, 2014) (slip op. at 40-41).

Finally, we find no merit to plaintiff's claims against Alessi and his law firm, and affirm dismissal substantially for the reasons stated by Judge Suter. The litigation privilege is broad, extends to quasi-judicial proceedings, shields statements made during the range of pretrial proceedings, and bars claims for tortious conduct and claims under the LAD. See Loigman v. Twp. Comm. of Middletown, 185 N.J. 566, 584-86 (2006); Hawkins v. Harris, 141 N.J. 207, 221-22 (1995); Peterson v. Ballard, 292 N.J. Super. 575, 583-90 (App. Div.), certif. denied, 147 N.J.

260 (1996). The privilege encompasses the acts of Alessi and his firm as alleged in the complaint.

To the extent not addressed, plaintiff's remaining arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.