

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**WILLIAM H. TOPPER, M.D.,
RESPONDENT**

vs.

**MIDWEST DIVISION, INC., et al.,
APPELLANTS**

DOCKET NUMBER WD70323

DATE: FEBRUARY 2, 2010

Appeal from:

Jackson County Circuit Court
The Honorable Jack R. Grate, Jr., Judge

Appellate Judges:

Division Two: Victor C. Howard, P.J., Joseph M. Ellis and Mark D. Pfeiffer, JJ.

Attorneys:

D. Bruce Keplinger, for Respondent

Thomas C. Walsh, for Appellants

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

WILLIAM H. TOPPER, M.D., RESPONDENT

v.

MIDWEST DIVISION, INC., et al., APPELLANTS

WD70323

Jackson County, Missouri

Before Division Two Judges: Victor C. Howard, P.J., Joseph M. Ellis and Mark D. Pfeiffer, JJ.

Midwest Division, Inc. d/b/a HCA Midwest Division; HCA Physician Services, Inc.; Midwest Division-RMC, LLC d/b/a Research Medical Center; and Centerpoint Medical Center of Independence, LLC appeal from a judgment entered in the Circuit Court of Jackson County in favor of Dr. William H. Topper in his action for tortious interference with contract and defamation.

REVERSED AND REMANDED IN PART AND AFFIRMED IN PART.

Division Two holds:

- (1) The fact that Midwest Newborn Care did not breach the terms of the employment contract in terminating Dr. Topper because he was terminable at will does not free others not party to the contract from liability if they tortuously interfered with that relationship.
- (2) As to whether the defendants were justified in convincing Midwest Newborn Care to terminate Dr. Topper, the simple fact that the defendants were not parties to the employment contract does not preclude them from having a valid interest in his employment.
- (3) Regardless of whether they had justification for interfering with the employment relationship, the interfering parties must not employ improper means. The record reflects that, as they were plotting to get rid of Dr. Topper, the defendants slandered and utilized false statistics to make it appear that Dr. Topper deserved to be fired. Misrepresentations and defamation constituted improper means that serve to destroy any justification the defendants had.
- (4) No reasonable factfinder could conclude that Kathy Fox's statement that "Dr. Topper had brought all of this on himself" was an assertion of objective fact, the truth or falsity of the statement is impossible to establish, and no

evidence was presented indicating that Fox's statement damaged Dr. Topper. According, the trial court erred in submitting Dr. Topper's claim against Research based upon Fox's statement.

- (5) Dr. Topper's misrepresentation claim against research related to its publication of newborn mortality rates was supported by substantial evidence where he establish that such statistics reflected badly upon him.
- (6) Statements made by the CEO for Centerpoint to corporate officers and employees that Dr. Topper created a hostile work environment, maliciously subverted the NICU, and displayed unprofessional conduct are assertions that Dr. Topper committed tortious and unprofessional acts and the truthfulness of those statements is capable of verification. According, those were not statements of opinion subject to First Amendment privilege.
- (7) The evidence sufficiently supported a determination by the jury that the CEO's statements were not made in good faith and, therefore, not protected by the intra-corporate privilege.
- (8) The evidence sufficiently supported a finding by the jury that Dr. Topper suffered damages from the defamatory comments where the evidence allowed a reasonable inference that those statements influence the decision to terminate his employment.
- (9) The evidence likewise allowed the jury to infer that the false statistics played a role in the removal of Dr. Topper as director of the NICU shortly after they were published.
- (10) The trial court did not abuse its discretion in allowing Dr. Topper to testify that Kenneth Washington had assured him that HCA was making a long term commitment to him and that he anticipated that Dr. Topper's employment contract would be renewed after its four-year term expired where these statements did not contradict the language of the contract and went to whether Midwest Newborn Care would have persisted in the employment relationship with Dr. Topper but for the conduct of the defendants.
- (11) The parol evidence rule does not preclude the admission of statements made subsequent to the execution of the contract.
- (12) The trial court did not err in refusing to submit a non-MAI instruction submitted by the defendants stating that statements of opinion are not defamatory. In order to require the trial court to give a non-MAI instruction, a party must prove that the MAI instruction submitted to the jury misstates the law, and the defendants did not and do not identify how the MAI defamation instructions misstate the law in any way.
- (13) The evidence sufficiently supported a finding by the jury that the defendants' conduct was outrageous because of evil motive or reckless indifference thereby support the submission of punitive damages to the jury on the defamation counts.
- (14) Appellants' speculation that certain evidence and arguments related to other claims may have caused the jury to inflate the punitive damages award does not provide a basis for reversal of those awards.

(15) The defamation verdict against Research, including the punitive damage award on the defamation count, is reversed, and the cause is remanded for further adjudication of whether Research is jointly liable for the actual damages found by the jury on the defamation claim, as well as potential punitive damages.

Opinion by: Joseph M. Ellis, Judge

February 2, 2010

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