

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

SAMUEL R. NEFF, M.D. : **CIVIL ACTION**

vs. :

COOPER HOSPITAL/UNIVERSITY : **NO. 96-5875**
MEDICAL CENTER

DUBOIS, J.

August 24, 1999

MEMORANDUM

1. BACKGROUND

This case required the jury to determine the terms of an employment agreement between a neurosurgeon and a hospital where the written employment contract, containing an integration clause, was contradicted by provisions of the hospital personnel manual which, under applicable law, was deemed to be part of the employment contract. The jury returned a verdict in favor of the neurosurgeon on his claims related to payment of a bonus and against him on all other claims. The case is before the Court on post-trial motions of the hospital. For the reasons that follow, the post-trial motions are denied.

A. Procedural History

The plaintiff, Samuel R. Neff, M.D., is a neurosurgeon who was employed by the defendant, Cooper Hospital/University Medical Center (“Cooper” or “defendant”), from August of 1991 until July of 1995. Plaintiff brought suit against Cooper to recover monies he alleged the defendant owed him under the terms of an oral agreement negotiated at the outset of his

employment at Cooper with Dr. Sherman Stein, a Cooper employee and the head of the Division of Neurosurgery, a part of the Department of Surgery at Cooper, and plaintiff's written contract with Cooper for fiscal year 1994-1995, and the provisions of Cooper's Human Resources Policies and Procedures Manual (the "Manual").

Plaintiff, in his Amended Complaint,¹ claimed as damages 1) \$342,586, the sum remaining in his overage² account for fiscal year 1994-1995, as a bonus for that year; 2) compensatory and punitive damages for the conversion by Cooper of money belonging to him (the same \$342,586); 3) compensatory and punitive damages for fraudulent inducement of contract; and 4) compensation for unused paid time off ("PTO") accumulated during his employment. Jurisdiction is based on diversity of citizenship of the parties under 28 U.S.C. § 1332.

Trial before a jury commenced on December 7, 1998. Defendant moved for judgment as a matter of law at the close of plaintiff's case, and renewed its motion for judgment at the close of all of the evidence, under Federal Rule of Civil Procedure 50(a), both of which motions were denied.

¹Plaintiff's original Complaint included only a claim for breach of contract.

²Although the term "overage" does not appear in the contract between plaintiff and Dr. Stein, or in the four contracts plaintiff entered into with Cooper, this term was widely used by the parties throughout the trial and is in common usage at Cooper. "Overage," as that term is used in this case, was the surplus of fees generated by a physician over and above department expenditures charged to that physician. These funds were held in accounts managed by Cooper, which maintained separate overage accounts for each physician. All fees for professional services rendered by Cooper's employed physicians, such as those in the Division of Neurosurgery, were billed by Cooper and, once remitted, were placed in the physician's overage account. At the end of the contract year, any surplus of fees over department expenses was deposited in a special account, which was then disbursed for "department needs," including the payment of bonuses to individual physicians.

The jury returned a verdict in favor of plaintiff in the amount of \$342,586 on the claims of breach of contract and conversion covering a bonus for fiscal year 1994-1995, and a verdict in favor of defendant on plaintiff's claims of fraudulent inducement, compensation for unused PTO, and punitive damages. By Order dated December 17, 1998, the Court entered judgment for plaintiff in the amount of \$407,780.11, representing the verdict plus interest at the rate of 0.055% per annum for the period from July 1, 1995 through December 15, 1998. The judgment was amended by Order dated December 29, 1998, to adjust the interest rate for pre-judgment delay damages to 0.035% per annum for the period from July 1, 1995 through December 31, 1995, pursuant to New Jersey law, resulting in a total judgment for plaintiff of \$404,265.53.

On December 28, 1998, defendant filed Motions For Judgment Notwithstanding the Verdict and New Trial; on January 7, 1999, defendant amended these motions to account for the December 29, 1998 adjustment of the pre-judgment delay damages.

B. Factual History

The evidence adduced at trial which is relevant to defendant's motions for judgment notwithstanding the verdict and for a new trial may be summarized as follows:

In the fall of 1990, during the final year of plaintiff Samuel R. Neff's residency in neurosurgery at Tufts University, he was contacted by Dr. Sherman Stein, the head of the Division of Neurosurgery at Cooper Hospital/University Medical Center, a not-for-profit hospital located in Camden, New Jersey. Dr. Stein offered plaintiff a position with him at Cooper's Division of Neurosurgery, a sub-group of the Department of Surgery. When plaintiff was first recruited at Cooper, the Chief of the Department of Surgery was Dr. Rudolph Camishon; Dr.

Camishon was succeeded in this position by Dr. Anthony J. DelRossi in 1991. The Department Chiefs reported to the Executive Vice President for Medical Affairs, Dr. Albert R. Tama, the only physician who served as a corporate officer for Cooper at the times relevant to this action. Transcript, Dec. 10, 1998 at 103-6.

In late 1990, plaintiff and Dr. Stein discussed the terms of plaintiff's prospective employment. Dr. Stein and plaintiff both testified that in 1990 and early 1991 Dr. Stein offered, and plaintiff accepted, terms of employment which both believed would govern plaintiff's employment at Cooper. Transcript, Dec. 8, 1998 at 71-73, 77-78; transcript, Dec. 9, 1998 at 37-41. Dr. Stein made an oral offer to plaintiff of a multiple-year employment package consisting of a base salary of \$125,000 for the first year, to increase to \$175,000 and \$225,000 for the next two years, respectively, which base salary in each year would be "charged" against plaintiff's earnings generated for that year. Transcript, Dec. 8, 1998 at 77; transcript, Dec. 9, 1998 at 42-43. Under this oral agreement plaintiff was to be compensated directly from division earnings, which meant that any shortfall of plaintiff's earnings under the guaranteed base salary would have been supplemented by Dr. Stein's personal income. Transcript, Dec. 9, 1998 at 43. The agreement also included a bonus plan, based solely on plaintiff's profitability, under which plaintiff was to receive 50% of his overage for the first three years, with Dr. Stein receiving the other 50%. After the third year, according to plaintiff, he was to be paid 100% of his overage as a bonus; Dr. Stein disagreed and said the fourth-year arrangement under the initial agreement was that he and plaintiff would equally divide their combined overage. Transcript, Dec. 8, 1998 at 77-78; transcript, Dec. 9, 1998 at 41. However, Dr. Stein testified that because he had been hospitalized in 1994 and had essentially turned over his practice duties to plaintiff during the fourth year of

plaintiff's employment, in his opinion plaintiff was entitled under their agreement to all of his overage for the 1994-1995 fiscal year. Transcript, Dec. 9, 1998 at 62, 66.

In January 1991, plaintiff accepted the terms of employment offered by Dr. Stein. Dr. Stein then arranged for the drafting of a written contract which covered, among other things, base salary and bonus terms, for the first year of plaintiff's employment only. This employment contract between Dr. Stein and plaintiff was signed by plaintiff in May of 1991 (the "Stein contract"). The Stein contract was prepared by an attorney under Dr. Stein's direction, and named Dr. Stein as the employer rather than Cooper. Dr. Stein testified that it was not unusual for heads of divisions to hire physicians in their own name, and that he was following a process of negotiation and contracting which had been followed by other division heads in the past. Transcript, Dec. 9, 1998 at 50-54. On this subject plaintiff stated that he had no discussions concerning the terms of his employment at Cooper with anyone other than Dr. Stein. He assumed from his course of dealing with Dr. Stein that Dr. Stein had authority to negotiate with him on behalf of Cooper and to bind Cooper to the terms of an employment contract.

Cooper presented evidence that Dr. Stein did not, in fact, possess actual authority to negotiate an employment contract with plaintiff. It was Dr. Tama's testimony that he and the Chief of a physician's department had the final responsibility for reviewing and approving the terms of all physician employment contracts. Transcript, Dec. 10, 1998 at 123-124. He admitted that heads of the divisions were responsible for initiating the recruitment process, but denied that he told Dr. Stein that Dr. Stein had authority either to enter into an employment contract with plaintiff, or to offer multiple-year terms of employment. Transcript, Dec. 10, 1998 at 124-129.

Evidence adduced by Cooper regarding the initiation of plaintiff's employment was

markedly different than plaintiff's own account. Dr. DelRossi testified that on February 1, 1991, he asked the Cooper business office to prepare a standard Cooper contract for the employment of plaintiff for one year effective August 1, 1991. This contract set plaintiff's salary at \$125,000 for the fiscal year 1991-1992, and while it contained no specific provision for a bonus, it provided that payments received by Cooper for plaintiff's professional services which exceeded plaintiff's base salary would be deposited in a "Restricted Account," which could be drawn on for "departmental needs" with the approval of both Cooper's Chief Executive Officer and the Chief of the Department of Surgery. Plaintiff's Exhibit 2, ¶ 2. Cooper presented evidence that the term "departmental needs" in paragraph 2 of the contract included payment of a bonus.

The 1991-1992 Cooper contract bears plaintiff's signature and is dated March 7, 1991, several months before plaintiff signed the Stein contract. However, plaintiff testified that he signed the contract with Cooper on March 7, 1992; he explained that the discrepancy as to the date resulted from the substantial volume of documents which were presented to him and his tendency to write the "old" year in the first months of a new one. Transcript, Dec. 8, 1998 at 89. Plaintiff also testified that Cooper was often late in providing its physicians with contracts, and that a signing date of March, 1992 for a 1991-1992 contract was consistent with general Cooper practice. Transcript, Dec. 8, 1998 at 104, 136, 160.

Soon after his arrival at Cooper, plaintiff was given a copy of Cooper's Human Resources Policies and Procedures Manual which contained, inter alia, the policy governing the award of bonuses to Cooper employees and a policy on apportioning, using and "carrying-over" an employee's PTO days. The provisions of this Manual were in effect during the entirety of plaintiff's employment at Cooper. Transcript, Dec. 8, 1998 at 92-94. The Manual provided that

“[t]here is an incentive plan within the clinical practices to ensure appropriate compensation of physicians based on the profitability of their practice, which is administered by the Chiefs of Service and overseen by the Executive Vice President for Medical Affairs.” Plaintiff’s Exhibit 22, at p.2. The Manual did not make reference to any criteria for the incentive or bonus plan other than profitability. The Manual also provided for PTO and extended sick leave (ESL) days, which were apportioned to employees by standard formulas set forth in the Manual, and covered the manner in which PTO and ESL days were to be accumulated, used, and carried over from year to year. However, the Manual explicitly excluded physicians from the PTO policies. Plaintiff’s Exhibit 24, at p.2.

In late 1991, at an executive committee meeting of the Department of Surgery attended by Dr. Stein and heads of other divisions, Dr. DelRossi announced that it had come to Dr. Tama’s attention that division heads had prepared and entered into individual employment contracts with members of their divisions, a practice Cooper decided to end. Transcript, Dec. 9, 1998 at 50-51. To that end, Dr. DelRossi told Dr. Stein and the other division heads that Dr. Tama wanted all physician contracts to be with Cooper, not the division heads. Transcript, Dec. 9, 1998 at 53-54.

Dr. Stein testified that his contract with plaintiff was not directly addressed at this meeting although, according to him, it “wasn’t a secret,” because other division heads had engaged in similar practices and plaintiff had no other contract with Cooper at the time. On that subject Dr. Stein said he had previously told Dr. DelRossi about Dr. Neff’s starting salary, although he could not recall whether he said anything to him about the bonus he negotiated with Dr. Neff. Transcript, Dec. 9, 1998 at 53-55. With respect to bonuses, Dr. Stein added that it was no secret that physicians at Cooper were being paid their overages as bonuses as part of regular

hospital practice. Transcript, Dec. 9, 1998 at 55.

Neither Dr. DelRossi nor Dr. Tama asked Dr. Stein or any other division head to provide them with copies of the contracts negotiated with physicians by the division heads. Dr. DelRossi denied any knowledge of the terms or existence of the Stein contract, or of any agreements between plaintiff and Dr. Stein other than the offer and acceptance of a \$125,000 base salary for 1991-1992, until after plaintiff filed suit. Transcript, Dec. 11, 1998 at 173.

Soon after the meeting between Dr. DelRossi and the division heads, in plaintiff's sixth or seventh month of employment, Dr. Stein informed plaintiff that Cooper wanted a new contract signed, a Cooper contract, naming Cooper as employer. Plaintiff specifically asked Dr. Stein whether this new arrangement would alter the terms of his employment agreement in any way, and Dr. Stein informed him that it would not. Transcript, Dec. 8, 1998 at 88. In reliance on Dr. Stein's representation that all terms of their initial contract were still in force, plaintiff testified that he signed the first and, over the course of his employment at Cooper, three subsequent Cooper contracts covering the period from 1992 to 1995. Transcript, Dec. 8, 1998 at 90-91.

The four Cooper contracts, covering fiscal years 1991-1995, each contained two provisions of particular importance to the instant motions. As embodied in plaintiff's 1994-1995 Cooper contract, the standard Cooper contract provided that all income generated by the physician would be deposited "in a Special Fund in the Department. The funds in this Special Fund of the Department will be used for departmental needs. All withdrawals require the approval of both Cooper's President/Chief Executive Officer or Executive Vice President/Medical Affairs and the Chief of the Department, in their sole discretion." Plaintiff's Exhibit 5, at ¶ 3.4. Any bonus paid to an individual physician would constitute such a

withdrawal. Transcript, Dec. 9, 1998 at 73. The Cooper contracts also contained a provision for PTO, 37 days per year in the 1994-1995 Cooper contract, and stated that “[a]ny unused PTO will be accumulated from year to year in accordance with Hospital PTO policy in effect at the end of the year in which it is not used.” Plaintiff’s Exhibit 5, at ¶ 4.5.

In the first three years of plaintiff’s employment at Cooper, all payments of salary and bonuses by Cooper to plaintiff were in accord with the 1991 agreement between Dr. Stein and plaintiff. Transcript, Dec. 9, 1998 at 62. Each year Dr. Stein recommended a bonus amount, based on plaintiff’s profitability and modified by their initial sharing agreement, and then forwarded that recommendation to Drs. DelRossi and Tama for approval. Neither Dr. DelRossi nor Dr. Tama ever questioned these numbers, and each of Dr. Stein’s recommendations was approved by Dr. Tama, whose office then issued the bonus checks. Transcript, Dec. 9, 1998 at 68-69. Dr. Stein testified that the funds in the overage account of the Division of Neurosurgery were fully distributed at the end of each fiscal year, a practice which continued throughout plaintiff’s employment. According to Dr. Stein, the sum in Dr. Neff’s account at the end of fiscal year 1994-1995 was \$342,586, and, in his view, this amount was owed to Dr. Neff and was his property. Transcript, Dec. 9, 1998 at 65-66.

In December 1994, Dr. Stein became ill, forcing him to transfer many of his duties to other physicians, with much of the work going to plaintiff. In late 1994, Dr. Stein recommended that a \$60,000 bonus be paid to plaintiff for the first part of the 1994-1995 fiscal year, and that plaintiff’s salary be increased by \$50,000 per year; the recommended salary increase was designed in part to compensate plaintiff for a delay in his bonus payments for the year prior. Transcript, Dec. 9, 1998 at 120-122. In accordance with Dr. Stein’s recommendation, Dr.

DelRossi directed that plaintiff's salary be increased by \$50,000 effective January 1, 1995, with \$25,000 of that sum to be prorated for the second half of that fiscal year. Transcript, Dec. 9, 1998 at 120; plaintiff's Exhibit 20. No bonus was paid to plaintiff at that time.

In April and June of 1995, Dr. Stein's illness caused the hospital to hire two additional physicians to handle the division's growing neurosurgery practice. The hiring of physicians at that time of year, in the spring and early summer, was customary for hospitals nationwide. Transcript, Dec. 11, 1998 at 171-172.

During June of 1995, without Cooper's knowledge, plaintiff began employment discussions with the chief of neurosurgery at Wills Eye Hospital in Philadelphia, and received an offer of employment at the end of that month. In the first week of July, plaintiff notified his superiors at Cooper and other physicians in his practice group that he would be leaving full-time employment at Cooper, although he offered to continue to work part-time with trauma call and emergency room call. This was unacceptable to Dr. DelRossi, who ordered on July 7 that plaintiff be locked out of his office and have his privileges at Cooper revoked.

In the wake of plaintiff's decision to leave Cooper, Dr. Tama decided not to pay plaintiff the \$60,000 bonus recommended by Dr. Stein for plaintiff's work in the first part of the 1994-1995 fiscal year, or any other bonus for that year, citing the poor timing of plaintiff's decision to leave Cooper and the impact on the newly-hired physicians as evidence of plaintiff's lack of good faith towards the hospital and an example of poor corporate citizenship. Transcript, Dec. 9, 1998 at 120-121; transcript, Dec. 10, 1998 at 159-162. The \$342,586 remaining in plaintiff's overage account for fiscal 1994-1995 was then transferred by Cooper to one of its general accounts. Plaintiff requested a sum representing his unused PTO after leaving Cooper; that request was

denied.

2. DISCUSSION

A. Standard of Review

Defendants have moved for the entry of judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b). A motion for judgment as a matter of law, “should be granted only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury could reasonably find liability.” Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1166 (3d Cir. 1993). “In determining whether the evidence is sufficient to sustain liability, the court may not weigh the evidence, determine the credibility of witnesses, or substitute its version of the facts for the jury's version.” McDaniels v. Flick, 59 F.3d 446, 453 (3d Cir. 1995) (quoting Lightning Lube, 4 F.3d at 1166 (citations omitted)). Although a mere scintilla of evidence is not enough to sustain a verdict of liability, the question is whether there is sufficient evidence upon which a jury could properly find a verdict for the prevailing party. Lightning Lube, 4 F.3d at 1166. Thus, viewing the evidence in the light most favorable to the non-moving party, the Court must determine whether the record contains the “‘minimum quantum of evidence from which a jury might reasonably afford relief.’” Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 691 (3d Cir. 1993) (quoting Keith v. Truck Stops Corp., 909 F.2d 743, 745 (3d Cir. 1990)).

Defendants have moved in the alternative for a new trial, pursuant to Federal Rule of Civil Procedure 59. “The decision to grant or deny a new trial is confided almost entirely to the discretion of the district court.” Blancha v. Raymark Industries, 972 F.2d 507, 513 (3d Cir.

1992). Under Federal Rule of Civil Procedure 59, the Court may grant a new trial if “the verdict is contrary to the great weight of the evidence or errors at trial produce a result inconsistent with substantial justice.” Sandrow v. United States, 832 F. Supp. 918, 918 (E.D. Pa. 1993) (citing Roebuck v. Drexel University, 852 F.2d 715, 735-36 (3d Cir. 1988)). A new trial should only be granted, however, “where a miscarriage of justice would result if the verdict were to stand.” Olefins Trading, Inc. v. Han Yang Chemical Corp., 9 F.3d 282, 289 (3d Cir. 1993). In reviewing a motion for a new trial, the court must “view all the evidence and inferences reasonably drawn therefrom in the light most favorable to the party with the verdict.” Marino v. Ballestas, 749 F.2d 162, 167 (3d Cir. 1984) (citation omitted).

B. Analysis

Defendant asserts as the basis of the Rule 50(b) and Rule 59 motions that 1) plaintiff had no contractual right to the payment of a bonus in 1995, because no such guarantee was included in the 1994-1995 Cooper contract signed by plaintiff, which was the only agreement governing plaintiff’s employment for that year; 2) because plaintiff signed the first Cooper contract on March 7, 1991, he knew and was bound by its terms before he entered into the employment contract with Dr. Stein in May of 1991; 3) Dr. Stein had neither actual nor apparent authority to bind Cooper to any terms agreed upon between Dr. Stein and plaintiff in 1991; 4) because plaintiff had no right to the payment of a bonus in 1995, his claim for conversion is untenable, and the jury’s award for conversion is inconsistent with its award for breach of contract; and 5) the jury’s assessment of damages is impermissibly speculative. The Court will examine each of these arguments in turn.

1. Contractual Ambiguity and Plaintiff's Right to a Bonus for 1994-1995

Defendant argues that the 1994-1995 Cooper contract, which plaintiff signed, places complete discretion over bonus payments to employees in the hands of Cooper's President/CEO or Executive Vice President for Medical Affairs, and the chief of the department, "in their sole discretion." Thus, defendant asserts, plaintiff never had a contractual right to any bonus for fiscal 1994-1995 under the terms of his contract with Cooper, nor, due to the integration clause contained in the contract, can plaintiff rely on his agreement with Dr. Stein to provide such a contractual right. The Court disagrees with Cooper's position in view of the evidence of ambiguities in the 1994-1995 contract that necessitated the admission of parol evidence to establish the understanding of the parties.

The Court determined that the 1994-1995 contract between Cooper and plaintiff was ambiguous because of contradictions between the bonus and PTO provisions of that contract and the Manual, which, under New Jersey law, was enforceable against Cooper just as if it had been a part of the contract itself. In determining whether a contract is ambiguous, the Court looks to the actual words of the agreement, the alternative meanings offered by counsel, and extrinsic evidence offered in support of those alternative meanings. See St. Paul Fire & Marine Ins. Co. v. Lewis, 935 F.2d 1428, 1431 (3d Cir. 1991). Once a contract is determined to be ambiguous, its interpretation is a question for the jury; interpretation of an unambiguous contract, on the other hand, is a matter of law for the court. See Girard v. Allis Chalmers Corp., Inc., 787 F. Supp. 482, 487 (W.D. Pa. 1992). Where, as in this case, the Court determines that a contract with an integration clause contains ambiguous terms, it is appropriate to receive in evidence parol

evidence offered to explain the meaning of the ambiguous terms. See, e.g., Washington Hospital v. White, 889 F.2d 1294, 1302 (3d Cir. 1989). Where ambiguity exists, the circumstances of the contract formation and subsequent conduct of the parties in the performance of the agreement may serve to reveal their original understanding. Journeyman Barbers, etc., Local 687 v. Pollino, 126 A.2d 194 (N.J. 1956).

It is undisputed that plaintiff signed a Cooper contract covering the fiscal year 1994-1995. It is also undisputed that this contract contained an integration clause declaring the contract to be the complete agreement between the parties. See Plaintiff's Exhibit 5, at ¶ 8. At trial, Cooper pointed out that under the express terms of this contract, which plaintiff signed on April 20, 1995, all withdrawals from the Special Fund of the Department, that is, the overage account, had to be approved by both Cooper's President/CEO or Executive Vice President for Medical Affairs, and the chief of the department, "in their sole discretion." Plaintiff's Exhibit 5, at ¶ 3.4. However, the Manual, which was distributed to all Cooper employees and which expressly included terms governing the employment of all Cooper employees, contradicted this contract provision. The Manual provided that "[t]here is an incentive plan within the clinical practices to ensure appropriate compensation of physicians based on the profitability of their practice, which is administered by the Chiefs of Service and overseen by the Executive Vice President for Medical Affairs." Plaintiff's Exhibit 22, at p.2 (emphasis added). The Manual did not make reference to any criteria for the incentive or bonus plan other than the profitability of the individual physician.

Because the Manual was promulgated by "an employer of a substantial number of employees" and contained provisions which "when fairly read, provides that certain benefits are

an incident of the employment,” its terms became enforceable against Cooper just as if they had been a part of the contract itself. Woolley v. Hoffmann-La Roche, 491 A.2d 1257, 1264 (N.J. 1985). The Manual expressly provides for an incentive compensation plan based solely on physician profitability, without mentioning any other criteria such as the exercise of discretion by Cooper administrators. The contract, therefore, contained one provision which granted apparently exclusive and complete discretion to Cooper administrators over the distribution of bonuses, while the Manual, given equal force under New Jersey law, provided that profitability alone would govern the award of bonuses to Cooper employees.

Nor was this the only ambiguity between the provisions of the 1994-1995 Cooper contract and the Manual; the PTO provisions of the 1994-1995 Cooper contract and the applicable portions of the Manual were likewise contradictory. While paragraph 4.5 of the 1994-1995 Cooper contract provided 37 days per year of paid time off, with unused PTO to be accumulated year to year in accordance with the “hospital PTO policy,” that policy, found in the Manual, expressly excludes employee physicians from coverage. Plaintiff’s Exhibit 24, at p.2. Thus the contract appeared to provide an employment benefit, the right to carry over unused PTO days from year to year, which was expressly repudiated by the very Manual provision referred to in the contract.

Once the Court determined that there was ambiguity between the 1994-1995 contract and the Manual provisions, the Court permitted plaintiff to present parol evidence relating to the circumstances of the contract formation and the subsequent conduct of the parties in the performance of the agreement. With regard to Cooper’s policy of calculating and distributing bonuses, Dr. Stein testified that, although both plaintiff’s and his own contract with Cooper left

discretion in granting bonuses entirely in the hands of Dr. Tama, he was assured by Dr. Camishon, Dr. DelRossi's predecessor, that any distribution of bonuses he recommended would be approved by the hospital, a representation which was later repeated to Dr. Stein by Dr. DelRossi. Transcript, Dec. 9, 1998 at 74. Dr. Stein said it was his practice to recommend a bonus amount, based solely on his own and plaintiff's profitability and modified by their initial sharing agreement, and then forward that recommendation for approval to Drs. DelRossi and Tama. All such recommendations for the years prior to 1994-1995 were approved by Dr. Tama and Dr. DelRossi.

Dr. Tama testified that he customarily considered a number of factors, including profitability of the department, profitability of the division and of Cooper itself, scholarly activities, general fairness, and corporate and departmental "citizenship," in deciding whether to issue a bonus to a Cooper physician. Transcript, Dec. 10, 1998 at 116-117. Under cross-examination Dr. Tama admitted that he could not recall a single instance from 1990-1994 in which he turned down a bonus recommendation from a division head. Nor, he stated, were the criteria he said he customarily considered in awarding bonuses ever published in any form or made known to Cooper employees generally, or Drs. Stein and Neff specifically, but rather were known only to himself and to Dr. DelRossi and the other department chiefs. Transcript, Dec. 10, 1998 at 118, 195. It was Dr. Tama's testimony that, using his criteria, he decided that the manner of plaintiff's departure in July of 1995 disqualified him from receiving a bonus. Dr. Tama cited the poor timing of plaintiff's decision to leave Cooper and the impact on the newly-hired physicians as evidence of plaintiff's lack of good faith towards the hospital and an example of poor corporate citizenship. Transcript, Dec. 10, 1998 at 159-161.

With regard to PTO, the evidence presented revealed that the parties interpreted the conflict in the PTO provisions of the contract and the Manual in diametrically opposed ways. Dr. Tama testified that in his view, the Cooper contract negated the provision in the Manual, while Dr. Neff said he understood that the PTO days would be accumulated year to year in accordance with the Manual. Transcript, Dec. 11, 1998 at 109-110; transcript, Dec. 8, 1998 at 132-135.

In deciding whether plaintiff was entitled to his complete overage as a bonus for the 1994-1995 fiscal year, the jury was permitted to consider, inter alia, the Manual and the testimony of Drs. Neff, Stein, Tama and DelRossi on the issue of Dr. Tama's discretion, the lack of any written record of Dr. Tama's bonus criteria, and the fact that bonuses were paid to plaintiff in prior years in accordance with Dr. Stein's recommendations, based solely on plaintiff's and Dr. Stein's profitability, and with both Dr. DelRossi's and Dr. Tama's approval.³ There was ample evidence for the jury to conclude that plaintiff's bonus for the 1994-1995 fiscal year should have been based on his profitability alone and that plaintiff was therefore entitled to the entirety of his overage for the 1994-1995 fiscal year, \$342,586. Because the jury returned a verdict in favor of defendant on the PTO claim, and that decision was not questioned by plaintiff, there is no need for the Court to address that issue.

³Defendant asserts in its memorandum of law in support of the instant Motions that plaintiff improperly argued to the jury that Dr. Tama's denial of the bonus for 1994-1995 violated the duty of good faith and fair dealing incorporated into every contract by action of New Jersey law. Defendant argues that "[p]laintiff . . . improperly invoked the covenant of good faith and fair dealing to rewrite his contract and allow the jury to second guess Cooper's decision [not to award a bonus for fiscal 1994-1995], when the contract is clearly to the contrary." Defendant's Memorandum at 35. The Court need not address this issue in light of its finding of ambiguity between the bonus provisions of the Cooper contract and the Manual.

2. The Signing of the First Cooper Contract

Defendant contends that plaintiff signed a standard employment contract with Cooper on March 7, 1991, several months before he entered into the allegedly unauthorized employment contract with Dr. Stein in May of 1991. Thus, defendant argues, plaintiff was on notice from the beginning of his employment at Cooper that no subsequent agreement with Dr. Stein would be binding on Cooper. Plaintiff responded to this argument by stating that he did not sign this Cooper contract until March 7, 1992, more than a year after he initially accepted the multiple-year terms of employment proposed by Dr. Stein.

The Court received in evidence Dr. DelRossi's February 1, 1991 memorandum asking the Controller of Medical Education to prepare an employment contract for plaintiff, a copy of the 1991-1992 Cooper contract, which bears plaintiff's signature and is dated March 7, 1991 and a memorandum from a hospital administrator to Dr. Tama dated July 1, 1991, which was attached to a signed copy of the 1991-1992 Cooper contract. Dr. Tama testified that no physician would have been on the payroll, as plaintiff was after August 1, 1991, without having signed a Cooper contract. Transcript, Dec. 11, 1998 at 82-84.

Plaintiff testified, however, that he signed the first Cooper contract on March 7, 1992, and that the substantial volume of documents which were before him at that time, as well as his tendency to write the "old" year in the first months of a new one, were responsible for his error. Transcript, Dec. 8, 1998 at 89. There was also testimony that Cooper was often late in providing its physicians with contracts, and that a signing date of March, 1992 for a 1991-1992 contract was not unusual. Transcript, Dec. 8, 1998 at 104, 136, 160; transcript, Dec. 11, 1998, at 92-94. There was thus sufficient evidence presented to raise a jury question as to when Dr. Neff signed

the 1991-1992 Cooper contract.

3. Dr. Stein's Actual or Apparent Authority

Defendant contends that Dr. Stein was without authority to bind Cooper to any contractual terms in 1991, and for that reason the provisions of the initial multi-year agreement between plaintiff and Dr. Stein cannot be enforced against Cooper. As noted above, the jury could reasonably have found that plaintiff was entitled under the binding terms of the Manual to a bonus based solely on his profitability in 1994-1995, regardless of any agreement he had with Dr. Stein. See supra section 1. However, evidence adduced at trial was sufficient to establish that Dr. Stein was acting as Cooper's agent in his negotiations with plaintiff and possessed the apparent authority to bind Cooper to contractual terms, or that Cooper was estopped to deny Dr. Stein's agency because of its negligence.

Plaintiff testified at trial that he understood Dr. Stein to have sole authority to negotiate terms of employment on behalf of Cooper. Dr. Stein was the only person at Cooper to ever negotiate with plaintiff, despite the fact that he had been introduced to both Drs. Tama and DelRossi before his employment commenced, and no one ever told him that any further negotiations were necessary. Transcript, Dec. 8, 1998 at 78-79. Even when Dr. Stein informed plaintiff that their initial contract had to be replaced by a Cooper contract, the reason he gave was that Cooper wanted to be named as employer; at the same time he told plaintiff that all substantive terms of their agreement would remain the same. Transcript, Dec. 8, 1998 at 88, 193.

Several theories of agency were advanced at trial and included in the Court's instructions to the jury, most importantly, apparent authority and agency by estoppel. "In the case of

apparent authority, the agent has the power to bind his principal because the principal has manifested its intent to be bound *to the third party* . . . [s]uch a manifestation ‘may be made directly to a third person, or may be made to the community, by signs, by advertising, by authorizing the agent to state that he is authorized, or by continuously employing the agent.’” Browne v. Maxfield, 663 F. Supp. 1193, 1199 (E.D. Pa. 1987) (emphasis in original) (quoting Restatement (Second) of Agency § 8, comment b (1958)). “The test for determining whether an agent possesses apparent authority is whether ‘a man of ordinary prudence, diligence and discretion would have the right to believe and would actually believe that the agent possessed the authority he purported to exercise.’” Universal Computer Systems, Inc. v. Medical Service Assoc., 628 F.2d 820, 823 (3d Cir. 1980) (quoting Apex Financial Corp. v. Decker, 369 A.2d 483, 485-86 (Pa. Super. 1976)). If apparent authority exists, “the third person has the same rights with reference to the principal as where the agent is authorized.” Restatement (Second) of Agency § 8, comment a.

“In the case of agency by *estoppel*, the principal is bound by the acts of its agent because the principal has a duty under the circumstances to correct a third party’s misapprehension that an agent is acting on its behalf and the principal has failed to satisfy that duty.” Browne, 663 F. Supp. at 1199 (emphasis in original) (citing Restatement (Second) of Agency § 8B). “Agency by estoppel” is created if (1) the person or corporation sought to be bound intentionally or carelessly caused a third party to believe that such agency existed or (2) knowing of such belief and the fact that others might change their positions because of it, the person or corporation sought to be bound did not take reasonable steps to notify such other person of the lack of authority. Drexel v. Union Prescription Centers, 582 F.2d 781, 791 n. 13 (3d Cir. 1978) (quoting Turnway Corp. v.

Soffer, 336 A.2d 871, 876 (Pa. 1975) (citations and footnote omitted)).

Under the facts as presented to the jury through the testimony of Drs. Neff, Stein, Tama, and DelRossi, the jury could reasonably have concluded that Dr. Stein had apparent authority to negotiate the terms of plaintiff's employment at Cooper. Despite the statements by Cooper administrators at trial to the effect that Dr. Stein lacked authority at the time of the 1990-1991 negotiations, in 1991 plaintiff had every reason to believe that Dr. Stein spoke for Cooper – Dr. Stein was the head of the division, he brought plaintiff to Cooper and introduced him as “the new neurosurgeon,” no one else ever engaged in negotiations with plaintiff, and testimony by plaintiff and Dr. Stein showed that plaintiff worked at Cooper, with the knowledge of Dr. Stein's superiors, for more than six months on the basis of his agreement with Dr. Stein without any suggestion that the agreement was not authorized by Cooper. These “manifestations to third persons,” in this case to plaintiff, constituted evidence of Dr. Stein's apparent authority to bind Cooper to the terms of employment agreed upon with plaintiff.

Likewise, the jury could have reasonably found under the evidence that Dr. Stein was Cooper's agent by estoppel. Plaintiff presented evidence that Cooper officials knew that physicians, including plaintiff, entered into separate employment contracts with their division heads, and that the payment of overages as bonuses was a common practice at Cooper. On that subject, Dr. Stein testified that his deal with plaintiff was not a secret at the hospital, and that his bonus recommendations, based on profitability, were calculated using figures provided by Cooper officials, all of which were available to Drs. Tama and DelRossi. Transcript, Dec. 9, 1998 at 128-130.

Even though Drs. Tama and DelRossi were aware of the unauthorized contracts between

division heads and physicians in their divisions, neither administrator asked Dr. Stein or any other division head to provide them with copies of those contracts. Moreover, knowing that such contracts had been negotiated, Cooper did not take any steps to notify physicians employed at the hospital such as plaintiff of the lack of authority of division heads to enter into separate employment contracts. The jury could have concluded based on that evidence that third persons such as plaintiff had a reasonable basis for believing that division heads such as Dr. Stein has authority to act for Cooper and that Cooper was negligent in failing to supervise Dr. Stein, thereby allowing Dr. Stein and others to exercise powers not granted to them. Moreover, with the evidence that payment of overages as bonuses to physicians based on profitability was a common practice at Cooper the jury could have concluded that Cooper failed to take reasonable steps to notify plaintiff and others similarly situated of Dr. Tama's different criteria for payment of bonuses. Such evidence was sufficient to support a jury determination that Dr. Stein was Cooper's agent by estoppel.

4. Plaintiff's Claim for Conversion

Defendant asserts that because plaintiff had no contractual right to the payment of a fixed bonus in 1995, his claim for conversion is untenable, and that the jury's award for conversion is inconsistent with its award for breach of contract. It is important to note that it makes no difference with respect to the verdict whether the jury found that a conversion took place, because the same sum, \$342,586, was at issue in plaintiff's claims for breach of contract and conversion, and that is the sum the jury awarded plaintiff. As discussed in section 5, infra, plaintiff earned \$864,496 in income during his final year at Cooper, from which Cooper deducted

\$521,190 in expenses. The total earnings remaining in his overage account for fiscal 1994-1995 were thus \$342,586. Transcript, Dec. 8, 1998 at 168; transcript, Dec. 9, 1998 at 65. Because plaintiff never received any of this amount, the jury could reasonably have found that Cooper breached its contract with plaintiff by not paying him this \$342,586 to which he was entitled under the provisions of the Manual. See supra section 1.

Conversion is the wrongful exercise of dominion or control over the property of another in a manner inconsistent with the other person's rights to the property. See, e.g., Mueller v. Technical Devices Corp., 84 A.2d 620, 623 (N.J. 1951). Because it is uncontroverted that Cooper used the funds in the overage account for its own purposes, the only element of conversion raised by defendant's argument is the requirement that the property in question, in the instant case the bonus allegedly due plaintiff constituting his 1994-1995 overage, belonged to plaintiff at the time of the alleged conversion.

Defendant claims that the overage account was maintained and controlled by Cooper and was at all times Cooper's property, and that the funds in the account were thus never plaintiff's property. Transcript, Dec. 10, 1998 at 148. While Dr. Tama admitted that the Cooper contracts did not explicitly state that funds in the overage accounts were the property of Cooper, but only provided that the funds would be "deposited" in Cooper-managed accounts, he maintained that at no time were these funds the "property" of anyone other than Cooper himself. Transcript, Dec. 10, 1998 at 177-178. Dr. Stein, however, testified that because the overage accounts in his division consisted of income generated by individual physicians, minus expenses charged by Cooper, in his view the balance in such accounts after all Cooper expenses were subtracted was earned by, and belonged to, the individual physicians. Transcript, Dec. 9, 1998 at 55-56. This was

plaintiff's understanding as well. Transcript, Dec. 8, 1998 at 168.

The jury heard, at length, the process by which income generated by individual physicians was deposited, expenses were deducted, and bonuses distributed to the physicians from the remainder. There was evidence from which the jury could have reasonably found that the funds in plaintiff's overage account, \$342,586, were his property, and thus were converted by Cooper. Such a finding is not contradictory to the finding that Cooper breached its contract with plaintiff; the jury could reasonably have concluded that Cooper owed plaintiff the sum of money in his overage account under the terms of the contract, and then converted those funds, which were plaintiff's legal property, at the end of fiscal 1994-1995.

5. The Jury's Assessment of Damages was not Impermissibly Speculative

Defendant asserts that the jury's award of \$342,586 to compensate plaintiff for the bonus due him for fiscal year 1994-1995 was impermissibly speculative. Contrary to defendant's assertions, there was ample evidence upon which the jury could reasonably have relied in assessing damages in that amount.

As discussed in section 1, supra, there was evidence that, pursuant to the Manual and Dr. Stein's agreement with plaintiff, the sole applicable criterion in determining plaintiff's bonus was plaintiff's profitability for fiscal 1994-1995. Under that evidence plaintiff was entitled to his entire overage as a bonus for that year. Dr. Stein testified concerning a document, Plaintiff's Exhibit 35, which detailed plaintiff's quarterly earnings and expenses for fiscal year 1994-1995; these figures, he explained, were based entirely on income and expense figures provided by the office manager and the business manager of the Department of Surgery, both Cooper employees.

Transcript, Dec. 9, 1998 at 62-63.

Dr. Stein testified, and plaintiff corroborated based on the same figures, that plaintiff had earned \$864,496 in income during his final year at Cooper, from which Cooper had deducted \$521,190 in expenses. The total earnings remaining in his overage account for fiscal 1994-1995 were thus \$342,586. Transcript, Dec. 8, 1998 at 168; transcript, Dec. 9, 1998 at 65. Dr. Tama declined to authorize any bonus payment from this account, and plaintiff never received any of this amount. Transcript, Dec. 8, 1998 at 168; transcript, Dec. 10, 1998 at 159. The jury's award to plaintiff on his claims for breach of contract and conversion was exactly \$342,586, the amount Cooper records reflected as plaintiff's overage for the disputed period. Viewing the evidence in the light most favorable to the plaintiff, the Court concludes the award was supported by the evidence.

3. CONCLUSION

For the foregoing reasons, Defendant Cooper Hospital/University Medical Center's Amended Motions For Judgment Notwithstanding the Verdict and New Trial are denied and, because they were superseded by the Amended Motions, Cooper's original Motions are denied as moot.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

SAMUEL R. NEFF, M.D. : **CIVIL ACTION**

vs. :

COOPER HOSPITAL/UNIVERSITY : **NO. 96-5875**
MEDICAL CENTER

ORDER

AND NOW, to wit, this 24th day of August, 1999, upon consideration of Defendant Cooper Hospital/University Medical Center's Motions For Judgment Notwithstanding the Verdict and New Trial (Doc. No. 61, filed Dec. 28, 1998), Defendant Cooper Hospital/University Medical Center's Amended Motions For Judgment Notwithstanding the Verdict and New Trial (Doc. No. 64, filed Jan. 7, 1999), and the Response of Samuel R. Neff, M.D., to the Motion For

Judgment Notwithstanding the Verdict and New Trial Filed by Cooper Hospital/University Medical Center (Doc. No. 65, filed Jan. 13, 1999), **IT IS ORDERED**, for the reasons set forth in the accompanying Memorandum, that Defendant Cooper Hospital/University Medical Center's Amended Motions For Judgment Notwithstanding the Verdict and New Trial are **DENIED**; Defendant Cooper Hospital/University Medical Center's Motions For Judgment Notwithstanding the Verdict and New Trial, superceded by the Amended Motions, are **DENIED AS MOOT**.

BY THE COURT:

JAN E. DUBOIS