

Hospital Fights Privileged Docs Release In Texas High Court

By **Jess Davis**

Law360, Dallas (February 25, 2015, 6:36 PM ET) -- Houston's Memorial Hermann Hospital System argued Wednesday in Texas Supreme Court that one of its former heart surgeons can't access privileged documents by simply alleging the hospital took anti-competitive acts, but must provide some evidence the hospital violated antitrust law.

The hospital is asking the court to block an order requiring the production of peer review committee records protected by a statutory privilege, in a case brought by cardiothoracic surgeon Miguel Gomez, who claims the hospital defamed him after he left for a competing hospital.

Gomez is defending a trial court order granting him access to a limited number of the committee documents. He contends his allegations that Memorial smeared his reputation to stop him from getting business at the new hospital are enough to trigger an exception to the statutory privilege.

In oral argument, Memorial's attorney Warren Huang of Norton Rose Fulbright told the court that the legislative history of the term "anti-competitive action" shows it has been used interchangeably with the term "antitrust" and doesn't apply to ordinary business torts. Huang said Gomez needed to present more than a scintilla of evidence supporting an antitrust claim to trigger the anti-competitive exception to the committee records privilege.

"Treating anti-competitive action as synonymous with antitrust action is consistent with the fact that antitrust law is the general law governing competition under Texas law," Huang said.

Gomez practiced at Memorial City Medical Center for 14 years, including as the chairman of its surgery department. He filed suit in 2012 after transferring his practice to a competing hospital, claiming his departure prompted Memorial to embark on a smear campaign as a move to block competition and interfere with his new business, which the hospital has denied.

Gomez alleged the hospital had publicly disseminated inaccurate and misleading patient mortality data, and he sought access to some records of a committee meeting. The hospital argued the requested documents were privileged, but after reviewing the documents in camera, the trial court ordered the hospital to produce some of the records that Gomez had requested.

The hospital sought relief from the discovery order at the First Court of Appeals, which denied the hospital's petition for mandamus in March in a two-sentence opinion.

Gomez's attorney Peter Kelly of Kelly Durham & Pittard LLP argued that it's unnecessary to bring an antitrust case to trigger the anti-competitive exception, so long as a plaintiff has raised claims that might give rise to antitrust damages.

Kelly said Gomez did raise claims that the hospital's actions were an attempt to stifle innovation and consumer choice by attacking a doctor who was using robotics instead of performing open-

heart surgeries.

“Even if anti-competitive means antitrust, we have passed that test anyway,” Kelly said.

The hospital system is represented by Robert J. Swift, Warren S. Huang and Jesse M. Coleman Sr. of Norton Rose Fulbright.

Gomez is represented by Peter M. Kelly of Kelly Durham & Pittard LLP and Michael P. Doyle and Kim Goodling of Doyle Raizner LLP.

The case is In re: Memorial Hermann Hospital System et al., case number 14-0171, in the Supreme Court of the State of Texas.

--Editing by Edrienne Su.

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