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~~No. 06-1180~~

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

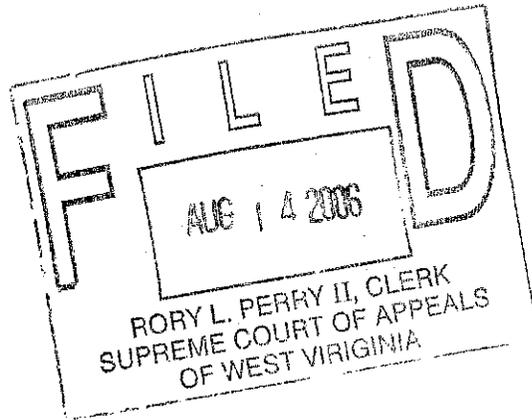
JAMES W. KESSEL, M.D.,
RICHARD M. VAGLIENTI, M.D., and
STANFORD J. HUBER, M.D.,

Petitioners/Plaintiffs Below,

v.

MONONGALIA COUNTY GENERAL HOSPITAL
COMPANY d/b/a MONONGALIA GENERAL
HOSPITAL, a West Virginia Non-Profit Corporation,
MARK BENNETT, M.D., individually,
BENNETT ANESTHESIA
CONSULTANT, P.L.L.C. and
PROFESSIONAL ANESTHESIA SERVICES, INC.,

Respondents/Defendants Below.



JOINDER OF PROFESSIONAL ANESTHESIA
SERVICES, INC. IN BRIEF OF APPELLEE
MONONGALIA COUNTY GENERAL HOSPITAL, INC.

Charles C. Wise III (WVSB No. 4616)
Bowles Rice McDavid Graff & Love, LLP
7000 Hampton Center, Suite K
Morgantown, West Virginia 26505
(304) 285-2500

Counsel for Professional Anesthesia Services, Inc.

I. INTRODUCTION

Professional Anesthesia Services, Inc. ("PAS") joins in and incorporates by reference the Brief of Appellee Monongalia County General Hospital, Inc. because the Circuit Court correctly concluded that the exclusive contracts between Monongalia General Hospital (MGH) and Bennett Anesthesia Consultants, P.L.L.C. (BAC) and Professional Anesthesia Services, Inc. (PAS) did not constitute per se violations of the antitrust laws, nor were such contracts an unreasonable restraint of trade under the "rule of reason" test. The Circuit Court correctly found that the contracts did not preclude plaintiffs from practicing their trade and were not "vertical" restraints of trade.

II. DISCUSSION

It is undisputed in this case that plaintiffs' anesthesia group, Monongalia Anesthesia Associates ("MAA") had an exclusive contract with Monongalia General Hospital ("MGH") for many years and was the exclusive provider of all anesthesia services (except cardiac) until 1999. The Hospital entered into negotiations with Dr. Mark Bennett in the Fall of 1998 and signed a contract with BAC for the exclusive provision of orthopedic anesthesia services on December 30, 1998. Thereafter, MGH negotiated exclusively with MAA for the provision of general anesthesia services but could not reach agreement. It was only then that MGH sent RFP's for general anesthesia services to ten anesthesia providers, including MAA and PAS.

There is no evidence that PAS had any discussions or agreements with BAC, or that PAS interfered in any way with the staff privileges of plaintiffs. Rather, PAS simply responded to a RFP, negotiated with MGH at arms-length, and eventually agreed to an exclusive contract. There

was no agreement between PAS and MGH concerning price except that PAS agreed that its fees for anesthesia services would be "reasonable".

Such acts by PAS did not amount to a "per se" violation of the antitrust laws, but were simply the acts of a fellow competitor of MAA. PAS was the winning bidder of the RFP for general anesthesia services, and plaintiffs have failed to prove that any acts of PAS constitute an unreasonable restraint of trade in violation of the anti-trust laws.

III. CONCLUSION

For these and the reasons discussed in the Brief of Appellee Monongalia County General Hospital, Inc., PAS respectfully requests that the decision of the Circuit Court be affirmed.

Dated this 14th day of August, 2006.

Charles C. Wise III by Charles H. Spurr

Charles C. Wise III (WVSB No. 4616)
Bowles Rice McDavid Graff & Love, LLP
7000 Hampton Center, Suite K
Morgantown, West Virginia 26505
(304) 285-2500

Counsel for Professional Anesthesia Services, Inc.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that he served the foregoing "Joinder of Professional Anesthesia Services, Inc., in Brief Of Appellee Monongalia County General Hospital, Inc." upon all counsel of record both by facsimile and by depositing true copies thereof in the United States mail, postage prepaid, in envelopes addressed as follows:

Frank E. Simmerman, Esquire
SIMMERMAN LAW OFFICE, PLLC
254 East Main Street
Clarksburg, WV 26301
Facsimile No.: (304) 623 4906

*Counsel for Plaintiff, James W. Kessel,
M.D.*

Susan B. Tucker, Esquire
177 Walnut Street
Morgantown, WV 26505
Facsimile No.: (304) 292-1072

*Counsel for Plaintiffs, Richard M.
Vaglianti, M.D. and
Stanford J. Huber, M.D.*

C. Michael Bee, Esquire
HILL, PETERSON, CARPER, BEE &
DEITZLER, P.L.L.C.
500 Tracy Way
Charleston, WV 25311
Facsimile No.: (304) 345 1519

*Counsel for Plaintiffs, Richard M.
Vaglianti, M.D. and
Stanford J. Huber, M.D.*

Anthony J. Maestro, Esq.
POWELL & MAESTRO, P.L.L.C.
405 Capitol Street, Suite P-1200
Charleston, WV 25301

*Counsel for Plaintiffs, Richard M.
Vaglianti, M.D. and
Stanford J. Huber, M.D.*

Charles T. Berry, Esquire
BOWLES, RICE, MCDAVID, GRAFF &
LOVE LLP
7000 Hampton Center, Suite K
Morgantown, WV 26505
Facsimile No.: (304) 599 1308

*Counsel for Defendants, Mark Bennett,
M.D., Bennett Anesthesia
Consultants, P.L.L.C. and Professional
Anesthesia Services, Inc.*

Gordon H. Copland, Esquire
Chase Tower, Sixth Floor
P.O. Box 2190
Clarksburg, W. Va. 26302-2190
Facsimile No.: (304) 624-8183

*Counsel for Respondent Monongalia
General Hospital*

Dated this 14th day of August, 2006.

Charles C. Wise III by Charles C. Wise III
Charles C. Wise III [WVSB No. 4616]