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Illinois Supreme Court Upholds "Willful and Wanton" Immunity Protection in Peer Review Cases

Background

Dr. Steven Valfer is a licensed OB-GYN who was a member of the medical staff at Evanston Northwestern Hospital ("Hospital") until March 16, 2005 when the Hospital's board of directors approved the recommendation to not reappoint him after Dr. Valfer exhausted his fair hearing and appeal rights under the bylaws. The basis of the initial adverse recommendation was a finding by the department chair that there were "multiple surgical cases for which approved indications for the intended procedures appear to be lacking." A previous review of 22 of Dr. Valfer's cases found that at least 50 percent of the surgeries he performed were unnecessary.

On March 15, 2007, Dr. Valfer sued the Hospital seeking civil damages for what he claimed was the wrongful termination of his medical staff membership and clinical privileges because the Hospital breached its bylaws. After a lengthy legal and procedural battle, the Hospital filed a motion for summary judgment in February 2014 seeking to dismiss Valfer's remaining breach of contract claim. The Hospital argued that it had complied with its bylaws when it decided not to reappoint him, that it was immune from liability under the Illinois Hospital Licensing Act (210 ILCS 85/10.2) ("Licensing Act") and that it also was immune under the Health Care Quality Improvement Act of 1986 (HCQIA) (42 U.S.C. §11101 et seq.). The trial court granted the Hospital's motion for summary judgment on all three grounds.

Dr. Valfer appealed to the Illinois Appellate Court arguing that the Hospital should have followed the bylaw procedures applicable to peer review and summary suspensions as opposed to reappointment on which the Hospital based its final decision. He further argued that the Licensing Act immunity protections do not apply because the Hospital was "willful and wanton" in failing to follow the correct bylaws procedures and further, by allowing two of his competitors to participate in the peer review process.

Dr. Valfer also argued that the HCQIA immunities did not apply because the Hospital did not follow the correct bylaw procedures.

The Appellate Court affirmed the summary judgment ruling on the basis that the Hospital was immune from civil liability under the Licensing Act. (*Valfer v. Evanston Northwestern Healthcare*, 2015 IL App (1st) 142284) While acknowledging that the protection does not apply where a hospital's conduct was willful and wanton, it determined that the plaintiff must allege some type of physical harm to a person's safety or the safety of others. It rejected Dr. Valfer's argument that the statute only requires an intention to harm. The court reasoned that such an interpretation would essentially nullify the protections

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afforded under the Act because there will always be some actual or possible loss of reputation and/or economic harm whenever a physician loses medical staff membership and clinical privileges.

Dr. Valfer's petition for leave to appeal to the Illinois Supreme Court was granted. The sole issue before the Court was whether a "plaintiff must plead and prove that physical harm resulted from the Hospital's actions" in order to satisfy the willful and wanton exception.

The Court's Decision

The court characterized the dispute as presenting a question of statutory construction which requires the court to give effect to the intent of the legislature (citations). Based on the "language employed in the Statute, which must be given as plain and ordinary meaning" (citation), the court then looked to the language in Section 10.2 of the Licensing Act which provides as follows:

> Because the candid and conscientious evaluation of clinical practices is essential to the provision of adequate hospital care, it is the policy of this State to encourage peer review by health care providers. Therefore, no hospital and no individual who is a member, agent, or employee of the hospital, hospital medical staff, hospital administrative staff, or hospital governing board shall be liable for civil damages as result of the acts, omissions, decisions, or other conduct, except for those involving the willful or wanton misconduct, of a medical utilization committee, medical review committee, patient care audit committee, medical care evaluation committee, quality review committee, credential committee, peer review committee, or any other committee or individual whose purpose, directly or indirectly, is internal quality control or medical study to reduce morbidity or mortality, or for improving patient care within the hospital, or the improving or benefitting of patient care and treatment, whether within a hospital or not, or for the purpose of professional discipline . . . . . For purposes of this Section 'willful and wanton misconduct' means a course of action that shows actual or deliberate intention to harm or that, if not intentional, shows an utter indifference to or conscious disregard for a person's own safety and the safety of others. (*Valfer v. Evanston Northwestern Healthcare*, No. 2016 IL 119220, May 19, 2016)

In affirming the Appellate Court's decision, the Supreme Court stated as follows:

> Reading Section 10.2 as a whole, we find that the Appellate Court was correct in determining that the 'willful and wanton' exception is limited to physical harm. We agree that the only reasonable way to interpret the last sentence of the above-quoted section defining willful and wanton misconduct is by finding that the phrase 'utter indifference to or conscious disregard for a person's own safety and the safety of others' clarifies the kind of intentional 'harm' the legislature had in mind. The last phrase of the exception's reference to safety clearly shows an intent that the harm contemplated is physical. Furthermore, if the legislature had intended to except from immunity any and all types of intentional harm, such as harm to one's reputation or economic well-being, it would surely negate the immunity entirely and would lead to an absurd result. (Id.)

In making this ruling, the court noted that "willful and wanton" is a "tort concept" that "applies only to reckless or intentionally tortious conduct that causes physical harm to a person or property [and therefore] it has no application to a non-tort claim, such as a routine breach of contract action involving a violation of the hospital bylaws." The court also rejected Dr. Valfer's argument that the effect of the Appellate Court's decision is to effectively grant absolute immunity to hospitals and further that it will open the door to "sham peer review."

The court noted that a judge may grant injunctive relief where a physician can demonstrate that a hospital and medical staff failed to follow its bylaws. In addition, if a physician can allege in a well-plead complaint supported by facts rather than conclusory allegations that he or she is being subjected to a peer review process which is not linked to "internal quality control . . . or the improving or benefiting of patient care and treatment, whether within a hospital or not, or for the purpose of professional discipline" (210 ILCS 854/10.2), then the physician might survive a motion to dismiss. The court noted that Valfer was able to proceed to summary judgment "despite the conclusory nature of his allegations" suggesting that the suit should have been dismissed at an earlier stage in the litigation.

Analysis and Recommendations

Prior to 1999, the immunity protections afforded under the Licensing Act were in fact absolute. In response to concerns that such protections could lead to instances of sham peer review, the willful and wanton standard was added to the Act but with the intention of creating a high bar in order for a plaintiff physician to bring a successful tort action against hospitals and medical staffs engaged in legitimate peer review procedures designed to improve patient care and reduce morbidity and mortality within the Hospital. The Supreme Court's decision is therefore a very important one which should encourage hospitals and their medical staffs to continue these important patient safety efforts, especially in light of the continued industry effort to deliver care that achieves identified quality and outcome expectations as a condition of continued licensure, accreditation and reimbursement.

That being said, all hospitals and medical staffs, irrespective of the hospital's state jurisdiction, should make a good faith effort to comply with the following recommendations:

1. Incorporate and implement remedial measures, including collegial intervention, monitoring, proctoring, and FPPE plans, to address quality and behavioral issues as soon as possible so as to avoid the need to request corrective or disciplinary action that often times leads to hearings and litigation.

2. Investigations and requests for such action should only be made when all other remedial measures have failed to address the identified problem.

3. It is critical that hospitals and medical staffs develop fair and objective peer review policies that allow for interaction with a physician early on in the process. Make sure your bylaws and policies comply with the peer review and hearing procedures required under state laws and HCQIA, and that you follow these procedures in order to gain the immunity protections afforded under these laws.

4. Avoid involving physicians who have business or personal conflicts of interest wherever possible even at the initial stages of peer review.

5. Continue to promote efforts to engrain a "just culture" approach to peer review that avoids the "blame game" and instead focuses on ways to assist health care practitioners in the collective effort to reduce risk and improve patient care.

6. Take steps to maximize the peer review privilege protections under state law and the Patient Safety Act so as to protect sensitive patient safety, quality and peer review information from discovery.