

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

S.C. Supreme Court

Diane S. Goodstein, Circuit Court Judge

Appellate Case No. 2015-000331
Case No. 12-CP-22-1004

Nadene Holliday, Individually and as Personal Representative
of the Estate of David Holliday, Appellant,

vs.

Waccamaw Community Hospital and
Kent M. McGinley, M.D., Defendants,

of whom

Waccamaw Community Hospital is the Respondent.

**APPELLANT'S RESPONSE TO *AMICUS CURIAE* BRIEF OF THE SOUTH
CAROLINA HOSPITAL ASSOCIATION**

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ARGUMENT

I. A negligent credentialing cause of action is not barred by South Carolina's peer review statutes.

In its *Amicus Curiae* brief, the South Carolina Hospital Association (“Hospital Association”) suggests that South Carolina’s peer review statutes, S.C. Code Ann. §§ 40-71-10 through 40-71-30 and §§ 44-7-390 through 44-7-394, bar a negligent credentialing cause of action.

Appellant has already addressed this argument in its Reply Brief and incorporates the same herein. See Appellant’s Reply Brief, pp. 1-2. In short, the “original” peer review statutes, S.C. Code Ann. §§ 40-71-10 through 40-71-30, do not provide any type of immunity to hospitals. Rather, they immunize members of professional committees and make confidential “all data and information acquired” by the committees “in the exercise of their duties.” S.C. Code Ann. §§ 40-71-10, 40-71-20. These are the statutes applicable to this case. The “new” peer review statutes, S.C. Code Ann. §§ 44-7-390 through -394, which do provide immunity to hospitals in certain situations, became effective on June 26, 2012, after the events giving rise to this lawsuit. See 2012 S.C. Laws Act 275, § 3 (H.B. 4008) (statutes “appl[y] to any investigative action undertaken as provided herein where the underlying event giving rise to the investigation occurs on or after the effective date.”). Nevertheless, these more recent peer review statutes do not foreclose the Court’s ability to recognize a negligent credentialing cause of action. Rather, they specifically allow the same. See Appellant’s Reply Brief, pp. 1-2.

In Larson v. Wasemiller, 738 N.W.2d 300 (Minn. 2007), the defendant hospital similarly argued that Minnesota’s peer review statutes, specifically Minn. Stat. § 145.63(1),

barred a negligent credentialing cause of action. That statute, which is substantially similar to S.C. Code Ann. § 44-7-390¹, provides:

No review organization and no person who is a member or employee, director, or officer of, who acts in an advisory capacity to, or who furnishes counsel or services to, a review organization shall be liable for damages or other relief in any action brought by a person or persons whose activities have been or are being scrutinized or reviewed by a review organization, by reason of the performance by the person of any duty, function, or activity of such review organization, unless the performance of such duty, function or activity was motivated by malice toward the person affected thereby. No review organization and no person shall be liable for damages or other relief in any action by reason of the performance of the review organization or person of any duty, function, or activity as a review organization or a member of a review committee or by reason of any recommendation or action of the review committee when the person acts in the reasonable belief that the action or recommendation is warranted by facts known to the person or the review organization after reasonable efforts to ascertain the facts upon which the review organization's action or recommendation is made.

Minn. Stat. § 145.63(1).

The Larson court disagreed with the defendant hospital's interpretation, finding that, while the statute did limit the liability of hospitals and credentialing committees, it did not indicate any intent to immunize hospitals or to abrogate a common law claim for negligent credentialing. Id. at 311. Rather, the court held that "the statutory scheme suggests that civil actions for credentialing decisions are indeed contemplated. If the legislature had intended to foreclose the possibility of a cause of action for negligent credentialing, it would not have addressed the standard of care applicable to such an action." Id.

¹ S.C. Code Ann. § 44-7-390(4): "There is no monetary liability on the part of, and no cause of action for damages arising against, a hospital licensed under this article, its parent, subsidiaries, health care system, physician practices owned by the hospital (its parent or subsidiaries), directors, officers, agents, employees, medical staff members, external reviewers, witnesses, or a member of any committee of a licensed hospital, whether permanent or ad hoc, including the hospital's governing body, for any act or proceeding undertaken or performed without malice, made after reasonable effort to obtain the facts, and the action taken was in the belief that it is warranted by the facts known, arising out of or relating to...the medical staff credentialing process, provided the medical staff operates pursuant to written bylaws that have been approved by the governing body of the hospital."

South Carolina's peer review statutes do not contain any language to allow the inference that the legislature intended to immunize hospitals from negligent credentialing causes of action. See Nuckolls v. Great Atl. & Pac. Tea Co., 192 S.C. 156, 5 S.E.2d 862, 864 (1939) ("it is not presumed that the Legislature intended to abrogate or modify a rule of the common-law by the enactment of a statute upon the same subject; that it is rather to be presumed that no change in the common-law was intended unless the language employed clearly indicates such an intention; that the rules of the common-law are not to be changed by doubtful implication, or overturned except by clear and unambiguous language").

The Hospital Association also argues that, due to the confidentiality mandated by the peer review statutes, a hospital would be unable to defend itself in a lawsuit alleging negligent credentialing. This argument is without merit for at least two reasons. First, the Respondent Hospital has been able to defend itself in the present lawsuit without waiving the peer review privilege. Second, the confidentiality imposed by the peer review privilege does not extend to information that is received from an "original source." See S.C. Code Ann. §§ 40-71-20, 44-7-392(3).

This same argument made by the Hospital Association was addressed by the Larson court, which reasoned:

[A]lthough [the confidentiality provisions of the peer review statute] would prevent hospitals from disclosing the fact that certain information was considered by the credentials committee, it would not prevent hospitals from introducing the same information, as long as it could be obtained from original sources. In this respect, the confidentiality provision may provide a greater advantage to hospitals than to patients because a hospital knows what information it actually considered and why it granted privileges and it may emphasize the information that most strongly supports its decision. The difficulty of proof may fall most heavily on the patients because the effect of the statute is to preclude the discovery of what evidence was actually

obtained by the hospital in the credentialing process, and the patients bear the burden of proof on negligence.

Id. at 310. As noted by the Larson court, both Ohio and Wyoming have similarly rejected the argument that the confidentiality provisions of their peer review statutes preclude a claim of negligent credentialing. See Browning v. Burt, 66 Ohio St.3d 544, 613 N.E.2d 993 (1993) (holding that the “original source” and “matters within a person's knowledge” exceptions to the confidentiality requirement would allow a hospital to defend itself against a claim of negligent credentialing); Greenwood v. Wierdsma, 741 P.2d 1079, 1088 (Wyo. 1987) (“[I]f the legislature had wanted to prohibit actions against hospitals for breaching their duties to properly supervise the qualifications and privileges of their medical staffs, it would have done so expressly. We will not construe the privilege statute to impliedly prohibit this category of negligence actions.”).

II. The traditional reluctance of our courts to review a private hospital's internal administrative decisions is no bar to a negligent credentialing cause of action.

The Hospital Association has argued that the courts of South Carolina have a long standing policy of deferring to the hospital review process when a physician is denied privileges and, thus, should also defer to the hospital review process when a physician is granted privileges. The Hospital Association's characterization of this “long standing policy” is inaccurate and the policy itself is inapplicable to this matter. The “policy” is equally applicable to any private enterprise or association. Just as a court will not interfere with a private company's decision not to hire an individual or a private club's decision not to extend membership to an individual absent discrimination or other illegality, the courts of this state have recognized that they are without the power to compel a private hospital to grant privileges to any particular physician.

It is beyond question that a voluntary association has the power to enact laws governing the admission of members and to prescribe the necessary qualification for membership. Harris v. Thomas, 217 S.W. 1068, 1076-77 (Tex. Civ. App. 1920). “Membership therein is a privilege which the society may accord or withhold at its pleasure, with which a court of equity will not interfere, even though the arbitrary rejection of the candidate may prejudice his material interest. Id.; citing McKane v. Democratic Gen. Comm., 123 N.Y. 609, 609, 25 N.E. 1057 (1890) (“An action is not maintainable to compel a voluntary political association of individuals, organized without a charter, but regulated as to its action by a constitution and by-laws, to admit plaintiff to membership and office. Membership in such an association is a privilege which may be accorded or withheld, and not a right which can be gained independently and then enforced.”); Branagan v. Buckman, 67 Misc. 242, 247, 122 N.Y.S. 610 (Sup. Ct. 1910) aff’d, 145 A.D. 950, 130 N.Y.S. 1106 (App. Div. 1911) (“Such membership is a privilege which the association may accord or withhold at its pleasure; and a court of equity has no jurisdiction to compel the admission of a person not regularly elected, even though, as in the case of a political organization or labor union, the arbitrary rejection of the candidate may prejudice his material interests.”).

Appellant does not dispute that, as a general rule, a private hospital’s decision to implement internal regulations that have the effect of restricting a physician’s practice are not subject to judicial review in an action brought by the physician. However, this is a general rule applicable only in certain circumstances. It cannot seriously be contended that a court would refrain from reviewing allegations made by a physician that he was denied credentials on the basis of his race, ethnicity, sex, religion, disability, or national origin. See Samuel v. Herrick Mem’l Hosp., 201 F.3d 830, 835 (6th Cir. 2000) (an “exception to

this nonreviewability rule arises when defendants have been accused of violating state or federal law, such as state or federal discrimination laws”); Menkowitz v. Pottstown Mem'l Med. Ctr., 154 F.3d 113, 121 (3d Cir. 1998) (stating physician may state claim under Americans with Disabilities Act); Ponca City Hosp. Inc. v. Murphree, 545 P.2d 738, 742 (Okla. 1976) (supporting judicial review of claims of race, sex, or age discrimination). Likewise, a court would certainly have jurisdiction to review an action brought by a physician alleging breach of contract as a result of denial or revocation of privileges. See Cooper v. Delaware Valley Med. Ctr., 539 Pa. 620, 630-31, 654 A.2d 547, 552 (1995) (finding persuasive the distinction between cases in which a physician seeks an injunction to have a staffing decision changed and those in which damages are sought under various tort and contract theories arising out of the peer review process, holding that the latter are subject to judicial review); Lewisburg Cmty. Hosp. Inc. v. Alfredson, 805 S.W.2d 756, 759 (Tenn. 1991)(“Like any other legal entity, hospitals are capable of breaching contracts, committing torts, or violating others' constitutional or statutory rights. When they do, they are no less subject to the courts' jurisdiction than anyone else.”) (citations omitted).

South Carolina’s peer review statutes are not at odds with this reasoning and do not call for an absolute policy of judicial nonintervention as argued by the Hospital Association. In fact, S.C. Code Ann. § 44-7-390(4) specifically allows judicial review of a credentialing decision if that decision is made with malice, made without a reasonable effort to obtain facts, made without the belief that it is warranted by the facts known, or if the decision is not made by a medical staff operating pursuant to the hospital’s bylaws. See Lee v. Chesterfield Gen. Hosp., Inc., 289 S.C. 6, 9, 344 S.E.2d 379, 381 (Ct. App. 1986) (“We agree that a private hospital is free, *in the absence of controlling legislation or*

regulatory provisions, to decide the nature and extent of medical practice permitted to persons it grants staff privileges.”) (emphasis added).

In considering Michigan’s substantially similar peer review statute, Mich. Comp. Laws Ann. § 331.531, excepting actions taken with malice from the immunity otherwise afforded to hospitals, the court in Feyz v. Mercy Mem’l Hosp., 475 Mich. 663, 719 N.W.2d 1 (2006), recognized that the legislature had actually codified limited judicial review of the peer review process. The Supreme Court of Michigan aptly reasoned:

Additionally, we are not persuaded by the argument that courts are incompetent to review hospital staffing decisions as a basis for adopting the judicial nonintervention doctrine. This claim overlooks the reality that courts routinely review complex claims of all kinds. Forgoing review of valid legal claims, simply because those claims arise from hospital staffing decisions, amounts to a grant of unfettered discretion to private hospitals to disregard the legal rights of those who are the subject of a staffing decision, even when such decisions are precluded by statute. This is not to say that hospital staffing decisions, which involve specialized medical and business knowledge and considerations, are not entitled to some measure of deference. However, **when those staffing decisions violate the legal rights of others, the judiciary must exercise its obligation to adjudicate legal disputes**, except to the extent that the citizens of this state, through their elected representatives, have made a policy choice to shield such decisions from liability.

Id. at 680, 719 N.W.2d at 11 (emphasis added).

None of the cases cited by the Hospital Association involve a physician’s allegations of illegality nor do they allege negligence. Additionally, none were decided after the enactment of S.C. Code Ann. § 44-7-390. Rather, they all state a rule, the application of which is not confined to private hospitals: courts will not interfere with, or compel, the internal decisions of private entities and associations absent allegations of discrimination or other illegality.

The reluctance of our courts to sort out disputes between physicians and hospitals concerning internal policies and administrative matters is not in any way related to a

negligent credentialing cause of action involving a patient's direct tort claim against a hospital.

CONCLUSION

Appellant respectfully requests that this Court: (1) reverse the decision of the lower court granting Respondent's Rule 12(b)(6) motion; (2) remand this matter for further proceedings consistent with its opinion; and (3) grant such other relief as it deems just and appropriate.

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APPELLANT'S CERTIFICATE OF COMPLIANCE

I certify that the enclosed Appellant's Response to *Amicus Curiae* Brief of the
South Carolina Hospital Association complies with South Carolina Appellant Court Rule
211(b).



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PROOF OF SERVICE

I do hereby certify that I have served all counsel of record in this action with a copy of the documents herein below specified by mailing a copy of the same by United States mail, postage prepaid, to the following addresses:


Documents: **Appellant's Response to *Amicus Curiae* Brief of the South Carolina Hospital Association**

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