

Michigan Supreme Court empowers physicians to challenge private hospital staffing decisions

On June 24, 2006, the Michigan Supreme Court issued its opinion in *Feyz v. Mercy Memorial Hospital, et al.* 475 Mich 663 (2006), repudiating more than 24 years of prior caselaw that had barred physicians from challenging private hospital staffing decisions in court.

In addition to abolishing this judicially created doctrine of non-intervention, the Michigan Supreme Court held that the medical peer review immunity statute — heavily relied upon by legal counsel for private hospitals as a defense to any action taken by a private hospital against a physician's medical staff privileges — does not extend to the hospital that makes the ultimate decision on staff privileging issues, but only to the communications made, and the participants who make them, in the peer review process.

The Michigan Supreme Court also provided much needed guidance on when the statutory peer review immunity does not apply.

Overall, this decision will have a significant impact on the manner in which private hospitals make all future medical staffing decisions.

Factual background

The underlying lawsuit by Bruce Feyz, M.D., against Mercy Memorial Hospital in Monroe arose out of a dispute between Dr. Feyz, a cardiologist, and the hospital's administration over a hospital nursing poli-

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cy regarding the documentation of incoming patients' prescribed medications.

Dr. Feyz believed the hospital policy was deficient and issued standing orders to nurses requiring them to obtain very specific information. The hospital instructed the nurses to disregard Dr. Feyz's orders and to follow the hospital's policy instead.

When Dr. Feyz discovered that nurses were not following his orders, he prepared incident reports and began noting in the patients' charts that his disregarded orders were intended to "prevent serious medication errors in the past." Dr. Feyz's actions eventually led the hospital to initiate peer review proceedings against him and disciplinary action followed.

Procedural background

Dr. Feyz filed a lawsuit against the hospital and various hospital administrators alleging statutory civil rights violations, invasion of privacy, breach of fiduciary and public duties, and breach of contract.

The Monroe County Circuit Court granted summary disposition to the hospital and the administrators on two bases: (1) the doctrine of judicial non-intervention bars the courts from reviewing private hospital staffing decisions, and (2) all of the defendants' actions arose out of the peer review process and thus they enjoyed immunity from liability under Michigan's Peer Review Immunity Statute.

In a 2-to-1 majority opinion, on Jan. 13, 2005, the Court of Appeals affirmed the trial court's dismissal of the claims for breach of fiduciary and public duties and the non-statutory claims against members of the ad-hoc committee (to the extent that the actions of these ad-hoc committee members were deemed peer-review activities under the Peer Review Immunity Statute).

However, the appellate court held that the non-intervention doctrine did not prevent Dr. Feyz from pursuing his statutory civil rights, breach of contract and tort claims as the doctrine was only for the limited proposition that a private hospital's staffing decisions are not subject to the same constitutional due process challenges faced by public hospitals.

The court also held that the statutory immunity of a peer review committee of a health facility only extends to a duly appointed peer review committee (e.g., an ad hoc committee convened for the purpose of investigating the hospital's allegations

against the subject physician), and does not extend to a hospital's executive committee that was not designated as a review entity in accordance with the peer review immunity statute.

The court further found that an alleged civil rights violation was not within the scope of peer review and was, by its very nature, a malicious act.

The hospital and the administrators filed an appeal to the Michigan Supreme Court, which was granted. Due to the significant issues at stake for both sides, hospital, physician and other interested groups, such as the Michigan Health & Hospital Association, Michigan Osteopathic Association and Michigan State Medical Society, filed amici curiae briefs advocating their respective positions.

Analysis

In its careful analysis of the case, the Michigan Supreme Court first reviewed the legislative intent behind Michigan's Peer Review Immunity Statute. The Michigan Supreme Court found that:

The purpose of statutory peer review immunity is to foster the free exchange of information in investigations of hospital practices and practitioners, and thereby reduce patient mortality and improve patient care within hospitals. . . . In order to create an environment in which candid explorations of the quality of hospital patient care can occur, among other protections, the Legislature prohibited the discovery of communications made within the peer review process and granted immunity from liability to all who participate in peer review without "malice"

In light of such legislative intent, the Michigan Supreme Court then addressed the following three main issues: (1) the judicial non-intervention doctrine, (2) exceptions to peer review immunity for malicious acts, and (3) hospital immunity for staffing decisions.

Judicial non-intervention doctrine

The judicial non-intervention or non-reviewability doctrine is a judicially created common-law doctrine providing that courts will not interfere with private hospital staffing decisions, based in part on the belief that courts are not equipped to review such decisions because they lack the specialized knowledge and skills required to adjudicate hospital staffing disputes.

The doctrine was first memorialized in Michigan in 1982 in the Michigan Court of Appeals' decision in *Hoffman v. Garden City Hospital-Osteopathic*, 115 Mich App 773 (1982), which held, in pertinent part, that staff privilege "decisions of the governing bodies of private hospitals are not subject to judicial review" and that private hospitals have "the power to appoint and remove members at will without judicial intervention."

Following this decision, numerous cases have upheld a private hospital's right to refuse to appoint physicians to its medical staff, to decline to renew a physician's appointment to its medical staff, and to terminate a physician's appointment to its medical staff in the hospital's sole discretion and that the affected physician had no judicial recourse.

The effect of these decisions over the years was to provide private hospitals with a strong sense of security that their staffing decisions were immune from judicial intervention.

However, more recently, cases have recognized that the *Hoffman* judicial non-intervention doctrine is not without exception.

In the 1989 decision of *Sarin v. Samaritan Health Center*, the Court of Appeals recognized that "there may be some situations where a court should be able to consider a hospital's action without violating the principle of nonreviewability."

Moreover, in the 1996 decision of *Loug v. Chelsea Community Hospital*, the Court of Appeals further stated that "private hospitals do not have carte blanche to violate the public policy of our state as contained in its laws. Had plaintiff in this case asserted that defendants violated state or federal law, we may have chosen to review his claim."

This recognition of the limited application of the judicial non-intervention doctrine was further expounded upon by the Court of Appeals in *Feyz*, which analyzed the basis for the *Hoffman* decision and its

progeny and concluded that the judicial non-intervention doctrine has been improperly expanded over the years beyond what was originally intended.

According to the Court of Appeals in *Feyz*, "a private hospital is subject only to the legal obligations of a private entity, not to the greater scrutiny of a public institution." As such, "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."

The Michigan Supreme Court found that the judicially created non-intervention doctrine is "inconsistent with the statutory regime governing the peer review process enacted by the Legislature." Moreover, the Supreme Court held that:

Because the peer review immunity statute establishes qualified immunity from liability for peer review communication and participants who provide such communications, we conclude that there is no justification for recognizing the non-intervention doctrine that the lower courts in this state have applied in considering claims arising from peer review. We therefore hold that this doctrine cannot supplement or supplant the statutory immunity granted by our Legislature. Furthermore, there is no basis, statutory or otherwise, to justify the application of a nonintervention doctrine to general staffing decisions of a private hospital.

In support of its holding, the Supreme Court stated the claim that the courts are not capable to review hospital staffing decisions "overlooks the reality that courts routinely review complex claims of all kinds" and that "[f]oregoing 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."

It should be noted that all seven justices agreed on the abrogation of the judicial non-intervention doctrine.

Malice exception to peer review immunity

Under Michigan's Peer Review Immunity Statute, MCL § 331.531, et seq., the Legislature has granted civil and criminal immunity to persons, organizations and entities that provide information to peer review groups or perform certain protected peer review communicative functions.

However, peer review immunity is not absolute. A person, organization or entity that has acted with "malice" when engaged in a peer review function is not protected from such liability. Prior to *Feyz*, lower courts ascribed different meanings to the term "malice" for purposes of peer review immunity.

In its *Feyz* decision, the Supreme Court sought to reconcile the different definitions of "malice" in light of the Legislature's intent to "foster the free exchange of information in investigations of hospital practices and practitioners" and to promote honest communication.

In doing so, a majority of Supreme Court justices decided not to follow the more liberal definition of malice adopted by the Court of Appeals majority in *Feyz*, but rather to adopt the more conservative definition used in cases of defamation — often referred to as "actual malice."

As such, the Supreme Court majority held that "malice" under the Peer Review Immunity Statute can be established when:

[A] person supplying information or data to a peer review entity does so with knowledge of its falsity or with reckless disregard of its truth or falsity. Similarly, a review entity is not immune from liability if it acts with knowledge of the falsity, or with reckless disregard of the truth or falsity, of information or data which it communicates or upon which it acts.

In so holding, the majority stated that this "defamation definition of 'malice' promotes the goals of peer review because peer review participants are not protected if they are not performing evaluations with a focus on improving patient care, but rather on the basis of false extraneous factors unrelated to patient care."

Medical Staffing

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Three of the seven Justices opined that a more liberal definition of "malice" was appropriate.

Hospital immunity for staffing decisions

In its *Feyz* decision, the Supreme Court sought to clarify confusion amongst the lower courts that had followed the judicial non-intervention doctrine with regard to the scope of the Peer Review Immunity Statute.

In its opinion, the court stated that there appeared to be confusion concerning the relationship between the common-law immunity that had been given to the hospitals under the judicial non-intervention doctrine and the statutory immunity given to peer review participants under the Peer Review Immunity Statute.

Such confusion is understandable in light of the breadth of the judicial non-intervention doctrine which obviated the need to examine whether a hospital was entitled to immunity under the Peer Review Immunity Statute.

In order to clarify such confusion, the Michigan Supreme Court noted that hospitals are not one of the specific enumerated "review entities" protected under the statute and emphasized that "the peer review immunity statute extends only to the communications made, and the participants who make them, in the peer review process, not to the hospital that makes the ultimate decision on staffing credential questions." (Emphasis added.)

More specifically, the Michigan Supreme Court stated that:

[T]he peer review process may assemble and assess data about a physician's competence, and it may even make a recommendation to the hospital leadership bearing on a staffing issue, but it is the hospital that remains ultimately and legally responsible for deciding issues relating to staffing privileges.

Impact for physicians

The decision in *Feyz* has empowered physicians who have been the victims of adverse actions against their medical staff privileges to seek and pursue against the hospital certain causes of action such as breach of contract, tortious interference with business relations, tortious interference with contracts, invasion of privacy, and civil rights violations in challenging such adverse actions.

While the *Feyz* court stopped short of finding that a hospital's breach of the medical staff bylaws was actionable under a breach of contract claim under Michigan law, it did not address the matter simply because that issue was not technically before it. This issue is likely to be addressed in the near future as aggrieved physicians adversely affected by private hospital staffing decisions begin filing their cases in court.

Prior to this decision, private hospitals enjoyed near total immunity for medical staffing decisions, at times resulting in unfair and unwarranted actions which had tremendous negative impact on physicians' livelihoods.

However, now private hospitals no longer have unfettered discretion to disregard the legal rights of physicians who are the subject of a staffing decision without exposing themselves to liability. Hospital administrators and other personnel that provide information to an ad hoc committee investigating a physician with knowledge that such information is false or with reckless disregard as to the truth of the information will be held responsible.

Moreover, hospitals that ultimately render the final decision on medical staffing issues will be held accountable. This decision is truly a victory for physicians across the State of Michigan.