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ClientAdvisory

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Illinois Appellate Court Upholds $8 Million Negligent Credentialing Verdict for Hospital's Failure to Follow Credentialing Criteria

In a case of first impression in Illinois, and one of only a handful of cases around the country, an Illinois Appellate Court upheld a jury verdict in a negligent credentialing case against a hospital that had appointed and reappointed a podiatrist despite the fact that he did not meet the required criteria for receiving certain surgical privileges.

I. Background

The plaintiff in this case, Jean Frigo, was a diabetic patient who had scheduled a bunionectomy procedure in 1998 at Silver Cross Hospital in Joliet, Illinois. Her treating podiatrist, Dr. Paul Kirchner, proceeded with this surgery even though she had an infected ulcer on her foot at the time of the operation. It was alleged at trial that the surgical incision went through the ulcer and caused the foot to become infected. At trial, an expert testified that because this resulting infection was not properly managed by Dr. Kirchner, Frigo's condition worsened and her foot had to be amputated. Frigo filed suit against both Dr. Kirchner and the Hospital. Dr. Kirchner settled the malpractice case for $900,000, leaving the Hospital as the sole defendant.

At the time that Dr. Kirchner had applied for membership and Level II surgical privileges at the Hospital in 1992, and in accordance with its credentialing criteria, a podiatrist was required to have additional postgraduate training, which meant either completion of an approved surgical residency training program or board eligibility or certification through the American Board of Podiatric Surgery. Dr. Kirchner did not meet any of these criteria.

In 1993, the credentialing standard was changed to require successful completion of a 12-month podiatric surgical residency training program, passage of at least the written portion of the board certification exam, and documentation of having performed the requisite number of procedures in all areas of requested privileges. For Level II surgical privileges, which included bunionectomies, a podiatrist needed to complete at least 30 procedures. For every reappointment thereafter and at the time Dr. Kirchner performed the bunionectomy on Jean Frigo, he had not satisfied any of these requirements and had only performed six Level II procedures, none of them at Silver Cross.

II. Decision

A. Podiatrist Was Never Grandfathered

An issue that was presented during the trial and addressed on appeal was whether Dr. Kirchner was ever "grandfathered", meaning that a formal exception to the required criteria was granted to him because his training, experience and record during his time at Silver Cross demonstrated current competency to exercise these Level II privileges. These grandfathering decisions are quite common, particularly with respect to board certification requirements which cannot typically be met by physicians who have been licensed for many years and are no longer eligible to take the certification exams.

Although one of the plaintiff's experts acknowledged that these exceptions are utilized by many hospitals and medical staffs, there was no evidence that Dr. Kirchner had ever been individually grandfathered or that any across-the-board exception for similarly situated practitioners had ever been adopted. Furthermore, the expert testified that grandfathering should not occur if the physician was not qualified at the outset to exercise these surgical privileges, in accordance with the criteria established by the Hospital.

The Hospital's CEO also testified that such grandfather clauses were typically reserved for physicians with many years of experience and that, at least in 1993, Dr. Kirchner did not have enough experience to qualify for this exception.

B. Court Rules that Hospital's Decision to Give Privileges to an Unqualified Physician Breached Its Duty to Patients

Based on these facts, the plaintiff argued that Dr. Kirchner never should have been given Level II privileges in the first place and certainly not in 1998 when he performed the surgery. Further, she maintained that the granting of privileges to an unqualified practitioner who was never appropriately grandfathered was a violation of the Hospital's duty to ensure that only those podiatrists who met the required criteria should have been given Level II bunionectomy privileges. Citing the Illinois Supreme Court decision in Darling v. Charleston Community Memorial Hospital, the 1965 seminal case in which the Doctrine of Corporate Negligence as applied to hospitals was first recognized, Frigo claimed that the Hospital's breach of this duty caused her amputation because of Dr. Kirchner's negligence. The jury agreed and awarded her $7,775,668.02.

Although the Hospital argued that its criteria did not establish an industry-wide standard, that Dr. Kirchner over the years had proven his qualifications, and that there were no adverse outcomes or complaints which would have supported denial of his 1998 reappointment, the Appellate Court disagreed.

Citing the Hospital's bylaws and the 1992 and 1993 credentialing requirements, as well as expert testimony, the Court held that the jury acted properly when it found that these requirements created a standard of care against which the Hospital's credentialing decisions were to be measured. Combined with the fact that the bylaws did not provide for any grandfathering for Dr. Kirchner, the Appellate Court ruled that there was sufficient evidence in the record to conclude that the Hospital had breached the credentialing standard it adopted. This finding, along with the jury's determination that Dr. Kirchner was negligent in his treatment and follow-up care of Jean Frigo, which was shown to be the proximate cause of her amputation, supported the jury's decision that her injury would not have been caused if the Hospital had not given Dr. Kirchner surgical privileges. The Appellate Court, accordingly, affirmed the jury verdict. A petition for leave to appeal to the Illinois Supreme Court has been filed.

III. Do Peer Review Confidentiality Statutes Bar the Introduction of Evidence to Defend Against a Negligent Credentialing Claim?

One of the arguments presented by the Hospital focused on to the impact of the Medical Studies Act (the "Act") on the ability of Silver Cross to present evidence to support its contention that the Hospital satisfied its duty to make sure that Dr. Kirchner was duly qualified to perform bunionectomies. This Act is the Illinois statute which makes privileged and confidential, and not subject to discovery or admissibility into evidence, peer review "information...used in the course of internal quality control or medical study for the purpose of reducing morbidity or mortality, or for improving patient care..." It appears that the Hospital tried to introduce information from confidential peer review records that would have included minutes and discussions at department and committee meetings in which Dr. Kirchner's quality outcomes, case reviews and other relevant data were reviewed so as to affirm Dr. Kirchner's qualifications to exercise Level II privileges.

In response, the Appellate Court noted that the documents and standards in issue were the Hospital's medical staff bylaws and credentialing standards, which are not protected under the Act. The question was whether Silver Cross complied with these standards. Therefore, neither the trial nor the Appellate Court needed to consider confidential peer review records to determine whether the Hospital's duty to patients was breached when it issued Level II surgical privileges to Dr. Kirchner.

It appears that the Court may have tried to finesse an important question, i.e., do peer review statutes which bar the introduction of protected information result in the effective denial of the right to present an adequate defense in a malpractice action? These statutes have always held the potential of being a double-edged sword. Hospitals assert these

peer review confidentiality provisions when seeking to deny access to a plaintiff who is hoping to uncover protected minutes and proceedings that may reveal whether the Hospital breached its duty to exercise reasonable care when granting clinical privileges to defendant physicians. Here, Silver Cross apparently wanted to introduce confidential peer review information to support an argument that the Hospital complied with this duty. The Act, however, does not provide for an exception under these circumstances. By only focusing on whether the Hospital strictly complied with its bylaws and credentialing criteria, the Court avoided the more difficult question of whether the Act's ban on producing confidential peer review documents under any circumstance effectively denied Silver Cross the opportunity to defend against the negligent credentialing claim.

Hospitals can ill afford to have their peer review statutes deemed unconstitutional on the grounds that it effectively denies them this right, because the elimination of these statutes would allow plaintiffs unfettered access to sensitive peer review records. Such a result would spell the death knell of effective peer review activities, which courts have universally upheld as necessary for the purpose of improving patient care by encouraging open and frank discussions about physician qualifications.

That said, if the Silver Cross peer review records for Dr. Kirchner truly evidenced that they thoroughly evaluated his records and outcomes and that these results established his competency to exercise bunionectomy privileges, and if they had been introduced at trial, the jury might have reached a different result.

IV. Lessons Learned

A. Hospitals and Medical Staffs Must Follow and Apply Credentialing Criteria Uniformly

In Frigo, the jury determined that Dr. Kirchner should not have been granted Level II surgical privileges because he did not meet the clearly established criteria either at the time of his appointment or reappointment. The language in the bylaws and policies did not provide for any exception to these criteria. If hospitals do not intend to uniformly apply these standards, they should be eliminated, modified or the basis for any exception should be spelled out.

B. Hospitals Must Carefully Examine a Physician's Qualifications Before Granting Privileges

Another troublesome finding in Frigo is that, during trial, the plaintiff's experts testified that there was no evidence to establish that the hospital or medical staff had ever really examined Dr. Kirchner's qualifications before issuing him Level II surgical privileges. Whether this was due to the fact that exculpatory information from the peer review record could not be introduced because of the Act, or whether no real investigation took place, is not clear from the reported decision. There is no question that Dr. Kirchner did not meet the established standard at the time of his appointment and reappointment. This finding proved to be the Hospital's downfall.

Given industry developments in the areas of pay for performance reimbursement standards, outcome determinations, and the new Joint Commission Medical Staff Standards, including the focus on performance monitoring, hospitals can ill afford to dole out privileges to new and existing staff members without truly investigating a physician's qualifications to exercise all requested clinical privileges. Failure to do so will expose the hospital to a Frigo-like claim.

C. Any Exception to Established Credentialing Criteria Should Clearly Be Set Forth in Bylaws, Rules or Regulations

A key problem in Frigo was that there was nothing in the bylaws or any other document which grandfathered Dr. Kirchner despite the fact that he did not meet the established credentialing criteria for Level II surgical privileges. When grandfathering decisions are made, it is customary to include such language in the bylaws or similar document because it reflects the collective judgment of the hospital and medical staff that an exception to adopted criteria is warranted.

Assuming the hospital and medical staff were carefully reviewing Dr. Kirchner's records at each reappointment and that he demonstrated current competency to exercise these privileges, some official pronouncement for the record should have been adopted. Keep in mind that, like Illinois, a state's peer review confidentiality statute may bar the introduction of information that otherwise would have evidenced a hospital's compliance with its duty to make sure that a physician is qualified to exercise all granted privileges. Your only option, therefore, is to either strictly apply its established criteria or to have any standards for exceptions reflected in a bylaw or policy that can be introduced as part of the hospital's defense in a negligent credentialing claim.

D. Hospitals With Similar Peer Review Statutes Should Assume That Confidential Information Cannot Be Introduced as Evidence to Defend Against Negligent Credentialing Claims

It is imperative that hospitals closely examine their confidential peer review statutes to determine what kinds of information can and cannot be discovered and introduced into evidence in order to defend against a negligent credentialing claim. As mentioned previously, these statutes are a tremendous shield when protecting against the disclosure of important peer review discussions that advance improvements in patient care. However, they typically do not include exceptions that would allow a hospital to pick and choose when to assert this protection and when it can be waived. Certainly, the Illinois Medical Studies Act does not provide for such an exception and thus may have had the effect of limiting the Hospital's ability to defend itself in Frigo.

Hospitals therefore need to understand the following: 1) whether the Doctrine of Corporate Negligence applies in its state; 2) if so, how a breach of this standard is established by the plaintiff; 3) whether the state has a peer review confidentiality statute; 4) if so, what impact this statute has on the kinds of information that can be introduced into evidence to establish that the hospital has not breached its credentialing duty to patients; and 5) with this information, what steps the hospital must take to otherwise prove compliance with this duty, such as clearly identifying grandfathering or other credentialing exceptions in its bylaws and policies.

The Illinois Supreme Court is expected to decide on whether to hear the Frigo case on appeal in the next few months.

If anyone has any questions regarding Frigo, the impact that this case may have on existing policies and bylaws, or how a state's peer review statute may affect a hospital's defense strategies in a negligent credentialing case, please feel free to contact Michael Callahan directly.

In addition, if you are interested in downloading for free recent presentation materials, advisory letters or articles on medical staff matters published by *Credentialing and Peer Review Legal Insider*, in which Michael Callahan has been quoted, please click here.

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