

LEGAL ALERT

July 28, 2006

MICHIGAN SUPREME COURT DECLARES NEW RULES GOVERNING PEER REVIEW ACTIVITIES AND PRIVILEGING ACTIONS

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In a major decision that will significantly impact peer review and privileging actions, the Michigan Supreme Court repudiated the common-law doctrine of judicial non-intervention and authoritatively interpreted the peer review immunity statute. *Feyz v Mercy Memorial Hospital*, No. 128059 (July 24, 2006). For many years, Michigan followed the “judicial non-intervention doctrine” under which courts refused to review a private hospital’s privileging actions. After *Feyz*, hospitals may be liable for staffing decisions. In addition, the Court analyzed the immunity provisions of the peer review statute. Under the statute, individuals, organizations and entities involved in peer review activities are immune from civil or criminal liability. *Feyz* holds that immunity is lost if a person has acted with malice, i.e. acts with knowledge that information is false or with reckless disregard of its truth or falsity.

While Michigan law still provides extensive protections to individuals and institutions engaged in peer review and privileging actions, *Feyz* will open the courtroom doors to persons dissatisfied with such decisions.

Doctrine of Judicial Non-Intervention

Historically, it has been widely recognized that staffing decisions by private hospitals are not subject to judicial review. Except for violations of state or federal civil rights and antitrust laws, Michigan courts generally barred any claims that required review of a private hospital’s staffing decisions and the methods employed in reaching those decisions. Individuals affected by peer review and privileging actions were not allowed to bring suit against hospitals based on arguments that bylaws or policies were not followed or that the grounds for action were erroneous or insufficient. While there were a few exceptions to

this rule, private hospitals were essentially free from any judicial review of staffing decisions.

In the last few years, the Court of Appeals had started to limit the broad scope of the judicial non-intervention doctrine. In *Feyz*, the Supreme Court completely rejected it. In the recent decision, the court held that the Legislature had defined the scope of peer review immunity by statute and that the judicial doctrine of non-intervention could not be allowed to expand that immunity. The court did recognize that hospital staffing decisions involve specialized medical and business knowledge and considerations and therefore, may be entitled to some measure of deference. However, *Feyz* concluded that “when staffing decisions violate the legal rights of others, the judiciary must exercise its obligation to adjudicate legal disputes,” except to the extent that the applicable statutes provide protection.

Scope of Peer Review Immunity

The second issue addressed in *Feyz* is the scope of peer review immunity under the Public Health Code. The statute, MCL 331.531, provides immunity to persons, organizations and entities when carrying out three types of protected peer review activities:

1. Providing information or data to a review entity;
2. Performing acts or making communications within the scope of the review entity; and
3. Releasing or publishing a record of peer review proceedings or the reports, findings or conclusions of a review entity.

Significantly, the Supreme Court held that a hospital itself is not a “review entity” and is not entitled to immunity under the statute. Instead, immunity extends only to individuals and entities

with designated peer review functions. Specifically, *Feyz* holds that “. . . the 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.”

There is also a suggestion in *Feyz* that peer review immunity might not apply to acts that do not advance the statutory goal to improve delivery of hospital care. This issue will have to be developed in further cases, since the Supreme Court did not expressly hold that peer review entities may be denied immunity for acts that are outside the scope of their peer review function. As a practical matter, this language may not have a significant impact on the liability of review entities, but the decision as a whole should encourage hospitals to carefully construct and follow their medical staff bylaws to avoid the increased possibility of judicial intervention.

Definition of “Malice”

Under the statute, immunity “does not apply to a person, organization, or entity that acts with malice.” *Feyz* holds that “malice” 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.” Peer review immunity remains available for “non-malicious acts or communications within its scope” as a review entity.

This is the “actual malice” standard used in defamation cases. The Supreme Court stressed the need to protect the free exchange and evaluation of information about a physician’s patient care practices. The heightened standard of “actual malice” was adopted “to keep physicians focused on performing honest and candid peer review, while protecting peer review participants from liability for every negative outcome that may be a by-product of such communication.” From the perspective of individuals and entities involved in peer review activities, adoption of this definition of malice is a positive aspect of the Supreme Court’s decision. The Court concluded that individuals and entities engaged in peer review should be immune

from liability for adverse outcomes suffered by physicians ultimately found by a hospital to lack the requisite professional skills or standards. Liability only exists when unfavorable evaluations, determinations and recommendations are based on negative information which the review entity knows to be false. Under the “actual malice” standard, a reckless disregard for the truth or falsity of information is equivalent to knowledge of falsity. “Actual malice” is a very difficult standard for a plaintiff to meet.

Conclusion

The Supreme Court’s decision highlights the need to approach the peer review process with caution but not trepidation. Individuals, review entities, and hospitals are still protected against liability for honest evaluations conducted under appropriate bylaws and procedures. Nothing in *Feyz* should deter private hospitals from doing what is necessary to maintain high professional standards and good patient care.

However, *Feyz* does mean that these actions and decisions may now be reviewed by a court or jury in certain circumstances. As a result, hospitals should make sure that “review entities” are properly designated in accordance with the statute and that peer review activities are only taken by the appropriate persons and entities. Any procedural requirements imposed by bylaws should be carefully followed in credentialing, discipline, and other medical staff matters. The reasons for staffing decisions should be properly documented. *Feyz* requires an awareness that a hospital may need to defend its peer review and privileging actions in court.

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