

Health Law

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What Every Litigator Needs to Know About Negligent Credentialing Claims

Introduction

On October 8, 1998, Dr. Paul Kirchner, a podiatrist on staff at Silver Cross Hospital and Medical Center, performed a bunion surgery on Jean Frigo's foot despite the presence of an infected ulcer on the foot. Complications ensued following the operation, and Frigo's foot had to be amputated. On October 6, 2000, Frigo filed a medical malpractice suit against Dr. Kirchner and Silver Cross claiming negligence based upon her foot surgery. *Frigo v. Silver Cross Hospital*, No. 1-05-1240, 2007 WL 2141822 (1st Dist. July 26, 2007).

With regard to Silver Cross, Frigo alleged it improperly managed and maintained the hospital. Frigo later learned through discovery that Silver Cross gave Dr. Kirchner Category II surgical privileges despite the fact that he did not meet the hospital's requirements for such privileges. On April 25, 2003, Frigo filed a first amended complaint alleging that Silver Cross negligently awarded Dr. Kirchner Category II surgical credentials despite the fact that he had not completed a 12-month podiatric surgical residency and he was not board certified as required by Silver Cross' bylaws and by JCAHO standards. Frigo also claimed that her injuries were proximately caused by Silver Cross' decision to allow Dr. Kirchner to care for her. Ultimately, a jury awarded Frigo approximately \$7.8 million in damages against Silver Cross. *Frigo*, 2007 WL 2141822 at *1.

Silver Cross appealed the jury verdict. In a case of first impression, the First District upheld a claim for negligent credentialing. In doing so, the appellate court held: (1) Frigo's negligent credentialing claim against Silver Cross was not barred by the statute of limitations, as it related back to her original complaint; (2) Silver Cross' credentialing requirements were not privileged and shielded from disclosure by the Medical Studies Act; (3) the Hospital Licensing Act did not protect Silver Cross from Frigo's negligent credentialing claim; and (4) there was sufficient evidence presented to establish a negligent credentialing claim against Silver Cross, as it breached its duty of care when it granted Dr. Kirchner Category II surgical privileges. *Id.*

Statute of Limitations

Upon comparing the management allegations made against Silver Cross in Frigo's original complaint to the more specific management and negligent credentialing allegations in Frigo's first amended complaint, the court found that these allegations all arose from Frigo's treatment during and after her foot surgery on October 8, 1998. Although the first amended complaint contained more specific allegations against Silver Cross, the court held Silver Cross had adequate notice in the original complaint because Frigo alleged Silver Cross negligently managed the hospital. Specifically, as Silver Cross was responsible for managing the hospital, it knew whether Dr. Kirchner met its

credentialing requirements. Therefore, Silver Cross was supplied with the essential information it needed to prepare a defense. *Id.* at *14.

Medical Studies Act

The court also rejected Silver Cross' contention that its credentialing decision was protected by the Medical Studies Act, 735 ILCS 5/8-2101. First, the court noted that the allegations in the first amended complaint focused on Silver Cross' credentialing requirements codified in the regulations, bylaws, and JCAHO standards and whether Dr. Kirchner met those requirements; it did not focus on the credentialing committee's discussions or processes used in granting Dr. Kirchner his credentials. *Frigo*, at *16. The court determined that such regulations, bylaws, and standards were generated in the ordinary course of business and were not generated by or for the specific use of the hospital's peer-review committee. Next, the court recognized that documents created in the ordinary course of a hospital's business, for the purpose of rendering legal opinions, to weigh potential liability risk, or for later corrective action by hospital staff are not privileged even if subsequently used by a committee in the peer-review process. Consequently, the court held that Silver Cross' regulations and bylaws and the JCAHO standards were not within the purview of the Medical Studies Act. Furthermore, the court asserted that if it were to make such an expansive reading of the Medical Studies Act, it would eliminate actions against hospitals for institutional negligence. *Id.*

Hospital Licensing Act

The court also rejected the argument that the action was barred by the Hospital Licensing Act. Section 10.2 of the Hospital Licensing Act provides that a hospital shall not be liable for "the acts, omissions, decisions, or any other conduct, except those involving wilful or wanton misconduct, of***any***committee or individual whose purpose, directly or indirectly, is internal quality control***, or for the purpose of professional discipline***." 210 ILCS 85/10.2. Despite this apparent limitation on a hospital's credentialing decisions, the court found the section to be inapplicable for several reasons. First, the court held that the purpose of the Hospital Licensing Act is to regulate internal hospital controls. *Frigo*, at *17. Furthermore, the Hospital Licensing Act is routinely at issue when physicians have filed suits against hospitals. *Id.* However, §10.2 of the Hospital Licensing Act limits its application to physicians aggrieved by a hospital's peer-review process, and specifies that it shall not "relieve any individual or hospital from liability arising from treatment of a patient." *Id.* at *18. Moreover, the Hospital Licensing Act has not been applied in negligent credentialing claims. In light of such, the court held there was no reason to extend the application of the Hospital Licensing Act to this case. *Id.*

Negligent Credentialing

Finally, the court turned to the question of whether Illinois recognized an action for negligent credentialing. The court began by discussing the Illinois Supreme Court holding in *Darling v. Charleston Community Memorial Hospital*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965). In *Darling*, the court recognized that hospitals may be held liable for institutional negligence, as they have an independent duty to assume responsibility for the care of their patients. *Frigo*, 2007 WL 2141822 at *18. The *Frigo* court concluded that the institutional negligence claim recognized in *Darling* included a claim for negligent credentialing.

Next, the court held that a plaintiff must prove the following elements to prevail in a claim for negligent credentialing: (1) the hospital failed to exercise reasonable care in granting medical staff privileges or membership to a physician; (2) the physician that was negligently credentialed breached the standard of care when treating the plaintiff; and (3) the negligent credentialing of the negligent physician was a proximate cause of the plaintiff's injuries. *Id.* at *21. Upon review of the record, the

court held the evidence presented was sufficient to establish a claim for negligent credentialing. *Id.* at *24.

Dissent

While specially concurring in part, Presiding Justice Quinn dissented as to the holding that the negligent credentialing allegations in the first amended complaint related back to Frigo's original complaint. *Id.* at *26. He noted that, while the majority conclusion logically flowed from the cases cited by Frigo, he believed the cases cited by Silver Cross were more closely related to the case at hand. *Id.* at *27. Additionally, Justice Quinn asserted that Frigo's language in her original complaint was "broad and nebulous." *Id.* at *29. Consequently, he stated that if such language is sufficient in this case, the relation back doctrine will be applicable in all similar cases, thus depriving hospitals of the protection of both the statute of limitations and the statute of repose. *Id.*

Conclusion

In recent years, Illinois courts have supported the expansion of an institutional cause of action against hospitals making it more difficult for hospitals to avoid liability under theories such as apparent agency. *Frigo* is consistent with that expansion. Defense counsel will likely see ever-increasing allegations of hospital institutional negligence in medical malpractice litigation in order to allow plaintiffs to reach the hospital's "deep pocket." *Frigo* will be cited not only to support negligent credentialing allegations, but also for a liberal interpretation of the relation back doctrine.

About the Authors

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