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Health Law Update

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Illinois Appellate Court Reinforces Broad Protection for Hospital Credentialing and Privileging Decisions

In *Larsen v. Provena Hospitals*, 2015 IL App (4th) 140255, the Illinois Appellate Court Fourth District, reinforced its ruling from *Lo v. Provena Covenant Medical Center*, 356 Ill. App. 3d 538 (4th Dist. 2005) with respect to the protection afforded to hospitals under § 10.2 of the Illinois Hospital Licensing Act. 210 ILCS 85/10.2 Specifically, the court held that for a physician whose medical staff membership was not renewed to survive dismissal in a subsequent action against the hospital, he or she must allege and prove the hospital actually or deliberately intended to *physically* harm the physician. *Larsen,* 2015 IL App (4th) 140255, ¶ 35. While this interpretation of the statute is perhaps overly literal, the case highlights the types of claims brought by aggrieved physicians and the analysis undertaken by courts in addressing those claims. Despite the broad protection afforded by the statute, providers should continue to ensure compliance with their internal bylaws, policies, rules and regulations and that credentialing/privileging decisions are properly documented.

Section 10.2 of the Hospital Licensing Act, 210 ILCS 85/10.2 (the Licensing Act) provides immunity to hospitals and others with respect to peer review decisions:

> Because the candid and conscientious evaluation of clinical practices is essential to the provision of adequate hospital care, it is the policy of this State to encourage peer review by health care providers. Therefore, no hospital and no individual who is a member, agent, or employee of a hospital, hospital medical staff, hospital administrative staff, or hospital governing board shall be liable for civil damages as a result of the acts, omissions, decisions, or any other conduct, except those involving wilful or wanton misconduct, of a medical utilization committee, medical review committee, patient care audit committee, medical care evaluation committee, quality review committee, credential committee, peer review committee, or any other committee or individual whose purpose, directly or indirectly, is internal quality control or medical study to reduce morbidity or mortality, or for improving patient care within a hospital, or the improving or benefiting of patient care and treatment, whether within a hospital or not, or for the purpose of professional discipline including institution of a summary suspension in accordance with Section 10.4 of this Act [21 ILCS 85/10.4] and the medical staff bylaws. Nothing in this Section shall relieve any individual or hospital from liability arising from treatment of a patient. . . . For the purposes of this Section, "wilful and wanton misconduct" means a course of action that shows actual or deliberate intention to harm or that, if not intentional, shows an utter indifference to or conscious disregard for a person's own safety and the safety of others.

210 ILCS 85/10.2.

In May 2011, the defendant, Provena Hospitals (Provena) declined to renew the medical staff membership and clinical privileges of the plaintiff, L. Royce Larsen, M.D., which Provena and its predecessors had renewed essentially biennially

for the previous 31 years. *Larsen*, 2015 IL App (4th) 140255, ¶ 1, 8. Dr. Larsen filed a four-count complaint against the hospital, alleging a cause of action for retaliation under the Whistleblower Act and seeking damages as a result of Provena's "willful and wanton misconduct" in harming his medical practice and professional reputation. *Id.* ¶ 1.

Provena moved to dismiss the complaint under § 2-615 of the Code of Civil Procedure, arguing Dr. Larsen failed to sufficiently plead willful and wanton misconduct as defined by § 10.2 of the Licensing Act, and that the Whistleblower Act did not apply absent an allegation that Provena received state funding. *Id.* ¶ 2. Dr. Larsen argued that because he alleged harm to his medical practice and professional reputation as a result of Provena's denial, which (he asserted) occurred without a hearing and in violation of the contractual medical-staff bylaws, he had sufficiently pleaded willful and wanton misconduct, and that the hospital's receipt of Medicaid reimbursement satisfied the state funding requirement under the Whistleblower Act. *Id.* ¶ 11, 54–56.

The trial court partially granted Provena's motion, holding that harm to a physician's medical practice and professional reputation was "not the type of harm required to state a claim for willful and wanton misconduct" under the Licensing Act. *Id.* ¶ 3. The court, however, upheld the retaliation claim, finding that: (1) the immunity provided by § 10.2 of the Licensing Act did not preclude that claim; and (2) the Whistleblower Act applied because Provena received state funding in the form of Medicaid payments. *Id.* The appellate court affirmed the dismissal but reversed the trial court's determination on the Medicaid issue. *Id.* ¶ 31, 60.

In *Lo*, the plaintiff physician brought similar claims, arguing the medical center involuntarily restricted his clinical privileges without a hearing, thereby violating the contractual agreement between the parties as provided by the medical-staff bylaws. *Lo*, 356 Ill. App. 3d at 539. The trial court dismissed the complaint, which was affirmed on appeal, because the plaintiff had "alleged no facts, and

. . . offered no evidence, from which [the court] could reasonably infer that defendant 'actually or deliberately intended to harm' him." *Id.* at 545 (quoting 210 ILCS 85/10.2) ("The physician's 'own safety' was never at issue in this case"). *Id.* at 545. Accordingly, the Licensing Act barred recovery for breach of contract. *Id.*

Relying on *Lo*, the *Larsen* court reasoned that, due to reporting requirements, a credentialing committee's decision not to renew a physician's privileges always and necessarily involves *reputational harm* to that physician. *Larsen*, 2015 IL App (4th) 140255, ¶ 29. Dr. Larsen's interpretation that this type of harm is actionable would destroy the Licensing Act's stated goal of encouraging "'candid and conscientious evaluation of clinical practices' to improve patient care by encouraging 'peer review by health care providers.'" *Id.* ¶ 30. (quoting 210 ILCS 85/10.2). In other words, "if merely denying a physician hospital privileges could result in civil liability for the medical facility or members of a credentialing committee, candid reviews would likely cease." *Larsen*, 2015 IL App (4th) 140255, ¶ 30.

Thus, "absent allegations of intentional *physical* harm or a showing that the committee at issue consciously disregarded the aggrieved physician's safety, the immunity afforded by that section remains intact." *Id.* ¶ 31. (citing *Lo*, 356 Ill. App. 3d at 545) (emphasis in original)). The court recognized physical harm was unlikely to ever result from a credentialing decision, but stated it was merely interpreting the plain language of the statute:

> In the almost 10 years since this court's decision in *Lo*, the legislature has not seen fit to further amend section 10.2 of the Hospital Act. The legislature's silence implies that—at a minimum—it is not displeased with our conclusion in *Lo* that an allegation of reputational harm does not "fit within the specialized definition of '[willful] and wanton misconduct' in section 10.2 [of the Hospital Act]." (Citation omitted.) Given that the medical profession is well-represented and influential within the legislative halls of the General Assembly, we would

> expect that if our interpretation in *Lo* of section 10.2 of the Hospital Act were erroneous, as Larsen contends, legislative action to correct that misinterpretation would have been forthcoming, just as the legislature acted after *Szczerbaniuk*. (Citation omitted.) ("The legislature is presumed to know how courts have interpreted a statute and may amend the statute if it intended a different construction.").

Larsen, 2015 IL App (4th) 140255, ¶ 34.

While this interpretation of the statute may be curtailed or corrected by future cases and/or legislative action, the broad protection of the Licensing Act is likely to remain intact. A more balanced interpretation of § 10.2 would protect credentialing decisions that have some underlying rational basis while allowing claims where the decision was motivated solely by the intent to damage the physician. Thus, as with many aspects in the healthcare field, providers should seek to ensure proper procedures are undertaken with respect to credentialing/privileging decisions, and that the underlying rationale for such decisions is properly documented. Where a provider complies with its own bylaws, policies, rules and regulations, and where its records reflect a rational basis to support a credentialing/privileging decision, the provider is on solid footing.

With respect to the Whistleblower Act issues, the court did not explain on what issue Dr. Larsen had blown the proverbial whistle. In any case, the court held the Licensing Act does not offer immunity for retaliation claims, but here, the statute did not apply to Provena. *Id.* ¶ 42–62. The Whistleblower Act only protects physicians who practice "in whole or in part, at a hospital, nursing home, clinic, or any medical facility that is a health care facility funded, in whole or in part, by the State." 740 ILCS 174/5. The only evidence offered as to financial assistance from the state was Medicaid payments under § 1396a(a)(32)(A) of the Social Security Act. *Larsen*, 2015 IL App (4th) 140255, ¶ 54–56. The court found that Medicaid assistance was designed to "defray the cost of providing medical care to the poor and needy by providing payment in satisfaction or partial satisfaction for the medical services provided," which did not amount to "fund[ing]" as required by the Whistleblower Act. *Id.* ¶ 60.

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