A MIDWESTERN LAW FIRM

MEDICOLEGAL MONITOR

A REVIEW OF MEDICAL LIABILITY AND HEALTHCARE ISSUES

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A Word From the Practice Group Chair

My paternal grandfather studied for the bar under a German speaking lawyer in Peoria until the circuit court of Peoria ceased conducting all proceedings in German and switched over to the English language in the late 19th century. My grandfather then became a farmer. Making the transition to English was critical to Peoria's full integration into the American economy and it was shortly after that that Peoria became the whiskey capital of the world. My grandfather's decision shows that it's okay for us to put limits on ourselves, but we shouldn't ask society to accept those same limits. Matt Thompson's analysis of *Mizyed v. Palos Community Hospital* underscores the fact that our courts now recognize that if we are going to continue to be the melting pot of the world, we'll need to speak a common language and English is as good a choice as any.

One corollary to Rick Hunsaker's article on termination of hospital privileges is that if we're going to make rules, we're going to have to live by them. For over 80 years now, Illinois courts have defined standard of practice for hospitals in part by their own internal rules and procedures. In *Valfer* the hospital was rewarded for following its own protocols. Alternatively, you may not want to set the bar so high for yourself that your own aspirations become your own undoing. Like everything else, it's just common sense.

We are honored to be your lawyers and we always feel validated when asked to defend your interests.

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Case Update

In our last newsletter, we discussed the case of *Fragogianis vs. Sisters of St. Francis Health Services*, a medical liability case that involved issues of apparent agency between a physician and hospital, and the admissibility of medical literature at trial. At the time of publication, the 1st District's Opinion was the subject of a Petition for Leave to Appeal to the Illinois Supreme Court. On May 25, 2016, the Petition for Leave to Appeal brought by Sisters of St. Francis Health Services was denied.

Consent Forms and the Non-English Speaking Patient: Court Rules Favorably for Hospitals and Other Healthcare Institutions

By J. Matthew Thompson - *mthompson@heylroyster.com*

In *Mizyed v. Palos Cmty. Hosp.*, 2016 IL App (1st) 142790, the Illinois Appellate Court considered the impact of a patient's inability to speak or read English on the effectiveness of a signed consent form. In a positive outcome, the court found that a hospital has no duty to determine a patient's education or ability to understand English-language consent forms, and has no duty to ensure the patient subjectively understands a consent form he signs. If recent trends concerning language use in the United States continue, this decision could be applied in a significant number of future cases.

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Background

In *Mizyed*, the plaintiff was sent to the ED at Palos Community Hospital for cardiac issues. He was a native Arabic speaker, who spoke limited English and could not read or write in either Arabic or English. He relied upon his adult children to read and translate documents for him.

The plaintiff's daughter and other family members visited the plaintiff in the emergency room and at times during the subsequent admission. Over the course of his emergency room visit and admission, the plaintiff executed five hospital consent forms, all of which were written in English. Each of the consents signed by the plaintiff contained a paragraph explicitly disclaiming any employment relationship between the hospital and its staff physicians. Specifically, a paragraph of each consent stated:

> I understand that all physicians providing services to me … are independent medical staff physicians and not employees or agents of Palos Community Hospital.

Mizyed, 2016 IL App (1st) 142790. ¶7.

At his deposition, the plaintiff admitted his daughter discussed some of the consent forms with him, testifying: "Yes. She told me, 'Dad, sign the paper because they want to do surgery for you,' and I trust my daughter. So I signed the papers." He stated, "I don't speak English 100 percent, and I don't know what the doctors were telling me. I based everything upon what [my daughter] told me and based upon that I signed." *Id*. ¶6.

The plaintiff's daughter testified that she did not read the consents entirely, but still encouraged the plaintiff to sign. She "did not exactly go line to line" through the consents. *Id*. ¶11. Nevertheless, she answered questions her father asked, and encouraged him to sign the consents.

Upon admission, the plaintiff did not have a physician on staff at the hospital. Dr. Kanashiro, an employee of Cardiology Internal Medicine Associates who had staff privileges at the hospital, was on call for the emergency department at that time. Therefore, she became the plaintiff's attending physician. Dr. Kanashiro stated that she exercised her own independent training, skill and judgment in treating the plaintiff, and her care was not controlled or directed by the hospital. Dr. Kanashiro never told the plaintiff she was an employee or agent of the hospital, but also admitted that she did not tell the plaintiff she was employed by Cardiology Internal Medicine Associates. Her badge simply indicated that she was a staff physician at the hospital, not an employee. Dr. Kanashiro testified that the plaintiff spoke English with her, and they did not need an interpreter to communicate.

During his admission to the hospital, the plaintiff developed an infection resulting from a PICC line insertion. Dr. Kanashiro confirmed the presence of infection from blood cultures, and then consulted with an infectious disease specialist. The plaintiff was given vancomycin, and was later discharged with a prescription for outpatient antibiotics. However, the plaintiff was later readmitted to a separate hospital for further treatment of the infection.

Later, the plaintiff filed a medical malpractice action against the hospital, alleging that the hospital was liable for the negligent acts of Dr. Kanashiro because Dr. Kanashiro was its apparent agent. The hospital moved for summary judgment, arguing that it had not held out Dr. Kanashiro as its agent or employee. The trial court granted the hospital's motion for summary judgment, and an appeal followed.

General Law Applicable to Apparent Agency Claims

In Illinois, a plaintiff must prove three elements in order to hold a hospital liable for the apparent agency of a non-employee physician, including:

> (1) the hospital, or its agent, acted in a manner that would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee or agent of the hospital; (2) where the acts of the agent create the appearance of authority, the plaintiff must also prove that the hospital had knowledge of and acquiesced in them; and (3) the plaintiff acted in reliance upon the conduct of the hospital or its agent, consistent with ordinary care and prudence.

Id. ¶38.

The first two factors, typically grouped together, are referred to jointly as the "holding out" factor. There, the focus is whether the patient knew or should have known the physician is an independent contractor. If a patient knows or should know that a physician is an independent contractor, the hospital cannot be vicariously liable. Put another way, if a patient "is in some manner put on notice of the independent status of the professionals with whom he might be expected to come into contact," the hospital cannot be liable.

An important factor is whether the plaintiff signed a consent form that clearly states the physician is not a hospital employee. In such cases, a plaintiff typically cannot prove that he or she reasonably believed the physician was an employee of the hospital. One court has found that "consents are almost conclusive in determining whether a hospital should be held liable for the medical negligence of an independent contractor." *Id*. ¶40. On the other hand, a plaintiff may be able to bring a claim if the consent is ambiguous or confusing regarding the physician's employment status.

New Issue: English-Language Consent Forms and a Non-English Speaking Patient

Mizyed presented unique facts not addressed in any previous case – the plaintiff's limited ability to speak English and inability to read or write in any language. Therefore, the plaintiff argued that he did not receive notice of or consent to the terms of the consent forms, and that the hospital was required to ensure the plaintiff actually understood the terms and legal implications of the consent forms. The plaintiff asked the court to find that the hospital was required to provide oral Arabic translation of the consent forms. The court, however, rejected the plaintiff's arguments.

First, the court rejected the plaintiff's argument that the hospital was required to provide him actual notice of the terms of the consent forms so that he subjectively understood them. The court explained that "if a patient has actual *or constructive knowledge* that the doctor is an independent contractor, the hospital is not vicariously liable." *Id*. ¶51. Therefore, the hospital had no duty to determine the plaintiff's education or ensure that he understood the English language consent forms. All the hospital had to show was that the plaintiff was "placed on notice" that his physicians were not hospital employees. Here, the court pointed to the involvement of the plaintiff's daughter who assisted the plaintiff in reviewing the consent forms and encouraging him to sign. Although the daughter claimed not to have read the consent forms entirely, the hospital "had no reason to doubt that she had fully read and understood the forms and accurately communicated them to her father before he signed, indicating his understanding and consent." *Id*.

¶52. Under these circumstances, "the hospital could rely on [the plaintiff's] signing of the documents as evidence of his understanding of their terms." *Id*.

Second, the court rejected the plaintiff's position because a person is presumed to have knowledge of the contents of a document he signs, whether or not he actually read the document. Applying that principle here, the court pointed to an Illinois Supreme Court finding that "illiteracy does not exempt a party from the terms of the document he signs." *Id*. ¶55. Thus, the court concluded that "although he may not have been able to read the consent forms, his decision to sign them legally signifies that he 'had an opportunity to become familiar with and comprehend' their terms." *Id*.

In sum, the court found that the plaintiff's "inability to read or speak English does not undermine the effect of the consent forms that he signed" and "conclude[d] that the explicit language of those consent forms put him on notice that his treating physicians were not [the hospital's] agents or employees, defeating his apparent agency claim." *Id*. ¶57.

Significance In Light of Population Trends

The importance of this decision is only likely to grow in coming years. Recent statistics show that the United States is becoming more linguistically diverse. According to the U.S. Census Bureau, the number of people that spoke a language other than English at home grew from about 23 million in 1980 to more than 59 million by 2010. *Language Use in the United States: 2011*, American Community Survey Reports, p. 7, Table 2, U.S. Census Bureau (August 2013). During this timeframe, the total population increased by about 38 percent, while the number of people that spoke a language other than English at home increased by more than 158 percent. By 2011, more than 60 million people in the U.S. spoke a language other than English at home. Of those 60 million people, over 13 million could not speak English well or could not speak English at all. Similar statistics were reported in Illinois, where more than 2.7 million people spoke a language other than English at home, of which about 600,000 people (or 22 percent) could not speak English well or could not speak English at all. If such trends continue, this decision could be applied to many future cases.

Decision Prevents Headaches for Hospitals and Other Institutions

The *Mizyed* decision is a big win for hospitals and other institutions facing similar issues with consent forms. If the court had adopted the plaintiff's arguments, it would have created significant problems for hospitals and health care providers, many of which would have no logical solution. For instance, in the Chicago metropolitan area, at least 153 languages are spoken. It would be nearly impossible for hospitals to provide consent forms in each patient's native language. This would not even address the issue of illiteracy presented in *Mizyed*. Furthermore, it would be nearly impossible for a hospital to know whether a patient subjectively understands the terms of a consent form. For patients that do not speak English it is reasonable for the hospital to rely upon a family member to interpret the consent form. In cases where a patient asks for an interpreter or asks a question about the consent, it may make sense for the hospital to attempt to accommodate the patient, assuming the hospital can find an interpreter for the given language within a reasonable time frame in light of the patient's condition. Fortunately, reason won out in the *Mizyed* case, which provides hospitals and other institutions a solid defense in similar future cases.

Matt Thompson concentrates his practice in the area of civil litigation, including the defense of cases in the areas of medical malpractice and professional liability, products liability, and commercial litigation. Matt regularly defends physicians, nurses, hospitals and clinics in professional liability claims involving significant injury or death.

Illinois Supreme Court Outlines a Physician's Remedies Against Hospital for Termination of Practice Privileges

By Richard Hunsaker - *rhunsaker@heylroyster.com*

In *Steven Valfer, M.D. vs. Evanston Northwestern Healthcare*, 2016 IL 119220, the Illinois Supreme Court has further outlined what is necessary to enforce actions of a hospital in revoking practice privileges or disciplining a staff physician.

Background

Dr. Steven Valfer brought an action against Evanston Northwestern Healthcare in connection with the non-renewal and revocation of privileges to practice. The Hospital's "non-renewal" decision followed a peer review which was conducted pursuant to the Illinois Hospital Licensing Act (201 ILCS 85/1 *et seq*). The peer review was comprised of an analysis by two other physicians, one of whom was chairman of the Hospital's OB-GYN department. In general, the review resulted in a finding that of Dr. Valfer's 21 surgical cases from the previous year, over 50 percent of those cases "lacked demonstrable indications for surgical intervention." *Valfer*, 2016 IL 119220, ¶5. Thereafter, the Hospital's Executive Committee determined that it would recommend to the Hospital's Board of Directors that Dr. Valfer not be reappointed to the staff. Dr. Valfer, pursuant to the Hospital's bylaws, requested a hearing on the matter. Dr. Valfer was represented by counsel and was given the opportunity to present evidence. After a hearing, where the two physicians who had conducted the peer review testified as witnesses, the Hearing Committee upheld the decision of the Executive Committee to deny the request for renewal of surgical privileges and staff reappointment. An appeal was requested by Dr. Valfer and the Hospital's Appellate Review Committee upheld the decision of both the Hearing Committee and the Executive Committee to deny the requested renewal of privileges and staff reappointment. The hearing and review process was reportedly conducted in compliance with the Hospital's bylaws.

Following the hearing and review, Dr. Valfer sued the Hospital in the Circuit Court of Cook County claiming that it acted improperly in deciding not to renew privileges.

The civil lawsuit brought by Dr. Valfer in Cook County was decided in favor of the Hospital following an evidentiary hearing. The trial court held that the Hospital was statutorily immune from suit based upon the language contained in Illinois' Licensing Act. On review, the trial court's decision was upheld by the First District Appellate Court.

Legal Issues

In its analysis of the case, the Illinois Supreme Court addressed two central issues. Is a hospital, which follows its own bylaws, immune from suit as a result of the Licensing Act, 210 ILCS 85/10.2? And, was there a basis in Dr. Valfer's case to conclude that the hospital

engaged in "willful and wanton misconduct" which is set out in the Licensing Act as an exception to statutory immunity?

The Illinois Supreme Court's decision clarifies a number of issues which have been the subject of some debate among lawyers, physicians and hospital administrators. First, the Supreme Court clearly states that hospitals do not enjoy absolute immunity for their staffing decisions. The court notes, without hesitation, that "*sham peer review*" is not condoned. Having said that, the Illinois Supreme Court held that the Licensing Act immunizes a hospital and those involved in its quality reviews from civil damages where the review was undertaken to maintain or improve the quality of health care. Second, the Illinois Supreme Court explored the scope of statutory immunity available to hospitals. In doing so, the court noted that physicians would always have the right to legally challenge the manner in which the hospital's bylaws were being applied or interpreted by way of a declaratory judgment action or through an action seeking injunctive relief. In Dr. Valfer's case, it was significant to the Supreme Court that there was no question raised of whether the hospital's bylaws were improperly applied or interpreted during the re-appointment process. Third, the Illinois Supreme Court addressed the concept of willful and wanton conduct as a statutory exception to hospital immunity. In assessing this exception, the Supreme Court held that a physician may be able to avail himself of the exception to the immunity provision where the purpose of the discipline was not based on internal quality control or enhancing patient care and treatment but was a sham. The court did not identify what might constitute a "sham peer review." Finally, in analyzing the "willful and wanton act" immunity exception, the Supreme Court determined that "willful and wanton" conduct, as applied in the context of the Licensing Act, is an exception which requires that the action produce "physical harm" to the plaintiff. The court very clearly held that harm to one's reputation or economic well-being are not sufficient to invoke the "willful and wanton" exception.

Conclusion

In outlining what is necessary to enforce actions of a hospital in revoking practice privileges or disciplining a staff physician, the Illinois Supreme Court has determined that the process must be based on the objective of enhancing the quality of medical care. And, the credentialing process must be clearly set forth in hospital bylaws and conducted in conformity with those written bylaws. If these requirements are met, it is very likely that the hospital will qualify for immunity from under section 10.2 of the Licensing Act.

Any credentialing process which does not involve evidence or conduct which touches upon quality of care issues could seriously undermine any later attempts to invoke the immunity protection should the hospital be sued by a disgruntled physician.

From the perspective of the individual physician, the Supreme Court has outlined the proper approach to challenging a process where the physician's privileges are disciplined, revoked or not renewed. First, the physician cannot allow the process to proceed where there is a factual basis to argue that the hospital bylaws are unclear, improperly applied or ignored. In those settings, the physician should seek immediate relief from the court either through a declaratory judgment action or an equitable action seeking injunctive relief. And, if the willful and wanton exception to the statutory immunity provision is to be invoked, the physician must have a basis

in fact to allege conduct establishing a course of action on the part of the hospital that demonstrates an actual or deliberate intention to harm or an utter indifference to or conscious disregard for a person's own safety and the safety of others. Though quite difficult to establish, the physician must also demonstrate that the conduct produced physical harm in order to invoke the willful and wanton immunity exception.

Based upon the Supreme Court's analysis, it would appear that the best alternative for a physician challenging the process is to assert that the hospital engaged in a "sham peer review." To make that argument, it is apparent from the court's opinion that the physician must have compelling evidence of an improper motive on the part of the hospital and support from competent experts establishing that the care which is the subject of the peer review was reasonable and appropriate.

Richard Hunsaker focuses his practice in a wide variety of health care arenas. Richard has taken more than 30 cases to verdict. He has an impressive record of favorable trial results, particularly in defending cases arising in the health care context. Richard has defended physicians, nurses, hospitals and medical device manufacturers. In the broader realm of professional liability, he has also defended clients in the fields of architecture, dentistry, medicine, veterinary medicine and insurance. Richard has served as coordinating counsel for a major medical device manufacturer in the management and defense of its general liability claims pending in various jurisdictions throughout the United States. In addition, Richard has experience in defending major corporate interests in the class action setting, particularly claims against health care providers. In that context, he has also served as administrative counsel in the settlement of an Illinois class action claim.

Heyl Royster serves clients in every county in Illinois. We have offices in six major population centers in Illinois - Peoria, Chicago, Edwardsville, Rockford, Springfield, and Urbana - which allows us to appear in any Illinois state or federal court quickly, effectively, and cost-efficiently for our clients. Our offices collaborate with each other and with our clients to achieve client goals. Our statewide practice has earned Heyl Royster a reputation for innovation, excellence, and professionalism and brings our clients a specialized knowledge of the courts and adversaries we face.

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