

IN THE SUPREME COURT OF OHIO

Loretta Schelling	:	Supreme Court No. 2007-2202
	:	
Plaintiff/Appellee	:	On Appeal From the Williams
	:	County Court of Appeals, Sixth
v.	:	Appellate District
	:	
Community Hospitals	:	Court of Appeals
Of Williams County	:	Case No. WM-07-001
	:	
Defendant/Appellant.	:	

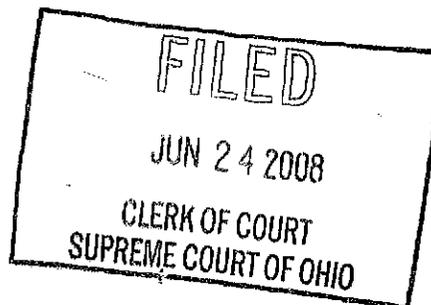
**REPLY BRIEF OF APPELLANT
COMMUNITY HOSPITALS OF WILLIAMS COUNTY**

Chad Tuschman, Esq. (0074534)
Williams, DeClark, Tuschman Co., L.P.A.
416 N Erie Street, 500 Toledo Legal Building
Toledo, OH 43604-6301
Phone: (419) 241-7700
Fax: (419) 245-3849
E-Mail: ctuschman@wdtlaw.org

COUNSEL FOR APPELLEE, LORETTA SCHELLING

Jeanne M. Mullin, Esq. (0071131)
Reminger Co., LPA
237 W. Washington Row, 2nd Floor
Sandusky, Ohio 44870
Phone: (419) 609-1311
Fax: (419) 626-4805
E-Mail: jmullin@reminger.com

COUNSEL FOR APPELLANT, COMMUNITY
HOSPITALS OF WILLIAMS COUNTY



Catherine M. Ballard, Esq. (0030731)
Anne Marie Sferra, Esq. (0030855)
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
Phone: (614) 227-2300
Fax: (614) 227-2390
E-Mail: cballard@bricker.com
asferra@bricker.com

COUNSEL FOR AMICUS CURIAE,
OHIO HOSPITAL CORPORATION AND
OHIO OSTEOPATHIC HOSPITAL ASSOCIATION

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ARGUMENT

I. Appellee's assertion that Ohio law allows a claim of negligent credentialing to proceed in the absence of a prior adjudication, admission, or stipulation of negligence by the subject physician is erroneous.

Let me begin by saying that the Appellant agrees completely with the Appellee that the principle of “stare decisis is patently applicable in this [case] because this Court is to ‘abide by it in order to foster predictability and continuity, prevent the arbitrary administration of justice, and provide clarity to the citizenry.’” See Appellee’s Merit Brief at Page 3, citing *State v. Simpkins* (2008), 117 Ohio St. 3d 420, 2008-Ohio-1197. The Appellant disagrees, however, as to what the outcome of such adherence to stare decisis would be. Specifically, contrary to the Appellee’s assertion, true application of the well-established legal principles and case law pertinent to the issues in this appeal would lead to the conclusion that the establishment of physician negligence is a legal prerequisite to a viable claim for negligent credentialing. In that regard, this Court has already clearly established that, in order to prevail on a negligent credentialing claim, a plaintiff must demonstrate, among other things, that she was “injured by the negligence of a staff physician.” *Albain v. Flower Hospital* (1990), 50 Ohio St.3d 251, at paragraph two of the syllabus. (Emphasis added). Indeed, the Appellee concedes in her brief that a patient who wants to bring a claim of negligent credentialing against an Ohio Hospital must prove that her injuries were sustained at the hands of a negligent physician. Accordingly, as it turns out, the Appellant’s position and that of the Appellee are not that far apart. The only real difference is the Appellee’s contention that it would be appropriate and permissible to try the claim of medical negligence as a “case within a case” for negligent credentialing. Thus, the dispute here essentially boils down to timing.

Although this Court has not clearly or directly articulated its position on this issue, we do know that at least one intermediary court has clearly established that a claim for negligent credentialing does not become ripe until medical negligence is found against the doctor. *Davis v. Immediate Medical Serv. Inc.* (Dec. 12, 1995), 5th Dist. App. No. 94 CA 0253 (judgment affirmed in part, reversed in part on other grounds, 80 Ohio St.3d 10, reconsideration denied, 80 Ohio St.3d 1449). It is that well-reasoned conclusion that the Appellant is asking this Court to adopt, and nothing in the Appellee's Brief should or could cause this Court to do otherwise.

In fact, in support of her position, the Appellee merely sets forth and supposes a “doom and gloom” scenario, whereby the tort of negligent credentialing would be left without any substance if the Appellant's Proposition of Law were adopted. Those assertions are nothing more than scare tactics, however, and are simply not based on reality. To reach that conclusion, one need only consider the fact that under existing law a plaintiff is already charged with having to prove the negligence of the subject physician before she can prevail on a negligent credentialing claim. In other words, the Proposition of Law does not impose a new burden on a patient-plaintiff. It simply requires a logical, sequential, and fair procedural course to be afforded to Ohio's Hospitals, by requiring a patient to establish physician negligence first, turning to a credentialing-based claim only if and when appropriate. The Appellee's approach, on the other hand, leads to an illogical and unfair burden being placed on Hospitals, by requiring them to spend time and limited resources on defending against a claim of professional negligence on behalf of a non-employee physician, over whom it had neither the duty nor right to control; a mandate that, thus far, this Court has refused to impose. *Albain*, supra, at 259.

In taking that position, the Appellee urges this Court to believe that forcing hospitals to take on this task is not really burdensome at all, claiming that a doctor's cooperation with a

hospital in the defense of a claim of professional negligence is natural, in that the doctor's livelihood and reputation "depend" on it. However, where a physician has no personal exposure, either because they are not a party to the suit or for some other reason (as in this case), there is no guarantee or even likelihood that a physician will cooperate, be engaged or otherwise committed to the defense of the claim of medical negligence. In that event, the hospital would have no choice but to take the reins in defending the medical negligence aspect of case, would be forced to hire experts to look at the issue of whether the doctor's care and treatment was substandard and, if it was not, defend the case through trial, all the while having no commitment or guarantee that the subject physician will even be a willing participant.

Perhaps due to the inherent weakness of her position, the Appellee's Merit Brief consists of page after page of statements not supported by fact. For example, she claims at Page 9 of her Brief that "[r]equiring a prior finding, admission or stipulation to negligence by the alleged physician would abolish negligent credentialing." Nothing could be farther from the truth. To the contrary, the practical effect of such a requirement would be to ensure that Hospital's are facing claims of negligent credentialing only in cases where they should be. In short, negligent credentialing claims that should be pursued, will be pursued. They will simply be pursued in a logical, well-reasoned order, and under circumstances where a plaintiff has the ability to meet her burden and establish each and every element of her claim.

Next, the Appellee states that "[c]ourts across this State have generally protected hospitals in situations such as this by bifurcating the negligent credentialing claim from the malpractice claim." *See* Appellee's Merit Brief at Page 9. Although that may "generally" be the case, it is not always. Moreover, plaintiffs routinely, as the Appellee did in this case, fight those requests by defendant-hospitals, which can lead to an inconsistent and unpredictable procedural

course from one trial court to the next. That type of inconsistency is exactly what the proposed Rule of Law would protect against. Specifically, if bifurcation is the appropriate approach, which the Appellee seems to be implying or arguing for in her Brief, it is only logical for this Court to establish a set rule of law, applicable evenly across the board to all courts, that requires a plaintiff to establish a prior adjudication, admission, or stipulation of negligence by the defendant physician before a negligent credentialing claim becomes ripe. The end result is simply a formal “bifurcation” rule, where a plaintiff would have to establish her claim of medical negligence against the subject physician first, moving to a negligent credentialing claim against a Hospital only if she was successful in her claim against the physician. Where, as in this case, the plaintiff chose not to pursue her claim against the physician directly, and/or failed to obtain a finding (whether through adjudication, admission, or stipulation) of medical negligence, she would be barred from pursuing a negligent credentialing claim.

The Appellee next asserts that it would somehow promote (rather than hinder) judicial economy to try a case of medical negligence within a case of negligent credentialing. *See* Appellee’s Merit Brief at Page 17. That is simply absurd. Clearly, both judicial economy and fundamental fairness to the Hospital requires that a plaintiff be in a position to prove all elements of a claim before proceeding with a case. Because physician negligence is a necessary element of a valid claim for negligent credentialing and because it is an “independent cause of action,” a plaintiff should be required to establish that first and only if she can do that should she be permitted to pursue a claim regarding the credentialing of that physician.

Finally, the Appellee takes great liberty in establishing her set of “supplemental facts” which are not properly before this Court, in that they were never established at the trial court level in this case. *See* Appellee’s Merit Brief at Pages 1-3, and 19. Specifically, Appellee talks

about “ample evidence” in support of a negligent credentialing claim based on Dr. Humphrey’s “criminal tendencies” and his alleged “fragile mental state.” Those claims however, even if they were established in the record below, would not be relevant to this Court’s analysis on the specific Proposition of Law presented and are mere red herrings designed to garner sympathy and divert the Court’s attention from the common sense and logical outcome that would flow from the adoption of the legal proposition at issue.

Despite the blanket, unsupported statements and “facts” strung throughout the Appellee’s brief, the issue before this Court is really simple: should a Hospital in the State of Ohio be forced to defend against claims of medical negligence on behalf of non-employee physicians? Stated differently, is this Court prepared to overturn well-established rules of law and require Ohio Hospitals to become the “insurers” of non-employee physicians over whom they have neither right nor duty to control? The answer to these questions must be an unequivocal “No.”

Despite the impression that the Appellee give in her brief, at no time has the Appellant argued that a tort of negligent credentialing is not a distinct and separate claim from a claim of medical negligence. Indeed, the Appellant concedes that that is well-established by this Court. *Browning v. Burt* (1993), 66 Ohio St. 3d 544, 563. That does not mean, however, that the latter is not dependent upon the former, which is the precise point that the Appellant believes that Chief Justice Moyer was trying to articulate in his *Browning* concurrence and dissent, when he stated that the majority had “underemphasized” the crucial point that negligent retention claims are dependent on an underlying malpractice claim against the staff physician. *Id.* at 566 (Moyer, C.J. dissenting). Indeed, the Chief Justice specifically noted that “*Albain* requires that the underlying malpractice of the physician be proven before the plaintiff can recover damages against the hospital for its own negligence.” *Id.* (Emphasis added).

At a time when there is a need to find a solution to the soaring costs plaguing the healthcare industry, the Appellant's Proposition of Law is logical and well-reasoned. More importantly, it is consistent with established law and the well-established principle that a "hospital is not an *insurer* of the skills of the physicians to who it has granted staff privileges." *Albain*, *supra*, at 259. (Italic emphasis in original, underlined emphasis added). Justice Wright made a good point when he quoted his former colleague, Justice Locher, in his dissent in *Clark v. Southview* (1994), 68 Ohio St.3d 435, noting "[t]he battle cry in this era of burgeoning litigation is 'sue, sue, sue!' 'Deep pocket' suits are upon us but for little purpose." *Id.* at 449. The health care industry simply cannot afford to become an insurer for staff physicians, nor can the patients they serve be allowed to go after them for their "deep pockets" on premature claims for credentialing without established wrongdoing first by the subject physician. To hold otherwise would lead to enormous increases in an already prohibitively expensive health care system.

The amici, Ohio Hospital Association and the Ohio Osteopathic Hospital Association, provided this Court with some astounding statistics in their Brief that are worth repeating. Specifically, 80% of the 4,004 medical malpractice claims closed in Ohio 2006, were closed without negligence having been established. *See* Brief of Amici at Page 16. The average cost to defend each case was \$25,672.00. *Id.* That amounts to roughly eighty-two million dollars (\$82,000,000) spent in one year to defend malpractice actions that resulted in no payment to the plaintiff. *Id.* To force hospitals to take on more than its share of that burdensome cost by forcing it defend not only the negligent credentialing claim against it, but also the underlying medical negligence claims of non-employee physicians will further impair an already broken system. The better solution, and one that is based soundly on existing Ohio law, fairness, and common sense, would be to require a prior finding, through adjudication, admission, or

stipulation of negligence by the subject physician, before a plaintiff can proceed with a negligence credentialing claim against a Hospital. Where a plaintiff forgoes obtaining such a finding directly against the physician (by prematurely dismissing him as the Appellee did in this case, for example), this Court must make it clear that she is barred from proceeding with a negligence credential claim.

CONCLUSION

In an era of tort reform designed to address the rising costs of medical care, it would be contrary to public policy to force Hospitals to spend their already limited resources on defending against malpractice claims on behalf of non-employee physicians whose actions it did not have the right or duty to control. Adopting Appellant's Proposition of Law is in accord with this Court's prior decisions, judicial economy, and the ideals of fundamental fairness. Accordingly, the Appellant requests that this Court adopt the Proposition of Law, thereby reversing the decision of the Court of Appeals and reinstating the decision of the trial court. In doing so, the Court will create uniform application of these legal principles and establish a sound and logic procedural course for the pursuit of negligence credentialing claims in this State.

Respectfully submitted,

Jeanne Mullin (by g.j.m.)

Jeanne M. Mullin, Esq. (0071131)
Reminger Co., L.P.A. 0074380
237 West Washington Row, 2nd Floor
Sandusky, Ohio 44870
Phone: (419) 609-1311
Fax: (419) 626-4805
E-Mail: jmullin@reminger.com

Counsel for Appellant, Community
Hospitals of Williams County

CERTIFICATE OF SERVICE

This is to certify that copy of the foregoing has been served by regular U.S. Mail with postage prepaid upon the following on this 24th day of June, 2008:

Chad Tuschman, Esq.
Williams, DeClark, Tuschman Co., L.P.A.
416 N Erie Street
500 Toledo Legal Building
Toledo, OH 43604-6301

Counsel for Plaintiff/Appellee

Catherine M. Ballard, Esq.
Anne Marie Sferra, Esq.
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215

Counsel for Amicus Curiae

Jeanne Mullin (by
Jeanne M. Mullin, Esq. (0071131) *A DM*
Counsel for Appellant, Community *0074380*
Hospitals of Williams County