STATE OF MICHIGAN

COURT OF APPEALS

DR. RICHARD COVIN,

Plaintiff-Appellant/Cross-Appellee,

v

GRAND VIEW HEALTH SYSTEMS, INC.,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
February 27, 2007

No. 271370
Gogebic Circuit Court
LC No. 06-000051-CZ

Before: Sawyer, P.J., and Neff and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the circuit court granting defendant's motion for summary disposition under MCR 2.116(C)(7). We affirm.

This Court reviews de novo the circuit court's grant of summary disposition under MCR 2.116(C)(7). *Poppen v Tovey*, 256 Mich App 351, 354; 664 NW2d 269 (2003). When deciding a motion under MCR 2.116(C)(7) based on a claim of immunity granted by law, the nonmovant's well-pleaded allegations must be considered true. A court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the nonmovant's favor and the motion should not be granted unless no factual development could provide a basis for recovery. *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (1999).

Plaintiff first argues that the peer review immunity statute, MCL 331.531, does not protect defendant because the immunity provided therein extends only to communications made in the peer review process and to the participants who make them, not to the hospital that makes the ultimate decision on staffing credential questions. We first note that this specific argument was not advanced below. Further, although plaintiff's statement of the law is correct, *Feyz v Mercy Memorial Hospital,* 475 Mich 663, 688-689; 719 NW2d 1 (2006), plaintiff's libel claim is addressed to defendant's communications, not its decision on staff credentials.

"The fundamental aim of statutory construction is to give effect to the intent of the Legislature." *Diamond v Witherspoon*, 265 Mich App 673, 684; 696 NW2d 770 (2005). Courts "must look at the specific statutory language and, if it is '"clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written."'"

Id., quoting *Erb Lumber, Inc v Gidley*, 234 Mich App 387, 392; 594 NW2d 81 (1999) (quoting *USAA Ins Co v Houston Gen Ins Co*, 220 Mich App 386, 389; 559 NW2d 98 [1996]).

MCL 331.531 provides in pertinent part:

> (1) A person, organization, or entity may provide to a review entity information or data relating to the physical or psychological condition of a person, the necessity, appropriateness, or quality of health care rendered to a person, or the qualifications, competence, or performance of a health care provider.
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> (2) As used in this section, "review entity" means 1 of the following:
>
> (a) A duly appointed peer review committee of 1 of the following:
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> * * *
>
> (iii) A health facility or agency licensed under article 17 of the public health code, . . . MCL 333.20101 to 333.22260.[1]
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> * * *
>
> (e) An organization established by a state association of hospitals or physicians, or both, that collects and verifies the authenticity of documents and other data concerning the qualifications, competence, or performance of licensed health care professionals and that acts as a health facility's agent pursuant to the health care quality improvement act of 1986, [42 USC 11101 to 11152.]
>
> (f) A professional corporation, limited liability partnership, or partnership consisting of 10 or more allopathic physicians and surgeons licensed under article 15 or the public health code, 1978 PA 368, MCL 333.16101 to 333.18838, who regularly practice peer review consistent with the requirements of article 17 of the public health code, 1978 PA 368, MCL 333.20101 to 333.22260. [MCL 331.531(1), (2)(a)(iii), (2)(e)-(f).]

With the exception of malice, MCL 331.531 expressly grants immunity for any acts or communications made by a "person, organization, or entity" within its scope as a review entity:

> (3) A person, organization, or entity is not civilly or criminally liable:
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> (a) For providing information or data pursuant to subsection (1).
>
> (b) For an act or communication within its scope as a review entity.

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[1] Article 17 pertains to licensing, certification, and requirements for health care "facilities and agencies." MCL 333.20101 to 333.22260.

> (c) For releasing or publishing a record of the proceedings, or of the reports, findings, or conclusions of a review entity, subject to [MCL 331.532] and [MCL 331.533].
>
> (4) The immunity from liability provided under subsection (3) does not apply to a person, organization, or entity that acts with malice. [MCL 331.531(3), (4).]

In this case, the parties do not dispute that defendant is a "health facility or agency licensed under article 17 of the public health code," MCL 331.531(2)(a)(iii), or that the peer review committee in issue is a "review entity" under MCL 335.531(2). Thus, the question to be considered is whether defendant is immune under MCL 331.531 for reporting the findings of the peer review committee to the NPDB.

MCL 331.532 provides for instances where the release of information is permitted, including the following:

> The release or publication of a record of the proceedings or of the reports, findings, and conclusions of a review entity shall be for 1 or more of the following purposes:
>
> (a) To advance health care research or health care education.
>
> (b) To maintain the standards of the health care professions.
>
> (c) To protect the financial integrity of any governmentally funded program.
>
> (d) To provide evidence relating to the ethics or discipline of a health care provider, entity, or practitioner.
>
> (e) To review the qualifications, competence, and performance of a health care professional with respect to the selection and appointment of the health care professional to the medical staff of a health facility. . . .

In this case, defendant released the reports to the NPDB. The facts indicate that the NPDB may make these reports available to other health care organizations if and when plaintiff is considered for a position at another health care facility. As defendant points out, federal law requires reporting "a professional review action that adversely affects the clinical privileges of a physician for longer than 30 days" to the Board of Medical Examiners, including the physician's name, "a description of the acts or omissions or other reasons for the action, if known," and "such other information respecting the circumstances of the action." 42 USC 11133(a)(1), (3). In turn, hospitals are required to query the agency and obtain such information reported when a physician applies for, and before they are granted, staff privileges by the hospital. 42 USC 11135(a).

Based on the foregoing, we conclude that defendant's release of the "reports, findings, and conclusions" of its peer review entity was within the immunity granted by MCL 331.531 absent a showing of malice. MCL 331.351(3)(c).[2]

In *Feyz*, *supra,* our Supreme Court held that "statutory immunity accorded to peer review activities does not apply 'if the person supplying information or data does so with knowledge of its falsity or with reckless disregard of its truth or falsity.'" *Feyz*, *supra* at 667, quoting *Veldhuis v Allan*, 161 Mich App 131, 136-137; 416 NW2d 347 (1987). Plaintiff has never disputed the accuracy of defendant's determination that he had been arrested for carrying a concealed weapon into the medical offices of his former employer, which were adjacent to surgical offices operated by the hospital and a few hundred feet from the hospital itself. Nor has plaintiff disagreed that this action was in violation of hospital bylaws. Rather, plaintiff has consistently argued that he was not exercising his medical privileges or treating patients at the time of the incident. Defendant does not dispute this, and indeed concedes that plaintiff was not active as a physician at the time of the incident, although his hospital privileges, which were the subject of the summary suspension, were in effect at the time.[3] Plaintiff argues that defendant's use of the code indicating "unprofessional conduct" in reporting the suspension to the NPDB was malicious because the NPDB code in issue contemplates that the unprofessional conduct take place while the physician was acting in his capacity as a physician, and defendant was fully aware plaintiff was not exercising his medical privileges or treating patients at that time.

The NPDB provides specific reporting codes used to identify the bases for action, including suspension, taken by professional review boards. In this case, defendant reported plaintiff's suspension under code 10, which is entitled "Unprofessional Conduct." Specifically, defendant indicated that it had suspended plaintiff's privileges for "failure to meet and/or discharge the basic qualifications or responsibilities of medical staff membership." Plaintiff argues that employing this code is inappropriate in this instance because it is included in a grouping of reporting codes that specifically relate to on-the-job misconduct.

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[2] Our Supreme Court's decision in *Feyz, supra*, does not affect this conclusion. In *Feyz*, the plaintiff physician asserted a breach of contract and civil rights claim against the defendant hospital for limiting his staff privileges because of actions the plaintiff took against hospital orders. 475 Mich at 667-670. Our Supreme Court held that the immunity provided by MCL 331.531(3)(b) did not apply to the defendant hospital because the defendant hospital itself was not a "peer review entity" as defined by the statute. *Id*. at 678-680. However, the *Feyz* Court also noted the immunity generally granted by subsections (3)(a) and (3)(c), observing that "*those* who release or publish a record of peer review proceedings" had immunity. *Id*. at 682 (emphasis added). The language used by the Court in explaining the subsections, coupled with the fact that the Court also noted the underlying policies of "promot[ing] free communications" and "proper publication of peer review materials" as bases for granting immunity, supports the conclusion that defendant in this case is immune for releasing the committee's findings to the NPDB. *Id*. at 685.

[3] The record indicates plaintiff's inactive status was attributable to a disability.

Code 10 ("Unprofessional Conduct") is categorized under the heading "Misconduct or Abuse." Several codes also included under the "Misconduct or Abuse" category tend to indicate that this category presupposes the cited physician was acting in the scope of his employment as a physician during the conduct that gave rise to discipline. For example, code 71, "Conflict of Interest," and code D2, "Non-Sexual Dual Relationship or Boundary Violation," both imply that the physician was serving in the role of physician when he engaged in the questionable conduct. Nevertheless, Code 10 does not so state, and, in all events, it is not unreasonable to conclude that displaying a weapon in a doctor's office adjacent to the surgical offices of the hospital constitutes unprofessional conduct, whether or not the doctor is then actively practicing. Further, defendant notified plaintiff of the code it intended to use, and plaintiff did not suggest an alternative code.

To the extent plaintiff's complaint alleges a breach of contract, that claim also does not challenge the decision regarding credentials, but rather the method of its implementation. Defendant voluntarily relinquished his privileges and does not seek to have them restored. Further, although plaintiff claims that defendant's summary action was a breach of contract, the actions were taken pursuant to its by-laws, and defendant made every effort to notify plaintiff of its action and his rights, including alerting him to the fact that a suspension of thirty days would have to be reported.

Plaintiff also argues the circuit court improperly granted summary disposition because no discovery had been conducted and that, as a result, plaintiff was substantially prejudiced because he was forced to argue defendant's motion for summary disposition without having had an opportunity to bring out factual circumstances and fully develop factual disputes. However, the facts were not in dispute, and plaintiff has failed to identify any discovery that might have affected the outcome of the motion.

Affirmed.

/s/ David H. Sawyer
/s/ Janet T. Neff
/s/ Helene N. White