RENDERED: MARCH 11, 2016; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000842-MR
AND
NO. 2013-CA-000912-MR

JOSEPH PAUL SPALDING AND
JOYCE SPALDING — APPELLANTS/CROSS-APPELLEES

APPEAL AND CROSS-APPEAL FROM MARION CIRCUIT COURT
v. HONORABLE DAN KELLY, JUDGE
ACTION NO. 10-CI-00011

SPRING VIEW HOSPITAL, LLC — APPELLEE/CROSS-APPELLANT

AND NO. 2013-CA-000983-MR

HELEN ADAMS — APPELLANT

APPEAL FROM PULASKI CIRCUIT COURT
v. HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 09-CI-01471

LAKE CUMBERLAND
REGIONAL HOSPITAL, LLC — APPELLEE

AND NO. 2014-CA-000600-MR
AND
NO. 2014-CA-000707-MR

KAREN JONES (NOW EPLEY) APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM MARION CIRCUIT COURT
v. HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 10-CI-00208

SPRING VIEW HOSPITAL, LLC APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING AS TO NOS. 2013-CA-000842-MR AND 2013-CA-000912-MR;
AND REVERSING AND REMANDING AS TO
NOS. 2014-CA-000600-MR, 2014-CA-000707-MR, AND
2013-CA-000983-MR

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; MAZE AND THOMPSON, JUDGES.

MAZE, JUDGE: These five consolidated appeals arise from three cases which originated in the Marion and Pulaski Circuit Courts. In three of the appeals, Karen Jones and Helen Adams seek reversal of two trial courts' dismissals of their claims under CR[1] 12, while Spring View Hospital, LLC (hereinafter "Spring View") cross-appeals on a statute of limitations issue in Jones's case. In the remaining two appeals, Joseph Spalding and his wife (hereinafter "the Spaldings") appeal from the grant of partial summary judgment on their claims of negligent credentialing against Spring View, which appeals from the denial of summary judgment on other

[1] Kentucky Rules of Civil Procedure.

grounds. The trial courts in all three cases held that the claims of negligent credentialing were unsustainable and unrecognized under current law.

Having reviewed the well-pled- and well-argued issues addressed to us from counsel for all parties, we affirm the Marion Circuit Court regarding partial summary judgment in the Spaldings' case; we affirm that same court's denial of summary judgment in favor of Spring View in Jones's case; and we reverse and remand the respective orders of the Marion and Pulaski Circuit Courts dismissing Jones's and Adams's negligent credentialing actions.

Background

I. Dr. Daniel Bailey and Spring View

Spring View is a hospital in Lebanon, Kentucky, accredited by the Joint Commission on Accreditation of Hospitals and subject to its Standards for Credentialing and Privileging. These guidelines provide that hospital governing authorities must, *inter alia*, draft and enforce bylaws outlining the credentialing process, "provide[] for a uniform quality of patient care, treatment, and services[,]" and "collect[] information regarding each practitioner's current license status, training, experience, competence and ability to perform the requested privilege."

Pursuant to these guidelines, Spring View's bylaws required that members of its active medical staff

> must be Board certified in the specialty for which they seek privileges, or have successfully completed a residency training program … in the specialty for which

> they are applying for privileges; or be board certified or board admissible by one of [several] specialty boards in the specialty for which the practitioner is applying for privileges. Members of the active staff must obtain Board Certification by a specialty recognized by the American Board of Medical Specialties within five (5) years of becoming eligible to sit for Board exams. This requirement will be considered at time of initial appointment and at each subsequent reappointment.

In September 2006, Dr. Daniel Bailey signed a Recruiting Agreement with Spring View pursuant to which he relocated his orthopedic surgery practice from Texas to Lebanon, Kentucky. Under the terms of the Recruiting Agreement, Dr. Bailey was required to be "duly licensed as a physician in the State of Kentucky," which he soon became, and to obtain and maintain active medical staff privileges with Spring View. Dr. Bailey submitted a formal application to join Spring View's medical staff in December 2006.

In his Application for Medical Staff Appointment, Dr. Bailey disclosed his experience performing orthopedic surgery at hospitals in Texas, indicating on his application that his practice focused on, and that he specialized in, "orthopedics." However, where the application requested the "names of specialty board by which you are certified[,]" Dr. Bailey left the form blank, and he provided no documentation of his eligibility for any specialty board. Instead, Dr. Bailey noted that he was "not planning to take specialty boards."[2] At the time of his application, it had been nine years since Dr. Bailey became eligible for board exams and he was not board certified.

[2] Dr. Bailey later stated in his deposition that he sought board certification in general surgery but failed to pass, missing the minimum score by ".4 points."

After the Kentucky Board of Medical Licensure granted Dr. Bailey his license to practice in Kentucky, both the Credentials Committee and the Medical Executive Committee at Spring View reviewed Dr. Bailey's application. Following this review, both committees voted to grant Dr. Bailey provisional medical staff privileges for one year. At the end of that year, at the Credentials Committee's urging, Spring View extended Dr. Bailey's provisional period by three months. In July 2008, once again following the recommendations of its Credentials Committee and the Medical Executive Committee, Spring View granted Dr. Bailey active medical staff privileges.

A. Joseph Spalding

In January 2009, Joseph Spalding fractured his hip in a fall from a ladder. After seeking treatment at Spring View, it was determined that Mr. Spalding's injury required surgery. Dr. Bailey performed this surgery the next day and provided care during Mr. Spalding's rehabilitation.

Following Mr. Spalding's recovery, Dr. Bailey recommended that he undergo a total replacement of his knee joint. This surgery occurred on April 22, 2009. However, Mr. Spalding soon developed complications as a result of the knee replacement operation, including failure of the knee prosthesis, severe infection, and necrosis. These complications necessitated two additional surgeries, and ultimately resulted in amputation of Spalding's leg above the knee.

In January 2010, the Spaldings filed suit against Dr. Bailey and Spring View, alleging negligence and seeking compensatory, punitive, and loss of

consortium damages. The Spaldings claimed that Spring View was negligent in granting Dr. Bailey active medical staff privileges due to his lack of qualification under the hospital's own bylaws and in failing to revoke Dr. Bailey's privileges in light of alleged prior "negligent actions."

The Spaldings' claims against Dr. Bailey and Spring View proceeded through extensive discovery, including the depositions of a credentialing expert, at least one member of Spring View's Medical Executive Committee, the orthopedic physician who treated Mr. Spalding after he developed complications, and Dr. Bailey himself. Dr. Bailey filed for Chapter 7 bankruptcy in October 2011, listing Spring View and the Spaldings, among others, as creditors in his petition. The Spaldings settled their claim against Dr. Bailey in an agreement dated December 27, 2012. As a condition of this settlement, the Spaldings released Dr. Bailey and agreed to indemnify him against any future claims brought against him, including for indemnity, arising from his treatment of Mr. Spalding. Hence, only the Spaldings' claim of negligent credentialing against Spring View remained.

In November 2012, Spring View filed Motions for Summary Judgment and Judgment on the Pleadings, the latter on the basis that the Spaldings failed to assert a recognized cause of action under Kentucky law. In an April 18, 2013 order, the trial court granted Spring View's motions in part. The trial court concluded "that absent controlling precedent recognizing the tort of negligent credentialing, the hospital cannot be held responsible for the medical malpractice of a non-staff physician using its premises under the circumstances of this case."

Additionally, the trial court found that even if the Spaldings' claim of negligent credentialing were viable, it would nonetheless fail because the Spaldings could not show that Spring View violated its proposed duty of care. The Spaldings now appeal from this portion of the trial court's order. The trial court's order also rejected Spring View's arguments concerning indemnification and the Spaldings' settlement with Dr. Bailey. Spring View cross-appeals on these issues.

B. Karen Jones

Karen Jones injured her knee in a 2005 motor vehicle accident. Following the accident, Jones's primary care physician referred her to Dr. Bailey for treatment, and Jones saw Dr. Bailey for the first time in August of 2007. Dr. Bailey ultimately performed a right patellofemoral knee replacement surgery and a subsequent total right knee arthroplasty. Following surgery, Jones experienced complications and ultimately transferred to another doctor in August 2009. Jones testified that upon consulting with her new physician, Dr. Sewell, she became aware that Dr. Bailey's treatment may have caused her injury.

Employing the same attorney as the Spaldings, Jones and her husband filed suit for medical malpractice against Dr. Bailey on May 28, 2010. More than two years later, in November 2012, Jones amended her complaint to add Spring View as a defendant, alleging that the hospital was negligent in granting Dr. Bailey staff credentials. Jones later settled her claim against Dr. Bailey, leaving only her negligent credentialing claim against Spring View to be resolved.

On December 27, 2012, Spring View filed a motion for summary judgment on Jones's claims against it on the basis that the amended complaint brought claims outside the one-year statute of limitations. Specifically, Spring View challenged Jones's contention that she could not reasonably have discovered her claim against Spring View until March 30, 2012, when discovery in the Spaldings' case revealed details of Spring View's decision to credential Dr. Bailey. However, the trial court summarily denied Spring View's motion for summary judgment in a brief order entered January 11, 2013. Spring View renewed this motion after additional discovery, and the trial court once again denied it.

In January 2014, Spring View filed a motion to dismiss Jones's claim, arguing that Kentucky law did not recognize the tort of negligent credentialing. In an April 2014 order, the Marion Circuit Court agreed and granted Spring View's motion. Jones's appeal from the dismissal follows, as does Spring View's appeal from the denial of its motion for summary judgment based upon the aforementioned statute of limitations issue.

II. Dr. Guy Sava and Lake Cumberland Regional Hospital

Dr. Guy Sava has long held a license to practice medicine in Kentucky. However, prior to 2005, when he moved to Kentucky permanently, Dr. Sava practiced primarily in Ohio, Saudi Arabia, and Minnesota, specializing in neurosurgery. In 2006, Lake Cumberland Regional Hospital (hereinafter "LCRH") granted Dr. Sava provisional medical staff privileges. In evaluating Dr. Sava's application, LCRH became aware of his history of chemical dependence and

depression for which he sought treatment in 2002.[3] LCRH also sought and received peer recommendations and comments pertaining to Dr. Sava's performance as a surgeon. These recommendations came from physicians with whom Dr. Sava had previously worked, and they ranged from "recommend highly without reservation" to "recommend with some reservation." Comments of those physicians who voiced reservation included concerns over Dr. Sava's professional judgment and patient management in past cases, including those involving complex spinal surgery. LCRH ultimately granted Dr. Sava full active staff privileges in May 2007.

A. Helen Adams

Helen Adams suffered from severe back and leg pain when she sought treatment from Dr. Sava in September 2008. Dr. Sava diagnosed Adams with multiple spinal conditions and scheduled her for surgery. Dr. Sava performed a spinal stabilization procedure on Adams at LCRH on October 6, 2008. The procedure called for the insertion of hardware into Adams's back along both sides of her spine. However, complications arose during surgery. Due to Adams's osteoporosis, Dr. Sava was only able to install the hardware on one side of her spine. Adams also suffered a torn dura, the layer covering the spinal cord.

Following surgery, Adams reported severe pain and fluid collection under the skin on her back. To address these complications, Dr. Sava performed a second procedure during which he discovered and repaired a cerebrospinal fluid

[3] The record shows that no incidents of substance abuse have occurred subsequent to this treatment.

leak. Following this second procedure, Adams continued to complain of radiating pain in her right leg, right foot numbness, and right foot drop.

On October 5, 2009, Adams filed suit alleging negligence against Dr. Sava, Dr. Sava's neurosurgery clinic, and LCRH. Adams claimed that, in light of Dr. Sava's history and the comments received from his former peers during review of his application, LCRH was negligent "in extending privileges to [Dr. Sava], or in failing to suspend or terminate Dr. Sava's privileges prior to the injuries caused to [Adams]." By agreement, Adams later dismissed a portion of her claims, leaving only her claim against Dr. Sava and her claim of negligent credentialing against LCRH unresolved.

On January 30, 2013, LCRH moved the Pulaski Circuit Court for judgment on the pleadings concerning Adams's claim of negligent credentialing. The trial court granted this motion on March 1, citing Adams's failure "to aver a viable cause of action under Kentucky law." Adams's appeal follows. Further facts regarding all five appeals will be developed as required.

Analysis

On appeal, Jones, Adams, and the Spaldings each implore this Court to recognize the tort of negligent credentialing. Such recognition would compel reversal of the trial court's dismissal of Adams's claim; and it would do the same in Jones's case if we also resolve the statute of limitations question in her favor. In reviewing the dismissal of their claims, we remember that a motion to dismiss raises a question of law, and we therefore owe no deference to the trial court's

determination. *See South Woodford Water Dist. v. Byrd*, 352 S.W.3d 340, 341 (Ky. App. 2001). We afford the same *de novo* standard of review to the trial court's decision to grant summary judgment on the Spaldings' claim. *See Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000). In reviewing all three decisions, we view the record in the light most favorable to the nonmoving party. *See City of Florence v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001), and *Scearse v. Lewis*, 43 S.W.3d 287, 299-89 (Ky. App. 2001).

I. The Tort of Negligent Credentialing

The law has traditionally treated hospitals as mere venues where physicians practice not as employees but as independent contractors. Under this construct, hospitals have enjoyed legal immunity from suits surrounding the negligent actions of physicians providing services on premises. *See* Benjamin J. Vernia, *Tort Claim for Negligent Credentialing of Physician*, 98 A.L.R.5th 533 (2002). However, this legal protection has eroded. *Id*. At least twenty-eight states now recognize the tort of negligent credentialing of independent physicians by hospitals. Jurisdictions recognizing negligent credentialing generally require proof that: 1) the defendant hospital owed the patient a duty to ensure a competent medical staff; 2) the hospital breached that duty by granting privileges to an incompetent or unqualified physician; and 3) the physician caused harm to the patient. Peter Schmit, 18 Causes of Action 2d 329 (2002).

Kentucky once, very briefly, counted itself among these jurisdictions. This Court recognized the cause of action in a 2011 case; however, the Supreme

Court reversed the decision on other grounds, leaving "for another day consideration of a negligent credentialing cause of action." *Trover v. Estate of Burton*, 423 S.W.3d 165, 168 (Ky. 2014). Such consideration is upon us today.

In 1965, Illinois became the first state to recognize negligent credentialing as a viable cause of action. *See Darling v. Charleston Cmty. Mem'l Hosp.*, 211 N.E.2d 253 (Ill. 1965). Since then, at least twenty-seven other states have followed suit.[4] Notably, Indiana, Ohio, New York, California, and Texas are among these jurisdictions. *See Winona Mem'l Hosp., Ltd. P'ship v. Kuester*, 737 N.E.2d 824 (Ind. Ct. App. 2000); *Albain v. Flower Hosp.*, 553 N.E.2d 1038 (Oh. 1990); *Sledziewski v. Cioffi*, 137 A.D.2d 186 (N.Y. App. Div. 1988); *Elam v. College Park Hosp.*, 132 Cal. App. 3d 332 (1982); *Garland Cnty. Hosp. v. Rose*, 156 S.W.3d 541 (Tx. 2004).

In acknowledging negligent credentialing as a viable cause of action, state courts have provided numerous reasons. The most common thread through them all is an acknowledgement of the almost-universal shift in hospital ownership and management from small, charitable organizations to those for-profit corporations. Other jurisdictions note a progressive expansion of liability

[4] In arguing against recognition of negligent credentialing in Kentucky, Spring View and LCRH contend that this so-called "national trend" toward recognition of negligent credentialing as a viable cause of action does not compel this Court to follow suit. We agree. Our Supreme Court recently held, albeit in *dicta*, that it generally places "little weight on the absolute number of jurisdictions which have adopted a particular rule, and instead evaluate alternative rules of law based upon their merits, which may or may not correspond with their popularity among other jurisdictions." *MV Transp., Inc. v. Allgeier*, 433 S.W.3d 324, 334 n. 8 (Ky. 2014). Hence, while other jurisdictions' adoption or rejection of the tort of negligent credentialing can and will inform our analysis, we do not view its adoption as dispositive of the tort's validity in Kentucky jurisprudence. Instead, we must delve into the legal and policy-based considerations surrounding negligent credentialing.

evidenced by the recognition of torts such as negligent hiring, negligent supervision, and corporate negligence. It is worth noting that Kentucky recognizes all three of these causes of action. *See, e.g., Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705 (Ky. 2009); *Turner v. Pendennis Club*, 19 S.W.3d 117, 121-22 (Ky. App. 2000); *Oakley v. Flor-Shin, Inc.*, 964 S.W.2d 438, 442 (Ky. App. 1998).

Some state legislatures have acted to limit or negate judicial recognition of the tort. Texas's Medical Malpractice Act requires a plaintiff claiming negligent credentialing to prove the existence of malice in the hospital's decision to grant staff credentials, effectively abrogating the cause of action. The legislatures in at least two other states, Ohio and Utah, have acted to completely immunize hospitals from negligent credentialing claims following judicial recognition of the tort in those states.[5]

Hospitals in Kentucky have historically relied on two legal doctrines to remain immune from suits arising from the actions of doctors credentialed at their facilities. The so-called "charitable immunity" doctrine became the law of Kentucky in the early twentieth century when the vast majority of hospitals were funded with donations, providing medical services as a charity and realizing no profit therefrom. *Cook v. John N. Norton Mem'l Infirmary*, 202 S.W. 874, 875

[5] Prior to this legislative action, Ohio case law, more so than any other jurisdiction, was replete with precedent discussing a litany of issues related to negligent credentialing. *See, e.g., Albain v. Flower Hosp.*, 553 N.E.2d 1038 (Oh. 1990) (initially recognizing negligent credentialing in the jurisdiction); *Browning v. Burt*, 613 N.E.2d 993 (Oh. 1993) (addressing the appropriate statute of limitations on negligent credentialing claims); *Clark v. Southview Hosp. & Family Health Ctr.*, 628 N.E.2d 46 (Oh. 1994) (extending application of the tort through the doctrine of agency by estoppel).

(Ky. 1918) (citing the need to preserve "assets. . . of the institution … impressed with a trust for charitable purposes…[,]" and patients' implied waiver and assumption of risk as justification for the immunity.). Kentucky's former Court of Appeals, as the predecessor to our Supreme Court, abrogated the doctrine of charitable immunity in 1961, noting the widespread shift in the character of most hospitals from that of the charitable organizations common in 1918 to the corporate, for-profit entities of 1961. *See Mullikin v. Jewish Hosp. Ass'n of Louisville*, 348 S.W.2d 930 (Ky. 1961). In light of this, the Court announced "that principles of law, logic and intrinsic justice demand that the mantle of immunity be withdrawn." *Id*. at 933 (internal citation and quotation omitted). Even in 1961, the Court of Appeals, like many other state courts of the time, observed that what had once been charity had become "big business." *Id*. at 932.

After *Mullikin*, hospitals relied upon the long-held principle in Kentucky law that a party "is not liable for the torts. . . of [an] independent contractor" in the performance of his job. *See City of Hazard Mun. Housing Comm'n v. Hinch*, 411 S.W.2d 686, 688 (Ky. 1967); *Miles Farm Supply v. Ellis*, 878 S.W.2d 803 (Ky. App. 1994). This remains the law in Kentucky, and it is the chief principle upon which Spring View and LCRH rely in the present appeals. We will not disturb that well-founded rule today. However, such a rule does not bar relief on a claim of negligent credentialing.

Unlike defendants in cases concerning principles of agency and vicarious liability, Spring View and LCRH are alleged to have committed

independent acts of negligence. Jones, Adams, and the Spaldings did not proceed under the theories of *respondeat superior*, vicarious liability, or ostensible agency; that is, they did not seek to hold Spring View and LCRH answerable merely for the negligence of others.[6] Rather, they sought to hold each hospital directly liable for its own acts of alleged negligence.[7] It is impossible to overstate the importance of this distinction. At the very least, it shows Spring View and LCRH's spirited reliance upon principles of agency to be misplaced.

Accordingly, this, or any, court's recognition of negligent credentialing is the last major hurdle the plaintiffs in these cases must clear before

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[6] Though distinguishable from the present claims, it is worth noting that the Supreme Court of Kentucky has permitted plaintiffs to proceed under the theory of ostensible agency against a hospital for negligent care provided by an emergency room physician, an independent contractor. *See Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985). The Court did so on the basis that the hospital held its physician out as its employee and not its independent contractor; that the plaintiff reasonably relied on this representation to her detriment; and that it was unreasonable to expect a patient to inquire as to the difference prior to seeking emergency medical treatment.

[7] In demonstrating this distinction, we could hardly improve, but by no means exclusively rely, upon a comparison drawn by the Supreme Court of Georgia in recognizing the tort of negligent credentialing for the first time in that state:

> …the plaintiff does not seek to hold the [hospital] liable under the doctrine of respondeat superior or principal and agent, but upon the doctrine of independent negligence in permitting the alleged negligent physician to practice his profession in the hospital, when his incompetency is known. Such negligence is comparable to that of the owner of a motor vehicle permitting an incompetent, inexperienced, or reckless driver to operate such motor vehicle. … [I]n such cases the mere permission is insufficient to hold the owner liable without actionable negligence by the operator, yet
>
> each is held for his independent acts and not as master and servant or principal and agent.

Mitchell Cnty. Hosp. Auth. v. Joiner, 189 S.E.2d 412, 414 (1972) (internal citation omitted).

the merits of their claims can be considered. Because Jones, Adams, and the Spaldings assert direct and not vicarious liability against Spring View and LCRH, we believe the ultimate question of recognition is best framed in terms of corporate negligence. In the present context, corporate negligence "is a doctrine under which the hospital is liable if it fails to uphold the proper standard of care owed the patient, 'which is to ensure the patient's safety and well-being while at the hospital.'" Barry A. Lindahl, 3 Modern Tort Law: Liability and Litigation § 25:142 (2d ed), quoting *Thompson v. Nason Hosp.*, 591 A.2d 703, 707 (Pa. 1991). This doctrine is based, in part, on the public policy that hospitals are charged with protecting those who enter their facilities and "thus have an independent duty to select and retain competent independent physicians." *Id.*, citing to *Insinga v. LaBella*, 543 So.2d 209 (Fla. 1989). It also finds its origins in the acknowledgment by courts, like the Kentucky Court of Appeals in *Mullikin*, that hospitals have become corporate, not charitable, entities. *See also Pedroza v. Bryant*, 677 P.2d 166, 169 (Wash. 1984) (validating a corporate negligence claim regarding credentialing in part because "[t]he community hospital has evolved into a corporate institution….").

Spring View and LCRH offer various policy-based arguments against recognition of negligent credentialing under this and other common law theories. They first contend that such a cause of action would negatively, even disproportionately, affect rural hospitals' ability to recruit doctors and would result in a broader "chilling effect" on the participation of credentialing committee

members due to concerns of personal liability. While we do not take these concerns lightly, they are nonetheless too speculative and tenuous to bar recognition of the tort under the facts presented to us in these appeals.

Spring View and LCRH also argue that subjecting healthcare facilities to liability for credentialing decisions would add to the already exorbitant cost of healthcare in Kentucky and would effectively make hospitals the insurers of the physicians with which they have merely contracted. This would be true if we were proposing to hold hospitals vicariously liable for the negligent actions of their independent contractors. That is not what is proposed. Rather, the tort we are asked to recognize, and the cause of action from which Spring View and LCRH beg protection, would impose liability upon a hospital for its own decision to credential a physician the hospital knew or reasonably should have known was incompetent. Thus, hospitals would be liable for, and would insure themselves against, only their own negligence. This is not a novel or irrational concept, nor is it necessarily bad public policy. In fact, it is a standard to which our laws and courts hold other individuals, other professionals, and other corporations.

LCRH also expresses concern that, if combined and tried with medical malpractice claims, negligent credentialing claims could give rise to the introduction of potentially irrelevant or prejudicial evidence concerning a physician's background or a credentialing committee's decision-making process. Among the present facts, Dr. Sava's history of chemical dependency best exemplifies this potential problem. However, we are confident that faithful

application of the Rules of Evidence, especially those concerning relevance, would provide sufficient protection regarding this concern.

Spring View next argues that KRS[8] 311.555 and other statutes demonstrate the General Assembly's belief that the Kentucky Board of Medical Licensure (hereinafter "the Board") is in the best position to regulate those it allows to practice medicine in the Commonwealth; and that it is the exclusive task of the Board, not hospitals, to investigate a physician's credentials, past conduct, malpractice history, or other potentially concerning background information. The Spaldings respond that Kentucky statutes and regulations establish "a strong public policy" in favor of maintaining the level of care and preventing incompetent physicians from practicing at hospitals. Specifically, the Spaldings cite to KRS 216B.042,[9] which sets out the duties of the Cabinet for Health and Family Services in regulating hospitals and similar facilities.

KRS 311.555 and KRS 216B show Spring View's argument to be unpersuasive. It is true that the General Assembly has declared, "the judiciary of the Commonwealth of Kentucky … shall not interfere or enjoin the board's actions…." KRS 311.555. However, the plaintiffs in the present appeals did not

[8] Kentucky Revised Statutes.

[9] Among these are the responsibilities to "[i]ssue, deny, revoke, modify, or suspend licenses or provisional licenses" and to establish "licensure standards and procedures to ensure safe, adequate, and efficient abortion facilities, health facilities and health services." The statute further requires that such standards and procedures must govern "[p]atient care standards and safety standards, minimum operating standards, minimum standards for training, required licenses for medical staff personnel, and minimum standards for maintaining patient records; [and] [l]icensure application and renewal procedures …."

sue the Board for its decisions to license Drs. Bailey and Sava; and this Court does not seek to interfere with those decisions. The present claims are against Spring View and LCRH for *their* allegedly negligent actions – nothing more.

Furthermore, we reject Spring View's argument to the extent that it portrays the Board's statutory responsibilities as mutually exclusive of a hospital's responsibility to evaluate a physician's fitness to perform medical services within its facility. The meaning of KRS 311.555 cannot be so expanded. Rather, KRS 311, KRS 216B, and 902 KAR[10] 20:016[11] combine to establish *both* the Board's

[10] Kentucky Administrative Regulations.

[11] 902 KAR § 20:016 defines a "governing authority" as "the individual, agency, partnership, or corporation, in which the ultimate responsibility and authority for the conduct of the institution is vested." Subsection (3)(8) of the same regulation goes on to state:

> (a) The hospital shall have a medical staff organized under bylaws approved by the governing authority. The medical staff shall be responsible to the governing authority for the quality of medical care provided to the patients and for the ethical and professional practice of its members.
> (b) The medical staff shall develop and adopt policies or bylaws, subject to the approval of the governing authority, which shall:
>
> 1. State the necessary qualifications for medical staff membership including licensure to practice medicine or dentistry in Kentucky, except for graduate physicians in their first year of hospital training;
> 2.a. Define and describe the responsibilities and duties of each category of medical staff, for example, active, associate, or courtesy;
> b. Delineate the clinical privileges of staff members and allied health professionals;
> c. Establish a procedure for granting and withdrawing staff privileges; and
> d. Credentials review;
> 3. Provide a mechanism for appeal of decisions regarding staff membership and privileges;
> 4. Provide a method for the selection of officers of the medical staff;
> 5. Establish requirements regarding the frequency of, and attendance at, general staff and department or service meetings of the medical staff;

responsibility to evaluate a physician's fitness to practice medicine within the Commonwealth and a hospital's independent ability to evaluate that physician's competency to practice within its facility.

Finally, Spring View and LCRH argue that it is the task of Kentucky's legislature, not its courts, to recognize negligent credentialing - that recognition of the tort should not be accomplished by judicial fiat. We disagree.

In the landmark case of *Hilen v. Hays*, our Supreme Court made comparative fault the law in Kentucky, noting that the vanquished doctrine of contributory negligence had been "court-made law that bears the imprimatur of neither the Kentucky constitution nor the General Assembly." 673 S.W.2d 713, 715-16 (Ky. 1984). The Court noted that, as a creation of the courts, such doctrine was subject to modification by those same courts: "The common law is not a stagnant pool, but a moving stream. It seeks to purify itself as it flows through time. The common law is our responsibility; the child of the courts. We are responsible for its direction." *Hilen* at 717, citing *City of Louisville v. Chapman*, 413 S.W.2d 74, 77 (Ky. 1967).

Largely the creation of our common law, the various concepts and causes of action under the umbrella of negligence are the courts' to direct and

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> 6. Provide for the appointment of standing and special committees, and include requirements for composition and organization, frequency of and attendance at meetings, and the minutes and reports which shall be part of the permanent records of the hospital. Committees may include: executive committee, credentials committee, medical audit committee, medical records committee, infections control committee, tissue committee, pharmacy and therapeutics committee, utilization review committee, and quality assurance committee ….

reform, albeit not imprudently. Though the General Assembly certainly possesses the power to recognize or reject negligent credentialing as a cause of action, it has yet to do so. The cases comprising this appeal present us with neither the luxury of waiting nor the opportunity to pass on the pressing legal question they place squarely before us.

In 2014, the Supreme Court left "for another day consideration of a negligent credentialing cause of action." *Trover*, 423 S.W.3d at 168. In light of all the aforementioned considerations, and seeing no legal or policy-based argument dictating otherwise, we believe that today is that day. We recognize negligent credentialing as a cause of action and as a means by which individuals can hold hospitals liable for the latter's negligent extension or renewal of staff privileges and credentials to independent contractor physicians.

We next turn to the respective trial courts' handling of Jones's and the Spaldings' claims and the individual issues their cases present. Concerning Adams, no issues beyond recognition of her chosen cause of action remain; hence, we reverse the Pulaski Circuit Court's dismissal of her claim, and we remand to that court for further proceedings.

II. Summary Judgment on the Spaldings' Claims

In granting partial summary judgment in favor of Spring View, the Marion Circuit Court declined to recognize the tort of negligent credentialing in the absence of appellate precedent favoring it. We have now provided that precedent. However, the trial court also granted summary judgment based on

Spring View's standard of care, and it briefly addressed a question Spring View raised concerning circular indemnification. Our recognition of negligent credentialing notwithstanding, we address the former and the latter if necessary.

Reviewing the Marion Circuit Court's grant of partial summary judgment, we remember that such a remedy is proper only when the movant shows that the adverse party cannot prevail under any circumstances. *Rose*, 683 S.W.2d at 256. Therefore, we will affirm only "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03.

A. Dr. Bailey's Standard of Care

The standard of care in a negligent credentialing claim is one of reasonable care under the same or similar circumstances. Vernia, 98 A.L.R.5th at 553. Applying principles of corporate negligence to the tort of negligent credentialing, a hospital owes a duty to use reasonable care in maintaining safe and adequate facilities and equipment; to select and retain only competent physicians; to supervise all persons practicing medicine within the hospital; and to formulate, adopt, and enforce adequate rules and policies to ensure quality patient care. *See* Colleen K. Sanson, *Cause of Action Against Hospital for Negligent Selection or Supervision of Medical Staff Member*, 32 Causes of Action 2d 1 (2006). The hospital's duty arises from the foreseeability of an unreasonable risk of danger to a

patient stemming from the granting of staff privileges to doctors who create an unreasonable risk of danger to patients. Vernia at 557.

At least one jurisdiction recognizing negligent credentialing under the theory of corporate negligence requires that, unless a hospital's negligence is obvious, a plaintiff must produce expert testimony to establish a deviation from the accepted standard of care and that the deviation was a substantial factor in causing the plaintiff's injuries. *Id*., citing to *Welsh v. Burger*, 698 A.2d 581 (Pa. 1997). In the context of medical negligence cases, Kentucky law contains the same requirement. *See Blankenship v. Collier*, 302 S.W.3d 665, 670 (Ky. 2010), citing *Perkins v. Hausladen*, 828 S.W.2d 652 (Ky. 1992). As the practice and process of evaluating physicians "is not within the scope of common experience of jurors," we see no reason this should not be the case with hospitals in negligent credentialing cases, as well. *Blankenship* at 671, quoting *Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W.3d 676, 680-81 (Ky. 2005). Plaintiffs like the Spaldings must provide expert testimony to support their claim that a hospital failed to meet its standard of care in credentialing a physician.

Spring View argues that the Spaldings failed to establish genuine issues of fact concerning breach of its standard of care, pointing to the following testimony from the Spaldings' credentialing expert, Kathy Matzka:

> COUNSEL: Well, you don't think there is a standard of care for credentialing physicians in the

country? You think that each hospital has its own standard, then?

MATZKA: Each hospital – there is a minimum requirement, but then some hospitals go above and beyond, yes.

COUNSEL: Okay.

MATZKA: So there is a minimum requirement that – a minimum standard that each hospital should meet.

COUNSEL: Did this hospital meet that minimum standard?

MATZKA: It didn't meet – it met it as far as its credentialing practices.…

This is damning testimony; however, Matzka testified that she believed the Medical Executive Committee and "the Credentials Committee as a whole" failed to meet their "quality of care" in granting staff privileges to Dr. Bailey because "he didn't meet the qualifications."

Ms. Matzka also pointed out in her deposition that Spring View had bylaws which complied with the standards of the Joint Commission on Accreditation of Hospitals. However, her testimony regarding the hospital's bylaws and their implications for the appropriate standard of care also raises concern. Matzka stated as follows:

COUNSEL: All right. So – and you understand what you're giving opinions on are the standard of care, not something that's the highest bar, correct?

MATZKA: Well, that's true, but I feel that the bylaws, the rules and regulations, credentialing processes that a hospital puts in place or a medical staff puts in place for itself do set the standard of care for that facility. If you set the bar high, then you should – you do it for a reason.

COUNSEL: Right. But the standard of care is what a reasonably competent hospital would do under the same or similar circumstances. Do you understand that to be the standard of care or something different?

MATZKA: Well, I understand that to be the reasonableness standard, but I feel if somebody sets the bar higher that they should meet their own requirements. I feel that it's a standard of care throughout hospitals when they require something in their bylaws. Now, accreditation standards set minimum requirements. The regulatory guidelines, they set minimum requirements. Each hospital and medical staff sets its own requirements, and the standard of care is that you meet – you follow the requirements that you set for your facility.

COUNSEL: So, to be fair, you are not giving an opinion in this case on what a national standard of care is for credentialing. What you're doing is saying you're going to give opinions whether this particular hospital followed its medical staff bylaws. Fair enough?

MATZKA: Well, the standard of care is that you meet your own bylaws.

The Spaldings assert that Matzka's testimony, when viewed in its entirety, establishes both Spring View's standard of care and its violation thereof. Having thoroughly reviewed Matzka's testimony, we must disagree.

It is our task to determine whether the record contains genuine issues of material fact which would entitle Spring View to judgment as a matter of law. CR 56.03; *see also Steelvest*, 807 S.W.2d at 480. Whether the appropriate standard of care is an objective or subjective one is undoubtedly a question of law; and Matzka's testimony indicated her confusion as to the answer.

The standard we outline *supra*, and that our courts have previously enunciated in cases of hospital negligence, is objective. It is not based solely upon a hospital's own bylaws. *See Rogers v. Kasdan*, 612 S.W.2d 133, 136 (Ky. 1981) (holding that the use of each of a corporate defendant's policies to establish special duties created "the false impression that unless all these procedures were complied with exactly, the hospital breached its duty. The effect [of doing so in a jury instruction] was to demand more of the hospital than the law requires.").

The Spaldings enthusiastically point out that this Court has held that "bylaws perform the same function as evidence of custom and practice. Although the bylaws [do] not conclusively determine the standard of care, they [are] evidence of the responsibility which the hospital assumed for the care of the patient[.]" *Williams v. St. Claire Med. Ctr.*, 657 S.W.2d 590, 595 (Ky. App. 1983). However, the Spaldings' reliance on *Williams* is misplaced. *Williams* established that a hospital's bylaws are relevant to its compliance with the appropriate standard of care; but that they do not – indeed they cannot – single-handedly *establish* that standard of care. Matzka's testimony as a whole fails to recognize this vital fact.

Matzka stated or insinuated several times that Spring View's own bylaws, not an objective state or national standard, established the appropriate standard of care. Of utmost concern, Matzka stated that if a hospital establishes bylaws which exceed the minimum standard, the hospital is held to the higher standard set under its bylaws, not the objectively reasonable, minimum standard. This is patently wrong, and it casts considerable doubt over what exactly Matzka

meant when she testified that Spring View and its credentialing authorities violated the standard of care. At the very least, it demonstrates a fundamental flaw in Matzka's understanding of the appropriate standard of care and whether Spring View's decision to credential Dr. Bailey fell below that standard.

This being the case, the Spaldings failed to provide sufficient expert testimony to establish Spring View's standard of care and a deviation therefrom. In the absence of evidence on this question of law lying at the heart of the Spaldings' negligent credentialing claim, we can find no error in the trial court's conclusion that summary judgment was appropriate.

B. Indemnification and the Spaldings' Settlement with Dr. Bailey

In its cross-appeal, Spring View asserts that, even if we recognize negligent credentialing as a viable cause of action under Kentucky law, the doctrine of circular indemnification prevented the Spaldings' recovery and entitled Spring View to judgment as a matter of law. Spring View further argues that because the Spaldings' settlement with Dr. Bailey included no admission of wrongdoing, the Spaldings cannot prove an essential element of their negligent credentialing claim. The trial court disagreed regarding both arguments and denied Spring View's motion for summary judgment. Our holding that Spring View was entitled to summary judgment regarding its standard of care renders the issue of indemnification moot and our consideration of it unnecessary. However, we will briefly address the implications of the Spaldings' settlement with Dr. Bailey.

The Spaldings were required to prove 1) that Spring View owed them a duty to ensure a competent medical staff; 2) that Spring View breached that duty by granting privileges to an incompetent or unqualified physician; and 3) that Dr. Bailey caused harm to the patient. Peter Schmit, 18 Causes of Action 2d 329 (2002). Proof of the latter element would not necessarily require, as Spring View contends, an admission of wrongdoing by Dr. Bailey or a finding of liability against him. Injury and causation can be proven by other means.

A plaintiff must show as part of her *prima facie* claim of negligent credentialing that the physician's treatment caused her harm and that the hospital's negligence was a substantial factor in bringing about the harm. However, the aforementioned crucial distinction between a medical negligence claim against a physician and a negligent credentialing or corporate negligence claim against a hospital once again comes into play. Under the latter claim, a plaintiff is not required to prove breach of the physician's independent duty before she may recover on the negligent credentialing claim. The elements of the separate and distinct causes of action against Dr. Bailey and Spring View cannot be so conflated. In sum, we agree very generally with the trial court[12] that a plaintiff's settlement with a physician would not preclude her success on a subsequent claim of negligent credentialing against a hospital.

[12] The trial court based its conclusion, at least in part, on its belief that Kentucky's apportionment statute permitted recovery. Given that we have affirmed the trial court's grant of summary judgment on other grounds, we do not take up the issue of apportionment specifically. Rather, we are confident such an issue can be resolved when it is more squarely presented.

III. Statute of Limitations in Jones's Case

In addition to seeking dismissal of Jones's chosen cause of action, Spring View sought summary judgment in Jones's case on the basis that her claim, which she filed on November 8, 2012, and more than two years after her suit against Dr. Bailey, was untimely under the appropriate statute of limitation. The Marion Circuit Court twice denied Spring View's motion based on this theory.

A. Statute of Limitations and the "Discovery Rule"

While other jurisdictions that recognize the tort of negligent credentialing have struggled to classify the tort for purposes of identifying the appropriate statute of limitations,[13] KRS 413.140 settles the matter in Kentucky. It includes among the list of actions to be brought "within one (1) year after the cause of action accrued: … An action against a physician, surgeon, dentist, or hospital licensed pursuant to KRS Chapter 216, for negligence or malpractice[.]" KRS 413.140(1)(e). Therefore, Jones's claim of negligence against Spring View was subject to a one-year statute of limitation.

However, the chronology of Jones's case presents the more complicated question of when her claim accrued. KRS 413.140(2) begins to address this issue, stating that in hospital negligence cases, "the cause of action shall be deemed to accrue at the time the injury is first discovered or in the exercise of reasonable care should have been discovered." The statute goes on to place an absolute limit of five years on the filing of any suit arising from such an injury. *Id*.

[13] *See, e.g.*, *Browning v. Burt*, 613 N.E.2d 993 (Oh. 1993).

Spring View argues that the statute of limitations and the "discovery rule" barred Jones's claim as first pled in 2012 because either Jones or her attorney was on notice of the claim against Spring View as early as 2009. Jones responds that she did not become aware of Spring View's potential negligence until 2012 when, in response to discovery in the Spalding case, the hospital admitted that Dr. Bailey did not meet the criteria for active staff credentials under its bylaws.

The "discovery rule" provides that a statute of limitation "begins to run on the date of the discovery of the injury, or from the date it should, in the exercise of ordinary care and diligence, have been discovered." *Wiseman v. Alliant Hosps., Inc.*, 37 S.W.3d 709, 712 (Ky. 2000), quoting *Hackworth v. Hart*, 474 S.W.2d 377 (Ky. 1977). The rule further entails a plaintiff's knowledge that: (1) he has been wronged; and (2) by whom the wrong was committed. *Id*., citing *Drake v. B.F. Goodrich Co.,* 782 F.2d 638, 641 (6th Cir. 1986), and *Hazel v. General Motors Corp.,* 863 F.Supp. 435, 438 (W.D. Ky. 1994). Kentucky's courts have generally refused to extend such a "discovery rule" without statutory authority to do so. *Roman Catholic Diocese of Covington v. Secter*, 966 S.W.2d 286, 288 (Ky. App. 1998). However, the Court in *Wiseman* found such authority in KRS 413.140(2). Hence, the parties in the present case do not dispute that the "discovery rule" applies to Jones's allegation of negligence against Spring View.

Spring View first contends that the one-year statute of limitation on Jones's claim began to run on August 3, 2009, when Jones learned from Dr. Sewall that other patients had complained about Dr. Bailey. However, this argument fails

to distinguish between facts and knowledge giving rise to Jones's claim against Dr. Bailey for medical malpractice and those giving rise to her negligent credentialing claim against Spring View.

For Spring View's argument to prevail, Jones would be required to glean from Dr. Sewall's August 3, 2009 statement "not only that [she] has been injured but also that [her] injury may have been caused by [Spring View]'s conduct." *Hazel*, 863 F.Supp. at 438. However, Dr. Sewall's statement gave Jones no reason to attribute Dr. Bailey's treatment of her to any action by Spring View. In sum, knowledge of other patients' complaints regarding Dr. Bailey exclusively concerned Dr. Bailey's role in causing Jones's injury, not Spring View's.

The same distinction acts to defeat Spring View's alternative argument that Jones's claim accrued when she read about the Spaldings' medical malpractice claims against Dr. Bailey in a local newspaper in 2010. Again, while Jones might have gleaned from this newspaper coverage that her complications arose from Dr. Bailey's negligence, that knowledge did not necessarily give rise to a suspicion of Spring View's negligence. Jones's deposition testimony in no way indicated that she knew of the Spaldings' claims against Spring View.

Spring View also portrays Jones's claim as untimely on the basis that her attorney, who had litigated the Spaldings' negligent credentialing case since at least 2011, had sufficient knowledge for Jones's similar claim to accrue well before it was filed. We disagree.

It is generally true that an attorney's knowledge may be imputed to his or her client. *See Lisanby v. Ill. Cent. R. Co.*, 272 S.W. 753, 755 (Ky. App. 1925); *3M Co. v. Engle*, 328 S.W.3d 184, 189 n 26 (Ky. 2010), citing 7A C.J.S. *Attorney & Client* § 225 (2015). However, this rule is subject to several exceptions. *Id*.

> Knowledge which an attorney obtained in transactions independent of his or her representation of the client is not imputed to the client, and a client is not affected with notice because of knowledge obtained by the attorney from outside sources and not in the course of his or her employment, as, for example, where the knowledge is acquired by the attorney in the performance of professional services for another.

Id. Therefore, we cannot impute to Jones her counsel's knowledge of Spring View's potentially negligent action in credentialing Dr. Bailey; and we cannot hold her cause of action to have accrued when counsel gained such knowledge in 2010.

Overall, we cannot agree that Jones was clearly on notice of her cause of action against Spring View before March 30, 2012, when information came to light concerning Spring View's credentialing of Dr. Bailey. At the very least, the concerns raised constitute genuine issues of material fact concerning when Jones was put on notice of her potential claim against Spring View – an issue which is a jury's to decide. *See Engle*, 328 S.W.3d at 189 (citation omitted). Therefore, the trial court correctly held that summary judgment was inappropriate.

Conclusion

If there is one fact upon which the members of this divided panel can agree, it would be that the predominant question presented in these appeals was a

difficult one in urgent need of resolution. As the only Court that was constitutionally guaranteed to hear the parties' appeals, we have dutifully responded to that urgency by confronting and addressing the difficult question squarely before us.

"[T]he sick leave their homes and enter hospitals because of the superior treatment there promised them." *Univ. of Louisville v. Hammock*, 106 S.W. 219, 220 (Ky. 1907). So it should be. However, that promise cannot be an empty one. Our decision today lends legal credence to a patient's reasonable belief that the hospital she enters has taken adequate steps to ensure compliance with an objective standard of patient care. This is neither bad policy nor is it unheard of in Kentucky law. Within the bounds we have set out in this opinion, this must extend to the selection and credentialing of even independent contractor physicians.

Accordingly, we affirm the Marion Circuit Court's ruling on summary judgment in the Spaldings' case. We further affirm that court's denial of Spring View's motion for summary judgment in Jones's case. We reverse and remand the order dismissing Jones's negligent credentialing claim; we reverse and remand the order of the Pulaski Circuit Court dismissing Adams's negligent credentialing claim; and we remand both cases to their respective trial courts.

ACREE, CHIEF JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

ACREE, CHIEF JUDGE, DISSENTING: After much consideration, I must respectfully dissent.

I authored the majority opinion in the recently decided case of *Brown v. Trover*, No. 2012-CA-001880-MR, 2016 WL 100311 (Ky. App. Jan. 8, 2016) (2-1 decision). In that case, this Court declined to recognize the tort of negligent credentialing and stated:

> More so than any other tort this Court has recognized, the legal and policy-based considerations involved are numerous, varied, and of interest and importance to contentious factions. *See generally* Andrew R. DeHoll, *Vital Surgery or Unnecessary Procedure? Rethinking the Propriety of Hospital Liability for Negligent Credentialing,* 60 S.C.L.Rev. 1127, 1146–1155 (2009); *Larson v. Wasemiller,* 738 N.W.2d 300, 312 (Minn.2007) (identifying policy considerations). This has resulted in multiple versions of the tort. In fact, one is hard pressed to find two identical versions. "[C]ourts should exercise great restraint in recognizing such new and complex causes of action." *Grubbs ex rel. Grubbs v. Barbourville Family Health Center, P.S.C.,* 120 S.W.3d 682, 691 (Ky. 2003). Whether to recognize the tort of negligent credentialing, we believe, is a decision better left to our Supreme Court.

Brown, 2016 WL 100311, at *5. I acknowledge that *Brown* was not a unanimous decision. I further acknowledge that had the three-judge panel in *Brown* been comprised of other associate judges, it is quite possible that mine would have been the minority, rather than the majority, view.

Judge Maze's majority opinion in this case is thoughtful and thorough. In fact, once I set aside my reticence in recognizing the tort, I can find

little fault with the opinion's reasoning. That has not been enough, however, to reverse my view.

It remains unknown whether our Supreme Court will recognize the tort when the issue is properly before it. *Trover v. Estate of Burton*, 423 S.W.3d 165, 168 (Ky. 2014) ("we are constrained . . . to leave for another day consideration of a negligent credentialing cause of action"). Presuming that Court will recognize the tort, my question is this: will this Court of Appeals opinion represent a perfectly accurate predictor of our high court's analysis of the various factors on the way to recognizing the tort? That is, will the Supreme Court weave the tort into the fabric of Kentucky jurisprudence exactly as Judge Maze has envisioned? As a simple matter of percentages, the odds of that are low. That is why I believe this particular tort should only be recognized, if at all, by the Supreme Court.

For these reasons, I humbly and respectfully dissent.

THOMPSON, JUDGE, CONCURRING IN RESULT ONLY: I concur with the majority because it is my opinion that negligent credentialing should be expressly adopted by this Court if only to bring temporary resolution until our Supreme Court conclusively decides the issue.

I admit my decision has not been without doubt and, ultimately, based on what I perceive as willingness by our Supreme Court to recognize the tort. Although presented to the Court in the context of a discovery issue under the peer review statute, Kentucky Revised Statutes (KRS) 311.377, in *Leanhart v. Humana,*

Inc., 933 S.W.2d 820 (Ky. 1996), our Supreme Court could have easily rejected the tort. In that case, the father of a child who died from an alleged negligent delivery filed a medical malpractice action and wrongful death action against the physician. Significant to our decision today, the complaint also alleged "*that Humana was negligent in its recruitment of Dr. Rich, granting him staff privileges, and allowing him to retain staff privileges while having the knowledge that he was incompetent or dangerous." Id.* at 820. (Emphasis added). The Court noted that the case was a medical negligence and corporate negligence case[.] *Id*. at 821. It is not unreasonable to conclude our Supreme Court at least implicitly recognized such a cause of action exists in Kentucky.

More recently, the Court had the opportunity to expressly adopt or reject the negligent credentialing in *Trover v. Estate of Burton*, 423 S.W.3d 165 (Ky. 2014). It decided to leave the question for another day yet necessarily did so with the knowledge that plaintiffs would continue to assert the cause of action. Our Supreme Court was unwilling to take the opportunity it was given to differ with that portion of this Court's opinion adopting the tort of negligent credentialing.

If I am correct and Kentucky adopts negligent credentialing, it will join the modern trend that recognizes it as an independent cause action. However, I am concerned about the possible ramifications.

The hospital credentialing process is unique in that physicians are not hired by the hospital but are granted medical staff privileges to *use* the medical

facility. A physician is not an employee or an independent contractor as that term is commonly used. The competence of physicians to practice medicine is regulated by the Kentucky Board of Medical Licensure and not by the hospital which granted him or her staff privileges.

The credentialing process in a hospital is conducted by a hospital peer review committee composed of volunteer members. Pursuant to KRS 311.377, the committee is granted a good faith privilege in actions by applicants for staff privileges for any conduct in the performance of its duties. In *Sisters of Charity Health Sys., Inc. v. Raikes*, 984 S.W.2d 464, 469 (Ky. 1998), the Court observed that the purpose of the peer review statute is "for the protection of peer review participants." Therefore, arguably, the good faith privilege extends not just to actions filed by applicants but also actions based on the decision to grant privileges to a specific physician. If so, the tort would be significantly limited in scope.

I am also concerned that we are not simply adding an additional cause of action to those already existing that may be pursued against hospitals. Hospitals are already liable based on a myriad of theories including medical negligence, theories of vicarious liability and negligent hiring, retention and supervision. The question is whether it is sound public policy to adopt yet another tort that will surely be piggybacked on these existing causes of action.

I also believe Spring View's concern that the adoption of negligent credentialing could have an unintended consequence is well founded. With the threat of liability for the future conduct of physicians granted privileges, hospitals

will be reluctant to grant privileges to new physicians and those with past personal or professional problems. Licensed physicians and qualified physicians may find it difficult to find hospitals willing to grant privileges and further skew the health care that patients may expect to receive based upon their geographic location and ability to pay.

The primary purpose of this concurring opinion is to join my dissenting colleague in urging our Supreme Court to resolve whether negligent credentialing is a cause of action in this Commonwealth. The trial courts and litigants need a definitive answer to the question.

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