

The Rollback of Immunity for Healthcare Institutions under Mahmoodian

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A recent decision by the West Virginia Supreme Court of Appeals could significantly increase the potential for litigation arising from adverse privileging decisions by healthcare institutions in the state. Under the Court's prior jurisprudence in *Mahmoodian v. United Hospital Center, Inc.*, healthcare institutions enjoyed substantial discretion and immunity for decisions terminating privileges of healthcare providers. The long-standing *Mahmoodian* decision provided that "[t]he decision of a private hospital to revoke, suspend, restrict or to refuse to renew the staff appointment or clinical privileges of a medical staff member is subject to limited judicial review..."

However, the Court's opinion in [*Camden-Clark Memorial Hospital Corporation v. Nguyen*](#), No. 16-0834, held that a hospital lacked the qualified immunity set forth in *Mahmoodian* if the physician alleges that the decision was taken in retaliation for an alleged complaint as to quality of care or patient safety. The Court further held that a hospital could potentially be liable for the employment decision of a related corporation that followed the credentials decision, and that a credentials decision could constitute the intentional infliction of emotional distress. Notably, the Court reached its conclusion in a case in which (1) the physician admittedly did not meet a hospital requirement for board certification, and (2) the physician did not take advantage of fair hearing procedures to challenge the decision not to renew privileges. The Court stressed that the decision would not necessarily apply in cases involving an appeal after hospital hearing procedures, thus creating an incentive for disgruntled physicians to disregard hospital procedural rights and go straight to litigation.

The result of the decision in *Nguyen* was not only the survival of the provider's claims, but also the initiation of costly discovery. The factual background of *Nguyen* was complex, and arose out of a contractual claim by a corporation related to the hospital that terminated Dr. Nguyen's employment and then sued based on the failure to obtain post-employment "tail" coverage. Healthcare institutions should be aware of the potential impact of the Court's decision in future privileging and employment decisions, which can involve the intersection of professional liability, healthcare regulation, and employment principles.

In 2013, Dr. Nguyen executed a new employment agreement with the Corporation; however, notwithstanding this new agreement, the hospital declined to renew his application for privileges to

practice because of his failure to obtain board certification. After the hospital declined to renew his privileges, Dr. Nguyen was terminated from his employment. At the meeting to terminate his employment, Dr. Nguyen alleged that the Corporation's administrator advised him that he was not required to obtain "tail coverage" as required by his employment agreement.

After the termination was effective, the Corporation filed an action against Dr. Nguyen for his failure to obtain tail coverage, which was associated by a cost of \$67,022.00 to the Corporation. In response to the Corporation's Complaint, Dr. Nguyen filed a third-party complaint against the hospital, alleging a cause of action under the West Virginia Patient Safety Act ("Act"), retaliatory discharge, and intentional infliction of emotional distress. As the basis for his claims, Dr. Nguyen alleged that, during his employment at the hospital, he performed call for a vascular surgeon, which was troubling because he did not have "deep-rooted expertise" in vascular surgery. His claim under the Act arose from his alleged voicing of patient safety concerns including inadequate staffing, contaminated instruments, and insufficient equipment and supplies.

The hospital moved to dismiss Dr. Nguyen's third-party complaint, relying on the immunity established under *Mahmoodian* for its decision not to renew Dr. Nguyen's privileges. The hospital further argued that its decision was justified due to Dr. Nguyen's failure to meet the requirement to become board certified in his field.

While the Court acknowledged the compelling interest of allowing healthcare institutions to be the final arbiters of staffing decisions, the Court concluded that those interests are marginalized when a healthcare provider alleges retaliatory or discriminatory conduct prohibited by statute – such as the Patient Safety Act – that seeks to safeguard the health and safety of hospital patients. Ultimately, the Court justified its decision, stating that the "West Virginia Legislature has made clear that courts should not ignore allegations that a hospital's actions contravene this significant public policy simply because credentialing standards or staffing privileges are implicated." Thus, the Court concluded that *Mahmoodian* did not preclude Dr. Nguyen's claims.

While the majority's opinion affirmed the Circuit Court's decision allowing the claims to proceed, Justice Loughry and Justice Ketchum authored pointed dissents, in opposition to the majority opinion. Stated succinctly by Justice Loughry, "[b]y blithely dismissing [quality assurance] in favor of [patient safety] under the dubious facts of this case and without fully considering the effect such holding may have on these goals, the majority has seriously jeopardized patient safety. Sadly, the majority does so for the negligible purpose of allowing a lone physician, who indisputably failed to comply with the hospital by-laws, to leverage the hospital with a separation-induced financial dispute."

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National Law Review, Volume VII, Number 338

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