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96-0085
ST. LUKE'S V. AGBOR

CONNELLY: This case involves a matter which arose from the TC where a plaintiff sued a physician for medical negligence and sued my client, St. Luke's Hospital, for negligence in allowing the credentials of the physician to continue at the hospital. St. Luke's moved for summary judgment on the grounds that there was not a negligent credentialing cause of action in Texas, that the hospital enjoyed limited immunity from patients' suits complaining of credentialing, absent a showing of malice, and that there was no evidence of malice in the case.

SPECTOR; What possible scenario would include evidence of malice?

CONNELLY: The same scenario that is intended by the definition of malice that's been accepted by the courts of this state; and that is the intent to injure others.

SPECTOR: The patient?

CONNELLY: Yes or take some action which is reasonably expected to cause harm to others. Those definitions are well accepted and not questioned in this case at all. But the circumstances under which that arise do exist. And by virtue of placing a limited immunity on credentialing activities is part of the purpose of the legislature and part of their efforts to balance those tests in this state.

SPECTOR: I can understand how there might be malice against the physician who is not credentialed, but I can't think of an instance where a hospital would with malice credential and expect harm to come to a patient? I just don't see that.

CONNELLY: Well I think the arguments that are used to lead to malice would be that in discharging the responsibilities of peer review, the physicians involved and ultimately the hospital governing board do not exercise sufficient judgment over the activities of a physician such that the physicians continue to practice within the hospital is likely to lead to harm to others. That's were malice could come in.

SPECTOR: And that's different from the case where there is no malice, where there is injury under those same circumstances?

CONNELLY: Absolutely. In fact one of the fallacies of the CA's decision here is that they tend to lump the patient's claim for negligent credentialing as a malpractice claim. It's not. They are entirely separate. The claim against St. Luke's hospital does not relate to the failure to provide appropriate medical care. It is an entirely separate claim and cause of action if it even exists. And it's the fact that it is so separate is what supports our argument that that cause of action has not been recognized as a common law cause of action in this state.

OWEN: Following up on Justice Spector's question, could you give us an example of where you might have a negligent credentialing situation as opposed to a credentialing situation carried out with malice? I am not sure I understand factually the distinction where the patient could say: the hospital was malicious when they credentialed this physician as opposed to barely negligent.

CONNELLY: I think the distinction would be where on the one hand physicians didn't inquire into the medical performance of a practitioner to even know whether or not they were qualified in doing their activities. And that could be described as failing to do what an ordinarily prudent member of the peer review committee would be in checking out someone's credentials. Malice goes beyond that. It would be in a situation where the peer review committee knew that this practitioner was incompetent and that the continued practice of medicine in the hospital could lead to injury to patients but did nothing about it.

OWEN: Isn't that what they are alleging here?

CONNELLY: No, not at all. In fact in the CA the brief by the respondent here clearly said there is no evidence of legal malice in this case. And that was something that's without dispute in this record. And the CA did not find that there was any evidence of malice in the case. In fact it was the summary judgment proof in the case that there was no malice in the case both by affidavits submitted by the hospital and affidavits submitted by the patient.

HECHT: Your position is there is not and should not be a cause of action in Texas for wrongful credentialing whether it's negligent or malicious?

CONNELLY: Is not and should not be. This court really only gets to that issue if you have to in trying to address the question of whether or not the provision of the Texas constitution for open courts needs to be addressed. You really have to focus first on the decision of the CA as to whether or not there is an ambiguity in this statute as to the application of limited immunity.

HECHT: The general rule appears to be that whoever selects an independent contractor is liable for negligence in that selection. Why shouldn't that apply to hospitals?

CONNELLY: That's a fair inquiry. And your honor those lines of cases generally involve situations where there is an employment situation, where someone has employed an independent contractor, and the restatement speaks to that issue and there are cases in this state which speak to that issue. That is not factually what you have in a hospital setting. The hospital is not employing the physician. And if you reach a situation where you have facts of employment, joint venture, or ostensible agency, then there is a body of law that deals with those situations in terms of potential hospital liability for that conduct. But not in the situation where you have a physician as an independent contractor because of the unique difference that exist between the practice of medicine by an individual license physician, and the administration of a hospital where the hospital cannot engage in the practice of medicine.

ENOCH: It used to be that hospitals provided facilities, doctors just took advantage of the facilities that were provided. But in today's health environment haven't hospitals become the provider of the primary care and you go to the hospital to seek medical care, and within the confines of the hospital it then provides doctors as well as facilities?

CONNELLY: That's true in very limited settings. And certainly those cases which the appellate courts see most often are those involving the emergency room setting where someone goes to an emergency room of a hospital and perhaps assumes by virtue of what they see, hear and what they are told, that a physician being provided in the emergency room is someone who is either employed by or has some other affiliation with the hospital. But those ostensible agency cases have not been extended beyond the emergency room setting in this state. And certainly not applicable to this situation where you have obstetrical care for a patient who had previously seen this physician and there is no dispute had selected this physician herself for continued care.

OWEN: Going back a minute ago, I am again trying to _______ what you say what evidence could they have alleged that would arise to malice. And I think you told us that if the hospital had inquired and they knew the physician was incompetent, but did nothing. And I thought there were at least some evidence in the summary judgment evidence that St. Luke's hospital knew that malpractice claims had been filed against this particular physician, and did nothing?

CONNELLY: That's right. And the summary judgment proof that was presented on behalf of the hospital was here's a full resuscitation of what we knew, what we investigated, what we did, and nothing about our conduct was anything other than in good faith and in keeping with the standards of peer review that are normally followed. On the other hand, the affidavit presented by the respondent is that there were certain things which should have been considered and the hospital didn't meet the standard of care. So in no respect did the summary judgment proof presented by the respondent even rise to the level of suggesting any malice. The issue of malice was never joined in the TC.

OWEN: Hypothetically assuming that that's supported in an affidavit in support of their response to summary judgment, that in your opinion would have constituted some evidence of malice to get past summary judgment?

CONNELLY: There are a lot of things that could be developed if the facts were there.

OWEN: That's what I am trying to get at. What kinds of things?

CONNELLY: Again I am going to allude to the same situation I did before those people engaged in peer review were aware of incompetence of the physician, had determined that there was incompetence of the physician, that the continued practice in the hospital would result in patient injury and still allowed it to happen. Those are the types of circumstances that I think would raise an issue of malice.

CORNYN: Would there have to be malice directed toward the individual patient?

CONNELLY: Not that patient specifically. And the legal definition of malice that this state has well accepted recognizes that. And so then any suggestion that this peer review committee did not specifically intend to harm this patient, therefore, it's impossible to prove malice, that's not well founded under the law of this state.

PHILLIPS: Other states have passed similar laws much like the federal law. Is there any other state statute that you've found to bar negligence credentialing cases?

CONNELLY: Yes. There are a number of other statutes that address this issue. I don't know that I can give you an actual statistical count. But what I can tell you is that there are some jurisdictions in this country which recognize a duty to credential physicians on a hospital staff following certain standards. There are other jurisdictions which do not. It is fairly uniform. It seems to be very common in the statutes of all jurisdictions trying to impose better protection on the peer review process, which is exactly what the Texas legislature was trying to do when it passed 4495(b). It had determined that the significance of trying to preserve the integrity of the peer review process was so important and had such a favorable bearing on the ultimate provisions of quality medical care, that it was willing to put discovery protections in that act, and limited immunities in that act. And it balanced those tests itself and wrote into the act specifically in plain and common language: No cause of action does accrue for actions in connection with peer review. And any person involved in peer review, any health care entity involved in peer review has immunity from any civil action.

OWEN: What if information came to the hospital that the doctor was incompetent and had on repeated occasions departed from the medical standard of care, and the hospital did nothing. They didn't convene the peer review committee. Would the act still give them a safe harbor?

CONNELLY: There is nothing about this act which prevents a patient from making a claim for being aggrieved by the credentialing process. All this act does is it says: Anyone who is involved in that credentialing process has got a limited immunity against civil liability and the discovery process cannot be used to breach the confidentiality of those proceedings.

OWEN: My scenario it's not alleged that the hospital perhaps was initially negligent in credentialing. But that thereafter the physician was incompetent, those facts were brought to the attention of the hospital and they did nothing. They didn't reconvene peer review, or they took no steps to remove the physician from the staff. Under those circumstances would the act afford a safe harbor or immunity from liability?

CONNELLY: Yes there would be no difference. This court has already recognized in decisions that you have rendered, that there isn't a difference between the initial credentialing process and some recredentialing process. And that rationale is well reasoned and there is no question that it is appropriate in that regard.

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RESPONDENT

PFEIFER: The problem with this case is that St. Lukes is attempting to change a medical licensing statute into a tort reform statute. And they are trying to do it in a back-handed manner where the issue was never presented to our legislature to decide. The best evidence of this is that our medical liability laws are contained in Art. 4590i, and also in the Civil Pract. & Rem. Code. If there was going to be a fundamental substantive change to the law of Texas Medical Malpractice it would have been in those statutes.

HECHT: Well it's not clear whether there is a change because 4590i doesn't mention credentialing cases either. It mentions health care liability claims and this is really different from that. This is you shouldn't put this person in this job.

PFEIFER: I don't think it is different. St. Lukes says it is, but I don't think Congress did.

HECHT: Congress clearly didn't.

PFEIFER: Not only that but congress clearly called the credentialing action a malpractice action in two ways. First of all, this is the committee report that we have in our brief where they present the scenario of someone going completely through peer review and the hospital giving them the seal of approval. Congress said that action can still be maintained ________________ not apply any of immunity to this kind of situation. Secondly, congress setup a specific mechanism, and this is something St. Lukes had never addressed. It is a fundamental problem with their physician. Section 11.135 of the federal statute Tays: that in malpractice cases if the hospital does not contact the federal practitioner data bank there is a presumption that arises in malpractice cases against the hospital, that if they had checked they would have found out about the doctor. So we have a congressional scheme that considers credentialing cases to be malpractice cases even provides a mechanism for plaintiff lawyers to get the information from the federal practitioner data bank and have adopted in 45 CFR §60 regulations by which plaintiff counsel in these specific cases can get the material from the federal data bank.

We have two parts to the federal scheme. Each part conflicts with the state statute under St. Lukes scenario. First of all is the immunity in the federal statute? The federal statute specifically provides that it doesn't apply to malpractice cases.

HECHT: But it doesn't keep states from doing it does it?

PFEIFER: It does. St Lukes gave you a handout today and you will notice in the handout that they have highlighted the very first part but they have neglected to highlight the clause that says: except as otherwise provided in this statute the states are free to do what they want to do in a professional review action.

HECHT: So your position is that Texas could not pass a statute making it harder to cover for negligent credentialing under any circumstances?

PFEIFFER: No. If it specifically conflicted with the provisions of the Health Care Quality Improvement Act I don't think they could. And this one does.

HECHT: Because it puts a restriction on it?

PFEIFFER: Because it restricts it unduly. And because it also totally vitiates the statutory presumption that congress has set up for use in credentialing malpractice cases. You see they only want to talk about the immunity part of the federal statute where there are two parts: the data bank; and the immunity. Both of those provisions are adopted in their entirety into our state statute. As Justice Owen wrote in the Summer trilogy concerning the discovery. It would be in ___________ for their to be a lack of discoverability in federal cases and discoverability in Texas cases. The same thing applies to the substantive cause of action. The federal and the state statutes are joined together.

HECHT: What about in states that have not recognized a wrongful credentialing cause of action? Are they required by the federal act to do so?

PFEIFFER: They are not required to do so because they don't already have them. I will tell you that that is a tremendous minority. Following up on Justice Phillips' question, I don't think he got an answer from Mr. Connelly, there are no cases anywhere that seek to do what St. Lukes wants to do.

HECHT: Why wouldn't the act require them to do so if it requires states that do have them not to limit them? How does that make any sense?

PFEIFFER: Because on the one hand it makes sense because substantive tort law is in place in one particular area and it doesn't preclude the other...it prevents it from going backward. It doesn't prevent it from going forward in terms of the creation of cause of action. But it is clearly inconsistent on both the data bank issue and the immunity issue with the Texas statute.

PHILLIPS: How did the idea arise that...who first suggested the idea of a malice requirement for negligent credentialing?

PFEIFER: I think that is simply just like the Bridgestone Firestone case that you were confronted with. The malice requirement came up as a result of the federal malice standard that is necessary in retaliatory lawsuits against doctors. This particular statute and all the legislative history shows that this statute was drawn to bring Texas into the federal immunity and to protect against these retaliatory lawsuits. Now let me point this out. It makes sense in that context of retaliatory lawsuits - doctor against the hospital. Why? Because the doctor is the one who treated the patient, the doctor knows his peers, the doctor has a due process hearing before the peer review committee at which he can present evidence and cross examine witnesses, and as provided in our statute §J of

§506 gets a written explanation of why they took action against him. He is a part of the process and can prove malice because he knows. The patient in this situation cannot prove malice under any situation because they don't know the politics, they don't know the doctor, and they can't in any way participate in the peer review process. All of the hypotheticals that you posed concerning this Justice Owen were answered by Mr. Connelly that
if the peer review committee or if the governing board were to know and to take no action, the problem is is that under the Summer trilogy you can never prove that. You can never get any evidence of what their actual subjective intent was and that's the key to malice - actual subjective knowledge.

OWEN: Going back to the federal statute. On pages 13 and 14 of your brief you talk about §11.115, it's very explicit. It says: The federal act is not designed to limit immunities. It goes on both sides - either claims or immunities by any physician, health care provider, or health care entity. You quote another section of the act and you've even highlighted it that the law is not preempting or overwriting any state law immunities that may otherwise be in effect. How do you square what you said on those pages with the argument you are making here that the state could not provide or limit liability?

PFEIFFER: Because of the difference in the situation that they are involved in. The federal statute specifically relates that the immunities don't apply in malpractice cases and yet the immunities can be granted and extended by the states concerning the conflicts between doctors and their hospitals.

HECHT: If the concern is that physicians won't participate in peer review because of fear of retaliatory suits, why aren't they also afraid of patient suits and equally likely to try to escape the peer review process?

PFEIFFER: Real simple. The patient can't find out who the doctors are on the peer review committee. There is no way to identify that.

HECHT: So they could not be sued?

PFEIFFER: I don't think they could be sued in that circumstance. What happens here is that the patient is unable to identify the peer review committee; can't even tell who is involved in the peer review process because of the protections.

What I am trying to convey to the court is that the hospitals want to have their cake and eat it too. They have their cake now because there is freedom of speech. There is peer review and that freedom of speech is amply protected by the federal and the states statutes and by the rulings of this court basically filling all the cracks this summer in the attempt to discover the peer review process. They have the immunity that they need because of the freedom of speech and the free flow of information. That's good; that promotes good health care. But what we can't do is then take that further and imply that this language takes away the rights of patients when the system breaks down

and the hospital doesn't do what it was supposed to do.

Now let me address another concern of this court, and that is what about the Park North situation? Is this really the law? I want to suggest to you that it is. I have provided a supplemental listing of authorities today with the states that have adopted the corporate negligence theory for hospital liability. And you will see in the materials that I gave you and in this chart, that every industrialized state in the US that has confronted the issue has recognized what this court, I think Justice Enoch noted, that modern practice of medicine implies more than the doctor doing house calls at home. California, New York, Illinois, Michigan, Ohio, Missouri, Washington, our neighbors in Oklahoma and New Mexico, this is not a novel off the wall theory. It is dramatically persuasive, that it is the majority rule in the US And this court would be taking an extremely, extremely minority position to say that the Park North case has no merit. Because the Park North case is in line with the overall mainstream of American jurisprudence and the recognition that these are ongoing problems. This same kind of concept plays into the HMO situation where people don't have choices concerning their doctors. What are we going to do about HMOs? What are we going to do about the impaired physician where the hospital knows the doctor is a drug addict, or an alcoholic, or is senile, or has had a stroke, and yet continues to allow the patient to be treated and that doctor to practice at that hospital? A malice requirement in those circumstances makes no sense. Who is going to take care of the patient? The hospital has the duty imposed by the medicare laws and the medicaid laws to screen its medical staff. Every hospital, there are 460 of them in the State of Texas, has the duty to be accredited and in order to be accredited under the JCAHO they have to have peer review committees. It is their duty and their responsibility and what they are arguing is that we have to take it one step further to make the process work.

I would suggest to this court that that is the kind of social theory that needs to be presented and aired to the legislature, that we should not take a _______ reaction here and conduct a scientific experiment, whether health care works better without malpractice cases, or with them. This is not what was presented to the legislature in 1987. And let me tell you this St. Lukes has admitted in their TC brief and in the CA, that there is absolutely nothing in the legislative history that suggests the legislature ever intended to apply these immunity provisions to plaintiff malpractice cases.

HECHT: Or that they didn't?

PFEIFFER: Then you've got to prove a negative. We know what they did intend because we've brought you the evidence of that and we've brought you 16 hours of tapes of legislative sessions. Listen to them. I have, the CA has, there is not one word in there about plaintiff malpractice cases. But on the other hand, we have the bill's sponsor, Rep. McKinney, who clearly indicates what we want to do is provide protection for the courageous doctors who will give adequate peer review so they don't have to worry about being sued by their buddy, that they are peer reviewing. That's in appendix B to our brief. The TMA representative says exactly the same thing. So on the one hand we have affirmative evidence of what the legislature intended, and we have no evidence that they intended to the contrary. And their argument is because we can't prove the negative, we have no knowledge of what the legislative intent is. We know one thing that they

intended. We know they were silent about the other, and we know that their interpretation would result in a massive conflict with the sister statute, the federal statute that was incorporated by reference. This is just like the Bridgestone/Firestone v. Glyn Jones case. And I urge Justice Hecht in this regard to make the same comment that he made in that case. You've got to put it in context. Words in a vacuum mean nothing. What we are trying to do is use creative language and creative interpretation by a law review article by a Dallas hospital lawyer who by the way signed on an amicus brief in this court, so you see how unbiased the law review article is, and try to adopt that to defeat causes of action.

SPECTOR: How do you answer the hospital's claim that they would then be the insurer of doctors?

PFEIFFER: I don't think they would be the insurer at all because we would still have to come forward with proof of negligence in that circumstance. They either knew or should have known. We would treat them just the same way we treat trucking companies that put incompetent drivers behind 18 wheelers. We would treat them the same way we treat everyone else in society and give them no special benefit other than the immunity that they have within their own setting for peer review, for those participating, and the freedom on of speech aspects so that there is a free interchange of ideas.

HECHT: Petitioners say the difference is that physicians are not employed that a hospital may have that duty with respect to its own employed staff, but physicians in their employ. They let them in the door.

PFEIFFER: Sometimes that's true and sometimes that not.

HECHT: And if it is true, what?

PFEIFFER: If it is true then first of all they are granted staff privileges. All of the bad things that happen to people happen in hospitals for the most part in malpractice situations. And the only reason that they are there doing what they are doing is because the legislature gave the hospital governing boards the authority to grade the papers of the doctors. And so even though there is not a direct employee/employee relationship, there is ongoing supervision of the doctors, there is the initial grant of the privilege to the doctors. They are there because the hospital said they could use the hospital facilities and do their job there.

Look at the situation of emergency room cases. Those doctors are all independent contractors. They put up the biggest bullet-proof contracts you have ever seen. You don't have the right or the opportunity in that situation to screen the credentials of those doctors. How do you know in that circumstance whether you are getting a competent doctor or not? The patient cannot. The patient has no way to know, and yet the patient can enter into a situation.

ENOCH: Mr. Connelly described that as being different than this case where this doctor

was picked by this patient.

PFEIFFER: Let me explain that, because that's a real can of worms. This doctor quit and moved to Massachusetts and was selling her practice. This patient had made arrangements to go to Park Plaza Hospital and have her baby delivered by another doctor by a c-section. Dr. Rothchild arrives back into town the day before this baby is born, gets the file back, and when Ms. Agbor is in active labor says: oh by the way we are changing the plans and we are going to St. Lukes. With no explanation. Now the reason they went to St. Lukes is because that's the only place in Houston that Dr. Rothchild still had her hospital privileged.

So we have a very dramatically situation where someone seeks out Denton Cooley to do their bypass surgery. You can think of countless examples where credentialing would apply. Aand this court shouldn't reject the credentialing theory as being applicable simply because we have an obstetric case as opposed to a radiology case, or an ER case, or a consultant case called in by the doctor for the physician.

The immunities don't make sense in the negligence credentialing context. They make perfect sense in the retaliatory lawsuits. The legislature never intended the result that St. Lukes seeks to impose on the patients of Texas.

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REBUTTAL

CONNELLY: One of the comments that counsel for respondent made, which I think necessitates a proper response, is his suggestion that the right to provide protection of peer review and limited immunity for peer review is somehow preempted by the federal act, and that that federal act somehow creates a credentialing cause of action for patients.

If you look at the specific language of the federal act which we've tried to highlight and present to the panel, it is absolutely clear through plain language that the federal act intends to be subordinate to any state action on peer review. And it expressly allows the state to pass additional protections for peer review as the state deems necessary. What we are addressing is a situation where the Texas legislature has determined there are additional protections for peer review that we in our judgment for what's best for Texas want to put in place.

PHILLIPS: Is there any legislative history of that, or is that purely plain language?

CONNELLY: That's plain language. And counsel is right in the suggestion that there is silence in the legislative history in terms of whether or not these protections are intended to apply to claims by patients. What clearly is in the legislative history is the intent of the legislature to shore up and protect the integrity of peer review, and not distinguish between retaliatory physician suits and claims by patients. That distinction is not made by the state in the legislative history. But the legislative history is clear in saying: We recognized the importance of improving quality care, we

recognize that the best way of doing it is to assure the integrity of the peer review process and this statute is intended to do it.

HECHT: Yet if there's no liability for wrongful credentialing, it looks to me that it doesn't provide any incentive to the hospital to do it right?

CONNELLY: I recognize that there are some who believe that the only incentive that professionals need is the threat of a lawsuit. I don't accept that position. And I think this panel doesn't need to accept that position, because counsel has already referenced the fact that professional organizations like hospitals and physicians are governed by other standards and don't need the threat of lawsuits to make them do what is right. For hospitals in particular there are credentialing standards of the JCAHO, which are extremely important in preserving their right to do business and keeping up with those standards and the mere threat of lawsuits is not the only incentive that they have in that regard.

OWEN: Who peer reviews the peer reviewers? What mechanisms are in place within the professional realm or somewhere else, the State board, to exert some sort of oversight on the peer review process?

CONNELLY: That's the quality assurance program of the hospital and the licensing of organizations like JCAHO. That's what oversees those things to determine whether or not the hospitals have in place a peer review process that meets the standards that is doing what needs to be done to assure quality care in the hospital. Because in the final analysis the determination of whether quality care is being practiced in the hospital is made by the physicians on staff. Those are the only people who are in a position to judge quality medical care. And they are making that decision. The quality assurance program of a hospital incorporates a review of whether the peer review process by physicians judging physicians is working appropriately and being done right, and also incorporates the process of reviewing those hospital services which are being rendered on a regular basis to make sure they are being done with proper quality. But even that is under the direction and supervision of the medical staff of the hospital.

CORNYN: Would it make any difference to your argument if this hospital was owned by an HMO, and this physician was an employee of the HMO?

CONNELLY: That would make no difference to the facts of this case. Because if the CA decision is allowed to stand, it would emasculate art. 4495b, and §506. If the protections against discovery of the peer review process and if the limited immunities that the legislature have put in place present an impossible burden for litigants, and work an injustice in this society for patient claims, then it does the same thing for retaliatory physician claims. The determination has already been made by this court that these provisions, these protections and immunities do not work such an injustice, and do not present an impossible burden. If these protections are removed they are removed for everyone involved in the peer review process.

OWEN: We can conceivably hold that the discovery protections stay in place. But the statute did not intend to preempt or override the common law, if there is one right, to sue for negligent credentialing. It may make your burden of proof very difficult in those cases, but conceivably this court could hold that.

CONNELLY: And the effect of that would be to remove limited immunity protection from everyone involved in the peer review process. Not just the hospital governing board who ultimately signs-off on it, but the physicians who are involved on the credentialing committee, the chief of service who approves their recommendation, the vice president of the hospital who oversees those activities. Because if that limited immunity is gone from the peer review process even with the discovery protections in place, it's gone as to everyone.

OWEN: But only if they can get over the hurdle of malice and what you have described for us today?

CONNELLY: That's exactly right. And what the legislature has said in plain and common language is preserving the integrity of that process is so important to assuring the quality patient care, that we are going to put those protections in place.

OWEN: Even under your scenario if there's an allegation of malice these same individuals are still subject to suit? They are not absolutely immuned?

CONNELLY: That's exactly right. But you remove that limited protection.

OWEN: What limited protection?

CONNELLY: The immunity.

OWEN: From what?

CONNELLY: The immunity from any civil action.

OWEN: Unless there's malice?

CONNELLY: That's right. I mean there is immunity from any civil action absent malice. If there's a showing of malice then conceivably there could be a civil action based on credentialing if this court recognizes such a common law cause of action against anyone involved in the process. If you remove that immunity there is no protection for anyone in the process.

SPECTOR: Is there any difference between the action of the peer review committee and the hospitals? If the peer review committee decides not to credential someone, is that the last word or is there some other procedure where the hospital could deny or grant that?

CONNELLY: That will be governed by the individual bylaws of each institution.

SPECTOR: At St. Lukes?

CONNELLY: Yes of that institution. The bylaws at that institution and the way credentialing works at that institution if the credentialing committee does not approve credentials it's not going to happen.

SPECTOR: How about the other way around?

CONNELLY: There are circumstances where the chief of service is allowed by the bylaws to grant temporary privileges until such time as the credentialing process can be initiated, but the decisions of the medical staff committees with regard to credentialing are determinative under the bylaws.

SPECTOR: And to remove credentials?

CONNELLY: And to remove credentials.

SPECTOR: The same thing?

CONNELLY: It has to be done pursuant to the bylaw provisions.