

Do Texas' Medical Peer Review Privileges Effectively Preclude Malicious Credentialing Claims?

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On May 27, 2005, the Supreme Court of Texas held in *Romero v. KPH Consolidation, Inc.* that there was insufficient evidence that a defendant hospital was “consciously indifferent” to the risks posed by an orthopedic surgeon’s drug abuse to prove that the hospital engaged in malicious credentialing.¹ The opinion raises an interesting issue as to whether two Texas medical peer review privileges effectively preclude claims for malicious credentialing.

The defendant, KPH Consolidation, Inc., operates Columbia Kingwood Medical Center (“Columbia”), a 155-bed, acute care facility located in Kingwood, Texas. Columbia’s Medical Executive Committee (“MEC”) is responsible for determining the qualifications and reviewing the performance of applicants to and members of Columbia’s medical staff through a process known as “credentialing.” As part of the credentialing process, the MEC is supposed to obtain extensive information from each physician about his or her education, licensure, board certifications, practice history, professional affiliations and associations, medical malpractice and settlement history, and criminal history. The MEC also is supposed to obtain relevant information about each physician from the Texas State Board of Medical Examiners, other health care facilities where the physician has or has had clinical privileges, the National Practitioner Data Bank, the Drug Enforcement Agency, and other relevant law enforcement agencies. The MEC is supposed to use this information to determine whether to grant or continue a particular physician’s medical staff membership and clinical privileges at Columbia.

In February 1993, Dr. Merrimon Baker applied to Columbia for medical staff membership and clinical privileges.² An orthopedic surgeon who practiced at Cleveland Regional Hospital (“Cleveland”), just north of Kingwood, in the late 1980s and early 1990s,³ Dr. Baker had been sued 10 times between 1988 and 1993 for medical malpractice, including one case that Dr. Baker settled after he operated on the wrong hip of a patient.⁴ Columbia granted Dr. Baker’s application for medical staff membership and clinical privileges in February 1994.⁵ Like other first-time applicants, Dr. Baker was granted provisional privileges that were subject to further review.⁶ Because the Texas Occupations Code and the Texas Health and Safety Code make the records and proceedings of medical peer review committees confidential, privileged, and not subject

¹ *Romero v. KPH Consolidation, Inc.*, No. 03-0497, 2005 WL 1252748 (Tex. May 27, 2005).

² *Id.* at *2.

³ *Id.* at *2.

⁴ *Id.* at *3.

⁵ *Romero*, 2005 WL 1252748, at *3.

⁶ *Id.*

to subpoena,⁷ it is unclear whether the MEC *actually* followed its credentialing process with respect to Dr. Baker.

In February 1995, Dr. Baker voluntarily entered a drug treatment program after admitting that he suffered from “a pattern of chemical abuse” involving the prescription pain killer hydrocodone.⁸ After Dr. Baker completed the treatment program in May 1995, Dr. Baker’s office manager and another physician reported Dr. Baker to the Texas State Board of Medical Examiners because they believed that Dr. Baker was continuing to abuse hydrocodone. Based on these reports, the Board notified Dr. Baker in April 1996 that it was investigating “allegations of suspected substance abuse, [improper] care and treatment of [four named patients], and . . . your recurring health-care liability claims.”⁹ Notwithstanding these events, Columbia removed Dr. Baker’s provisional status and granted him full clinical privileges in August 1996.¹⁰

On May 15, 1998, Cleveland suspended Dr. Baker from its medical staff after Dr. Baker operated again on the wrong part (this time, the wrong leg) of a patient.¹¹ Two months later, at Columbia, Dr. Baker performed elective back surgery on Ricardo Romero, a 40-year-old longshoreman.¹² During the surgery, Romero lost a significant amount of blood before Dr. Baker noticed and, in the 45 minutes it took to prepare a transfusion, Romero went into cardiac arrest.¹³ Although Romero was resuscitated, he suffered severe and permanent brain damage.¹⁴ Shortly thereafter, Columbia suspended Dr. Baker’s clinical privileges.¹⁵

Romero’s wife sued Columbia, alleging that it negligently delayed Romero’s blood transfusion and that it maliciously credentialed Dr. Baker and allowed him to practice at Columbia.¹⁶ The jury agreed with Romero’s wife, finding that Columbia negligently delayed Romero’s blood transfusion and maliciously credentialed Dr. Baker.¹⁷ Columbia appealed, arguing that Romero’s wife had not proved by clear and convincing evidence that it acted with malice in credentialing Dr. Baker.¹⁸ The Houston Court of Appeals examined the evidence of malice and concluded that Dr. Baker did pose an extreme risk to patients because of his drug abuse (but not because of the lawsuits filed against him) and that Columbia would have known about Dr. Baker’s drug abuse and other problems if Columbia had followed its normal credentialing process.¹⁹ However, the Court of Appeals did not find evidence that Columbia was “consciously indifferent” to the risk Dr.

⁷ TEX. OCC. CODE ANN. § 160.007(a) (Vernon 2005); TEX. HEALTH & SAFETY CODE ANN. § 161.032(a) (Vernon 2005).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at *4.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at *5.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

Baker's drug abuse posed to his patients.²⁰ When the Court of Appeals remanded the case for a new trial based solely on the negligence theory, Romero's wife petitioned the Supreme Court of Texas for review.²¹

On review, the Supreme Court of Texas analyzed whether Columbia was "consciously indifferent" to the risk Dr. Baker's drug abuse posed to his patients.²² First, the Court explained that, because Texas law makes the records and proceedings of medical peer review committees confidential, privileged, and not subject to subpoena,²³ the Court was unable to learn what actions Columbia actually took in response to the information Columbia might have had about Dr. Baker.²⁴ The Court emphasized, however, that it could not infer anything from its lack of information.²⁵ Second, the Court considered the argument that the Court of Appeals should have considered Dr. Baker's history of medical malpractice and two wrong-part surgeries in assessing evidence of malice. The Supreme Court ultimately concluded that "there is no evidence . . . that questions about Baker's competence required Columbia to keep him from operating on Romero as he did."²⁶ Accordingly, the Supreme Court upheld the Court of Appeals' decision.

Interestingly, the Supreme Court noted that Romero's wife complained that the Texas peer review laws "effectively preclude[] recovery for malicious credentialing."²⁷ However, the Supreme Court stated that this complaint "in this case, at least, is overstated."²⁸ The Supreme Court further explained:

We do not doubt that such evidence of malice is difficult to come by, but the Legislature has made recovery for improper credentialing of physicians difficult. Indeed, since this case was tried, the Legislature has amended the definition of malice to mean "a specific intent by the defendant to cause substantial injury or harm to the claimant," eliminating the alternative definition of conscious indifference to a known, excessive risk. Thus, the Legislature has made it more difficult to establish liability for improperly credentialing a physician.²⁹

Strong peer review privileges are believed to be necessary to encourage medical peer review committee members to engage in peer review and to encourage knowledgeable individuals to provide information about physicians to medical peer review committees. However, these privileges also can make it difficult for an injured patient to prove that a hospital did not adequately review the practice history and professional competence of a particular physician on the hospital's medical staff.

²⁰ *Id.*

²¹ *Id.* at *6.

²² *Id.* at *7.

²³ See note 5, *supra*.

²⁴ *Romero*, 2005 WL 1252748, at *8.

²⁵ *Id.*

²⁶ *Id.* at *9.

²⁷ *Id.* at *10.

²⁸ *Id.*

²⁹ *Id.*