2018

JODIE K. LEVITT, M.D., Plaintiff/Appellant, v. IASIS HEALTHCARE HOLDINGS INC., a Delaware Corporation; SALT LAKE REGIONAL MEDICAL CENTER, LP, a Delaware Limited Partnership, DBA Salt Lake Regional Medical Center; ALAN DAVIS, M.D.; WANDA UPDIKE, M.D., Defendants/Appellees. : Brief of Appellant

Utah Court of Appeals

340

No. 20180260-CA

IN THE UTAH COURT OF APPEALS

JODIE K. LEVITT, M.D.,
Plaintiff/Appellant,

v.

IASIS HEALTHCARE HOLDINGS INC., a Delaware Corporation; SALT LAKE REGIONAL MEDICAL CENTER, LP, a Delaware Limited Partnership, DBA Salt Lake Regional Medical Center; ALAN DAVIS, M.D.; WANDA UPDIKE, M.D.,
Defendants/Appellees.

BRIEF OF APPELLANT

On appeal from the Third District Court, Salt Lake County, from Summary Judgment before the Honorable Andrew Stone, District Court Case No. 160900952

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Oral Argument Requested

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Table of Contents

Addenda

Table of Authorities

Cases

Statutes

Current and Former Parties

Appellant

Jodie K. Leavitt, M.D.

Represented by: Cecil R. Hedger

Appellees

Iasis Healthcare Holdings, Inc.
Salt Lake Regional Medical Center, LP
Alan Davis, M.D.
Wanda Updike, M.D.

Represented by: Jonathan A. Dibble, Elaina M. Maragakis and Erin M. Adams of Ray Quinney & Nebeker

Parties Below Not Parties to this Appeal

None

Introduction

This case arises from an action for breach of contract, breach of the covenant of good faith and fair dealing, tortious interference with economic relations, and civil conspiracy. Plaintiff is a board certified neurosurgeon and member of several medical societies including the American Association of Neurological Surgeons; Congress of Neurological Surgeons; Rocky Mountain Neurological Society; Utah Association of Neurological Surgeons; Utah State Medical Association; and the American Medical Association. Dr. Levitt has been the recipient of several honors and awards including the 2014 Top Ten Neurosurgeons Utah-Vitals and Patients' Choice Award Physician for the years 2010, 2011, 2013 and 2014. Prior to the actions of Defendants that gave rise to this case, Dr. Levitt enjoyed an exemplary professional reputation among her peers.

Dr. Levitt has had surgical privileges at Salt Lake Regional Medical Center ("SLRMC") under a contract embodied in the Medical Staff Bylaws from 2002 to the present. Dr. Levitt held the position of Chief of Surgery at SLRMC from 2006 until 2010. However, beginning in late 2011 and culminating in February and March of 2012, Defendants took actions that resulted in the breach of that contract and its covenant of good faith and fair dealing by summarily suspending Dr. Levitt for 28 days, shrouding the reasons for the suspension in a conspiracy of secrecy, and ultimately denying her the fair hearing required by the bylaws. Denying the fair hearing denied her the opportunity to clear her good name and preserve her professional reputation. It also denied her the opportunity even to know the basis for her suspension.

Defendants'/Appellees' defense was that they were immune from suit under both state and federal law. However, the immunity could be rebutted by a showing of bad faith or malice.

From the beginning of this case, Defendants have asserted that virtually every document that would shed any light on the reasons for Dr. Levitt's summary suspension or that would shed any further light on the nature, quality and timing of communication between the parties was privileged and that they were immune from suit. The only documents provided to Plaintiff were a handful of documents deemed by Defendants not to be privileged and a "privilege log" with extremely limited descriptions of the documents, their authors, recipients and vague references to their subject matter. In ruling on these assertions the district court stated that Dr. Levitt could designate documents from the privilege log for *in camera* review so the court could determine if they were in fact privileged or should be discoverable in the context of the issue in this case. Dr. Levitt never got that chance to view the documents or even to set forth which documents the court should review, because the court made its summary judgment ruling based on proffers and affidavits without the aid of the documents themselves.

The question on this appeal is whether, on motion for summary judgment, the district court erred by deciding disputed issues of fact, and the inferences to be drawn from those facts, in favor of the moving parties (Defendants). The district court erred by taking each incident or action of the Defendant alleged by Dr. Levitt one at a time, in isolation, and erroneously deciding that each of them standing alone was not evidence of bad faith. Dr. Levitt's contention is that bad faith can be inferred from the totality of the

circumstances regarding the conduct of the Defendants toward her. Their conduct began with their initial conspiracy of silence with regard to the reasons for a limited, conditional, short-term renewal of her privileges. It continued by extending the conspiracy of silence regarding the reasons for her summary suspension. Their conduct culminated with their outright denial of her request for the fair hearing required by the bylaws. Defendants claimed that the proctoring plan that they required Dr. Levitt to complete was a bargained for alternative to a fair hearing and thus there was no breach of the bylaws. Dr. Levitt asserts that the fair hearing is the only way to safeguard a doctor's professional reputation when faced with an adverse action, and thus the only way to show good faith in an otherwise secretive process. She contends that denial of the fair hearing is, in and of itself, tantamount to bad faith, especially when coupled with numerous other missteps in communication, including drafting documents and delaying their delivery to Dr. Levitt, continually refusing to discuss the issues with her, and treating her like a pariah.

The district court erred when it failed to view the facts, and all inferences to be drawn from those facts, in the light most favorable to Dr. Levitt, the non-moving party. The district court erred when it summarized that there was "no evidence" of bad faith on the part of Defendants. Finally the district court erred when it ruled that in the absence of bad faith Defendants were entitled to statutory immunity and granted the Defendants summary judgment on all of Dr. Levitt's claims.

The Court should reverse summary judgment and remand the case ordering the district court to finish discovery of the alleged privileged documents and conduct a trial on the merits.

Statement of the Issue

Issue: Whether summary judgment was appropriate where there were genuine disputed issues of material fact and the facts and inferences to be drawn from them were not viewed in favor of the nonmoving party, Dr. Levitt.

Standard of Review: This appeal requires the Court to examine the district court's legal conclusions for correctness. Summary judgment is only appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Smith v. Four Corners Mental Health Center, Inc.*, 70 P.3d 904, 909 (Utah 2003). The Court must view the facts and all reasonable inferences drawn therefrom in the light most favorable to Dr. Levitt, the nonmoving party. *Id.* at 907. If, after review of the record, it appears that there is a material factual issue, the Court must reverse the district court's grant of summary judgment. *Id.* at 909.

Preservation: This issue is preserved. [R.976 – 977.]

Statement of the Case[1]

Plaintiff Jodie K. Levitt, M.D. is a duly licensed physician who has been licensed in the State of Utah since 2002. Dr. Levitt is a neurosurgeon who has practiced her specialty full-time since 1996. Dr. Levitt is board certified and is a member of several medical societies including the American Association of Neurological Surgeons; Congress of Neurological Surgeons; Rocky Mountain Neurosurgical Society; Utah Association of Neurological Surgeons; Utah State Medical Association; and the American Medical Association. Dr. Levitt has been the recipient of several honors and awards including 2014 Top Ten Neurosurgeons Utah-Vitals, and Patients' Choice Award Physician for the years 2010, 2011, 2013 and 2014. Dr. Levitt was chief of neurosurgery at the Guthrie Clinic from 1998 to 2002 when she relocated to Salt Lake City, Utah and SLRMC. Prior to the actions of Defendants complained of hereinafter, Dr. Levitt enjoyed an exemplary professional reputation among her peers. [R.3] During all relevant time periods, Dr. Levitt had active staff membership with full surgical privileges at SLRMC. Dr. Levitt held a position of Chief of Surgery at SLRMC from 2006 until 2010. She has also had, and continues to have, a private practice in neurosurgery in Salt Lake City since 2007. [R.3.]

In October 2009 Dr. Levitt was hospitalized for depression. This hospitalization was fully disclosed to relevant decision makers at SLRMC including, but not limited to, Chief Executive Officer (CEO) Jeff Frandsen in 2009. Thereafter Jeff Frandsen

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[1] Because Dr. Levitt was the nonmoving party against whom summary judgment was granted, she presents the facts in the light most favorable to her. [R.823.]; *Orvis v. Johnson,* 177 P.3d 600 (Utah 2008).

disclosed Plaintiff's hospitalization to, *inter alia*, Defendant Dr. Wanda Updike, Chief of Staff; Bill Southwick, Chief Nursing Officer; and Defendant, Dr. Alan Davis, the Chief of Staff. [R. 3-4.]

In September of 2011 Dr. Levitt applied for renewal of privileges at SLRMC. On the advice of her therapists and psychiatrist, Dr. Levitt did not disclose her 2009 hospitalization on her September 2011 application for renewal of privileges because SLRMC and IASIS management (including SLRMC'S MEC committee) were already aware of the hospitalization in 2009.[2] Indeed, the application itself allowed that Dr. Levitt could supplement her application by informing the CEO (who already knew of the hospitalization). The attestation section of the application reads in part: "I have the responsibility to keep this application current by informing the facility, through the Chief Executive Officer, of any changes in the areas of inquiry contained herein." This led Dr. Levitt to believe that informing the CEO of her hospitalization was the functional equivalent of including the information on the application, while still protecting her privacy. This was particularly so where, as here, Dr. Levitt was not "impaired" and was not a threat to health care in any sense of the word following her hospitalization. Indeed, at no time did IASIS or SLRMC ever assert or accuse Dr. Levitt of being "impaired." [R.4.]

Standard renewals of privileges at SLRMC were for two year terms. On or about December 29, 2011 Dr. Levitt received a letter that was dated November 23, 2011

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[2] As stated above, in spite of the hospitalization Dr. Levitt remained Chief of Surgery for SLRMC and IASIS in 2009 and 2010. [R. 3]

granting conditional approval of her renewal/reappointment for six months, retroactive to September 29, 2011. Its stated reason for the shorter-term "conditional reappointment" was that Dr. Levitt had "several peer reviews pending." The letter also requested "further clarification on [her] hospitalization in the last five years and medications that [she] might be taking that may affect either [her] clinical judgment or motor skills." The reappointment was made subject to "the [Medical Staff] Bylaws, Rules and Regulations, and Policies of the Hospital and Medical Staff in force during the term of [her] appointment." [R. 4-5.]

This letter dated November 23, 2011, but not received until December 29, 2011, was the only communication Dr. Levitt had received since she had submitted her application for renewal of privileges in September, 2011. This was a criticism of Dr. Levitt's professional standing and is the touchstone example of the malicious and vexatious nature of the conduct exhibited by Dr. Wanda Updike, Dr. Alan Davis and others as well as IASIS and SLRMC. This bad faith conduct by all Defendants commencing on or about December 29, 2011, which continues to date,[3] is the reason Dr. Levitt has been forced to seek judicial relief. [R. 5.] Furthermore, this letter dated November 23, 2011 and not received until December 29, 2011 was the first notice Dr.

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[3] Surgeons at SLRMC have block time so that they can schedule surgeries without having to consult the O.R. in advance each time they schedule a patient for surgery. Dr. Levitt has been trying to get block time restored to her since 2012 and even after the summary judgment ruling in this case her block time has not been restored. This is a continuing example of the malicious, bad faith treatment Dr. Levitt has endured at SLRMC. Furthermore, Dr. Levitt's suspension is still her record. A Fair Hearing could have removed the suspension from her record.

Levitt received that she had "several peer reviews pending." Yet there was no information as to the nature of the reviews nor the reasons therefor. [R.5.]

Dr. Levitt made repeated attempts to get clarification from SLRMC decisionmakers, including the individual Defendants and their administrative staff, as to why her reappointment was "conditional." All Defendants failed and intentionally refused to provide Dr. Levitt any information in breach of the Medical Staff Bylaws. At one point she was told she needed to wait until after the new year when decision makers returned from the holidays. [R. 5-6.]

While Dr. Levitt was awaiting clarification she obtained a copy of a letter from her treating psychiatrist and resubmitted the opinion dated November 7, 2009 supporting her continued competence and which did not demonstrate any impairment at any relevant time. Dr. Levitt also obtained a second opinion from an outside psychiatrist, Dr. Robert Strong, who opined that Dr. Levitt was at all times competent and not impaired in 2009 forward. Dr. Levitt provided that second opinion to SLRMC decision makers, who continued to fail and intentionally refused to provide Dr. Levitt with the necessary information. This intentional activity of all Defendants continues to date, and was malicious, unprofessional, and in breach of the Medical Staff Bylaws. [R.6.]

After the new year Dr. Levitt made repeated requests, both verbally and through email, for information as to the reason for the "conditional reappointment" and continuing review. But her requests were rejected and/or ignored. [R.7.]

On or about February 10, 2012, Bill Southwick, Chief Nursing Officer, asked Dr. Levitt if she had received a "certified letter." Dr. Levitt answered in the negative and

immediately went to hospital administration to request a copy of this letter. She ultimately received a copy of a letter dated January 30, 2012, some eleven days earlier, which alleged on its face that it had been sent Certified Mail, return receipt requested. The mailed letter was not received by Dr. Levitt until almost the end of February, 2012. [R.7.] The letter was from the Credentials Committee Chair, Dr. Richard Nielson, and requested written responses by March 1, 2012. The letter requested responses to three different issues that were based, at least in part, on misinformation stated in the letter as the premise for Dr. Levitt's responses. Dr. Levitt was unsuccessful at getting anyone among Defendants to address the intentional misinformation contained in the letter. [R.7.]

Dr. Levitt immediately called Dr. Updike, who referred her to Dr. Davis. Dr. Levitt spoke to CEO, Jeff Frandsen, who stated that he could not see or discuss any of the information that allegedly called for review. Again, CEO, Jeff Frandsen, in the insanity of the conspiracy to hurt and damage Dr. Levitt, referred Dr. Levitt back to Dr. Davis, who refused to provide information; indeed, refused to even talk to Dr. Levitt. [R.8.] This unprofessional, bad faith, and malicious behavior, caused Dr. Levitt great emotional distress. [R.8.]

This January 30, 2012 correspondence from Dr. Nielsen, pretextually and for no good faith reason(s), purported to accuse Dr. Levitt of errors and omissions by not listing her 2009 hospitalization for depression and went on, pretextually with no good faith reason(s), to require Dr. Levitt to list her hospitalization for depression in her reapplication for privileges when the decision makers at IASIS and SLRMC knew of the 2009 hospitalization, including CEO Jeff Frandsen, CNO Bill Southwick, Chief of Staff

Dr. Wanda Updike and incoming Chief of Staff Dr. Alan Davis. Defendants, and each of them, had known of Dr. Levitt's hospitalization for over three years… indeed, Dr. Levitt continued as Chief of Surgery after they knew of her hospitalization. [R.21.]

The January 30, 2012 Correspondence from Dr. Nielsen, stated, in part:

> Even though you have disclosed information to the CEO, this information needs to be documented in your reappointment application in order for the Credentials Committee to have consistent and current information [which the Credentials Committee had, as admitted by Dr. Richard Nielsen]. The CEO is not a member of the Credentials Committee. PLEASE CORRECT THE APPLICATION BY MARCH 1, 2012 AND SUBMIT IT TO THE MEDICAL STAFF OFFICE (Michelle Judy).

This quoted portion of the pretextual correspondence from Dr. Nielsen, received by Dr. Levitt on February 10, 2012, flies in the face of the attestation provision in the application for privileges which Dr. Levitt submitted in September, 2011, the specifically states that the application may be supplemented by informing the CEO. [R.8-9.]

The January 30, 2012 letter also requested that Dr. Levitt submit protocols for handling CSF (cerebral spinal fluid) leaks and for preventing wrong site surgeries. [R.1010]

On February 14, 2012 Dr. Levitt submitted her responses in writing to address the issues set forth in the January 30, 2012 letter. [R.9.]

Also on February 14, 2012, Dr. Levitt was called in to meet with Jeff Frandsen, Dr. Updike, and Dr. Davis. Inexplicably, Dr. Levitt's privileges at SLRMC were wrongfully suspended for 28 days on February 14, 2012. The letter included a signature line asking for Dr. Levitt's agreement. She never signed the letter, nor did she agree to a proctorship in lieu of a Fair Hearing. [R.1014-15.] During the first 14 days of the

suspension, Dr. Levitt was not allowed to use the hospital, including any operating rooms. In the ensuing 14 days, she was wrongfully required to complete seven proctored surgeries or she would be reported to the National Practitioner Data Bank (access to information in the NPDB is used to make licensing, credentialing, privileging or employment decisions in health care facilities). [R.10.]

During the days that followed her suspension Dr. Levitt made numerous attempts to get answers to the substance of the complaints against her. She also requested permission, given the short time frame, to do some of the proctored cases at other facilities so that she would not be derailed by lack of operating room availability. The efforts by Dr. Levitt to obtain information about her wrongful suspension of privileges at SLRMC crashed into a conspiratorial, malicious, "wall of silence" by all Defendants. Permission to utilize other facilities to complete the wrongfully required proctored cases (in light of the short time frame that Dr. Levitt was required to complete the same) was denied. This malicious and bad faith behavior of Defendants in denying Dr. Levitt permission to utilize other facilities of IASIS to perform the seven proctored surgeries was a material breach of the Medical Staff Bylaws; was, and could only be, done for the sole purpose of hurting Dr. Levitt's career. [R.10.]

On February 15, 2012 Dr. Levitt sent an email to Jeff Frandsen requesting answers to her questions. Mr. Frandsen refused to answer her questions, referring her instead, again, to Dr. Davis. Then on February 17, 2012 Dr. Levitt sent separate letters to Dr. Davis and Dr. Updike requesting to meet to discuss the situation. Both requests were denied. [R.11]

On or about February 24, 2012 Dr. Levitt was allowed by Jeff Frandsen to see a cursory list of the cases giving rise to the suspension. She sent a letter asking for removal from the list of one patient upon whom Dr. Levitt had not operated. She received no response. [R.11]

On February 25, 2012 Dr. Levitt met with the proctor Dr. Yonemura. She later received a call from Dr. Davis indicating that she could not start performing proctored surgeries on the 15th day of her suspension as she had been led to believe she would be allowed to do. The reason stated was that "It [was]too early," without any clarification. Dr. Davies claimed there was missing information WHEN THERE WAS NO MISSING INFORMATION because it had already been submitted to Michelle Judy. Moreover, the so-called "missing" information, according to Dr. Nielsen's January 30, 2012 letter, was not due until March 1, 2012. This further reduced the her time for completing the seen proctored surgeries to one week. [R.11.]

Pursuant to her earlier request to use other facilities to complete her proctored surgeries, Dr. Levitt received permission from CEO, Jeff Frandsen, to use other facilities and did, in fact, perform two proctored cases at Lakeview Hospital. Upon being informed of these two proctored cases being performed at the IASIS Lakeview Hospital by Dr. Levitt, Dr. Davis inexplicably and maliciously denied the inclusion of them among the seven required proctored surgeries. Thus Dr. Levitt was required to perform a total of nine proctored surgeries in the shortened time frame to satisfy the demands made upon her by all Defendants. [R.12.]

This "summary suspension" was an adverse action under the Medical Staff Bylaws that Dr. Levitt's reappointment was expressly made subject to by the letter dated November 23, 2011. Under those same Medical Staff Bylaws, Dr. Levitt was entitled to a notice from the hospital that she had a right to a "Fair Hearing" to resolve the issue and to refute the malicious, wanton and reckless accusations made against her. [R.12.] Once requested, she has an absolute right to the Fair Hearing to clear her name.

On February 28, 2012 Dr. Levitt sent a letter to the MEC requesting a Fair Hearing as provided in the Medical Staff Bylaws. This request was summarily, and maliciously denied by Dr. Davis. [R.12]

On March 2, 2012 Dr. Levitt made a request of Dr. Davis to see and discuss the alleged cases that had been reviewed which resulted in her suspension. Dr. Davis responded by saying, "I am not going to talk to you about your cases." [R.12-13.]

On March 16, 2012 Dr. Levitt received a second six-month "conditional reappointment" by email from Dr. Davis. Finally, sometime after March 16, 2012, Dr. Levitt received the cursory list of the "cases" that had been reviewed. But to date, Dr. Davis, Dr. Updike and SLRMC administration have refused to discuss the peer review cases, even without patient identifying information. Dr. Levitt still has not been given any clear reasons for her suspension, or any opportunity to clear her name and professional reputation. [R.13-14.] Her suspension is still on her record.

Dr. Levitt filed her Complaint on February 8, 2016 alleging breach of contract, breach of the covenant of good faith and fair dealing, tortious interference with economic relations, civil conspiracy, and intentional infliction of emotional distress. [R.1-24.] On

September 20, 2017 Defendants filed a Motion for Judgment on the Pleadings [R.1279-1304.] which was heard by the district court on December 11, 2017. [R.781.] On December 28, 2017 the district court signed and entered its Order on Motion for Judgment on the Pleadings dismissing Plaintiff's claim for intentional infliction of emotional distress. Claims for breach of contract, breach of covenant of good faith, and tortious interference remained. [R.957-58.]

From as early as June 23, 2017 Defendants have asserted that each and every document that would shed light on the issues in this case is privileged under Rule 26(b)(1) of the Utah Rules of Civil Procedure, the Utah Care Review Statute, Utah Code Ann. §26-25-3 and the Peer Review Privilege §78B-3-419. [R.1258-68.] Dr. Levitt's contention throughout this case has been that a physician's only protection from the possibility of unfair and malicious attacks on her professional competence is the "Fair Hearing" provisions of the Medical Staff Bylaws. [R.13-15, 983-994, 1004-05.] Had the Defendants granted Dr. Levitt's request for a Fair Hearing and given her the chance to defend her professional reputation, it would be reasonable and in furtherance of the goals of the Care Review Statute to allow the privileges and immunities to stand. But absent the Fair Hearing, allowing the blanket privilege and immunity denies Dr. Levitt the protections that the Bylaws were designed to provide.

On July 12, 2017 the district court held a telephone conference on the issue of privilege based on Defendants' Motion to Classify and Defendants' Statement of Discovery Issues. [R.224.] The court ordered as follows: "the Motion is DENIED without prejudice, and that discovery shall proceed, and to the extent Defendants contend

that responsive or relevant documents are protected by any claim of privilege or are entitled to any protection, Defendants shall compile a log of all such documents. The Court will then entertain any motion to exclude documents which Defendants maintain are protected by any privilege." Defendants' drafted a proposed Order including this language and emailed it to Plaintiff's counsel on July 18 2018. However, the Order was never submitted to the court for signing and entry.

On November 20, 2017 Plaintiff filed a Motion for Extension of Time for Discovery [R.658-64.] and a Statement of Discovery Issues [R.674-77.] regarding allegedly privileged documents. The hearing was ultimately scheduled for February 7, 2018, the same day as the hearing for Summary Judgment discussed below. [R.1024-27, 1055.][4]

Defendants filed a Motion for Summary Judgment on December 20, 2017 [R.823-883.] arguing, for purposes of this appeal, that Defendants were immune from suit under Utah's Health Care Providers Immunity from Liability Act and the federal Healthcare Quality Improvement Act. [R.830-840.] They argued that Defendants are entitled to immunity if they acted "with respect to deliberations, decisions, or determinations made or information furnished in good faith and without malice." [R.830.] They further argued that Defendants are entitled to a presumption of good faith unless Plaintiff can show malice and bad faith by clear and convincing evidence. [R.831.] Defendants supported their position with self-serving declarations of the Defendants' subjective intent, and

[4] Because the district court ruled in favor of Defendants on their Motion for Summary Judgment, the issue of extension of time for discovery and Plaintiff's Statement of Discovery Issues were not heard. [R.1216.]

downplayed the manner in which they kept the whole process "shrouded in secrecy" (to use the words of Judge Stone). [R.833.] They then cited "substantial objective evidence" they claim demonstrates a lack of bad faith or malice. [R.833-34.] In doing so they gloss over the extreme delays in providing what little information they did provide to Dr. Levitt. They downplay the significance and the potential inference of bad faith and malice of completely withholding information of exactly what errors Dr. Levitt had committed that would warrant her summary suspension. They do so under the guise of "protecting the peer review privilege." [R.834.] Finally, they argue that while Dr. Levitt was not provided the Fair Hearing that she requested, she was instead given the alternative of completing seven proctored surgeries in a unilaterally compressed time frame and that this was somehow more beneficial to her than the Fair Hearing would have been. [R.833-34 & n. 17] They try to claim that this was a bargained for exchange and that proctorship was somehow better for Dr. Levitt because the Fair Hearing process would extend beyond the 30 days and require reporting to the NPDB, as stated in a redacted email introduced by Defendants. [R. 1224-25.] However, a review of some of the unredacted portions of the email from Dr. Davis to Dr. Levitt shows that Dr. Davis, at minimum believed he had the power to suspend the tolling of the 28 days of the suspension and the reporting requirement. But apparently only for Defendants' purposes. [R.1230.] The fact that they would present an email in redacted form that is one document from among the documents that they claim are absolutely privileged further indicates that they are willing to waive the privilege for their own purposes.

Dr. Levitt opposed the motion, arguing that there were numerous missteps by Defendants including: delays in communication; denials of requests for even the slightest bit of information; miscommunications and a runaround as to from whom she might get information; a summary suspension without the proper notice of her right to a Fair Hearing as required by the Medical Staff Bylaws; the arbitrary decision to deny her a Fair Hearing; the demand that she complete a proctorship, only later (in the course of this litigation) to claim that the proctorship was a better alternative for her with which she had agreed; and arbitrarily delaying and reducing the time in which she could comply with the proctoring demand. [R.977-985] However, information as to the nature and magnitude of errors and the qualifications of reviewers could have easily been provided without divulging the identity of patients, complainants or reviewers. [R.990.] Instead Defendants chose to remain silent, or deflect Dr. Levitt's inquiries to others within the conspiracy. [R.1002-05.] Plaintiff disputed the inferences that Defendants claimed could be drawn from the "objective evidence." .Under the summary judgment standard Dr. Levitt is entitled, at this stage of litigation, for all reasonable inferences to be drawn in her favor, not in favor of Defendants. [R.987.] Indeed, taking all actions or inaction into consideration as a whole the court could and should infer malice and bad faith. The Arizona Court of Appeals in *Scappatura v. Baptist Hospital of Phoenix,* 584 P.2d 1195, 1201 (Ariz. App. 1978), a case relied upon by Defedants, stated, "[m]alice and maliciously import a wish to vex, annoy or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law." [R.987.] Significantly, in each of the cases, relied upon by Defendants in this case, where the requisite malice

was not found, the defendants has followed extensive internal procedures with full knowledge and participation of the Plaintiffs before taking the adverse actions of which the Plaintiffs complained. That did not happen in the instant case. [R.986-90.]

On February 7, 2018 the district court held the hearing on all motions including Defendants' Motion for Summary Judgment. [R. 1055.] The district court granted summary judgment by Order dated March 2, 2018 on the grounds of immunity under state law. [R.1064-65.]

In making its ruling during the hearing, the district court acknowledged first that "the record in this case is a little atypical it's – I think 'shrouded in secrecy' is not a bad characterization of that, but that is really by necessity because the legislature has already made the policy determination that we don't litigate healthcare quality questions in court..." [R.1247.] The court stated that it understood that the parties "have very different version[s]" of the facts regarding compliance with the Medical Staff Bylaws and whether proctoring was an appropriate substitute for a Fair Hearing. The court also stated that it is "problematic" for the court to infere [sic] from those "faults" in the internal process, and to infere [sic] from "those missteps" malice or lack of good faith. [R.1247-48.] However, at the summary judgment stage Plaintiff, as the nonmoving party is entitled to that inference unless such an inference is wholly unreasonable. No such inferences here were unreasonable.

The court stated that "[o]rdinarily. We look for some sort of extrinsic evidence of good faith, and we look for cases where we sort out ulterior purpose ... whether the primary purpose was something impermissible like competitive exclusion, ... [p]ersonal

enmity, [r]etaliation, [or] [d]iscrimination...." [R.1248.] The court went on to say, "[i]nstead, I'm asked to infere [sic] just from the sum total of what plaintiffs [sic] contends are missteps in the care review process to infere [sic] from that malice.... I can't do that." [R.1248.] However, the nonmoving party is entitled to just such an inference unless it is wholly unreasonable.

Finally, the court addresses several "missteps" in isolation and states that he cannot infer malice from any of them saying: "the conditional reappointment doesn't strike me as malice, it's reappointment [R.1248-49.] (This ignores the fact that typical reappointment is unconditional and for a period of two years, not six months.); delays in notifying of reappointment, perhaps it's sloppy, but it doesn't lead to an inference of malice [R.1249.]; refusal [to provide any information] I have talked about the necessity for preserving the privilege around protecting healthcare processes [R.1249.]; the summary suspension, I can't from just that fact of the summary suspension infer ... lack of good faith or malice [R.1249.]; finally, the proctoring requirements seems more like an opportunity to seek reinstatement than it is some sort of malicious act or some action taken in bad faith [R.1249.]. The Court concluded that Dr. Levitt had not met her burden of showing malice or bad faith and granted summary judgment based on immunity under state law. [R.1249].

Summary of the Argument

Health care providers enjoy statutory immunity under Utah law only if their actions are carried out in good faith and without malice. In this case Defendants should

be denied statutory immunity because their actions taken together illustrate malice and bad faith. Defendants made adverse decisions concerning Dr. Levitt's hospital privileges and repeatedly delayed sending notice of these decisions. Defendants repeatedly refused to provide Dr. Levitt with the reasons for the decisions, and refused to provide any justification for such refusal. It wasn't until after this case was filed that they cited the "peer review privilege" as their justification for keeping the entire process "shrouded in secrecy." Defendants could easily have provided Dr. Levitt with the underlying reasons for their actions without divulging the identities of the patients, complainants, or reviewers involved and still "protected the privilege." While maintaining their conspiracy of silence, Defendants summarily suspended Dr. Levitt's hospital privileges and demanded that she complete seven proctored cases within the next 28 days, but she could not use the operating room during the first fourteen days of the suspension. The notice of suspension failed to include the mandatory notice of her right to a Fair Hearing as required by the Medical Staff Bylaws.

Dr. Davis further complicated matters by arbitrarily delaying her access to the operating room for an additional week thereafter. The CEO Jeff Frandsen first approved of Dr. Levitt doing some of the proctored surgeries at other IASIS facilities only to have Dr. Davis later arbitrarily, and without explanation, deny the inclusion of the two surgeries she performed at IASIS Lakeview facility among the seven required proctored. Thus, she was ultimately required to perform nine proctored surgeries. Finally, and maybe most importantly she requested a Fair Hearing and her request was denied in direct violation of the Medical Staff Bylaws.

When considering summary judgment the district court must resolve all genuinely disputed facts and all reasonable inferences to be drawn therefrom in favor of the nonmoving party. In this case that was Dr. Levitt. In this case the district court failed to do so.

Each of the Defendants' missteps, as the district court called them, viewed in isolation, may not draw an inference of bad faith and malice. But, when viewed altogether as potentially coordinated efforts which served to vex and frustrate the professional aspirations and damage the professional reputation of Dr. Levitt, a reasonable jury could infer bad faith and malice from the totality of the circumstances. The district court erred as a matter of law when it resolved these factual disputes and the inferences to be drawn from those facts in favor of the moving parties, the Defendants. While each "misstep" may seem relatively innocuous in isolation, taken as a whole a reasonable jury could view the pattern of conduct and draw the inference that Defendants acted with malice and in bad faith.

Furthermore, the court in making its rulings invaded the province of the jury when it made a factual determination that a conditional reappointment was arguably a positive development. The court's statement "the conditional reappointment doesn't strike me as malice it's reappointment" suggests it did not understand the negative impact on Dr. Levitt's career and reputation and at this stage of litigation it is Dr. Levitt that is entitled to any inferences to be drawn from the fact of a conditional reappointment. The court's claim that "proctoring seems more like an opportunity" is another example of not understanding the situation and the burden such a requirement placed on Dr. Levitt.

Stating that it "seems more like an opportunity" invades the province of the fact finder as well, because its Dr. Levitt that is entitled to a negative inference, not the "opportunity" that seemed to be to the district court. This is especially true when proctoring is not mentioned in the Medical Staff Bylaws as a substitute for a Fair Hearing.

This Court should reverse the ruling of the district court and remand for further proceedings including an Order for Defendants to produce redacted copies of documents or *in camera* review of allegedly privileged documents so that there may be a full and fair trial on the merits of this case.

Argument

This case has proven problematic since Defendants began hiding behind the peer review statute to prevent Dr. Levitt from obtaining the very records and documents that would shed light on the procedures (or lack thereof) that the Defendants followed in taking adverse actions against her. Defendants first raised the issue of privilege on June 23, 2017. Significantly, Defendants never mentioned any privilege to Dr. Levitt in 2011 or 2012 when the events that gave rise to this case were occurring.

In the overall context of this case, if you consider that the causes of action arose in 2011 and early 2012, their "privilege" defense is relatively new. It was first raised on June 23, 2017 to classify as protected, documents included in Dr. Levitt's initial disclosures that Defendants had received on July 8, 2016 nearly a year earlier. [R.55-56, 1258-61.] Since then Defendants have used the "protection of the peer review privilege" to explain away their unconscionable refusals to provide any information to Dr. Levitt as

to what, if anything, she had done wrong. [R.829, 847,1222.] Apparently, this explanation struck a chord with the district court. The court acknowledged that the case could be characterized as containing a "shroud of secrecy." [R.1247.] The court then accepted the Defendants' explanation of the secrecy to "preserve the peer review privilege." [R.1248.] This is a *post hoc* justification, not the reason for their secrecy. Throughout these proceedings, however, Defendants have failed to acknowledge that they could have told Dr. Levitt what she had done wrong, and why she was subject to their adverse actions without divulging the identity of patients or others who provided them with information. Documents including privileged information are routinely put before factfinders, with the protected information redacted. (Defendants themselves presented to the court, in the hearing on Motion for Summary Judgment, a redacted email from Dr. Davis to Dr. Levitt that purported to show that she somehow tacitly agreed to the proctorship as an alternative to her contractual right to a Fair Hearing, while steadfastly maintaining it was a privileged document. [R.1224-25.]) It is the identities of patients, complainants, or reviewers, not the substance of complaints that is intended for protection, especially in this context where it is the physician who's conduct is under review who is seeking the information. Interestingly, Defendants repeatedly claim that the silence was to "protect the privilege" but the single bit of information they ultimately did provide, even though it was late in the process, was a list of patient names, arguably among the most sensitive and protected information they could provide. [R.829, 847, 1222, 1248]

Because of the manner in which the district court ruled this dismissal on summary judgment boiled down to one issue: that health care providers enjoy statutory immunity under Utah Code Ann. §58-13-4 only if their actions are carried out "***in good faith and without malice***." *Id.* In their supporting memorandum in the court below, Defendants claim "the weight of Utah authority 'grants deference to hospital officials' professional judgment' for corrective actions affecting hospital staff" and they go on to discuss two cases.[5] [R.830-31.] Interestingly, neither case addresses the statutory immunity argument. In both cases the courts address contractual immunity under the hospital bylaws and/or applying contractual fair process provisions. [R.986-87.] Significantly, in *Don Houston* the hospital engaged in extensive review procedures and Dr. Houston was kept fully informed on an ongoing basis of the reasons for, and the results of ,the reviews over a period of more than two years before he was summarily suspended. 933 P.2d at 404-405. [R.986.] Defendants also cited *Scappatura v. Baptist Hospital of Phoenix,* 584 P.2d 1195 (Ariz. App. 1978). The court there ruled that plaintiff doctor had not proven malice. But circumstances were very different from the instant case. The plaintiff's privileges has been temporarily suspended, pending a full investigation, as the result of numerous complaints concerning a patient who expired shortly after surgery. *Id.* at 1197. After a full hearing, [the plaintiff's] privileges were reinstated. *Id.* at 1198. The defendants explicitly stated the reasons for the suspension. Finally, "[l]ess than one month after his suspension [plaintiff] was reinstated with certain restrictions and

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[5] *Don Houston, M.D, Inc. v. Intermountain Health Care, Inc.,* 933 P.2d 403 (Utah Ct. App. 1997) and *Brinton v. IHC Hospitals, Inc.,* 973 P.2d 956, 964 (Utah 1998).

conditions, through a series of formal hearings, all of which comported with due process standards." *Id.* at 1199. [R.987-88.] None of these procedural safeguards, guaranteed by the Medical Staff Bylaws were provided to Dr. Levitt in this case. That said this case, at this point boils down to the issue of whether Dr. Levitt has shown a genuine issue of material fact.

I. On Motion for Summary Judgment the Court Failed to Construe All Facts and the Reasonable Inferences to be Drawn Therefrom in Favor of Dr. Levitt

In deciding a motion for summary judgment the district court must construe all facts and the reasonable inferences to be drawn therefrom in favor of Plaintiff as the non-moving party. *Norton v. Blackham,* 669 P.2d 857, 859 (Utah 1983). "Summary judgment is appropriate only upon a showing 'that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Waddoups v. Amalgamated Sugar Co.,* 54 P.3d 1054, 1060 (Utah 2002). To defeat summary judgment Plaintiff need only present evidence that is sufficient to establish a genuine issue of material fact. *Id.* at 1063. [R.977.]

A. Dr. Levitt Has Presented Sufficient Evidence to Establish Several Genuine Issues of Material Fact

This case is replete with disputes of fact and disputes regarding the inferences that can and should be drawn from otherwise objective evidence. Defendants made adverse decisions concerning Dr. Levitt's hospital privileges and repeatedly delayed sending notice of these decisions. Defendants repeatedly refused to provide Dr. Levitt with the reasons for the decisions, and refused to provide any justification for such refusal. It

wasn't until after this case was filed that they cited the "peer review privilege" as their justification for keeping the entire process "shrouded in secrecy." Defendants could easily have provided Dr. Levitt with the underlying reasons for their actions without divulging the identities of the patients, complainants, or reviewers involved and still "protected the privilege." While maintaining their conspiracy of silence, Defendants summarily suspended Dr. Levitt's hospital privileges and demanded that she complete seven proctored cases within the next 28 days, but she could not use the operating room during the first fourteen days of the suspension. The notice of suspension failed to include notice of her right to a Fair Hearing as required by the Medical Staff Bylaws. Then Dr. Davis further complicated matters by arbitrarily delaying her access to the operating room for an additional week thereafter. The CEO Jeff Frandsen first approved of Dr. Levitt doing some of the proctored surgeries at other IASIS facilities only to have Dr. Davis later arbitrarily, and without explanation, deny the inclusion of the two surgeries she performed at the IASIS Lakeview facility among the seven required proctored. Thus, she was ultimately required to perform nine proctored surgeries. Finally, and maybe most importantly, she requested a Fair Hearing and her request was denied in direct violation of the Medical Staff Bylaws. The failure to provide the notice of right to a Fair Hearing, and the failure to provide the requested Fair Hearing, both in direct violation of the Medical Staff Bylaws, render any claimed efforts to conduct a peer review nothing but a sham.[6] This is because with statutory privileges being invoked to

[6] In their Motion for Judgment on the Pleadings Defendant cited an article by Dinesh Vyas & Ahmed E. Hozain entitled *Clinical Peer Review in the United States* to explain

hide information, Dr. Levitt's only true defense to her reputation was through the Fair Hearing procedures.

The district court characterized the Defendants actions as "those faults", "missteps" and "sloppy." [K.1247-1249.] The court explains away the secrecy surrounding the entire affair as "preserving the peer review privilege." If indeed that was the reason in 2011 and early 2012, why was that reason never expressed until June 23, 2017, nearly a year after the July 8, 2016 date upon which Plaintiff's initial disclosures were submitted? The court refused to infer malice or bad faith from the "conditional reappointment" because it viewed reappointment, at least in part, as a good thing. Dr. Levitt disputes that such conditional reappoint was in any way a positive and at this stage of litigation she is entitled to the negative inference. Dr. Levitt is entitled to the inference that the undisputed significant delays in communication (46 days and at least 11 days) are more than sloppy, they harmed her, and some form of bad faith could be inferred from them. At this stage of litigation, Dr. Levitt is entitled to an inference of bad faith regarding her summary suspension without any communicated justification. Finally, the court improperly decided that the fact of the proctorship "seems" more like an opportunity than a detriment. Again, at this stage of this litigation, Dr. Levitt is entitled to her view that being forced to perform a total of nine proctored surgeries to satisfy a

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the "critical public policies" in which immunity is anchored. [R.1283 n.2] However, that same article points out that blanket immunity has given rise to abuses in the form of "sham peer reviews." The article calls for much needed standardization of peer review processes, external reviews and legislative reform. Dinesh Vyas & Ahmed E. Hozain, *Clinical Peer Review in the United States, History, Legal Development, and Subsequent Abuse,* World J. Gastroenterology, v. 20(21); 2014 Jun 7.

requirement of seven surgeries within 28 days (ultimately reduced to 7 days) was a serious detriment and professional hardship. Given each and every inference that Dr. Levitt was entitled to and was denied; if those inferences are viewed in her favor a reasonable jury could decide that there was clear and convincing evidence of bad faith and malice because taken as a whole there is no other more likely explanation.

Conclusion

This Court should hold that Dr. Levitt has presented sufficient evidence establishing several material issues of material fact as to the events and circumstances surrounding her suspension. Those material issues of fact improperly decided by the trial court here, requires that this Court reverse the grant of summary judgment and remand this case with instruction to conclude discover and set this matter for trial before a jury.

DATED this 24th day of August, 2018.

/s/ *Cecil R. Hedger*

Attorney for Plaintiff / Appellant

Certificate of Compliance

I hereby certify that:

1. This brief complies with the word limits set forth in Utah R. App. P. 24(g)(1) because the brief contains 7854 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).
2. This brief complies with Utah R. App. P. 21(g) regarding public and non-public filings.

/s/ Cecil R. Hedger

Certificate of Service

I, the undersigned, hereby certify that on the 24th day of August, 2018 I caused to be served by email the foregoing BRIEF OF APPELLANT upon:

Jonathan A. Dibble
Elaina M. Maragakis
Erin M. Adams

Counsel for Defendants / Appellees

/s/ Cecil R. Hedger

Addendum A

58-13-4 Liability immunity for health care providers on committees -- Evaluating and approving medical care.

(1) As used in this section, "health care provider" has the same meaning as in Section 78B-3-403.

(2) Health care providers serving in the following capacities and the organizations or entities sponsoring these activities are immune from liability with respect to deliberations, decisions, or determinations made or information furnished in good faith and without malice:

(a) serving on committees:

(i) established to determine if hospitals and long-term care facilities are being used properly;

(ii) established to evaluate and improve the quality of health care or determine whether provided health care was necessary, appropriate, properly performed, or provided at a reasonable cost;

(iii) functioning under Pub. L. No. 89-97 or as professional standards review organizations under Pub. L. No. 92-603;

(iv) that are ethical standards review committees; or

(v) that are similar to committees listed in this Subsection (2) and that are established by any hospital, professional association, the Utah Medical Association, or one of its component medical societies to evaluate or review the diagnosis or treatment of, or the performance of health or hospital services to, patients within this state;

(b) members of licensing boards established under Title 58, Occupations and Professions, to license and regulate health care providers; and

(c) health care providers or other persons furnishing information to those committees, as required by law, voluntarily, or upon official request.

(3) This section does not relieve any health care provider from liability incurred in providing professional care and treatment to any patient.

(4) Health care providers serving on committees or providing information described in this section are presumed to have acted in good faith and without malice, absent clear and convincing evidence to the contrary.

Amended by Chapter 3, 2008 General Session

Addendum B

The Order of the Court is stated below:
Dated: March 02, 2018 02:45:39 PM
/s/ ANDREW H STONE
District Court Judge

Jonathan A. Dibble (0881)
Elaina M. Maragakis (7929)
Erin M. Adams (15979)
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Attorneys for Defendants IASIS Healthcare Holdings, Inc., Salt Lake Regional Medical Center, Alan Davis, M.D. and Wanda Updike, M.D.

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JODIE K. LEVITT, M.D., Plaintiff, v. IASIS HEALTHCARE HOLDINGS, INC., a Delaware Corporation; SALT LAKE REGIONAL MEDICAL CENTER, LP, a Delaware Limited Partnership, DBA Salt Lake Regional Medical Center; ALAN DAVIS, M.D., WANDA UPDIKE, M.S.; and DOES 1-10, Defendants.	**ORDER** Case No. 160900952 Judge Andrew H. Stone Tier III

The Court, having reviewed the Motion for Summary Judgment (the "Motion") submitted by Defendants IASIS Healthcare, Salt Lake Regional Medical Center, Alan Davis, M.D. and Wanda Updike, M.D. (collectively, the "Defendants"), the Defendants' Memorandum in Support of the Motion for Summary Judgment, the Plaintiff's Memorandum in Opposition to the Motion for Summary Judgment, and Plaintiff's Declaration, and the Defendants' Reply Memorandum in

Support of the Motion for Summary Judgment and all exhibits attached to all the papers filed and having heard oral argument by all parties on February 7, 2018, and being fully informed, hereby GRANTS the Defendants' Motion for Summary Judgment on all of Plaintiff's claims, and finds as follows:

1. Defendants have properly invoked the peer and care review privileges.

2. There is no evidence that Defendants acted from any motive other than healthcare quality improvement and concern for patient care.

3. Plaintiff has failed to rebut the presumption of good faith and lack of malice under Utah Code Ann. §58-13-4.

4. Based on the foregoing, Defendants are immune from Plaintiff's claims.

5. All of Plaintiff's claims are dismissed in their entirety, with prejudice.

* * * END OF ORDER * * *

In accordance with URCP Rule 10(e) and the Utah State District courts E-filing Standard No. 4, this Order does not bear the handwritten signature of the Judge, but instead displays an electronic signature at the upper right-hand corner of the first page of this Order.

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2018, I emailed the foregoing **[Proposed] Order** to:

Cecil R. Hedger, Esq.
chedger@tessorolaw.com
Attorney for Plaintiff

Whereas Plaintiff gave no response and made no objection within seven days, we now file the foregoing **[Proposed] Order** pursuant to Rule 7(j)(5)(B) of the Utah Rules of Civil Procedure.

/s/ Erin M. Adams

Addendum C

SALT LAKE
REGIONAL MEDICAL CENTER

November 23, 2011

Jodie K Levitt, MD
82 South 1100 East
Suite 303
Salt Lake City, UT 84102

Re: Reappointment to the Medical Staff

Dear Dr. Levitt:

On behalf of the Board of Trustees, I wish to inform you that your reappointment to the Active Medical Staff of Salt Lake Regional Medical Center and renewal of privileges in Neurosurgery have been approved. ***As you have several peer reviews pending, it is their recommendation that you be approved for a six-month conditional reappointment in order that they might review their dispositions in a more timely manner. Also, the Credentials Committee has requested further clarification on your hospitalization in the last five years and medications that you might be taking that may affect either your clinical judgment or motor skills.*** Your medical staff period is for 09/29/2011 to 03/29/2012.

The reappointment is subject to all the terms and conditions of your initial appointment and previous reappointments, and the Bylaws, Rules and Regulations, and Policies of the Hospital and Medical Staff in force during the term of your appointment.

The clinical privileges were granted as requested.

We hope for a continued strong relationship with you and the community we serve.

Sincerely,

Jeff Frandsen
Chief Executive Officer

JF/mj
Enclosure

1050 East South Temple, Salt Lake City, Utah 84102
T: 801.350.4717 F: 801.350.4571

Never Received.

SALT LAKE
REGIONAL MEDICAL CENTER

B
C

January 30, 2012

CERTIFIED MAIL
Return Receipt Requested

Jodie Levitt, MD
82 South 1100 East, Suite 303
Salt Lake City, Utah 84102

Dear Dr. Levitt:

The Credentials Committee met recently and reviewed your file, as the end of your six month conditional reappointment is coming up in March 2012. We reviewed the six cases that were sent out to an external reviewer and two other recent occurrences that are pending review. The Credentials Committee requests the following for continuation of your privileges at Salt Lake Regional Medical Center:

1. Review of your cases find there have been several CSF leaks in the last few years. Therefore, we recommend that you establish a written protocol for handling CSF leaks in the future. You need to submit this in writing to the Medical Staff Office by March 1, 2012.

2. Review of your cases finds that you have had three wrong site surgeries in the last few years. We recommend that you have a written protocol as to how you will establish confirmation of correct site surgery in the operating room. The Committee feels these are serious events and if another wrong site occurrence happens, the Committee will discuss further action which could include termination of privileges. Please submit this in writing to the Medical Staff Office by March 1, 2012.

3. Review of your reappointment application finds there was an omission of your hospitalization in November 2009. The Credentials Committee takes errors/omissions in applications very seriously. Even though you have disclosed information to the CEO, this information needs to be documented in your reappointment application in order for the Credentials Committee to have consistent and current information. The CEO is not a member of the Credentials Committee. Please correct the application by March 1, 2012 and submit it to the Medical Staff Office.

Assuming you respond in a satisfactory and timely manner to the requests described above, the Credentials Committee will approve a three-month conditional reappointment. During this time the Credentials Committee will be reviewing your cases in a concurrent fashion.

If you have any questions regarding these items, you are welcome to make an appointment to meet with the Credentials Committee.

Sincerely,

Richard Nielsen, MD
Credentials Committee Chair
Salt Lake Regional Medical Center

/mj

1050 East South Temple, Salt Lake City, Utah 84102
T: 801.350.4717 F: 801.350.4571

Salt Lake Regional
MEDICAL CENTER

Jeff Frandsen, CEO

February 15, 2012

Dear Dr. Levitt

Per the meeting with yourself, Jeff Frandsen, CEO, Dr. Alan Davis, and Dr. Wanda Updike on Wednesday, February 14, 2012, regarding your privileges at Salt Lake Regional Medical Center and the actions taken by the Medical Executive Committee; the following is a summary of those actions and requests:

1. 28-day suspension of your privileges to practice at Salt Lake Regional Medical Center (both surgically and medically)
2. The minimum length of the suspension period, should you meet the following criteria, will remain at least 14 days beginning February 15, 2012. However, this timeframe will be at the sole discretion of the Chief of Staff and CEO, collectively.
3. Below are the criteria requested by the Executive Committee:
    a. Submit a proctoring plan to the Chief of Staff, which is to include:
        i. Proctoring by a neurosurgeon only
        ii. Proctoring of one lumbar case
        iii. Proctoring of one cervical case
        iv. Proctoring of four other cases to be proposed by you and approved by the Chief of Staff that would pertain to the areas of clinical or procedural concern as discussed with you in this meeting.
        v. Reapply for privileges as outlined by the Credentials Committee letter dated January 30, 2012, which has been given to you. This letter was signed by Dr. Richard Nielsen, Committee Chairman
        vi. Fully comply with all of the requests of the aforementioned Credentials Committee letter (Section 3.v.)
        vii. Submit with signature, documentation of a back-up coverage plan should you be out of town or otherwise become unable to care for your patients who may present themselves to Salt Lake Regional Medical Center for services.

4. Privileges will be reinstated upon completion of all criteria noted herein. However, the Medical Executive Committee and Administration reserve the right to take further or alternative steps based upon discovery of additional concerns or proactive and positive remediation of identified needs for improvement regarding your ability to provide high-quality patient care.

E

5. During the period of suspension, your patients who present for care at Salt Lake Regional Medical Center will need to be referred to another medical professional on call for that care. If there is not a medical professional available to appropriately care for your patient, the patient will likely need to be transferred to another facility (while maintaining the strictest of compliance to EMTALA laws).

Should you have any other questions or requests as to terms and conditions of your suspension herein defined, please contact Dr. Alan Davis, Salt Lake Regional Medical Center Chief of Staff. The contents of this letter represent (but are not exclusive of) the direction of Salt Lake regional Medical Center's Medical Executive Committee and Administration.

Thank you Dr. Levitt. We sincerely hope for your success as you move forward.

Sincerely,

Alan Davis M.D.

Wanda Updike, M.D.

Jeff Brandsen, CEO

Jodie Levitt, M.D.
(Please sign as an acknowledgement of acceptance of these terms)

Addendum D

THIRD JUDICIAL DISTRICT COURT

FOR SALT LAKE COUNTY, STATE OF UTAH

JODIE K. LEVITT, MD, PLAINTIFF, VS. IASIS HEALTHCARE HOLDINGS INC., DEFENDANT.	Case No. 160900952 Transcript of: MOTION HEARING

BEFORE THE HONORABLE ANDREW H. STONE

SCOTT M. MATHESON COURTHOUSE
450 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84111

FEBRUARY 7, 2018

TRANSCRIBED BY: Katie A. Harmon, RPR, CSR

February 7, 2018

P R O C E E D I N G S

* * *

THE COURT: All right. Good afternoon. This is Case No. 160900952, Levitt v. Iasis Healthcare Holdings, Inc.

Could I have appearances, please.

MR. HEDGER: Cecil Hedger, Your Honor, for plaintiff. Plaintiff is also with me at counsel table.

MR. DIBBLE: Your Honor, Jonathan Dibble, Elaina Maragakis, and Erin Adams representing Iasis, Salt Lake Regional Medical Center, Dr. Alan Davis, and Dr. Wanda Updike.

THE COURT: Okay. We're here today on defendants' motion for summary judgment, and then a motion regarding extension of discovery as well. Is that correct?

MR. DIBBLE: That's correct, Your Honor. And our thought was that you may want to hear the motion for summary judgment first because that may dispose of the other, possibly.

THE COURT: I think that's correct. So let's hear the motion for summary judgment for starters.

MS. MARAGAKIS: Good afternoon, Your Honor. We thank you again for your time. I know, Your Honor --

THE COURT: Well, shoot. I should also apologize to everyone for having to bump this hearing too. I, unfortunately, had double-booked at one point.

MS. MARAGAKIS: Well, I would think you would be able

On February 20 --

MR. HEDGER: Uh -- Counsel, I am sorry. I will have a chance to respond. I apologize to Counsel and to the Court.

THE COURT: All right. Thank you.

MS. MARAGAKIS: On February 24th there was a meeting that took place and at that point it was a meeting between two of the defendants, Dr. Davis, Dr. Updike, who were then the current and former chairs of the medical executive committee, or MEC, as well as Jeff Franzen, who was the then CEO and Dr. Levitt. And at that point, she was allowed to see what Dr. Levitt characterized as a cursory list of the cases giving rise to the suspension. And the important thing is is that she was called in to meet at that point prior to her suspension.

And finally, there was a list of cases provided to her. They contend it was after March 16, 2012, but in any event, to say that there was no notice or that there -- you know, she had absolutely no idea of any of the reasons for her suspension, is just belied by all of the contents of these letters and the February 24th meeting as well.

I will also note, Your Honor, that the defendants never reported Dr. Levitt to the National Practitioner Databank. The suspension did not last longer than 30 days, so there was no -- nothing on her NPDB record. And, in fact, the suspension was lifted upon successful completion of her proctorship and so -- that's where she continues to this day.

action is taken and the reasonable belief that the action was in furtherance of quality healthcare. On that point, Your Honor, I will just submit to you the same facts that I just recited to you, namely that these peer reviews were pending, there were -- they were elevated at some point to outside peer review and, obviously, there is an abundance of evidence that there was potential -- there were potential issues that could impact quality healthcare.

The second point is after a reasonable effort to obtain the facts of the matter, again, we did invite additional responses, which doctor -- which Dr. Levitt did provide. And after adequate notice hearing procedures are afforded to the position involved or after such other procedures as are fair to the physician under the circumstances.

This has been a bit of point of contention by the plaintiff, but, Your Honor, I just underscore the fact that as many of these cases -- as is the case with many of these cases, it was simply resolved by the fact that she accepted and completed this proctorship. Now I know that the plaintiff will say, "Well, she didn't really accept it," but the fact of the matter is: She did accept the proctorship because she completed it and her suspension was lifted.

If there is some sort of dispute about whether that was accepted, I suppose the suspension would still be in place. So I don't think that there is any reasonable argument that

somehow she was entitled to a fair hearing when she proceeded with the option of the proctorship and I think that's important to note.

I also will note, Your Honor, there has been an allegation by the plaintiff that she was denied the opportunity for a fair hearing. And the plaintiff actually attached a copy of an email to and -- to Dr. Davis and -- from Dr. Davis and we have attached it in redacted form, but I will just note, Your Honor, that in that email Dr. Davis specifically talks about if you want to have a hearing, you are going to have to request that by March -- I think it was March 16th -- it won't occur prior to -- prior to the 30 days.

THE COURT: Am I correct in reading that chain that there was a response from the doctor March 8th from doctor [inaudible].

MS. MARAGAKIS: So there was not a response on the issue of whether she wanted to request a fairing hearing.

THE COURT: No, it was just more thank you, as I recall.

MS. MARAGAKIS: Yes. But there was never any response to that, no "I want to go through with my fair hearing, I want to clear my name," nothing further at least is indicated by that -- by that --

THE COURT: I'm just trying to date when the offer for a hearing was made, and so it was made shortly before

only receiving it for purposes of making that determination.

MR. HEDGER: May I approach?

THE COURT: Yes.

MR. HEDGER: I think it's important for the Court to read the entirety of this email to allow the rest of my argument concerning both the state's statute and the federal statute with respect to what we're dealing with here.

Okay. Your Honor, Dr. Davis indicates "it will only count as 28 days in extending a deadline with respect to the suspension," meaning that could he have, at any point in time prior to my client's slip-and-fall in the operating room, which caused the extension and sometime on the 4th, 5th, or 6th of March, my client fell and suffered a concussion in the operating room, which triggered the reference here to extending this thing for another week.

I will have the ability this -- email says and stands for, to extend or to hold or to determine when the 28 days starts or counts or whatever. And that's important for this reason: It's because my client asked for a fair hearing prior to -- in February, prior to her slip-and-fall in the operation room. Dr. Davis told her no.

And then in his affidavit, Your Honor, that's Exhibit-1 to their motion, he says that he told my client, which my client denies, that if you have a fair hearing, it's going to extend the suspension and cause problems with the

THE COURT: No, thanks.

MS. MARAGAKIS: Thank you.

THE COURT: Well, first of all, I mean, I think I should acknowledge the record in this case is little atypical it's -- I think "shrouded in secrecy" is not a bad characterization of that, but that is really by necessity because the legislature has already made the policy determination that we don't litigate healthcare quality questions in court and we permit healthcare entities to collect data about healthcare quality and take actions about healthcare quality without subjecting that documentation to even discovery in court. And that makes these cases peculiarly challenging when we start talking about suspension of privileges, but that's by design, that's what the legislature intends.

I understand that plaintiff takes issue with some of the substantive decisions and some of the procedures that were undertaken in her case with the hospital. I understand that there is a dispute about whether the hospital substantively complied about the bylaws, whether the plaintiff was -- requested a hearing and was provided an opportunity for that hearing or whether that was denied. I understand all of that. The whole issue of proctoring versus the hearing process, I understand the parties have very different version of. But it really is problematic for the Court to infere from those faults that the plaintiff takes with the internal

process, all of which no one has disputed really to healthcare quality improvement and to infere from those missteps the failure, for example, to provide a hearing, malice or lack of good faith.

Ordinarily, we look for some sort of extrinsic evidence of good faith, and we look for cases where we sort out an ulterior purpose from healthcare improvement and the challenges that decide whether the primary purpose was something impermissible like competitive exclusion, no evidence of that in this case. Personal enmity, no testimony about that at all in this case. Retaliation, nothing in this case suggests any retaliatory motive. Discrimination on some improper purpose, nothing discussed in the testimony about this.

Instead, I'm asked to infere just from the sum total of what plaintiffs contends are missteps in the care review process to infere from that malice. And not only that malice or lack of good faith by clear and convincing evidence it would overcome a presumption, a statutory presumption of good faith and lack of malice. I can't do that.

When I -- when I look at this record and I've looked thoroughly at all of plaintiff's theories, the secrecy surrounding the collection of ten cases for peer review, there is a simple explanation for that secrecy, is to preserve the peer review privilege. The conditional reappointment doesn't

strike me as malice, it's reappointment. The delays in notifying of reappointment -- of the conditional reappointment, perhaps it's sloppy, but it doesn't lead to an inference of malice.

The refusal discussed, again, I have talked about the necessity for preserving the privilege around protecting healthcare processes within the entity. The summary suspension, I am -- you know, the parties have danced around the reason for that, I understand the reasons that, but I can't from just the fact of the summary suspension infer from that that there is some lack of good faith or malice.

The proctoring requirements seems more like an opportunity to seek reinstatement than it is some sort of malicious act or some act taken in bad faith and that's borne out by the fact that Dr. Levitt's privileges were ultimately reinstated.

So based on all of that, I have conclude that plaintiff has failed to meet her burden in rebutting the presumption of good faith and lack of malice and therefore all of the actions complained of within the complaint are subject to the immunity under the state law. I think it probably also subjects them to the immunity granted in the bylaw, but I don't reach that. I think it is sufficient simply to say that state law immunity applies and summary judgment should be granted.

Ask Ms. Maragakis to prepare an order.