AMERICAN HEALTH LAWYERS ASSOCIATION

PRACTICE GROUP email alert

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# *Schmitt v. MeritCare*: Candid Responses to Credentialing Questionnaires Withstand Legal Challenge

By Robin Locke Nagele*

The North Dakota Supreme Court, in *Schmitt v. MeritCare Health System et al.*, 2013 ND 136 (ND, July 22, 2013), upheld the summary judgment (Summary Judgment) for MeritCare Health System (MeritCare) on a host of state law claims asserted by surgeon John Schmitt, MD, arising out of candid responses to credentialing inquiries about Schmitt.

Schmitt was employed by defendant Dakota Clinic from August 2002 until his contract was not renewed in December 2004, and was employed by defendant MeritCare from June 2005 until he ended his employment effective in July 2007. He then contracted with a Locum Tenens agency, and through that agency, received a job offer from St. Joseph's Hospital in Dickinson, ND, subject to verification of his credentials. He signed a standard release form as to any "individuals, entities or organizations who provide [St. Joseph's] in good faith and without malice, information concerning [Schmitt's] professional competence . . . [etc.]."

Defendant Dakota Clinic responded "do not recommend" to St. Joseph's questionnaire. Defendant MeritCare required an additional, specific release from Schmitt, which Schmitt eventually signed (later claiming he did so "under duress"). After receiving the signed, specific release form, MeritCare responded to the questionnaire, inter alia, checking a box that it "would recommend" Schmitt, but added a handwritten note stating "with reservation." Queried as to disciplinary actions, MeritCare stated that "Dr. Schmitt was presented with an action plan based on episodes of insensitive comments and irritability with others. He submitted his resignation before completing the action plan. No restriction or limitation of privileges was suggested by the action plan." Schmitt alleged that, after receiving the credentialing responses, St. Joseph's did not employ him, and that he was turned down for employment by other medical facilities as well.

Schmitt sued Dakota Clinic and MeritCare, asserting state law claims for defamation, tortious interference, and state antitrust claims. The trial court granted the Summary Judgment on all claims (Dakota Clinic settled), and the Supreme Court upheld the decision in favor of MeritCare. On the defamation claim, Schmitt conceded that MeritCare's credentialing responses were "perhaps technically true" but claimed that they constituted "defamation by implication, because they used innuendo, insinuation, or sarcasm to convey an untrue and defamatory meaning." The high court ruled, as a matter of law, that MeritCare's

credentialing response, read as a whole, was "not reasonably and fairly susceptible of defamatory meaning." The court also rejected an argument that MeritCare's *delay in responding to the inquiry* (to obtain the signed special release) was itself an "implied defamatory assertion." Because the high court determined there was no defamation, it did not reach the related issues as to whether or not either the original or special release was effective, and/or whether the defendants came within any state statutory immunity protections.

The court also rejected the tortious interference and state antitrust claims finding that, as to both of those theories, Schmitt would have had to provide evidence of some degree of concerted action or conspiracy between Dakota Clinic and MeritCare, and there was no evidence that actually happened.

It is interesting that the court avoided ruling on the effectiveness of the physician's release of liability. Many hospitals follow the same practice as MeritCare did in this case, of requiring the physician to sign a specific waiver and release-from-liability form, and such forms are generally regarded as providing strong protection against defamation and other state law claims. When hospitals use such forms, it is generally a good idea to make sure that, at a minimum, they match up to the protections afforded under state law. For instance, the release form in this case stated that it would only apply if the respondents acted in good faith and without malice, which is consistent with the maximum protection afforded under many states' laws. However, some states provide broader protections that would permit hospitals to require physicians to waive liability for any statements made in the absence of "willful and wanton" misconduct. Some hospitals go further and require physicians to sign "absolute waivers" regardless of any state law limitations--on the theory that the state court may uphold such waivers on basic contract principles. Hospitals that follow this approach should understand the risk that a court may decline to enforce such a broad waiver on public policy grounds.

Regardless of any waiver/release language, where a response is provided it should be truthful, objective, and factual. It is prudent to make sure that it is neither over- or under-inclusive in terms of the level of detail provided. Not only will the responding party be better protected against any legal claims filed by the physician but it will also avoid an allegation from the requesting hospital that it detrimentally relied on a response that was purposefully or negligently incomplete or misleading.[1]

This decision should give reinforcement to those hospital medical staff offices that provide candid, truthful, and substantive responses to credentialing inquiries regarding physicians who have had problematic histories as employees or members of their medical staffs.

**We would like to thank Robin Locke Nagele, Esquire (Post & Schell PC, Philadelphia, PA), for authoring this email alert.*

[1] *See Kadlec v. Lakeview Medical Center*, 527 F.3d 412 (5th Cir. 2008), *cert den.*, 129 S.Ct. 631 (2008), and related proceedings.

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