

**Bruce B. Feyz, M.D. v Mercy Memorial Hospital et al., Supreme Court of Michigan
No. 128059 (June 24, 2006)**

Background Summary:

This is a case involving a physician who insisted that his orders be followed in treating patients admitted to the hospital. The hospital, however, sought to force Dr. Feyz to use their standing orders, instead of orders provided by Dr. Feyz. Basically, the hospital required nursing staff to document patient medications by copying the label of the prescription bottle or by copying a list of medications carried by the patient. Dr. Feyz believed that the hospital's standing orders were not adequate and may not be accurate as sometimes the dose or frequency of medications may change, and therefore may be different than that printed on the prescription bottle. Dr. Feyz felt that the nurses should actually ask patients how they were taking the medications – i.e. obtain a more accurate history.

As a result of this disagreement with the hospital, Dr. Feyz was put on probation and referred to the Health Professionals Recovery Program for psychiatric examination. This is a common sham peer review tactic – i.e. physicians who disagree with “hospital authorities” are often alleged to be psychiatrically impaired.

Because Dr. Feyz continued to write specialized orders for his individual patients, he was placed on indefinite probation by the hospital.

Dr. Feyz subsequently brought suit against this private hospital, “alleging civil rights violations, invasion of privacy, breach of fiduciary duty and public duties, and breach of contract, relating to peer review of physician and resulting discipline.”

The case was heard en banc (Supreme Court of Michigan) and the majority opinion was written by Justice Robert P. Young Jr.

Court Rejects Absolute Immunity

Although HCQIA and state peer review statutes provide qualified immunity to peer review entities, the common law doctrine of judicial nonintervention or non-review often transforms this qualified immunity into absolute immunity. The immunity provided to peer reviewers and peer review entities is typically “qualified” by stipulating that the review be conducted in good faith, with absence of malice and with a reasonable belief that the action taken was in the furtherance of quality health care. However, due to the “prudential doctrine” of judicial non-review, courts may avoid addressing questions of malice or whether the action was taken with a reasonable belief that it was in the furtherance of quality health care.

In this case, the court rejected the proposition that courts are not competent to review hospital staffing decisions:

...we are not persuaded by the argument that courts are incompetent to review hospital staffing decisions as a basis for adopting the judicial nonintervention doctrine. This claim overlooks the reality that courts routinely review complex claims of all kinds. Forgoing review of valid legal claims, simply because those claims arise from hospital staffing decisions, amounts to a grant of unfettered discretion to private hospitals to disregard the legal rights of those who are the subject of a staffing decision, even when such decisions are precluded by statute.

The court also specifically rejected the hospital's claim of absolute immunity.

However, peer review immunity is not absolute. A person organization, or entity that has acted with malice when engaging in a peer review function is not protected from liability.

Definition of Malice

In this case the court defined malice according to the defamation definition of "actual malice." The court reasoned that communication was the core feature of peer review, and, therefore, the defamation definition of malice should apply –

Although this definition originated in the context of defamation, this definition is uniquely appropriate to Michigan's peer review scheme [MCL 331.531], as peer review immunity is based on the communication of information about professional activities and standards.

Thus the court adopted the actual malice standard as stated in *Veldhuis v. Allan* – "if the person supplying information or data does so with knowledge of its falsity or with reckless disregard of its truth or falsity. Similarly, a review entity is not immune from liability if it acts with knowledge of the falsity, or with reckless disregard of the truth or falsity, of information or data which communicates or upon which it acts."

The court also essentially acknowledged the existence of sham peer review based on the following statement:

The defamation definition of "malice" promotes the goals of peer review because peer review participants are not protected if they are not performing evaluations with a focus on improving patient care, but rather on the basis of false extraneous factors unrelated to patient care.

Judgement:

"...Accordingly, the judgment of the Court of Appeals is vacated, and we remand this case to the Monroe Circuit Court for further proceedings consistent with this opinion."