



Tibbs v. Bunnell, 136 S. Ct. 2504 (2016)

448 S.W. 3d 796 (Ky. 2014)

Topics Covered: Patient Safety Act, Peer Review

Outcome: Very Unfavorable

Issue

The issue in this case was whether the Patient Safety and Quality Improvement Act (PSQIA) privilege against non-disclosure preempts Kentucky state law, which would otherwise allow plaintiffs in medical injury lawsuits to discover information voluntarily reported to Patient Safety Organizations (PSOs).

AMA Interest

The AMA supports federal legislation that will enhance protection of peer review information.

Case Summary

A patient died while being treated for a medical condition at a University of Kentucky hospital, and the estate for the decedent subsequently sued the hospital for malpractice. The hospital had prepared an incident report and submitted the report to a PSO for the purpose of compiling and analyzing data to improve health care quality. During discovery, the estate asked for production of the incident report. The hospital objected to the production on the basis of the PSQIA privilege, and the trial court ruled the privilege inapplicable.

The hospital then filed an interlocutory appeal with the Kentucky Court of Appeals. It asserted that, even if Kentucky law would otherwise have allowed production of the PSO incident report, the PSQIA preempted the state law. The Court of Appeals held that the PSQIA did preempt Kentucky law. However, the court continued, the privilege would only apply to the extent the incident reports contained a "self-examining analysis." The hospital appealed to the Kentucky Supreme Court, where it contended that the incident report was fully privileged, regardless of whether it contained a self-examining analysis and regardless of whether it included information beyond such analysis.

On August 21, 2014, by a split decision the Kentucky Supreme Court reversed the Court of Appeals. The Supreme Court held that incident reports may be privileged even if they do not contain a "self-examining analysis." However, incident reports may be discoverable if they are prepared pursuant to state laws requiring their preparation in connection with the state's regulation of health care facilities. It remanded for an *in camera* determination of whether the report in this case was privileged.

The hospital petitioned the Kentucky Supreme Court for rehearing. On December 18, 2014, by a vote of 3 to 3, the petition for rehearing was denied.

The hospital has petitioned the United States Supreme Court for *certiorari*, but that petition was denied on June 27, 2016.

Litigation Center Involvement

The Litigation Center, through the AMA and the Kentucky Medical Association, filed an *amicus* brief in the Kentucky Supreme Court. The brief urged recognition and an expansive reading of the Patient Safety Act privilege. The Litigation Center also filed an *amicus* brief in support of the petition for rehearing, but the Court refused to allow it.

The Litigation Center filed an *amicus* brief in support for the petition for *certiorari*.

Kentucky Supreme Court brief

United States Supreme Court brief in support of petition for *certiorari*