THE SUPREME COURT OF ALABAMA
Docket No. 1022099

RADIATION THERAPY ONCOLOGY, P.C.; KENNETH ELLINGWOOD, M.D.; GREGORY COTTER, M.D.; and ROD KRENTEL, M.D., Appellants/Plaintiffs,	)	**Appeal from the Circuit Court Mobile County, Alabama**
vs.	)	**Hon. Robert J. Kendall**
PROVIDENCE HOSPITAL; SETON MEDICAL MANAGEMENT, INC., MICHAEL MESHAD, M.D. and THADDEUS BEEKER, M.D. Appellees/Defendants	)	

***Amicus Curiae* Brief of the American Medical Association, the Medical Association of the State of Alabama, and the American College of Radiology in Support of Appellants/Plaintiffs and Against Providence Hospital, One of the Appellees/Defendants**

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STATEMENT REGARDING ORAL ARGUMENT

Amici do not seek to participate in oral argument.

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STATEMENT OF FACTS

Amici adopt the Statement of Facts set forth in the brief of Appellants/Plaintiffs.

SUMMARY OF THE ARGUMENT

This case claims breach of a written contract, embodied in the medical staff bylaws of Providence Hospital. The opinion of the trial judge, Robert G. Kendall, gave but the slightest consideration to that contract. Without regard to their terms, the court held that the medical staff bylaws could not limit the power of the hospital's directors to make business decisions. Judge Kendall apparently discovered a new public policy, previously unknown in the State of Alabama -- "the court should not interfere in the internal policies and decision making of a private, nonprofit hospital corporation when those decisions are made pursuant to its Corporate Bylaws."

Judge Kendall was wrong twice over. He was wrong on the black letter of the law, and he was wrong on the interpretation of public policy.

ARGUMENT

I. PROVIDENCE HOSPITAL BREACHED THE BLACK LETTER OF THE LAW.

The medical staff bylaws include the following provisions:

Preamble –

"These bylaws… create a mutually binding agreement between the medical staff and the board of directors [of Providence Hospital] which may not be unilaterally amended."

Section 5.1 Exercise of Privileges –

"The termination, granting, continuation or restriction of medical staff membership and privileges based on criteria unrelated to clinical qualifications, professional responsibilities or quality of care is prohibited, with the exception of statutory, regulatory, or judicial requirements, or other exceptions which may be defined in the medical staff bylaws. When privileges are granted it also includes the right to exercise those privileges."

Section 7.7-1 Time for Appeal –

"[The] action or recommendation [of the medical staff fair hearing panel] may be affirmed or denied by the board of directors provided that the board limits its consideration to criteria related to quality of care and does not consider criteria unrelated to the criteria considered by the fair hearing panel."

The hospital's actions in this case, which had the purpose and effect of disenfranchising the plaintiff physicians,

rose solely from its desire to maximize profits, rather than the criteria set forth above as bases to limit or revoke staff privileges.

The plaintiff physicians are independent contractors. Until the incidents giving rise to this lawsuit, they were members of the medical staff at Providence Hospital, with clinical privileges in its radiation oncology department. They charged patients directly for their services, and Providence Hospital did not receive any profit from that payment.

This suit arises from a decision by Providence Hospital to convey its radiation oncology equipment to Seton Medical Management, Inc. ("Seton"), a company owned by Ascension Health, the same company that owns Providence Hospital. The conveyance was without direct compensation to the hospital. The hospital is now referring its radiation oncology patients to Seton, which is physically adjacent to it. Seton contracts with Providence Hospital for all administrative personnel and services needed to operate the radiation oncology department. Providence Hospital

represents to the public and to its staff that it still operates the radiation oncology department.

The physicians who currently provide radiation oncology services for Providence Hospital patients are Seton employees, and Seton now charges patients for the radiation oncologists' services. Assuming that Seton receives more money for radiation oncology services from the patients than it pays to those radiation oncologists (a reasonable assumption for purposes of challenging a summary judgment), the transaction made the radiation oncology department more profitable.

The conveyance was a sham. It was designed to enhance the hospital's profitability,[1] not to further patient care.
The plaintiff physicians have, as a matter of form only, retained their staff privileges at Providence Hospital. Without access to the radiation oncology department, however, those privileges are meaningless. As a practical matter, the plaintiffs have lost the right -- explicitly

[1] Since plaintiffs have claimed that the transfer was a sham and have adduced evidence of the same, this Court, for purposes of its review of the summary judgment, should treat the hospital, Seton, and Ascension Health as a single entity. See plaintiffs' brief at pg. 62. Based on the evidence and the reasonable inferences, the financial interests of these three companies are identical.

protected in the medical staff bylaws -- to exercise their privileges, for reasons unrelated to clinical qualifications, professional responsibilities or quality of care. Thus, after disregarding obfuscatory corporate formalities, the hospital breached § 5.1 (and other provisions) of the medical staff bylaws.

Before the conveyance was consummated, the plaintiff physicians demanded and then received a hearing before a "fair hearing" panel of the medical staff. They sought a determination of whether their privileges were being curtailed and whether the hospital was entitled to enter into the contemplated transaction under the medical staff bylaws. Providence Hospital itself acknowledged that the physicians were entitled to a hearing. The fair hearing panel decided in favor of the plaintiff physicians, and the hospital did not appeal that decision. Nevertheless, the hospital proceeded with the transaction, in outright defiance of that panel, whose decision was to be controlling under the medical staff bylaws.

The law in Alabama is clear. Medical staff bylaws constitute a binding contract between the medical staff and the hospital, and an individual member of the medical staff can sue the hospital to enforce his or her rights under the bylaws. *Clemons v. Fairview Medical Center, Inc.,* 449 So. 2d 788, 790 (Ala. 1984). If there was any doubt that such was the intent of Providence Hospital when it propounded the instant bylaws, that intent is dispelled by the preamble, part of which is quoted *supra*. Since Providence Hospital breached the medical staff bylaws, the plaintiffs are entitled to sue for their enforcement.

Even if, *arguendo*, the interpretation of the medical staff bylaws is unclear, it should not change the outcome for this Court. Because this case comes as an appeal of a summary judgment, any ambiguity in the medical staff bylaws must be resolved after a full trial. *Id.* Summary judgment is inappropriate when there is any doubt as to the parties' rights. *Wilbanks v. Hartselle Hosp., Inc.,* 334 So. 2d 870, 871 (Ala. 1976); *Harsco Corp. v. Navistar Int'l Transp. Corp.*, 630 So. 2d 1008, 1011 (Ala. 1993); *J. Paul Jones*

Hosp. v. Jackson, Coker & Assoc., Inc., 491 So. 2d 972, 973-73 (Ala. App. 1986). There is certainly doubt in this case, and so the summary judgment should be reversed.

II. PUBLIC POLICY REQUIRES THAT, WHERE REQUIRED BY THE MEDICAL STAFF BYLAWS, THE COURTS SHOULD LIMIT THE EXERCISE OF DECISIONAL POWER BY HOSPITAL BOARDS OF DIRECTORS.

Instead of considering the language of the medical staff bylaws or the clear holding of *Clemons*, Judge Kendall relied solely on one case, decided by a state court in South Dakota. *Mahan v. Avera St. Luke's*, 621 N.W. 2d 150 (S.D. 2001). The holding of that case, however, is readily distinguishable from the situation at bar, and the language employed as *dictum* in that case cannot withstand close scrutiny.

The issue in *Mahan* was whether the hospital could refuse to accept applications for its medical staff from orthopedic surgeons or from other physicians requesting staff privileges for three spinal surgical procedures. According to the South Dakota Supreme Court, nothing in the medical staff bylaws of Avera St. Luke's Hospital

specifically prohibited it from closing the medical staff as it wished. Even though Dr. Mahan was unable to point to specific language in the medical staff bylaws to justify the requested relief, the *Mahan* trial court had held that "the spirit of the [medical staff] bylaws taken as a whole" prohibited the hospital from closing the staff to these procedures.

On appeal, the South Dakota Supreme Court reversed. It noted that, as a general matter, the hospital board of directors has the authority to run the hospital. Since the medical staff bylaws did not specifically limit the hospital's power to close its medical staff to certain procedures, the hospital, inherently, had this right. Thus, it held for the hospital.

Even if, arguendo, this Court is inclined to accept the *Mahan* holding, its force should be limited to situations, unlike the case at bar, in which the medical staff bylaws are silent. However, the *Mahan* decision included extensive *dictum*, to the effect that the medical staff is inherently subordinate to and in some respects even the agent of the

hospital administration. The medical staff, therefore, should not question the decision of the hospital board of trustees or the administrators who act under the board's directions. The suggestion is that hospitals somehow stand above other legal entities.

A court, under this reasoning, need not consider whether hospitals may have voluntarily and explicitly yielded a portion of their administrative powers through the medical staff bylaws. It is irrelevant, under this theory, whether the hospital may have specifically agreed that other parties, such as members of the medical staff, are to have contractual rights that are clearly intended to trump the decisions of the hospital administration. It was this *dictum* that formed the basis of Judge Kendall's decision.

The *Mahan dictum* is wrong, and Judge Kendall erred by following it. It is contrary to *Clemons*, and it is contrary to sound public policy.

A. The Individual Members of the Medical Staff Have an Economic Interest in Enforcement of the Medical Staff Bylaws.

The primary purpose of this brief is to advise the Court on how medical staff bylaws are grounded on

considerations of health care policy. In addition, private economic expectations are also legitimate matters of public policy. Each member of the medical staff at Providence Hospital had to decide whether to associate himself or herself with the hospital. The plaintiff physicians devoted a substantial portion of their careers to developing professional relationships with the medical and non-medical staff within the hospital. They could, instead, have chosen to practice elsewhere. The hospital profited from the physicians' loyalty, and the plaintiffs anticipated that their relationship would be protected in accordance with the medical staff bylaws.

In *Clemons*, this Court held that expectations such as these are reasonable and are entitled to judicial protection. That case recognized that members of a medical staff have the legal right to overturn decisions made by a hospital, if so provided under the medical staff bylaws. In fact, *Clemons* held that the plaintiff could overturn the hospital's business decision to close its physical therapy department, if the medical staff bylaws so provided.

Fairview Medical Center was at least open about its actions, while here Providence Hospital has been surreptitious. Such subterfuge should not validate the argument that actions of hospitals are somehow entitled to special legal deference.

B. Patient Care in Providence Hospital is Enhanced by Enforcement of Private Contractual Rights Established by the Medical Staff Bylaws.

Amici acknowledge the obvious. It is not the role of the judicial system to decide how patients should be cared for in Providence Hospital. That decision has already been made by those with the greatest knowledge of the subject -- the physicians, the hospital

administrators who work in Providence Hospital, and the Providence Hospital Board of Directors. Their decision is embodied in the medical staff bylaws. Assuredly, it is the proper role of the judicial system to enforce those bylaws as written.

Patient care will follow as a consequence of such enforcement. This is true as a matter of general principle, and it is true under the specific facts of this lawsuit.

(1) Medical Staff Bylaws, in General and at Providence Hospital Specifically, are an Important Component of Patient Care.

Physicians and hospitals stand in a unique relationship. Under certain circumstances, patients may subjectively deem themselves to be primarily under the care of the hospital (as, *e.g.*, when they are admitted to an emergency room), while under other circumstances they may deem themselves primarily under the care of their physician (as, *e.g.*, when they undergo a scheduled medical procedure). Few other, if any, transactions in our society encompass such a blurred standard of consumer expectations.

Furthermore, although hospitals are responsible for their patients' care, only physicians (and persons, under supervision, who are training to be physicians) can legally practice medicine in Alabama. ALA. CODE tit. 34-24 § 51 (2003). Physicians, but not hospitals, must abide by rules of professional conduct. ALA. CODE tit. 34-24 § 360(2)

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(2003). Physicians, but not hospitals, can make medical decisions.[2]

Thus, the relationship between physician and hospital is inherently one of shared responsibility -- not a relationship traditionally compatible with corporate governance. *Fairhope Single Tax Corp. v. Rezner*, 527 So. 2d 1232, 1236 (Ala. 1987). In fact, the *Mahan* court articulated its discomfort at 621 N.W. 2d at 158. Nevertheless, such shared responsibility is endorsed by the state and federal governments and is consistent with public health policy.

Medical staff bylaws provide the framework for this system of shared responsibilities. They result from a negotiation between the persons most knowledgeable about the varying and sometimes conflicting demands of hospital administrative priorities, medical professionalism, and

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patient needs -- the medical staff, the hospital administration, and the board of directors. The preamble to the Providence Hospital medical staff bylaws aptly states the purpose

[2] This holds true even when physicians are employees. The *sine qua non* of the principal/agent relationship is the principal's right to control the means and method of the agent's actions. *Thrash v. Credit Acceptance Corp.*, 821 So. 2d 968, 972 (Ala. 2002). Since such control is missing in the physician/hospital context, physicians generally ought not be deemed the agents of hospitals. *Diggs v. Harris Hosp.-Methodist, Inc.*, 847 F. 2d 270, 274 (5th Cir. 1988); *Parker v. Collins*, 605 So. 2d 824, 828 (Ala. 1992). This is common sense. Is it reasonable that a hospital board of trustees should even begin to tell a surgeon how to operate on a patient? Footnote 8 of the *Mahan* decision is simply wrong. *Mahan,* 621 N.W.2d at 161.

behind medical staff bylaws, both within Providence Hospital specifically and more generally within the medical community:

> "These bylaws are adopted in order to provide for the organization of the medical staff of Providence [H]ospital and to provide a framework for self-government in order to discharge its responsibilities in matters involving quality of medical care, and to govern the orderly resolution of those purposes."

An organized medical staff, given recognition through the medical staff bylaws, plays a vital function in the overall quality of care provided by the hospital. Its role is to "oversee the quality of patient care, treatment, and services provided by practitioners privileged through the medical staff process." Joint Commission on Accreditation of Healthcare Organizations, *Hospital Accreditation Standards*, 2004 Medical Staff Standards MS.2.10.

Before the advent of the organized medical staff, staff appointments were often based on favoritism, rather than clinical skills. Medical staff bylaws and procedures

alleviate this problem by providing objective standards for staff appointments. Those standards are interpreted by physicians, who have the training and experience to apply them effectively.

Equally importantly, physicians have the skill to critique and supervise their fellow physicians, while lay hospital administrators and board members do not. Likewise, hospital licensing bodies have only limited expertise in the skills of medical practice. Review of physician performance by the formalized efforts of the medical staff is thus a

critical factor in quality control. Physician discipline, through formal peer review proceedings, is also an attribute of the organized medical staff and the medical staff bylaws.

The medical staff organization and bylaws provide public assurance, by those with the most knowledge, the greatest motivation, and the highest skill, that patient care standards are met. That is their ultimate purpose. *See* Dallon, *Understanding Judicial Review of Hospitals' Physician Credentialing and Peer Review Decisions*, 73 Temple

L. Rev. 597, 609-10 (2000). The medical staff bylaws establish a system of "checks and balances" on the hospital administration, through the collective action and responsibility of the medical staff itself.

The United States Department of Health and Human Services and the Alabama State Board of Health both require hospital self-regulation through the organized medical staff, operating under legally enforceable medical staff bylaws. 42 C.F.R. §§ 482.12 (2003), *Id.* at 482.22 (2003); ALA. ADMIN. CODE r. § 420-5-7-.08 (2003). Likewise, the United States Congress has recognized that high standards of patient care within hospitals are best met through professional accreditation standards, which mandate a medical staff, acting under medical staff bylaws. 42 U.S.C. § 1395bb(a)(1) (2003); S. REP. NO. 404, 89th Cong., 1st Sess. (1965), *reprinted in* [1965] U. S. CODE CONG. & AD. NEWS 1943, 1969. In addition, Congress has enacted the Health Care Quality Improvement Act, to encourage physicians to "peer review" each other and lower the incidence of medical

malpractice. 42 U.S.C. §§ 11101 (2003), *et seq*.[3] "There is a public policy recognition that the public will be best protected when physicians are organized to maintain quality of care!" Kalzielski, Fenton & Lang, *The Hospital Medical Staff: What is its Future,"* 16 Whittier L. Rev. 987, 999 (1995).

The Providence Hospital medical staff bylaws, although employing somewhat idiosyncratic language, are in most respects typical. In addition to rules for internal staff organization and procedure, they include provisions for four important areas of hospital regulation: (i) initial admission to the medical staff and the retention of medical staff privileges (Article IV); (ii) delineation of the clinical scope of privileges for individual members of the medical staff (Article V); (iii) delegation of supervisory authority within each department of the medical staff, to ensure compliance with appropriate standards of patient care

(Article IX); (iv) peer review, to correct unsafe medical practices and to suggest improvements in patient care. This latter function may include revocation of medical staff privileges (Articles VI and VII).

[3] The AMA, speaking as the consensus voice of America's physicians, has enacted numerous policies supporting medical staff bylaws as enforceable contracts and supporting peer review as a vital function of the organized medical staff within the hospital setting. Relevant policies are attached as an appendix to this brief. These can be found on the AMA web site at http://www.ama-assn.org/apps/pf_online/pf_online

All of these functions involve substantial limitations on -- even interference in -- administrative control of the hospital. That is the very essence of the organized medical staff and of the medical staff bylaws that give it life. It is true at Providence Hospital, and it is true elsewhere.

If, however, following Judge Kendall's reasoning, hospitals are free to violate medical staff bylaws, based on self-interested financial considerations, then the system of checks and balances fails. No hospital is going to deliberately harm its patients. Rather, it will make subtle compromises with patient care in order to enhance its own finances. As in the instant case, it will varnish the truth, with carefully disguised, self-serving rhetoric and with hired consultants. The degradation of standards will be remote, but it will be inexorable. The body best positioned to fight for these standards, the hospital's organized medical staff, will be powerless.

(2) The Undercutting of the Medical Staff Bylaws has Compromised Patient Care at Providence Hospital.

The facts of this case well illustrate that these concerns are more than theoretical. This case is about more than a financial battle between the plaintiff physicians and Providence Hospital. Patient care at Providence Hospital has been degraded, although the indicia of such degradation are hidden.

No longer do the physicians of the Providence Hospital radiation oncology department answer to other physicians. No longer is there collective responsibility by the entire medical staff. If the medical practice of the radiation oncologists at Seton should fall below acceptable standards, it is only the hospital administrators or the public licensing officials who can spot the deficiencies before the damage is done. By the time the hospital administration or the public agencies are able to observe and act upon any mistakes in medical procedure, those mistakes will have become flagrant. Neither hospital administrators nor public regulators are effective substitutes for physician peer review. The first line of defense in quality control, a vigilant and empowered medical staff, is gone.

CONCLUSION

Amici neither expect nor ask this Court to determine how to care for the patients of Providence Hospital. That decision has been made by others -- by federal and state legislators and regulatory agencies, by accreditation organizations, by the physicians on the medical staff at Providence Hospital, and, through enactment of the medical staff bylaws, by Providence Hospital itself. *Amici* merely ask that this Court follow its own decision in *Clemons* and enforce those bylaws as written. If the interpretation of those bylaws is unclear, then, for now, all doubts should be resolved in favor of the plaintiff physicians. As the system of hospital governance is structured, the patients of Providence Hospital will be best served if this Court adheres to its established precedent and allows the plaintiff physicians their day in court.

For these reasons, *amici* pray that this Court reverse the summary judgment entered below and remand this case for a full trial.

Date: November _____, 2003

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APPENDIX

Policies on Medical Staff Bylaws, on the Organized Medical Staff, and on Peer Review in the Hospital Setting

H-235.976 Medical Staff Bylaws and Medical Staff Autonomy.
Our AMA reaffirms that the (1) medical staff bylaws are a contract between the organized medical staff and the hospital; and (2) application for medical staff appointment and clinical privileges should provide that each member of the medical staff, as well as the hospital, is bound by the terms of the medical staff bylaws, and the terms of the medical staff bylaws should be incorporated by reference into the application.

H-235.990 Organized Self-Governing Medical Staff.
With respect to the responsibilities and functions of the hospital, its governing board and the medical staff, the AMA believes that: (1) the hospital has corporate responsibility for maintaining the necessary facilities, a safe environment, and a mechanism for the prudent selection of those who treat patients within the institution; (2) the governing board is responsible for the operation and management of the hospital and fulfilling its corporate responsibilities; (3) the organized medical staff and its members have a contractual obligation, entered into with the hospital, to carry out their professional medical responsibilities through the efficient operation of medical staff committees; the objective selection of professionally qualified members of the organized medical staff and disciplinary functions relating to their competent performance; and functioning as a self-governing body in promoting quality patient care within the hospital; and (4) members of the organized medical staff may likewise deal collectively, as an entity, with the hospital and its governing board with respect to professional matters involving their own interests, as distinguished from the functions the organized medical staff performs on behalf of the hospital.

H-300.973 Promoting Quality Assurance, Peer Review, and Continuing Medical Education.

Our AMA: (1) reaffirms that it is the professional responsibility of every physician to participate in voluntary quality assurance, peer review, and continuing medical education activities; (2) to encourage hospitals and other organizations in which quality assurance, peer review, and continuing medical education activities are conducted to provide recognition to physicians who participate voluntarily; (3) to increase its efforts to make physicians aware that participation in the voluntary quality assurance and peer review functions of their hospital medical staffs and other organizations provides credit toward the AMA's Physicians' Recognition Award; and (4) to continue to study additional incentives for physicians to participate in voluntary quality assurance, peer review, and continuing medical education activities.

H-375.990 Peer Review of the Performance of Hospital Medical Staff Physicians.

Our AMA encourages peer review of the performance of hospital medical staff physicians, which is objective and supervised by physicians.