

PRESENTED AT

28th Annual Health Law Conference

April 21-22, 2016
Houston, Texas

OPERATIONAL IMPACT OF SIGNIFICANT CASES

**Yvonne K. Puig
Daphne Andritsos Calderon
Eric J. Hoffman**

Author Contact Information:
Yvonne K. Puig
Norton Rose Fulbright US LLP
98 San Jacinto Boulevard, Suite 1100
Austin, Texas 78701

yvonne.puig@nortonrosefulbright.com
(512) 536-2450

©ALL RIGHTS RESERVED BY YVONNE K. PUIG
AUSTIN, TEXAS

I.	ISSUES AFFECTING HOSPITALS AND HEALTHCARE PROVIDERS.....	1
A.	Physician Credentialing & HCQIA Immunity.....	1
1.	<i>Klaine v. Southern Illinois Hospital Services</i>	<i>1</i>
2.	<i>Anderson v. Eastern Connecticut Health Network, Inc.</i>	<i>3</i>
B.	Theories of Liability.....	7
1.	<i>Lippincott v. Whisenhunt</i>	<i>7</i>
2.	<i>KBMT Operating Co. v. Toledo.....</i>	<i>8</i>
3.	<i>Teladoc, Inc. v. Texas Medical Board</i>	<i>10</i>
4.	<i>In re Memorial Hermann Hospital System.....</i>	<i>14</i>
5.	<i>Doctors Hospital at Renaissance, Ltd. v. Andrade.....</i>	<i>18</i>
C.	Hospital Claims	19
1.	<i>Southern Baptist Hospital of Florida, Inc. v. Charles</i>	<i>19</i>
2.	<i>Harlingen Family Dentistry v. Tex. Health & Human Servs. Comm’n.....</i>	<i>22</i>
3.	<i>Stayton v. Delaware Health Corporation</i>	<i>24</i>
D.	HIPAA and HITECH	27
1.	<i>Smith v. Triad of Alabama, LLC</i>	<i>27</i>
II.	INTERPRETATION AND APPLICATION OF the Texas Civil Practice & Remedies Code	29
A.	Substantive Issues Raised Under TCPRC	29
1.	<i>Crocker v. Babcock.....</i>	<i>29</i>
2.	<i>Montalvo v. Lopez.....</i>	<i>30</i>
B.	Is It a Health Care Liability Claim?	32
1.	<i>Ross v. St. Luke’s Episcopal Hospital.....</i>	<i>32</i>
2.	<i>In re Seton Northwest Hospital.....</i>	<i>35</i>
3.	<i>Randol Mill Pharmacy v. Miller</i>	<i>36</i>
4.	<i>Verticor, Ltd. v. Wood.....</i>	<i>38</i>
5.	<i>State of Texas v. Emeritus Corporation.....</i>	<i>41</i>
6.	<i>Post-Ross Slip-and-Fall Decisions</i>	<i>43</i>
C.	Procedural Issues Raised Under the TCPRC.....	44
1.	<i>Houston Methodist Hospital v. Nguyen</i>	<i>44</i>
2.	<i>Montaño v. Frezza</i>	<i>45</i>
	ENDNOTES.....	49

I. ISSUES AFFECTING HOSPITALS AND HEALTHCARE PROVIDERS

A. Physician Credentialing & HCQIA Immunity

1. *Klaine v. Southern Illinois Hospital Services*

In this decision, the Illinois Supreme Court considered the scope of various privileges with respect to a physician's applications for staff privileges, information reported to the National Practitioner Data Bank (NPDB), and raw data regarding treatment and procedures performed by a physician in connection with a medical malpractice plaintiff's motion to compel production of documents.¹

Carol and Keith Klaine filed a medical malpractice suit against Frederick Dressen, D.O., Southern Illinois Medical Services, and Southern Illinois Hospital Services d/b/a St. Joseph Memorial Hospital and Memorial Hospital of Carbondale (SIHS).² Among other allegations, the plaintiffs asserted a claim for negligent credentialing against SIHS.³ The plaintiffs served discovery requests on SIHS, and SIHS produced over 1,700 pages of documents in response.⁴ SIHS refused, however, to provide certain documents, which it asserted were privileged under, *inter alia*, the Illinois Medical Studies Act and the Illinois Health Care Professional Credentials Data Collection Act (Credentials Act).⁵

The plaintiffs moved to compel, and SIHS submitted the contested documents to the trial court for *in camera* review.⁶ Upon review of the documents, the trial court agreed with SIHS that most, but not all, of the documents were privileged.⁷ SIHS produced one category of documents, but continued to maintain that "Group Exhibit F," which consisted of Dr. Dressen's three applications to SIHS for staff privileges, was privileged.⁸

To facilitate SIHS's appealing of its ruling, the trial court held SIHS in "friendly" contempt and imposed a \$1 monetary sanction.⁹ SIHS filed an interlocutory appeal, which the appellate court affirmed with two modifications.¹⁰ The court required the redactions of all references to the "Greeley Report," an external peer review report contained in Dr. Dressen's December 2011 application for staff privileges, and any patient identifying information contained in Dr. Dressen's applications to the extent required by the federal regulations set forth in 45 C.F.R. § 164.512(e).¹¹

SIHS filed a petition for leave to appeal to the Illinois Supreme Court.¹² The court allowed the petition and permitted various Illinois medical societies and associations to file a joint *amicus curiae* brief in support of SIHS, and permitted the Illinois Trial Lawyers Association to file an *amicus curiae* brief in support of the plaintiffs.¹³

In its appeal, SIHS argued that Dr. Dressen's applications for staff privileges were nondiscoverable in their entirety pursuant to Section 15(h) of the Credentials Act, which provides that all "credentials data collected or obtained by the hospital shall be confidential."¹⁴ Alternatively, SIHS argued that, even if the court found that the materials contained in Group Exhibit F were not privileged in their entirety, any references in the applications to information reported to the NPDB were required to be redacted because they were privileged under Section 11137 of the federal Health Care Quality Improvement Act of 1986 (HCQIA), and information

concerning medical treatment provided by Dr. Dressen to patients who were not parties to the suit in question were required to be redacted because such information was privileged under the Credentials Act or the physician-patient privilege.¹⁵

Section 15(h) of the Credentials Act provides that any credentials data collected by a health care entity “shall be confidential, as provided by law, and otherwise may not be redisclosed without written consent of the health care professional”¹⁶ The court of appeals had held that to create a privilege, the plain language of the statute must explicitly state that the information that is confidential is also privileged, nondiscoverable, or inadmissible, and that the Credentials Act did not contain such language.¹⁷ The Illinois Supreme Court agreed.¹⁸

The court detailed the formation of the Credentials Act, which was enacted in 1999 to provide for the formation of a Health Care Credentials Council, which would collaborate with the Illinois Department of Public Health to create “uniform health care and hospital credentials forms.”¹⁹ Such forms, when completed by the health care professional, would contain all of the credentials data commonly requested by a health care agency or hospital for purposes of credentialing or recredentialing a health care professional.²⁰

SIHS argued that because the Credentials Act provides that all credentials data collected or obtained by a hospital is confidential and may not be disclosed, the legislature explicitly indicated that applications for staff privileges are privileged and nondiscoverable.²¹ The court disagreed, citing to the dictionary definition of “confidential” as “known only to a limited few: not publicly disseminated.”²² The court found that this definition meant that confidential information is information that may not be disclosed generally, but that a confidentiality provision in a statute or rule “does not necessarily mean that an impenetrable barrier to disclosure has been erected.”²³ The court noted that information, though confidential, “may be highly relevant to matters at issue in a trial and, therefore, critical to the truth-seeking process.”²⁴ Consequently, the court found, the confidential nature of information does not prevent it from being discoverable unless the plain language of the statute explicitly provides that such information is not discoverable.²⁵

The court found that the information contained in Group Exhibit F, the only materials which, by statute, SIHS was required to consider in determining whether to credential and recredential Dr. Dressen, would be highly relevant to the negligent credentialing cause of action.²⁶ In fact, the court continued, “we fail to see how a cause of action for negligent credentialing could proceed if we were to deny plaintiffs access to this information.”²⁷ Having determined that the entirety of the documents contained in Group Exhibit F were not privileged, the court proceeded to consider whether any materials within that category were privileged.²⁸

In his application for staff privileges, Dr. Dressen provided SIHS with information concerning reports that were made to the NPDB, as required by law.²⁹ SIHS argued that such information was privileged under Section 11137(b)(1) of HCQIA, which provides that “information reported under this subchapter is considered confidential.”³⁰ SIHS cited no cases in which Section 11137 has been applied to prevent the discovery of information reported to the NPDB, however.³¹ The court noted that under the Code of Federal Regulations, hospitals are not only permitted to request information concerning a health care practitioner from the NPDB, but

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Operational Impact of Significant Cases

Also available as part of the eCourse

[Developments and Hot Topics in Healthcare Operations](#)

First appeared as part of the conference materials for the
28th Annual Health Law Conference session

"Operational Impact of Significant Cases"