You Want Power: You Won't Find It in the Medical Staff Bylaws!

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ABSTRACT

How much administrative power and decision making authority do you believe the hospital would, in all reality, sign over to the physicians who work there? Is it even fathomable that a hospital would allow the physicians to determine whether or not closing privileges to new medical staff is a sound business decision in the best interest of the hospital corporation? This very proposition was asserted by a group of physicians in Aberdeen. The physicians, who own their own surgical center and hold medical staff privileges at the hospital assert that it is unconscionable for the hospital to close medical staff privileges to any new physicians. They brought suit against the hospital and the Supreme Court of South Dakota held in favor of Avera St. Luke's. Align with South Dakota Corporation Law, the hospital has the authority to make decisions which are in the best interest of the hospital corporation and the medical staff does not have such authority.

The hospital board made an executive decision considering the best interest of the community and the hospital when it decided to close staff privileges of certain procedures to any new physicians wishing to obtain such privileges. The physicians who already had staff privileges at the hospital retained them. The issue in this case is a result of the hospital denying new medical privileges to a physician who was recently employed by the said physicians who already had privileges and own their own for profit surgical center. The physicians are alleging breach of contract. The contract allegedly breached was created by the hospital's derivation of medical staff bylaws from the corporate bylaws granting certain powers and privileges to the medical staff. The lower court, reading to the spirit of the medical staff bylaws as a whole, found that the physicians had the exclusive power to grant or deny medical staff privileges to new physicians as long as the new physician proves certain criteria.

The South Dakota Supreme Court opposes that the proper interpretation of the bylaws is by reading the spirit of the bylaws as a whole as the lower court did. The supreme court would not grant such broad sweeping powers to the medical staff. The duties and powers of the medical staff are derived from the corporate bylaws and delineated in the medical staff bylaws. To understand the relationship created by the adoption of medical staff bylaws, the history of the relationship between the medical staff and the hospital board is important to examine. In addition, the history of the relationship formed by the medical staff bylaws and the rights and powers of the medical staff in regards to the granting or denying of medical staff privileges is at the heart of every physician's profession.

INTRODUCTION

A. Bylaws and Privileges

"No hospital in the United States can operate with out a set of bylaws that define the

medical staff's activities, . . . not matter if it is a private for-profit corporation, a private non-profit corporation, or a public non-profit corporation."[1] Not only should the hospital create medical staff bylaws, the bylaws should be tailored to their specific needs.[2] Effective bylaws should be created and updated to reflect the current times and not copied from "a 'model,' without regard to the unique characteristics of a particular hospital, to the composition of its medical staff, or to the needs of its community."[3] Once the bylaws are created a contractual relationship exists between the medical staff and the hospital corporation.[4]

Embodied in the medical staff bylaws, the contract, are the processes and procedures for physicians to obtain staff privileges at the hospital corporation.[5] The staff privileges grant the physicians access to use the hospital to perform and provide their medical services to their own patients.[6] The privileges are essential for the viability of any physician's career.[7] The privileges create a relationship, unique to the profession, between the physicians and the hospital.[8] That relationship can be described on three different levels.[9]

These levels depict the amount of dependency the physicians have on the hospital in their effort to continue to work in the medical profession.[10] The lowest level of dependency exists with the community-based physicians, who practice primarily in his or her own office but use the hospital for treatment of patient's illnesses.[11] The community-based physician is more dependent on the hospital in the event a community only has one hospital.[12] A higher level of dependency exists with the hospital-based physicians and encompasses three levels within it: "(1) the physician-employee; (2) the 'dependent' physician, whose services are billed by the hospital; and (3) the 'quasi-independent' physician, who bills his or her services directly but who must have access to hospital equipment in order to render such services."[13] In the particular instance, the relationship between the hospital corporation and the physicians who have medical staff privileges at Avera St. Luke's is most similar to a "quasi-independent" physician relationship.[14] The physicians have their own surgical center, but access the Avera St. Luke's hospital to render certain services.[15]

In order for the physicians to use Avera St. Luke's hospital to render medical services, they must first obtain medical staff privileges.[16] In the simplest sense, the process for obtaining medical staff privileges is to first apply and then second meet the limited criteria and third gain approval from the board and medical staff.[17] Once the physician is granted privileges the contractual relationship commences. This relationship is governed through the medical staff bylaws which are derived from the corporate bylaws. As a result it is imperative for the hospital corporation to explicitly demarcate the scope of authority which the hospital wishes to bestow and the amount of power the hospital desires to retain in regards to granting or denying of medical staff privileges.[18] The hospital should reserve the final decision on any administrative matter with the board. In particular, the bylaws must make it clear that the board's decision supersedes any grant of power to the physicians in making a selection of granting privileges.[19] It is imperative to make a clear and unambiguous reservation of power within the board when creating medical staff bylaws grating certain powers to the physicians in regards to granting of medical staff privileges.

B. South Dakota

South Dakota recognizes that the granting of specific powers from the hospital to the medical staff through bylaws creates an enforceable contract between the hospital corporation and the physicians.[20] Although South Dakota recognizes such relationship as a contract, there still are several state courts which refuse to find that the medical staff bylaws create an enforceable contractual obligation between the physician and hospital corporation. [21] As well, some courts consider if a contractual relationship exists on a case-by-case basis[22] while others find such relationship existing per se.[23] Whether the a contract exists or not, much litigation has transpired because of a hospital's denial of or revocation of medical staff privileges to certain physicians.[24] Medical staff privileges are essential to the viability of a physician's profession and "[a]s the relationship between physicians and hospitals continues to evolve, denial or revocation of medical staff privileges may essentially prevent a physician from practicing in a community."[25] This is especially true in Aberdeen, South Dakota, a one hospital town.

HYPOTHESIS

It is not a breach of contract, formed as a result of corporate bylaws deriving medical staff bylaws, when the Board makes an executive decision in the best interest of the community and the hospital corporation to close privileges of certain procedures, particularly procedures offered by direct competition.

ANALYSIS

A. The Relationship

Contemporaneously, as the relationship between physicians and hospitals continues to evolve, the quality of healthcare in America endures relentless criticism and controversy. [26] "A hospital's most powerful assurance of the quality of patient care lies in its selection of a competent and committed medical staff [a decision] which is exercised by the board of trustees."[27] The medical staff is preserved as a separate entity possessing certain rights and responsibilities as a result of the contractual relationship with the hospital. "The medical staff is a sacrosanct entity recognized in the law and insistent upon by organized medicine and physicians in hospitals throughout the United States."[28] The rise and desire of an organized medical staff grew as a result of the trustee's impossibility in running the day-to-day operations of the hospital.[29] The role of a trustee used to be considered an honor as the trustee was the main fundraiser for the hospital.[30] As the role of the trustees evolved away from a role as a main fundraiser, the desire for a stronger relationship between the medical staff and board of trustees ensued. The trustee's responsibility as a fundraiser changed to a person "educated in the legal and regulatory framework under which hospitals functioned."[31] Then, as a result of malpractice situations the board and trustees then assumed the role as "actively oversee[ing] the development of strategic policy direction, the financial situation and direction of the hospital, and the quality of care provided by the hospital."[32] The final shift in the board and trustee's role and relationship with the hospital was to one which develops the missions and goals and executor of policies to promote hospital capabilities to continue to carry out the hospital mission.[33] Now the board and the medical staff, working together, ensure the economic viability of the hospital taking into account patient care, safety and credentialing. The yin and the yang: yes, the medical staff has been given power,

but there are many problems which result in emotional lawsuits across America. Medical staffs are in fear of a board making a decision which affects their privileges on grounds other than competency and professionalism. For example, economic credentialing is a policy issue not favored and actually frown upon by the physicians.   Economic credentialing is defined by the American Medical Association "as the use of economic criteria unrelated to quality of care or professional competency in determining qualifications for initial or continued medical staff membership or privileges."[34] It is contended that:

[e]conomic credentialing threatens the very basic tenets of the personal relationship between physician and patient and the obligation of the physician to provide care to an individual patient. An economic efficiency model of medicine, as envisioned by illegitimate uses of economic criteria, diminishes the role of a physician to that of a maintenance mechanic: treatment is only based on a manual of permitted procedures; some repairs may be economically too expensive to make; when it is more efficient, simply allow a machine to wear out rather than replacing and providing further service and when a machine has reached the end of its useful life – retire it.[35]

There exists legitimate use of economic credentialing. For example, quality assurance purposes, such as: "clinically unnecessary treatment, fraud and abuse . . . and hospital admissions compared to outpatient services utilizations."[36] "[P]ersonal referral patterns, operating room underutilization, low census or admission rates . . ." are examples of a hospital board's illegitimate use of economic credentialing.[37] The Joint Commission for the Accreditation of Healthcare Organizations (hereinafter JCAHO), developed standards for granting of medical staff privileges and is void of any economic criteria.[38]

The trustees recognize that it is best for the day-to-day decisions to be made by the medical staff as the staff is better equipped. Yet the trustees recognize that the medical staff does not have the knowledge to work in a way that cut costs.[39] To better organize the rights and responsibilities of the medical staff in relation to the hospital corporation, hospitals derive medical staff bylaws.[40] The exact terms of the arrangement considering staff duties, rights and responsibilities are exacted in the medical staff bylaws.[41]

For the hospital to effectively promote the quality of care "rendered within the hospital, [it] must have full and unimpeded legal authority to make any and all decisions related to the provision of quality of care that [does] not speak directly to the individual practitioner's professional competencies."[42] The medical staff is the revenue producing unit and the board makes the complex decisions and steers the direction of the hospital.[43] The hospital's board is the "nexus for planning, implementing and institutionalizing"[44] the corporate culture and for a motivating business strategy.[45] The medical staff represents the interests of the individual members and assures the quality of care for the patients. Together the medical staff and hospital have mutual responsibility to:

(1) cooperate and work together to meet the overall health and medical needs of the community and preserve patient care; (2) acknowledge the constraints imposed on the two by limited financial

resources; (3) recognize the need to preserve the hospital/health systems economic viability; and (4) respect the autonomy, practice prerogatives, and professional responsibilities of the physicians. [46]

Essential to the relationship is the economic viability of the hospital. As a result the board which represents the interests of the hospital has the power to make executive decisions as long as the decisions are in the best interest of the community and the hospital.

B. The Corporate Bylaws and the Medical Staff Bylaws

1. Corporate Bylaws

The bylaws delineate the organization and membership of the corporation as well as the membership and organization within the medical staff. The corporate bylaws designate themselves as the governing body. South Dakota Nonprofit Corporation Law prescribes that the affairs of a corporation shall be managed by a board of directors.[47] To protect the hospital from a potential lawsuit regarding privileges, the board should draft bylaws which clarify amount of authority retained in the governing body and for what reasons the medical staff would make executive decisions. For example, the hospital should clarify that the:

governing body organizes the practitioners with privileges at the hospital . . . under the medical staff bylaws approved by the governing body; that, when necessary, the medical staff bylaws will be revised to reflect the hospital's current practices with respect to medical staff organizations and functions; that the governing body only considers medical staff recommendations regarding appointments to the medical staff; and that each member of the medical staff has appropriate authority and responsibility for the care of his or her patients, subject to the limitation contained in both the hospital bylaws, rules and regulations of the medical staff.[48]

When bylaws are approached considering all the relevant factors, the hospital has less of a chance with a medical staff confusing their role in the hospital decision making process.[49] "Any delegation or assignment of responsibility or authority from the governing body is conditioned upon the presumption that the governing body . . . is responsible for effective quality assurances."[50] It is essential to include a clause in stating that the governing body reserves the superior power and ultimate decision making when it is an administrative or business decision.

2. Medical Staff Bylaws

From the medical staff's perception obtaining access to the hospital to carry out their medical services is essential to their continued practice of medicine. As part of obtaining access to the hospital the physician adopts the medical staff bylaws as part of the agreement for employment. The bylaws include the criteria which for physicians to obtain privileges.[51] For example: current licensure, training and experience, competency, good physical and mental health and geographic proximity, are all factors taken into account.[52] Current licensure is required for the

physician to practice in the state in which the hospital is located.[53] Proof of training and experience is essential to protect the hospital from granting privileges to unqualified professionals.[54] Professional competency assures the board that the physician will perform at the accepted level of quality.[55] For a physician to be able to provide adequate quality of care it is essential that he/she is in good physical and mental health.[56] Lastly, for the physician to be able to respond timely to the hospitals needs a requirement of close geographic proximity is necessary.[57] In addition to inclusion of criteria for obtaining privileges, the bylaws delineate the amount of responsibility the physician will have in the hospital.[58] Also, the scope of patient care the physician is permitted to provide along with the level of activity the physician is allowed in the use of hospital resources.[59]

These criterion type standards are developed from JCAHO.[60] The standards are not law but are used as threshold standards by courts. JCAHO recognizes that the medical staff has certain powers and responsibilities granted through the medical staff bylaws, but also recognize that authority does not reach the ultimate decision making about granting or denying privileges.[61] The controversy which arose in Aberdeen is with the interpretation of the medical staff bylaws when determining who has the power to grant or deny medical staff privileges.

C. Denial of Privileges

1. Who has the Power?

The medical staff who are the miracle performers and the hospital which is the sanctuary, both depend upon the survival of an economically successful hospital corporation. The relationship between the two needs to be one of trust, empathy and great leadership. JCAHO recognizes that the medical staff has the responsibility to promote quality care through management of the professional services provided by the medical personnel.[62] The medical staff is described as the cornerstone of quality in hospitals across America even though they are recognized as a separate entity utilizing the hospital to provide medical services.[63] The hospital corporation on the other hand has the responsibility to remain competitive in the market place which will ensure that the medical staff will have a place to provide medical services.[64] So who has the power to decide how many and which physicians or surgeons or other medical staff should be granted medical staff privileges at a hospital corporation? A group of physicians in Aberdeen assert that the medical staff bylaws grant the exclusive authority to make that decision to the medical staff.[65]

D. Mahan v. Avera St. Luke's

1. The Story

This case involves hospital services in a South Dakota town, Aberdeen, which has been a one hospital town in the surrounding ninety mile radius until the rise of this controversy which ensued in and around 1992.[66] Avera St. Luke's (hereinafter ASL), which has operated without competition for centuries, is now in direct competition with Orthopedic Surgery Specialists (hereinafter OSS). [67] OSS opened a surgical center which performed three orthopedic spinal

procedures that were also offered at ASL.[68] As a result of the competition and other relevant factors, ASL closed medical staff privileges to any new medical staff for those three procedures.[69]

ASL is a non-profit hospital under the nonprofit corporation laws of South Dakota and sponsored by the Sisters of the Presentation of the Blessed Virgin Mary of Aberdeen, South Dakota.[70] "Since 1901, the Presentation Sisters have been fulfilling their mission statement 'to respond to God's calling for a healing ministry . . . by providing quality health services' to the Aberdeen community."[71] South Dakota Corporation law requires that the hospital be governed by a board of trustees.[72] "It is the duty of the board '[t]o implement the purpose and objectives of [ASL] as determined by the Members of [ASL] and in accordance with the Statement and Philosophy of the Presentation Sisters.'"[73]

ASL is a general service hospital and such services include surgery for orthopedic needs.[74] Over a period of years ASL employed a variation of two, three, and one orthopedic surgeon(s) with the last surgeon accomplishing the amount of work that two surgeons would potentially complete.[75] Because of the amount of work performed by the surgeon who left the hospital, ASL recognized the need to recruit either two neurosurgeons or two orthopedic surgeons, instead of one.[76] One obstacle preventing ASL from hiring new surgeons was the opening of a new for profit surgery center by OSS, Dakota Plains Surgical Center, which would directly compete with ASL for orthopedic surgeries.[77] The ASL hospital board determined potential applicants would not want to come to Aberdeen, a small town, and directly compete with a surgical center for the same specialty services they offer.[78] The new surgical center made it more difficult if not impossible for ASL to hire a new surgeon.[79] In addition, the direct competition resulted in a loss of more than one thousand hours at ASL during the first seven months Dakota Plains was open.[80]

As a direct result of the loss in hours and the difficulty in recruiting a new surgeon, the Board for ASL passed two motions: "clos[ing] St. Luke's medical staff with respect to physicians requesting privileges for three specific procedures [and] clos[ing] St. Luke's medical staff with respect to orthopedic surgeons except for two orthopedic surgeons then currently being recruited to the community by St. Luke's."[81] These closures were made to ensure effective recruitment and retainment of a neurosurgeon to ASL and also sustainment of profitable hospital services.[82] "St. Luke's cannot offer unprofitable, but essential services such as the emergency room, labor and delivery, pediatrics, and the critical care unit if it does not have any profit-making areas to cover the losses these areas accrue annually . . . [and] to take steps to maintain a sufficient volume of orthopedic cases in the hospital's operating faculties to keep the staff proficient."[83]

The motions to close staff privileges did not affect the physicians who already held medical staff privileges – ASL did not revoke privileges they had already committed to and were bound to the by contractual relationship existing in the medical staff bylaws.[84] Yet the OSS physicians brought a suit against ASL for breach of contract on the theory that the medical staff bylaws create an enforceable contract between the physicians and ASL and that the contract grants them, the physicians, with the power to grant medical staff privileges or not.[85]

2. Plaintiff's Argument (OSS)

OSS contends that ASL made the decision to close the medical staff to the enumerated procedures to "destroy a competitor."[86] OSS asserted that ASL acted in a way to punish the surgeons because of their intention to build a surgery center which would operate in direct competition with ASL.[87] To rise above the competition, or destroy the competitor, OSS believed that ASL implemented a marketing plan to "protect the [ASL's] high profit margin orthopedic surgery volume [with an ultimate goal . . . to maintain or enhance [their] market share and revenues in the area of orthopedic surgery and in the related ancillary areas."[88]

OSS not only is concerned that the "plan" was created in an effort to "destroy the competitor," but also that the closing of privileges was a "death blow" to OSS ever being able to recruit any new surgeons to Aberdeen because ASL is the only full service hospital in a ninety-mile radius.[89] "Since Aberdeen surgeons require access to the Hospital's facilities in order to fully practice in Aberdeen, the threatened loss of privileges at the [ASL] is akin to a threat to these physicians' ability to engage in their chosen profession in the city they chose to live in."[90]

Medical services often are viewed as a necessity. Most services associated with medical care, therefore, are characterized by inelastic demand relationships. Inelastic demand means, because services are necessary, consumers will continue to purchase them no matter highly priced the services are. . . . As such, suppliers of medical services are not responsive to the self-regulation of the market place. When provision of services is also monopolized in an area, a consumer cannot demonstrate his or her dissatisfaction with the service by patronizing another supplier (the effect of monopolization) or by refraining from buying the service (the effect of the inelasticity). Whereas most free enterprise is ideally governed by supply and demand and will, therefore, conform to consumer needs, the medical industry operates outside of this system of self regulation.[91]

"Construction of the medical staff [b]ylaws is at the heart of this lawsuit."[92] The medical staff bylaws, as contended by OSS, grant enumerated power to the medical staff in regards to granting and denying of privileges and that denial will be based on competency and not economic factors.[93] OSS cites authority supporting that in order for ASL to be able to close privileges for economic reason, the bylaws have to explicitly approve such criteria.[94]

[A]s hospitals are now considering the use of economic criteria in the decision-making process, the bylaws must be inspected to find approval for the use of such criteria. Since current bylaws reflect the original intent to the peer review process (that is quality and competency concerns) finding such approval in the bylaws may prove difficult . . . without specific provision in the medical staff bylaws allowing for the use of economic credentialing, such a policy will constitute breach of the hospital's contractual obligation.[95]

In particular the surgeons rely on the part of the medical staff bylaws which grant the medical

staff with certain rights in relation to appointment and review of medical staff privileges.[96] Because of this grant of authority OSS insists the power to appoint and review is superior over the board in regards to privileges decisions and in this case closing of privileges.[97] OSS disagrees that the Board has the right to make a business decision in regards to privileges and instead alleges that the medical staff bylaws enumerate a right to the medical staff to govern the credentialing process and that the decision to grant privileges would be based on residence and professional competence only.[98] Article VI, Section 1(b) of the medical staff bylaws provide that: "[t]he evaluation of such requests [for clinical privileges] shall be based upon the applicants' education, training, experience, demonstrated competence, references and other relevant information, including appraisal by the clinical section in which privileges are sought."[99]

OSS does not assert that the board has to grant privileges whenever an applicant meets the criteria set forth in the bylaws, but instead that what the board has done is counter to the hospitals meeting of their duties to the public as an essential provider of medical services.[100] The board's involvement in granting or denying of medical staff privileges is equated to that of an officer's duty to sign checks on behalf of the corporation.[101] In essence the board's only duty or authority is the final authority to grant or deny privileges is only invoked after the applicant has gone through the credentialing process.[102] As a final attempt, OSS suggests that if there is any vagueness in the bylaws it should be construed against the hospital, not the surgeons.[103] If the court has any doubt on where and who the power resides with the corporate power is denied.[104] OSS contends that the corporate bylaws do not explicitly grant the power to the board so the closure of privileges should be enjoined.[105]

3. Defendant's Argument

In no attempt to monopolize, ASL contends that the decision to close staff privileges was a business decision made in the best interest of the hospital.[106] The effect that the decision may have on increasing market share for the hospital or enhancement of the economic viability of the hospital is not anticompetitive.[107] In response to OSS' claim that ASL was acting to "destroy" them when the motioned to close medical staff privileges, ASL asserts that the proposition fails because it is unsupported with evidence.[108] The decision to close the procedures was a sound business decision based on the care and concern of medical representation for those procedures in the Aberdeen community in addition to concerns for profitable services at ASL, which is necessary to continue operating as a general service hospital.[109]

South Dakota corporation law, SDCL 47-23-13, mandates that ASL be governed by a board of trustee's, which in this case is a combination of physicians, Presentation Sisters, and members of the Aberdeen community.[110] ARSD 44:04:04:02:01, requires that ASL have a "medical staff organized under bylaws and rules approve by the governing body and responsible to the governing body of the hospital for the quality of all medical care provided patients in the hospital and for ethical and professional practices of its members."[111] The medical bylaws set out the duties and responsibilities of the medical staff and are derived from the corporate bylaws, the duties and responsibilities of the board are set out in the corporate bylaws which, to reiterate, create the staff bylaws.[112]

To read the bylaws in a way which delegates absolute power to the medical staff to grant or deny medical staff privileges, only using the board as a ratifying power, is vesting the power with the improper group.[113] "The role of the medical staff is limited to those areas in which the medical staff has expertise."[114] The hospital does not dispute that the medical staff does have the right to provide input to the board in matters involving staff credentialing, but not to the extent the plaintiff's here assert.[115] It is clear that the corporate bylaws do not grant the plaintiff's the power the pray for. One commentator recognizes the role of the medical staff:

Because the governing body lacks the knowledge and expertise to assess or regulate the practice of medicine, and since it is often legally prohibited from engaging in the practice of medicine, it must delegate substantial authority to the medical staff in order that the practice of medicine within the institution may be effectively organized and supervised. . . . The medical staff necessarily exercises a substantial degree of self-determination in those areas which the medical staff is the only repository of the requisite skill, training and experience. Thus, when evaluating patient care services, utilization, infection control, pharmacy and laboratory activities, medical records, and credentialing, the medical staff is traditionally given the power to establish and implement policies, subject only to the ultimate approval of the governing board.[116]

Because the decision to close the staff privileges to the enumerated procedures, the decision was not one which references to qualifications or competence. As a result the medical staff recommendation is not essential to the decision.

When the board passed the two motions to close medical staff privileges to those who do not currently have such privileges, they were responding to and trying to fill an orthopedic surgeon vacancy do to the recent loss of their own orthopedic surgeon.[117] "By closing the medical staff for three spinal procedures in orthopedic practice area, [ASL] hoped to provide a sufficient spinal practice for neurosurgeons to ensure that a neurosurgeon is always available to treat stroke victims and patients with head injuries or brain trauma who might not be able to survive a transfer." [118] Not only did ASL want to ensure that physician's would want to come to Aberdeen, ASL needed to take steps to maintain financial profit by maintaining sufficient volume of orthopedic cases.[119]

4. The South Dakota Supreme Court's Rationale

"Staff Bylaws are derived from Corporate Bylaws."[120] The court dictates that the place to begin when analyzing whether the board acted within its powers when it closed the medical staff privileges is at the corporate bylaws first and then at the medical staff bylaws.[121] Because the medical staff bylaws exist as a creation from the corporate bylaws they cannot be examined as "separate and equal sovereigns."[122] The Hospital Board Bylaws read pertinent in part:

[T]he members of the Board of Trustees shall have and exercise the authority in the management of the Corporation, as follows, but not in limitation, to wit: . . .

(b) To implement the purpose and objectives of the Corporation as determined by the Members of

the Corporation and in accordance with the Statement of Philosophy of the Presentation Sisters. . .

(i) To periodically examine its goals, its policies and the current programs of the hospital and to be responsible for the development of a mechanism that provides a systematic review of the quantity and quality of services provided. . .

(j) To ensure that personnel policies and practices that are adequate to support sound patient care are established and maintained. . .

(r) . . . to analyze and evaluate data which reflects the communities [sic] present and projected health needs and accordingly develop a written plan for the hospital's growth and development; to provide appropriate physical and financial resources and personnel required to meet the needs of the community and the patients; and to make appropriate recommendations with respect thereto to the Members of the Corporation. . .

(u) To delegate to the Medical Staff the authority to evaluate the professional competence of staff Members and applicants for staff privileges and to hold the Medical staff responsible for making recommendations to the Members of the Board of Trustees concerning initial staff appointments, reappointments and the assignment or curtailment of privileges, all subject to the final approval of the Members of the Board of Trustees. . .

(v) To ensure the development of the Medical Staff Bylaws, Rules and Regulations which must state the policies under which the Medical Staff regulates itself, and to approve the same.[123]

The medical staff bylaws read, pertinent in part:

1. To provide quality care for patients admitted to the hospital as inpatients, outpatients, to the ancillary services of the hospital and those admitted to the emergency room for first-aid treatment.

2. To provide a high level of professional performance of all practitioners authorized to practice in the hospital through the appropriate delineation of the clinical privileges that each practitioner may exercise in the hospital, and through ongoing review and evaluation of each practitioner's performance in the hospital.

3. To promote medical education to the hospital.

4. To initiate and maintain rules and regulations for the government of the Medical Staff.

5. To provide means whereby problems of medico-administrative nature may be discussed by the Medical Staff with the Governing Body and the Administration.[124]

In the examination of the corporate bylaws the court determined that there is no express power granted to the medical staff which gives them the sole right to grant or deny medical staff privileges.[125] In fact the court believes that notion is contrary to South Dakota corporation law.[126] The court addressed the lower courts evaluation of the controversy and the conclusion that the medical staff has superior decision making authority as a result of the medical staff bylaws.[127] The lower court claims that when considering whether the action of the board violated the medical staff bylaws the "spirit of the Bylaws [should be] taken as a whole."[128] The supreme court finds that rationale absurd – who would grant "control over the day to day hospital administration to a medical staff who is not legally accountable for the hospital's decisions, has no obligation to further the mission of the Presentation Sisters, and has unknown experience in running a hospital or meeting the medical needs of the community."[129]

The court concluded that the board made the decision to close the medical staff privileges based on a sound business decision, as it was necessary to "insure 24-hour neurosurgical coverage for the Aberdeen area" and was made in consideration of community interests and the hospital viability.[130] The board's motions to close the staff privileges were administrative decisions and the court agreed and does not desire to interfere with a corporate decision when it is "made pursuant to its Corporate Bylaws."[131] Because the decision was an administrative one and the fact that the medical staff was not involved in the decision was of no consequence.[132] By adopting the trial court's rationale that the "spirit of the bylaws taken as a whole" is the proper approach, the court is ripping power away from the board.[133] "The board must be allowed to make such reasonable, independent decisions if it is to continue to provide comprehensive medical services to the Aberdeen community."[134]

CONCLUSION

Is the South Dakota Supreme Court Correct?

"Improper motives cannot transform lawful actions into actionable torts. Whatever a man has the legal right to do, he may do with impunity, regardless of motive, and if in exercising his legal right in a legal way damages results to another, no cause of action arises against him because of bad motive in exercising that right."[135]

Taking that quote to heart, ASL has the right to close medical staff privileges as that power is granted to them in the corporate bylaws. The fact that the decision affected a new hire from OSS is of no consequence. "Clearly, a hospital cannot act arbitrarily and capriciously and must have a reasonable basis for withholding staff privileges."[136] OSS surgeons want their cake (their own for profit hospital) and want to eat it too (have continued medical staff privileges at ASL).

OSS's argument that the decision made by the board was based on improper motives, like economic credentialing is without merit. The hospital must to continue to operate successfully in the Aberdeen community does have to considered economic criteria when considering staffing possibilities and probabilities. Dr. Mahan, who was not able to obtain medical staff privileges at ASL as a result of the supreme court's holding, knew before he accepted his job with OSS that ASL had closed privileges. Mahan accepted his position with the understanding that he would not

obtain privileges at ASL for the enumerated procedures, which consequently, are the exact procedures Mahan specializes.

OSS could not pinpoint the exact provision in the medical staff bylaws which granted the medical staff the exclusive power to grant or deny privileges. Instead OSS claimed that because their was not an express provision in the corporate bylaws granting the board such power, that it then must be granted to the medical staff. A more rational statement emerged from the supreme court's opinion: reliance on the medical staff bylaws "turns the corporate structure of ASL upside down, granting control over day to day hospital administration to a medical staff that is not legally accountable for the hospital's decisions, has not obligation to further the mission of the Presentation Sisters, and has unknown experience in running a hospital or meeting the medical needs of the community."[137]

Avera St. Luke's board made a business decision considering the needs of the community as well as the economic viability of the hospital. OSS opened a for profit hospital which directly competed with ASL for certain orthopedic procedures. ASL had just lost their orthopedic surgeons and found it difficult if not impossible to obtain any interest from potential applicants because of the competition from OSS. As a result of those factors among others, ASL made the motion to close medical staff privileges to those physicians who have not already been granted them. Essentially, those physicians at OSS who already have privileges did not loose them, but they complain anyway – because they cannot have their cake and eat it too.