

DOCKET NO. 1022099

IN THE SUPREME COURT OF ALABAMA

RADIATION THERAPY ONCOLOGY, P.C., \*  
KENNETH ELLINGWOOD, M.D., GREGORY \*  
COTTER, M.D., and ROD KRENTEL, M.D. \*

Appellants, \*

vs. \*

PROVIDENCE HOSPITAL, \*

Appellee. \*

APPEAL FROM THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA  
THIRTEENTH JUDICIAL CIRCUIT  
CASE NO. CV-2001-2850

BRIEF OF AMICI CURIAE  
ALABAMA HOSPITAL ASSOCIATION  
and  
AMERICAN HOSPITAL ASSOCIATION  
IN SUPPORT OF  
APPELLEE PROVIDENCE HOSPITAL

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## STATEMENT OF THE CASE

The Alabama Hospital Association ("ALAHA") and the American Hospital Association ("AHA") adopt the Statement of the Case set forth in Providence Hospital's brief.

## STATEMENT OF THE ISSUE

Whether, as part of its overall authority, a governing board of directors may make a business decision to transfer a hospital service to an office-based practice without the review and approval of the medical staff.

## STATEMENT OF FACTS

The ALAHA and the AHA adopt the Statement of Facts of Providence Hospital.



## SUMMARY OF THE ARGUMENT

The board of directors of a private, non-profit hospital has the ultimate authority and responsibility to make all of the decisions for governance of the hospital. The medical staff, through the medical staff bylaws, does not have the power to veto management decisions made by the hospital, even when those decisions affect the ability of some members of the medical staff to practice at the hospital. The board of directors' authority is borne of its legal responsibility for the operation, management, and governance of the hospital, and this authority is derived from state and federal statutes and regulations, corporate articles and bylaws, the medical staff bylaws, and numerous court decisions. Giving the medical staff the power to veto management decisions made by the hospital board would create an untenable situation whereby the board would be unable to discharge its duties in keeping the hospital to its mission. For this reason, among others, the decision of the trial court in this case, which recognized the ultimate authority of the Providence Hospital Board of Directors to transfer the hospital's cancer program, should be affirmed.

## ARGUMENT

- I. A GOVERNING BOARD OF DIRECTORS MAY MAKE A BUSINESS DECISION TO TRANSFER A HOSPITAL SERVICE TO AN OFFICE-BASED PRACTICE WITHOUT THE REVIEW AND APPROVAL OF THE MEDICAL STAFF.

The ALAHA is joined by the AHA in submitting this amicus curiae brief. The AHA includes among its membership thousands of hospitals throughout the United States. The ALAHA has 106 member hospitals, all of which are located in Alabama. Each of these member hospitals operates under licensing laws that in virtually every state, as in Alabama, place direct responsibility for the quality of hospital services and the care rendered therein upon the hospital's governing body.

As representatives of hospitals across Alabama and the nation, the Hospital Associations have a legitimate interest in the role and authority of a board of directors to operate, manage, and govern a hospital. The board of directors of a hospital carries the ultimate responsibility for the hospital's accomplishment of its mission. Interpreting medical staff bylaws to allow individual physicians to veto management decisions made by the board

of directors, as urged by Appellants, interferes with the board's authority to meet that responsibility.

- A. In recognition of the hospital board of directors' ultimate legal responsibility for the management of the hospital, the role of the hospital board has evolved over the last century into an active manager of the hospital's affairs.

In general, hospitals are corporations and they are governed by a board of directors.<sup>1</sup> The role of such boards in the United States has gradually changed from 1900 to the present. From 1900 to the 1960's, the role of the hospital boards of directors was more symbolic than substantive. Being a hospital board member was considered an honor. One of the main functions of a board member was fund-raising for the hospital. Beyond fund-raising, hospital boards were responsible for the construction and maintenance of the hospital's physical facilities. All other

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<sup>1</sup> For the background on the general role and authority of hospital boards, the Hospital Associations rely heavily upon a publication entitled "The Guide to Governance for Hospital and Health Systems Trustees," written by Mark K. Totten and James E. Orlikoff, published by the Health Research and Educational Trust, an affiliate of the American Hospital Association, Copyright 1990 and 1999.

responsibilities in that early stage of hospital governance were divided between management and the medical staff.

During the 1960's and 1970's, boards became more involved in the actual governance of the hospitals. While several economic factors triggered this transitional role, one of the key catalysts was the *Darling* malpractice case. The case of *Darling v. Charleston Community Memorial Hospital*, 211 N.E.2d 253 (Ill. 1965), involved a father who brought suit against his son's treating physician and the hospital for negligent emergency treatment that necessitated amputation of the son's right leg from casting the leg too tightly. The basic dispute in the case centered on the duty that rested upon the defendant hospital. The court affirmed a jury verdict and damage award against the defendant hospital on the ground that it had a duty to supervise the competence of its medical staff members. *Id.* at 260-261. This case caused hospital boards to re-examine their roles as governors and their relationships with the medical staff and to gradually increase their involvement in the administration of their institutions.

In the 1980's and continuing into and throughout the 1990's, hospital boards gradually developed the form of governance which characterizes the hospital of the twenty-first century. This type of governance is epitomized by boards that strive to understand their accountabilities, roles, and responsibilities, and to discharge them effectively. Such boards actively direct the development of their hospital's strategic policy, oversee their financial condition, and insure the quality of their delivery of medical care. With the many changing pressures affecting hospitals, such as managed care, capitation, competition, liability, and capital financing concerns, an active and effective governing board is critical to the successful operation and continued survival of the modern hospital.

Hospital boards have been influenced and pressured by case law, and by state statutes and rules that have often developed in response to case law, to assume active responsibility for all aspects of hospital governance. Uniformly, however, the standard is clear; it is the board of directors that is charged with the responsibility of keeping the hospital true to its mission. As such, the

board has the ultimate decision-making authority over all aspects of the hospital. The Hospital Associations are concerned that misconstruing medical staff bylaws to allow individual physicians the power to veto management decisions made by a hospital board, as Appellants urge in this case, will materially derogate from the unitary mission of hospitals and, quite unnecessarily, impose substantial obstacles to the performance by hospital governing boards of the functions the responsibility for which the law ultimately places upon them.

- B. The board of directors of a hospital has final authority to manage the affairs of the hospital; the medical staff bylaws do not give individual physicians veto power over the board's management decisions, including decisions that affect those physicians' ability to practice at the hospital.

Because of its ultimate legal responsibility for the operation of the hospital, the board of directors has final authority to manage the affairs of the hospital, notwithstanding the medical staff bylaws. Stated another way, the medical staff bylaws are subject to the board's authority to manage the affairs of the hospital. Therefore, individual physicians, through the medical staff bylaws, do not have veto power over the management decisions made by the board of directors.

By viewing select provisions of the medical staff bylaws in a vacuum, Appellants and their amici attempt to provide individual physicians with veto power over board decisions where those decisions affect the physician's ability to practice at the hospital. When viewed in the proper context, however, it is clear that the medical staff bylaws do not give individual physicians veto power over board decisions.

Outside of the medical staff bylaws, there are a number of other guidelines that exist to aid in an interpretation of the relationship between a hospital and the members of its medical staff, and in determining who has ultimate responsibility for all decisions. First, there are Alabama statutes and administrative rules that apply. Alabama corporate law requires that a non-profit corporation be governed by a board of directors. "All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation shall be managed under the direction of a board of directors." Ala. Code § 10-3A-34(a). Alabama Administrative Code rules 420-5-7-.06 and 420-5-7-.08 incorporate federal regulations found at 42 C.F.R. §§ 482.12 and 482.22. Section 482.12 provides that a hospital "must have an effective governing body legally responsible for the conduct of the hospital as an institution" and must "[e]nsure that the medical staff is accountable to the governing body for the quality of care provided to patients." 42 C.F.R. § 482.12. Section 482.22 provides that "[t]he medical staff must be well organized and accountable to the governing board for the quality of medical care provided to patients." 42 C.F.R. § 482.22.



The medical staff bylaws themselves provide that "Membership is not a right of any person. Membership on the medical staff of the hospital is a privilege." (C. 931). Acceptance by a physician of membership on the medical staff includes agreement to abide by the terms of the bylaws, rules and regulations, and policies and procedures of the hospital. (C. 943). The corporate bylaws of Providence Hospital, as with virtually all corporate bylaws, provide that the board of directors has the right to make administrative decisions regarding the operation and management of the hospital. (C. 1086-87). Further, Providence Hospital's Articles of Incorporation confer on the board of directors the power and responsibility to manage the affairs of the hospital. (C. 1073).

In addition to the statutes, regulations, and corporate documents discussed above, numerous decisions by state and federal courts across the nation have recognized the ultimate authority of a hospital board to operate, manage, and govern a hospital. The decision of the South Dakota Supreme Court in *Mahan v. Avera St. Luke's*, 621 N.W.2d 150 (S.D. 2001), relied upon by the trial judge in this case,

is but one example, albeit a particularly well-reasoned example, of the accepted principle that the medical staff bylaws are subject to and dependent upon the final authority of a hospital board to manage the affairs of the hospital.

In *Mahan*, the court affirmed the decision of the board of directors of Avera St. Luke's Hospital to close its staff to physicians seeking to perform certain spinal procedures. The *Mahan* court concluded that the medical staff bylaws did not supersede the board of directors' ultimate authority and responsibility for the management of the hospital, authority conferred upon the board by the hospital's corporate bylaws and state law. *Mahan*, 621 N.W.2d at 154-55.

The *Mahan* court considered and rejected the plaintiffs' argument that the medical staff bylaws trumped the authority of the board of directors to make decisions affecting the ability of physicians to practice at the hospital. The *Mahan* court explained:

Pursuant to its authority, the Board of ASL [Avera St. Luke's] has delegated certain powers associated with the appointment and review of medical personnel to its medical staff. These designated powers are manifested in the

Staff Bylaws. Plaintiffs now claim that the Staff Bylaws trump the decision-making ability of the Board as to all decisions relating in any way to, or incidentally affecting, medical personnel issues. We do not agree.

The circuit court failed to give sufficient weight to the fact that the Staff Bylaws are derived from the Corporate Bylaws. Under . . . the Corporate Bylaws, any powers supposedly granted under the Staff Bylaws must originate from, and be authorized by, the Board pursuant to the Corporate Bylaws. Their legal relationship is similar to that between statutes and a constitution. They are not separate and equal sovereigns. The former derives its power and authority from the latter.

*Id.* at 154-55.

After examining the provisions in the hospital's corporate bylaws which, like the provisions in Providence Hospital's corporate bylaws, conferred on the board the power to manage the business and property of the hospital, the Mahan court concluded that "the medical staff has no authority over any corporate decisions unless specifically granted that power in the Corporate Bylaws or under the laws of the State of South Dakota." *Id.* at 155. The Mahan court's conclusion took into account the relative responsibilities of the medical staff and the hospital; as

that court recognized, the plaintiffs' interpretation of the medical staff bylaws would

turn[] 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 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.

*Id.* at 156. While the *Mahan* court recognized that board decisions unavoidably might affect members of the medical staff, it noted that "merely because a decision of the Board affects the staff does not give the staff authority to overrule a valid business decision made by the board."

*Id.* at 158.

The decision of the South Dakota Supreme Court in *Mahan* is not an anomaly. Quite the contrary, courts across the nation have reached similar conclusions based upon the principle that the medical staff bylaws are subject to the board of directors' authority to manage the affairs of the hospital. See *Bartley v. Eastern Maine Med. Ctr.*, 617 A.2d 1020, 1022 (Me. 1992) (corporate bylaws confer authority on the board to enter into an exclusive contract with certain

physicians to the exclusion of others on the medical staff; the medical staff bylaws are "subject to" these corporate bylaws); *Lyons v. St. Vincent Health Ctr.*, 731 A.2d 206, 213-14 (Pa. Commw. Ct. 1999) (under corporate bylaws and medical staff bylaws, the hospital board has the sole authority to manage the affairs of the hospital, including the authority to enter into an exclusive contract which excludes certain members of the staff); *Anne Arundel Gen. Hosp. v. O'Brien*, 432 A.2d 483, 491 (Md. 1981) (corporate bylaws of the hospital give the board "full power and authority to manage the business and property of the Corporation without limitation or restriction," including the power to consolidate its radiology and nuclear medicine departments to the exclusion of certain members of the medical staff); *Ivey v. Galen Hosps. of Texas*, No. 05-97-00435-CV, 2000 Tex. App. LEXIS 2051, at \*30-\*31 (Tex. App. 2000) (internal procedures set up in medical staff bylaws cannot contractually limit the governing board's authority to manage the hospital); *Williams v. Hobbs*, 460 N.E.2d 287, 292 (Ohio Ct. App. 1983) (control and management of the hospital is assigned to the board of trustees by the hospital's Code of Regulations; exclusive contract excluded

medical staff member despite credentials committee decision to renew and extend his privileges at the hospital); *Gonzalez v. San Jacinto Methodist Hosp.*, 880 S.W.2d 436, 440 (Tex. App. 1994) ("The purpose of [a medical staff bylaws] hearing is not to override administrative decisions on the operation of the Hospital."); *Keskin v. Munster Med. Research Found.*, 580 N.E.2d 354, 360 (Ill. App. Ct. 1991) (corporate bylaws give the hospital board authority to enter into exclusive contracts to the exclusion of certain members of its medical staff); *Holt v. Good Samaritan Hosp.*, 590 N.E.2d 1318, 1322-23 (Ohio Ct. App. 1990) (same); *Redding v. St. Francis Med. Ctr.*, 255 Cal. Rptr. 806, 811 (Cal. Ct. App. 1989) (hospital board has the "right to make rational management decisions, even when exercise of that right might prove adverse to the interests of specific individual practitioners"); *Centeno v. Roseville Comty. Hosp.*, 107 Cal. Rptr. 183, 187 (Cal. Ct. App. 1979) (same).

- C. Practical considerations require that the hospital's board of directors, and not the medical staff, possess the ultimate authority for management of the hospital's affairs.

It is impractical for the medical staff to be given veto power over the management of the affairs of a hospital, yet this is precisely the position taken by

Appellants and their *amici* in this case. If the medical staff, through the medical staff bylaws, can veto business decisions made by the board, then the board would cease to function as the governing body of the hospital. Under plaintiffs' formulation, the medical staff could require that the hospital maintain money-losing services, even if doing so threatened the financial health of the hospital. Hospitals could not sell or transfer equipment, such as x-ray machines or linear accelerators, without prior approval from the medical staff, because any transfer might potentially affect members of the medical staff. Obviously, this position is untenable, but it is exactly the position maintained by Appellants and their *amici* in this case.

In sum, as set forth in the corporate bylaws, medical staff bylaws, state and federal laws and regulations, and the case law discussed above, a hospital's board of directors has the ultimate authority and responsibility to make decisions for management of the affairs of the hospital, even if those decisions may impact the practice of certain physicians at the hospital. The medical staff bylaws, which govern the internal relationship between the

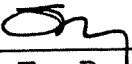
individual physicians and the hospital, are subject to the board's ultimate authority to manage the hospital. The trial court recognized this fact when it ruled in favor of Providence Hospital in this case. Appellants' contention that the medical staff bylaws trump the board's authority has no legal basis and acceptance of this contention would have the unprecedented effect of restricting the ability of the board to effectively manage the hospital whenever a board decision might have some effect on a physician's ability to practice at the hospital.



## CONCLUSION

As the entity ultimately responsible for the operation, management, and governance of the hospital, the hospital's board of directors has the ultimate authority to make all of the decisions for management of the hospital. The medical staff bylaws do not trump this authority, but are subject to it. The trial court's holding in this case, that Providence Hospital's board of directors had the right to transfer the cancer program out of the hospital to an office-based practice, is legally correct and sound public policy and should be affirmed.

Respectfully submitted,

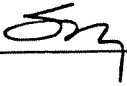
  
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CERTIFICATE OF SERVICE

I do hereby certify that I have, on this 17<sup>th</sup> day of December, 2003, served a copy of the foregoing brief below listed counsel for all parties to this proceeding, by placing same in the United States Mail, properly addressed and first class postage prepaid.

  
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