

STATE OF INDIANA)
)ss:
COUNTY OF MARION)

MARION SUPERIOR COURT
CIVIL DIVISION 10
CAUSE NO. 49D10-9909-CT-1315

DAN HARROLD, EVA HARROLD,)
and NATALIE HARROLD,)
)
Plaintiffs,)
)
vs.)
)
FAIRBANKS HOSPITAL,)
)
Defendant.)
)

**ORDER DENYING FAIRBANKS’S MOTION FOR PRELIMINARY
DETERMINATION OF LAW**

Introduction

Plaintiff Natalie Harrold and her parents (“Harrold”) seek damages from Defendant Fairbanks Hospital (“Fairbanks”) for negligent supervision, among other claims, regarding tortious acts of an employee. Fairbanks moves for preliminary determination of law under the Indiana Malpractice Act (“Act”) arguing the Act covers “negligent supervision.” The Court finds Harrold’s claim for neglect supervision is not related to “health care” or “professional services,” and therefore falls outside the Act. Fairbanks’s motion for preliminary determination of law is denied.

Issue

Is Harrold’s negligent supervision claim within the Act?

Facts and Procedural History

In September 1997, Natalie Harrold became a resident patient of Fairbanks. At that time, former co-defendant Larry Shears (“Shears”) was employed as an Adolescent Guidance Specialist (“AGS”). The position requires, according to Fairbanks’s job description, “[k]nowledge of the disease model and principles of support groups such as A.A. and N.A. and personally endorses patient participation in such activities.” In addition, the job description indicates a preference for a bachelor’s degree in a healthcare-related field, and “experience working with adolescent substance abuse patients in an in-patient setting.” The job description further list duties and responsibilities of the position as follows:

1. Participates in initiation and direction of the treatment process for patients by interviewing patients for psychosocial information and documenting any pertinent information by submitting progress notes in the patient’s chart.
2. Transports patients to support groups or other mandatory appointments as directed by supervisor.
3. Participates in daily staffings and weekly rounds and clearly communicates the patient’s progress to the treatment team.
4. Takes vital signs, searches patients and patient’s belongings whenever directed.
5. With appropriate supervision and specific direction, initiates and documents phone contacts to significant others . . .
6. Assist in the planning, participation, and implementation of recreation therapy activities.
7. Assist in the admission process when directed by supervisor.
8. Takes patients to meals and eats with patients if so directed.
9. Facilitates educational focus groups with adolescents.
10. Responsible for supporting and enforcing unit rules and behavior management system.
11. Responsible for following patient’s schedule and assuring all activities occur.

Natalie Harrold was admitted to Fairbanks for alcohol and substance abuse treatment. She had contact with Shears in various ways. For example, Shears assisted Natalie during hospital admission. He also lead Natalie’s unit in a daily discussion, and

generally counseled Natalie about drugs and alcohol. But in addition, Shears also allegedly made sexual and unwelcome advances to Natalie, including physical contact. The Proposed Complaint describes these encounters as “nighttime sexual assaults.” The designated record shows unrefuted testimony alleging:

- Shears forcefully tried to kiss Natalie at least once
- Shears regularly entered Natalie’s room without knocking
- Shears patted Natalie on the “rear end” on more than one occasion
- Shears came into Natalie’s room during the night and rubbed Natalie’s body when she was asleep
- Shears put his body “up against” Natalie on one occasion
- Natalie found apparent pubic hair on her hospital room windowsill
- Shears contacted Natalie’s parents without authorization and falsely informed them that Natalie was “suicidal”

Eventually, Fairbanks received information about Shears’s alleged inappropriate actions toward Natalie. After an internal investigation, they terminated Shears’s employment.

In September 1999, Harrold sued Fairbanks under four counts including negligent supervision.

Also in September 1999, Harrold filed a proposed complaint in the Indiana Department of Insurance alleging Fairbanks committed malpractice by its negligent supervision of Shears.¹ The medical review panel subsequently found in favor of Harrold. Since Harrold’s claims are pending in both this Court and the Indiana

Department of Insurance, Fairbanks now seeks a preliminary determination of law under the Act to establish whether Fairbanks's liability for negligent supervision falls either under the Act or common law.

Applicable Law

A court with jurisdiction over medical malpractice cases and the parties to a proposed complaint filed with the Indiana Department of Insurance may preliminarily determine an issue of law. I.C. 34-18-11-1 et. seq.

The Act defines "malpractice" as "a tort or breach of contract based on *health care* or *professional services* that were provided, or that should have been provided, by a *health care* provider, to a patient." I.C. 34-18-2-18. (emphasis supplied) "Health care" is defined by the Act as "any act or treatment performed or furnished, that should have been performed or furnished, by any healthcare provider *for, to, or on behalf of a patient* during the patient's medical care, treatment, or confinement." I.C. 34-18-2-13.(emphasis supplied)²

Long standing Indiana common law prescribes that courts may not interpret a statute which is plain and unambiguous. But when a statute is ambiguous, a court may construe the statute to give affect to the intention of the General Assembly. Winona Memorial Foundation v. Lomax (1984), Ind. App., 465 N.E.2d 731, 735.

When properly interpreting the Act, Indiana courts have found legislative intent to make the Act very inconclusive. Ogle v. St. John's Hickey Memorial Hospital (1985),

¹ The parties agree that Fairbanks is a "qualified health care provider" under the Act. But at all times, Harrold argues to the Department of Insurance that the Act does not apply, but the Proposed Complaint is filed to preserve the malpractice claim, if necessary.

² "Professional services" is not specifically defined by the Act.

743 N.E.2d 1055 found that “Those seeking to avoid coverage under the Act travel a rocky road. The framers of the Act used broad language.” Id. at 1057. On the other hand, the Act only applies to “curative or salutary” conduct of a health care provider acting within his or her professional capacity. Conduct unrelated to the promotion of a patient’s health or the provider’s exercise of professional expertise, skill, or judgment is outside the Act. Doe by Rowe v. Madison Center Hospital (1995) Ind. App., 652 N.E.2d 101, 104; Sice v. Sentany (1992), 595 N.E.2d 264, 266; Collins v. Thakkar (1990), Ind. App., 552 N.E.2d 507, 510. Overall, courts are generally guided by the substance of the plead claim when necessary to determine whether the Act applies. Doe by Rowe v. Madison Center Hospital, supra. at 104.

With respect to hospital liability for employee conduct, the Act does not usually apply unless the conduct is alleged to relate to treatment or an alleged “therapist” relationship. Doe by Rowe v. Madison Center Hospital supra; Grzan v. Charter Hospital of Northwest Indiana (1998), Ind. App., 702 N.E.2d 786; Murphy v. Mortell (1997), Ind. App., 684 N.E.2d 1185.³

This Court finds Judge Mathias’s articulate approach in Winona Memorial Hospital v. Kuester (2000), Ind. App. 737 N. E.2d 824 to be most applicable to the instant case. Like Harrold’s predicament, Winona also presents an issue of first impression about hospital liability, that is, whether a claim for “negligent credentialing” falls within the Act. Winona’s analysis follows common law statutory construction: is the Act ambiguous about “credentialing,” and if so, what is the legislative intent? After reviewing other authorities, the purpose of credentialing physicians, and the practical

³ But one case implies that hospital liability for negligent hiring or supervision can fall within the Act in some cases. See Putnam County Hospital v. Sells (1993), Ind. App., 619 N.E.2d 968, 971.

purpose of the medical review panel, Winona found the “credentialing process actually involves *a blend of both medial and non medical personnel and expertise*. Credentialing, therefore, is neither clearly within the Act nor outside of it. For this reason, we hold that the Act is ambiguous . . .” (emphasis supplied) Id. at 827.

Most importantly, Winona found a “new wrinkle” in such hospital liability claims: since hospital liability is derivative from underlying employee conduct, the Act’s coverage is derivative as well. The court drew upon the plaintiff’s claim, that is, . . . “that *two* negligent acts occurred to proximately cause her injury . . . she must first establish that a negligent act of [the doctor] proximately caused her injury . . .As a result, it is inappropriate to look only to the credentialing conduct . . . “ Id. at 828. The court found support from Sue Yee Lee v. Lafayette Home Hospital (1980), Ind. App., 410 N. E.2d 1319:

Viewed from the historical prospective we believe the conclusion is inescapable that our *general assembly intended that all actions the underlying basis for which is alleged in medial malpractice are subject to the Act*. The obvious purpose of the Act is to provide some measure of protection to healthcare providers from malpractice claims, and to preserve the availability of the professional services of physicians . . . (emphasis supplied)

Id. at 1234.

Winona held that “negligent credentialing” is within the Act because the underlying claims, and alleged damage, are clearly related to medical malpractice.

Analysis

The Act Is Ambiguous

Unlike Winona, the record here does not show any other legal authorities to define an AGS, the “negligent supervision” of an AGS, or supervision of any specific

medical personnel. There are no specific statutes regarding supervision of employees at drug and alcohol treatment facilities like Fairbanks. Generally, the “supervision” of employees involves an “action, process, or occupation of supervising,” or “oversight.” Webster’s New Collegiate Dictionary (1981). Furthermore, Black’s Law Dictionary (8th Edition) defines “supervision” as “the act of managing, directing, overseeing persons or projects.”⁴ The essential nature of “supervision,” therefore, includes generic tasks or duties not unique to “health care” or medical treatment. But it may also arguably include some medical tasks or duties related to a specific supervised job position. The description of an AGS clearly includes some tasks and duties related to treatment. Consequently it is apparent, as in Winona, that the supervision of an AGS involves a “blend of both medical and non-medical personnel and expertise.” Accordingly, the Act is ambiguous regarding its coverage of alleged “negligent supervision.” The Court must proceed to interpret the Act to give effect to the intent of the General Assembly. Winona Memorial Foundation v. Lomax supra.

Legislative Intent

Does the General Assembly intend Harrold’s claim to sound in medical malpractice or ordinary negligence? The negligent supervision count necessarily includes proof of the underlying claim, so “it is inappropriate to look only to the [hospital] conduct to determine whether it sounds in malpractice or in an ordinary, common law cause of action.” Winona Memorial Hospital v. Kuester, supra. at 828.

The underlying claim here seeks damages for the misconduct of an AGS. As noted above, the record includes a litany of Shears’s job duties, most of which seemingly

⁴ Black’s Law Dictionary does include a definition of “negligent hiring” but it relates only to the selection of an unfit person.

relate to “health care,” and Harrold’s allegations of tortious acts, both comparable in length. But the Proposed Complaint does not accuse Shears of a single act related to “health care,” treatment, or “professional services.” The Court is unable to correlate a single job duty to a single Harrold allegation in their comparable lists above.

In Winona, the plaintiffs sought damages against a facility for credentialing a physician who allegedly committed “malpractice.” In our present case, Harrold seeks damages for the alleged failure to supervise an unregulated and unlicensed hospital attendant who allegedly performed “nighttime sexual assaults” during unsupervised shifts - obviously a “tort.”

It is important here to note an intriguing distinction in Collins v. Thakkar, supra. Defendant Dr. Thakkar was accused of intentionally inducing miscarriage of a baby allegedly conceived between him and a patient. The court found Thakkar’s medical conduct was not at issue, but rather the basis of the claim was the intentional damage from such conduct. It reasoned that the alleged conduct was not “for, to, or on behalf of a patient,” so it was not “health care” under the Act. Since it was not undertaken for the benefit of the patient, the court found no legislative intent to include it in the Act. As the court indicated, “The acts as alleged...do [not] call into question Thakkar’s use of his skill or expertise required of a member of medical profession.” 552 N.E.2d at 511.

Shears’s alleged conduct, like Thakkar’s, does not call into question the use of Shears’s skill in rendering any benefit or treatment to Natalie Harrold. Therefore, the “negligent supervision” claim does not include such consideration either.

Our common law clearly finds the Act is not intended to cover claims of ordinary negligence unrelated to patient care, particularly involving sexual misconduct between

non-physicians and patients. Doe by Rowe v. Madison Central Hospital, *supra*. Indeed, many courts facing similar circumstances outside Indiana have also found “negligent supervision” involving sexual misconduct amounts to ordinary negligence and not medical malpractice. Doe v. Institute of Living, 2007 WL 2429161 (Conn.Super.); Smith v. Friends Hosp. (2007), Pa.Super., 928 A.2d 1072; St. Joseph Medical Center v. Medical Professional Liability Catastrophe (2004), Pa.Cmwlth., 854 A.2d 692; Community Hosp. at Glen Cove v. American Home Assur. Co. (1991), N.Y., 567 N.Y.S.2d 122.

Therefore, the Act does not cover Harrold’s claim of negligent supervision.

Order

Fairbanks’s motion for preliminary determination is denied.

Dated this 11th day of October 2007.

David J. Dreyer, Judge