

## Insights

### Getting Staff to Report Impaired Physicians May Have Just Become More Difficult

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In a recent decision, ***Rebecca J. Denman, M.D. v. St. Vincent Medical Group, Inc., St. Vincent Carmel Hospital, Inc., 20A-PL-1236*** (Aug. 18, 2021), the Indiana Court of Appeals upheld a \$4.75 million verdict awarded by a Marion County jury to Dr. Rebecca Denman against a charge nurse, St. Vincent Carmel Hospital (the "Hospital"), and St. Vincent Carmel Medical Group, Inc. ("Medical Group"). The case illustrates the necessity of following written policy with respect to suspected physician impairment and carefully addressing it as a professional peer review matter rather than a human resources matter.

In December 2019, a charge nurse employed by the Hospital reported that she smelled alcohol on the breath of Dr. Denman, an OB/GYN with privileges there. Dr. Denman, who was on call, drove to the Hospital after one of her colleagues texted her to let her know that a nurse had asked him to check on Dr. Denman's patient. Upon arrival to the Hospital, Dr. Denman excoriated the nurses, including the charge nurse, for involving another physician with her patient. She reported that the charge nurse looked angry with her. Dr. Denman then went into the patient's room to evaluate the patient. The charge nurse followed Dr. Denman into the patient's room and observed her. The charge nurse testified that she saw nothing unusual or concerning while Dr. Denman examined the patient. Dr. Denman left the Hospital shortly thereafter. She fielded phone calls throughout the night, including at least one from the charge nurse herself. No one else had smelled alcohol on Dr. Denman's breath during the conversation at the nurses' station that evening.

The charge nurse waited until the end of her shift, approximately 12 hours later, to email her report about Dr. Denman to the Director of Nursing, even though hospital policy required immediate reporting. It appears that Dr. Denman asserted that the charge nurse made the alcohol allegation in retaliation for Dr. Denman's verbal confrontation with her earlier in the evening. She argued that the nurse waited to make her allegation until blood alcohol testing would not be possible.

The Hospital and the Medical Group that employed Dr. Denman conducted meetings, an investigation, and a "peer review screening" but no formal peer review. Ultimately, the Medical Group placed Dr. Denman on paid administrative leave and required her to submit to an assessment by the State Medical Association's Physician Assistance Program. The assessment led to a request for a third-party evaluation, six weeks of in-patient treatment, and the Medical Association's rigorous five-year alcohol monitoring program, requiring random testing

and ongoing counseling.

The charge nurse testified that it was not her intent to wait twelve hours so that Dr. Denman could not have her blood tested, but she "didn't know what to do." She also testified that she did not believe that Dr. Denman was drunk, and she observed no signs of impairment. Regardless, this delay in reporting was not compliant with the applicable Hospital policy, which was available to the charge nurse on the Hospital's intranet. Dr. Denman claimed that the report was unsubstantiated by any other nurses or reports and was made belatedly, too late for Dr. Denman to obtain testing to clear her name. Dr. Denman argued that this caused a chain of events dramatically and negatively affecting her life, reputation, and career.

Dr. Denman argued that the Medical Group's Chief Medical Officer misrepresented to her that peer review had been performed, and that if she had known that formal peer review had not occurred, she never would have agreed to go to the State Medical Association for assessment. Reading between the lines, if Dr. Denman had known this was simply an employment matter, rather than a medical staff matter that had the potential of generating a National Practitioner Data Bank report, she would have responded differently to the allegations.

The Hospital and Medical Group filed unsuccessful motions for summary judgment prior to trial and judgement on the evidence during trial. The Court of Appeals affirmed these trial court rulings. The trial court and the Court of Appeals determined that whether the Hospital acted without justification as an element of tortious interference with an employment relationship was a question of fact for the jury. They held that the jury was free to weigh the facts to evaluate justification or lack thereof, based on the report not being "timely made, that Dr. Denman had not been tested per Hospital protocols, and that, consequently, Dr. Denman was not offered an opportunity to clear her name."

In Indiana, the common interest qualified privilege exists as a defense to defamation. The common interest privilege includes intracompany communications regarding the fitness of an employee. The plaintiff has the burden of overcoming that privilege by showing that it has been abused.

In an amicus curiae brief filed by the Indiana Hospital Association (IHA), the IHA argued that the charge nurse's statement was not defamatory, was protected by the common interest privilege and served the public interest and legitimate business purposes. The IHA also argued that the outcome of this case threatens to chill essential reporting by hospital personnel of suspected physician misconduct, which will directly threaten public safety. Ultimately, the Court of Appeals affirmed the trial court's decision that whether the common interest privilege had been abused was a question of fact for determination by the jury.

Hopefully, this case will not significantly discourage the reporting of impaired physicians, which already requires significant courage on the part of colleagues, nurses, and others. Hospitals and medical staffs may need to remind nurses and other providers of the need to protect patients from impaired practitioners, particularly during a stressful resurgence in Covid-19 admissions. Personnel should be reminded of the resources available to support those who speak up and for those practitioners who may be experiencing substance abuse challenges. It is also clear from this case that it is usually advantageous to address such issues under the rubric of medical staff peer review, rather than as a personnel/HR matter. As of this date, the defendants have not filed any further petitions with the Court of Appeals or the Indiana Supreme Court.



Please contact **Robert A. Anderson** or **Nicole M. Keith** with questions.

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