

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

State of West Virginia ex rel., Wheeling Hospital, Inc.,

Petitioner,

vs.)

Docket No. 15-0558

Honorable Ronald E. Wilson, Judge of the Circuit Court
Of Ohio County; and Stephanie Mills,

Respondents.

**RESPONSE IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION ON BEHALF
OF INTERVENOR-RESPONDENTS DAVID GHAPHERY, M.D. AND A.D.
GHAPHERY PROFESSIONAL ASSOCIATION**

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QUESTION PRESENTED

1. Whether the Circuit Court clearly erred as a matter of law in granting Plaintiff's motion to compel and ordering petitioner-defendant Wheeling Hospital, Inc., to produce certain documents from the credentialing file of David A. Ghaphery, M.D. which constitute the privileged records of a "review organization" engaged in "peer review" within the meaning of W.Va. Code §30-3C-1 (2012) and W.Va Code §30-3C-3 (2012)?

STATEMENT OF THE CASE

The matter before the Court is a medical professional liability action instituted by the Respondent, Stephanie Mills, by the filing of a complaint on October 2, 2013. Plaintiff alleges that the intervenor-respondent, David A. Ghaphery, M.D., committed medical negligence in the performance of a thyroidectomy resulting in injuries to Mills' vocal cords. Mills also named as a defendant the petitioner Wheeling Hospital. Mills alleges that Wheeling Hospital negligently credentialed Dr. Ghaphery as a surgeon with privileges to perform thyroidectomies and other procedures at Wheeling Hospital. Appendix pp. 009-020.

Respondent Mills and Petitioner Wheeling Hospital became embroiled in a discovery dispute over Petitioner's assertion that documents sought by Mills were protected from discovery under West Virginia's peer review privilege, W.Va. Code §30-3C-1 (2012) et. seq. The dispute culminated in Mills filing a motion to compel production on June 2, 2014. Appendix pp. 081-097. The circuit court ordered Wheeling Hospital to produce a privilege log identifying each document for which it was asserting the peer review privilege by (i) author or source, (ii) date of origin, (iii) description of parties involved in the communication, (iv) the purpose and subject of the communication, (v) any attached materials, (vi) all recipients, (vii) a sufficient description of the contents and (viii) grounds for the assertion of privilege. Appendix, pp. 112-119. On August 29, 2014, Wheeling Hospital submitted its 60-page privilege log setting forth the ordered information pertaining to documents from Dr. Ghaphery's credentialing file. Appendix, pp. 126-185.

Following the production of the privilege log, Mills withdrew her requests for certain documents and Wheeling Hospital withdrew its assertion of privilege as to certain other documents. As a result of these efforts, approximately 350 pages from Dr. Ghaphery's

credentialing file remained in dispute. Appendix, pp. 192-195. Following supplemental briefing by the parties, the circuit court ordered Wheeling Hospital to produce all remaining pages in dispute with the exception of six (6) pages the court determined not to be relevant. Appendix, pp. 001-008.

On June 11, 2015, Wheeling Hospital filed its petition for writ of prohibition. On August 25, 2015, this Court entered its Rule to Show Cause scheduling this matter for oral argument on October 7, 2015.

SUMMARY OF THE ARGUMENT

The circuit court erred in its ruling that the peer review privilege extends only to records generated “solely for” the hospital’s credentialing committee. The definitions of “peer review” and what constitutes a “review committee” under W.Va. Code §30-3C-1 extends beyond the workings of the credentialing committee and extends to any healthcare committee or organization tasked with gathering or reviewing “information relating to the care and treatment of patients for the purposes of: (i) Evaluating and improving the quality of health care rendered; (ii) reducing morbidity or mortality; or (iii) establishing and enforcing guidelines designed to keep within reasonable bounds the cost of health care.” By holding that the peer review privilege applied only to quality assurance records used exclusively in the credentialing process, the trial court ignored the plain language and intent of the privilege under W.Va. Code §30-3C-3.

The trial court further erred in finding that quality assurance records created by Wheeling Hospital for use outside the credentialing process constitutes “information, documents or records otherwise available from original sources” within the meaning of the exception to the peer review privilege found in W.Va. Code §30-3C-3. Wheeling Hospital cannot be an “original source” for records gathered by its own credentialing committee within the meaning of the statutory exception.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the Rule to Show Cause entered on August 25, 2015, this matter has been set by the Court for oral argument pursuant to Rule 19. Counsel for the intervenor-respondents, David A. Ghaphery, M.D. and A.D. Ghaphery Professional Association, respectfully requests leave to participate in the oral argument in this matter set for October 7, 2015.

ARGUMENT

The legislature's enactment of the Health Care Peer Review Privilege Organization Protection Act, W.Va. Code §30-3C-1 *et. seq.*, "clearly evinces a public policy encouraging health care professionals to monitor the competency and professional conduct of their peers in order to safeguard and improve the quality of patient care." Syl. pt. 2, *Young v. Saldanha*, 189 W.Va. 330, 431 S.E.2d 669 (1993). "The peer review privilege represents a legislative choice between medical staff candor and the plaintiff's access to evidence." *Shroades v. Henry*, 187 W.Va. 723, 727, 421 S.E.2d 264, 268 (1992).

The determination of whether materials are privileged under W.Va. Code §30-3C-1 *et. seq.*, is essentially a factual question and the party asserting the privilege has the burden of demonstrating that the statute's protection applies. Syl. Pt. 2, *Shroades*. However, determining whether the circuit court correctly interpreted and applied the peer review statute to the documents at issue "presents a purely legal question subject to *de novo* review." Syl. pt. 2, *State ex rel. Charles Town General Hosp. v. Sanders*, 210 W.Va. 118, 556 S.E.2d 85 (2001).

1. The circuit court erroneously interpreted the "original sources" exception under W.Va. Code §30-3C-3 to find that quality assurance records generated by Wheeling Hospital for purposes other than the exclusive use of its credentialing committee do not constitute privileged "peer review" records.

For his Memorandum Order directing Wheeling Hospital to produce essentially all of the disputed records from Dr. Ghaphery's credentialing file, Judge Wilson found as follows:

The nucleus of the court's decision to permit the disclosure of many of these documents was an acceptance of the plaintiff's legal argument that the documents now ordered were not created solely for Wheeling Hospital's crediting [sic] committee but are otherwise from original sources extraneous to that committee and these documents contain information that the hospital gathers in the ordinary course of its business, or pursuant to regulations, that the crediting [sic] committee then uses in its work. The peer review statute does make the specific

point that the information, documents or records otherwise available from original sources are not to be construed as immune from discovery or use in any civil action merely because they were presented during proceedings of such organization. The court accepts as correct the plaintiff's argument that "the language of the statute grants a privilege to the proceedings and records of a review organization, but only if that information is not "otherwise available from original sources." *State ex rel. Shroades v. Henry*, 180 W.Va. 723, 728, 420 S.E.2d 264, 269 (1992).

By accepting the plaintiff's argument the court has rejected the defendant's contention that these documents that remain in dispute are privileged and protected from disclosure under applicable West Virginia and federal law.

Appendix, pp. 003-004.

The trial court's acceptance of the plaintiff's argument that only documents created "solely for" Wheeling Hospital's credentialing committee merit the protection of W.Va. Code §30-3C-1 et seq. ignores the clear language and intent of the law. By its ruling the trial court mistakenly accepted the plaintiff's implied argument that a hospital's "peer review" of its physicians only occurs during the credentialing and re-credentialing process. Neither the plain language and intent of W.Va. Code §30-3C-1 et seq. nor this Court's precedents restrict the application of the peer review privilege to the confines of the credentialing committee's work.

W.Va. Code §30-3C-1 defines "peer review" to mean "the procedure for evaluation by health care professional of the quality and efficiency of services ordered or performed by other health care professionals, including practice analysis, inpatient hospital and extended care facility utilization review, medical audit, ambulatory care review, claims review and patient safety review." By this language, all tasks undertaken by "healthcare professionals to evaluate the quality and efficiency of services ordered or performed by other healthcare professionals" are part of the "peer review" process.

W.Va. Code §30-3C-1 further defines a "review organization" to mean

[A]ny committee or organization engaging in peer review, including a hospital utilization review committee, a hospital tissue committee, a medical audit committee, a health insurance review committee, a health maintenance organization review committee, hospital, medical, dental and health service corporation review committee, a hospital plan corporation review committee, a professional health service plan review committee or organization, a dental review committee, a physicians' advisory committee, a podiatry advisory committee, a nursing advisory committee, any committee or organization established pursuant to a medical assistance program, the joint commission on accreditation of health care organizations or similar accrediting body or any entity established by such accrediting body or to fulfill the requirements of such accrediting body, any entity established pursuant to state or federal law for peer review purposes, and any committee established by one or more state or local professional societies or institutes, to gather and review information relating to the care and treatment of patients for the purposes of: (i) Evaluating and improving the quality of health care rendered; (ii) reducing morbidity or mortality; or (iii) establishing and enforcing guidelines designed to keep within reasonable bounds the cost of health care. It shall also mean any hospital board committee or organization reviewing the professional qualifications or activities of its medical staff or applicants for admission thereto, and any professional standards review organizations established or required under state or federal statutes or regulations.

As defined by W.Va. Code §30-3C-1, any committee or organization engaging in “peer review” for the purpose of “gather[ing] and review[ing] information relating to the care and treatment of patients for the purposes of: (i) Evaluating and improving the quality of health care rendered; (ii) reducing morbidity or mortality; or (iii) establishing and enforcing guidelines designed to keep within reasonable bounds of the cost of health care” constitutes a “review organization.” As the final sentence of the statute’s definition of a review committee makes clear, a hospital’s credentialing committee is but one example of a “review committee” whose records and proceedings are privileged from discovery. The focus of the privilege extends well beyond the workings of the credentialing committee and applies to any “committee or organization” engaged in “evaluating and improving the quality of healthcare rendered”,

“reducing morbidity or mortality” or “establishing and enforcing guidelines designed to keep within reasonable bounds the cost of health care.”

W.Va. Code §30-3C-3, titled “Confidentiality of review organization’s records,” sets forth the applicable privilege and its “original source” exception.

The proceedings and records of a review organization shall be confidential and privileged and shall not be subject to subpoena or discovery proceedings or be admitted as evidence in any civil action arising out of the matters which are subject to evaluation and review by such organization and no person who was in attendance at a meeting of such organization shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings of such organization or as to any findings, recommendations, evaluations, opinions or other actions of such organization or any members thereof: Provided, That information, documents or records otherwise available from original sources are not to be construed as immune from discovery or use in any civil action merely because they were presented during proceedings of such organization, nor should any person who testifies before such organization or who is a member of such organization be prevented from testifying as to matters within his knowledge, but the witness shall not be asked about his testimony before such an organization or opinions formed by him as a result of said organization hearings: Provided, however, That an individual may execute a valid waiver authorizing the release of the contents of his file pertaining to his own acts or omissions, and such waiver shall remove the confidentiality and privilege of said contents otherwise provided by this section: Provided further, That upon further review by any other review organization, upon judicial review of any finding or determination of a review organization or in any civil action filed by an individual whose activities have been reviewed, any testimony, documents, proceedings, records and other evidence adduced before any such review organization shall be available to such further review organization, the court and the individual whose activities have been reviewed. The court shall enter such protective orders as may be appropriate to provide for the confidentiality of the records provided the court by a review organization and all papers and records relating to the proceedings had before the reviewing court.

It is clear that the trial court misconstrued the language and meaning of W.Va. Code §30-3C-3. A review of Wheeling Hospital's privilege log reveals that all of the records at issue originated either in Wheeling Hospital's credentialing committee or its quality assurance committee.¹ Further, the descriptions of these documents set forth in the privilege log support the conclusion that they were generated internally at Wheeling Hospital in order "to gather and review information relating to the care and treatment of patients for the purposes of: (i) Evaluating and improving the quality of health care rendered; (ii) reducing morbidity or mortality; or (iii) establishing and enforcing guidelines designed to keep within reasonable bounds the cost of health care" within the meaning of W.Va. Code §30-3C-1.

A non-exhaustive review of Wheeling Hospital's privilege log reveals that among the documents which the trial court ordered to be produced include reports by Wheeling Hospital's Quality Review Committee and/or Credentialing Committee concerning the following subjects:

- Data regarding acute denials by insurance companies relating to treatment by Dr. Ghaphery and other doctors. Appendix, p. 151.
- Data for SCIP of colon procedures by Dr. Ghaphery. Appendix, p. 151.
- Detailing procedure statistics for Dr. Ghaphery including type and number of laparoscopic gastric bypass surgeries. Appendix, p. 152.
- Detailing procedure statistics for Dr. Ghaphery including type and number of surgeries. Appendix, p. 153.
- Summary of operating room, ORC, and endoscopy procedure totals by physician (including Dr. Ghaphery). Appendix, p. 153.

¹ Counsel for the intervenor-respondents has not seen or otherwise been provided access to the documents at issue. Counsel's knowledge of the records is limited to the information set forth in Wheeling Hospital's privilege log.

- Number of delinquent medical records deficiencies for Dr. Ghaphery and other physicians. Appendix, p. 154.
- Physician specific surgical site infection rates per quarter. Appendix, p. 154.
- Mortality/Morbidity and unscheduled returns to OR for Dr. Ghaphery and other physicians. Appendix, p. 155.
- All admissions report based upon infection dates. Appendix, p. 165.
- Clinical profile of Dr. Ghaphery and data regarding various items for purposes of including clinical quality, medical records/patient safety, mortality, service quality, risk management and utilization management. Appendix, p. 170.
- Complication, mortality and readmission comparison rates for Dr. Ghaphery for complete thyroidectomies. Appendix, p. 184.

These descriptions reveal that the trial court has ordered Wheeling Hospital to produce in discovery quality assurance records expressly defined and protected as “peer review” within the meaning of W.Va. Code §30-3C-1 and W.Va. Code §30-3C-3.

The peer review privilege was enacted expressly for the purpose of encouraging “health care professionals to monitor the competency and professional conduct of their peers in order to safeguard and improve the quality of patient care.” Syl. pt. 2, *Young v. Saldanha*, 189 W.Va. 330, 431 S.E.2d 669 (1993). For the purposes of the privilege it matters not whether these documents were generated “solely for” the credentialing committee. The only consideration is not “for whom” the documents were generated but “why?”. If the documents were generated by Wheeling Hospital for the purpose of “evaluating and improving the quality of health care rendered” by Dr. Ghaphery or other physicians – which it clearly appears these records were –

then the privilege applies regardless whether or not they were for the sole use of the credentialing committee.

Because the trial court's ordered production is premised on a misconstruction and misapplication of the W.Va. Code §30-3C-1 et seq., Wheeling Hospital's request for a writ of prohibition should be granted and the trial court's order compelling production should be set aside.

2. The circuit court erroneously determined that internal quality assurance records generated within Wheeling Hospital constitute "information, documents or records otherwise available from original sources."

As noted hereinabove, the trial court premised its ordered production on the fact that the records at issue were not generated "solely for" the credentialing committee. As such, the court reasoned, these records are "otherwise available from original sources." As noted above the court's reasoning ignores the clear purpose and intent of the peer review statute which protects from disclosure documents generated "to gather and review information relating to the care and treatment of patients for the purposes of: (i) Evaluating and improving the quality of health care rendered; (ii) reducing morbidity or mortality; or (iii) establishing and enforcing guidelines designed to keep within reasonable bounds the cost of health care" within the meaning of W.Va. Code §30-3C-1.

The court's ordered production is flawed for another equally cogent reason. The clear intent of the "original source" exception under W.Va. Code §30-3C-3 is to prevent health care providers, such as Wheeling Hospital, from asserting, as privileged, documents gathered from third-parties or sources outside the hospital. If the plaintiff or the public-at-large can gain access to the disputed records from such "outside sources" then the mere fact that the records were

gathered by a “review committee” will not shield them from discovery. Such is not the case with the records ordered to be produced by the trial court.

Based on the origins and descriptions set forth in Wheeling Hospital’s privilege log, it appears that all of the records ordered to be produced by the trial court were generated within Wheeling Hospital. Simply stated, Wheeling Hospital cannot be considered an “original source” for records provided to its own credentialing committee within the meaning of the statute. *See State ex rel. Charles Town General Hospital v. Sanders*, 210 W.Va. 118, 556 S.E.2d 85 (2001) (holding that a hospital is a “review organization” within the meaning of W.Va. Code §30-3C-1 et seq.). Such an interpretation would effectively consume the privilege.²

Because the trial court impliedly and erroneously found quality assurance records generated within Wheeling Hospital and provided to its credentialing committee to constitute documents which are “otherwise available from original sources” the Court should grant Wheeling Hospital’s request for a writ of prohibition and set aside the trial court’s ordered production.

² The trial court’s order further suggests that records produced “in the ordinary course of business” or “pursuant to regulation” fall outside the peer review privilege. There is nothing in the language or intent of W.Va. Code §30-3C-1 et seq. to merit the creation of these additional exceptions to the privilege.

CONCLUSION

The trial court's ordered production of Wheeling Hospital's internally generated quality assurance records contravenes both the clear language and intent of the Health Care Peer Review Privilege Organization Protection Act, W.Va. Code §30-3-1 et. seq.. The trial court erroneously interpreted the statute by holding that only records generated "solely for" the credentialing committee are privileged from discovery under the statute. By ordering Wheeling Hospital to produce internally generated quality assurance records the trial court undermines the very policy intended by the legislature by its enactment of W.Va. Code §30-3-1 et. seq.

For all of these reasons, the intervenor-respondents pray that this Honorable Court grants petitioner's requested relief setting aside and prohibiting the trial court from enforcing its memorandum order dated February 16, 2015.

Respectfully submitted,



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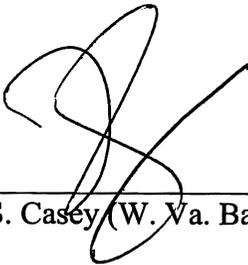
CERTIFICATE OF SERVICE

The undersigned, Patrick S. Casey, hereby certifies that on September 8, 2015, a true and correct copy of the **RESPONSE IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION ON BEHALF OF INTERVENOR-RESPONDENTS DAVID GHAPHERY, M.D. AND A.D. GHAPHERY PROFESSIONAL ASSOCIATION** was served upon all counsel of record via U.S. Mail, postage prepaid, addressed as follows:

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