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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ROBERT D. TOLER,
Plaintiff Below, Petitioner,

v.

Case No. 21-0830

**CORNERSTONE HOSPITAL
OF HUNTINGTON, LLC**
Defendant Below, Respondent

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PETITIONER'S BRIEF

FROM THE CIRCUIT COURT OF CABELL COUNTY

**TO THE HONORABLE JUSTICES
OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**


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TABLE OF CONTENTS

Table of Contents	 i
Table of Authorities	 ii
Assignments of Error	 1
Issue on Appeal / Statement of the Case	 1-2
Facts / Summary of Arguments	 3
Statement Regarding Oral Argument and Decision	 3
Standard of Review	 3-4
Argument	 4
1. Robert Toler, a non-patient guest of Cornerstone Hospital, suffered injuries in a premises liability accident, rendering the incident report discoverable without privity to the peer review privilege.	4
2. Defendant's witness Jeffrey Hall should have never been permitted to testify, and witness Brandon Gagnon, opened the door to the incident report, allowing Plaintiff the right to explore the evidence.	6
Conclusion & Prayer	 10
Certificate of Service	 11
Appendix as Agreed by Parties	 APP_001-323

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PETITIONER'S BRIEF

ASSIGNMENTS OF ERROR

- I. The trial court erred in broadening the West Virginia Peer Review Privilege beyond its scope to cover a non-patient premises liability accident.
- II. The trial judge erred in sustaining Defendant's objection to witness "opening the door" to the incident report.

STATEMENT OF THE CASE

The only significant issue on appeal is whether the circuit court erred by preventing disclosure of an incident report finding it was protected by peer review privilege. The circuit court found that the peer reviewed privilege extended to a non-patient, non-medical treatment event. Robert D. Toler was a non-patient visitor at Cornerstone Hospital, where his long-time companion was receiving care as a patient. On the morning of January 7, 2019, while visiting his companion, Robert Toler testified that he slipped and fell on a roll of medical tape that was left in the floor by the hospital's nursing staff. *App. 49. (Tr. 195-96)* Tammy Jividen, a nurse, that happened to be passing by the room saw another nurse Crystal Burgess standing near Mr. Toler's room immediately after the fall and the nurses checked on him. *App. 71* Ms. Jividen

immediately reported the fall to the supervising nurse on duty, Jeff Hall. Mr. Hall then went to check on Mr. Toler and completed an incident report to document the matter. *App. 84 (Tr. 336:6)* In the hours that followed, Mr. Toler was taken to the emergency room at St. Mary's Medical Center where it was determined that Mr. Toler had a broken femur (neck) and had to undergo immediate surgery where physicians implanted medical screws into his femur. *App. 52 (Tr. 207)* All of the stated facts are uncontested and not in dispute.

During the discovery phase of this matter, Mr. Toler sought production of the incident report taken by Jeff Hall. *App. 175* Cornerstone claimed the document was protected by the peer review privilege found at 30-3C-1 et seq. and supplied a privilege log of the documents existence. *App. 188* Mr. Toler moved to compel and a hearing was had wherein the circuit court conducted an in camera review of the document and ruled that the Peer Review privilege applied and prohibited its production and disclosure. See *App. 225 (transcript) and App 241 Order Denying Motion To Compel* Without the incident report, Mr. Toler was unable to effectively cross exam Mr. Hall's version of statements made by Robert Toler. See also *Protective Order Concerning Deposition App. 246 & App. 275* At trial, Counsel for Appellant / Plaintiff Toler objected to permitting Hall to testify as to his conversation with Toler due to the protective order entered covering his investigation and incident report on the basis that Plaintiff could not meaningfully cross exam Hall and that his entire testimony should be the subject of peer review just has his written incident report. *App. 84 (Tr. 334-336)*. Essentially, Mr. Hall claimed that the roll of tape never existed and that Mr. Toler (absolutely 100%) never mentioned a roll of tape as causing his fall injuries requiring surgery. *App. 85 (Tr. 337:17)* To compound matters, while in the presence of the jury, defendant's corporate representative Brandon Gagnon uttered as to the existence of the incident report and the jury absolutely knew of its existence. *App. 66* During

deliberations the jury sent out four (4) written questions asking about and for the incident report. *App. 117*. The circuit court denied the juries request to see the incident report and the jury promptly returned a verdict in favor of the Defendant.

SUMMARY OF ARGUMENTS

The circuit court impermissibly broadened the scope of W.Va. Code 30-3C-1 et seq. by applying the peer review privilege to a non-patient, non-medical, routine incident such as the slip and fall premises liability accident in this case. To broaden the scope of the peer review privilege to cover routine non-patient non-medical events would be to grant health care facilities and providers broad authority which the legislature did not envision.

STATUS OF CASE

This case came before the Circuit Court of Cabell County, West Virginia for trial in which a verdict was entered in favor of Defendant on August 26, 2021. Final Order of Judgment on Jury Verdict was entered on September 15, 2021.

STATEMENT REGARDING ORAL ARGUMENT

It is the belief of Petitioner that oral argument is necessary in this matter, as the facts and legal arguments made in Petitioner's Brief, Appendix, and the Record of this appeal present critical questions before the court which necessitates full discussion and argument. This process would be significantly aided by the oral argument.

STANDARD OF REVIEW

"It is well settled that a trial court's rulings on the admissibility of evidence, 'including those affecting constitutional rights, are reviewed under an abuse of discretion standard.'" *State v.*

Kaufman, 227 W.Va. 537, 548, 711 S.E.2d 607, 618 (2011) (citing *State v. Marple*, 197 W.Va. 47, 51, 475 S.E.2d 47, 51 (1996)).

ARGUMENT

I. Robert Toler, a non-patient guest of Cornerstone Hospital, suffered injuries in a premises liability accident, rendering the incident report discoverable without privity to the peer review privilege.

“The enactment of West Virginia Code §§ 30-3C-1 to -3 (1993) 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.” *Young v. Saldanha*, 189 W.Va. 330, 431 S.E.2d 669 (W. Va. 1993) Regarding the procedure for the discovery of allegedly privileged documents, this Court has provided such a procedure which is as follows:

“(1) the party seeking the documents must do so in accordance with the reasonable particularity requirement of Rule 34(b) of the West Virginia Rules of Civil Procedure; (2) if the responding party asserts a privilege to any of the specific documents requested, the responding party shall file a privilege log that identifies the document for which a privilege is claimed by name, date, custodian, source and the basis for the claim of privilege; (3) the privilege log should be provided to the requesting party and the trial court; and (4) if the party seeking documents for which a privilege is claimed files a motion to compel, or the responding party files a motion for a protective order, the trial court must hold an in camera proceeding and make an independent determination of the status of each communication the responding party seeks to shield from discovery.”

State ex rel. HCR ManorCare, LLC v. Stucky, 776 S.E.2d 271, 283 (W. Va. 2015).

“The privilege log also should contain specific information regarding (1) the origin of each document, **and whether it was created solely for or by a review committee**; and (2) the use of each document, with disclosures as to whether or not the document was used exclusively by such committee. Finally, the privilege log should provide a description of each document and a recitation of the law supporting the claim of privilege.”

State ex rel. Wheeling Hosp., Inc. v. Wilson, No. 15-0558, 2016 W. Va. LEXIS 59, at *33 (Feb. 9, 2016).

“‘Peer review’ means the procedure for evaluation by health care providers of the quality, delivery, 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, preparation for or simulation of audits or surveys of any kind, and all forms of quality assurance / performance improvement whether or not required by any statute, rule, or regulation applicable to a health care facility or health care provider.” *West Virginia Code 30-3C-1 et seq.* None of the underlying concerns are met as this incident / matter does not concern the delivery of health care. The incident in question involves basic premises safety, the same as any business, grocery store, workshop, or shopkeeper would have. Nothing about this case is specific to healthcare or healthcare facilities. Yet, the circuit allowed the Respondent to use the peer review as a sword to shield material evidence in a premises liability case.

The peer review statute “grants a privilege to all the records and proceedings of a review organization, but no privilege attaches to information, documents or records considered by a review organization if the material is ‘otherwise available from original sources.’ Material that originates in a review organization remains privileged even if held by a non-review organization and **material that originates in a non-review organization does not become privileged after presentation to a review organization.**” *Shroades v. Henry*, 421 S.E.2d 264 (W.Va. 1992).

There are three overarching purposes of a review organization/committee: 1) evaluating and improving the quality of health care rendered; 2) reducing morbidity or mortality; or 3) establishing and enforcing guidelines designed to keep within reasonable bounds the cost of healthcare. None of these purposes can be justified by the circuit court in finding that the initial incident report in a slip in fall accident should be covered as peer review material. Moreover,

information and documents do not become privileged simply because the peer review board may have reviewed the information. The incident report in this matter did not become privileged just because it was created, or even reviewed by a peer review organization.

The exclusion of the incident report was nothing short of prejudicial and an impermissible expansion of the West Virginia Peer Review Privilege. The Respondent argued to the circuit court that because Conerstone had a policy in place for non-routine events to take an incident report, the incident report prepared by Jeff Hall therefore must be privileged. In today's world there is a "policy" for everything. This court should not permit a "policy to have a policy" as being the framework to cloak otherwise discoverable information under the guise of the peer review privilege. Notwithstanding the Respondents internal policy, the appellant argued unsuccessfully to the circuit court that the incident report itself was a factual and should be disclosed because the discovery request did not seek to review the peer review committee's findings or conclusions.

The ruling which allowed such an exclusion is a slippery slope; allowing peer review privilege to cover a routine non-medical accident involving a non-patient guest, who was receiving absolutely no medical treatment, sets an example to other medical providers that it is possible to stifle discovery of all accidents, including workplace accidents by employees, parking lot accidents, product liability cases, and premises liability cases like this one, simply by having a policy to have a policy and designate all fact finding original sources as peer review privileged.

II. Defendant's witnesses Jeff Hall should have never been permitted to testify, and witness Brandon Gagnon, opened the door to the incident report, allowing Plaintiff the right to explore the evidence.

At pre-trial hearings, the Defendant moved to exclude and/or protect the incident report as privileged and/or inadmissible from Plaintiff's case, then elicited testimony evidence to Defendant's own advantage, i.e. that he did not see nor did Toler mention the cause of his fall. Jeffrey Hall testified about his interaction with Mr. Toler minutes after the fall, including his discussion about the cause of the fall. Mr. Hall testified that Toler never told him about a roll of tape as being the reason for his fall nor did he see any tape in the room when he was present in the room. The Defendant claimed, and the court agreed, that Hall's testimony was an 'original source' and thus not protected by peer review, but that his document which he created during his conversation somehow must be protected under peer review privilege. "The doctrine of opening the door allows a party to explore [the] otherwise inadmissible evidence...[because] the opposing party has made unfair prejudicial use of related evidence." *State v. Baker* (W.Va. 2013) citing *United States v. Lum*, 466 F.Supp 328, 344 (D. Del. 1979). Here, the incident report is pertinent evidence that was not available to Plaintiff for use of cross examination of Mr. Hall. How can Hall's testimony of his investigation/discussion with Toler be admissible, but his contemporaneous notes of the conversation be protected under peer review? Such a dichotomy is incongruous.

The circuit court's ruling operates as follow: Defendant successfully excludes evidence (Hall's written document taken at the time of incident) just to selectively introduce pieces of said evidence (Hall's testimony as to conversation) for their own advantage, preventing Plaintiff from introducing the evidence in its "proper context." Even if the court finds that the peer review privilege properly applies, respondent's witness Hall effectively opens the door to cross examination when he testifies as to his conversation and interaction including his contemporaneous notes, i.e. the incident report. Yet the report has been shielded from disclosure

to Appellants all along. Respondent argued successfully to the circuit court to preclude disclosure of the incident report taken by Mr. Hall under the basis that Hall's sole purpose of meeting Mr. Toler was to take the incident report. Then, at trial, the court permitted Hall to testify as to his interaction free from cross examination from his excluded written incident report. It is fundamentally unfair. Either his interaction (interview exchange with Toler and his incident report) should be excluded in toto as peer review privileged, or none of it should be. Appellant objected to Hall being called as a witness without disclosing the incident report.

Lastly, respondent's corporate representative witness Brandon Gagnon introduced the existence of the incident report to the jury thus opening the door to the report and its admissibility. Effectively, witness Gagnon rang the bell in front of the jury as to its existence. *See App. 66 (Tr. 263:24 - 264:23)* The one piece of contemporaneous evidence that clarity to the jury the true version of events and possibly impeach Respondent's key witness Jeff Hall. How do we know the jury was placed importance upon the incident reports existence? We know because during deliberations, the jury specifically asked the court (by written question) to produce the report for their review. *App. 117 (Tr. 466:8-13)* The jury asked:

- Is there an initial incident report?
- Was it filed?
- Who filed it?
- Can we have a copy of said incident report)

App. 117 (Tr. 466:8-13)

The jury was seeking the truth. They evaluated contradicting testimony between Toler and Hall and sought the aid of the written incident report to help them weigh the testimony. The circuit court refused to answer the jury's written questions seeking affirmation of the reports' existence and request to produce the "incident report" after the report had been introduced by witness Gagnon. The court addressed the jury by stating that the jury had all admissible evidence before them and that they were to deliberate accordingly, essentially denying its existence and importance. *App. at 118*. Hall testified without the ability to be effectively cross examined using his own written incident report.

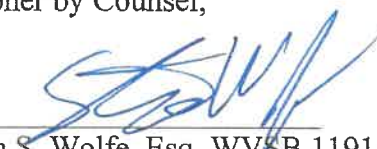
Even if the report was privileged prior to testimony, Gagnon opened the door in the presence of the jury which necessitated the court to permit the Plaintiff to explore its contents. As this court has explained, the doctrine of ‘open the door’ is essentially a rule of expanded relevancy. “The opening the door ‘doctrine operates to prevent a defendant from successfully excluding from the prosecution's case-in-chief inadmissible evidence and then selectively introducing pieces of this evidence for the defendant's own advantage, without allowing the prosecution to place the evidence in its proper context.” *State v. Baker*, 230 W.Va. 407, 738 S.E. 2d 909 (W.Va. 2013) quoting *State v. James*, 144 N.J. 538, 677 A.2d 734, 742 (1996). The decision in *James* added that [t]he “opening the door” doctrine is essentially a rule of expanded relevancy and authorizes admitting evidence which otherwise would have been irrelevant or inadmissible in order to respond to (1) admissible evidence that generates an issue, or (2) inadmissible evidence admitted by the court over objection. *Baker*, 738 S.E.2d 914. At a bare minimum, justice requires that that this court find that the circuit court erred in permitting Hall to testify without also permitting the disclosure of the incident report and that Gagnon opened the door when he uttered the existence of the report in the presence of the jury.

It cannot be credibly argued that these errors were minor, as Hall was the key witness that interviewed Robert Toler and gave an account that was wholly inconsistent with Plaintiff’s version of events. Effectively Hall denied that Toler ever mentioned the roll of tape in the floor that caused the Plaintiffs fall and injuries, and the jury believed him. The jury should have been permitted to review the Incident Report. This case is an example of the peer review privilege being expanded outside of the legislatures intent to protect and improve upon the quality and delivery of health care.

CONCLUSION & PRAYER

The Plaintiff prays that this court reverse the Circuit Court's extension of the peer review privilege to routine, non-patient, non-medical, premises liability cases. Likewise, the Plaintiff prays this court find error in the court's exclusion of the incident report after witnesses 'opened the door' to the evidence at trial. The Plaintiff prays for the court to overturn the verdict and remand the matter to the circuit court for a new trial along with disclosure of the incident report.

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CERTIFICATE OF SERVICE

I, Steven S. Wolfe, Esq., Counsel for Petitioner, Robert D. Toler, do hereby certify that the contents of this Brief and Appendix have been provided to opposing counsel and all parties of record as follows:

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Tendered this 14th day of January 2022



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