5-6-1983

Beth Israel Hospital and Geriatric Center v. District Court of Denver

SUPREME COURT, STATE OF COLORADO

Case No. 83-SA-147

ORIGINAL PROCEEDING
District Court, 80-CV-2215

BETH ISRAEL HOSPITAL AND GERIATRIC CENTER,

Petitioner,

vs.

THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER; THE HONORABLE DANIEL B. SPARR, one of the Judges thereof; and FRANK O. FRANCO, M.D.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO RULE TO SHOW CAUSE

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I. FACTS

Respondent, Dr. Franco, brought the underlying action in the District Court seeking damages and other relief against several parties, including the Petitioner. The Complaint alleges outrageous conduct, civil conspiracy and other claims against the Defendants arising out of the termination, without cause, of his surgical privileges at the Petitioner Beth Israel Hospital. His privileges were passed on by peer review committees subject to C.R.S., 1973, § 12-43.5-101 et seq. Early in the case, Dr. Franco sought discovery of the minutes, expert reports and other documents produced in the course of the review committee hearings. The facts of the case and the disposition of that request are set forth in the case of Franco v. District Court, 641 P.2d 922 (Colo. 1982). This Court ruled that the records requested were privileged pursuant to C.R.S., 1973, § 12-43.5-101 et seq.

Respondent Franco later requested, pursuant to C.R.C.P. 34, production of certain patient care records in the possession of the Petitioner. The Petitioner acknowledges that the records sought were in its possession and were among those considered by the review committees at the Petitioner Hospital prior to terminating the Respondent's surgical privileges. See, Petition for Relief pursuant to C.A.R. 21, p.3. The Petitioner refused to produce the records and objected to their production on the basis

that they were subject to a physician-patient privilege and were privileged pursuant to C.R.S., 1973, § 12-43.5-102(3)(e). Respondent Franco filed an Affidavit with the District Court stating that all the records requested were records of his patients.

At a hearing before Respondent Sparr, the Petitioner abandoned its position that the records were protected by physician-patient privilege[1] and relied solely on the privilege created by C.R.S. 1973, § 12-43.5-102(3)(e).

The Trial Court ruled that the records were discoverable and that merely because they were presented to the review committee did not convert them from simple medical records to "records of a review committee."

II. ISSUE PRESENTED FOR REVIEW

In an action by a physician against a hospital, do patient records, which are relevant and otherwise discoverable, become privileged and not subject to discovery pursuant to C.R.S., 1973, § 12-43.5-102(3)(e) merely because they were considered by a "review committee" which is subject to C.R.S., 1973, § 12-43.5-101 et seq.?

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1 Even assuming a physician-patient privilege existed, that objection could be avoided by an appropriate protective order. See, Community Hospital Association v. District Court, 194 Colo. 98, 570 P.2d 243 (1977).

II. ARGUMENT

A. SUMMARY OF ARGUMENT

The Petitioner does not, at this time, argue that the records are protected by a physician-patient privilege. The sole argument presented by the Petitioner is that the records in question are "records of a review committee" and are protected from discovery by C.R.S., 1973, § 12-43.5-102(3)(e).

This Court has previously addressed the existence of a privilege pursuant to that statute in Franco v. District Court, 641 P.2d 922 (Colo. 1982). In that case, this Court held that a privilege is created by that statute which applies to an action brought by a physician against a hospital and others alleging tortious conduct in the termination of his surgical privileges. The issue before the Court at this time is different. In Franco v. District Court, supra, this Court held that the "records of a review committee" are privileged in this type of action. However, no issue was raised nor decision rendered as to what constituted "records of a review committee." The only comment by this Court on that subject was contained in footnote 3 at page 925, where this Court stated:

> No issue is raised here as to whether the information sought by the petitioner is part of 'the records of a review committee' within the meaning of Section 12-43.5-102(3)(e), C.R.S., 1973 (1978 Repl. Vol. 5) . . . Committee records may include the testimony and written reports of witnesses, documents and other material presented to the committee, and the committee's notes, memoranda, minutes

> and other records relating to its investigatory and hearing functions. Id. at P.2d 925, n.3.

Now an issue has been raised as to what constitutes the privileged "records of a review committee" under C.R.S., 1973, § 12-43.5-102(3)(e).

The records which are the subject of this proceeding are patient charts which pre-dated any committee consideration of Dr. Franco's privileges. They are pre-existing documents which were not created in the course of the confidential relationship which is claimed as the privilege preventing discovery. Since the records sought did not originate in the confidential relationship, keeping them secret does not promote the policy behind the peer review privilege. In addition, the construction of the statute argued for would lead to an absurd and unjust result.

B. PEER REVIEW COMMITTEE CONSIDERATION DOES NOT GIVE PRIVILEGED STATUS TO OTHERWISE UNPRIVILEGED PATIENT RECORDS

The Petitioner does not deny that the subject records would be discoverable by Dr. Franco at any time in any action until they were reviewed by a "review committee." At that point, according to the Petitioner, a privilege attaches to them regardless of whether any such privilege existed before.

This type of reasoning has been repeatedly rejected by courts in this state and elsewhere. Most recently, this Court ruled on a similar assertion in People v. Swearingen, 649 P.2d

1102 (Colo. 1982). In that case, the defendant was charged with forgery and other crimes. He had moved to suppress several documents, including an original deed of trust and promissory note. These documents had been given to the Deputy District Attorney by the defendant's attorney. The District Court concluded that the documents were protected by the attorney-client privilege because they had been given by the defendant to his attorney. This Court disagreed, and after discussing the importance of the attorney-client privilege in the context of a criminal case, stated:

> The District Court overlooked the case law and commentary establishing that the protection for confidential communications does not apply to physical evidence unless the evidence is created in the course of the lawyer-client consultation. . . . [citations omitted, emphasis added] Id. at P.2d 1105.

The general rule is that documents which pre-date the existence of a privileged relationship cannot later become privileged by passing into the hands of those whose deliberations are privileged. See, McCormick, Handbook of the Law of Evidence, § 89, p.184-85 (Cleary ed. 1972); Fisher v. United States, 425 U.S. 391, 96 S. Ct. 1569, 48 L.Ed.2d 39 (1975); Law Offices of Bernard D. Morley, P.C., v. J. D. MacFarlane, 647 P.2d 1215 (Colo. 1982). The cases refuse to accord any special privilege to documentary evidence even though held by an attorney and even in the context of criminal cases where constitutional issues are at stake. Unless a document was created in the course of and as

part of a privileged relationship it can not be protected by a privilege.

Generally, it has been held that four conditions are essential for a privilege to be recognized:

(a) communications must originate in confidence;

(b) confidentiality must be essential to the relationship;

(c) society must have a strong interest in fostering the relationship; and

(d) injury to the relationship from disclosure of the communication must be greater than the benefit of full disclosure.

Lindsey v. People, 66 Colo. 343, 181 P. 531 (1919); 8 Wigmore, Evidence, § 2285 (McNaughton rev. 1961); 81 Am.Jur.2d, Evidence, § 141 (1976).

The documents sought in this proceeding did not originate in the confidential relationship of the peer review process. Yet that is the basis upon which they are claimed to be privileged. The documents before this Court originated as part of a physician-patient relationship in which Dr. Franco was the physician.

Since the patient records are not the product of the confidential relationship which the Petitioner seeks to protect, they cannot gan special status merely by passing into the possession of those whose deliberations are privileged. There is no reason that the peer review statute should be treated differently than any other privilege in this respect.

C. PETITIONER'S POSITION DOES NOT FURTHER THE POLICY FAVORING PEER REVIEW

The Petitioner's argument is inconsistent with similar cases defining other privileges. Nor does it promote the policy which this Court has enunciated to be at the basis of the privilege created by the peer review statute. This Court articulated that policy, in part, as follows:

> It would be unreasonable to impose upon committee members a statutory duty to "openly, honestly, and objectively study and review" the conduct of practicing members of the medical profession if the records of their study and review were available for discovery in subsequent litigation seeking money damages against the hospital, its review committees and the individual members thereof for disciplinary action imposed in the peer review process. In addition, members of the medical profession cannot be expected to initiate or willingly participate in a peer review investigation if their testimony and reports may be subjected to discovery in subsequent civil litigation involving issues far beyond a meaningful judicial review of the committee's action. (emphasis supplied).

Franco v. District Court, 641 P.2d 922, 928-29 (1982).

The purpose of a privilege protecting peer review committee records is not dissimilar from the privilege between attorney and client. The purpose is to foster full disclosure and consideration of the issues by the committee. Thus, this Court concluded that records of committee "study and review" should not be available to the aggrieved physician, nor should "their testimony and reports" be subject to discovery. This proceeding does not

deal with records of "study and review" nor with "testimony and reports." The Request for Production of Documents, which is the subject of this proceeding, does not request anything created by, during or for the peer review process. Not one item which is the subject of this proceeding would directly reveal the consideration, thoughts, processing, or procedures of the peer review committees involved. No policy would be served by extending the extraordinary protection of this statute to records which preexisted the committee consideration of Dr. Franco.

D. PETITIONER'S POSITION LEADS TO AN ABSURD RESULT

Posey v. District Court, 196 Colo. 396, 586 P.2d 36 (1978), established that there could be no discovery of peer review committee proceedings in a malpractice action. Posey did not hold that the plaintiff in such an action could not discover his own medical records even if considered by the review committee.

The Petitioner's argument, carried to its logical conclusion and consistent with the Posey case, would deny a patient of Dr. Franco's the right to discovery of his own medical records once Dr. Franco's care of that patient had come under consideration by a peer review committee and that patient's records had been reviewed by that committee. Thus, a patient suing for malpractice could be denied access to his own records because his doctor may have committed malpractice but a peer review committee happened to consider it before the plaintiff did. Certainly the

purpose of the statute is not to restrict medical malpractice cases and yet, this result is the logical extension of the Petitioner's argument.

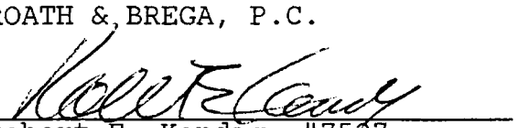
In Franco v. District Court, supra, this Court stated that the peer review statute is not designed to prevent a physician from bringing a tort action against peer review committees and committee members. Id. at P.2d 929, n.9. This Court further stated that in the event a physician brings such an action, he can establish his case by evidence both direct and circumstantial which is not within the scope of the privilege. Id. at P.2d 931, n.12. This Court has already ruled that the records of the Review Committee are privileged. Thus, the Plaintiff cannot establish tortious conduct based on records generated by the Committee which might demonstrate the correctness of his claims. However, if medical records which pre-existed any committee action were considered by the Committees and demonstrate proper care of those patients, it would be circumstantial evidence that matters other than the quality of Dr. Franco's patient care were considered in passing on his privileges.

Just as a plaintiff in a malpractice action should not be denied access to his own records, Dr. Franco should not be denied access to his records for preparation of a case that this Court has held that he has the right to maintain.

IV. CONCLUSION

The Petitioner claims that merely by presenting a document, any document, to a Review Committee it becomes subject to the privilege created by C.R.S., 1973 § 12-43.5-102(3)(e). Petitioner claims that this privilege exists regardless of whether the document was generated by, for or during the Committee proceedings. Such a position is inconsistent with the law in interpreting similar privileges. It is inconsistent with generally relied on standards for creation of a privilege. Such a position would not tend to further the policy for which the statute was enacted and leads to illogical and absurd conclusions. The Respondent requests that this Court discharge the Rule to Show Cause, and lift the stay imposed on the production of the records requested.

ROATH & BREGA, P.C.

By 

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CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 6th day of May, 1983, true and correct copies of the above and foregoing RESPONDENTS' BRIEF IN OPPOSITION TO RULE TO SHOW CAUSE were mailed to:

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