5-31-1983

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

SUPREME COURT, STATE OF COLORAO

Case No. 83-SA-147

ORIGINAL PROCEEDING

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.

PETITIONER'S REPLY BRIEF

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I. STATEMENT OF FACTS

A description of the facts giving rise to this original proceeding is contained in the Petition for Relief Pursuant to C.A.R. 21, at pages 1 through 5, and is incorporated herein by reference.

II. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Are patient records reviewed by a peer review committee in the evaluation of the quality of care provided by a physician "records of a review committee," and therefore, privileged from discovery pursuant to C.R.S. (1973) §12-43.5-102(3)(e) in the physician's civil action for injunctive relief and damages?

III. SUMMARY OF THE ARGUMENT

The peer review privilege embodied in C.R.S. (1973) §12-43.5-102(3)(e) cannot be construed according to the rules applicable to the attorney-client privilege, but rather must be interpreted to give effect to the legislative intent underlying its enactment. The legislative intent to shield records of a review committee from discovery in civil litigation not involving judicial review of the disciplinary action cannot be effectuated if a physician, in his civil action to recover damages from those who imposed disciplinary action against him, is permitted to discover and use at trial some portion of the materials considered by the committee, while other materials relied upon by the committee remain privileged. However, the peer review privilege need not be construed so broadly as to forever preclude disclosure of committee

records to which a statutory entitlement exists and which are relevant in civil litigation for reasons other than their significance as records of a review committee.

A hospital's voluntary disclosure of committee records to the Colorado State Board of Medical Examiners for use in its investigations and hearings should be held not to constitute a waiver of the peer review privilege. However, the true issue raised by the amicus curiae brief concerns the extent of the Board's power to request or compel production of privileged review committee records, and this issue is beyond the scope of this proceeding.

IV. ARGUMENT

A. THE LAW RELATING TO THE SCOPE OF THE ATTORNEY-CLIENT PRIVILEGE DOES NOT APPLY TO THE STATUTORY PRIVILEGE FROM DISCOVERY FOR RECORDS OF A REVIEW COMMITTEE.

The Respondents argue that pre-existing documents which are not created in the course of the confidential relationship upon which a claim of privilege is based cannot become privileged by reason of disclosure within that relationship. Citing cases dealing with the attorney-client privilege, Respondents conclude:

> 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 <u>those</u> <u>whose deliberations</u> <u>are</u> <u>privileged</u>. [Emphasis added]

Respondents' Brief in Opposition to Rule to Show Cause, page 5.

Petitioner would agree that the generally recognized rule is that documents which would be subject to discovery in the

possession of the client do not become privileged because the clients gives them to his attorney. McCormick, Handbook of the Law of Evidence, §89, p. 185 (Cleary Ed. 1972). However, the "general rule" as stated by respondents overstates the rule applicable to the attorney-client privilege, in an apparent effort to create an analogy between that privilege and the statutory privilege for records of a review committee set forth in C.R.S. (1973), §12-43.5-102(3)(e). An examination of the policies underlying the respective privileges reveals that such an analogy must fail.

It is obvious that the essential purposes of pretrial discovery and judicial resolution of civil disputes would be defeated if a party could conceal any documents in his possession by merely passing them to his attorney. The attorney-client privilege is recognized to encourage clients to make full disclosure to their attorneys for the furtherance of the administration of justice. McCormick, supra, p. 182. The privilege exists not because an attorney's "deliberations are privileged," but because society has an interest in protecting confidential communications between a client and his attorney.

In contrast, the statutory privilege for records of a review committee is justified not by a confidential relationship among the committee members, but rather by society's interest in ensuring that physicians will not be deterred from initiating or participating in the peer review process. As this court observed in Franco v. District Court, 641 P.2d 922 (Colo. 1982):

> 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.

641 P.2d at 928-929.

Because of the different purposes of the policies which justify recognition of the attorney-client privilege and the peer review privilege, the analogy advanced by respondents must fail. The mere fact that the patient records in dispute are not documents which were created by the review committees in the course of their deliberations is not dispositive of the question whether patient records reviewed by the committees are privileged from discovery in this civil action. This Court's construction of the statutory privilege for records of a review committee must be consistent with the expressed intent of the legislature in enacting the privilege.

B. THE LEGISLATIVE INTENT AND STATE POLICIES UNDERLYING THE PEER REVIEW PRIVILEGE WOULD BE ADVANCED BY A HOLDING THAT PATIENT RECORDS STUDIED BY A PEER REVIEW COMMITTEE ARE NOT DISCOVERABLE IN A PHYSICIAN'S ACTION FOR DAMAGES AND INJUNCTIVE RELIEF.

The legislative history preceding the enactment of the peer review privilege reveals that one of the purposes of §12-43.5-102(3)(e) is to establish judicial review as the primary means of redress for a disciplined physician. Franco, 641 P.2d at 927. The statutory scheme affords the physician full due process

and an opportunity to have the action overturned by a court, and in the legislature's view, the availability of this procedure justifies closing the entirety of the committee's process for purposes other than judicial review.

The records and proceedings of the committee's review of the quality of care rendered by a physician are thus open to the physician and the court in a judicial review proceeding, but this Court has held that the legislature intended to shield the committee records from subpoena or discovery in all other civil litigation. Id.

For the legislative intent to be given meaningful enforcement, it is essential that the scope of the peer review privilege be construed so as to prevent any civil litigation other than a judicial review proceeding from being turned into a trial of the correctness of the peer review committee's collective professional judgment.

The expressed legislative intent would be emasculated if some of the documents reviewed by the committee and upon which it based its recommendation were available for discovery and admission into evidence, while others were held privileged, depending only on the source or time of creation of the particular documents. The existence of a privilege would be utterly meaningless, producing precisely the chilling effect on the conduct of the peer review process that the legislature clearly intended to avoid. The result would be that a physician who has chosen not to utilize the available means of judicial review could do indirectly, in a civil

action for damages and injunctive relief, what he cannot do directly. Posey v. District Court, 196 Colo. 396, 586 P.2d 36, 38 (1978).

The policy and intent of the legislature would be effectuated by a holding that the "records of a review committee" within the meaning of C.R.S. (1973) §12-43.5-102(3)(e) 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." Franco, 641 P.2d, n. 3 at 925. Specifically, hospital patient records which are among the materials considered by a review committee in its investigations, hearings and deliberations, should be held to fall squarely within the scope of the privilege.

C. THE INCLUSION OF PATIENT RECORDS CONSIDERED BY A REVIEW COMMITTEE WITHIN THE SCOPE OF THE PEER REVIEW PRIVILEGE DOES NOT REQUIRE A CONCLUSION THAT SUCH PATIENT RECORDS WOULD BE UNAVAILABLE TO ALL PERSONS AND ENTITIES FOR ALL PURPOSES.

The Respondents argue that a holding that patient records considered by a review committee fall within the scope of the peer review privilege would mean that a hospital could forever refuse to release patient records to anyone for any reason on the ground of privilege, simply because the records were once part of a peer review process. However, such a conclusion is not necessary.

Section 12-43.5-102(3)(e) specifically authorizes the production of review committee records for the limited purpose of a judicial review proceeding brought by the physician, and such disclosure does not constitute a waiver of the privilege which

protects these records from compelled disclosure in other civil litigation:

> Admittedly, the physician's exercise of his statutory right to judicial review will result in the disclosure to him of testimony and other material presented during the peer review proceedings, as well as the review committee's comments and recommendations. However, we do not believe these limited disclosures, which are conducive to procedural fairness, derogate from the legislature's intent to shield such information from subpoena and discovery in litigation not involving judicial review of the disciplinary action.

Franco, 641 P.2d at 928.

Similarly, where entitlement to production of specific records which are records of a review committee could be established under a separate statutory authority, or where their existence and relevancy could be established apart from their significance as records of a review committee, production of such records in discovery would not constitute a waiver of the peer review privilege.

Thus, for example, a hospital patient is entitled to inspect and obtain copies of his own hospital records pursuant to C.R.S. (1973) §25-1-801, as amended. The policy of encouraging physicians to participate in the peer review process would not be furthered by interference with this statutory right afforded hospital patients to obtain their own hospital records.

Even in a situation like that presented in Community Hospital Association v. District Court, 194 Colo. 98, 570 P.2d 243 (1977), involving a patient's civil action against a physician for malpractice and against a hospital for negligently retaining the

physician on the hospital staff, there would be no necessity for barring the production of hospital patient records of the plaintiff or other patients treated by the physician, as long as the existence of the records and their relevancy to the subject matter of the action could be established in the absence of any disclosure that the records were a part of the materials considered by a peer review committee reviewing the quality of care rendered by the physician. Like the limited disclosure authorized in the case of a judicial review proceeding, these limited disclosures do not derogate from the legislature's intent to shield records of a review committee from discovery in civil litigation where they are only significant because of their involvement in disciplinary action against a physician.

Construing the scope of the privilege always with the guidance of the policies and intent underlying its enactment, it is clear that the peer review privilege need not preclude discovery of patient records which are records of a review committee in all instances. The legislative intent makes it equally clear, however, that to give full meaning to the privilege, it must be construed to include all of the records and materials reviewed by the committee.

D. PRODUCTION OF REVIEW COMMITTEE RECORDS TO THE COLORADO STATE BOARD OF MEDICAL EXAMINERS, IF REQUIRED, SHOULD BE HELD NOT TO CONSTITUTE A WAIVER OF THE PEER REVIEW PRIVILEGE.

The Colorado State Board of Medical Examiners, amicus curiae, asserts that its concern in this proceeding is that if patient records studied by a review committee are protected by the peer review privilege, the Board may be impeded in executing its

statutory duty to investigate when a hospital reports disciplinary action imposed against a physician.

The Petitioner agrees that the existence of the peer review privilege should not interfere with the Board's investigations, since the state policy underlying both peer review and the authority of the Board is to provide the public with high quality medical care. C.R.S. (1973), § 12-43.5-101, 12-36-102. To further the legislative objectives of both statutory schemes, a hospital's voluntary disclosure of review committee records to the Board of Medical Examiners upon its request, like the limited disclosure authorized by the peer review statute in a judicial review proceeding, should specifically be held not to constitute a waiver of the peer review privilege for purposes of subsequent civil litigation not involving judicial review.

However, the Petitioner contends that the real issue sought to be raised by the amicus curiae brief is much broader, concerning the power of the Board to request or compel production of review committee records at all, whether or not patient records are held to fall within the privilege. This question arises from an apparent conflict among three statutes bearing on the production of information and documents to the Board. Briefly stated, Section 12-43.5-102(3)(e) states that the Board, upon request, shall be provided summaries of the findings and recommendations of the review committee and the actions taken thereon by the hospital governing board, but is silent as to whether the Board may obtain the privileged committee records. Section 25-3-107(2), on the

other hand, requires the hospital to provide such additional information as is deemed necessary by the Board to conduct a further investigation and hearing regarding disciplinary action taken against a physician by the hospital. Further, Section 12-36-104(1)(b) empowers the Board to subpoena witnesses and compel the production of books, papers and records relevant to any inquiry or hearing.

The Petitioner urges the Court to recognize that the question of the extent of the powers and duties of the Colorado State Board of Medical Examiners to obtain records is much broader than the issue raised in this proceeding, and that the construction of these three statutes must be undertaken only when properly postured for review. The present concern of the Board can be resolved consistently with the Petitioner's position by holding that voluntary disclosure of committee records to the Board to aid its investigations and hearings does not constitute a waiver of the peer review privilege.

V. CONCLUSION

The Petitioner respectfully requests this Court to hold that patient records considered by a peer review committee are "records of a review committee" within the meaning of C.R.S. (1973) §12-43.5-102(3)(e), to make the rule absolute, and to enter its Order prohibiting the Respondent District Court from enforcing its order compelling the Petitioner to produce 18 hospital patient records reviewed by the peer review committees.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on this 31st day of May, 1983, a true copy of the foregoing PETITIONER'S REPLY BRIEF was deposited in the United States mail, postage prepaid and addressed to the following:

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APPENDIX

(b) (I) If the findings of the investigation indicate substantial lack in the quality of care rendered by such physician, the review committee shall hold a hearing to consider the findings; except that, if the review committee has conducted the investigation, it shall transmit its findings to an established adjudicatory board. If any member of the review committee has conducted the investigation, he shall disqualify himself from sitting with the committee at any hearing held pursuant to this paragraph (b).

(II) The physician allegedly offering substandard care shall be notified of such hearing, shall have a right to be present and be represented by counsel at such hearing, and shall be allowed to offer evidence in his own behalf.

(c) After such hearing, the review committee shall make any recommendations it deems necessary for the discipline of such physician to the governing board of the hospital or as provided by written bylaws of the hospital or by federal law or regulation. A copy of such recommendations shall be given to the physician allegedly offering substandard care, and he shall have the right to appeal the decision of the review committee to the governing board or other body to which the recommendations are made.

(d) A report of any recommendation for disciplinary action of a review committee shall be forwarded to the Colorado state board of medical examiners if final action on such recommendations results in the disciplining of a physician.

(e) The records of a review committee shall not be subject to subpoena in any civil suit against the physician, but, at the request of the Colorado state board of medical examiners, the board shall be provided a summary of the findings, recommendations, and disposition of actions taken by a review committee. Said board may also request, and shall receive, a summary of the actions of the hospital board of trustees in regard to recommendations of a review committee. The records of a review committee or a hospital board may be subpoenaed in a suit brought by the physician seeking judicial review of any action of the review committee or a hospital board.

(f) Investigations, examinations, hearings, meetings, or any other proceedings of a professional review committee conducted pursuant to the provisions of this article shall be exempt from the provisions of any law requiring that proceedings of the committee be conducted publicly or that the minutes or records of the committee with respect to action of the committee taken pursuant to the provisions of this article be open to public inspection.

Source: L. 75, p. 465, § 1; L. 76, pp. 426, 427, § § 1, 1; L. 77, p. 667, § 13.

Editor's note: Section 14 of chapter 150, Session Laws of Colorado 1977, provides that the introductory portion to and paragraph (d) of subsection (2) and paragraph (a) of subsection (3) are effective July 1, 1977, and apply to professional review proceedings occurring on or after said date.

Law review. For note, "Medical Products and Services Liability: Public Policy Requires Legislative Innovation and Judicial Restraint", see 53 Den. L.J. 387 (1976).

ARTICLE 43.5

Professional Review - Health Care

12-43.5-101. Legislative declaration. (1) It is the policy of this state to encourage discipline and control of the practice of health care rendered by physicians by committees made up of physicians licensed to practice in this state. It is the duty of such committees to openly, honestly, and objectively study and review the conduct of practice by members of the profession, including the quality of service and, when appropriate, the length of hospital confinement.

(2) It is the duty of the health care profession to do all things necessary to provide the public with services of proper quality at the lowest reasonable cost. To this end, review committees and members thereof should be granted certain immunities relating to their actions within the scope of the official conduct of their responsibilities and should additionally review, discipline, and educate the profession by free, open, and unfettered exercise of professional judgment.

Source: L. 75, p. 465, § 1.

Law review. For note, "Medical Products and Services Liability: Public Policy Requires Legislative Innovation and Judicial Restraint", see 53 Den. L.J. 387 (1976).

12-43.5-102. Establishment of review committee - function. (1) A review committee may be established pursuant to this section to review and evaluate the quality of care being given patients by any physician licensed under article 36 of this title, in order to protect patients against the unauthorized, unqualified, and improper practice of such physician.

(2) Any review committee established pursuant to this section shall include in its membership at least three persons licensed under article 36 of this title. Such a committee may be authorized to act only by:

(a) The medical staff of a hospital licensed pursuant to part 1 of article 3 of title 25, C.R.S. 1973, if the medical staff operates pursuant to written bylaws approved by the governing board of the hospital;

(b) A professional standards review organization established or organized pursuant to 42 U.S.C. 1320c, or any other organization performing similar review services under federal or state law;

(c) The Colorado state board of medical examiners; or

(d) A society or an association of physicians whose membership includes not less than one-third of the medical doctors or doctors of osteopathy licensed to practice and residing in this state if the physician whose services are the subject of review is a member of such society or association.

(3) (a) A review committee acting pursuant to this section may investigate or cause to be investigated the quality of care being given by any physician licensed under article 36 of this title upon its own motion, pursuant to written allegations made by a patient of such physician, or upon recommendation of a professional working in the health care field. An investigation may relate to the physician's professional qualifications, clinical competence, mental or emotional stability, or physical condition or any other matter affecting the quality of care provided.

12-43.5-103. Immunity from liability. (1) As used in this section, unless the context otherwise requires, "review committee" includes a review committee established pursuant to this article, an adjudicatory board composed of physicians licensed to practice in this state to which a review committee submits its recommendations, and a grievance committee established by the Colorado state board of medical examiners.

(2) A member of a review committee or a witness before a review committee shall be immune from suit in any civil action brought by a physician who is the subject of review by such committee if such member or witness acts in good faith within the scope of the function of such committee, has made a reasonable effort to obtain the facts of the matter as to which he acts, and acts in the reasonable belief that the action taken by him is warranted by the facts.

(3) The board of trustees of a hospital and the individual members of a board of trustees shall be immune from suit for damages in a civil action brought by a physician who is the subject of action taken in good faith by such board if the action is based upon recommendations of the review committee; but nothing in this subsection (3) shall preclude judicial review of the action of a board of trustees.

Source: L. 75, p. 466, § 1; L. 76, pp. 426, 427, § § 2, 2.

Law review. For note, "Medical Products and Services Liability: Public Policy Requires Legislative Innovation and Judicial Restraint", see 53 Den. L.J. 387 (1976).