IN THE SUPREME COURT OF PENNSYLVANIA

Nos. 20-23 WAP 2016

ELEANOR REGINELLI and ORLANDO REGINELL
Plaintiffs/Appellees

v.

MARCELLUS BOGGS, M.D.; MONONGAHELA VALLEY HOSPITAL, INC.; and UPMC EMERGENCY MANAGEMENT MEDICINE, INC., d/b/a EMERGENCY RESOURCE MANAGEMENT, INC.
Defendants/Appellants

Petitions for Allowance of Appeal from the Order of Superior Court Entered October 23, 2015 at Nos. 1584 and 1585 WDA 2014, Affirming the Order Entered August 29, 2014 in the Court of Common Pleas of Washington County at No. 2012-5172

BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AND THE PENNSYLVANIA MEDICAL SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICI CURIAE*

Amicus Curiae, the American Medical Association (the "AMA"), is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents and medical students are represented in the AMA's policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. AMA members practice in every medical specialty area and in every state, including Pennsylvania.

Amicus curiae the Pennsylvania Medical Society ("the Medical Society") is a Pennsylvania non-profit corporation that represents physicians of all specialties and is the Commonwealth's largest physician organization. The Medical Society regularly participates as an *amicus curiae* before this Court in cases raising important health care issues, including issues that have the potential to adversely affect the quality of medical care. This is such a case.

The Medical Society's overriding concern is that the rules governing peer review be broadly construed so as to allow the peer review process to function effectively. The Medical Society participated in one of the first appellate decisions addressing the scope of the confidentiality protections applicable to peer review

proceedings and documents. *See, e.g., Sanderson v. Bryan*, 522 A.2d 1138 (Pa. Super. 1987).[1]

Both *amici* file this Brief on their own behalves and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts.

For those reasons, the Medical Society and the AMA participate in this action in support of Appellees.

1 Both *amici* are participating in *Shinal v. Toms*, No. 31 MAP 2016 (informed consent; pending argument). Among other recently decided cases, the Medical Society has participated in *Green v. Pennsylvania Hospital*, 123 A.3d 310 (Pa. 2015) (ability of nurse to provide expert testimony in medical professional liability case); *Seebold v. Prison Health Services*,57 A.3d 1232 (Pa. 2012) (physician liability to non-patients); *Cooper Lankenau Hospital*, 51 A.3d 183 (Pa. 2012) (informed consent); and *Vicari v. Spiegel*, 989 A.2d 1277 (Pa. 2010); *Gbur v. Golio*, 963 A.2d 443 (Pa. 2009), and *Anderson v. McAfoos*, 57 A.3d 1141 ((Pa. 2012), (all involving expert witness qualifications in medical professional liability cases).

STATEMENT OF THE QUESTIONS PRESENTED

The Questions Presented as set forth in the Order granting review are:

> 1. Whether the Superior Court erred by holding an outside medical provider's peer review proceedings regarding its employees who staff a hospital's Emergency Department under a contract with that hospital are not entitled to protection from disclosure under the Pennsylvania Peer Review Protection Act?
>
> 2. Whether the sharing of peer review records by a third-party medical provider that operates a hospital's Emergency Department with the administration of that hospital constitutes a waiver of peer review protection as to those records?
>
> 3. Whether a hospital that contracts with a third-party medical provider to operate the hospital's Emergency Department may claim protection under the Peer Review Protection Act for records of peer review proceedings conducted by the medical provider regarding its employees who staff the hospital's Emergency Department

Amici seek "yes" answers to the first and third questions and a "no" answer to the second.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 42 Pa.C.S. § 742, having granted the Petition for Allowance of Appeal filed in this matter.

ORDERS IN QUESTION

Superior Court's Order, entered October 23, 2015 was:

> Judgment Entered.
>
> Joseph D. Seletyn, Esq.
> Prothonotary

The Order of the Court of Common Pleas of Washington County was:

> **ORDER**
>
> AND NOW, this 29th day of August, 2014, upon consideration of Plaintiffs' Motion to Compel Discovery Directed to Defendant, Monongahela Valley Hospital, Inc., it is hereby ORDERED, ADJUDGED and DECREED that same is GRANTED. However, this documentation shall remain confidential with Plaintiffs' counsel, and shall not be copied or reproduced in any fashion, and in the event that this court determines same is not relevant evidence in the case *sub judice*, same shall be returned to Defendant.
>
> BY THE COURT:
>
> Debbie O'Dell-Seneca, P.J.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Amici adopt the Statement of Scope and Standard of Review as set forth in Appellants' Briefs.

STATEMENT OF THE CASE

A: The Facts Pertinent To The Peer Review Issue

This is a medical professional liability action. The details of the care and allegations of negligence are, in general, irrelevant to this appeal. What is relevant is that the medical care Mrs. Reginelli received at the Mon Valley Hospital Emergency Department was provided by an employee, not of the Hospital, but of defendant Emergency Resource Management, Inc. ("ERMI"). ERMI was at times relevant here a Pennsylvania corporation with experience in the operation and management of emergency facilities. The Hospital had contracted with ERMI to provide most of the services at the Emergency Department and the staff who would provide them. In addition to ERMI and Mon Valley, Marcellus Boggs, M.D., the emergency department physician and ERMI employee who cared for Ms. Reginelli, is a defendant.

A 2010 "Emergency Department Services Agreement" (the "Agreement") (R. 1b-18b) outlined the relationship and respective duties between Mon Valley and ERMI. It, supplemented by testimony as to how the Agreement actually operated, is the key evidence pertinent to this appeal. As background, the Agreement noted that Mon Valley was a licensed Hospital; that it maintained an emergency department; that ERMI had expertise and experience in that field; and that the Hospital wished to have ERMI provide certain services to the Hospital "to facilitate the efficient operation" of the Emergency Department including "the

provision of qualified emergency medicine physicians ... to staff the Emergency Department" and provide certain ancillary services. *See* Whereas Clauses (R. 1b).

Under the Agreement, ERMI provided the Department's Medical Director and Associate Director and was responsible for staffing the department with a sufficient number of licensed and qualified physicians. §§ 2.1, 2.2 (R. 3b). The physicians were to render medical care consistent "with the standards of good emergency medical practice within the medical community ...." § 2.2 (R.3b). ERMI assumed the responsibility to ensure that its physicians would provide care "in accordance with the accepted local and national standards of care," including those of the Joint Commission on Accreditation of Healthcare Organizations and other regulatory agencies; the Hospital's policies and procedures; and the Medical Staff Bylaws, Rules, and Regulations. § 2.5 (R. 5b). The Agreement required ERMI physicians to obtain and keep Hospital privileges. § 2.6 (R. 5-6b).

The Agreement included materials on "Quality Improvement" and "peer review." Under § 2.9, the ERMI Medical Director was to "conduct clinical reviews and provide regular reports ... to [the] Hospital for the use by the Hospital in its quality improvement and peer review process ...." (R. 6b) ERMI Physicians were to serve on the Hospital's Medical staff committees and participate in its quality assurance programs. *Id.* Both the Hospital and ERMI had interests, generally overlapping, in having the ERMI-provided emergency department physicians provide high quality care. Monitoring physician performance and

sharing the results was an integral part of measuring compliance with and achieving the quality of care goals.

ERMI is fairly viewed as a medical practice, practicing the specialty of emergency medicine; the only salient difference between it and a primary care practice is that ERMI's "office" is located solely within the Hospital. The portion of ERMI working under the Agreement is equally fairly viewed as the Hospital's Emergency Department. In this respect, the Agreement was "exclusive" in that ERMI was the sole provider of emergency services at the Hospital during the contract's term. *See* § 1.7 (R. 2b) Thus, Dr. Walther, the ERMI employee who acted as medical director of the Mon Valley Emergency Department was effectively the Department chairman as well.

Brenda Walther, M.D., the ERMI employee who served as the Emergency Department's Medical Director, described how she monitored the Mon Valley physicians:

> I do random chart reviews for every physician every quarter. That is a minimum of ten charts just randomly chosen for each physician per quarter. I [also] personally look at the first 10 to 20 charts of every new physician that starts their first couple of shifts just to make sure from the onset that there's no documentation or care issues before we go any further. I look at all core measure fallouts, PQRS fallouts, patient complaints, anything that is staff requested, I look at 48 hour returns that get admitted.
>
> ****

> I do that on behalf of the hospital and ERMI. They [the hospital] don't, other than what goes to the peer review committee, I don't believe they redo what I've done.
>
> ****
>
> If I find an issue during my internal peer review ... that I feel is a care issue, I will forward it to the [hospital's] peer review committee. I'll also at least send it under confidential peer review to my superior at ERMI just so they're aware.

Walther Depos. Tr., Vol. I, pp. 63-64, 65, 68; R. 206-07a).[2] Her reviews of Dr. Boggs did not include Ms. Reginelli's care. The "performance file" was nonetheless the subject of a discovery request and the subsequent discovery dispute that is now before this Court.[3] Information on medical care Dr. Boggs provided to other patients would be relevant, if at all, to prove the Hospital's breach of its duty to select and retain only competent physicians.

Dr. Walther further explained that decisions as to whether to retain a particular emergency department physician were made jointly by the Hospital and ERMI, and that the Hospital could unilaterally choose not to recredential a physician when it thought that action was warranted. (Depos. Tr. Vol. I, pp. 68-69;

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[2] PQRS is an acronym for Medicare's Physician Quality Reporting System program that encourages medical professionals and group practices to report to Medicare information on the quality of care provided. *See* https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/PQRS/index.html?redirect=/pqri

[3] The trial court's brief Rule 1925 Opinion seemed to think it both important and a factor favoring discovery that Dr. Walther's review did *not* include Ms. Reginelli's care. *See Id.* at 3 ("Moreover, this Court notes that Defendant Hospital admits no peer review of Dr. Boggs was done in the instant case.")

R. 207-08a). That shared decision-making requires a sharing of information.

B: Brief Procedural History

Dr. Walther's deposition testimony led to a discovery request for the performance file directed to the Hospital. The Hospital objected on grounds that the documents were protected from disclosure by the Peer Review Act. Plaintiffs moved to compel. The trial court granted the motion, but directed that "documentation ... remain confidential" pending the Court's ultimate ruling on relevance.

All defendants appealed and Superior Court held the Order was appealable under Rule 313, Pa.R.App.P. Reaching the merits, the Court, per President Judge Gantman and Judges Lazarus and Musmanno, affirmed in a short unpublished opinion. The Opinion's key points were:

- Dr. Walther's review of Dr. Boggs was assertedly "created and maintained solely by Dr. Walther on behalf of her employee;"[4]
- ERMI, as an independent contractor staffing the Hospital's emergency room, was not an entity enumerated in the Peer Review Act as protected by the peer review privilege; and
- Dr. Walther's performance review file had been shared with the hospital, thereby assertedly waiving any privilege.

Defendants sought and were denied reargument *en banc*. Defendants then sought review from this Court, which was granted.

[4] As *amici* discuss in the Argument section of this Brief, that statement is at odds with both the Agreement and the testimony concerning it.

SUMMARY OF ARGUMENT

Two simple principles, adopted by this Court in *McClelland v. Health Maintenance Organization of Pa*., 686 A.2d 801 (Pa. 1996), guide resolution of this appeal. *First*, peer review is an important tool in improving the quality of health care. *Second*, the willingness to criticize peers that an effective review process requires cannot occur without ironclad confidentiality. Here, the Medical Director of a hospital Emergency Department reviewed treatment records of a Department physician. That is the paradigm for protected activity under the Peer Review Protection Act.

Both the Medical Director and the physician being reviewed worked for a third party with whom the Hospital had contracted to run and staff the emergency department. Superior Court incorrectly thought that the entity's status as an independent contractor deprived its work product of protection. Nothing in the Act imposes that rule. Indeed, many physicians providing care and participating in peer review at hospitals are either an independent contractors or, as here, employees of one.

ERMI's quality review integral to the Hospital's peer review process. ERMI is effectively the Hospital's Emergency Department, its medical director the Department chairman. Alternatively, ERMI can be viewed as a medical practice (with the specialty of emergency medicine) conducting its own quality review. Under either approach, the quality review was a positive activity that should be

encouraged, not "discovered" through the litigation process into ineffectiveness and ultimately oblivion. Under both analyses, the review qualifies as peer review activity.

The model here – of a hospital contracting with a third party to provide specified services under an exclusive contract – is one that is commonly used to provide a variety of hospital-based specialty care (*e.g.*, anesthesia, radiology, pathology and emergency services). As they do so, hospitals recognize the need – and legal duty under *Thompson v. Nason*, 591 A.2d 703 (Pa. 1991) – to impose performance standards on the contracting entity and to mandate quality of care reviews so as to determine that standards are met. Mon Valley did so here, requiring ERMI to conduct quality reviews of all physicians, and to share the results with the Hospital. If the Peer Review Act is to stay relevant in light of these systemic changes, it is necessary to avoid hypertechnical rules that the Act does not explicitly establish.

Narrowing the scope of peer review protected materials will negatively affect peer review itself and conflict with the Act's core goal of promoting effective peer review. This Court should reaffirm the importance of those policies. To do so, it must reverse Superior Court and provide a broad definition of the scope of the peer review confidentiality provisions.

ARGUMENT

I. THE PERFORMANCE REVIEW OF A HOSPITAL EMERGENCY DEPARTMENT PHYSICIAN BY ITS MEDICAL DIRECTOR IS A PEER REVIEW-PROTECTED ACTIVITY; IT IS IRRELEVANT THAT THE HOSPITAL HAD CONTRACTED WITH A THIRD PARTY TO STAFF AND RUN THE EMERGENCY DEPARTMENT

A. Introduction

Two simple and indisputable principles, adopted by this Court in *McClelland v. Health Maintenance Organization of Pa*., 686 A.2d 801 (Pa. 1996), guide resolution of this appeal. *First*, peer review is an important tool in improving the quality of health care. *Second*, the candor and willingness to criticize peers that an effective peer review process requires cannot occur in the absence of ironclad confidentiality.[5] Giving those principles short shrift, Superior Court reached a result that will inevitably degrade and subvert the peer review

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[5] In *McClelland*, this Court "accept[ed] ... as accurate articulations of the Act's purpose" that:

> [t]he Act was promulgated to serve the legitimate purpose of maintaining high professional standards in the medical practice for the protection of patients and the general public
>
> and
>
> seeks to foster the greatest candor and frank discussion at medical review committee meetings....

Id. at 805, *citing Cooper v. Delaware Valley Medical Center*, 630 A.2d 1, 7 (Pa. Super. 1993), *affirmed* 654 A.2d 547 (Pa. 1995), and *Robinson v. Magovern*, 83 F.R.D. 79, 86 (W.D. Pa. 1979). In *Cooper*, 654 A.2d at 551, this Court unanimously stated that "it is beyond question that peer review committees play a critical role in the effort to maintain high professional standards in the medical practice."

process, to the patient's detriment; as *amici* discuss later, the contractual arrangement between ERMI and Mon Valley is a common one. This is a classic instance of individual plaintiffs seeking to place their interests over those of the public at large.

Superior Court's decision might be understandable if the statutory language compelled it. It does not. Superior Court's brief discussion on this issue is replete with error and irrelevancy. At bottom, Superior Court mischaracterized the peer review that the Hospital and ERMI, the medical practice running the Hospital's emergency department, were jointly and cooperatively undertaking. Superior Court then applied a hypertechnical approach to find that neither was entitled to the privilege. Properly understood, both were.

B. Dr. Walther's Review of Dr. Boggs Qualifies as Protected "Peer Review"

Dr. Walther's review can be viewed in either of two ways: (1) as part of the Hospital's peer review process; or (2) as a supplemental and parallel endeavor. It can be readily sustained as covered peer review in either analysis. *Amici* believe the first is the better approach, truer to the cooperative relationship the Agreement established; but both can be easily sustained. But more importantly, Dr. Walther's review process of Dr. Boggs and all of the EMRI physicians is a positive and worthwhile activity that should be encouraged, not "discovered" into ineffectiveness and ultimately oblivion.

The confidentiality provision in the Peer Review Act, 63 P.S. § 425.4, applies to the proceedings and records of a "review committee." Rather than defining a "review committee," the Act defines a "review organization," which *amici* believe to be the relevant term. The definition, at § 425.2, is broad:

> "Review organization" means any committee *engaging in peer review*, including a hospital utilization review committee, a hospital tissue committee, a health insurance review committee, a hospital plan corporation review committee, a professional health service plan review committee, a dental review committee, a physicians' advisory committee, a veterinary review committee, a nursing advisory committee, any committee established pursuant to the medical assistance program, and any committee established by one or more State or local professional societies, 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 individual reviewing the professional qualifications or activities of its medical staff or applicants for admission thereto*. It shall also mean a committee of an association of professional health care providers reviewing the operation of hospitals, nursing homes, convalescent homes or other health care facilities.

(emphasis supplied). "Peer Review" as used in that definition is itself defined, also at § 425.2, as:

> the procedure for evaluation *by professional health care providers of the quality and efficiency of services ordered or performed by other professional health care providers, including practice analysis*, inpatient hospital

> and extended care facility utilization review, medical audit, ambulatory care review, claims review, and the compliance of a hospital, nursing home or convalescent home or other health care facility operated by a professional health care provider with the standards set by an association of health care providers and with applicable laws, rules and regulations.

It thus has two components – (1) that the review be of and by a "professional health care provider;" and (2) that it address "the quality and efficiency" of care. Finally, the term "Professional health care provider" used in that definition is broadly defined to "include[] but not be limited to" 12 categories of individuals and organizations, from physician to veterinarian.

Whether viewed as a peer review activity of ERMI itself or as part of the Hospital's process, all of the definitions and criteria listed above are met.

1. As physicians, Drs. Boggs and Walther are both "professional health care providers," as that term is defined and then used in the definition of "peer review."

2. This was a "peer review." Dr. Walther's review focused on "the quality and efficiency of services ordered or performed by [Dr. Boggs]." This definition is met under both alternative scenarios.

3. The review was undertaken by a "review committee," a term that includes "any hospital board, committee *or individual* reviewing the professional qualifications or activities of its medical staff or applicants for admission thereto." (emphasis supplied). If Dr. Walther's review is viewed as part of the Hospital's peer review process, it fits neatly into the excerpted language above. If viewed as

part of ERMI's peer review, it likewise satisfies the definition. As per the Agreement, ERMI "operates" the Hospital's emergency department in every meaningful respect. The review was indisputably for the purpose of "evaluating and improving the quality of health care rendered." ERMI is, as noted earlier, fairly viewed as either, or more accurately as both a medical practice, with the specialty of emergency medicine, and as a hospital department. In either event, it engages in peer review when one or more persons associated with the practice or department review the quality of care provided by one of the practice's or department's members. As Superior Court had previously and correctly held, "[w]hether a multi-person committee or an individual conducts the review is inconsequential – the 'overriding intent of the Legislature' is to 'protect peer review records'." *Piroli v. Lodico*, 909 A.2d 846, 849 (Pa. Super. 2006).

C. Superior Court's Various Errors

Superior Courts various statements as it reached the contrary result are all flawed.

First, its statement (Slip Op. at 6) that "Dr. Walther's review of Dr. Boggs was 'created and maintained solely by Dr. Walther on behalf of her employee,'" cannot be reconciled with the Agreement's language, at § 2.9, that the EMRI Medical Director was to "conduct clinical reviews and provide regular reports ... to

Hospital for the use by the Hospital in its quality improvement and peer review process ...."[6]

Second, Superior Court erred (Slip Op. at 6) in concluding that "ERMI, as an independent contractor staffing the Hospital's emergency room, is not an entity enumerated in the Act as being protected by peer review privilege." That statement overlooks that a physician practice or hospital department certainly fits within the protected entities. Indeed, many if not most hospital physicians are independent contractors and not employees. Nothing in the Peer Review Act addresses or turns on the legal relationship (employee or independent contractor) between the Hospital and the physicians and/or ERMI. Indeed, many hospital physicians who sit on peer review committees are independent contractors rather than employees. That status makes no difference at all.

Additionally, as noted earlier, the Act's enumeration of covered entities is expressly non-inclusive being protected by the peer review privilege is not meant

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[6] Superior Court's statement cites to the Reply Brief of ERMI and Boggs, at 6. That Brief does include the referenced language ("Dr. Boggs' 'performance file' ... was created and maintained solely by Dr. Walther on behalf of her employer.") The Reply Brief, in turn, cites to those defendants' Reply To Appellees' Motion To Quash Appeal. In contrast to the Reply Brief that filing repeatedly refers to Dr. Walther as having conducted the peer review in a "dual capacity." *See Id.* at 5-6 ("The file ... was maintained solely by Dr. Walther as part of her review and evaluation of Dr. Boggs' performance on behalf of UPMC Emergency Medicine, Inc. and Monongahela Valley Hospital" and noting she created the document in her "dual capacity.") and 7 (referencing her "dual role" and "dual capacity as an employee of UPMC Emergency Medicine, Inc., and Director of the Emergency Department at Monongahela Valley Hospital.") The "dual capacity" analysis is consistent with the Agreement and the "solely on behalf of her employer" is not. Superior Court, perhaps understandably, did not drill down in the briefing to the degree necessary to find the contradiction and resolve it. Regardless, this Court should not decide an important case on an errant finding.

to be all-inclusive. The listed individuals and entities listed are examples of professional health care providers. *See Dechert LLP v. Commw.*, 998 A.2d 575, 584, n. 8 (Pa. 2010) ("if we were to construe the words of such statutes in their narrowest terms without regard to the legislature's intent, we would render the 'including, but not limited to' language of such statutes meaningless….").

Third, Superior Court erred (Slip Op. at 7) in concluding that ERMI had "destroy[ed] any privilege that may have existed" by sharing Dr. Boggs' performance file with the Hospital. This fails to recognize the cooperative nature of the Hospital/ERMI arrangement. The Hospital chose to have the person best suited to evaluate the competency of the Emergency Department physicians, the Department's Medical Director, perform the reviews. Dr. Walther may have been a ERMI employee, but she was also a credentialed member of the Hospital staff and effectively the Department Chairman. At bottom, the Hospital was sharing with itself. It that constitutes a waiver, the practice of peer review is replete with them as committees and physicians share and transmit information.

D. <u>The Potential Impact of This Case on Peer Review and Health Care</u>.

The model here – of a hospital department contracted out via an exclusive contract – is one that has been commonly used for several decades, particular as to hospital-based specialties that must be staffed to deliver services on a 24/7/365 basis. Examples of specialties in addition to emergency medicine that are often provided in that manner are anesthesia, radiology, and pathology (laboratory

services*). See, e.g.*, Robert M. Portman, *Exclusive Contracts in the Hospital Setting: A Two-Edged Sword, Part I: Legal Issues;* J. Am. Coll. Radiol. 2007 May; Vol. 4, Issue 5:305-12.[7]

Hospitals commonly organize to meet the need for those types of specialty physician services quite similarly to how Mon Valley did here. As they do so, hospitals recognize the need – and legal duty under *Thompson v. Nason*, 591 A.2d 703 (Pa. 1991) – to impose performance standards on the contracting entity and to mandate quality of care reviews so as to determine that standards are met. Mon Valley did so here.

Hospitals and physicians are constantly reinventing and revising the relationships between them as they try to improve quality while simultaneously reducing costs. The pressures to change, stemming from new laws (primarily the Affordable Care Act) and market forces, are never ending. The need to effectively

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[7] As discussed in the article:

> Exclusive contracts have traditionally been awarded to hospital-based physicians, such as *radiologists, anesthesiologists, pathologists, and emergency physicians*. In some cases, hospitals will award such agreements to other specialists, including cardiologists, for the management of *cardiac catheterization laboratories*. It is also becoming increasingly common for hospitals to contract out certain surgical departments, such as *cardiac surgery*, that traditionally have not been subject to closure.

(emphasis supplied) The article is accessible at http://www.jacr.org/article/S1546-1440(07)00003-8/fulltext.

monitor the quality of care is one of the few constants. If the Peer Review Act is to stay abreast of these changes, it is necessary to avoid hypertechnical rules that the Act does not explicitly establish.

In this respect, establishing rules that narrow the scope of peer review protected materials and that thereby negatively affect peer review itself, violates several rules of statutory construction. More specifically, it violates the principles in 1 Pa.C.S.A. § 1921 that when there is an ambiguity, the court should consider, *inter alia,* **(**1) The occasion and necessity for the statute; (4) The object sought to be attained by the statute; and (6) the consequences of a particular interpretation. Here, all of those principles support a broad construction of what qualifies for confidentiality protection under the Act. A narrow construction will limit the willingness of a physician's peers to speak candidly and to criticize when criticism is due. It is not speculative to suggest that the Quality Improvement and Peer Review activities that ERMI undertook pursuant to the Agreement will feel that chilling effect.

In *Sanderson v. Bryan,* 522 A.2d 1138 (Pa. Super. 1987), the first major Pennsylvania appellate decision construing the Act, Superior Court noted the broad consensus as to the value of peer review and the need for confidentiality for it to work effectively. The court, after conducting a nationwide survey, noted that "forty-six states have enacted some type of statutory limitation on the disclosure and use of peer review materials." *Id.* at 1140 and n.3. The number of states may

have changed somewhat over the years, but the basic point has not; if anything, there is an enhanced focus on activities that promote quality and accountability in the delivery of health care. The focus on doctor-driven review of medical care, with substantial career consequences to those providers found to have fallen short of quality performance standards, remains. The "strong policies favoring peer review protection" that Superior Court noted in 1987 in *Sanderson, Id.* at 1140, are as valid today as 30 years ago. The Court's decision in this matter should reaffirm the importance of those policies. To do so, it must reverse Superior Court and provide a broad definition of the scope of the peer review confidentiality provisions.

CONCLUSION

Based on the foregoing arguments, *amicus curiae* the American Medical Association and the Pennsylvania Medical Society respectfully request that the Court reverse the decision of the Superior Court and hold that the documents at issue are covered by the confidentiality protections of the Peer Review Protection Act.

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CERTIFICATION AS TO LENGTH OF BRIEF

I hereby certify that the Brief, as calculated by the word processing system used to prepare the Brief, is 4,222 words in length and thus complies with Rule 2135(b), Pa.R.App.P.

Robert B. Hoffman
Robert B. Hoffman

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2016, I caused two true and correct copies of the foregoing document to be served upon the following counsel of record by United States mail, postage prepaid:

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EXHIBIT A

OPINION OF SUPERIOR COURT

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

ELEANOR REGINELLI AND ORLANDO REGINELLI v. MARCELLUS BOGGS, M.D., AND MONONGAHELA VALLEY HOSPITAL, INC., AND UPMC EMERGENCY MEDICINE, INC., D/B/A EMERGENCY RESOURCE MANAGEMENT, INC. APPEAL OF: MONONGAHELA VALLEY HOSPITAL, INC.	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1584 WDA 2014

Appeal from the Order Entered August 29, 2014
In the Court of Common Pleas of Washington County
Civil Division at No(s): 2012-5172

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ELEANOR REGINELLI AND ORLANDO REGINELLI v. MARCELLUS BOGGS, M.D., AND MONONGAHELA VALLEY HOSPITAL, INC., AND UPMC EMERGENCY MEDICINE, INC., D/B/A EMERGENCY RESOURCE MANAGEMENT, INC. APPEAL OF: UPMC EMERGENCY MEDICINE, INC., AND MARCELLUS BOGGS, M.D.	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1585 WDA 2014

EXHIBIT A

Appeal from the Order Entered August 29, 2014
In the Court of Common Pleas of Washington County
Civil Division at No(s): 2012-5172

BEFORE: GANTMAN, P.J., LAZARUS, J., and MUSMANNO, J.

MEMORANDUM BY LAZARUS, J.: **FILED OCTOBER 23, 2015**

Appellants, UPMC Emergency Medicine, Inc., doing business as Emergency Resource Management, Inc. ("ERMI"), Marcellus Boggs, M.D., and Monongahela Valley Hospital, Inc. (the "Hospital"), seek review of the order directing the Hospital to produce specific documents over Appellants' claim of privilege.[1] After careful review, we affirm.

The relevant factual and procedural history of this matter is as follows:

> In January 2011, [Appellee] Eleanor Reginelli (hereinafter "Mrs. Reginelli") experienced chest pain, and was taken to [Appellant] Marcellus Boggs, M.D. (hereinafter "Dr. Boggs"), an employee of [Appellant] UPMC Emergency Medicine, Inc., d/b/a Emergency Resource Management, Inc. (hereinafter "ERMI"). In August 2012, [Appellees] brought suit, alleging that Dr. Boggs' negligence resulted in permanent damage to Mrs. Reginelli's heart. In the course of discovery, [Appellees] learned Dr. Brenda Walther – an ERMI employee who was Dr. Boggs' supervisor at the Hospital – kept performance data for the emergency department physicians at the Hospital.
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> [Appellees] requested this performance data, which included, but was not limited to, Dr. Boggs' performance file. [Appellants] objected to this discovery request, and, on June 19, 2014, this [c]ourt heard argument on [Appellees'] motion to compel. On August 29, 2014, this [c]ourt granted Plaintiffs' motion. . . .

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[1] Appellant Hospital filed an appeal and Appellants ERMI and Dr. Boggs filed a separate appeal of the order. As the issues raised in the two appeals are identical, we dispose of both appeals simultaneously in this memorandum.

> [Appellants] Boggs, the Hospital, and ERMI appealed,[2] but only with regard to Dr. Boggs' performance file.

Trial Court Opinion, 11/25/14, at 1-2.

Appellants raise the following issues on appeal:

1. Whether the August 29, 2014 [order] granting Plaintiffs' [m]otion to [c]ompel [d]iscovery[] is a collateral order appealable as of right pursuant to Pa.R.A.P. 313, when that order compels production of documents protected from production as privileged under the Pennsylvania Peer Review Protection Act[.]

2. Whether the trial court committed an error of law in issuing its August 29, 2014 [order,] as it pertained to Plaintiffs' Document Request Number 10, requesting "the complete 'performance file' for [Dr.] Boggs maintained by Dr. Walther as she described during her recently reconvened deposition" when the evidence of record shows [the] file and documents contained therein are the result of the review and evaluation by the Director of Emergency Services at Monongahela Valley Hospital, Inc.[,] in accordance with the Pennsylvania Peer Review Protection Act[,] of the quality and efficiency of health care services being performed and provided to patients by other physicians, and therefore that file is privileged and protected from discovery under that act.

Brief for Appellant, Monongahela Valley Hospital, Inc., at 5-6.

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[2] The Reginellis assert that ERMI and Dr. Boggs are not aggrieved parties and have no standing to appeal the order granting the motion to compel since it compelled production from the Hospital only. However, ERMI and Dr. Boggs take the position that they are aggrieved because Dr. Boggs' performance file was created and maintained solely on behalf of ERMI. On this basis, ERMI and Dr. Boggs assert that the performance file is privileged as peer review. Thus, ERMI and Dr. Boggs have a direct interest in the outcome. ***Cf. Harrison v. Hayes***, 870 A.2d 326, 330 (Pa. Super. 2005) (non-party entity which did not allege peer review privilege did not have standing to appeal grant of motion compelling defendant hospital to produce documents).

We begin by considering whether the order compelling production of Dr. Boggs' performance file is an appealable order. Ordinarily,

> [a]n appeal may be taken only from a final order unless otherwise permitted by statute or rule. A final order is ordinarily one which ends the litigation or disposes of the entire case; however, "[a]n appeal may be taken as of right from a collateral order of an administrative agency or lower court." Pa.R.A.P. 313(a). A collateral order is defined under Pa.R.A.P. 313(b) as "an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost."

Ben v. Schwartz, 729 A.2d 547, 550 (Pa. 1999).

Instantly, the trial court has ordered disclosure of Dr. Boggs' performance file, comprised of documents which Appellants assert are confidential pursuant to the Pennsylvania Peer Review Protection Act (the "Act").[3] Such orders are reviewable by this Court as collateral orders under Pa.R.A.P. 313. First, "the issue of privilege is separate from the merits of the dispute for purposes of the collateral order doctrine." ***Ben***, ***supra*** at 552. Secondly, if the trial court granted disclosure in error, the confidential nature of allegedly protected documents would be irreparably lost. ***See Dodson v. DeLeo***, 872 A.2d 1237 (Pa. Super. 2005) (in professional negligence action, order requiring disclosure of information hospital contended was protected from discovery pursuant to the Act was appealable

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[3] 63 P.S. §§ 425.1-425.4.

collateral order since confidential nature of documents would be lost if disclosed). Thus, the order granting the Reginellis' motion to compel discovery is an appealable collateral order.

Next, we turn to whether the trial court committed an error of law in ordering the disclosure of Dr. Boggs' performance file. Appellants assert that the performance file is protected from discovery pursuant to the Act. In our analysis of whether the performance file is protected, we note that the purpose of the Act is "to facilitate self-policing in the health care industry" and that the "medical profession itself is in the best position to police its own activities." ***Dodson***, ***supra*** at 1242.

The medical profession regulates itself via peer review, defined as "a procedure for evaluation by professional health care providers of the quality and efficiency of services ordered or performed by other professional health care providers." ***Venosh v. Henzes***, ___ A.3d ___, 2015 PA Super 169, *2 (filed August 7, 2015) (citing 63 P.S. § 425.2). Regarding peer review, the Act mandates that "proceedings and records of a review committee shall be held in confidence." 63 P.S. § 425.4. However, "under the express terms of the Act, 'peer review occurs only when one professional health care provider is evaluating another professional health care provider.'" ***Venosh***, ***supra*** at *2 (quoting ***Yocabet v. UPMC Presbyterian***, 119 A.3d 1012, 1021 (Pa. Super. 2015)).

The parties dispute whether the contents of Dr. Boggs' performance file are privileged peer review records and whether Appellants may invoke

the protection of the Act. We note that the "party invoking a privilege must initially set forth facts showing that the privilege has been properly invoked." ***Yocabet***, ***supra*** at 1019. As with other privileges, the privilege arising under the Act applies only to information that remains private. ***See Dodson***, ***supra*** at 1243 (peer review privilege could be invoked because "documents were both generated and used exclusively by [] peer review department").

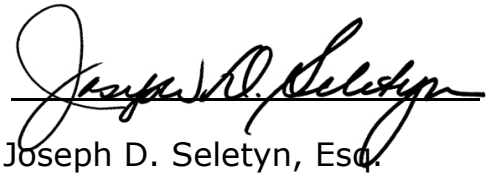
Here, the alleged peer review was conducted by Dr. Walther, an ERMI employee. Dr. Boggs' performance file was "created and maintained solely by Dr. Walther on behalf of her employer." Reply Brief of ERMI and Boggs, at 6. The Hospital therefore cannot claim that the file is the Hospital's privileged peer review, since, as the trial court noted, "it is untenable that the Hospital could claim a privilege for documents that it neither generated nor maintained." Trial Court Opinion, 11/25/14, at 2-3. Thus, any privilege that may exist regarding Dr. Boggs' performance file cannot be invoked by the Hospital.

ERMI and Dr. Boggs are also unable to claim privilege pursuant to the Act. First, ERMI, as an independent contractor staffing the Hospital's emergency room, is not an entity enumerated in the Act as being protected by peer review privilege. ***See*** 63 P.S. § 425.2; ***see also McClellan v. Health Maint. Org. of Pennsylvania***, 686 A.2d 801, 806 (Pa. 1996) (professional health care providers that may conduct privileged peer review are either direct health care practitioners or administrators of a health care

facility). Secondly, even if ERMI were considered to be an entity entitled to assert the Act's peer review privilege, Dr. Boggs' performance file did not remain exclusive. Instead, it is apparent that ERMI shared the file with the Hospital, since the Reginellis sought the file from the Hospital and the Hospital has provided it *in camera*. Thus, any privilege for Dr. Boggs' performance file that may have existed was destroyed via disclosure to the Hospital.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

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