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Recent Developments in Pennsylvania Health Law

Phil Zarone¹ and Ian Donaldson²

Health Law — Confidentiality of National Practitioner Data Bank (NPDB) reports; Peer Review Privilege. The Superior Court of Pennsylvania held that documents contained in a physician's credentials file were immune from discovery under the federal Health Care Quality Improvement Act (HCQIA) and the Pennsylvania Peer Review Protection Act (PRPA).


Elizabeth Troescher and her husband sued Dr. Marvin Grody for medical malpractice and failure to obtain informed consent.³ Troescher also sued Temple University Health System (TUHS) and several of its affiliates, alleging that they were liable for damages under the doctrine of corporate negligence for allowing a "sub par" surgeon to perform her operation.⁴ Troescher sought Dr. Grody's credentials file, but Grody and TUHS claimed the documents were privileged under the federal Health Care Quality Improvement Act (HCQIA)⁵ and the Pennsylvania Peer Review Protection Act (PRPA).⁶

The trial court ordered Grody and TUHS to disclose certain documents from Dr. Grody's credentials file, some of which were

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⁴. Troescher, 869 A.2d at 1016, 1025.
⁵. 42 U.S.C. §§ 11101-11145. HCQIA was established to restrict the ability of incompetent physicians to move state to state without disclosure of their previous performance by providing protection for physicians engaging in professional peer review activities.
⁶. 63 P.S. §§ 425.1-425.4. PRPA provides immunity to individuals who participate in peer review activities, and provides for confidentiality for certain documents used in an organization's peer review activities.
created by the National Practitioner Data Bank (NPDB)\(^7\) and some of which were generated by TUHS and its medical staff to be used in the hospital's credentialing process.\(^8\) Grody and TUHS appealed, arguing that the documents created by the NPDB were confidential under HCQIA and that the credentialing documents were confidential under the PRPA.\(^9\)

Based on a "plain reading" of the confidentiality provisions of HCQIA and the NPDB regulations, the superior court held that the documents obtained from the NPDB and maintained in Dr. Grody's credentials file were confidential and immune from discovery.\(^10\) The court rejected Troescher's argument that the discovery rules in the Pennsylvania Rules of Civil Procedure authorized her to obtain the NPDB reports, noting that the rules apply only to information that is "not privileged."\(^11\)

The superior court also held that Dr. Grody's credentialing files were privileged under the PRPA.\(^12\) The superior court noted that the PRPA was promulgated to maintain high professional standards and recognized that medical professionals are in the best position to police their own activities.\(^13\) Accordingly, the PRPA provides confidentiality for the proceedings and records of peer review committees.\(^14\)

Troescher argued that some of the credentialing documents were discoverable because their authors sent a copy to the peer review committee but kept the original for themselves.\(^15\) The court rejected this interpretation of the "original source" exception in the PRPA, finding that "[t]he proviso does not turn on whether a document itself is technically the 'original' or merely a 'copy.'"\(^16\) Rather, it turns on whether the documents are available from an 'original source,' other than the review organization itself."\(^17\) The superior court also rejected Troescher's argument that the PRPA only shields documents created by a review committee, and not by

\(^7\) See 45 C.F.R. §§ 60.01-60.14. The NPDB is a by-product of HCQIA created to collect and release certain information relating to the professional competence and conduct of physicians and other health practitioners.

\(^8\) Troescher, 869 A.2d at 1017, 1019-20.

\(^9\) Id. at 1018.

\(^10\) Id. at 1019-20.

\(^11\) Id. at 1020.

\(^12\) Id.

\(^13\) Id. at 1020-21.

\(^14\) Id.

\(^15\) Id.

\(^16\) Id. at 1022.

\(^17\) Id.
an individual, finding that “review organization,” as used in the PRPA confidentiality provision, refers to both an entity and an individual involved in peer review.\textsuperscript{18}

\textit{Troescher} is significant because it resolves an ambiguity in the PRPA. The PRPA states that the proceedings and records of a “review committee” are shielded from discovery,\textsuperscript{19} but does not define the term “review committee.” Instead, it defines the term “review organization.”\textsuperscript{20} The plaintiffs in \textit{Troescher} attempted to take advantage of this ambiguity by arguing that the PRPA applies only to review committees, and thus does not shield documents created by individuals.\textsuperscript{21} The court rejected this argument, finding that for all practical purposes, the Legislature uses the terms “committee” and “individual” interchangeably. In our view, drawing a distinction between multi-person committees and single individuals would be a distracting and meaningless exercise. It would also subvert the plain and overriding intent of the Legislature to protect peer review records.\textsuperscript{22}

\textbf{Health Law — Corporate Negligence — The Superior Court of Pennsylvania held that a patient was able to establish a prima facie case of corporate negligence against a hospital.}


In June 1995, Tammy Brodowski presented to Montgomery Hospital's emergency room complaining of numbness and partial paralysis to the right side of her body.\textsuperscript{23} The emergency room physician identified stroke and “conversion reaction disorder,” a psychiatric disorder, as potential causes of Brodowski's symptoms, and ordered that various tests be conducted.\textsuperscript{24} Although these initial tests came back negative, the emergency room physician intended for Brodowski to be admitted to the hospital's medical (as

\begin{itemize}
\item \textsuperscript{18} \textit{Id.}
\item \textsuperscript{19} 63 P.S. § 425.4.
\item \textsuperscript{20} 63 P.S. § 425.2.
\item \textsuperscript{21} \textit{Troescher}, 869 A.2d at 1022.
\item \textsuperscript{22} \textit{Id.}
\item \textsuperscript{24} \textit{Brosdowski}, 855 A.2d at 1050.
\end{itemize}
opposed to psychiatric) unit. \textsuperscript{25} However, after the emergency room physician completed his shift, an unknown individual had Brodowski admitted to the hospital's psychiatric department before a neurological consultation had been obtained and medical causes of her symptoms had been ruled out. \textsuperscript{26}

After three hours, Brodowski checked herself out of the psychiatric unit. \textsuperscript{27} Later that night, she was taken to Suburban Hospital with the same complaint of right-side weakness. \textsuperscript{28} Physicians at Suburban also recommended that she undergo psychiatric evaluation and later discharged her to a local psychiatric facility. \textsuperscript{29} While at the psychiatric facility, Brodowski began to suffer facial weakness and speech difficulties, and an MRI revealed evidence of infarcted brain tissue resulting from a stroke. \textsuperscript{30}

In May 1996, Brodowski filed a complaint alleging that Montgomery Hospital was liable for corporate negligence because, among other things, no neurological consultation had been conducted and inadequate shift-change and record-keeping procedures had caused her to be admitted to the psychiatric unit rather than the medical unit. \textsuperscript{31} Prior to trial, the court granted the hospital's motion in limine to dismiss the corporate negligence claims, apparently agreeing with the hospital that Brodowski's expert had provided no testimony to support a claim of corporate negligence. \textsuperscript{32} Brodowski appealed. \textsuperscript{33}

The Pennsylvania Superior Court began by noting that Thompson v. Nason Hospital established that a hospital can be found directly liable for corporate negligence if it fails any of the following four duties: (1) a duty to use reasonable care in the maintenance of safe and adequate facilities and equipment; (2) a duty to select and retain only competent physicians; (3) a duty to oversee all persons who practice medicine within its walls as to patient care; and (4) a duty to formulate, adopt and enforce adequate rules

\textsuperscript{25} Id. at 1051.
\textsuperscript{26} Id. at 1050-52. An expert at trial described conversion reaction disorder as a psychiatric diagnosis "where a person has a sudden onset of either a motor symptom, their arm doesn't move, or they're weak on one side... and they are usually either suddenly numb on one whole side of their body or numb from their foot up... ."
\textsuperscript{27} Id. at 1052.
\textsuperscript{28} Id. at 1052-53.
\textsuperscript{29} Brodowski, 885 A.2d at 1053.
\textsuperscript{30} Id.
\textsuperscript{31} Id.
\textsuperscript{32} Id. at 1053-54.
\textsuperscript{33} Id. at 1054.
and policies to ensure quality care for patients. A corporate negligence claim is based on the negligent acts of the institution itself, and it does not require the negligence of a doctor or other third-party to establish a cause of action.

On appeal, Montgomery Hospital argued that Brodowski's expert had only provided testimony that individual physicians had acted negligently, and had not provided evidence of negligence on the part of the hospital itself. Brodowski countered that the expert's testimony supported her claims that the hospital had failed to enforce its rules and policies and had failed "to oversee and supervise its physicians with respect to triage of patients from the emergency room to hospital admission, and transfer of patients at shift changes."

The superior court agreed with Brodowski, noting:

What occurred at Montgomery could be described as a chain of missteps whereby each physician who examined Plaintiff recognized a differential diagnosis of [stroke] versus conversion reaction disorder and, still, through an unknown individual . . . Plaintiff was admitted to the psychiatric unit with an outstanding physical diagnosis of [stroke] and no neurology consult. [Two hospital representatives] agreed that physical causes for symptoms would have to first be ruled out before admission to the psychiatric unit. Yet, this did not occur, thereby providing Plaintiff with evidence of Montgomery's failure to oversee or supervise.

Brodowski is significant because it makes clear that hospitals must do more than merely adopt policies to promote quality care for patients. Hospitals can be liable if they fail to ensure that physicians comply with such policies. Furthermore, the opinion puts hospitals on notice that the corporate negligence doctrine, as defined by the Supreme Court of Pennsylvania in Thompson, is alive and well.

35. Brodowski, 885 A.2d at 1056.
36. Id.
37. Id. at 1058-59.
38. Id. at 1059.
39. Id. at 1058-59.
40. Id.
**Health Law — Medical Monitoring — The Superior Court of Pennsylvania held that the members of a class of patients who alleged they were intentionally misled by a hospital issuing Pap smear reports failed to state a viable cause of action for medical monitoring.**


Female patients brought a class action lawsuit against Magee-Womens Hospital on behalf of a proposed class of women whose Pap smears were processed from 1995 to the present. The class alleged that Magee intentionally deceived its patients by issuing computer-generated Pap smear reports that were reviewed by cytotechnologists but were affixed with a reproduced signature or attestation of a pathologist. The class claimed that the hospital caused them harm by allowing cancer and other serious conditions to go undetected as a result of tests that may have been read incorrectly. The class sought damages in the form of the cost of the medical monitoring of their conditions to assure that any previous errors were identified and appropriate follow-up care was received. In January 2004, Magee filed objections to the complaint, arguing that the patients bringing the class action suit lacked standing to maintain a cause of action and that they failed to state a claim upon which relief may be granted. The trial court dismissed the patients’ complaint with prejudice, finding that they failed to demonstrate that they suffered any legally cognizable injury other than the “fear of being at an increased rate of having a serious medical injury.”

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41. Walter v. Magee Womens Hosp. of UPMC Health Sys., 876 A.2d 400, 402 (Pa. Super. Ct. 2005), aff’d 906 A.2d 1194 (Pa. 2006) (per curium order). The case was one in a series of lawsuits brought against the hospital in relation to its practice of allowing Pap smear reports to be reviewed by cytotechnologists, instead of doctors. The other lawsuits included that of two former Magee pathologists who claimed Magee was deceptively affixing physicians’ signatures to its Pap smear reports, and another by a patient who alleged the hospital’s laboratory failed to identify her cervical cancer because her Pap smear reports were inadequately reviewed. See Steve Twedt, Woman Sues Over Pap Smear Test She Claims False Results Caused Complications, PITT. POST-GAZETTE, Feb. 6, 2004, at B12.


43. Walter, 876 A.2d at 402.

44. Id. at 403.

45. Id.

46. Id. at 404.
The Superior Court of Pennsylvania held that for plaintiffs to prevail on a medical monitoring claim, they must prove that they were exposed to greater than normal background levels of a proven hazardous substance, that this exposure was caused by the defendant’s negligence, and that the exposure was the proximate cause of a significantly increased risk of contracting a serious, latent disease. The patients claimed that their exposure to unsafe and dangerous medical care in the form of “inherently unreliable” testing was equivalent to exposure to a hazardous substance. The superior court rejected this analogy, stating, “[T]here was no exposure or event caused by the Defendant’s negligence that resulted in a significantly greater risk that Plaintiffs will suffer from a serious medical condition.” Furthermore, the court held that the patients suffered no greater increased risk of cancer by Magee’s actions, and that there was no allegation that any of the class members actually had any condition that would have been detected if a physician would have reviewed their Pap smear reports. Therefore, the superior court affirmed the trial court’s decision to dismiss the patients’ claim with prejudice. On December 13, 2005, the Supreme Court of Pennsylvania agreed to hear an appeal on whether the superior court erred in finding that the patients failed to state a cause of action and whether the class of patients suffered legal injury sufficient to confer standing.

Walter is significant because it demonstrates the superior court’s reluctance to extend the cause of action for medical monitoring claims as plaintiffs had requested. Regardless of how this case is ultimately decided, it will most likely fuel the ongoing debate over malpractice liability and insurance costs.

47. Id. at 405.
48. Id.
49. Walter, 876 A.2d at 405.
50. Id. at 406.
52. In a related action, the hospital was cited in October 2005 by the Department of Health for allowing unauthorized staff to sign Pap smear reports and for not maintaining quality assessment records. See Steve Twedt, Glitch in Magee-Womens’ Computer System Caused Pap Smear Errors, State Says, PITT. POST-GAZETTE, Oct. 4, 2005, at B5. A spokesman for the department stated that the department believed the error was due to a glitch in Magee’s computer system and that it did not find any patient care issues associated with the error. Id.
Health Law — Peer Review Protection Act — The Superior Court of Pennsylvania held that quality management reports generated and used exclusively by a hospital for peer review purposes were privileged from discovery under the Pennsylvania Peer Review Protection Act (PRPA).


In April 2001, Verna Dodson underwent a vertical banded gastroplasty that was performed by Dr. Joanna DeLeo. Dodson brought a professional negligence claim against Dr. DeLeo and Pinnacle Health Hospital, alleging the procedure and subsequent post-operative care were below the standard of care.

Dodson filed a Motion to Compel Answers and Production of Documents. Specifically, Dodson sought several “Department of Surgery Quality Management Credentialing Report[s].” The reports in question were “specific to Dr. DeLeo, and detail[ed] all of Dr. DeLeo's cases which were reviewed by the Quality Assurance Committee during the [applicable] calendar year, as well as any action taken by the Quality Assurance Committee.” The reports were generated by the Performance Improvement Department. As the court noted, “[t]he documents chart problems and potential problems with the doctor's performance. Each of these problems and potential problems is rated on a scale of one to five, with one indicating “No Problem” and five indicating “Deviation in patient management and adverse effects.”

DeLeo and Pinnacle asserted that the documents were protected from discovery under the Pennsylvania Peer Review Protection Act (PRPA). The PRPA provides immunity to individuals who participate in peer review activities and a privilege from discovery for documents used in an organization’s peer review activities.

The trial court granted Dodson’s Motion to Compel Documents in part, finding that the documents were “merely raw data” that had been compiled and then submitted to a peer review commit-

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54. *Id.* at 1239.
55. *Id.*
56. *Id.* at 1240.
57. *Id.*
58. *Id.* at 1240-41.
60. *Id.*
61. 63 P.S. §§ 425.1-425.4.
DeLeo and Pinnacle appealed, arguing that the documents were used exclusively for purposes of physician credentialing and were protected under the PRPA.

The Pennsylvania Superior Court noted that the PRPA was enacted to facilitate the self-policing of health care providers. Therefore, the legitimate records of a peer review committee are privileged under the PRPA. However, general business records are not privileged and do not become privileged merely because they are reviewed by a peer review committee.

The superior court held that the documents were both created and used exclusively by the hospital for peer review purposes and were therefore privileged under the PRPA. A review of the documents showed that they recorded information related to a physician's performance, which was clearly related to peer review activities. Furthermore, the superior court held that the documents did not lose their privileged status simply because some of the information contained therein was available from other non-privileged sources.

Dodson sheds light on the extent to which information will be viewed as part of the peer review process, and thus protected from discovery, or instead be viewed as a "business record" that is not protected from discovery. It also makes clear that information generated by a peer review committee is not discoverable simply because some of that information is available from other sources.

62. Dodson, 872 A.2d at 1243.
63. Id. at 1240. The documents in question were created by the hospital's Performance Improvement Department and were used exclusively within the physician's credentialing file for purposes of quality assurance.
64. Id. at 1242.
65. Id. at 1243.
66. Id.
67. Id.
68. Dodson, 872 A.2d at 1243.
69. Id. at 1244.
In 2004, Mississippi tobacco litigator, Richard Scruggs, organized the filing of lawsuits against hundreds of nonprofit hospitals on behalf of uninsured patients in federal courts.70 In 2005, most of these actions were dismissed, including complaints brought against two hospitals in Pennsylvania.71

In these cases,72 the uninsured patients alleged that the nonprofit hospitals, as tax-exempt charitable entities under the Internal Revenue Code, had an express or implied contract with the United States government and the Commonwealth of Pennsylvania to provide affordable medical care to all patients.73 Based on these allegations, the uninsured patients asserted two primary claims: (1) they suffered harm as a third-party beneficiary to a government contract, and (2) the hospitals were in breach of a public charitable trust.74

Under the third-party beneficiary claim, the uninsured patients first argued that the hospitals agreed to meet a number of specific obligations, including providing charity care, in exchange for receiving tax-exempt status.75 The uninsured patients, who alleged that they were charged excessive medical fees and were subject to “humiliating” debt collection tactics, claimed that they did not receive the intended benefits of this agreement due to the hospitals’
breach.\textsuperscript{76} However, the district court dismissed the claim, finding that the Internal Revenue Code (IRC) did not create a private cause of action without the intervention of the Secretary of the Treasury or the United States Attorney General.\textsuperscript{77} Furthermore, the court found that even if such an action could be brought, the IRC did not create a contract between the government and the hospitals.\textsuperscript{78} Quoting the United States Supreme Court, the district court stated:

\[\text{Absent some clear indication that the legislature intends to bind itself contractually, the presumption is that a law is not intended to create private contractual or vested rights ... the language of IRC 501 does not indicate that Congress intended to create contractual rights for United States citizens.}\textsuperscript{79}

The uninsured patients also argued that the hospitals created a public charitable trust to provide mutually affordable medical care to uninsured patients by accepting tax exemption, and that their actions breached their trust obligations.\textsuperscript{80} The court again held that the IRC did not create a private cause of action.\textsuperscript{81} Furthermore, under the Restatement (Second) of Trusts, the court held that a party must manifest an intent to form a charitable trust.\textsuperscript{82} Here, the uninsured patients showed no intent on the part of the hospitals.\textsuperscript{83} Therefore, because there was no legal basis for the existence of a contract under 501(c)(3), and because there was no breach of a public charitable trust, the district court dismissed the two complaints.\textsuperscript{84}

Like the complaints filed in the Eastern District of Pennsylvania, most of the suits filed on behalf of the uninsured in other jurisdictions have also been dismissed.\textsuperscript{85} Nevertheless, despite these failures, the Scruggs-led litigation has pushed on at the

\textsuperscript{76} Id.
\textsuperscript{77} Id. at *3.
\textsuperscript{78} Id.
\textsuperscript{79} Feliciano, 2005 WL 2397047, at *3.
\textsuperscript{80} Id. at *4.
\textsuperscript{81} Id. at *5.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Feliciano, 2005 WL 2397047, at *7.
state level with hopes for greater success.\textsuperscript{86} As of November 2005, lawyers for class-action plaintiffs had filed over 60 state lawsuits, with one hospital in Oregon choosing to enter a settlement agreement.\textsuperscript{87}

Regardless of their success, this series of lawsuits has pushed the issue of hospital billing practices to the forefront of media coverage and may also serve as a signal to hospitals that they could expect closer scrutiny as the number of uninsured Americans continues to grow.

\textsuperscript{86} Id. (stating that "[t]he change in strategy follows about a dozen dismissals of the more than 50 suits filed in federal courts by the Scruggs consortium. . . .")

\textsuperscript{87} Laura B. Benko, The First of Many? Ore. System Settles Scruggs' Charity-Care Lawsuit, MODERN HEALTHCARE, Nov. 7, 2005, at 14. Providence Health System agreed to a settlement with a Scruggs'-affiliated Seattle law firm after deciding it would be costlier to litigate the matter than to settle. However, the article also notes that a similar settlement for $150 million with North Mississippi Health Services, Tupelo, Mississippi, which was proposed in federal court, "unraveled" in April 2005.