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DAVID S. WALKER and DANIELLE L. WALKER, Parents and Natural Guardians of BLAKE WALKER, a minor, and DAVID S. WALKER and DANIELLE L. WALKER, Individually, Plaintiffs, v. LAWRENCE E. ROGINA, M.D., ELENA KEHOE, CNM, MARTY BERNER, CNM, GAIL F. CHAPIN, CNM, POTOMAC OB/GYN ASSOCIATES, SUZANNE SHUCK SHAN CHAN, Executrix of Estate of Daniel M. Chan, M.D., Deceased, ROBERTO D. NAVARRO, M.D., and WAYNESBORO HOSPITAL, Defendants, Court of Common Pleas, 39th Judicial District, Franklin County Branch, Civil Action — Law, 1995–523

*Medical Malpractice — Discovery — Peer Review Protection Act, 63 Pa.C.S.A. section 425.1 et seq.*

1. The purpose of the Peer Review Protection Act is to encourage members of the medical community to engage in the candid review of the quality of care administered to patients by protecting the confidentiality of the proceedings and records of peer review committees.
2. Although the Act protects information prepared and used solely for peer review purposes, discovery of original sources is permitted even if those sources are discussed during the course of peer review.
3. “Original sources,” though undefined in the Act, has been interpreted to mean documents routinely prepared by medical staff in the course of patient care.
4. A study of hospital services is immune from discovery where it is prepared solely for the purpose of improving patient care in the context of peer review proceedings.
5. Although interviews and documents which themselves may be original sources are utilized during the study, the resulting report and/or compilation of original sources containing findings and recommendations is not in itself discoverable.
6. “Incident reports” prepared contemporaneously with key events underlying the malpractice action cannot be shielded from discovery simply because a hospital’s broad, pre-set policy declares that all reports are prepared solely for peer review purposes and are kept separate from patients’ charts.

**Appearances:**

*Edward R. Kennett, Esq.*, Counsel for Plaintiffs

*Joseph A. Ricci, Esq.*, Counsel for Defendant Waynesboro Hospital

**OPINION**

Herman, J., May 18, 2001

This is a medical malpractice action filed by the plaintiffs against several defendants alleging negligence in connection with the birth of the minor Blake Walker on November 30, 1993. The plaintiffs filed a motion to compel defendant Waynesboro Hospital to provide responses to the following requests for production of documents:

#1: A copy of the report of the investigation of the Anesthesia Department at Waynesboro Hospital titled "The Problems of the Anesthesia Department," referred to by Daniel M. Chan, M.D., in his suicide note of September 11, 1994...

#2: The Incident Report(s) pertaining to the labor and delivery of [Blake's mother] Danielle Walker on November 30, 1993.

The Hospital objected to these requests, asserting the information sought is immune from discovery under the Peer Review Protection Act, 63 Pa.C.S.A. section 425.1 et seq.<sup>1</sup> The Hospital also pointed out the correct title of the anesthesia department report is "Study of Anesthesia Services."

The purpose of the Peer Review Protection Act is to encourage members of the medical community to engage in candid review of the quality of care administered to patients by protecting the confidentiality of the proceedings and records of peer review committees. *McClellan v. Health Maintenance Organization of Pennsylvania*, 686 A.2d 801 (Pa. 1996); *Sanderson v. Frank S. Bryan, M.D., Ltd.*, 522 A.2d 1138 (Pa.Super. 1987); *Steel v. Weisberg*, 500 A.2d 428 (Pa.Super. 1985); *Thompson v. Nason Hospital*, 535 A.2d 1177 (Pa.Super. 1988), affirmed, 527 A.2d 703 (Pa. 1991). To that end, section 425.4 entitled "Confidentiality of review organization's records" provides as follows:

The proceedings and records of a review committee shall be held in confidence and shall not be subject to discovery or introduction into evidence in any civil action against a professional health care provider arising out of the matters which are the subject of evaluation and review by such committee and no person who was in attendance at a meeting of such committee shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings of such committee or as to any findings, recommendations, evaluations, opinions or other actions of such committee

<sup>1</sup> This motion to compel was previously before the court and was the subject of an Opinion and Order issued February 7, 2001. In that Opinion, the court held the record had not been sufficiently developed to allow a ruling about whether the discovery sought is entitled to protection under the Act. We ordered the Hospital to complete the record in that regard, and allowed for the plaintiffs to renew the motion if they continued to believe the documents are discoverable. The Hospital filed the affidavit of its quality review manager on February 26th and the plaintiffs filed their renewed motion to compel on March 1, 2001. The court also has briefs on the matter.

The original motion also sought a response to request #3: "Incident Reports pertaining to the services provided by the Anesthesiology Department at Waynesboro Hospital in the time frame November 30, 1988 — November 30, 1993, inclusive." The court denied the motion as to that request for its over-breadness without prejudice to the plaintiffs' right to amend the motion once the Hospital rounded out the record. The Hospital provided a separate affidavit as to this information, but the plaintiffs have not renewed their motion as to request #3 and therefore the issue of whether that information is protected under the Act is not currently before the court.

or any members thereof: **Provided, however, That information, documents or records otherwise available from original sources are not to be construed as immune from discovery or use in any civil action merely because they were presented during proceedings of such committee**, nor should any person who testifies before such committee or who is a member of such committee be prevented from testifying as to matters within his knowledge, but the said witness cannot be asked about his testimony before such a committee or opinions formed by him as a result of said committee hearings.

[Emphasis supplied.] "Peer review" is defined in section 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...

This section defines "review organization" as follows:

**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 purpose 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.] As section 425.4 indicates, a document prepared solely for purposes of peer review is not discoverable. The Act does allow discovery of "information, documents or records which are otherwise available from original sources" and such materials are not immune from discovery merely because they were also discussed during peer review proceedings. *Short v. Pavlides*, 33 D.&C. 3d 628 (1997); *Hanzsek v. McDonough*, 44 D.&C. 3d 639 (1987)(C.P. Allegheny County, Wettick, J.). Unfortunately, the Act does not define original sources and there is a surprising lack of appellate authority on this issue. With this background in mind, we turn to the plaintiffs' discovery requests.

#### Request #1: Study of Anesthesia Services

Based on the affidavit of the Hospital's quality review manager Deborah Davis, which was filed February 26, 2001, the study and follow-up report was an evaluation of the quality and efficiency of services available within the anesthesia department, was prepared solely for peer review purposes and as such is protected from discovery:

The study was undertaken at the request of the Hospital Leadership Conference to obtain an independent evaluation of both the quality of care provided in the anesthesia department and issues concerning utilization review. The study was conducted under the direction of Daniel R. Sullivan, M.D., J.D., who independently interviewed administrators, physicians and ancillary personnel as well as reviewed relevant documents. Following the quality study, a report entitled Study of Anesthesiology Services was prepared to document the conclusions of the examination for evaluation by the Leadership Conference Committee.... The contents of the report were made available only to the Members of the Hospital Leadership Conference and the members of the Anesthesia Department at the time the report was drafted. The Hospital Leadership Conference is a committee formed by Waynesboro Hospital which is used as a forum for interaction and discussion

amongst its members regarding issues which significantly impact on the quality of care or services deliverable by the Hospital. The results of the study were then utilized to improve the quality and efficiency of anesthesia services provided at Waynesboro Hospital.

The report which flowed from the study was prepared on March 24, 1994, approximately four months after Blake Walker's birth. The Hospital maintains the report's confidentiality by keeping the original locked in the office of the chief operating officer, a member of the quality assessment committee. The only copies known to exist are four, one to each member of the anesthesiology department as of March 24, 1994, and the fourth which was later provided to Hospital's counsel in response to plaintiffs' motion to compel. Davis does not know where the three doctors keep their copies.

It has been held that an assessment of hospital staff and procedures by an independent third party constitutes peer review if it is undertaken for the sole purpose of improving the quality of patient care. In this respect it makes no difference whether the third party is an individual, committee or organization. Section 425.2. For example, a task force study commissioned by a hospital which entails interviews of its medical staff, examination of hospital documents and issuance of a report containing findings and recommendations regarding ways to improve patient care is immune from discovery because such a task force constitutes a peer review committee or organization. *Cytryn v. Cardiovascular Associates*, 15 D.&C. 4th 376 (1992)(C.P. Franklin County, Kaye, J.). Also considered a committee engaged in peer review is the Joint Commission on Accreditation of Hospitals, even though that Commission is not specifically enumerated by name in section 425.2. *O'Neill v. McKeesport Hospital*, 48 D.&C. 3d 115 (1987)(C.P. Allegheny County, Wettick, J.). What matters is that the purpose of the study or review is to evaluate the hospital's strengths and weaknesses in its delivery of care to patients with an eye toward improving services.

The plaintiffs make several challenges to the Hospital's claim that the report is immune from discovery. First the plaintiffs challenge the Hospital's representation that the Leadership Conference Committee is a peer review organization. However, according to Davis's sworn affidavit, that Committee is "used as a forum for interaction and discussion amongst its members" about issues affecting patient services. Given the Act's broad definition of a peer review organization and the absence of contrary evidence in the record, we accept the representation that the Leadership Conference Committee is an entity dedicated to evaluating the procedures and activities

of the anesthesiology department in order to improve patient care and that this study was undertaken solely for that purpose.

The plaintiffs next argue that *Cytryn* does not support the Hospital's claim of the report's immunity. The plaintiff in *Cytryn* filed an action for declaratory judgment pertaining to payment allegedly due him by the defendant under an employment contract. The plaintiff subpoenaed certain documents from a third party, the Chambersburg Hospital, specifically a task force study commissioned and conducted by the hospital regarding whether community health care needs were being met. The court held the study's results, aside from being undiscoverable trade secrets, constituted peer review and as such were immune from disclosure because the study was still in progress and the participating physicians had been assured their responses would be kept confidential.

The plaintiffs argue *Cytryn* does not support the Hospital because that court did not address whether the task force study or the documents it used were "original sources" under section 425.4. Dr. Sullivan's report, according to the plaintiffs, is simply a summary of interviews he conducted and documents he examined which are themselves original sources open to discovery. Although "original sources" is not defined in the Act, it has been interpreted to mean documents routinely prepared by nurses or other medical support staff contemporaneously with the delivery of care to patients. Insofar as such documents are not prepared solely for peer review purposes, they would be discoverable. *Atkins v. Pottstown Memorial Medical Center*, 634 A.2d 258 (Pa.Super. 1993); *Hanzsek, Crawford v. Nedurian*, 20 D.&C. 4th 419 (1994).

Although it is true that Davis's affidavit does not specify what documents Dr. Sullivan examined as part of his study, a compilation of original source documents by a review organization is not discoverable so long as the generated report is not randomly distributed and is kept confidential. Insofar as Dr. Sullivan's report contains evaluations, findings, opinions and recommendations concerning the quality of patient care at the Hospital, the fact that some of the documents he consulted during the report's preparation may be original sources does not mean the plaintiffs are entitled to the report itself:

[O]nly the findings and conclusions of the peer review committee are protected. Any documents and records of the treatment which the peer review committee reviewed continues to be subject to discovery. A peer review committee obtains the facts on which to render opinions only by reviewing existing records and possibly talking to

persons who provided or observed the medical treatment. The same documents and witnesses are available to plaintiff's counsel. **The peer review privilege does not in any way interfere with the ability of plaintiff's counsel to obtain the same information that was made available to the peer review committee...This privilege — unlike other privileges which bar the discovery of factual information — only precludes plaintiff's counsel from basing his or her case on the opinions of the committee members.** Section 4 of the Peer Review Protection Act protects only the facts known or opinions held by an expert who was retained to conduct a retrospective review of medical care and treatment previously provided...

*O'Neill*, supra at 124–125. [Emphasis supplied.] Plaintiffs Danielle and Blake Walker still have access to their own medical records as well as any other relevant records prepared and maintained in the ordinary course of the Hospital's business. *Plappert v. Kelley*, 21 D.&C. 4th 313 (1993). Any individual possessing first-hand knowledge of the events at issue can be compelled to testify. In addition, the plaintiffs have the right to retain their own expert witness to review the facts of the case and render an opinion about the quality of care which they received. *Sanderson*, supra at 1143. For the foregoing reasons, the motion to compel will be denied as to the anesthesiology department study.

Request #2: Incident report(s) pertaining to the labor and delivery of Danielle Walker on November 30, 1993.

According to Deborah Davis's affidavit, five incident reports were prepared on November 30, 1993, by registered nurse Catherine McAfee and doctor Lawrence Rogina concerning the events surrounding Blake Walker's birth — two at 1825 hours (6:25 p.m.), one at 1854 hours (6:54 p.m.), one at 1900 hours (7:00 p.m.) and one at 1902 hours (7:02 p.m.). The court directed the Hospital to state the purpose for which these reports were prepared and/or the circumstances under which they were prepared. The Hospital responded as follows:

The Waynesboro Hospital Risk Management Policy, Number 107, provides that the Hospital's incident reporting policy was prepared for the following purpose: "In order to enhance the quality of patient care and to assist in providing a safe environment for patient care, the hospital

provides a means for discovering and reporting all unusual occurrences within the institution. This is accomplished through a well developed incident reporting procedure." The Policy further notes that reports are to be provided to the risk manager who, along with the Quality Assessment committee, "will use the information provided in the report to institute corrective action and to develop staff education as a long range benefit." Additionally, the Policy provides that once the reports are prepared, they are to remain separate from the patient's chart and that copies are not to be made from the original...The purpose...is to improve the quality and efficiency of medical services provided at the Waynesboro Hospital.

(Paragraphs #4 and #9.) The affidavit also indicates that all the original incident reports are kept in the Hospital's quality review department, with one copy in the possession of the Hospital's counsel and that access is restricted thereto. We note here that paragraphs #4 and #9 do not explain the **specific** circumstances under which the subject incident reports were prepared. After careful review, we find the incident reports are discoverable because we cannot accept the Hospital's contention that they were prepared **solely** for peer review purposes.

According to the averments in the complaint, various events took place during the labor and delivery of Blake Walker on November 30, 1993. Key moments are alleged to have occurred during that labor and delivery at **6:25 p.m.**, **6:54 p.m.**, and **7:02 p.m.**<sup>2</sup> It is clear from paragraph (b)(3) of Davis's affidavit that four of the five incident reports were prepared simultaneously with the birthing events which the plaintiffs describe in the complaint.

As discussed above, "original sources" has been construed to refer to documents prepared in the ordinary course of a hospital's business, including incident reports prepared by nurses or other medical support staff whenever an unusual event occurs during the course of patient care. *Hanzsek; Crawford*. The court cannot accept the proposition that the reports at issue, four of which were prepared by attending medical staff contemporaneously with the birthing events as they unfolded, were prepared **solely** for peer review purposes. It is disingenuous for the Hospital to attempt to insulate all incident reports from discovery simply by setting a broad policy under which **all** such reports are classified *a priori* as being prepared

<sup>2</sup> Paragraphs 43, 44, 55 and 56, complaint filed November 30, 1995.

for use in later peer review proceedings, regardless of the actual, immediate circumstances of their preparation. One wonders how a document prepared in the midst of an urgent situation such as an emergency medical procedure can legitimately be called a "report" under the normal usage of that word.<sup>3</sup> Nor can the Hospital legitimately immunize these "reports" from being viewed as original sources simply by keeping them separate from a patient's chart, regardless of the pressing circumstances under which they were prepared. *Plappert, Johnson v. Tray*, vol. 17 Franklin County Legal Journal, p. 118 (C.P. Fulton County, October 4, 1999, Walker, J.); see also *Congdon v. Lancaster General Hospital*, 8 D.&C. 4th 596 (1990).

The Hospital argues the plaintiffs have already deposed the persons who prepared the incident reports and had ample opportunity to question them about what they witnessed. The Hospital therefore maintains that those persons, not the "reports" they authored, are the original sources contemplated by the Act. While we do not deny that those individuals constitute original sources, their depositions on May 22, 1997 (Dr. Rogina) and August 4, 1997 (Catherine McAfee, R.N.) were taken some time after the November 30, 1993, birth. The reports, prepared at the exact same time as the birth, could very well contain additional or more accurate information relevant to the plaintiffs' negligence claims.

It was the Hospital's burden as the party asserting the privilege to show that privilege exists and is applicable. *Commonwealth v. Stewart*, 690 A.2d 195 (Pa. 1997). We are not satisfied they have done so as to the incident reports. The plaintiffs' motion to compel production of those reports will therefore be granted.

#### ORDER OF COURT

Now this 18th day of May, 2001, plaintiffs' motion to compel defendant Waynesboro Hospital to produce documents is granted in part and denied in part; the motion is denied as to request #1, and granted as to request #2. Defendant Waynesboro Hospital is directed to provide plaintiffs' counsel with the incident reports involving Danielle Walker from November 30, 1993, no later than 10 days of receipt of this Order.

<sup>3</sup> A report is defined as "1. A usually **detailed** account. 2. A **formal** account of the proceedings or transactions of a group." Webster's II New Riverside University Dictionary, 1984, p. 997. [Emphasis supplied.]