SUPERIOR COURT
OF THE
STATE OF DELAWARE

JAN R. JURDEN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Date Decided: October 19, 2005

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RE: Leroy D. Cain v. Robert C. Villare, M.D. and Beebe Medical Center, Inc.
C.A. No. 04C-01-179-JRJ

Upon Plaintiff's Motion to Compel: GRANTED IN PART; DENIED IN PART

Dear Counsel:

In follow-up to the hearing on October 14, 2005, I reviewed the peer review statute (24 Del.C. § 1768), the relevant case law and the parties' written submissions. The issue before the Court stems from the Plaintiff's attempt to take discovery on the issue of whether Beebe Hospital negligently granted privileges to Dr. Villare to perform certain complicated esophageal surgeries on the Plaintiff.

Discovery taken by the Plaintiff so far suggests: (1) before the surgeries, when the Plaintiff asked Dr. Villare whether Beebe could handle the proposed surgery, Dr. Villare told the Plaintiff the surgery was routine and could be performed at Beebe; (2) Dr. Villare had never performed this particular operation at Beebe prior to operating on the Plaintiff; (3) Dr. Villare had only performed

this operation "a few times" in his career; (4) the surgical nurse assistants involved had little or no prior experience assisting in such an operation; (5) only three myotomies (including Plaintiff's) were performed at Beebe in the last eight years; and (6) the Beebe "Delineation of Privileges" form, in which Dr. Villare requested certain surgical privileges at Beebe, contains no information in the columns which request the physician to state how many times the physician has performed the particular surgical procedure in the last 25 years. Based on this discovery, one of the Plaintiff's experts has opined that Beebe should not have allowed this surgery to be performed on the Plaintiff.

24 Del. C. § 1768(a) provides that medical personnel who participate in professional standards peer review:

> [S]hall not be subject to, and shall be immune from, claim, suit, liability, damages or any other recourse, civil or criminal, arising from any act or proceeding, decision or determination undertaken or performed or recommendation made so long as such member acted in good faith and without malice in carrying out the responsibilities, authority, duties, powers and privileges of the offices conferred by law... or duly adopted rules and regulations of the aforementioned committees, organizations and hospitals, good faith being presumed until proven otherwise, with malice required to be shown by the complainant.

Additionally, 24 Del. C. § 1768(b) states:

> [R]ecords and proceedings of any such committees or organizations as described in subsection (a)...shall be confidential and shall be used by such committees or organizations and the members thereof only in the exercise of the proper functions of the committee or organization and shall not be public records and shall not be available for court subpoena or subject to discovery; and no person in attendance at a meeting of any such committee or organization shall be required to testify as to what transpired thereat.

Connolly v. Labowitz[1] is instructive on the scope of the peer review statute. As the Court noted in Connolly:

[1] Connolly v. Labowitz, 1984 WL 14132 (Del. Super. Ct.).

> Privileges are repugnant to the adversarial judicial system in the United States and are therefore narrowly construed. The need to develop relevant facts is fundamental in an adversarial system. The integrity of our system relies on full disclosure of all relevant facts with the framework of the Rules of Evidence.[2]

In Dworkin v. St. Francis Hospital, Inc.,[3] the Court explained the public policy underlying the Legislature's enactment of the peer review statute:

> [T]he protective immunity extends to such information as is necessary to further the Legislature's purpose in enacting the statute. That purpose–to prevent the chilling effect caused by the prospect of public disclosure of statements made to, or information prepared for and used by, medical review committees in the accomplishment of their assigned tasks- does not include insulating the decisions of such committees from outside scrutiny. Scrutiny is indeed necessary to ensure that the committees act in accordance with their powers and in a manner consistent with principles of fairness. Inquiries dealing with the existence of an investigation, the steps taken to generate evidence from which to render a decision, and the evidence on which such decisions are based provide information that is essential toward this end. Until the Legislature indicates otherwise, the Court will not shield medical review committees from challenges to the appropriateness of their actions.[4]

The Court in Dworkin, expressly following the guidelines set forth in Connolly, held:

> [T]his Court reads the privilege statute to protect records prepared for the exclusive use of the Committee, transcripts of Committee meetings, and testimony actually received by the Committee. In addition, "no person in attendance at a meeting of any such committee or organization shall be required to testify as to what transpired thereat."[5]

The Court finds in this case that the Plaintiff is entitled to depose knowledgeable individuals (including Dr. Marvel and Dr. Fried) about the process generally followed with respect to applications for surgical privileges (the "Delineation of Privileges" application form), including but

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[2] Id. at *1 (citations omitted).

[3] Dworkin v. St. Francis Hospital, Inc., 517 A.2d 302 (Del. Super. Ct. 1986).

[4] Id. at 307.

[5] Id. (citations omitted).

not limited to, (1) as a general matter, whether a physician is requested or required to complete the columns requesting information about the number of times the physician has performed the particular procedure for which he is requesting privileges, (2) as a general matter, what information the physician recommending the grant of the privilege typically or usually is supplied, requests, and/or considers before initialing the form in the column titled, "Privilege Recommended," and (3) as a general matter, what inquiry, if any, the recommending physician typically or usually makes before initialing the "Delineation of Privileges" form.

At this point, the Court will not grant the Plaintiff's request to take discovery on Beebe's specific actions or inactions with regard to Dr. Villare's credentialing. However, the Court expects Beebe will, if it has not already, produce all documents that have been used by or published to any person outside the credentialing committee and therefore are not subject to the protections of 24 Del. C. § 1768.[6]

Understanding that this opinion does not address every conceivable question that the Plaintiff might pose on the discoverable topics noted above, the Court will be available by telephone during the depositions prompted by this opinion. Please provide me with the dates and times of the depositions as soon possible.

IT IS SO ORDERED.

Very truly yours,

Jan R. Jurden
Judge

JRJ/mls

Original to Prothonotary
cc: Samantha Kabi, Esq.

[6]Publication of documents to persons outside the credentialing committee waives the privilege making such documents discoverable. See Connolly v. Labowitz, 1984 WL 14132, at *1, 3-4 (Del. Super. Ct.).