

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
November 30, 2022 Session

**FILED**  
10/04/2023  
Clerk of the  
Appellate Courts

**PAYTON CASTILLO v. DAVID LLOYD REX, M.D., ET AL.**

**Appeal from the Circuit Court for Hamilton County  
No. 20C1270      Ward Jeffrey Hollingsworth, Judge**

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**No. E2022-00322-COA-R9-CV**

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The plaintiff filed this healthcare liability action against several healthcare providers following the death of her husband. We granted this interlocutory appeal in which the defendants request review of the trial court’s denial of their motion for a protective order to prohibit further inquiry into a meeting held between the defendant hospital and the decedent’s family. We affirm the trial court.

**Tenn. R. App. P. 9 Interlocutory Appeal; Judgment of the Circuit Court  
Affirmed; Case Remanded**

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which THOMAS R. FRIERSON, II and KRISTI M. DAVIS, JJ., joined.

H. Dean Clements and Brie Allaman Stewart, Chattanooga, Tennessee, for the appellants, Diagnostic Imaging Consultants, P.C. and Thomas R. Rimer, M.D.

Cara E. Weiner and Christopher R. Ramsey, Chattanooga, Tennessee, for the appellants, Memorial Health Care System, Inc. and Memorial Health Care System, Inc. d/b/a CHI Memorial.

J. Eric Miles, Brigham A. Dixon, and Chelsey A. Stevenson, Chattanooga, Tennessee, for the appellants, David Lloyd Rex, M.D., Virtual Radiologic Corporation, Virtual Radiologic Professionals of Minnesota, P.A., Virtual Radiologic Professionals, LLC, and Virtual Radiologic Services, LLC.

Alix C. Michel and David J. Ward, Chattanooga, Tennessee, for the appellee, Payton Castillo.

## OPINION

### I. BACKGROUND

In the early morning hours of January 3, 2020, Marshall Castillo (“Decedent”) presented at the emergency department for the Memorial Health Care System, Inc. d/b/a CHI Memorial (“Memorial”) in Chattanooga, Tennessee. Decedent complained of severe abdominal pain. He received a CT scan and ultrasound at the hospital. David Lloyd Rex, M.D., a physician located in Minnesota and working virtually, read the CT scan, finding the intraperitoneal space “unremarkable” with no free air and no significant fluid collection. Thomas R. Rimer, M.D. reviewed the ultrasound and advised that despite a distended gallbladder and other concerns, the images were otherwise “negative.” Based upon these findings, Ryan Bowman, P.A., recommended discharge with instructions to drink fluid and eat fiber. Decedent returned home, where he was later found on the bathroom floor by his wife, Payton Castillo (“Plaintiff”). Plaintiff called for an ambulance, and Decedent was returned to Memorial at 1:12 p.m. He died at 1:48 p.m.

Thereafter, a Quality Improvement Committee (“QIC”) proceeding was held, where the circumstances surrounding Decedent’s death were discussed. Following the QIC proceeding, Anthony Houston, the Chief Operating Officer for Memorial, invited Plaintiff to a Communication and Optimal Resolution (“CANDOR”) meeting to discuss the circumstances of Decedent’s death. Mr. Houston, along with two physicians, were present at the meeting with Plaintiff and her parents. While the doctors providing care were not named, Plaintiff was advised that Decedent should not have been discharged because the CT scan revealed a bleed.

Plaintiff filed this healthcare liability action against Memorial and the other entities and physicians responsible for Decedent’s care (collectively “Defendants”) on December 28, 2020, asserting claims of negligence. The case proceeded to discovery, where Plaintiff deposed the physicians present at the CANDOR meeting, questioning the statements made to the family. Defense counsel objected and advised the witnesses not to answer. Plaintiff filed a second request for production of documents, requesting any and all documents used in preparation for the CANDOR meeting. Defendants moved for a protective order to prohibit further inquiry into the nature and contents of all statements made at the CANDOR meeting as direct or indirect discovery of the QIC proceeding itself.

The trial court denied the motion, finding that statements made in the CANDOR meeting were not privileged. The court reasoned that a deponent may admit to statements made at a CANDOR meeting without violating the privilege attached to the QIC proceeding. However, the trial court granted Defendants permission to file an interlocutory appeal on this issue pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. Defendants filed three separate applications for interlocutory appeal. We granted the Rule 9 applications and consolidated the appeals for our review.

## II. ISSUES

The issues certified by this court for review are as follows:

A. Whether statements made by representatives of Memorial in a CANDOR meeting, which are based on information obtained in a QIC meeting are privileged pursuant to Tennessee Code Annotated section 68-11-272.

B. Whether testimony from representatives of Memorial regarding statements made in a CANDOR meeting, which are based on information obtained in a QIC proceeding constitutes “direct or indirect discovery” of QIC activities as prohibited by Tennessee Code Annotated section 68-11-272.

## III. STANDARD OF REVIEW

This appeal concerns issues pertaining to discovery and the trial court’s denial of a protective order for information claimed as privileged. Decisions pertaining to discovery and the issuance of a protective order are subject to an abuse of discretion standard of review. To determine whether a decision constitutes an abuse of discretion, we review the trial court’s decision to ascertain:

(1) whether the factual basis of the decision is supported by sufficient evidence; (2) whether the trial court has correctly identified and properly applied the applicable legal principles; and (3) whether the trial court’s decision is within the range of acceptable alternatives.

*Gooding v. Gooding*, 477 S.W.3d 774, 780 (Tenn. Ct. App. 2015) (quotation omitted). To the extent that these discovery issues require us to interpret and apply statutes, we note that statutory interpretation is a question of law, which we review de novo, affording no presumption of correctness to the conclusions of the trial court. *State v. Crank*, 468 S.W.3d 15, 21 (Tenn. 2015).

## IV. DISCUSSION

A. & B.

The Tennessee Rules of Civil Procedure limit the scope of discovery to “any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or

defense of any other party[.]” Tenn. R. Civ. P. 26.02. Our Supreme Court has provided the following additional guidance on such matters:

When a discovery dispute involves the application of a privilege, the court’s judgment should be guided by the following three principles. First, Tennessee’s discovery rules favor discovery of all relevant, non-privileged information. Second, even though privileges do not facilitate the fact-finding process, they are designed to protect interests and relationships that are regarded as sufficiently important to justify limitations on discovery. Third, while statutory privileges should be fairly construed according to their plain meaning, they need not be broadly construed.

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The threshold issue in any case involving the application of an evidentiary privilege is whether the privilege being asserted applies to the materials sought to be discovered. Analyzing this issue requires a two-step analysis. With specific regard to the privilege in [Tennessee Code Annotated section 63-6-219(e)]<sup>1</sup>, the first step is to determine whether the subject matter of the underlying proceeding is within the subject matter covered by the statute. The second step is to determine whether the person or entity from whom the information is sought is a person or entity protected by the statute. If the answer to either question is “no,” the information being sought is not privileged, and the court should deny the invocation of the privilege and permit the discovery of the information being sought. If, however, the court determines that the subject matter of the proceeding and the person or entity from whom the information is being sought are included within the reach of [the statute], the court should then proceed to address the other specific disputes regarding the invocation of the privilege that may have been raised.

*Powell v. Cmty. Health Sys., Inc.*, 312 S.W.3d 496, 504 (Tenn. 2010) (citations omitted).

The Legislature drafted the statute at issue, the Patient Safety and Quality Improvement Act of 2011 (“the Act”), in recognition of Tennessee’s general policy “to encourage the improvement of patient safety, the quality of patient care and the evaluation of the quality, safety, cost, processes and necessity of healthcare services by hospitals, healthcare facilities and healthcare providers.” Tenn. Code Ann. § 68-11-272(a). The Act provides “certain protections” to ensure that such entities “are able to effectively pursue these measures.” *Id.* These protections are found in Tennessee Code Annotated section 68-11-272(c), which provides, in pertinent part, as follows:

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<sup>1</sup> Section 63-6-219 was repealed and replaced with Section 68-11-272, the statute at issue here.

(c)(1) Records of a QIC and testimony or statements by a healthcare organization's officers, directors, trustees, healthcare providers, administrative staff, employees or other committee members or attendees relating to activities of the QIC shall be confidential and privileged and shall be protected from direct or indirect means of discovery, subpoena or admission into evidence in any judicial or administrative proceeding. Any person who supplies information, testifies or makes statements as part of a QIC may not be required to provide information as to the information, testimony or statements provided to or made before such a committee or opinions formed by such person as a result of committee participation.

(2) Any information, documents or records, which are not produced for use by a QIC or which are not produced by persons acting on behalf of a QIC, and are otherwise available from original sources, shall not be construed as immune from discovery or use in any judicial or administrative proceeding merely because such information, documents or records were presented during proceedings of such committee.

The purpose of a QIC proceeding is to allow healthcare organizations and providers a forum in which the actions leading to an unfavorable outcome may be reviewed and analyzed to improve the quality of care provided in the future without fear of legal prosecution for actions already committed. The Legislature recognized the benefit of such proceedings and passed the Act to ensure that the details of such proceedings are privileged and protected from discovery. In so doing, the Legislature further identified the functions of a QIC proceeding, none of which relate to facilitating candid communications between healthcare facilities or providers with patients or their families following an adverse outcome. *Cf.* Tenn. Code Ann. § 68-11-272(b)(4) (listing the recognized functions of a QIC proceeding).

Here, Plaintiff seeks to discover the particulars of a CANDOR meeting, which are meetings held with patients or the families following an adverse healthcare event to provide information concerning the details of the care provided and to facilitate an optimal resolution. The Legislature has not addressed the purpose or protections that should be afforded to such meetings in Tennessee. However, other states have taken steps to address such meetings and to provide a corresponding privilege to facilitate the open dialogue necessary to facilitate an optimal resolution. One such state is Colorado.<sup>2</sup>

The Colorado CANDOR Act lays out the framework for hospitals to participate in an open discussion after an adverse healthcare event with patients or families but also informs them that the information shared is privileged and confidential. Colo. Rev. Stat. § 25-51-105(1). Participants must sign a confidentiality agreement to participate in such a

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<sup>2</sup> Iowa and Utah also have similar Acts.

meeting, where the optimal resolution reached often involves an offer of compensation. Colo. Rev. Stat. § 25-51-105(1). The record reflects that Plaintiff was not presented with a similar confidentiality agreement prior to or during her CANDOR meeting. She was also not advised that the information shared was privileged and confidential.

In the absence of such an agreement, Defendants argue that the statutory privilege afforded in Section 68-11-272 must work to protect discovery of the information provided in the CANDOR meeting because the information was based on information obtained in the QIC meeting and because such discovery constitutes direct or indirect discovery of QIC activities. We disagree.

As stated previously, “the first step in ascertaining the application of a statutory privilege is to determine whether the subject matter of the underlying proceeding is within the subject matter covered by the statute.” *Powell*, 312 S.W.3d at 504. The subject matter of the two proceedings is inherently different. QIC proceedings are held to allow healthcare organizations and providers a forum in which the actions leading to an unfavorable outcome may be reviewed and analyzed to improve the quality of care provided in the future without fear of legal prosecution for actions already committed. Neither patients nor families are involved in such proceedings. Instead, they are prohibited from discovery of the results of such a proceeding or the documents generated by such a proceeding. Whereas, a CANDOR meeting is held with the patient or the family following an adverse healthcare event to provide information concerning the details of the care provided and to facilitate an optimal resolution. The healthcare facility or the provider holding the meeting determines what information to share.

Defendants argue that a healthcare facility holding a CANDOR meeting may not waive the privilege of information collected for the purpose of a QIC proceeding on behalf of all providers. A panel of this court previously held that “[t]he language of [Section] 68-11-272 clearly and unambiguously provides that the purpose of a QIC [proceeding] is to ‘evaluate the safety, quality, processes, costs, appropriateness or necessity of healthcare services.’” *Reynolds v. Gray Med. Inv'rs, LLC*, 578 S.W.3d 918, 923 (Tenn. Ct. App. 2018) (quoting Tenn. Code Ann. § 68-11-272(b)(4)). The statements made at the CANDOR meeting were not designed to “evaluate the safety, quality, processes, costs, appropriateness or necessity of healthcare services.” Tenn. Code Ann. § 68-11-272(b)(4). The privilege simply does not apply to statements made at the CANDOR meeting whether or not such statements were based upon information obtained from a QIC proceeding.

Accordingly, we hold that statements made by representatives of Memorial in a CANDOR meeting, which are based on information obtained in a QIC proceeding are not privileged pursuant to Section 68-11-272. We likewise hold that testimony from representatives of Memorial regarding statements made in a CANDOR meeting, which are based on information obtained in a QIC proceeding does not constitute “direct or indirect discovery” of QIC activities as prohibited by Section 68-11-272.

## V. CONCLUSION

For the reasons stated above, we affirm the decision of the trial court. The case is remanded for such further proceedings as may be necessary. Costs of the appeal are taxed equally to the appellants.

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JOHN W. MCCLARTY, JUDGE