

No. 31042 --SER Brooks v. Zakaib

FILED

June 23, 2003

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

McGraw, J., dissenting:

I fail to see how something that is no longer privileged, because it was published, or a doctor waived his or her privilege, can ever become privileged again. While the Circuit Court of Grant County theoretically could have sealed the information, if it did not seal it, I do not believe the Circuit Court of Kanawha County would have that power in this case.

Unless one entitled to a privilege assiduously guards it by requesting protective orders when confidential information is used in open court, I cannot see how a second court could “recover” the lost confidentiality. Simply stated, short of mass hypnosis, the genie can’t be put back in the bottle.

For the reasons stated, I must respectfully dissent.