The Peer Review Privilege May Not Extend to Independent Contractor Physicians

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The Supreme Court of Pennsylvania, in *Reginelli v. Boggs, Monongahela Valley Hospital, and UPMC Emergency Medicine, Inc.*, is currently considering the question of whether the peer review of an emergency physician who was employed by an independent contractor corporation staffing the emergency department of a hospital is privileged from discovery under Pennsylvania's Peer Review Protection Act.

In the case being reviewed by the Supreme Court, an employee-physician of an independent contractor corporation staffing the emergency department of a hospital peer reviewed a subordinate employee-physician of that corporation who had provided the care in question in the medical malpractice lawsuit. The supervising physician kept "performance data for the emergency department physicians" who work at the hospital, including the physician at issue. The data contained the "results of the review and evaluation" of the care provided by the sued physician by the supervising physician, who was also the Director of Emergency Services at the hospital. The corporation then shared the peer review with the hospital for which it staffed the emergency department.

The plaintiff sought to discover the peer review in its medical malpractice lawsuit against the hospital, the independent contractor corporation which staffed the hospital's emergency department, and the emergency physician who provided the care in question. In the Superior Court, the peer review was determined to be *not* privileged, because, the court held:

> (1) The independent contractor corporation that staffed the emergency department, and not the hospital, "generated" and "maintained" the peer review. Accordingly, "any privilege that may exist regarding [the physician's] performance file cannot be invoked by the hospital."
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> (2) An independent contractor corporation that staffs an emergency department for a separate hospital is "not an entity enumerated in the Act as being protected by peer review privilege." To support this conclusion, the court cited 63 Pa.C.S. 425.2, and *McClellan v. HMO of PA*, for the proposition that "professional health care providers that may conduct privileged peer review are either direct health care practitioners or administrators of a health care facility."
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> (3) Even if the independent contractor corporation that staffed the emergency room were determined to be an entity that could conduct privileged peer review, the peer review in this case "did not remain exclusive" because the independent contractor corporation which staffed the emergency department at the hospital had "shared the [peer review] file with the Hospital." The court determined that this "disclosure" "destroyed" any privilege that "may have existed."

In a day and age where it is increasingly difficult to argue that an emergency physician or his employer are not the ostensible agents of a hospital, even when the physician and his employer are not the actual agents/employees of a hospital, the logic behind the Superior Court's decision requires serious scrutiny by the Supreme Court. If a plaintiff is permitted to hold a hospital vicariously liable for the acts of independent contractors working in the hospital's emergency department under an ostensible agency theory, it seems that, at the very least, the hospital and the independent contractors should be permitted to share peer review with one another without it being discoverable by a plaintiff – for the same worthy reasons that the General Assembly determined that peer review of a hospital's *employee* physician should be protected.

Under circumstances where a plaintiff pleads that an independent contractor emergency physician and his or her employer are the ostensible agents of a hospital, a plaintiff should be estopped from arguing that peer review done by the non-hospital independent contractor employer of the independent contract emergency physician is either not privileged, or is waived if it is shared with the hospital.

What's more, if the peer review of an independent contractor emergency physician performed by his or her independent contractor employer is determined by the Supreme Court to not be protected at all or to not be protected if it is shared with the ostensible principal-hospital by the independent contractor, the General Assembly should quickly move to amend the Peer Review Protection Act. By amending, they should aim to close this glaring – and illogical – loophole by adding independent contractors, and their employees, of the type at issue in *Reginelli,* to the list of entities enumerated in the Act as being protected by peer review privilege.

If you have questions or would like additional information, please contact Andrew Ralston (ralstona@whiteandwilliams.com; 610.782.4908) or another member of our Healthcare Group.