

HEALTH CARE PRACTICE GROUP

MED MAL BULLETIN

Vol. 106

WGLAW.COM

PENNSYLVANIA SUPERIOR COURT REVERSES DISCOVERY ORDER IN MALPRACTICE CASE, PROHIBITS DISCLOSURE OF SURGEON'S PAST FIVE YEARS OF OPERATIVE REPORTS

The Superior Court issued an important opinion on Oct. 5, 2012, overturning a trial court order directing a hospital to disclose the operative reports of a defendant surgeon for the preceding five years. **Kathleen and Michael Buckman v. Verazin, et al.**, 2012 Pa. Super. 216

In January of 2008, Kathleen Buckman underwent a sigmoid colectomy at Wilkes-Barre General Hospital, performed by Dr. Gary Verazin. After surgery, she experienced abdominal pain and a CT scan on post-op day three showed free air in her abdomen, which led to a couple of subsequent surgeries for an anastomotic leak with intraabdominal abscesses and sepsis. She sued the hospital, the surgeon, and the physician who was covering for the surgeon in the three days post-operation.

In his deposition, Dr. Verazin asserted that Mrs. Buckman had unusual anatomy (a very shortened mesentery which made the proximal bowel difficult to mobilize) which required that he use a less well-known operative technique. In light of this testimony, the Plaintiffs served a discovery request on the hospital, demanding that it produce the medical records of all patients who underwent a sigmoid colectomy or anterior resection performed by Dr. Verazin for five years prior Mrs. Buckman's surgery. The hospital objected, asserting that the records of other patients were protected health information. Plaintiffs filed a Motion to Compel production, arguing that the five prior years of surgical records were necessary to determine Dr. Verazin's experience with the specific procedure at issue as well as his technique in performing the surgery at issue.

Following oral argument, the Honorable Lewis Wetzel at first denied the Plaintiffs' Motion to Compel, but granted it on reconsideration following additional deposition testimony by Dr. Verazin which allegedly created an inconsistency. The Defendants filed an appeal which the Superior Court agreed to hear *even though the case had not concluded*, given that it involved the potential disclosure of confidential information, and an appeal after the fact would come too late to protect the important interests involved.

On appeal, the Defendants argued that the right to confidentiality of the prior surgical patients outweighed the Plaintiff's need to explore Dr. Verazin's experiences with this type of surgery and the techniques he employed. They asserted that the information sought by the Plaintiffs was confidential and protected from discovery as a matter of law by the United States and Pennsylvania Constitutions, HIPAA, Pennsylvania common law and the physician-patient privilege. Dr. Verazin further contended that the requested records were not relevant to the Plaintiffs' negligence and loss of consortium claims.

Likewise, Wilkes-Barre General Hospital argued principally that the discovery request violated the physician-patient privilege, which is codified at 42 Pa. C.S. § 5929, and states:

No physician shall be allowed, in any civil matter, to discuss any information which he acquired in attending the patient in a professional capacity, and which was necessary to enable him to act in that capacity, which shall tend to blacken the character of the patient, without consent of said patient, except in civil matters brought by such patient, for damages on account of personal injuries.

The hospital also adopted the position that the patients' medical records were the property of the hospital and the personal nature of the information they contained results in an obligation on the part of the hospital to maintain their confidentiality. Furthermore, their privacy could not be adequately protected by redacting patient identifying information from the records.

The Plaintiffs argued that the records were relevant "to show Dr. Verazin's knowledge of the standard of care for the type of surgery performed on Mrs. Buckman." Plaintiffs cited to **In Re: June 1979 Allegheny Cty Investigating Grand Jury**, 415 A.2d, 73 (Pa. 1980), with regard to the physician-patient privilege, and contended that

Pennsylvania case law has drawn a distinction between information learned by a physician through communication to him by a patient and information acquired through examination and observation. The Plaintiffs, therefore, claimed that since the operative reports sought were not gained as a result of communications with the patients, any constitutional concerns would not be offended. Plaintiffs stated that they "must be able to discover what Dr. Verazin knew or thought to be the standard of care, and whether he was telling the truth regarding the surgical method he used. They sought to have patient names and identifying information such as social security numbers removed to protect patient confidentiality.

The Superior Court reversed the trial court and held that the information must be kept confidential. The Court held that what Dr. Verazin "knew or believed to be the standard of care" was irrelevant. The law in Pennsylvania "only allows consideration of whether the care a physician rendered falls below the standard of care established by expert testimony." It does not allow consideration of the subjective state of mind of the doctor when he or she undertakes to treat a patient.

The Superior Court further held that information relating to third parties was confidential and irrelevant to the negligence claims at issue. Dr. Verazin's operative procedures in other surgeries was not relevant to whether he negligently operated on Mrs. Buckman. The standard of care is an objective standard and does not contemplate a focus on a physician's state of mind. Moreover, the Court held that the Plaintiffs' goal – to find information to impeach Dr. Verazin's credibility – could be accomplished by less intrusive means, such as the testimony of another doctor or questions asked of the physician himself regarding his prior cases. Finally, the court held that the Plaintiffs' need to discover the information from prior surgeries did not outweigh the prior patients' interests in confidentiality and privacy.

This decision is an important one in the defense of malpractice cases and in protecting the confidentiality rights of patients. Permitting a malpractice plaintiff to obtain a physician's prior operative reports from a hospital poses a number of problems beyond the privacy rights of the patients in those surgeries. The Plaintiffs could end up finding fault with the Defendant's performance of prior surgeries, and the trial would become a broader indictment of the surgeon's practice, losing sight of the issues in the case. Plaintiffs might also find cases in which there had been a poor outcome and recruit the patient to file their own lawsuit. The Superior Court's decision limiting the scope of this discovery and focusing the parties back on the proper issue in the case – whether the physician was negligent in the performance of **this** surgery, is a helpful precedent.

Plaintiffs have now filed a Petition asking the Supreme Court of Pennsylvania to hear the case, but at this writing the Supreme Court has not yet decided whether to accept it.

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