



Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-20-00327-CV

IN RE CHRISTUS SANTA ROSA HEALTHCARE CORP.
d/b/a Christus Santa Rosa Hospital – Westover Hills

Original Mandamus Proceeding¹

Opinion by: Liza A. Rodriguez, Justice

Sitting: Patricia O. Alvarez, Justice
Irene Rios, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: September 2, 2020

PETITION FOR WRIT OF MANDAMUS CONDITIONALLY GRANTED

Relator filed a petition for writ of mandamus asking this court to compel respondent to vacate a portion of his order compelling production of an email that relator contends is privileged. We conditionally grant the petition.

BACKGROUND²

Hoedebecke was admitted to Christus Santa Rosa Hospital – Westover Hills (the “hospital”) at approximately 1:00 a.m. on January 31, 2017. General surgeon, Dr. Patrick Nguyen,

¹ This proceeding arises out of Cause No.2019-CI-01248, styled *Debra Hoedebecke v. Christus Santa Rosa Health Care Corp., et al.*, pending in the 225th Judicial District Court, Bexar County, Texas. The Honorable Aaron S. Haas signed the order at issue in this proceeding.

² In Hoedebecke’s response to the petition for writ of mandamus, she relies on the entirety of her deposition. However, in her motion to compel and at the hearing on the motion, Hoedebecke relied on only a small portion of her deposition. In its reply to her response, relator objects to this court relying on any portion of the deposition that was not before the trial court. “In determining whether a trial court abused its discretion, a reviewing court is generally bound by the record before the trial court at the time its decision was made. [citation omitted] Because portions of the record were

was called to evaluate Hoedebecke at 11:50 p.m. on February 1, evaluated her at 12:57 a.m. on February 2, and immediately performed emergency surgery.

Hoedebecke later sued relator and others for negligence. In the portion of her deposition that was before the trial court, Hoedebecke contends that when she awoke from surgery, Dr. Nguyen shared with her that, after surgery, he and the assisting surgeon wrote “scathing emails” to the hospital staff. According to Hoedebecke, Dr. Nguyen pulled up an email on his phone and told her he used words like “idiot, stupid, and incompetent.” She claimed Dr. Nguyen was “livid” because her treating physicians had not consulted with a surgeon soon enough. Hoedebecke contends Dr. Nguyen said she should “sue [another doctor] because [he was negligent].”

During discovery, Hoedebecke requested, among other things, copies of any emails, letters, or similar documents written to the hospital by Dr. Richard Peterson and Dr. Nguyen that regarded her. In response, the hospital produced a redacted copy of one email from Dr. Peterson and three emails from Dr. Nguyen. The hospital asserted Dr. Peterson’s email was redacted because it contained “information pertaining to other unnamed patients and/or incidents,” and Dr. Nguyen’s emails were privileged based on the peer review privilege. Hoedebecke filed a motion to compel, and the hospital provided a privilege log.

A few days before the hearing on the motion to compel the hospital provided the affidavit of Rebekka Kingsford to support the assertions of privilege. Hoedebecke filed an amended and supplemental motion to compel, asserting the peer review privilege, if any, had been waived by voluntary disclosure. The trial court conducted a hearing on June 12, during which the parties argued over whether Dr. Nguyen’s emails were privileged and whether any privilege had been

not before the trial court when its decisions were made, they will not be considered by this court in determining whether the trial court abused its discretion.” *See In re M-I L.L.C.*, 505 S.W.3d 569, 574 (Tex. 2016) (orig. proceeding). Accordingly, we do not consider any portion of Hoedebecke’s deposition that was not before the trial court. *See id.*

waived. After the hearing, the trial court took the matter under advisement and the hospital tendered the withheld documents for *in camera* review. On June 19, the trial court signed an order granting in part and denying in part the motion to compel the four emails. In this original proceeding, relator challenges only one of the rulings, which stated: “In-Camera Document #1 (Email from Patrick Nguyen 02/02/17 12:19 a.m.): Motion to compel is granted and claim of privilege is overruled. The email will be produced to Plaintiff’s counsel by 5:00 p.m. on June 25, 2020.”

Relator filed its petition for writ of mandamus challenging the ruling on June 25, 2020 and this court issued a stay of the discovery order pending the outcome of this original proceeding. Hoedebecke filed a response, to which relator replied.

STANDARD OF REVIEW

Mandamus is an extraordinary remedy that will issue only to correct a clear abuse of discretion when there is no other adequate remedy at law. *In re Sw. Bell Tel. Co., L.P.*, 235 S.W.3d 619, 623 (Tex. 2007) (orig. proceeding). To satisfy the clear abuse of discretion standard, the relator must show “the trial court could reasonably have reached only one decision.” *Liberty Nat’l Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 630 (Tex. 1996) (orig. proceeding) (quoting *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding)). “A trial court has no ‘discretion’ in determining what the law is or applying the law to the facts. Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion, and may result in appellate reversal by extraordinary writ.” *Walker*, 827 S.W.2d at 840.

“[A] party will not have an adequate remedy by appeal when the appellate court would not be able to cure the trial court’s discovery error.” *Walker*, 827 S.W.2d at 843. “If the trial court issues an erroneous order requiring the production of privileged documents, the party claiming the privilege is left without an adequate appellate remedy.” *In re Christus Santa Rosa Health Sys.*,

492 S.W.3d 276, 279 (Tex. 2016) (orig. proceeding); *In re Living Centers of Tex., Inc.*, 175 S.W.3d 253, 256 (Tex. 2005) (orig. proceeding).

DISCUSSION

Relator argues the email at issue is protected by the peer review privilege. In her motion to compel and in her response to relator's petition for writ of mandamus, Hoedebecke asserts (1) the email is not privileged because it was sent before the peer review process began and was not sent to everyone on the hospital's peer review committee and (2) any privilege was waived because the email was shared with third parties.

A. The Peer Review Privilege

"The provisions of [Texas Occupations Code] section [160.007] expressly delineate and limit the circumstances under which the records of and communications to a peer review committee may be accessed." *Irving Healthcare Sys. v. Brooks*, 927 S.W.2d 12, 16 (Tex. 1996) (orig. proceeding) (interpreting pre-codification version of statute). The medical peer review privilege provides that, "[e]xcept as otherwise provided by this subtitle, each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged." TEX. OCC. CODE § 160.007(a). "Unless disclosure is required or authorized by law, a record or determination of or a communication to a medical peer review committee is not subject to subpoena or discovery and is not admissible as evidence in any civil judicial or administrative proceeding without waiver of the privilege of confidentiality executed in writing by the committee." *Id.* § 160.007(e). "The records and proceedings of a medical committee are confidential and are not subject to court subpoena." TEX. HEALTH & SAFETY CODE § 161.032(a). "The straightforward language of section [160.007] provides several explicit exceptions to the rule of nondisclosure of peer review proceedings, records, and communications." *Brooks*, 927 S.W.2d at 16. For example, the "records made or maintained in

the regular course of business by a hospital . . . [or] medical organization’ are not covered by section 160.007 and therefore are not confidential under that section.” *In re Mem’l Hermann Hosp. Sys.*, 464 S.W.3d 686, 699-700 (Tex. 2015) (orig. proceeding). Hoedebecke did not argue below that this exception applies.

The Occupations Code defines “medical peer review committee” or “professional review body” as

a committee of a health care entity, the governing board of a health care entity, or the medical staff of a health care entity, that operates under written bylaws approved by the policy-making body or the governing board of the health care entity and is authorized to evaluate the quality of medical and health care services or the competence of physicians, including evaluation of the performance of those functions specified by Section 85.204, Health and Safety Code. . . .

TEX. OCC. CODE § 151.002(a)(8).

B. Email to Peer Review Committee

We first consider Hoedebecke’s argument that Dr. Nguyen’s email was not sent to the entire peer review committee. Dr. Nguyen’s email was sent to the hospital’s chief medical officer, president, chief nursing officer, the chief of bariatric surgery, and the department chair of surgery—all of whom are on the peer review committee. Relator argues that neither Occupations Code section 160.007 nor the hospital’s peer review policy requires a communication to be sent to every member of a peer review committee.

Whether a discovery privilege applies is a matter of statutory construction and is a question of law we review *de novo*. *Christus Santa Rosa*, 492 S.W.3d at 280. “A court may not judicially amend a statute and add words that are not implicitly contained in the language of the statute.” *Lee v. City of Houston*, 807 S.W.2d 290, 294-95 (Tex. 1991). Section 160.007(a) protects as privileged “any communication made to a medical peer review committee . . .” TEX. OCC. CODE § 160.007(a). Nothing in section 160.007 requires, and Hoedebecke cites to no authority for her argument, that the communication must be sent to the entirety of a medical peer review committee.

“Reading additional requirements into the statute would drastically alter its scope and severely hamper its purpose, as well as deprive a medical peer review committee of sources of information it may need to make informed decisions.” *Brooks*, 927 S.W.2d at 19. Therefore, we conclude there is no statutory requirement that Dr. Nguyen send his email to every member of the peer review committee.

The Christus Santa Rosa Practitioner Peer Review Policy (“Peer Review Policy”), which was admitted into evidence by the trial court, defines a “Patient Care (Reviewable) Event” as follows:

Actions by practitioners which may potentially compromise or have compromised the quality of patient care, patient safety, or orderly and ethical operation of CSRHS. These actions may be identified through multiple sources as described in Section V of this policy. Reviewable events shall be addressed as outlined in the Practitioner Peer Review Process. (Attachment A)

Attachment A sets forth several procedures including that events “will be screened by the Peer Review Manager for accuracy of identified criteria/indicators and appropriateness for review” and “events which have been identified as needing further review/discussion shall be forwarded to the Multispecialty Peer Review Committee [the “Peer Review Committee”].” The Peer Review Policy does not require any communication raising concerns go directly to the Peer Review Committee. The Peer Review Committee may take action based on “a majority of the voting members at a meeting at which a quorum is present.” Therefore, we conclude there is no requirement by the hospital that Dr. Nguyen send his email to every member of the hospital’s Peer Review Committee.

Because Hoedebecke presented no evidence to controvert the Peer Review Policy at the hearing and provides no authoritative support for her argument, we agree with relator that there is no requirement that any communication from a concerned physician must be sent to every member of the hospital’s Peer Review Committee.

C. Application of Peer Review Privilege

Hoedebecke also asserts that no peer review process had yet begun when Dr. Nguyen's email was sent. She concludes the email is not cloaked by privilege merely because it "later became the impetus for the peer review." Relator counters that a peer review proceeding must start somewhere and, in this case, it started with the email.

As the party seeking to avoid discovery, relator had the burden to establish a prima facie case for the privilege by testimony or affidavit. *Christus Santa Rosa*, 492 S.W.3d at 279. "If the party asserting the privilege establishes a prima facie case for the privilege and 'tenders documents to the trial court, the trial court must conduct an in camera inspection of those documents before deciding to compel production.'" *Id.* (quoting *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004) (orig. proceeding) (per curiam)). "Once the party claiming privilege presents a prima facie case that the documents are privileged, the burden shifts to the party seeking production to prove that an exception to the privilege applies." *Id.* at 279-80. The nature and extent of the privilege is a question of law. *Brownwood Reg'l Hosp. v. Eleventh Court of Appeals*, 927 S.W.2d 24, 27 (Tex. 1996) (orig. proceeding) (per curiam). We first consider whether relator presented a prima facie case for privilege, and if it did so, we then consider whether Hoedebecke met her burden to prove that an exception to the privilege applies.

The medical peer review privilege protects "an evaluative process, not mere records." *Living Ctrs.*, 175 S.W.3d at 258. "Medical peer review" "means the evaluation of medical and health care services, including "the evaluation of the qualifications and professional conduct of professional health care practitioners and of patient care provided by those practitioners. The term includes evaluation of the . . . merits of a complaint relating to a health care practitioner and a determination or recommendation regarding the complaint [and the] report made to a medical peer review committee concerning activities under the committee's review authority . . ." TEX. OCC.

CODE § 151.002(a)(7)(A), (D). Furthermore, “[t]he privilege from discovery under [section 160.007] is not restricted to communications to a medical peer review committee during the course of a specific investigation or an ongoing proceeding.” *Brooks*, 927 S.W.2d at 19. “[E]ven a ‘gratuitous’ communication to a peer review committee about the qualifications of a physician or the quality of health care provided by that physician is within the scope of section [160.007].” *Id.*

As support for its assertion of privilege, relator submitted to the trial court Rebekka Kingsford’s affidavit, in which she asserts she has personal knowledge of the facts stated in her affidavit. In 2017, Kingsford was the Peer Review Manager for the hospital. Since 2018, she has served as the Peer Review Manager for Christus Santa Rosa Hospital – New Braunfels and Christus Santa Rosa – Medical Center. Kingsford attested that all entities are part of Christus Santa Rosa Health Care Corporation and the documents identified in her affidavit are applicable to all hospitals within the corporation. Kingsford attached to her affidavit the Hospital’s Corporate Bylaws, Medical Staff Bylaws, the Christus Santa Rosa Medical Staff Organization Manual (“MSO Manual”), and the Peer Review Policy. All documents were in effect in 2017 and all were admitted into evidence before the trial court. Kingsford explained the documents attached to her affidavit as follows.

Under the terms of the Corporate Bylaws, the Board of Directors governs the business and affairs of the Christus Santa Rosa System. The Board is ultimately responsible for the oversight of the delivery of safe and effective quality patient care, which it fulfills by providing for the coordination and integration of organizational leaders to ensure effective functioning of activities related to performance improvement, risk management, and other activities. The Board ensures each separately licensed facility, including the hospital, has an organized Medical Staff that has overall, facility-level responsibility for the quality of the patient care provided. The Medical Staff at each facility is delegated with the responsibility to conduct a continuous review and appraisal

of the quality of professional care rendered at that facility. The facility's Medical Staff is responsible for reporting such activities to the Board.

At the facility level, the hospital is governed by the Christus Santa Rosa Hospital Medical Staff Bylaws. Consistent with the Corporate Bylaws, the Medical Staff Bylaws state that the Medical Staff is to provide a mechanism for accountability to the Board for the quality and appropriateness of patient care services. The Medical Staff Bylaws also charge the Medical Staff with the responsibility of assessing and improving the effectiveness and efficiency of medical care and making recommendations to the Board regarding same. In furtherance of the Medical Staff's responsibilities, including those related to the quality of patient care, the Medical Staff Bylaws set up committees that are designated to be, among other things, medical peer review committees.

In conjunction with the Medical Staff Bylaws, the MSO Manual operates to set up additional committees that are designated to be, among other things, medical peer review committees, including the Multispecialty Peer Review Committee ("Peer Review Committee"). The Peer Review Committee was established to ensure that the medical staff promotes quality health care and patient safety through active participation in a consistent and effective, focused, and ongoing peer review process.

The Peer Review Committee is composed of a Chairman, the Associate Medical Officer, the Region Chief Medical Officer, Department Chairs, Section Chairs, and, on occasion, ad hoc members. The President of the Hospital and the Chief Nursing Officer serve as ex officio members, and agents of, the Peer Review Committee. The Peer Review Committee reports directly to the Hospital's Medical Executive Committee. The Peer Review Committee also acts in accordance with the terms of the Peer Review Policy.

Procedurally, the Peer Review Policy states that patient records and/or events are screened by Kingsford, as Peer Review Manager, for accuracy of identified criteria/indicators and

appropriateness for review. Patient records and/or events that meet criteria are forwarded to a designated physician for peer review. Those patient records and/or events that are identified as needing further review or discussion are then forwarded to the Peer Review Committee for handling and recommendations regarding final action(s). The Peer Review Committee reviews the patient records and/or events and recommends final action(s).

Kingsford attested that the individuals to whom Dr. Nguyen's email was sent are all members of the Peer Review Committee. The email was forwarded to an ad hoc member of the committee who, in turn, forwarded the email to Kingsford. The email was forwarded through the hospital's internal reporting process/peer review database for further handling. In his email, Dr. Nguyen expressed his concern regarding what happens when a patient with potential surgical issues is transferred to the hospital from another facility. Dr. Nguyen used Hoedebecke's case as an example. Kingsford made the email available to members of the Peer Review Committee for review and consideration. According to Kingsford, the email served as the impetus for a peer review proceeding and the case was subsequently referred to and reviewed and considered by the entire Peer Review Committee.

Kingsford's affidavit and the documents attached thereto make clear that the reporting of an event, such as Dr. Nguyen's email, is the first step in the peer review process, and are sufficient to make a prima facie showing that the email is entitled to the claimed privilege. *See Brooks*, 927 S.W.2d at 19 (“[t]he privilege from discovery under [section 160.007] is not restricted to communications to a medical peer review committee *during the course of a specific investigation or an ongoing proceeding*”) (emphasis added).

D. Waiver

“The statute does not prohibit discovery from alternative sources.” *Id.* at 18. “For example, a medical peer review committee may have obtained and reviewed a copy of a letter from a

physician, but that document is not thereby clothed with a privilege if its author or recipient share it with individuals or entities that do not come under the umbrella of [section 160.007].” *Id.*

Hoedebecke argues any privilege was waived for two reasons. First, she contends that although Dr. Nguyen did not show her his email, he conveyed to her its “essence.” Second, she contends another doctor, Dr. Trawick, was on later email chains making him privy to the entire email chain about which the hospital claims privilege. Thus, Hoedebecke asserts that because Dr. Nguyen conveyed the “essence” of his email to her and because the email itself was shared with third parties, the email never became privileged.

Dr. Nguyen’s email was sent at 12:19 a.m. on February 2, after the surgery but before Hoedebecke spoke to him later. In her deposition, Hoedebecke admitted Dr. Nguyen did not show her the email and he told her “there would be a peer review.” We conclude the record does not support Hoedebecke’s argument that privilege was waived because Dr. Nguyen read her a few words from the email. As to the alleged disclosure to a Dr. Trawick, Hoedebecke did not raise this argument before the trial court and, therefore, provided no evidence as to Dr. Trawick’s identity or that Dr. Nguyen’s email was part of an email chain sent to persons outside the peer review process.

Even if Dr. Nguyen had disclosed a few words from his email, “the source of discovery cannot be the peer review committee or any other entity or individual included within the protections of section [160.007], except of course where there has been a waiver of the privilege” *Id.* “Rather, a party must seek the documents and communications from a nonprivileged source.” *Id.* “Section [160.007] expressly provides that all *communications to* and *proceedings of* a medical peer review committee are confidential and protected from discovery.” *Id.* (emphasis in original). “A litigant should not be able to discover through a back door the substance of the proceedings of a peer review committee and what that committee had before it in arriving at its

decisions.” *Id.* Occupations Code section 160.007 “evidences an intent to allow disclosure of confidential records, proceedings, or communications only at the option of the peer review committee or a party who has participated in the peer review process.” *Id.* at 16-17. “A peer review committee must waive the privilege of confidentiality in writing.” *Id.* Here, the hospital’s Peer Review Committee did not waive the privilege in writing.

On this record, we conclude the peer review privilege was not waived.

CONCLUSION

For the reasons stated above, we conclude the trial court abused its discretion by compelling disclosure of privileged material and relator does not have an adequate remedy at law. Accordingly, we conditionally grant the petition for writ of mandamus and direct the trial court, no later than fifteen days from the date of this opinion, to vacate that portion of its June 19, 2020 “Order Regarding Plaintiff’s Motion to Compel” granting Hoedebecke’s Motion to Compel the “Email from Patrick Nguyen 02/02/17 12:19 a.m.” and ordering production of the email to Hoedebecke’s counsel.

Liza A. Rodriguez, Justice