IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

Docket No. 646 EDA 2021
(consolidated with Docket Nos. 648 EDA 2021 and 659 EDA 2021
by Order of Court dated August 16, 2021)

CHRISTIANA SANDERS AND BRYAN SANDERS, AS CO-ADMINISTRATORS OF THE ESTATE OF M.S., AND CHRISTIANA SANDERS AND BRYAN SANDERS, IN THEIR OWN RIGHT, Appellees,
v.
THE CHILDREN'S HOSPITAL OF PHILADELPHIA, Appellant

SHEILA LIMPREVIL, AS CO-ADMINISTRATOR OF THE ESTATE OF L.G.W., AND SHEILA LIMPREVIL, IN HER OWN RIGHT AND TERRELL WILLIAMS, AS CO-ADMINISTRATOR OF THE ESTATE OF L.G.W., AND TERRELL WILLIAMS, IN HIS OWN RIGHT, Appellees,
v.
THE CHILDREN'S HOSPITAL OF PHILADELPHIA, Appellant

COURTNEY GILL, AS ADMINISTRATRIX OF THE ESTATE OF T.C.G., AND COURTNEY GILL AND TERRENCE GILL, IN THEIR OWN RIGHT, Appellees,
v.
THE CHILDREN'S HOSPITAL OF PHILADELPHIA, Appellant

BRIEF OF *AMICI CURIAE*, THE AMERICAN MEDICAL ASSOCIATION, THE PENNSYLVANIA MEDICAL SOCIETY, THE PENNSYLVANIA ORTHOPAEDIC SOCIETY, THE PENNSYLVANIA CHAPTER OF THE AMERICAN COLLEGE OF PHYSICIANS, AND THE PENNSYLVANIA CHAPTER OF THE AMERICAN ACADEMY OF PEDIATRICS IN SUPPORT OF APPELLANT

Appeal from the Order of Court entered by the Honorable Angelo J. Foglietta
of the Court of Common Pleas of Philadelphia County on
March 12, 2021, at Case Nos. 171204286, 180802309, and 180900385.

Michael K. Feeney, Esquire
PA I.D. #88530

MATIS BAUM O'CONNOR
912 Fort Duquesne Blvd.
Pittsburgh, PA 15222
(412) 338-4750

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

RULES OF COURT

SECONDARY SOURCES

STATEMENT OF INTEREST OF *AMICI CURIAE* PURSUANT TO Pa.R.A.P. 531(b)(2)

Amicus Curiae, **the American Medical Association ("AMA"),** is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all physicians, residents, and medical students in the U.S. are represented in the AMA's policy making process. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty area and in every state, including Pennsylvania.

Amicus Curiae, **the Pennsylvania Medical Society (the "Medical Society"),** is a Pennsylvania non-profit corporation that represents physicians of all specialties and is the Commonwealth's largest physician organization. The Medical Society regularly participates as an *amicus curiae* before this Honorable Court in cases raising important health care issues, including issues that have the potential to adversely affect the quality of medical care.

The AMA and Medical Society submit this brief on their own behalf and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA

and the medical societies of each state and the District of Columbia. Its purpose is to represent the viewpoint of organized medicine in the courts.

Amicus Curiae, **the Pennsylvania Orthopaedic Society ("PaOrtho"),** is a non-profit organization founded in 1956 and represents over 1,200 orthopaedic surgeons, residents, and fellows practicing throughout the Commonwealth of Pennsylvania. The organization's Mission is "to enhance our members' ability to provide the highest quality musculoskeletal care." Its Vision is to "be the primary organization that promotes quality musculoskeletal health for the citizens of Pennsylvania."

Amicus Curiae, **the Pennsylvania Chapter of the American Academy of Pediatrics ("PA-AAP"),** is a not-for-profit organization affiliated with the American Academy of Pediatrics. Founded in 1930, the AAP is comprised of more than 67,000 pediatricians. The PA Chapter has more than 2,300 member pediatricians and pediatric specialists practicing in the Commonwealth of Pennsylvania. The organization's Mission is "to attain optimal physical, mental, and social health and well-being for all infants, children, adolescents and young adults."

Amicus Curiae, **the Pennsylvania Chapter of the American College of Physicians ("PA-ACP"),** a not-for-profit organization, is the Commonwealth of Pennsylvania's largest medical specialty organization, affiliated with the American College of Physicians. Founded in 1915, the ACP has 159,000 members including

7,650 Pennsylvania members – internal medicine physicians practicing general internal medicine and its related subspecialties. The organization's Mission is to "enhance the quality and effectiveness of health care, secure and maintain the best patient care and the highest standards of medical practice."

Amici Curiae all have a special interest in the outcome of this case and have significant concerns regarding how it will substantially and negatively affect their respective memberships. *Amici Curiae* are all recognized as credible sources of information and data to decision makers in Harrisburg and throughout the Commonwealth of Pennsylvania, including the General Assembly, the Governor's Office, state regulatory agencies, and beyond.

No person or entity other than those identified above, their members, or their counsel paid in whole or in part for the preparation of this brief or authored this brief in whole or in part.

ARGUMENT

The trial court's decision in this case prioritizes discovery in three medical malpractice lawsuits over sound public policy, intended to protect patients across our Commonwealth, that the General Assembly enshrined into law nearly 50 years ago. If affirmed at the statewide level, patient safety will be imperiled.

In August 2016, the Children's Hospital of Philadelphia ("CHOP"), conducted an intensive patient safety investigation to determine the cause of an adenovirus outbreak in its Neonatal Intensive Care Unit ("NICU"). When a possible connection between adenovirus and non-contact ophthalmologic equipment became apparent, CHOP and its physicians urgently alerted the pediatric ophthalmologic community, both at CHOP and across the world, of their novel findings. The decision to publish the novel findings was purely for altruistic purposes to save lives.

Just shy of five years later, on March 12, 2021, the Court of Common Pleas of Philadelphia ruled that virtually all of the documents that CHOP withheld from discovery were discoverable in three different medical malpractice lawsuits, despite that the documents themselves had never been published and were protected by the peer review privilege and/or Pennsylvania's Medical Care Availability and Reduction of Error Act ("MCARE Act"), 40 P.S. § 1303.101 to 1303.910.

The trial court's decision to cast aside statutory peer review privilege in wholesale fashion is especially conspicuous in light of the Supreme Court of

Pennsylvania's recent decision in Leadbitter v. Keystone Anesthesia Consultants, Ltd., 256 A.3d 1164 (Pa. 2021), which held that the proceedings and records of any committee that performs a peer review function are privileged and not discoverable pursuant to the Pennsylvania Peer Review Protection Act ("PRPA"), 63 P.S. §§ 425.1 to 425.4. Leadbitter unquestionably supports that the trial court's decision be overturned with respect to the documents that were claimed to be privileged under the PRPA.

I. The Opinion of the Supreme Court of Pennsylvania in *Leadbitter v. Keystone Anesthesia Consultants, Ltd.*, supports reversal of the trial court's ruling.

In August, the Supreme Court of Pennsylvania issued a decision in Leadbitter v. Keystone Anesthesia Consultants, Ltd., 256 A.3d 1164 (Pa. 2021). It weighs heavily in favor of reversal with regard to the documents for which Appellant claimed peer review privilege under the PRPA.

In Leadbitter, the plaintiffs in a medical malpractice case served discovery requests asking the defendant hospital to produce "the complete credentialing and/or privileging file" of a defendant physician. The defendant hospital produced much of the requested file, but withheld or redacted several documents. In ruling on a motion to compel, the trial court ordered production of the complete, unredacted file. Id. at 1167.

The central inquiry in Leadbitter, as it relates to this case, surrounded portions of the physician's credentialing file that involved peer review, including an Ongoing Professional Practice Evaluation Summary Report and a Professional Peer Review Reference and Competency Evaluation, which contained evaluations prepared by other physicians of Dr. Petraglia's performance. Id. The plaintiffs claimed that the documents in question were not protected by the PRPA, as they were maintained by a credentialing committee, not a "peer review" committee. The Supreme Court of Pennsylvania disagreed, holding that the determinative inquiry is not the title of the committee that maintains the documents in question, but instead whether that committee actually performs a peer review function. Specifically, the court held:

> [A] committee which performs a peer-review function, although it may not be specifically entitled a "peer review committee," constitutes a review committee whose proceedings and records are protected under Section 4 of the act. … Consequently, the information redacted by the Hospital, and the documents it withheld, are not discoverable by Plaintiffs if they constitute peer review "proceedings" or "records," 63 P.S. § 425.4, in accordance with the PRPA's definition of peer review.

Leadbitter, 256 A.3d at 1177-78 (*citing* Trinity Med. Ctr. v. Holum, 544 N.W.2d 148, 155 (N.D. 1996) (indicating that the scope of a peer-review protection act should not be limited "by the name employed to describe the committee and to thereby contradict legislative intent") *and* Babcock v. Bridgeport Hosp., 742 A.2d 322, 342 (Conn. 1999) (explaining that the privilege does not depend on the nature of the committee, but on whether it was engaged in peer review)).

In so holding, the Supreme Court of Pennsylvania again reiterated the fundamental reason for the existence of the peer review privilege: patient safety. "The purpose of this privilege system is to improve the quality of health care .... Thus, it is beyond question that peer review committees play a critical role in the effort to maintain high professional standards in the medical practice." Leadbitter, 256 A.3d at 1168-69 (*quoting* Reginelli v. Boggs, 181 A.3d 293, 300 (Pa. 2018)). This foundational principle, that healthcare providers should be able to focus on the medicine when conducting peer review activities – undistracted by potential legal liabilities – is the crux of these appeals.

Leadbitter at its core held that the proceedings and records that relate to peer review, as defined by Section 425.4 of the PRPA, are privileged and shielded from discovery if the committee that maintains such records performs a peer review function. Unfortunately, the trial court in the appeals *sub judice* did not have the benefit of Leadbitter at the time it rendered its decision in these cases. If it had, there is no question that the documents protected by the PRPA would have been shielded from discovery.

II. Many documents described in the trial court's Opinion and the parties' briefing below are unquestionably privileged under the Pennsylvania Peer Review Protection Act.

Amici Curiae have obviously not had access to the privileged documents in question. It can be said with certainty, however, that certain categories of documents

described in the trial court's Opinion and in the parties' briefing would clearly and appropriately fall within the protections of the PRPA. These documents would include: root cause analysis reports; the meeting minutes of an Infection Prevention and Control ("IP&C") Committee; and other documents prepared and used during the course of an investigation conducted under the purview of a hospital's IP&C Department, including e-mails, Microsoft PowerPoint slides, and hospital intranet safety postings.

Whether the PRPA protects documents withheld during discovery is a matter of pure statutory interpretation. "When engaging in statutory construction, a court's duty is to give effect to the legislature's intent and to give effect to all of a statute's provisions." Crown Castle NG E. LLC v. Pennsylvania Pub. Util. Comm'n, 234 A.3d 665 (Pa. 2020) (citing 1 Pa.C.S. § 1921(a)). "The best indication of legislative intent is the plain language of the statute." Id. (*citing* Matter of Private Sale of Prop. by Millcreek Twp. Sch. Dist., 185 A.3d 282, 290-91 (Pa. 2018)).

In 1974, the General Assembly enacted the PRPA, to "provid[e] for the increased use of peer review groups by giving protection to individuals and data who report to any review group." McClellan v. HMO, 660 A.2d 97, 100 (Pa. Super. 1995). The PRPA provides an evidentiary privilege, intended "to prevent the disclosure of peer review information to outside parties seeking to hold professional health care providers liable for negligence." Hayes v. Mercy Health Corp., 739 A.2d

114, 118 (Pa. 1999). Section 425.4 of the PRPA, titled "Confidentiality of Review Organization's Records," establishes the peer review privilege, as follows:

> The proceedings and records of a review committee shall be held in confidence and shall not be subject to discovery or introduction into evidence in any civil action against a professional health care provider arising out of the matters which are the subject of evaluation and review by such committee and no person who was in attendance at a meeting of such committee shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings of such committee or as to any findings, recommendations, evaluations, opinions or other actions of such committee or any members thereof: Provided, however, That information, documents or records otherwise available from original sources are not to be construed as immune from discovery or used in any such civil action merely because they were presented during proceedings of such committee, nor should any person who testifies before such committee or who is a member of such committee be prevented from testifying as to matters within his knowledge, but the said witness cannot be asked about his testimony before such a committee or opinions formed by him as a result of said committee hearings.

63 P.S. § 425.4 (emphasis added). The privilege only applies to professional health care providers, which Section 425.2 defines as an individual or organization who is "approved, licensed or otherwise regulated to practice or operate in the healthcare field in Pennsylvania." 63 P.S. § 425.2.

Although the PRPA does not specifically define "review committee," Section 425.2 of the PRPA, which governs definitions of terms used within the PRPA, defines "review organization" as follows:

> "Review organization" means any committee engaging in peer review, including a hospital utilization review committee, a hospital tissue committee, a health insurance review committee, a hospital plan corporation review committee, a professional health service plan review committee, a dental review committee, a physicians' advisory committee, a veterinary review committee, a nursing advisory committee, any committee established pursuant to the medical assistance program, and any committee established by one or more State or local professional societies, to gather and review information relating to the care and treatment of patients for the purposes of (i) evaluating and improving the quality of health care rendered; (ii) reducing morbidity or mortality; or (iii) establishing and enforcing guidelines designed to keep within reasonable bounds the cost of health care. It shall also mean any hospital board, committee or individual reviewing the professional qualifications or activities of its medical staff or applicants for admission thereto. It shall also mean a committee of an association of professional health care providers reviewing the operation of hospitals, nursing homes, convalescent homes or other health care facilities.

63 P.S. § 425.2 (emphasis added). Thus, for a record to be protected, the committee that maintains the record must be engaged in "peer review."

In turn, Section 425.2 also defines "peer review" as:

> "Peer review" means the procedure for evaluation by professional health care providers of the quality and efficiency of services ordered or performed by other professional health care providers, including practice analysis, inpatient hospital and extended care facility utilization review, medical audit, ambulatory care review, claims review, and the compliance of a hospital, nursing home or convalescent home or other health care facility operated by a professional health care provider with the standards set by an association of health care providers and with applicable laws, rules and regulations.

Id. (veterinary provisions omitted).

There can be no doubt that certain records withheld during discovery are protected under the PRPA. The physician who spearheaded the investigation and prepared the documents in question was acting in her role as the Medical Director of CHOP's IP&C Department. R.R. 509a to 521a (Ex. "A" to CHOP's Supplemental Brief in Opposition to Plaintiffs' Motion to Strike Defendant's Privilege Objections to Plaintiffs' Discovery Requests). There is no question that CHOP's efforts to evaluate and review the adenovirus outbreak would qualify as an effort "to gather and review information relating to the care and treatment of patients for the purposes of evaluating and improving the quality of health care rendered and reducing morbidity or mortality" and to examine "the quality and efficiency of services ordered or performed by other professional health care providers" under Section 425.2 of the PRPA. There is no ambiguity here, either in the PRPA or in the application of facts to the plain language of the PRPA. Application of the peer review privilege to the documents withheld on PRPA grounds should have been clear.

In short, this was a textbook peer review conducted under the careful purview of the IP&C Department. The protection of the peer review privilege is essential to its work. The trial court's ruling that CHOP's evaluation and review somehow eludes the protective umbrella of the IP&C Department simply because the Medical Director of the IP&C Department began her review immediately, rather than waiting

for a formal meeting, is nothing short of shocking. It essentially advises hospitals to sit on their hands until meetings can convene, which flies in the face of both patient safety and common sense.

Even assuming the PRPA's plain language was somehow ambiguous, either itself or in relation to the facts of this case – which it is not – the legislative intent behind the PRPA should have guided the trial court to the correct decision. Additionally, a review of the General Assembly's intent in passing the PRPA may be relevant to provide context to its provisions. "While we may not ignore unambiguous language under the pretext of pursuing the spirit of the statute, we must always read the words of a statute in context and not in isolation, and give meaning to every provision." Thompson v. Thompson, 223 A.3d 1272, 1277 (Pa. 2020); *see also* 1 Pa. C.S. § 1921(c).

The purpose of the PRPA has been examined countless times by Pennsylvania courts. This Honorable Court recently observed that "the purpose of that Act is to 'to facilitate self-policing in the health care industry.'" Venosh v. Henzes, 121 A.3d 1016, 1018 (Pa. Super. 2015) (*quoting* Dodson v. DeLeo, 872 A.2d 1237, 1242 (Pa. Super. 2005)); *see also* Yocabet v. UPMC Presbyterian, 119 A.3d 1012, 1019 (Pa. Super. 2015). Additionally, "the Act itself expresses the legislature's conclusion that the 'medical profession itself is in the best position to police its own activities.'" Id. (*quoting* Sanderson v. Frank S. Bryan, M.D., Ltd., 522 A.2d 1138, 1139-40 (Pa.

Super. 1987) (“[t]hrough these immunity and confidentiality provisions ... the Legislature has sought to foster free and frank discussion by review organizations”)). As the Supreme Court of Pennsylvania noted:

> Pennsylvania courts have recognized the laudable goal of the PRPA, which was enacted "to serve the legitimate purpose of maintaining high professional standards in the medical practice for the protection of patients and the general public" based upon the General Assembly's determination that "because of the expertise and level of skill required in the practice of medicine, the medical profession itself is in the best position to police its own activities."

Reginelli v. Boggs, 181 A.3d 293, 300 (Pa. 2018) (*citing* McClellan v. Health Maint. Org. of Pa., 686 A.2d 801, 805 (Pa. 1996) *and* Cooper v. Delaware Valley Med. Ctr., 630 A.2d 1, 7 (Pa. Super. 1993)); *see also* Steel v. Weisberg, 500 A.2d 428, 430 (Pa. Super. 1985); Robinson v. Magovern, 83 F.R.D. 79, 86 (W.D. Pa. 1979) (in enacting the PRPA, the General Assembly's intent was to encourage peer evaluation of health care provided so as to improve the quality of care rendered, reduce morbidity and mortality, and keep within reasonable bounds the costs of health care”).

The Supreme Court of Pennsylvania acknowledged this concept of self-policing yet again in Leadbitter: "the practice of medicine is highly complex and, as such, the medical profession is in the best position to police itself … and, the profession's self-regulation is accomplished, at least in part, through a peer-review mechanism undertaken to determine whether a particular physician should be given clinical privileges to perform a certain type of medical activity at a hospital."

Leadbitter, 256 A.3d at 1168-69 (citations omitted) (*citing* Reginelli, 181 A.3d at 300 and Cooper v. Del. Valley Med. Ctr., 654 A.2d 547, 551 (Pa. 1995)).

In fact, Pennsylvania courts have observed that the words prefacing Section 425.1 of the PRPA provide further evidence of this intent: "[p]roviding for the use of peer review groups by giving protection to individuals and data who report to any review group." 63 P.S. § 425.1; Sanderson, 522 A.2d at 1140 (quoting H.B. 1729, Act of July 20, 1974, P.L. 564, No. 193). Simply, the legislature's goal in enacting the PRPA was to expand the invaluable mission of peer review in the field of medicine, with the guarantee of confidentiality deemed to be the central means to achieve that goal. Id.; *see also* Robinson, 83 F.R.D. at 87 (reasoning that through the grants of immunity and confidentiality, the legislature intended to foster peer evaluations of health care providers).

By enacting the PRPA, the General Assembly sought to "foster the greatest candor and frank discussion" and to "encourage peer evaluation of health care provided." McClellan, 686 A.2d at 805. "The PRPA embodies the legislature's effort to protect physicians who candidly reveal concerns about the quality of care rendered by their peers to committees that conduct such assessments, so as to ensure candid and reprisal-free physician assessments by those who are most qualified and best positioned to make them." Krappa v. Lyons, 222 A.3d 372, 374 (Pa. 2019) (Wecht, J., concurring).

Thus, the PRPA establishes a framework for professional health care providers to evaluate the professional competence of their peers, improve the quality of health care, reduce morbidity and mortality, and reduce the cost of health care. McClellan, 686 A.2d at 805. This framework, however, would collapse without an assurance of confidentiality, the cornerstone of a sound peer review process. *See* Piroli v. Lodico, 909 A.2d 846, 850 (Pa. Super. 2006) ("Without the protection afforded through the confidentiality of the proceedings, the ability of the profession to police itself effectively would be severely compromised.").

Confidentiality is especially critical in the context of investigations, root cause analysis meetings, and morbidity and mortality conferences, which are oftentimes conducted not just to assess a particular physician's competence, but also to prevent future harm. Public policy supports a reading of the PRPA that fosters rather than inhibits peer review activities. Upholding the trial court's refusal to apply peer review protections to quintessentially peer review functions would acutely curtail the effectiveness of such efforts. Patient safety would be compromised, which clearly is not what the General Assembly intended in passing the PRPA.

There are many reasons that healthcare providers may be reluctant to participate in the peer review process unless they are assured that their contributions will be kept confidential. George E. Newton II, *Maintaining the Balance: Reconciling the Social and Judicial Costs of Medical Peer Review Protection*, 52

Ala. L. Rev. 723, 726 (2001); *see also* Lisa M. Nijm, *Pitfalls of Peer Review: The Limited Protections of State and Federal Peer Review Law for Physicians*, 24 J. Legal Med. 541, 541 (2003). They may have a professional relationship with the practitioner whose actions are under review, they may be concerned about losing referrals, or they may fear being sued themselves. Newton, *supra*, at 727; Nijm, *supra*, at 541. Introducing these factors into the investigative process will undoubtedly and unavoidably undermine a hospital's ability to safeguard patient safety through its IP&C Department and PSC.

Additionally, the PRPA's assurances of confidentiality cannot be waived. Pennsylvania courts have traditionally refused to apply principles of waiver to statutory privileges in the absence of specific statutory language to the contrary. *See, e.g.*, Castellani v. Scranton Times, L.P., 956 A.2d 937, 951 (Pa. 2008) (rejecting exception to statutory privilege because the court was "not at liberty to create [exceptions] that the Legislature chose not to include in the text of the statute"); *see also* Reginelli, 181 A.3d at 300 (*quoting* McLaughlin v. Garden Spot Village, 144 A.3d 950, 953 (Pa. Super. 2016) ("[W]here the legislature has considered the interests at stake and has granted protection to certain relationships or categories of information, the courts may not abrogate that protection on the basis of their own perception of public policy unless a clear basis for doing so exists in a statute, the common law, or constitutional principles.")).

Unquestionably, the PRPA is silent as to waiver. As a result, the trial court's analysis in applying waiver principles was flawed from the outset. *See* Trial Court Opinion at Pgs.12-14. The mere fact that the PRPA contains a limited "original source" exception, *see* 63 P.S. § 425.4, does not give the trial court license to in invent and apply waiver principles to the PRPA. Additionally, the trial court's reliance on Justice v. Banka, 2014 WL 4450536 (Philadelphia C.C.P., August 29, 2014), is misguided. In that case, the defendants disclosed information to the general public in a press release, whereas CHOP's "disclosure" in this case was publication of the novel findings of its patient safety investigation in medical journals *to prevent future harm at other institutions.*

Other jurisdictions have explicitly rejected the notion that the peer review privilege may be waived. *See, e.g.*, Powell v. Cmty. Health Sys., Inc., 312 S.W.3d 496, 513 (Tenn. 2010) (declining to recognize a waiver principle in the peer review statute); Ayash v. Dana-Farber Cancer Inst., 822 N.E.2d 667, 692 n.28 (Mass. 2005) ("In our view, applying waiver principles to peer review communications would significantly undermine the effectiveness of the statute."); McCoy v. Hatmaker, 763 A.2d 1233, 1251 (Md. Ct. Spec. App. 2000) (holding that peer review materials are confidential even when they are acquired by an opponent).

Finally, the trial court's application of the original source exception to the PRPA is flawed. *See* Trial Court Opinion at Pgs.10-12. As discussed above, the

physician who spearheaded the evaluation and review of the adenovirus outbreak, and prepared the documents in question, was acting in her role as the Medical Director of CHOP's IP&C Department in furtherance of its explicit statutory purpose. As a result, the peer review privilege applies.

III. Many of the documents described in the trial court's Opinion and the parties' briefing below are unquestionably privileged under the MCARE Act.

The General Assembly has acknowledged and supported the importance of the peer review privilege so much that, in passing Pennsylvania's MCARE Act, it enshrined another confidentiality protection into law.

The MCARE Act requires hospitals to develop and maintain an infection control plan, including a multidisciplinary infection control committee, 40 P.S. § 1303.403(a)(1), and also requires hospitals to form a standing patient safety committee, 40 P.S. § 1303.310. Hand-in-hand with these requirements, the MCARE Act provides confidentiality in relation to a hospital's PSC. Section 311 of the MCARE Act, which governs "confidentiality and compliance," provides:

> **(a) Prepared materials.** – Any documents, materials or information solely prepared or created for the purpose of compliance with section 310(b) or of reporting under section 304(a)(5) or (b), 306(a)(2) or (3), 307(b)(3), 308(a), 309(4), 310(b)(5) or 3131 which arise out of matters reviewed by the patient safety committee pursuant to section 310(b) or the governing board of a medical facility pursuant to section 310(b) are confidential and shall not be discoverable or admissible as

> evidence in any civil or administrative action or proceeding. Any documents, materials, records or information that would otherwise be available from original sources shall not be construed as immune from discovery or use in any civil or administrative action or proceeding merely because they were presented to the patient safety committee or governing board of a medical facility.

Id. (emphasis added). The confidentiality protections of Section 311 also apply to reports generated by a hospital's IP&C Department. *See* 40 P.S. § 1303.405 ("The report to the authority shall also be subject to all of the confidentiality protections set forth in section 311.").

The physician who spearheaded the investigation and prepared the documents in question was acting in her roles as the Medical Director of CHOP's IP&C Department and also as a member of CHOP's Patient Safety Committee. R.R. 509a to 521a (Ex. "A" to CHOP's Supplemental Brief in Opposition to Plaintiffs' Motion to Strike Defendant's Privilege Objections to Plaintiffs' Discovery Requests). It is beyond question that she prepared the documents in question in furtherance of the statutory purposes of both the IP&C Department and the PSC, meaning that they must be deemed confidential under Section 311 of the MCARE Act.

This patient safety review was conducted by two of the most sacrosanct hospital organizations in existence: the IP&C Department and the PSC. All hospitals within the Commonwealth of Pennsylvania are statutorily required to do exactly what CHOP did here: prevent the spread of infection and improve patient safety.

See 40 P.S. § 1303.403(a)(1) (requiring hospitals to develop and maintain an infection control plan, including a multidisciplinary infection control committee); *see also* 40 P.S. § 1303.310 (requiring hospitals to form a standing patient safety committee). The confidentiality protections of Section 311 are an essential piece of this statutory framework. The trial court's ruling that CHOP's patient safety evaluation falls outside of the protective umbrella of the IP&C Department and PSC simply because the review began immediately, rather following formal meetings, is nothing short of shocking. It essentially advises hospitals to sit on their hands until meetings can convene, which flies in the face of both patient safety and common sense. This cannot be what our Legislature intended.

In its Opinion, the trial court quoted the *entirety* of Section 311, *see* Trial Court Opinion at Pg. 7, but it failed to offer a genuine reason why the peer review privilege should not apply. The trial court simply repeated its factually unsupported conclusion three times over, as if in a trance:

> This Court found that (1) the documents were not prepared for purposes of peer review, but were utilized by members of the peer review committee after the fact and (2) that the confidentiality provisions do not apply because these documents were not prepared for purposes of peer review.
>
> As discussed above, the original source exception applies. Here, this Court held in camera review of the documents and determined that these documents were not produced for purposes of peer review.

Id. at 11-12 (emphasis added). The trial court, however, does not cite any evidence or testimony that would support this factual finding of fact, aside from the mere fact that some of the documents are dated earlier than CHOP's first PSC meeting about the patient safety investigation.

The trial court's holding incorrectly assumes that a member of a PSC cannot act on behalf of the PSC outside the setting of a formal PSC meeting. If upheld on appeal, the trial court's interpretation of Section 311's confidentiality protections would severely restrain if not eviscerate the functional abilities of hospital PSCs, especially in times when urgent action is needed. Given that Chapter 3 of the MCARE Act is dedicated to "the reduction of medical errors for the purpose of ensuring patient safety," 40 P.S. § 1303.301, and that the explicit policy of the MCARE Act as a whole is, in part, that "[e]very effort must be made to reduce and eliminate medical errors by identifying problems and implementing solutions that promote patient safety," 40 P.S. § 1303.102(5), the trial court's holding is both absurd[1] and a danger to the citizens of this Commonwealth.

The trial court must be reversed.

---

[1] A well-established principle of statutory construction in Pennsylvania is that "the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." 1 Pa.C.S. § 1922(1); *see also* Unemployment Comp. Bd. of Rev. v. Tickle, 339 A.2d 864, 869 (Pa. Cmwlth. 1975) (holding that "it would be both absurd and unreasonable to conclude that the Legislature intended the exact same phrase to have two distinct meanings in the same section of a statute.").

CONCLUSION

For all of the foregoing reasons, *Amici Curiae*, the American Medical Association, the Pennsylvania Medical Society, the Pennsylvania Orthopaedic Society, the Pennsylvania Chapter of the American Academy of Pediatrics, and the Pennsylvania Chapter of the American College of Physicians respectfully request that this Honorable Court **REVERSE** the Order of Court entered by the Honorable Angelo J. Foglietta of the Court of Common Pleas of Philadelphia County on March 12, 2021, at Case Nos. 171204286, 180802309, and 180900385.

Michael K. Feeney, Esquire
PA I.D. #88530

MATIS BAUM O'CONNOR
912 Fort Duquesne Blvd.
Pittsburgh, PA 15222
(412) 338-4750

Counsel for Amici Curiae

CERTIFICATION OF COMPLIANCE

Pursuant to Pennsylvania Rule of Appellate Procedure 2135(d), I hereby certify that this Brief of *Amici Curiae* complies with the word count limits of Pennsylvania Rules of Appellate Procedure 531(b)(3).

I further certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Michael K. Feeney, Esquire
PA I.D. #88530

MATIS BAUM O'CONNOR
912 Fort Duquesne Blvd.
Pittsburgh, PA 15222
(412) 338-4750

Counsel for Amici Curiae

PROOF OF SERVICE

Pursuant to Pennsylvania Rule of Appellate Procedure 121(d), I hereby certify that two (2) copies of this Brief of *Amici Curiae* were served upon the following counsel of record via U.S. Mail, first class, postage pre-paid, on this 5th day of November, 2021.

Howard M. Klein, Esq. Stacy A. Orvetz, Esq. Conrad O'Brien, P.C. 1500 Market Street Suite 3900 W. Tower Philadelphia, PA 19102 *(counsel for Appellant, the Children's Hospital of Philadelphia)*		Maureen M. McBride, Esq. Lamb McErlane, P.C. P.O. Box 565 West Chester, PA 19381 *(counsel for Appellant, the Children's Hospital of Philadelphia)*
Shanin Specter, Esq. Charles L. Becker, Esq. Ruxandra M. Laidacker, Esq. Ella Robertson, Esq. Kline & Specter, P.C. 1525 Locust Street, Fl. 19 Philadelphia, PA 19102 *(counsel for All Appellees)*		

Michael K. Feeney, Esquire
PA I.D. #88530

MATIS BAUM O'CONNOR
912 Fort Duquesne Blvd.
Pittsburgh, PA 15222
(412) 338-4750

Counsel for Amici Curiae

IN THE SUPERIOR COURT OF PENNSYLVANIA

Courtney Gill, as Administratrix of The Estate of T.C.G., and Courtney Gill and Terrence Gill, in their own right v. The Children's Hospital of Philadelphia Appellant	: : :	659 EDA 2021

PROOF OF SERVICE

I hereby certify that this 5th day of November, 2021, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service

Served:	Charles Lyman Becker
Service Method:	eService
Email:	charles.becker@klinespecter.com
Service Date:	11/5/2021
Address:	Kline & Specter, P.C. 1525 Locust Street, 19th Floor Philadelphia, PA 19102
Phone:	215--77-2-1000
Representing:	Appellee Gill, Courtney and Gill, Terrence, etal.

Served:	Elia Robertson
Service Method:	eService
Email:	elia.robertson@klinespecter.com
Service Date:	11/5/2021
Address:	1525 Locust Street, 19th Floor Philadelphia, PA 19102
Phone:	215--77-2-1363
Representing:	Appellee Gill, Courtney and Gill, Terrence, etal.

Served:	Howard Michael Klein
Service Method:	eService
Email:	hklein@conradobrien.com
Service Date:	11/5/2021
Address:	1500 Market Street Centre Square, West Tower, Suite 3900 Philadelphia, PA 19102
Phone:	215--86-4-9600
Representing:	Appellant The Children's Hospital of Philadelphia

IN THE SUPERIOR COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Maureen Murphy McBride
Service Method:	eService
Email:	mmcbride@lambmcerlane.com
Service Date:	11/5/2021
Address:	24 East Market Street P.O. Box 565 West Chester, PA 19381
Phone:	610--43-0-8000
Representing:	Appellant The Children's Hospital of Philadelphia

Served:	Ruxandra Maniu Laidacker
Service Method:	eService
Email:	andra.laidacker@klinespecter.com
Service Date:	11/5/2021
Address:	1525 Locust St. Floor 19 Philadelphia, PA 19102
Phone:	215--77-2-1000
Representing:	Appellee Gill, Courtney and Gill, Terrence, etal.

Served:	Stacy A. Orvetz
Service Method:	eService
Email:	sorvetz@conradobrien.com
Service Date:	11/5/2021
Address:	Conrad O'Brien 1500 Market Street Centre Square West Tower St. 3900 Philadelphia, PA 19102-2100
Phone:	215--86-4-8072
Representing:	Appellant The Children's Hospital of Philadelphia

IN THE SUPERIOR COURT OF PENNSYLVANIA

/s/ Michael Keith Feeney

(Signature of Person Serving)

Person Serving:	Feeney, Michael Keith
Attorney Registration No:	088530
Law Firm:	Matis Baum O'Connor
Address:	912 Fort Duquesne Blvd Pittsburgh, PA 15222
Representing:	Amicus THE AMERICAN MEDICAL ASSOCIATION, THE PENNSYLVANIA MEDICAL SOCIETY, THE

IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

Docket Nos. 646 EDA 2021, 648 EDA 2021, and 659 EDA 2021

CHRISTIANA SANDERS AND BRYAN SANDERS, AS CO-ADMINISTRATORS OF THE ESTATE OF M.S., AND CHRISTIANA SANDERS AND BRYAN SANDERS, IN THEIR OWN RIGHT, Appellees,
v.
THE CHILDREN'S HOSPITAL OF PHILADELPHIA, Appellant

SHEILA LIMPREVIL, AS CO-ADMINISTRATOR OF THE ESTATE OF L.G.W., AND SHEILA LIMPREVIL, IN HER OWN RIGHT AND TERRELL WILLIAMS, AS CO-ADMINISTRATOR OF THE ESTATE OF L.G.W., AND TERRELL WILLIAMS, IN HIS OWN RIGHT, Appellees,
v.
THE CHILDREN'S HOSPITAL OF PHILADELPHIA, Appellant

COURTNEY GILL, AS ADMINISTRATRIX OF THE ESTATE OF T.C.G., AND COURTNEY GILL AND TERRENCE GILL, IN THEIR OWN RIGHT, Appellees,
v.
THE CHILDREN'S HOSPITAL OF PHILADELPHIA, Appellant

PRAECIPE FOR ENTRY OF APPEARANCE ON BEHALF OF *AMICI CURIAE*, THE AMERICAN MEDICAL ASSOCIATION, THE PENNSYLVANIA MEDICAL SOCIETY, THE PENNSYLVANIA ORTHOPAEDIC SOCIETY, THE PENNSYLVANIA CHAPTER OF AMERICAN COLLEGE OF PHYSICIANS, AND THE PENNSYLVANIA CHAPTER OF THE AMERICAN ACADEMY OF PEDIATRICS, IN SUPPORT OF APPELLEES

Appeal from the Order of Court entered by the Honorable Angelo J. Foglietta
of the Court of Common Pleas of Philadelphia County on
March 12, 2021, at Case Nos. 171204286, 180802309, and 180900385.

Michael K. Feeney, Esquire
PA I.D. #88530

MATIS BAUM O'CONNOR
912 Fort Duquesne Blvd.
Pittsburgh, PA 15222
(412) 338-4750

PRAECIPE FOR ENTRY OF APPEARANCE
ON BEHALF OF *AMICUS CURIAE*

To: Superior Court of Pennsylvania
Prothonotary, Eastern District
530 Walnut Street, Suite 315
Philadelphia, PA 19106

Kindly enter my appearance in this case on behalf of *Amicus Curiae*, he American Medical Association, The Pennsylvania Medical Society, The Pennsylvania Orthopaedic Society, The Pennsylvania Chapter of American College of Physicians, and The Pennsylvania Chapter of the American Academy of Pediatrics.

Michael K. Feeney, Esquire
PA I.D. #88530

MATIS BAUM O'CONNOR
912 Fort Duquesne Blvd.
Pittsburgh, PA 15222
(412) 338-4750

Counsel for Amici Curiae, The American Medical Association, The Pennsylvania Medical Society, The Pennsylvania Orthopaedic Society

CERTIFICATION OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Michael K. Feeney, Esquire
PA I.D. #88530

MATIS BAUM O'CONNOR
912 Fort Duquesne Blvd.
Pittsburgh, PA 15222
(412) 338-4750

Counsel for Amici Curiae, The American Medical Association, The Pennsylvania Medical Society, The Pennsylvania Orthopaedic Society, The Pennsylvania Chapter of American College of Physicians, and The Pennsylvania Chapter of the American Academy of Pediatrics

PROOF OF SERVICE

Pursuant to Pennsylvania Rule of Appellate Procedure 121(d), I hereby certify that two (2) copies of this Praecipe for Entry of Appearance of *Amici Curiae* were served upon the following counsel of record via U.S. Mail, first class, postage pre-paid, on this 5th day of November, 2021.

Howard M. Klein, Esq. Stacy A. Orvetz, Esq. Conrad O'Brien, P.C. 1500 Market Street Suite 3900 W. Tower Philadelphia, PA 19102 *(counsel for Appellant, the Children's Hospital of Philadelphia)*		Maureen M. McBride, Esq. Lamb McErlane, P.C. P.O. Box 565 West Chester, PA 19381 *(counsel for Appellant, the Children's Hospital of Philadelphia)*
Shanin Specter, Esq. Charles L. Becker, Esq. Ruxandra M. Laidacker, Esq. Ella Robertson, Esq. Kline & Specter, P.C. 1525 Locust Street, Fl. 19 Philadelphia, PA 19102 *(counsel for All Appellees)*		

Michael K. Feeney, Esquire
PA I.D. #88530

MATIS BAUM O'CONNOR
912 Fort Duquesne Blvd.
Pittsburgh, PA 15222
(412) 338-4750

Counsel for Amici Curiae, The American Medical Association, The Pennsylvania Medical Society, The Pennsylvania Orthopaedic Society, The Pennsylvania Chapter of American College of Physicians, and The Pennsylvania Chapter of the American Academy of Pediatrics