Medical Malpractice Fundamentals for Superior Court Judges
Peer Review Privilege
UNC School of Government
Chapel Hill, NC

March 27, 2014

Peer Review Statutes, Cases and Forms

Governing Statutes

N.C. Gen. Stat. §1-72.1(d)

N.C. Gen. Stat. §1A-1, Rule 5(e)

N.C. Gen. Stat. §131E-76(5)

N.C. Gen. Stat. §131E-95(b)

Interpretive Case Law

Bost v. Riley, 44 N.C. App. 638, 262 S.E.2d 391 (1980)

Cameron v. New Hanover Memorial Hospital, 58 N.C. App. 414, 293 S.E.2d 901 (1982)

Shelton v. Morehead Memorial Hospital, 318 N.C. 76, 347 S.E.2d 824 (1986)

Blanton v. Moses H. Cone Memorial Hospital, 319 N.C. 372, 354 S.E.2d 455 (1987)

Virmani v. Presbyterian Health Services Corp., 350 N.C. 449, 515 S.E.2d 675 (1999)

Woods v. Moses Cone Health System, 198 N.C. App. 120, 678 S.E.2d 787 (2009)

Bryson v. Haywood Regional Medical Center, 204 N.C. App. 532, 694 S.E.2d 416 (2010)

Philips v. Pitt County Memorial Hospital, ___N.C. App.___ , 731 S.E.2d 462 (2012)

Hammond v. Saini, ___N.C.App.___, 748 S.E.2d 585 (2013), pet. disc. rev. allowed,
No. 492PA13 (N.C. Supreme Court, March 7, 2014)

Forms

Motion to Seal Peer Review Materials and Close Proceedings, Bombay v. General Hospital Inc., File No.: Redacted/Substituted

Order to Seal Peer Review Materials and Close Proceedings, Bombay v. General Hospital Inc., File No.: Redacted/Substituted

Order Denying Defendant's Motion to Compel, Murphy Medical Center v. Sills,
File No.: 07 CVS 162 (N.C. Superior Court, 2008)
Forms (cont'd)

West's North Carolina General Statutes Annotated
Chapter 1. Civil Procedure
Subchapter III. Parties
Article 6. Parties

N.C.G.S.A. § 1-72.1

§ 1-72.1. Procedure to assert right of access

Currentness

(a) Any person asserting a right of access to a civil judicial proceeding or to a judicial record in that proceeding may file a motion in the proceeding for the limited purpose of determining the person's right of access. The motion shall not constitute a request to intervene under the provisions of Rule 24 of the Rules of Civil Procedure and shall instead be governed by the procedure set forth in this statute. The movant shall not be considered a party to the action solely by virtue of filing a motion under this section or participating in proceedings on the motion. An order of the court granting a motion for access made pursuant to this section shall not make the movant a party to the action for any purpose.

(b) The movant shall serve a copy of its motion on all parties to the proceeding in any manner provided in Rule 5 of the Rules of Civil Procedure. Upon receipt of a motion filed pursuant to this section, the court shall establish the date and location of the hearing on the motion that shall be set at a time before conducting any further proceedings relative to the matter for which access is sought under the motion. The court shall cause notice of the hearing date and location to be posted at the courthouse where the hearing is scheduled. The movant shall serve a copy of the notice of the date, time, and location of the hearing on all parties to the proceeding in any manner provided in Rule 5 of the Rules of Civil Procedure.

(c) The court shall rule on the motion after consideration of such facts, legal authority, and argument as the movant and any other party to the action desire to present. The court shall issue a written ruling on the motion that shall contain a statement of reasons for the ruling sufficiently specific to permit appellate review. The order may also specify any conditions or limitations on the movant's right of access that the court determines to be warranted under the facts and applicable law.

(d) A party seeking to seal a document or testimony to be used in a court proceeding may submit the document or testimony to the court to be reviewed in camera. This subsection also applies to (i) any document or testimony that is the subject of a motion made under this section and that is submitted for review for the purposes of the court's consideration of the motion to seal, and (ii) to any document or testimony that is the subject of a motion made under this section and that was submitted under seal or offered in closed session prior to the filing of a motion under this section. Submission of the document or proffer of testimony to the court pursuant to this section shall not in itself result in the document or testimony thereby becoming a judicial record subject to constitutional, common law, or statutory rights of access unless the document or testimony is thereafter introduced into evidence after a motion to seal or to restrict access is denied.

(e) A ruling on a motion made pursuant to this section may be the subject of an immediate interlocutory appeal by the movant or any party to the proceeding. Notice of appeal must be given in writing, filed with the court, and served on all parties no later than 10 days after entry of the court's ruling. If notice of appeal is timely given and given before further proceedings are held in the court that might be affected by appellate review of the matter, the court, on its own motion or on the motion of the movant or any party, shall consider whether to stay any proceedings that could be affected by appellate review of the court's ruling on the motion. If notice of appeal is timely given but is given only after further proceedings in the trial court that could be affected

by appellate review of the ruling on a motion made pursuant to this section, or if a request for stay of proceedings is made and is denied, then the sole relief that shall be available on any appeal in the event the appellate court determines that the ruling of the trial court was erroneous shall be reversal of the trial court's ruling on the motion and remand for rehearing or retrial. On appeal the court may determine that a ruling of the trial court sealing a document or restricting access to proceedings or refusing to unseal documents or open proceedings was erroneously entered, but it may not retroactively order the unsealing of documents or the opening of testimony that was sealed or closed by the trial court's order.

(f) This section is intended to establish a civil procedure for hearing and determining claims of access to documents and to testimony in civil judicial proceedings and shall not be deemed or construed to limit, expand, change, or otherwise preempt any provisions of substantive law that define or declare the rights and restrictions with respect to claims of access. Without in any way limiting the generality of the foregoing provision, this section shall not apply to juvenile proceedings or court records of juvenile proceedings conducted pursuant to Chapters 7A, 7B, 90, or any other Chapter of the General Statutes dealing with juvenile proceedings.

(g) Nothing in this section diminishes the rights of a movant or any party to seek appropriate relief at any time from the Supreme Court or Court of Appeals through the use of the prerogative writs of mandamus or supersedeas.

Credits

Added by S.L. 2001-516, § 1, eff. Jan. 1, 2002.

Notes of Decisions (1)

N.C.G.S.A. § 1-72.1, NC ST § 1-72.1

The statutes and Constitution are current through the end of the 2013 Regular Session of the General Assembly.

End of Document

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West's North Carolina General Statutes Annotated
Chapter 1A. Rules of Civil Procedure (Refs & Annos)
Article 2. Commencement of Action; Service of Process, Pleadings, Motions, and Orders

Rules Civ.Proc., G.S. § 1A-1, Rule 5

Rule 5. Service and filing of pleadings and other papers

Effective: October 1, 2011
Currentness

(a) Service of orders, subsequent pleadings, discovery papers, written motions, written notices, and other similar papers - When required. - Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment and similar paper shall be served upon each of the parties, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

(a1) Service of briefs or memoranda in support or opposition of certain dispositive motions. - In actions in superior court, every brief or memorandum in support of or in opposition to a motion to dismiss, a motion for judgment on the pleadings, a motion for summary judgment, or any other motion seeking a final determination of the rights of the parties as to one or more of the claims or parties in the action shall be served upon each of the parties at least two days before the hearing on the motion. If the brief or memorandum is not served on the other parties at least two days before the hearing on the motion, the court may continue the matter for a reasonable period to allow the responding party to prepare a response, proceed with the matter without considering the untimely served brief or memorandum, or take such other action as the ends of justice require. The parties may, by consent, alter the period of time for service. For the purpose of this two-day requirement only, service shall mean personal delivery, facsimile transmission, or other means such that the party actually receives the brief within the required time.

(b) Service -- How made. -- A pleading setting forth a counterclaim or cross claim shall be filed with the court and a copy thereof shall be served on the party against whom it is asserted or on the party's attorney of record as provided by this subsection.

With respect to all pleadings subsequent to the original complaint and other papers required or permitted to be served, service shall be made upon the party's attorney of record and, if ordered by the court, also upon the party. If the party has no attorney of record, service shall be made upon the party. With respect to such other pleadings and papers, service with due return may be made in a manner provided for service and return of process in Rule 4. Service under this subsection may also be made by one of the following methods:

(1) Upon a party's attorney of record:

a. By delivering a copy to the attorney. Delivery of a copy within this sub-subdivision means handing it to the attorney, leaving it at the attorney's office with a partner or employee, or sending it to the attorney's office by a confirmed telefacsimile transmittal for receipt by 5:00 P.M. Eastern Time on a regular business day, as evidenced by a telefacsimile receipt confirmation. If receipt of delivery by telefacsimile is after 5:00 P.M., service will be deemed to have been completed on the next business day.

b. By mailing a copy to the attorney's office.

(2) Upon a party:

a. By delivering a copy to the party. Delivery of a copy within this sub-subdivision means handing it to the party.

b. By mailing a copy to the party at the party's last known address or, if no address is known, by filing it with the clerk of court.

Service by mail shall be complete upon deposit of the pleading or paper enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(b1) Service -- Certificate of Service. -- A certificate of service shall accompany every pleading and every paper required to be served on any party or nonparty to the litigation, except with respect to pleadings and papers whose service is governed by Rule 4. The certificate shall show the date and method of service or the date of acceptance of service and shall show the name and service address of each person upon whom the paper has been served. If one or more persons are served by facsimile transmission, the certificate shall also show the telefacsimile number of each person so served. Each certificate of service shall be signed in accordance with and subject to Rule 11 of these rules.

(c) Service - Numerous defendants. - In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any crossclaim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing. -- The following papers shall be filed with the court, either before service or within five days after service:

(1) All pleadings, as defined by Rule 7(a) of these rules, subsequent to the complaint, whether such pleadings are original or amended.

(2) Written motions and all notices of hearing.

(3) Any other application to the court for an order that may affect the rights of or in any way commands any individual, business entity, governmental agency, association, or partnership to act or to forego action of any kind.

(4) Notices of appearance.

(5) Any other paper required by rule or statute to be filed.

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(6) Any other paper so ordered by the court.

(7) All orders issued by the court.

All other papers, regardless of whether these rules require them to be served upon a party, should not be filed with the court unless (i) the filing is agreed to by all parties, or (ii) the papers are submitted to the court in relation to a motion or other request for relief, or (iii) the filing is permitted by another rule or statute. Briefs or memoranda provided to the court may not be filed with the clerk of court unless ordered by the court. The party taking a deposition or obtaining material through discovery is responsible for its preservation and delivery to the court if needed or so ordered.

(e)(1) Filing with the court defined. -- The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(2) Filing by electronic means. -- If, pursuant to G.S. 7A-34 and G.S. 7A-343, the Supreme Court and the Administrative Officer of the Courts establish uniform rules, regulations, costs, procedures and specifications for the filing of pleadings or other court papers by electronic means, filing may be made by the electronic means when, in the manner, and to the extent provided therein.

Credits

Added by Laws 1967, c. 954, § 1. Amended by Laws 1971, c. 538; Laws 1971, c. 1156, § 2.5; Laws 1975, c. 762, § 1; Laws 1983, c. 201, § 1; Laws 1985, c. 546, § 1; Laws 1991, c. 168, § 1; S.L. 2000-127, § 1, eff. Oct. 1, 2000; S.L. 2001-379, § 3, eff. Oct. 1, 2001; S.L. 2001-388, § 1, eff. Aug. 26, 2001; S.L. 2004-199, § 5(a), eff. Oct. 1, 2004; S.L. 2005-138, §§ 1, 2, eff. Oct. 1, 2005; S.L. 2006-187, § 2(a), eff. Aug. 3, 2006; S.L. 2011-332, § 4.2, eff. Oct. 1, 2011.

Editors' Notes

COMMENT

Comment to this Rule as Originally Enacted. -- *Section (a).* This section is based upon the federal rule and incorporates part of the West Virginia rule.

Former § 1-125 required that a copy of the answer be mailed to the plaintiff or his attorney of record by the clerk and prohibited the clerk from allowing the answer to be filed without a copy for that purpose. Former § 1-140 stated that if no copy of an answer containing a counterclaim was served upon the plaintiff or his attorney, the allegations in the counterclaim should be denied as a matter of law. Other statutes dealing with serving of notice included: former § 1-578, providing that no motion might be heard and no orders in the cause might be made outside the county where the action was pending unless notice of motion was served on the opposing party in accordance with the provisions of § 1-581; former § 1-568.13, service of order upon person to be examined under adverse party examination statutes; former § 1-568.14, notice to all other parties; former § 8-89, inspection of writings; former § 8-90, production of documents; former §§ 8-71 and 72, depositions; former § 1-153, motion to strike; and § 40-17, notice to parties in eminent domain proceedings.

This section is intended to include all such motions and orders. The phrase "and similar paper" indicates that the enumeration of papers is not exhaustive.

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Section (b). -- This section is based upon the federal rule but does not track the exact language of the federal rule. The section preserves the requirement of former § 1-140 that a counterclaim or crossclaim be served on the party against whom it is asserted or on his attorney of record.

Former §§ 1-585, 586, and 587 prescribed the form of notices and method of service, which was similar to this section. These provisions permit service upon a party or his attorney unless otherwise provided.

No statutory provision providing heretofore for notice by mail has been found, but such notice by mail was upheld by the court in a case where defendant filed a written motion to strike portions of the complaint and the court found that copies of the motion had been mailed to and received by plaintiff's attorneys. The court said in such circumstances plaintiff was not entitled to have notice of the motion to strike served on her by an officer. Heffner v. Jefferson Std. Life Ins. Co., 214 N.C. 359, 199 S.E. 293 (1938).

Section (c). -- This section tracks the language of the federal rule. It should be pointed out that the rule is permissive and applies only when the court makes an order under the rule. If such an order is made, a copy of the order must be served upon all parties. If such an order is made, each defendant prepares his answer to the complaint in which he may state his defenses to the complaint, counterclaims against the plaintiff, and cross actions against any or all of the defendants. Each defendant must serve his answer upon the plaintiff within the time prescribed by Rule 12 (a) and file it with the court. The plaintiff is not required to serve and file replies to counterclaims stated in any of the answers of the defendants, and no defendant need serve and file an answer to a crossclaim asserted against him in any of the answers of the defendants. Any counterclaim, crossclaim, or matter constituting an avoidance or affirmative defense contained in any of the answers of the defendants shall be deemed denied. It should be noted that this section dispenses with service of replies to counterclaims and answers to crossclaims only. Other pleadings and all motions must be served as in other cases.

This section also provides that "the filing of any such pleading and service thereof on the plaintiff constitutes due notice of it to the parties." In all cases where an order is entered under the provisions of this section the defendant or his attorney would be required to examine the court file to determine if any crossclaim had been filed against him.

Former § 1-140 provided that if an answer containing a counterclaim was not served on the plaintiff or his attorney, the counterclaim should be deemed denied. The second paragraph of the same statute provided that if a defendant asserted a crossclaim against a codefendant, no judgment by default might be entered against such codefendant unless he had been served with a notice together with a copy of such crossclaim. Thus, the statute did not require that a counterclaim or crossclaim be "served"; it merely denied certain kinds of relief (default judgment) if such was not served.

Default provisions such as Rule 55 would obviously be inoperative if the judge made an order under this section.

Section (d). -- Although this section incorporates most of the federal rule, federal Rule 5 (d) was deemed insufficient for North Carolina practice. Consequently, this section is more detailed than the federal rule. The section also incorporates part of the West Virginia rule but does not track the language of that rule. There is no provision in the federal rule with respect to acceptance of service or of a certificate indicating the method of service. It is believed that this section is more in line with North Carolina practice with respect to service or acceptance of service of summons and other process.

This section will not affect the provisions of certain other rules with respect to filing of papers, such as Rule 3, which requires the complaint to be filed before service.

In substance, this section requires the filing with the court of all papers which are required to be served. There are also papers which are not required to be served, which must also be filed, such as motions which may be heard ex parte. Good practice would indicate that all papers relating to the action should be filed with the court whether required by these rules or not.

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Section (e). -- This section tracks the federal rule. It reflects prior North Carolina practice.

Comment to the 1975 Amendment. -- The amendment adds the words "every paper relating to discovery required to be served upon a party unless the court otherwise orders." It, therefore, makes it clear that all papers relating to discovery required to be served on any party must be served on all parties, unless the court orders otherwise. The language of the former rule expressly included notices and demands, but was not explicit as to answers or responses under Rules 33, 34, and 36. The court is given the power to vary the requirement if in a given case it proves needlessly onerous, such as where the papers are voluminous or where there are numerous parties.

COMMENTS -- 2000

The rule does not require any party to submit a brief or memorandum; it only applies in certain instances in which a party intends to submit a brief or memorandum to the court. The rule would not preclude a party from providing the judge with copies of cases or statutes at a hearing.

This addition to the Official Comment shall only be for annotation purposes and shall not be construed to be the law.

Notes of Decisions (49)

Rules Civ. Proc., G.S. § 1A-1, Rule 5, NC ST RCP § 1A-1, Rule 5
The statutes and Constitution are current through the end of the 2013 Regular Session of the General Assembly.

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West's North Carolina General Statutes Annotated
Chapter 131E. Health Care Facilities and Services (Refs & Annos)
Article 5. Hospital Licensure Act (Refs & Annos)
Part 1. Article Title and Definitions

N.C.G.S.A. § 131E-76

§ 131E-76. Definitions

Effective: October 1, 2009
Currentness

As used in this article, unless otherwise specified:

(1) "Commission" means the North Carolina Medical Care Commission.

(1a) "Critical access hospital" means a hospital which has been designated as a critical access hospital by the North Carolina Department of Health and Human Services, Office of Research, Demonstrations and Rural Health Development. To be designated as a critical access hospital under this subdivision, the hospital must be certified as a critical access hospital pursuant to 42 CFR Part 485 Subpart F. The North Carolina Department of Health and Human Services, Office of Research, Demonstrations, and Rural Health Development may designate a hospital located in a Metropolitan Statistical Area as a rural hospital for the purposes of the critical access hospital program if the hospital is located in a county with twenty-five percent (25%) or more rural residents as defined by the most recent United States decennial census.

(1b) to (1d) Reserved for future codification pursuant to the Revisor of Statutes.

(1e) "Gastrointestinal endoscopy room" means a room used for the performance of procedures that require the insertion of a flexible endoscope into a gastrointestinal orifice to visualize the gastrointestinal lining and adjacent organs for diagnostic or therapeutic purposes.

(2) "Governing body" means the Board of Trustees, Board of Directors, partnership, corporation, association, person or group of persons who maintain and control the hospital. The governing body may or may not be the owner of the properties in which the hospital services are provided.

(3) "Hospital" means any facility which has an organized medical staff and which is designed, used, and operated to provide health care, diagnostic and therapeutic services, and continuous nursing care primarily to inpatients where such care and services are rendered under the supervision and direction of physicians licensed under Chapter 90 of the General Statutes, Article 1, to two or more persons over a period in excess of 24 hours. The term includes facilities for the diagnosis and treatment of disorders within the scope of specific health specialties. The term does not include private mental facilities licensed under Article 2 of Chapter 122C of the General Statutes, nursing homes licensed under G.S. 131E-102, adult care homes licensed under Part 1 of Article 1 of Chapter 131D of the General Statutes, and any outpatient department including a portion of a hospital operated as an outpatient department, on or off of the hospital's main campus, that is operated under the hospital's control or ownership and is classified as Business Occupancy by the Life Safety Code of the National Fire Protection Association as referenced under 42 C.F.R. § 482.41. Provided, however,

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if the Business Occupancy outpatient location is to be operated within 30 feet of any hospital facility, or any portion thereof, which is classified as Health Care Occupancy or Ambulatory Health Care Occupancy under the Life Safety Code of the National Fire Protection Association, the hospital shall provide plans and specifications to the Department for review and approval as required for hospital construction or renovations in a manner described by the Department.

(4) "Infirmary" means a unit of a school, or similar educational institution, which has the primary purpose to provide limited short-term health and nursing services to its students.

(5) "Medical review committee" means any of the following committees formed for the purpose of evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing:

a. A committee of a state or local professional society.

b. A committee of a medical staff of a hospital.

c. A committee of a hospital or hospital system, if created by the governing board or medical staff of the hospital or system or operating under written procedures adopted by the governing board or medical staff of the hospital or system.

d. A committee of a peer review corporation or organization.

(6) Recodified as subd. (1a).

(6a) "Operating room" means a room used for the performance of surgical procedures requiring one or more incisions and that is required to comply with all applicable licensure codes and standards for an operating room.

(7) "Rural hospital network" means an alliance of members that shall include at least one critical access hospital and one other hospital. To qualify as a rural hospital network, the critical access hospital must submit a comprehensive, written memorandum of understanding to the Department of Health and Human Services, Office of Research, Demonstrations and Rural Health Development, for the Department's approval. The memorandum of understanding must include provisions for patient referral and transfer, a plan for network-wide emergency services, and a plan for sharing patient information and services between hospital members including medical staff credentialing, risk management, quality assurance, and peer review.

(8) Recodified as subd. (1e).

(9) Recodified as subd. (6a).

Credits

Added by Laws 1983, c. 775, § 1. Amended by Laws 1985, c. 589, § 41; Laws 1993, c. 321, § 245, eff. July 1, 1993; Laws 1995, c. 535, § 20, eff. Oct. 1, 1995; S.L. 1997-443, § 11A.118(a), eff. July 1, 1997; S.L. 2004-149, §§ 1.1, 2.4, eff. Aug. 2,

2004; S.L. 2004-199, § 49, eff. Aug. 17, 2004; S.L. 2005-346, §§ 1, 2, eff. Aug. 31, 2005; S.L. 2009-462, § 4(j), eff. Oct. 1, 2009; S.L. 2009-487, § 4(a), eff. Aug. 26, 2009.

Notes of Decisions (19)

N.C.G.S.A. § 131E-76, NC ST § 131E-76
The statutes and Constitution are current through the end of the 2013 Regular Session of the General Assembly.

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West's North Carolina General Statutes Annotated
Chapter 131E. Health Care Facilities and Services (Refs & Annos)
Article 5. Hospital Licensure Act (Refs & Annos)
Part 5. Medical Review Committee

N.C.G.S.A. § 131E-95

§ 131E-95. Medical review committee

Effective: July 19, 2006
Currentness

(a) A member of a duly appointed medical review committee who acts without malice or fraud shall not be subject to liability for damages in any civil action on account of any act, statement or proceeding undertaken, made, or performed within the scope of the functions of the committee.

(b) The proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential and not considered public records within the meaning of G.S. 132-1, " 'Public records' defined", and shall not be subject to discovery or introduction into evidence in any civil action against a hospital, an ambulatory surgical facility licensed under Chapter 131E of the General Statutes, or a provider of professional health services which results from matters which are the subject of evaluation and review by the committee. No person who was in attendance at a meeting of the committee shall be required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the committee or as to any findings, recommendations, evaluations, opinions, or other actions of the committee or its members. However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee. Documents otherwise available as public records within the meaning of G.S. 132-1 do not lose their status as public records merely because they were presented or considered during proceedings of the committee. A member of the committee or a person who testifies before the committee may testify in a civil action but cannot be asked about the person's testimony before the committee or any opinions formed as a result of the committee hearings.

(c) Information that is confidential and is not subject to discovery or use in civil actions under this section may be released to a professional standards review organization that performs any accreditation or certification including the Joint Commission on Accreditation of Healthcare Organizations, or to a patient safety organization or its designated contractors. Information released under this subsection shall be limited to that which is reasonably necessary and relevant to the standards review organization's determination to grant or continue accreditation or certification, or the patient safety organization's or its contractors' analysis of patient safety and health care quality. Information released under this subsection retains its confidentiality and is not subject to discovery or use in any civil actions as provided under this section, and the standards review or patient safety organization shall keep the information confidential subject to this section, except as necessary to carry out the organization's patient safety, accreditation, or certification activities. For the purposes of this section, "patient safety organization" means an entity that collects and analyzes patient safety or health care quality data of providers for the purpose of improving patient safety and the quality of health care delivery and includes, but is not limited to, an entity formed pursuant to Public Law No. 109-41.

Credits

Added by Laws 1983, c. 775, § 1. Amended by S.L. 1999-222, § 2, eff. June 25, 1999; S.L. 2002-179, § 19, eff. Oct. 1, 2002; S.L. 2004-149, § 2.5, eff. Aug. 2, 2004; S.L. 2006-144, § 3.2, eff. July 19, 2006.

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Notes of Decisions (54)

N.C.G.S.A. § 131E-95, NC ST § 131E-95
The statutes and Constitution are current through the end of the 2013 Regular Session of the General Assembly.

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44 N.C.App. 638
Court of Appeals of North Carolina.

Gladys L. BOST, Administratrix of the Estate of Wade Lee Bost; and Gladys L. Bost, Individually
v.
William J. RILEY, B. L. Rabold, Louis Hamman, and Catawba Memorial Hospital, Inc.

No. 7925SC256. | Feb. 5, 1980.

Administratrix of decedent's estate sued physicians and hospital for medical malpractice. The Superior Court, Catawba County, Hal H. Walker, J., rendered judgment on a directed verdict for the hospital and on a jury verdict for the physicians. Administratrix appealed. The Court of Appeals, Wells, J., held that: (1) the trial court reversibly erred in excluding, for impeachment purposes, a conversation had by the decedent's father with a hostile witness physician after the physician had performed an operation on the decedent, in which the physician had implied that the defendant hospital was an inferior one and the defendant physicians did not transfer the decedent to the second hospital promptly enough, and (2) where any breach of the hospital's duty to adequately monitor and oversee the decedent's treatment was not a contributing factor to the decedent's death, the hospital could not be held liable.

Affirmed in part; new trial.

West Headnotes (10)

[1] **Evidence**
Contradiction and impeachment

In medical malpractice action against physicians and hospital, trial court reversibly erred in excluding, for impeachment purposes, conversation had by decedent's father with hostile witness physician after physician had performed operation on decedent, in which physician had implied that defendant hospital was an inferior one and defendant physicians did not transfer decedent to the second hospital promptly enough.

[2] **Evidence**
Contradiction and impeachment

Prior inconsistent statements of physician are admissible to impeach his testimony.

1 Cases that cite this headnote

[3] **Witnesses**
Necessity of Laying Foundation

Where inconsistent statements related to matter which was pertinent and material to pending inquiry, or which respected subject matter in regard to which witness was examined, inconsistent statements could be proved by other witnesses without first bringing them to attention of main witness.

[4] **Trial**
Sufficiency to present issue of fact

Generally, directed verdict may be granted only if evidence is insufficient to justify verdict for nonmovant as matter of law.

[5] **Health**
Hospitals or Clinics

Hospital could be found vicariously liable under respondeat superior if negligence of any of its employees, agents, or servants, acting within scope of their authority, contributed to patient's death.

4 Cases that cite this headnote

[6] **Health**
Hospitals or Clinics

Where physicians treating patient were not acting as employees, agents, or servants of hospital, hospital could not be held liable for any malpractice on their part under principal of respondeat superior.

4 Cases that cite this headnote

[7] **Health**

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Negligent hiring or supervision

Hospital has duty to make reasonable effort to monitor and oversee treatment which is prescribed and administered by physicians practicing at facility.

9 Cases that cite this headnote

[8] **Health**

Surgery in general

Where hospital had rule requiring physicians to keep progress notes on patient's condition, its failure to take action against surgeons who violated that rule was negligence; however, where that failure did not contribute to patient's death, hospital could not be held liable for patient's death.

14 Cases that cite this headnote

[9] **Health**

Hospitals in General

Where hospital's breach of duty is not contributing factor to patient's injuries, hospital may not be held liable.

1 Cases that cite this headnote

[10] **Health**

Weight and Sufficiency, Particular Cases

Physician's testimony calling hospital “inferior hospital” and stating that hospital unreasonably delayed its referral of patient to another hospital, was not sufficient evidence to take malpractice case against hospital to jury.

2 Cases that cite this headnote

****392** ***639** Plaintiff's intestate, Wade Lee Bost (Lee), was involved in a bicycle accident on 23 July 1974 in which he injured the left side of his body. On 25 July 1974 Lee was seen in the emergency room of defendant Catawba Memorial Hospital, Inc. (Catawba) and was admitted to Catawba under the supervision of defendant Dr. William J. Riley. Riley conducted tests and diagnosed Lee's injury as a delayed rupture of the spleen. Riley, a surgeon, performed a splenectomy on Lee and replaced blood lost as a result of the rupture. Following the operation, Lee was placed in the intensive care unit, fed intravenously and given various medications. Defendant Riley went on vacation from 29 July 1974 through 11 August 1974, leaving Lee in the care of his two partners, defendants Drs. Bernard L. Rabold and Louis Hamman.

***640** Lee's progress improved from the time of the operation until the late evening of 29 July 1974, when he began experiencing abdominal pain, increased intraperitoneal fluid, perspiration, decreased blood pressure, rapid breathing and vomiting. Defendants Rabold and Hamman diagnosed Lee's condition as peritonitis, and infection of the peritoneal cavity. The doctors placed Lee on the antibiotic Geopen. Between 3 August 1974 and 4 August 1974 Lee's vital signs improved somewhat and the doctors, sensing an improved condition, removed Lee from the intensive care unit.

On 5 August 1974, Lee's condition took a sudden turn for the worse. His temperature shot up to 104*o* , his blood pressure dropped substantially, his skin became pale and his abdomen showed a marked increase in distention and tenderness. Defendants Rabold and Hamman operated on Lee on 6 August 1974 and found a volvulus, a twisting of the intestine which blocked the passage of its contents and the blood supply. The doctors resected approximately three feet of gangrenous bowel. Postoperatively, Lee recovered poorly, developing a fecal fistula, malnutrition and septicemia, and was treated with antibiotics, steroids, hyperalimentation and transfusions.

On 23 August 1974 Lee was transferred to Baptist Hospital in Winston-Salem, his condition critical, under the care of Dr. Richard T. Myers. Three additional operations were performed on Lee, but his condition continued to deteriorate. On 27 January 1975 Lee died of liver failure induced by sepsis.

Plaintiff administratrix of Lee's estate sued defendants Riley, Rabold, Hamman and Catawba for malpractice. In the complaint it was alleged the defendant surgeons were negligent, Inter alia, in failing to take adequate preoperative blood studies prior to the operation of 25 July 1974, damaging organs in the area of this operation, failing to diagnose and adequately treat Lee's intestinal infection, failing to adequately monitor Lee's progress, failing to provide Baptist Hospital with adequate information of Lee's condition, failing to keep plaintiff informed about Lee's true condition,

removing an excess quantity of Lee's bowel, and failing to adequately treat Lee's condition both prior and subsequent to the ****393** operation performed on 6 August 1974. Plaintiff charged Catawba with negligence in the selection of the defendant surgeons to practice surgery in that hospital and allowing the ***641** surgeons to perform such surgery, in failing to adequately supervise and monitor the activities of the defendants, and in failing to adequately monitor the condition of Lee or require the defendant surgeons to keep better progress notes on Lee's condition.

At trial, plaintiff called as adverse witnesses the defendant surgeons and other personnel of Catawba, as well as two radiologists and Dr. Richard T. Myers, the surgeon who treated Lee at Baptist Hospital. Plaintiff also called Dr. Stanley R. Mandel, a surgeon practicing at North Carolina Memorial Hospital at Chapel Hill, who had reviewed Lee's medical records. At the close of plaintiff's evidence, all of the defendants moved for a directed verdict. The trial court granted only the motion of defendant Catawba. The defendant surgeons offered no evidence, but renewed their motions for a directed verdict, which were all again denied by the court. The jury answered the issue of negligence in favor of the defendant surgeons. From the judgment of the court entered upon the jury's verdict, plaintiff appeals.

Attorneys and Law Firms

Gaither & Gorham by James M. Gaither, Jr. and J. Samuel Gorham, III, Hickory, for plaintiff-appellant.

Mitchell, Teele, Blackwell & Mitchell by W. Harold Mitchell, Valdese, for defendants-appellees.

Opinion

WELLS, Judge.

Plaintiff alleges error by the trial court in the admission and exclusion of evidence, the making of prejudicial remarks before the jury, granting defendant Catawba's motion for a directed verdict, charging the jury, and failing to grant plaintiff's motion for a new trial.

[1] **[2]** Plaintiff assigns as error the trial court's exclusion of testimony of Ed Bost, Lee's father, of the conversation which Mr. Bost allegedly had with Dr. Richard T. Myers after Dr. Myers had performed his first operation on Lee at Baptist Hospital. Bost testified In camera that Dr. Myers had told him that Lee, at that point in time, was just a "mass of infection." Bost said that Dr. Myers commented, "(I)nferior hospitals . . . (w)ould hold patients . . . too long sometimes and then they would send them to him and expect miracles." Bost stated that he believed Dr. Myers was ***642** categorizing defendant Catawba Memorial Hospital as one such "inferior hospital." The trial court excluded this testimony. Plaintiff's position is that this comment was admissible for impeachment purposes as to prior inconsistent statement of Dr. Myers. Under our rules of evidence, prior inconsistent statements of a physician are admissible to impeach his testimony. Ballance v. Wentz, 286 N.C. 294, 210 S.E.2d 390 (1974). Dr. Myers, though called by plaintiff, was an adverse and hostile witness, and was therefore subject to impeachment by plaintiff. G.S. 1A-1, Rule 43(b). See also, State v. Anderson, 283 N.C. 218, 195 S.E.2d 561 (1973).

Defendants maintain that since Dr. Myers did not testify whether or not Lee should have been transferred to Baptist Hospital prior to 23 August 1974, this statement was not inconsistent or contradictory to his testimony. We do not agree. Dr. Myers was called by plaintiff as a hostile witness, and testified on cross-examination that the splenectomy was performed well, that defendants' treatment of Lee for acute gastric dilatation was by a good, medically accepted process, and that defendant Rabold ordered the proper blood tests. Dr. Myers further stated that the medication and treatment prescribed and performed by defendants Rabold and Hamman were proper and in keeping with good medical practice, that surgery was not indicated as early as 31 July 1974, and that after the second operation at Catawba, Lee's postoperative management care was in keeping with good medical practice. Dr. Myers testified that sufficient progress notes on Lee's condition were kept at defendant Catawba after the 6 August 1974 operation. ****394** In summary, it was Dr. Myers' opinion that all of the treatment which Lee received at defendant Catawba was in keeping with accepted medical practices.

The comments which Dr. Myers allegedly made to Lee's father, however, clearly implied that Lee's treatment at Catawba had left him in such a condition as to require "miracles" to be performed at Baptist and that Lee should have been transferred to Baptist Hospital sooner. This statement stands in direct contradiction to the unfettered stamp of approval Dr. Myers gave at trial to the care Lee received at Catawba. The trial court's failure to admit this testimony was prejudicial to the plaintiff. Plaintiff called only two surgeons as witnesses who were not named defendants in the suit. The testimony of one of these witnesses, Dr. ***643**

Mandel, was sufficiently favorable to plaintiff to carry the issue of negligence to the jury. The other surgeon to testify who was not a named defendant was Dr. Myers.

Dr. Myers' credentials were impressive. At the time he treated Lee, he was Chairman of the Department of Surgery at Bowman-Gray School of Medicine. He co-authored an authoritative treatise on the surgical aspects of acute abdominal disorders entitled The Acute Abdomen. Dr. Myers examined Lee within a few days of his transfer from Catawba to Baptist. The excluded testimony of Mr. Bost apparently described an initial reaction by Dr. Myers to Lee's condition at the time he was transferred and to the treatment which Lee received at Catawba. Plaintiff's case was unquestionably critically damaged because the jury was prevented from hearing a patently negative statement from Dr. Myers made at the time he was treating Lee, relating to the quality of treatment Lee received at Catawba.

[3] Defendants further argue that the trial court's exclusion of this testimony was proper because plaintiff's counsel was required to lay a foundation for the questions posed to Lee's father, which plaintiff failed to do in the correct manner. We disagree. The rule in North Carolina as to whether a foundation need be laid by first confronting the witness to be impeached with the inconsistent statements is as follows: Where the inconsistent statements relate to a matter which is pertinent and material to the pending inquiry, or which respects the subject matter in regard to which he is examined, the inconsistent statements may be proved by other witnesses without first bringing them to the attention of the main witness. State v. Mack, 282 N.C. 334, 193 S.E.2d 71 (1972); State v. Wellmon, 222 N.C. 215, 22 S.E.2d 437 (1942); 1 Stansbury's N.C. Evidence s 48, pp. 135-140 (Brandis rev. 1973).

We believe that in the present case, the statements which Dr. Myers allegedly made to Lee's father concerning the quality of care offered at Catawba were pertinent and material to whether all or any of the defendant physicians were negligent the issue central to this lawsuit. Accordingly, plaintiff was not required to afford Dr. Myers an opportunity to deny or explain these statements prior to impeaching him through the testimony of another witness.

***644** Furthermore, even though plaintiff was not required to lay a foundation for her impeachment of Dr. Myers, plaintiff, in fact, did lay an adequate foundation:

> (Plaintiff's counsel): All right, sir. And after the second operation, do you recall saying anything to Mr. Bost to the effect that . . . Lee received poor treatment at Catawba Memorial Hospital?
>
> (Myers): No, I never said that.
>
> (Plaintiff's counsel): Do you recall indicating or saying anything or indicating that after the second operation?
>
> (Myers): No.

The record does not clearly reveal whether the conversation Ed Bost avers he had with Dr. Myers occurred after the first or second operation performed on Lee at Baptist Hospital. However, defendants do not argue on appeal that Dr. Myers may not have been confronted with the proper time at which the conversation allegedly occurred, preventing him from recalling the matter. Instead, defendants maintain that ****395** the wording of the above questions posed to Dr. Myers was insufficient to put Dr. Myers on notice about any comments he may have made to Mr. Bost concerning "inferior hospitals." We do not believe that plaintiff's counsel was required to confront Dr. Myers with the identical words Ed Bost attributes to him, as long as Dr. Myers was questioned with language meaning the same thing. Dr. Myers denied saying anything to Ed Bost to the effect that Lee received poor treatment at Catawba Hospital. Mr. Bost's testimony that Dr. Myers had made a statement to him previously to the effect that Catawba was an inferior hospital and that Lee was kept there too long, plainly related to the quality and sufficiency of treatment which Lee received at Catawba. Dr. Myers was thus afforded an adequate opportunity to explain or deny the conversation he allegedly had with Mr. Bost, and Dr. Myers flatly denied the conversation.

[4] Plaintiff also assigns as error the trial court's granting of defendant Catawba's motion for a directed verdict at the close of plaintiff's evidence. Generally, a directed verdict under G.S. 1A-1, Rule 50(a) may be granted only if the evidence is insufficient to ***645** justify a verdict for the nonmovant as a matter of law. Arnold v. Sharpe, 296 N.C. 533, 251 S.E.2d 452 (1979).

[5] **[6]** Plaintiff argues that the evidence it presented at trial was sufficient to withstand defendant Catawba's motion under both the theory of Respondeat superior and the doctrine of corporate negligence. Catawba could be found vicariously liable under Respondeat superior if the negligence of any of

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its employees, agents, or servants, acting within the scope of their authority, contributed to Lee's death. Waynick v. Reardon, 236 N.C. 116, 72 S.E.2d 4 (1952). However, because plaintiff's evidence failed to show that the physicians treating Lee were acting as employees, agents, or servants of Catawba, the principle of Respondeat superior is inapplicable to this case.

In contrast to the vicarious nature of Respondeat superior, the doctrine of "corporate negligence" involves the violation of a duty owed Directly by the hospital to the patient. Prior to modern times, a hospital undertook, "only to furnish room, food, facilities for operation, and attendants, and (was held) not liable for damages resulting from the negligence of a physician in the absence of evidence of agency, or other facts upon which the principle of Respondeat superior (could have been) applied." Smith v. Duke University, 219 N.C. 628, 634, 14 S.E.2d 643, 647 (1941). In contrast, today's hospitals regulate their medical staffs to a much greater degree and play a much more active role in furnishing patients medical treatment. In abolishing the doctrine of charitable immunity, formerly available to charitable hospitals as a defense to negligence actions in North Carolina, Justice (later Chief Justice) Sharp acknowledged the changed structure of the modern hospital, quoting from Bing v. Thunig, 2 N.Y.2d 656, 666, 163 N.Y.S.2d 3, 11, 143 N.E.2d 3, 8 (1957):

> "The conception that the hospital does not undertake to treat the patient, does not undertake to act through its doctors and nurses, but undertakes instead simply to procure them to act upon their own responsibility, no longer reflects the fact. Present-day hospitals, as their manner of operation plainly demonstrates, do far more than furnish facilities for treatment. They regularly employ on a salary basis a large staff of physicians, nurses and internes, as well as administrative and manual workers, and they charge patients ***646** for medical care and treatment, collecting for such services, if necessary, by legal action. Certainly, the person who avails himself of 'hospital facilities' expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility."

Rabon v. Hospital, 269 N.C. 1, 11, 152 S.E.2d 485, 492 (1967).

There has recently been a great deal of discussion about the liability of a hospital for its corporate negligence. See, e. g., ****396** Note, The Hospital's Responsibility for its Medical Staff: Prospects for Corporate Negligence in California, 8 Pacific L.J. 141 (1977); Comment, Medical Malpractice Hospital May Be Held Liable for Permitting Incompetent Physician to Operate, 8 Rut.-Cam.L.J. 177 (1976); Payne, Recent Developments Affecting a Hospital's Liability for Negligence of Physicians, 18 S.Texas L.J. 367 (1977); Spero, Vicarious and Direct Corporate Responsibility for Acts of Professional Negligence Committed in a Hospital, 15 Trial 22 (No. 7, July 1979); Southwick, The Hospital's New Responsibility, 17 Clev.-Mar.L.Rev. 146 (1968); Annot., Hospital's Liability for Negligence in Failing to Review or Supervise Treatment Given by Individual Doctor, or to Require Consultation, 14 A.L.R.3d 873 (1967).

The proposition that a hospital may be found liable to a patient under the doctrine of corporate negligence appears to have its genesis in the leading case of Darling v. Hospital, 33 Ill.2d 326, 211 N.E.2d 253 (1965), Cert. denied, 383 U.S. 946, 86 S.Ct. 1204, 16 L.Ed.2d 209 (1966). In Darling, the plaintiff broke his leg while playing in a college football game and was seen at the defendant hospital's emergency room by the physician on call. With the assistance of hospital personnel the physician put a plaster cast on the plaintiff's leg. The cast was put on in such a manner as to restrict the blood flow in plaintiff's leg. Plaintiff was in great pain and his toes became swollen and dark in color, and later cold. When the doctor removed the cast two days later much of plaintiff's leg tissue had died and the leg had to be amputated below the knee.

The Supreme Court of Illinois affirmed the jury's finding of negligence on the part of the hospital. The Court held that the jury could have found the hospital was negligent, Inter alia, in failing to have a sufficient number of trained nurses attending the ***647** plaintiff, failing to require a consultation with or examination by members of the hospital staff, and failing to review the treatment rendered to the plaintiff. Since Darling, the courts of other states have found that a hospital's corporate negligence extends to permitting a physician known to be incompetent to practice at the hospital.Corleto v. Hospital, 138 N.J.Super. 302, 350 A.2d 534 (Super. Ct. Law Div. 1975); Purcell v. Zimbelman, 18 Ariz.App. 75, 500 P.2d 335 (1972); Hospital Authority v. Joiner, 229 Ga. 140, 189 S.E.2d 412 (1972).

While the doctrine of corporate negligence has never previously been either expressly adopted or rejected by the courts of our State, it has been implicitly accepted and applied in a number of decisions. The Supreme Court has intimated that a hospital may have the duty to make a reasonable inspection of equipment it uses in the treatment of patients

and remedy any defects discoverable by such inspection. Payne v. Garvey, 264 N.C. 593, 142 S.E.2d 159 (1965). The institution must provide equipment reasonably suited for the use intended. Starnes v. Hospital Authority, 28 N.C.App. 418, 221 S.E.2d 733 (1976). The hospital has the duty not to obey instructions of a physician which are obviously negligent or dangerous. Byrd v. Hospital, 202 N.C. 337, 162 S.E. 738 (1932). We have suggested that a hospital could be found negligent for its failure to promulgate adequate safety rules relating to the handling, storage and administering of medications, Habuda v. Hospital, 3 N.C.App. 11, 164 S.E.2d 17 (1968), or for its failure to adequately investigate the credentials of a physician selected to practice at the facility, Robinson v. Duszynski, 36 N.C.App. 103, 243 S.E.2d 148 (1978).

[7] Since all of the above duties which have been required of hospitals in North Carolina are duties which flow directly from the hospital to the patient, we acknowledge that a breach of any such duty may correctly be termed corporate negligence, and that our State recognizes this as a basis for liability apart and distinct from Respondeat superior. If, as our Supreme Court has stated, a patient at a modern-day hospital has the reasonable expectation that the hospital will attempt to cure him, it seems axiomatic that the hospital have the duty assigned by the Darling Court to make a reasonable effort to monitor and oversee the treatment which is prescribed and administered by physicians practicing at the facility.

****397 [8] [9] *648** The plaintiff in the present case has introduced evidence tending to show that the defendant surgeons failed to keep progress notes on Lee's condition for a number of days in succession following the operation of 6 August 1974, in violation of a rule promulgated by Catawba. Catawba took no action against the surgeons for their violation. While this evidence is sufficient to show that Catawba may have violated the duty it owed to Lee to adequately monitor and oversee his treatment, plaintiff has offered no evidence to show that this omission contributed to Lee's death. Where a hospital's breach of duty is not a contributing factor to the patient's injuries, the hospital may not be held liable. Habuda v. Hospital, 3 N.C.App. 11, 164 S.E.2d 17 (1968).

[10] Neither may the previously discussed impeachment testimony of Mr. Bost, which was hearsay, alleging that Dr. Myers called Catawba an "inferior hospital" and that Catawba unreasonably delayed its referral of Lee to Baptist Hospital, be considered substantive evidence of the quality of care administered by Catawba. State v. Mack, 282 N.C. 334, 193 S.E.2d 71 (1972); 1 Stansbury's N.C. Evidence s 46, p. 131 (Brandis rev. 1973). There was also no evidence at trial that Catawba failed to use reasonable care in selecting the defendant surgeons to practice at the hospital. Accordingly, the trial court correctly granted defendant Catawba's motion for a directed verdict. However, as discussed previously, there must be a new trial with respect to the defendant surgeons for the trial court's failure to admit the above testimony as impeachment evidence.

Since plaintiff's other assignments of error are not likely to occur on retrial, we decline to address them here.

As to defendant hospital, affirmed; as to individual defendants,

New trial.

HEDRICK and ROBERT M. MARTIN, JJ., concur.

Parallel Citations

262 S.E.2d 391

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58 N.C.App. 414
Court of Appeals of North Carolina.

Donald J. CAMERON, D.P.M., N. F. Costin, D.P.M., and Podiatry Associates of Wilmington, P.A.
v.
NEW HANOVER MEMORIAL HOSPITAL, INC., Peter J. Watkins, Walter Craven, Bruce B. Cameron, Mrs. Caronell C. Chestnut, Samuel Warshauer, M.D., Sigmond A. Bear, M.D., William Kingoff, Alma Ryder, Thomas Jervay, Ellen C. Williams, F. P. Fensell, Irving Fogler, Seymore L. Alper, R. E. Kizer, Jr., Frank Reynolds, M.D., Individually and as Trustees of New Hanover Memorial Hospital, Inc., W. F. Morrison, Jr., J. R. Dineen, M.D. and David P. Thomas, M.D.

No. 815SC1135. | Aug. 3, 1982.

Podiatrists brought action against public hospital, its trustees, administrators and two medical doctors on its staff for alleged wrongful denial of hospital staff privileges caused by alleged conspiratorial conduct. From a judgment of the Superior Court, New Hanover County, Robert D. Rouse, Jr., J., the podiatrists appealed. The Court of Appeals, Hill, J., held that: (1) certain evidence was properly admissible under business records exception, while certain other evidence was not; (2) certain documents were correctly excluded based upon hospital's general assertion of privilege; (3) podiatrists failed to prove actionable conspiracy or wrongful interference with business relations, contractual rights or prospective advantage; (4) podiatrists failed to show restraint of trade or unfair methods of competition and practice; (5) podiatrists failed to show compensable injury resulting from “false light” publication; and (6) qualifications imposed by hospital board were reasonably related to operation of hospital and were fairly administered.

Affirmed.

West Headnotes (17)

[1] **Evidence**
Unofficial or Business Records in General
Evidence
Form and Sufficiency in General

Requisites of business records exception to nonadmissibility of hearsay evidence were met through voir dire testimony of witness who identified certain hospital records, but as to documents identified by other witnesses, they were not admissible as business records in view of fact that witnesses did not show mode of preparation, that minutes were recorded at or near time of meetings, that minutes were made by someone having knowledge of data set forth and did not show that minutes were made ante litem motam.

[2] **Evidence**
Unofficial or Business Records in General

It was of no consequence that proper foundation for admission of evidence under business records exception was laid subsequent to first introduction of minutes of meeting which authenticating witness recorded.

[3] **Evidence**
Form and Sufficiency in General

Where authenticating witness testified that excluded portion of minutes of meeting was true to best of his knowledge at time he wrote it, “business records” exception to hearsay rule applied equally to excluded portion though authenticating witness indicated he was not certain of source of comments excluded by the trial judge.

[4] **Libel and Slander**
Qualified Privilege

Where public interest in free expression and communication of ideas is sufficient to outweigh state's interest in protecting a plaintiff, law does not allow recovery of damages occasioned by the communication and thus defense of qualified privilege arises where communication is made in good faith, where its subject and scope is one in which party uttering it has valid interest to uphold or in reference to which he has legal right or duty, and where communication is made to

person or persons having corresponding interest, right or duty.

[5] **Privileged Communications and Confidentiality**
Minutes of Meetings and Transcripts
Privileged Communications and Confidentiality
Medical or Health Care Peer Review

Law in state was uncertain concerning subject of privileged communications in context of hospital committee records at time of case, but policy enunciated by statute was grounded in common law, and trial judge correctly excluded and sealed documents consisting of minutes of meetings which recorded good-faith communications of hospital committees in which those present had corresponding interest in administration of hospital, but attorney-client privilege was not applicable. G.S. § 131-170.

3 Cases that cite this headnote

[6] **Conspiracy**
Nature and Elements in General

For civil action for conspiracy, there must be wrongful act resulting in injury to another, which must have been done by one or more of conspirators pursuant to common scheme and in furtherance of common object.

1 Cases that cite this headnote

[7] **Conspiracy**
Evidence

Evidence which did not go beyond mere suspicion or conjecture was insufficient for jury to infer that particular defendants agreed to boycott two hospitals, joined by others, causing privileges of plaintiff podiatrists therein to be terminated, and thus evidence was insufficient as matter of law to justify verdict for plaintiffs on their claim of civil conspiracy.

1 Cases that cite this headnote

[8] **Torts**
Knowledge and Intent; Malice

Generally, a defendant's motive or purpose is determining factor as to liability in actions for interference with economic relations, and plaintiffs were bound to show that defendants acted with malice and for reason not reasonably related to protection of legitimate business interest of defendants.

13 Cases that cite this headnote

[9] **Torts**
Absence of Justification or Privilege
Torts
Injury and Causation

Where tort claim is based upon wrongful interference with prospective advantage, plaintiffs must show lack of justification for inducing third party to refrain from entering into contract with them which contract would have ensued but for the interference.

26 Cases that cite this headnote

[10] **Antitrust and Trade Regulation**
Questions of Law and Fact
Torts
Business Relations or Economic Advantage, in General

Evidence in action by podiatrists against medical doctors on hospital staff was insufficient for jury on allegation of defendants' “anticompetitive” conduct causing plaintiff podiatrists to be denied hospital privileges, and evidence was also insufficient for submission of plaintiffs' claim for wrongful interference with prospective advantage.

20 Cases that cite this headnote

[11] **Antitrust and Trade Regulation**
Cartels, Combinations, Contracts, and Conspiracies in General
Antitrust and Trade Regulation
Restraints and Misconduct in General

Plain language of state statute based upon first section of Sherman Act requires that some

concerted action in restraint of trade be proved, and unilateral action cannot violate the statute, and state's substantive law of civil conspiracy also applies in context of such statute, and for same reasons that evidence was insufficient to support claims of civil conspiracy and interference with economic relations, there was insufficient evidence to show the concerted action required for such statutory claim. G.S. §§ 75-1, 75-1.1; Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

4 Cases that cite this headnote

[12] **Antitrust and Trade Regulation**
Sellers and Suppliers

Public hospital, its trustees, administrator and medical doctors on its staff were not "sellers" within unfair competition statute which, as written when podiatrists' action accrued or was later amended, did not apply to circumstances of case. G.S. §§ 75-1.1, 75-1.1(a, b).

2 Cases that cite this headnote

[13] **Antitrust and Trade Regulation**
Medical Professionals; Doctor and Patient
Antitrust and Trade Regulation
Other Particular Relationships

Nature of consideration of whom to grant hospital staff privileges is necessary assurance of good health care and is rendering of "professional services" excluded from unfair competition statute. G.S. §§ 75-1.1, 75-1.1(a, b).

9 Cases that cite this headnote

[14] **Torts**
False Light

Plaintiff in action for invasion of privacy need not plead and prove special damages, but compensable injury must result from the "false light" published by a defendant.

[15] **Health**
Actions and Judicial Review

In reviewing action of hospital board denying hospital privileges, court is charged with narrow responsibility of assuring that qualifications imposed by board are reasonably related to operation of hospital and fairly administered. G.S. § 90-202.12.

4 Cases that cite this headnote

[16] **Health**
Licenses and Qualifications

Standards established by hospital board, i.e., membership in American College of Foot Surgeons, board eligible or board certified by American Board of Podiatric Surgery and residency requirement for type 2 privileges were considerations reasonably related to operation of hospital and it was not arbitrary, capricious and discriminatory to exclude from requested surgical procedures plaintiffs who were unable to comply with standards properly established by such hospital board. G.S. §§ 90-202.12, 131-126.11A, 131-126.11B.

4 Cases that cite this headnote

[17] **Constitutional Law**
Employment of Physicians; Hospital Staff Privileges

Procedures afforded two podiatrists by hospital board were sufficient to afford to them procedural due process through podiatrists were excluded from performing surgical procedures which they requested. G.S. §§ 90-202.12, 131-126.11A.

****903** ***416** This is an action by two podiatrists, duly licensed to practice podiatry in this State, against a public hospital [hereinafter referred to as New Hanover] [1], its individual trustees, its administrator, and two medical doctors on its staff [hereinafter referred to as Dineen and Thomas] alleging a wrongful denial of hospital staff privileges to the podiatrists caused by alleged conspiratorial conduct of Dineen and Thomas which was joined by the other named defendants.

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In their complaint, filed 13 October 1978, the podiatrists, plaintiffs Cameron and Costin, alleged twelve claims for relief: (1) that defendants discriminated against plaintiffs solely because they are podiatrists and conspired, among other things, to interfere and did interfere with their civil rights in violation of 42 U.S.C.A. § 1985(3); (2) that defendants had the power to prevent ****904** "the wrongs conspired to be done" in the first claim, but failed to exercise that power, and that the wrongs were committed in violation of 42 U.S.C.A. § 1986; (3) that defendants' actions "in refusing to amend the medical-dental staff by-laws so as to permit plaintiffs' application for hospital privileges to be considered on its own merits constitutes a denial of procedural and substantive due process of law," and is in violation of 42 U.S.C.A. § 1983; (4) that defendants conspired to restrain trade by conspiring and agreeing to deny and by denying hospital privileges to plaintiffs, and by agreeing to participate in and participating in a "group boycott" of plaintiffs, anticompetitive in purpose and effect, in violation of G.S. 75-1; (5) that defendants engaged in and continue to engage in "unfair methods of competition and unfair practices," anticompetitive in purpose and effect, in violation of G.S. 75-1.1; ***417** (6) that the allegations in claims four and five also constitute violations of the provisions of the common law; (7) that "[d]efendants intentional acts of exclusion of plaintiffs from hospital privileges is a violation of defendants' common-law duty to deal fairly and equitably with plaintiffs"; (8) that defendants intentionally conspired to interfere and destroy and did interfere with plaintiffs' business; (9) that defendants intentionally conspired to interfere and did interfere with plaintiffs' contractual rights with defendant hospitals, with plaintiffs' relationship with their patients, and with plaintiffs' prospective advantage; (10) that "[d]efendant Dineen and others have defamed, slandered and libeled plaintiffs" which has been encouraged by other named defendants; (11) that defendants violated plaintiffs' rights of privacy by making false statements which cast them "in a ridiculous light," and by intentionally placing them "in the position of second-class citizens;" and (12) that defendants' actions violate G.S. 90-202.12.

Plaintiffs prayed for preliminary and permanent injunctions to prohibit defendants from refusing to amend hospital bylaws "to permit consideration of podiatrists for hospital privileges on their individual merits," and to prohibit defendants from the continuance of the wrongful actions alleged in plaintiffs' several claims for relief. Plaintiffs further prayed for actual damages of "at least $250,000.00 per plaintiff," for treble damages under their fourth and fifth claims for relief, and for $1,000,000.00 in punitive damages.

Dineen and Thomas generally denied plaintiffs' allegations and pleaded the statute of limitations as a bar to any claim asserted by plaintiffs. New Hanover and its related defendants similarly answered plaintiffs' complaint.

On 20 February 1980, plaintiffs moved for summary judgment. However, on 16 May 1980, Judge Tillery entered an order in part denying plaintiffs' motion for summary judgment, and dismissing plaintiffs' first, second, and third claims for relief pursuant to motions to dismiss pleaded in defendants' answers. Such motions to dismiss plaintiffs' fourth through twelfth claims were denied. Dineen and Thomas also filed motions for summary judgment on 29 December 1980. On the same date, New Hanover and its related defendants moved for partial summary judgment ***418** and to dismiss plaintiffs' fourth, sixth, eighth, ninth, tenth, and eleventh claims for relief on the ground that those claims are barred by the statute of limitations. The trial judge entered an order on 10 February 1981 in part severing plaintiffs' tenth claim for relief from the trial of the remaining claims, and denying defendants' motions for summary judgment, with the exception of such motions as they relate to the tenth claim for relief; summary judgment upon that claim was allowed as to all defendants except Dineen, whose motion for summary judgment upon the tenth claim was denied.

Subsequent to the filing of their complaint, Judge James heard plaintiffs' motion for a preliminary injunction to prohibit defendants from refusing to amend hospital bylaws to permit consideration of podiatrists for staff privileges. On 29 December 1978, an order was entered which provided, in part, as follows:

> ****905** Each of the defendant hospitals shall act on Drs. Cameron and Costin's pending requests for amendments to the by-laws to permit the granting of hospital privileges to licensed podiatrists and their pending requests for hospital privileges and shall grant Drs. Cameron and Costin evidentiary hearings before the medical-dental staff of the hospital, or a duly designated committee of said staff, and before the board of trustees in support of those requests.
>
> Each hearing shall be conducted in accordance with the following procedural due process requirements mandated by the Fifth and Fourteenth Amendments to the United

States Constitution: right to notice of the hearing; right to representation of counsel at the hearing; right to call witnesses, who shall testify under oath; right to cross-examine witnesses; right to have the hearing conducted on the record before a court reporter agreed upon by the parties; right to a copy of the record; right to a written decision following each hearing, which writing shall contain a statement of the reasons for any determinations made.

Pursuant to this order, a hearing was held on 12 February 1979 by a special committee of the New Hanover medical staff, at which plaintiffs and their counsel were present and offered evidence. Upon receipt of the committee's recommendations, plaintiffs requested a hearing before New Hanover's Board of ***419** Trustees. Following the hearing on 27 March 1979, at which plaintiffs and their counsel were present and offered evidence, the board issued its decision on 8 May 1979 granting to plaintiffs "Type 1 podiatric privileges." Such privileges were defined in recommended amendments to the New Hanover medical staff bylaws as follows:

... Type 1 podiatric privileges allow a podiatrist to treat the foot by mechanical, medical and surgical means in a manner that does not cause bleeding or require an anesthetic, except in the case of the removal of toenails, either partial or complete, with or without excision of the nail matrix, in which case bleeding and the use of a local anesthetic is acceptable.

In reaching this decision, the board established and applied to plaintiffs certain standards for the provision of hospital staff privileges for podiatrists. The decision stated, in part, as follows:

It is the opinion of the Board that the formulation and adoption of amendments to the medical staff bylaws so as to permit podiatrists to apply for privileges at New Hanover Memorial Hospital should be undertaken without regard for the particular applications now pending from Dr. Cameron and Dr. Costin. The new bylaws should apply to any and all podiatrists who might apply for privileges at New Hanover Memorial Hospital, and should establish standards that are not only fair to the applicant, but which, at the same time, provide the Credentials Committee, the Executive Committee and the Board of Trustees with meaningful and responsible guidelines to maintain the Hospital's highly competent surgical staff.

With respect to podiatric surgical procedures, it is the position of this Board that the practitioner, whether he be a physician or a podiatrist, shall be highly competent to perform the surgical privileges which are granted to him.

....

In short, the Board has a duty to formulate clear standards to be met by any podiatrist seeking privileges at New Hanover Memorial Hospital.

[T]he traditional and accepted standards that have been applied to physicians seeking surgical privileges at New ***420** Hanover Memorial Hospital include the consideration of whether such physicians are members of their respective medical colleges and whether such physicians have been classified as Board eligible or Board certified by their respective specialty boards. It seems reasonable to apply comparable standards to podiatrists seeking surgical privileges at New Hanover Memorial Hospital.

....

****906** Therefore, it is the opinion of the Board that membership in the American College of Foot Surgeons is still a reasonable and relevant consideration to be considered in evaluating the competence of a podiatrist seeking surgical privileges at New Hanover Memorial Hospital.

....

Since a podiatrist can be classified as Board eligible without having completed a residency, and since residency training is a basic factor to be considered in evaluating the competency of applicants seeking surgical privileges at New Hanover Memorial hospital, it is the opinion of the Board of Trustees that the residency requirements set forth in the proposed bylaw amendment is a reasonable standard to be satisfied by applicants seeking Type 2 podiatric privileges. [2]

....

[I]t is the opinion of the Board that recognition as being either Board eligible or Board certified by the

American Board of Podiatric Surgery is a reasonable and relevant consideration to be considered in evaluating the competence of a podiatrist seeking surgical privileges at New Hanover Memorial Hospital.

The Board perceives its duty in formulating the requested bylaw amendment as being two-fold. The amendment should set forth a framework for evaluating the competency of any applying podiatrist in a fair and reasonable manner. ***421** At the same time, the standards of evaluation set forth in any bylaw must also reflect the responsible exercise of the Board's duty to the public to assure a highly competent medical staff. It is the opinion of the Board that the best efforts of the special committee, the medical staff and this Board have been devoted to accomplishing that two-fold purpose.

Thus, the board concluded, "Sound academic training and continued postgraduate training under the supervision of specialists in the respective medical fields are, in the opinion of this Board, basic factors to be considered in evaluating the competency of any applicant seeking surgical privileges at New Hanover Memorial Hospital."

In his order of 16 May 1980, Judge Tillery reviewed Judge James' order, the records of the hearings held pursuant to that order, and the recommendations made, and found that Judge James' order "has been complied with by the defendant hospitals, the individual plaintiffs have been given due process hearings on their requests for bylaw amendments and hospital privileges, and the actions of the respective hospital boards of trustees on said requests were not arbitrary or capricious."

Upon the completion of plaintiffs' evidence at trial, the trial judge granted defendants' motions for directed verdict upon all issues. Plaintiffs appeal from the judgment entered thereon.

Attorneys and Law Firms

Smith, Moore, Smith, Schell & Hunter by Jack W. Floyd, Frank J. Sizemore, III, and Alan W. Duncan, Greensboro, for plaintiffs-appellants.

Ward & Smith by Thomas E. Harris and Robert H. Shaw, III, New Bern, and Marshall, Williams, Gorham & Brawley by A. Dumay Gorham, Jr., for defendant-appellee New Hanover Memorial Hosp., Inc., Wilmington, and its related defendants-appellees.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan by John H. Anderson, Samuel G. Thompson and Robin K. Vinson, Raleigh, for defendants-appellees J. R. Dineen, M.D., and David P. Thomas, M.D.

Opinion

***422** HILL, Judge.

Plaintiffs' evidence at trial tends to show that plaintiff Cameron graduated from the Ohio College of Podiatric Medicine with the degree of doctor of podiatric medicine. While in school, Cameron performed or assisted in performing surgeries on the human foot. He received his North Carolina license to practice podiatry in 1952. Along ****907** with other professional affiliations, Cameron is an affiliate of the American College of Foot Surgeons Associates and an associate of the American College of Foot Surgeons. He is past president of the North Carolina Podiatry Society. Plaintiff Costin graduated from the Temple University School of Chiropody, later known as the Pennsylvania College of Podiatric Medicine, in 1954. He received the degree of doctor of surgical chiropody, later exchanged for the degree of doctor of podiatric medicine. Costin testified that the exchange of degrees "was done only for those whose curriculum was comparable to the curriculum at the time the exchange was made." Costin had no training in surgical procedures under general anesthesia. He began the practice of podiatry in Wilmington in 1956. At the time of trial, Costin served on the North Carolina Board of Podiatry Examiners.

In 1960 or 1961, Cameron applied for and received hospital privileges at Cape Fear Memorial Hospital, Inc. [hereinafter referred to as Cape Fear]. From approximately 1961 to 1964, Cameron performed 75 to 125 surgeries under general anesthesia at Cape Fear. Costin joined Cameron's practice of podiatry in 1962 and also performed surgeries at Cape Fear until 1964.

Cameron testified that he was present at a meeting of the Cape Fear medical staff on 22 April 1964. He described the meeting as follows:

I did hear Dr. David Thomas make some statements at that meeting. To the best of my recollection, Dr. Thomas stated to the staff that he felt that it would downgrade the profession of orthopedics if podiatrists continued to do surgery on an in-patient. He

> felt, he and Dr. Dineen, that it would jeopardize them and their status with the American Orthopedic Association, and they could no longer do surgery in Cape Fear Hospital if podiatrists were performing on an in-patient basis as we had been.

***423** A portion of the minutes of the meeting was later admitted into evidence against Dineen and Thomas, but not against New Hanover, and a portion was excluded totally by the trial judge. [3] The admitted minutes stated, in part, as follows:

> Dr. Thomas informed the staff that he and his associate Dr. Dineen were opposed to the practice of podiatry on in-patients in the hospital. He said that this was the opinion of the Orthopedic Academy and that to practice in a hospital ... where podiatry was permitted might jeopardize his status with the Am. Board of Orthopedic Surg. In particular Dr. Thomas objected to the technical performance of surgery in the operating room suite and to the ... performance of surgery with the patient under general anesthesia. Dr. Thomas said that he had no objection to podiatrists working on out-patients under local anesthesia and that there was nothing personal concerning Drs. Cameron and Coston [sic] to which his opposition had reference.
>
> When queried by Dr. Mebane as to why he held these views, Dr. Thomas said that he considered the practice of podiatric surgery in the operating room and when under general anesthesia to represent an infringement on the field of orthopedic surgery and to downgrade, (to lower the status of) orthopedic surgery. Dr. Thomas also said that he did not see how he could continue to work in a hospital which had podiatrists (working in the operating rooms and under general anesthesia).
>
> Dr. Thomas said he could not speak for the other orthopedists in town (Drs. Dorman, Boyes and T. Craven) who are associated in practice.

****908** Following the 22 April meeting, Cameron continued to exercise non-surgical staff privileges at Cape Fear; however, all staff ***424** privileges at Cape Fear subsequently were terminated. In 1973 and 1974, plaintiffs constructed operating room facilities in their office. Surgeries performed in that office facility were under local anesthesia. Cameron testified that "[t]he number of surgical procedures performed by me and Dr. Costin in our own privately constructed operating room has remained fairly constant over the years from 1973 to date-at about 20 to 30 a month."

Since their staff privileges were terminated, plaintiffs from time to time made applications to Cape Fear and New Hanover [4] "for clinical privileges." On 30 July 1973, plaintiffs wrote a letter to the chairman of the Board of Trustees at Cape Fear which was read to the jury as follows:

> "On July 6, 1973, we received correspondence from Mr. R. J. McLeod that 'at a meeting of the Board of Trustees, held on July 3, 1973, it was decided that it would not be advantageous for the hospital to have a podiatry staff at the present time.' For four years we had full privileges including the operating room. In April 1964 our privileges were greatly restricted; however, the podiatry staff still remained a part of the hospital bylaws. We feel that the deletion of podiatric staff privileges by the recent revision of hospital bylaws constitutes a violation of our rights according to Standard VII of the 1970 Accreditation Manual for Hospitals by the Joint Commission on Accreditation of Hospitals, page 43:
>
> > 'Provide an appeal mechanism relative to medical staff recommendations for denial of staff appointments and reappointments, as well as for denial, curtailment, suspension or revocation of clinical privileges. This mechanism shall provide for review of decisions, including the right to be heard at each step of the process when requested by the practitioner. The final decision must be rendered by the governing body within a fixed period of time.'
>
> "In accordance with the above paragraph, we are requesting a review of this decision and would like to be heard at each step of the process as outlined above."

***425** On 9 September 1975, plaintiffs sent an "informational letter" to the Cape Fear medical staff concluding that "we do hereby formally request that the medical staff of Cape Fear Memorial Hospital approve amending the bylaws to provide for the establishment of a podiatry staff at this institution." Again on 24 January 1978, plaintiffs requested "that the Board of Trustees of Cape Fear Memorial Hospital consider an amendment to the bylaws of the hospital which would allow for the inclusion of podiatry in accordance with the Accreditation Manual for Hospitals ...." A similar letter was written to the Chairman of the Board of Trustees at New Hanover on 9

February 1978. Following the acknowledgment of receipt of both letters at Cape Fear and New Hanover, plaintiffs heard nothing further on their requests.

Dr. Heber Johnson, a general surgeon at Cape Fear, testified that he knew Cameron and, by observing Cameron's performance in surgery, determined that his surgery was "excellent." Johnson further testified that during a medical staff meeting at Cape Fear in October 1973, Dineen presented a case he thought was treated unnecessarily and overcharged by plaintiffs. Johnson stated that "Dr. Dineen said that he did not want to lie down with skunks. I presumed that from the tenor of the conversation, his conversation, that the appellation 'skunks' was applied to the podiatrists who had applied for hospital privileges." Although he testified that he knew why plaintiffs' hospital privileges were restricted in 1964, Johnson stated, "I have no personal recollection of the events that occurred in 1964 except from the minutes of the meetings of the staff which I personally extracted to review two years ago for the deposition which I had." However, when shown a copy of the minutes of the Cape Fear Medical staff ****909** meeting on 27 April 1964, Johnson testified on *voir dire* that it "does not refresh my recollection as to why the privileges were restricted." [5]

***426** Robert J. McLeod was the administrator of Cape Fear from 1959 to 1980. He testified that he did not recall discussing plaintiffs' competency to use the hospital's operating room with Dineen or Thomas. McLeod did recall that at one meeting, "Dr. Dineen said if the podiatrists [plaintiffs] were admitted to the staff that they would not patronize the hospital and they would talk to the other orthopedic surgeons and ask them not to patronize the hospital." However, McLeod further testified, "I do not know if the withdrawal of privileges at Cape Fear Hospital was directly responsive to the demands of the orthopedics [sic] on the staff."

Defendant William F. Morrison, administrator of New Hanover since 1969, testified that the process by which clinical privileges are granted to "health practitioners" is as follows:

> I am fairly well acquainted with the process at New Hanover by which clinical privileges are granted to health practitioners. A practitioner that wishes privileges at our institution normally inquires as to what the process is. We inform them that there is an application which we supply them with. The application is filled out by the inquirer or applicant, returned to my office along with recommendation letters. We then see that the application is complete, turn the application over to the designated committee of the Medical Staff to begin processing. If it is determined from the application that the applicant does not have a license to practice in the State of North Carolina, it stops at that point. If he does have a license to practice his profession, it goes to a committee of the medical staff. Our office turns the application over to the chairman of the Credential Committee, an appointed chairman of that committee .... The committee is generally responsible for establishing that the applicant has the required credentials for the position on the staff which is being applied for.... The process of the credential granting privileges is entirely that of the Medical Staff of New Hanover Hospital and the Board of Trustees.... The Credential Committee reports to the Executive Committee of the Medical Staff. The Executive Committee hears the comments and report of the Credential Committee and acts upon a recommendation of the committee concerning the applicant.

Morrison further testified that he did not believe this process would apply to a podiatrist who applied for staff privileges in ***427** 1973 and 1977. He stated, "If I had received an application for clinical privileges at New Hanover by a podiatrist in the year 1973, I don't know what I would have done with it. I have no provision for processing."

Morrison identified numerous minutes of New Hanover Executive Committee and medical staff meetings which were read to the jury that described, in part, the process of considering plaintiffs' requests to change the staff's bylaws to include privileges for podiatrists at New Hanover. This evidence was admitted against New Hanover but not against Dineen and Thomas.

At the 11 June 1973 meeting of the Executive Committee, plaintiffs were present and presented their request to amend the bylaws " 'to include granting of hospital privileges to qualified podiatrists.' " The matter was referred to the Department of Surgery for consideration. On 9 July, Thomas, reporting for the Department of **910 Surgery, stated that the department recommended that privileges not be granted to podiatrists. The Executive Committee adopted the department's recommendation " 'on the basis primarily that the extra work and supervision by the medical or surgical staff members would tend to overburden their already heavy patient load.' "

The 13 August 1973 minutes of the Executive Committee reveal that plaintiffs were granted permission to appear before the committee and present further evidence on behalf of their request for staff privileges. However, at the 7 September meeting of the surgical staff, it was unanimously recommended that the Executive Committee be advised that " 'surgical staff saw no medical reason to change the bylaws at this time ....' " The Executive Committee voted to seek legal advice on the question at the 10 September 1973 meeting; the medical staff likewise voted to seek legal advice at its 11 September meeting. Upon receipt and consideration of the legal advice, the medical staff " 'overwhelmingly' " voted to deny plaintiffs' request on 11 December 1973. The Board of Trustees was informed of this action at its 18 December 1973 meeting.

The New Hanover Executive Committee again considered plaintiffs' request to amend the medical staff's bylaws to include staff privileges for podiatrists on 13 March 1978. The matter then was referred to the Credentials Committee; this action was *428 reported to the Board of Trustees at its 25 April 1978 meeting. On 13 November 1978, one month after plaintiffs filed their complaint in the present case, the Executive Committee heard the report of the Credentials Committee. The minutes of that meeting were read to the jury, in part, as follows:

> "At the present time our bylaws do not provide for [podiatrists to become members of the medical staff]. The committee recommended that the bylaws be amended so that applications for qualified podiatrists could be considered. They further recommended that surgical or nonsurgical privileges be granted depending upon individual qualifications. Their work on the staff would be subject to the restrictions defined in the JCAH [Joint Commission on the Accreditation of Hospitals] standards similar to the restrictions of dentists."

Ellen Carraway Williams, a member of the New Hanover County Board of Commissioners and a member of New Hanover's Board of Trustees in 1978, then considered in her official capacity the question of whether podiatrists should have clinical privileges at Wilmington hospitals. She testified that although the patient was the "major concern," she relied upon the hospital committees to inform her "as a Trustee what surgeons are or are not competent to practice in the hospital ...." Williams further testified as follows:

> My feeling is that the hospital must determine who is qualified to serve in that hospital whether it is podiatrists or any other M.D., surgeon or what have you; that the hospital must determine whether they are going to be allowed to practice in that hospital and if they are not allowed to practice in that hospital, then they have to make the choice. As to who has to make the choice, the Board has to determine with what information comes to it, all the information it can determine, whether they feel that those asking privileges have the qualifications that the hospital has set as standard.

Williams thought that she told the local media that she "did not feel these two plaintiffs were qualified to practice in the hospital." However, she stated that she has not agreed with anyone to destroy plaintiffs' professional practice.

*429 The deposition testimony of Dineen was admitted into evidence concerning his objections to Costin as a speaker for the Cape Fear Diabetes Association on the subject of the diabetic foot. He wrote two letters to the members of the New Hanover Department of Orthopedic Surgery decrying the choice of the speaker. Dineen testified, "Inasmuch as there were eleven orthopedists practicing in Wilmington at that time, I felt that a chiropodist, now called podiatrist, **911 was a poor choice of speaker on the subject of the diabetic foot, or the care of the diabetic foot, which is a condition that is not just limited to the foot."

Bruce Canady, a pharmacist employed by the Area Health Education Center, testified that he spoke with Dineen concerning speakers for the diabetes association. Canady rejected Dineen's idea of taping Costin's speech, and Dineen "at that time said that he was of the impression that it was not up to me and I disagreed with that. He then said that he would take the matter further as, I believe he said, 'It was time to put on the gloves.' "

Dineen also was called as an adverse witness for plaintiffs. He testified that in late 1964, he told McLeod, "I was not going to continue to practice at the Cape Fear Hospital if podiatrists were allowed to operate in the operating room unsupervised, as I had learned had happened prior to my arrival." Dineen denied that he ever made such a statement to anyone associated with New Hanover. Dineen variously described plaintiffs as follows:

> I was dealing with two chiropodists who did not have hospital training, did not have any post-graduate training, had limited premedical training and very limited training in the four years referred to in their graduate program.
>
> ....
>
> The plaintiffs are not now and never have been podiatrists. They are what I call chiropodists. Under my definition of that term, it is a lower status than that of podiatry.
>
> ....
>
> I am certain that these plaintiffs qualified under that law [licensing of podiatrists] or they wouldn't be practicing. But in my own mind, the way I define the term podiatry, they do not qualify.
>
> ....
>
> ***430** As to whether I have ever made an investigation to determine whether or not these doctors are competent surgeons in their field, I am sure they are competent in chiropody, obviously, but not in podiatry. I don't recall sharing that opinion with my colleagues on the staff at the hospitals from time to time through the years. This is my own personal opinion from my own personal experience with podiatrists.

He further testified that "[a]t no time after 1964 did I join with Dr. Thomas in opposing the practice of podiatry surgery in the hospitals in Wilmington."

Dr. James Alan Gray, a surgeon at Cape Fear and New Hanover, testified by deposition, in part, as follows:

> ... I felt in 1964 that I would be subject to criticism, as a member of the American Academy of Orthopaedic Surgeons, if I operated in a hospital that permitted podiatrists to operate on patients under general anesthesia without medical supervision.... I think it would have, in my opinion, adversely affected my reputation by practicing with podiatrists in the hospital.
>
> ....
>
> Concerning the nature of my position, my objection was that they were not qualified to do the surgical procedures that they applied for. These procedures were open operations on the foot, meaning procedures that could draw blood. I considered them unqualified to perform those procedures ... [because of] ... the knowledge that we had of their background and training.

Nevertheless, Gray stated that he and Dineen had no discussion about their opposition to plaintiffs other than "passing remarks" which indicated that they shared the same opinion.

I

By their Assignment of Error Nos. 7 and 8, plaintiffs argue that substantial evidence was improperly excluded by the trial judge that further demonstrated the sufficiency of the evidence ***431** to withstand defendants' motions for directed verdict. Specifically, plaintiffs contend that the judge improperly excluded certain minutes of medical staff meetings and other hospital documents "under the guise of the hearsay rule" and that the judge erred in denying to plaintiffs ****912** access to all the minutes of the New Hanover medical staff meetings and other documents in New Hanover's possession on the ground of an asserted privilege. Because our disposition of these assignments of error necessarily affect our consideration of the propriety of the directed verdict entered for defendants, we address these questions at the outset of this opinion.

A

> "Evidence, oral or written, is called hearsay when its probative force depends, in whole or in part, upon the competency and credibility of some person other than the witness by whom it is sought to produce it." ... Expressed differently, whenever the assertion of any person, other than that of the witness himself in his present testimony, [footnote omitted] is offered to prove the truth of the matter asserted, the evidence so offered is hearsay. [Footnote omitted.] If offered for any other purpose, it is not hearsay. 1 Stansbury's N.C. Evidence (Brandis rev. 1973) § 138, pp. 458-60 [hereinafter referred to as Stansbury]. *Accord Wilson v. Hartford Accident & Indemnity Co.*, 272 N.C. 183, 158 S.E.2d 1 (1967). Hearsay evidence is inadmissible unless it falls within one of the recognized exceptions to the hearsay rule.

[1] The modern "business records" exception to the hearsay rule was enunciated by our Supreme Court in the landmark case of *Firemen's Insurance Co. v. Seaboard Air Line Railway*, 138 N.C. 42, 50 S.E. 452 (1905). The requisites of this exception to admit hearsay evidence have been summarized adequately: "If the entries were made in the regular course of business, at or near the time of the transaction involved, and are authenticated by a witness who is familiar with them and the system under which they are made, they are admissible." 1 Stansbury § 155, p. 523.

In the present case, minutes of medical staff meetings and other hospital documents are clearly hearsay for they were offered to prove the truth of the matters asserted therein. ***432** However, defendants argue that "[m]inutes of medical staff meetings do not constitute business records or hospital records" because only records used in the provision of health care are admissible under the "business records" exception. "It is a matter of common knowledge, we think, that modern hospitals are staffed by medical, surgical and technological experts who serve as members of a team in the diagnosis and treatment of human ills and injuries." *Sims v. Charlotte Liberty Mutual Insurance Co.*, 257 N.C. 32, 35, 125 S.E.2d 326, 329 (1962). An essential part of the "teamwork" required of modern hospital staffs is the staff meeting where, as the evidence in the present case clearly shows, important decisions are made concerning the provision of health care in the hospital. [6] The need for accuracy in these records is as important as that required of hospital patient records. *Cf. Sims v. Charlotte Liberty Mutual Insurance Co., supra.* Therefore, to accept defendants' contentions that the minutes of medical staff meetings are not "business records" is to deny the reality of modern hospital administration. There is no question, then, that the minutes of medical staff meetings were made in the regular course of the hospital's business.

Of course, a proper foundation must be laid for the introduction of these "business records" in light of the requisites of the hearsay exception stated above.

> The hospital librarian or custodian of the record or other qualified witness must testify to the identity and authenticity of the record and the mode of its preparation, and show that the entries were made at or near to the time of the act, condition or event recorded, that they were made by persons having knowledge of the data set forth, and that they were made *ante litem motam.*

****913** *Sims v. Charlotte Liberty Mutual Insurance Co., supra* at 35, 125 S.E.2d at 329. Here, plaintiffs apparently sought to lay a foundation for the admission of the minutes of medical staff meetings and other hospital documents by eliciting the testimony of Dr. ***433** Albert David Warshauer, McLeod, Morrison, and Joseph L. Soto, who replaced McLeod as Cape Fear's administrator.

On *voir dire*, Warshauer testified that he recorded the minutes of certain Cape Fear medical staff meetings. He stated that he would take "little notes" during the meeting and "go to another office where there was a typewriter and type the minutes" after the meeting or on the next day. Warshauer further testified that the minutes were kept in a book and that he considered them to be a part of the official records of the hospital. McLeod testified that as Cape Fear's administrator, he was responsible for the hospital's records, which were locked in his office, including the records of the medical staff. He stated that certain minutes of medical staff meetings which he identified were "business records." Morrison also testified that as New Hanover's administrator, he is responsible for the minutes of the Board of Trustees. He stated, "It is part of my duties at New Hanover Memorial Hospital to serve as custodian of the minutes of the Board of Trustees and their various committees, and of the Medical Staff and its various committees." Soto merely testified that he is "custodian of the minutes of the Medical Staff and the Board of Trustees" at Cape Fear.

We conclude that the testimony of McLeod, Morrison and Soto did not lay a proper foundation under the criteria set out in *Sims.* Although they were custodians of the records,

McLeod, Morrison, and Soto did not adequately authenticate the documents they identified; they did not show the mode of preparation, that the minutes were recorded at or near the time of the meetings, that the minutes were made by someone having knowledge of the data set forth, and they did not show that the minutes were made *ante litem motam. See Sims v. Charlotte Liberty Mutual Insurance Co., supra.* However, these deficiencies which are fatal to the admission of the documents identified by McLeod, Morrison, and Soto are present in the *voir dire* examination of Warshauer summarized above. Thus, only those minutes authenticated by Warshauer are admissible under the "business records" exception to the hearsay rule since the remaining requisites of that exception have been met through Warshauer's *voir dire* testimony.

[2] Our review of the record on appeal reveals that the minutes of only two Cape Fear medical staff meetings properly authenticated ***434** by Warshauer were identified and offered into evidence: the 22 April 1964 minutes and the 24 April 1963 minutes.[7] Both documents were read, in part, to the jury and admitted by the trial judge against Dineen and Thomas but not against New Hanover and its related defendants. It is of no consequence that the proper foundation was laid subsequent to the first introduction of the minutes of the 22 April 1964 meeting which Warshauer recorded. *See State v. Franks*, 262 N.C. 94, 136 S.E.2d 623 (1964).

Although we sustain plaintiffs' assignments of error as described above, we find no error in the admission of the minutes of these Cape Fear medical staff meetings against Dineen and Thomas, but not against New Hanover and its related defendants. However, we conclude that the trial judge erred in totally excluding a portion of the minutes for the 22 April 1964 meeting. *See* footnote 3, *supra.*

[3] As noted above, the minutes were offered to prove the truth of the matters asserted therein. Warshauer's *voir dire* testimony regarding this portion of the 22 April 1964 minutes indicates that he is not certain of the source of the comments excluded by the trial judge. However, Warshauer testified that the excluded portion of ****914** the minutes was "true to the best of my knowledge at the time I wrote it." Under these circumstances, the "business records" exception to the hearsay rule equally applies to the excluded portion.[8] It also should have been admitted against Dineen and Thomas, but not against New Hanover and its related defendants.

***435 B**

Prior to the presentation of evidence, counsel for New Hanover objected to plaintiffs' request to review certain documents which the trial judge had ordered to be brought to trial. Defendants' objection was grounded as follows: "First, the privilege as to the nature of the discussions that were the subjects of the meetings, which are reflected by the minutes. Second, the fact that some of the minutes reflected meetings of the trustees, committees where counsel was present." The judge sustained the objections based upon the assertion of attorney-client privilege and sealed the documents he had ordered to be brought to trial.

We are constrained to note that subsequent to the filing of this action, G.S. 131-170 was codified as follows:

> The proceedings of, records and materials produced by, and the materials considered by a committee are not subject to discovery or introduction into evidence in any civil action against a provider of professional health services arising out of the matters which are the subject of evaluation and review by the committee, and no person who was in attendance at a meeting of the committee shall be required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the committee or as to any findings, recommendations, evaluations, opinions, or other actions of the committee or its members. However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee nor should any person who testifies before the committee or who is a member of the committee be prevented from testifying as to matters within his knowledge, but the witness cannot be asked about his testimony before the committee or

> opinions formed by him as a result of the committee hearings.

Thus, under present law, plaintiffs would not be entitled to introduce any of the minutes of medical staff meetings they offered into evidence unless a witness to the meetings testified as to ***436** "matters within his knowledge ...."[9] *Id.* In effect, the legislature has created a qualified privilege for the communications described above.

While construing a statute similar to G.S. 131-170, the California Court of Appeal noted that Cal.Evid.Code (West) § 1157 "was enacted upon the theory that external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity.... Section 1157 represents a legislative choice between competing public concerns. It embraces the goal of medical staff candor at the cost of impairing plaintiffs' access to evidence." *Matchett v. Superior Court for County of Yuba*, 40 Cal.App.3d 623, 629, 115 Cal.Rptr. 317, 320-21 (1974).

****915** **[4]** Our Supreme Court has long embraced this philosophy as the basis for the doctrine of privileged communications: " 'The great underlying principle of the doctrine of privileged communications rests in public policy.' *Alexander v. Vann*, 180 N.C. 187, 104 S.E. 360. The basis of privilege is the public interest in the free expression and communication of ideas." *R. H. Bouligny, Inc. v. United Steelworkers of America*, 270 N.C. 160, 170, 154 S.E.2d 344, 354 (1967). Where this interest is sufficient to outweigh the State's interest in protecting a plaintiff, the law does not allow recovery of damages occasioned by the communication. *Id.* Thus, the defense of qualified privilege arises in circumstances where

> (1) a communication is made in *good faith*, (2) the subject and scope of the communication is one in which the party uttering it has a valid interest to uphold, or in reference to which he has a legal right or duty, and (3) *the communication is made to a person or persons having a corresponding interest, right, or duty.*

Presnell v. Pell, 298 N.C. 715, 720, 260 S.E.2d 611, 614 (1979) (emphasis original). *Accord Stewart v. Nation-Wide Check Corp.*, 279 N.C. 278, 182 S.E.2d 410 (1971). *See also* Prosser, *Law of Torts* (4th ed. 1971) § 115, p. 785 [hereinafter referred to as Prosser].

***437** **[5]** In the present case, the minutes of the meetings sought to be protected by the asserted privilege recorded good faith communications of the hospital committees in which those present had a corresponding interest in the administration of the hospital. The rationale of the common law qualified privilege therefore applies. Thus, although the law in this State was uncertain concerning the subject of privileged communications in the context of hospital committee records at the time of the present case, the policy enunciated by G.S. 131-170 is grounded in our common law. We hold that the trial judge correctly excluded and sealed the documents based upon New Hanover's general assertion of privilege; however, we do not endorse defendants' objection based upon their assertion of attorney-client privilege. *See generally* 1 Stansbury § 62, p. 196.

II

Plaintiffs' Assignment of Error No. 1 alleges that the trial judge erred in granting defendants' motions for a directed verdict upon all issues at the end of plaintiffs' evidence. The question raised by a directed verdict motion is whether the evidence is sufficient to go to the jury. *Rappaport v. Days Inn of America, Inc.*, 296 N.C. 382, 250 S.E.2d 245 (1979); *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971). In passing upon such a motion, the trial judge must consider the evidence in the light most favorable to the non-movant, resolving all conflicts and giving to him the benefit of every inference reasonably drawn in his favor. *Rappaport v. Days Inn of America, Inc., supra; Summey v. Cauthen*, 283 N.C. 640, 197 S.E.2d 549 (1973). A directed verdict motion by defendant may be granted only if the evidence is insufficient as a matter of law to justify a verdict for plaintiff. *Husketh v. Convenient Systems, Inc.*, 295 N.C. 459, 245 S.E.2d 507 (1978); *Dickinson v. Pake*, 284 N.C. 576, 201 S.E.2d 897 (1974). We now examine the causes of action stated in plaintiffs' complaint which they believe should have gone to the jury to determine the propriety of the trial judge's ruling.

A

[6] "A conspiracy has been defined as 'an agreement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful way.' " *Dickens v. Puryear*, 302 N.C. 437, 456, 276 S.E.2d 325, 337 (1981), *quoting* ***438** *State v. Dalton*, 168 N.C. 204, 205, 83 S.E. 693, 694 (1914).

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Thus, to create a civil action for conspiracy, " 'a wrongful act resulting in injury to another must be done by one or more of the conspirators pursuant to the common scheme and in furtherance of the common object.' " *Muse v. Morrison*, 234 N.C. 195, 198, 66 S.E.2d 783, 785 (1951), *quoting Holt v. Holt*, 232 N.C. 497, 500, 61 S.E.2d 448, 451 (1950).

> The action is for damages caused by acts committed pursuant to a formed conspiracy, ****916** rather than by the conspiracy itself; and unless something is actually done by one or more of the conspirators which results in damage, no civil action lies against anyone. The gist of the civil action for conspiracy is the act or acts committed in pursuance thereof-the damage-not the conspiracy or the combination.

Reid v. Holden, 242 N.C. 408, 414, 88 S.E.2d 125, 130 (1955); *quoted in Shope v. Boyer*, 268 N.C. 401, 405, 150 S.E.2d 771, 774 (1966). "Although civil liability for conspiracy may be established by circumstantial evidence, the evidence of the agreement must be sufficient to create more than a suspicion or conjecture in order to justify submission of the issue to a jury." *Dickens v. Puryear, supra*, 302 N.C. at 456, 276 S.E.2d at 337.

[7] In their brief, plaintiffs herein state that the evidence is sufficient to show that (1) "plaintiffs' surgical privileges at Cape Fear were terminated *as a direct result* of the threatened group boycott by the orthopedic surgeons in Wilmington, and in particular, by Dr. Thomas and Dr. Dineen;" and (2) "[b]ecause of the economic coercion imposed by the orthopedists' threatened boycott, New Hanover acquiesced in and embraced the conspiracy"-conduct dubbed by plaintiffs as "anticompetitive in nature." Considering the evidence offered at trial by plaintiffs as recounted above, including the portion of the minutes of the 22 April 1964 meeting which should have been admitted by the trial judge, we conclude that such evidence is insufficient to support the statements made by plaintiffs in their brief. In sum, there is no sufficient evidence beyond mere suspicion or conjecture, either direct or circumstantial, for the jury to infer that Dineen and Thomas agreed to boycott the two hospitals, joined by New Hanover and its related defendants, causing plaintiffs' privileges therein to be terminated.

***439** Plaintiffs, of course, point to the statements attributed to Dineen and Thomas in the minutes of Cape Fear medical staff meetings in 1964 and 1973 quoted above. However, we construe that evidence as individual expressions of like personal opinion that do not rise to the level of proof of an agreement to perpetrate the "anticompetitive" conduct alleged by plaintiffs. More importantly, there is no evidence of an overt act, or acts, by defendants that is indicative of an agreement which resulted in damage to plaintiffs. Had plaintiffs established a *prima facie* conspiracy independently of the statements attributed to Dineen and Thomas, those statements would have been admissible as declarations of the conspirators. *See Greer v. Skyway Broadcasting Co.*, 256 N.C. 382, 124 S.E.2d 98 (1962); 2 Stansbury § 173, p. 24; *see also State v. Conrad*, 275 N.C. 342, 168 S.E.2d 39 (1969).

Therefore, since the evidence is insufficient as a matter of law to justify a verdict for plaintiffs on their claim of civil conspiracy, the trial judge properly granted defendants' motions for a directed verdict upon this issue.

B

[8] **[9]** In their eighth and ninth claims for relief, plaintiffs allege that defendants' actions constitute a wrongful interference with their business relations, contractual rights, and prospective advantage. Generally, a defendant's motive or purpose is the determining factor as to liability in actions for interference with economic relations, "and sometimes it is said that bad motive is the gist of the action." Prosser § 129, pp. 927-28. Thus, to maintain an action for interference with business relations in North Carolina, plaintiffs must show that defendants "acted with malice and for a reason not reasonably related to the protection of a legitimate business interest of [defendants]." *Smith v. Ford Motor Co.*, 289 N.C. 71, 94, 221 S.E.2d 282, 296 (1976). Our Supreme Court has stated the essential elements of wrongful interference with contractual rights as follows:

> ... First, that a valid contract existed between the plaintiff and a third person, conferring upon the plaintiff some contractual right against the third person. [Citations omitted.] *Second*, that the outsider had knowledge of the plaintiff's ****917** contract with the third person. [Citations omitted.] Third, that the outsider intentionally induced the third person ***440** not to perform his contract

> with the plaintiff. [Citations omitted.] *Fourth*, that in so doing the outsider acted without justification. [Citations omitted.] *Fifth*, that the outsider's act caused the plaintiff actual damages.

Childress v. Abeles, 240 N.C. 667, 674, 84 S.E.2d 176, 181-82 (1954). Where the claim is based upon wrongful interference with prospective advantage, plaintiffs must show lack of justification for inducing a third party to refrain from entering into a contract with them which contract would have ensued but for the interference. *Spartan Equipment Co. v. Air Placement Equipment Co.*, 263 N.C. 549, 140 S.E.2d 3 (1965).

[10] A thread running through each of these actions is the requirement that plaintiffs must show a malicious, unjustifiable action by defendants resulting in the interference of plaintiffs' economic relations. Plaintiffs' strongest allegation in the present case is that such interference was defendants' combined, malicious, unjustifiable "anticompetitive" conduct as characterized above.

" 'As a general proposition any interference with free exercise of another's trade or occupation, or means of livelihood, by preventing people by force, threats, or intimidation from trading with, working for, or continuing him in their employment is unlawful.' " *Coleman v. Whisnant*, 225 N.C. 494, 506, 35 S.E.2d 647, 656 (1945), *quoting Kirby v. Reynolds*, 212 N.C. 271, 281, 193 S.E. 412, 418 (1937). Nevertheless, our prior conclusion that plaintiffs' evidence is insufficient to support their allegation of defendants' "anticompetitive" conduct also must cause this claim to fail. Although plaintiffs have presented evidence to indicate a competition between their practice and that of Dineen and Thomas, the evidence properly before the jury is also insufficient to infer any cause and effect relationship between that competition and the denial of staff privileges at New Hanover which, plaintiffs contend, interferes with their business relations and contractual rights with their patients.[10]

***441** As it relates to plaintiffs' claim of wrongful interference with prospective advantage, competition is a privilege, the "life of trade."

> So long as the plaintiff's contractual relations are merely contemplated or potential, it is considered to be in the interest of the public that any competitor should be free to divert them to himself by all fair and reasonable means.
>
> ....
>
> [S]ince all the members of a group may be free to do what any one of them may do, the addition of the element of combination or agreement of a number of defendants to carry out such policies adds nothing in itself, and will not result in liability. [Footnote omitted.] In such cases of group action, however, the possibilities of unprivileged coercion, intimidation, and a monopolistic restraint of trade are vastly increased, and the defendants frequently have been held liable on this basis.

Prosser § 130, pp. 954-55.

Again, in the present case, the evidence recounted above shows no "anticompetitive" conduct, or "group action," spurred by "unprivileged coercion, [or] intimidation ...." *Id.* To the extent that the evidence indicates a competition between plaintiffs' practice and that of Dineen and Thomas, we find that based upon the principles quoted above, plaintiffs' claim for wrongful interference with prospective advantage also must fail. For these reasons, plaintiffs have failed to prove the requisite interference. The trial judge therefore correctly granted defendants' motions for a directed verdict upon these issues.

****918 C**

[11] As indicated by our above discussion, the issues of civil conspiracy and wrongful interference with economic relations by alleged "anticompetitive" conduct have similar underpinnings; the same is true where such "group action" is alleged to show a "monopolistic restraint of trade." Prosser § 130, p. 955. Thus, we now consider plaintiffs' claims that defendants engaged in a restraint of trade and in unfair methods of competition and practice in violation of G.S. 75-1 & 75-1.1.

***442** At the time of the trial of the present case,[11] G.S. 75-1 stated, in part, as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal. Every person or corporation who shall make

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> any such contract expressly or shall knowingly be a party thereto by implication, or who shall engage in any such combination or conspiracy, shall be guilty of a misdemeanor ....
>
> This statute is based upon section one of the Sherman Act, 15 U.S.C.A. § 1, "[a]nd, the body of law applying the Sherman Act, although not binding upon this Court in applying G.S. 75-1, is nonetheless instructive in determining the full reach of that statute." *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 655, 194 S.E.2d 521, 530 (1973).

The plain language of G.S. 75-1 requires that some concerted action in restraint of trade must be proven; unilateral action cannot violate the statute. *See Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911, 101 S.Ct. 1981, 68 L.Ed.2d 300 (1981), and the cases cited therein. *See generally State v. Atlantic Ice & Coal Co.*, 210 N.C. 742, 188 S.E. 412 (1936). "The substantive law of trade conspiracies requires some consciousness of commitment to a common scheme." *United States v. Standard Oil Co.*, 316 F.2d 884, 890 (7th Cir. 1963), *quoted in Klein v. American Luggage Works, Inc.*, 323 F.2d 787, 791 (3d Cir. 1963). *Accord Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., supra; Robinson v. Magovern*, 521 F.Supp. 842 (W.D.Pa.1981).

> Direct proof of an express agreement is not required. On the contrary, the plaintiff may rely on an inference of a common understanding drawn from circumstantial evidence .... Nevertheless, [plaintiff has] the burden of adducing sufficient evidence from which the jury could find illegal concerted action on the basis of reasonable inferences and not mere speculation.

Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., supra at 111. *See also* ***443** *The Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309 (3d Cir. 1975). We further note that in the federal jurisdiction, uniform business behavior is admissible circumstantial evidence from which an agreement may be inferred. However, such evidence alone does not make out a violation of the Sherman Act. *Coughlin v. Capitol Cement Co.*, 571 F.2d 290 (5th Cir. 1978). Thus, it is clear that North Carolina's substantive law of civil conspiracy, outlined above, also applies in the context of G.S. 75-1.

For the same reasons that plaintiffs' evidence is insufficient to support their claims of civil conspiracy and interference with economic relations, we now must conclude that plaintiffs have not presented sufficient evidence to show the concerted action required as a threshold to their claim under G.S. 75-1. Defendants' motions for a directed verdict upon this issue were properly granted.

When plaintiffs' action accrued, [12] G.S. 75-1.1 provided, in part, as follows:

> ****919** (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any *trade or commerce* are hereby declared unlawful.
>
> (b) The purpose of this section is to declare and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between *buyers and sellers* at all levels of *commerce* be had in this State.

(Emphasis added.) Since the language of G.S. 75-1.1(a) is strikingly similar to that of a section of the Federal Trade Commission Act, ***444** 15 U.S.C.A. § 45(a)(1), our courts have held that federal decisions construing that Act are instructive upon the meaning of G.S. 75-1.1. *State of North Carolina ex rel. Rufus L. Edmisten v. J.C. Penney Co.*, 292 N.C. 311, 233 S.E.2d 895 (1977); *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975).

In *Penney*, our Supreme Court stated as follows:

> "Commerce" under federal decisions "is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms ...." *Welton v. Missouri*, 91 U.S. 275, 280, 23 L.Ed. 347, 349 (1876); *accord, Adair v. United States*, 208 U.S. 161, 177, 52 L.Ed. 436, 443, 28 S.Ct. 277, 281 (1908); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90, 6 L.Ed. 23, 68 (1824). The federal courts have properly assigned the broadest possible definition to the word "commerce," since in defining the word, they define the limits of federal power to regulate activities under the commerce clause. U.S.Const. art. 1, § 8, cl. 3.
>
> ....
>
> By inserting the word "trade" in G.S. 75-1.1, which has a narrower meaning than the word "commerce," we believe

> the legislature signaled its intent to limit the otherwise broad definition of "commerce" obtained under federal decisions.... The use of the word "trade" interchangeably with the word "commerce" indicates that a narrower definition of commerce which comprehends *an exchange* of some type was intended.
>
> Just as in one sense the word "trade" has a limiting effect on the word "commerce," in another sense the word "commerce" enlarges the meaning of the word "trade." The two words, when used in conjunction, "include practically every business occupation carried on for subsistence or profit, and into which the elements of bargain and sale, barter, exchange, or traffic, enter." Black's Law Dictionary (4th Ed. 1968). Thus, a host of occupations would be covered by G.S. 75-1.1 that would not be subject to a statute which relied exclusively on the word "trade." ...
>
> We believe the unfair and deceptive acts and practices forbidden by G.S. 75-1.1(a) are those involved in the bargain, ***445** sale, barter, exchange or traffic. We are reinforced in this view by G.S. 75-1.1(b), a declaration of legislative intent having no counterpart in the federal act....
>
> The General Assembly, thus, is concerned with openness and fairness in those activities which characterize a party as a "seller."

Id. 292 N.C. at 315-17, 233 S.E.2d at 898-99. *See also Johnson v. Phoenix Mutual Life Insurance Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980). *But see United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F.Supp. 1041 (E.D.N.C.1979). *See generally* Morgan, *The People's Advocate in the Marketplace-The Role of the North Carolina Attorney General in the Field of Consumer Protection*, 6 Wake Forest Intra.L.Rev. 1 (1969).

****920 [12] [13]** In the context of the Uniform Commercial Code, this Court has held that medical professionals do not engage in the sale of "goods" when they either issue a prescription for a drug, *Batiste v. American Home Products Corp.*, 32 N.C.App. 1, 231 S.E.2d 269, *disc. rev. denied*, 292 N.C. 466, 233 S.E.2d 921 (1977), or prepare and fit dentures, *Preston v. Thompson*, 53 N.C.App. 290, 280 S.E.2d 780, *disc. rev. denied*, 304 N.C. 392, 285 S.E.2d 833 (1981). *See* G.S. 25-2-105.

> Inherent in the legislation is the recognition that the essence of the transaction between the retail seller and the consumer relates to the article sold, and that the seller is in the business of supplying the product to the consumer. It is the product and that alone for which he is paid. *The physician offers his professional services and skill. It is his professional services and his skill for which he is paid, and they are the essence of the relationship between him and his patient.*

Batiste v. American Home Products Corp., supra, 32 N.C.App. at 6, 231 S.E.2d at 272, *quoted in Preston v. Thompson, supra* at 295, 280 S.E.2d at 784 (emphasis added). Moreover, "[l]earned professions 'are characterized by the need of unusual learning, the existence of confidential relations, the adherence to a standard of ethics higher than that of the market place, and in a profession like that of medicine by intimate and delicate personal ministration.' " *Commonwealth v. Brown*, 302 Mass. 523, 527, 20 N.E.2d 478, 481 (1939), *quoting McMurdo v. Getter*, 298 Mass. 363, 367, 10 N.E.2d 139, 142 (1937).

***446** Thus, in light of this authority, we do not consider defendants to be the "sellers" whose unfair and deceptive acts and practices our Supreme Court says are forbidden by the former G.S. 75-1.1. Defendants' alleged "anticompetitive" conduct is not that "involved in the bargain, sale, barter, exchange or traffic." *State of North Carolina ex rel. Rufus L. Edmisten v. J. C. Penney Co., supra*, 292 N.C. at 316-17, 233 S.E.2d at 899. We therefore conclude that G.S. 75-1.1, as it was written when plaintiffs' action accrued, does not apply to the circumstances of the present case.

We are constrained to add that our conclusion would not be different had we retroactively applied the current version of G.S. 75-1.1(a) & (b) in this case. *See* footnote 12, *supra.* Plaintiffs contend that the so-called "learned profession" exception in the current G.S. 75-1.1(b) does not exclude defendants' alleged "anticompetitive" conduct because that conduct involves "commercial" activity, not the rendering of "professional services." We do not agree for the following reasons.

At most, plaintiffs' evidence tends to show that Dineen and Thomas have individual, like personal opinions regarding the provision of hospital staff privileges to plaintiffs. Dineen's testimony indicates that his objection to plaintiffs is grounded in their qualifications to practice podiatry in a hospital. Further, upon plaintiffs' final request for an amendment to

the New Hanover medical staff bylaws to include hospital staff privileges for podiatrists, the 13 November 1978 minutes of the Executive Committee state that the Credentials Committee recommended that staff privileges for podiatrists "be granted depending upon individual qualifications." Williams' testimony also shows that the New Hanover Board of Trustees considered qualifications as a paramount issue: "As to who has to make the choice, the Board has to determine with what information comes to it, all the information it can determine, whether they feel that those asking privileges have the qualifications that the hospital has set as standard."

This evidence indicates that defendants were acting in large measure pursuant to an "important quality control component" in the administration of the hospital. Wadlington, *Cases & Materials on Law & Medicine* (1980), p. 209. As one court described it, the hospital's obligation is "to exact professional competence and the ***447** ethical spirit of Hippocrates as conditions precedent to ... staff privileges." *Sosa v. Board of Managers of the Val Verde Memorial Hospital*, 437 F.2d 173, 174 (5th Cir. 1971). We ****921** conclude that the nature of this consideration of whom to grant hospital staff privileges is a necessary assurance of good health care; certainly, this is the rendering of "professional services" which is now excluded from the aegis of G.S. 75-1.1.[13] In this respect, the current version of G.S. 75-1.1 is not a substantive change from our prior law. Defendants' motions for a directed verdict upon this issue also were properly granted.

D

[14] Plaintiffs' eleventh claim for relief states, in part, as follows:

> ... Defendants have violated plaintiffs rights of privacy by making and permitting the making of false statements and statements calculated to cause and which have caused plaintiffs great embarrassment, which statements have cast them in a ridiculous light and wrongfully, maliciously and intentionally placed them in the position of second-class citizens and which had no relation or relevance to plaintiffs' petitions for hospital privileges.

Plaintiffs allege damage to "their persons, property and profession by these unlawful acts of defendants;" in their brief, plaintiffs contend that such acts are Dineen's alleged statement in a 1973 Cape Fear medical staff meeting " 'that he did not want to lie down with skunks,' " and his statements in letters to the New Hanover Department of Orthopedic Surgery regarding Costin's speech for the diabetes association.

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> ***448** (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (Second) of Torts § 652E, p. 394. Although a plaintiff need not plead and prove special damages, *Flake v. The Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938), it is elementary that a compensable injury must result from the "false light" published by a defendant. *See generally* Prosser § 1, p. 4.

In the present case, plaintiffs have failed to produce any evidence that the statement and letters attributed to Dineen proximately resulted in damages to "their persons, property and profession" as they allege in their complaint. With the essential element of damages missing from plaintiffs' proof, the trial judge correctly granted defendants' motions for a directed verdict upon this issue.

III

Plaintiffs' Assignment of Error Nos. 1, 3, and 4 make a broadside attack upon the 8 May 1979 decision of the New Hanover Board of Trustees in which the board adopted certain standards for the provision of hospital staff privileges for podiatrists and applied those standards to plaintiffs. In general, plaintiffs contend that "defendants' continued denial of clinical privileges is arbitrary, capricious and discriminatory." Specifically, plaintiffs contend that

> New Hanover arbitrarily adopted and seeks to enforce by-law provisions that require these plaintiffs to complete a

> year of residency, be board eligible pursuant to certification from the American Board of Podiatric Surgery, and be Fellows in the American College of Foot Surgeons before they will qualify for *consideration* of the surgical privileges requested.

(Emphasis original.) They state that "the sole relevant consideration raised by their application," competency to perform surgical procedures in a hospital, has never been ****922** reviewed by New Hanover. We do not agree with plaintiffs' contentions for the following reasons.

***449 A**

[15] **[16]** Our scope of review of these issues was best stated in the case of *Sosa v. Board of Managers of the Val Verde Memorial Hospital, supra*, as follows:

> No court should substitute its evaluation of such matters for that of the Hospital Board. It is the Board, not the court, which is charged with the responsibility of providing a competent staff of doctors. The Board has chosen to rely on the advice of its Medical Staff, and the court cannot surrogate for the Staff in executing this responsibility. Human lives are at stake, and the governing board must be given discretion in its selection so that it can have confidence in the competence and moral commitment of its staff. The evaluation of professional proficiency of doctors is best left to the specialized expertise of their peers, subject only to limited judicial surveillance. *The court is charged with the narrow responsibility of assuring that the qualifications imposed by the Board are reasonably related to the operation of the hospital and fairly administered.* In short, so long as staff selections are administered with fairness, geared by a rationale compatible with hospital responsibility, and unencumbered with irrelevant considerations, a court should not interfere.

Id. at 177 (emphasis added). *Accord Laje v. R. E. Thomason General Hospital*, 564 F.2d 1159 (5th Cir. 1977), *cert. denied*, 437 U.S. 905, 98 S.Ct. 3091, 57 L.Ed.2d 1134 (1978); *Khan v. Suburban Community Hospital*, 45 Ohio St.2d 39, 340 N.E.2d 398 (1976). We therefore first must determine whether the qualifications stated in the 8 May 1979 decision of the New Hanover Board of Trustees are reasonably related to the operation of the hospital.

"Training is one of those relevant professional qualifications 'which may be constitutionally applied in determining the class of people who are eligible to practice medicine in a public hospital.' " *Shaw v. The Hospital Authority of Cobb County*, 614 F.2d 946, 952 (5th Cir. 1980), *cert. denied*, 449 U.S. 955, 101 S.Ct. 362, 66 L.Ed.2d 220 (1981), *quoting Foster v. Mobile County Hospital Board*, 398 F.2d 227, 230 (5th Cir. 1968). The *Accreditation Manual for Hospitals* (1979 ed.), p. 84, prepared by the Joint Commission on the Accreditation of Hospitals, specifically suggests that specialty board certification ***450** or eligibility "is an excellent benchmark to serve as a basis for privilege delineation ...." [14]

Nevertheless, in *Armstrong v. Board of Directors of Fayette County General Hospital*, 553 S.W.2d 77, 79 (Tenn.App.1976), which plaintiffs cite, the Tennessee Court of Appeals held that "a requirement of certification by any particular society as a mandatory prerequisite for the right of a duly licensed physician to practice his profession in a public hospital is illegal, arbitrary, capricious and beyond the jurisdiction of the governing body of the hospital" where the governing body fails to consider the competency of the candidate once the absence of the acceptable certification is established. The court did, however, endorse such a certification as a standard to be used by the hospital governing body to grant hospital staff privileges. *Id.*

In the present case, plaintiffs' evidence and the 8 May 1979 decision of the New Hanover Board of Trustees does not support plaintiffs' contention that their competency to perform surgical procedures in a hospital was never reviewed. Rather, the board's decision made an extensive review of plaintiffs' qualifications and applied that evidence to the standards established for the consideration of hospital staff privileges for podiatrists. [15] Type 1 privileges thereupon

****923** were granted. We therefore do not read *Armstrong* as supportive of plaintiffs' claim.

***451** Other courts have gone further and held that a candidate's "personal qualities" are reasonably related to the operation of the hospital. *See Robbins v. Ong*, 452 F.Supp. 110 (S.D.Ga.1978); *Schlein v. The Milford Hospital*, 423 F.Supp. 541 (D.Conn.1976). In *Schlein*, the court stated, "A doctor's ability to work well with others, for instance, is a factor that could significantly influence the standard of care his patients received. *Due process does not limit the hospital's consideration to technical medical skills.*" *Id.* at 544 (emphasis added).

Since the filing of this action, G.S. 131-126.11A has been codified as follows:

> The granting or denial of privileges to practice in hospitals to licensed physicians and other practitioners licensed by the State of North Carolina to practice surgery on human beings, and the scope and conditions of such privileges, shall be determined by the governing body of the hospital based upon the applicant's education, training, experience, demonstrated competence and ability, judgment, character and the reasonable objectives and regulations of the hospital in which such privileges are sought. Nothing in this Article shall be deemed to mandate hospitals to grant or deny to any parties privileges to practice in said hospitals.

G.S. 131-126.11B, also codified since the filing of this action, provides, in part, that "[a]ll practitioners must comply with all applicable medical staff bylaws, rules and regulations, including the procedures governing qualification methods of selection and the delineation of privileges."

These statutes reflect that the current policy of this State is in accord with the authorities discussed above. Therefore, we find that the standards established by the New Hanover Board of Trustees-membership in the American College of Foot Surgeons, ***452** board eligible or board certified by the American Board of Podiatric Surgery, and the residency requirement for Type 2 privileges-are considerations that are reasonably related to the operation of the hospital. It is not arbitrary, capricious, and discriminatory to exclude plaintiffs from performing the surgical procedures they requested when they have been unable to comply with the standards properly established by the New Hanover Board of Trustees. *See Khan v. Suburban Community Hospital, supra.*

[17] Plaintiffs do not specifically challenge the procedure by which the New Hanover Board of Trustees reached its conclusions and recommendations. Their sole argument in this vein is that procedural due process cannot be afforded to plaintiffs unless their competency to perform the surgical procedures they requested is reviewed by a hospital committee. Clearly, as we have noted, plaintiffs' competency has been adequately reviewed. Nevertheless, upon a ****924** review of the hearings ordered by Judge James on 29 December 1978, we find that the procedure then outlined was followed in every respect; Judge Tillery's findings to this effect are supported by our review. Judge James' guidelines for the procedure quoted above are sufficient to afford to plaintiffs procedural due process in hearings of this type. *See generally Silver v. Castle Memorial Hospital*, 53 Hawaii 475, 497 P.2d 564, *cert. denied*, 409 U.S. 1048, 93 S.Ct. 517, 34 L.Ed.2d 500 (1972).

B

G.S. 90-202.12 states as follows:

> No agency of the State, county or municipality, nor any commission or clinic, nor any board administering relief, social security, health insurance or health service under the laws of the State of North Carolina shall deny to the recipients or beneficiaries of their aid or services the freedom to choose the provider of care or service which are within the scope of practice of a duly licensed podiatrist or duly licensed physician as defined in this Chapter.

Plaintiffs contend that they are entitled to practice podiatry at New Hanover under the terms of this statute. They argue that the trial judge "erred in failing to enforce the terms of this statute by requiring New Hanover to grant surgical privileges to the plaintiffs."

***453** As indicated by our above discussion, the right to enjoy hospital staff privileges is not absolute; it is subject to the standards set by the hospital's governing body. We agree with New Hanover that this is implicit in the language of G.S. 90-202.12, especially in view of the policy of this State as currently stated by G.S. 131-126.11A, quoted above. Therefore, we do not read G.S. 90-202.12 to *require* New Hanover to grant staff privileges regardless of the standards set by its Board of Trustees which are reasonably related to the operation of the hospital. Generally, the protection offered by the statute is for patients to have the freedom to choose a qualified "provider of care or service." Our holding is not inconsistent with this purpose.

IV

We have carefully reviewed plaintiffs' and defendants' remaining arguments and find them to be without merit, not warranting further discussion in this opinion.

For all the reasons set forth above, the judgment below is

Affirmed.

VAUGHN and HARRY C. MARTIN, JJ., concur.

COURT OF APPEALS OF NORTH CAROLINA

Cases Reported Without Published Opinions

COA NO.	TITLE OF CASE	COUNTY AND NO.	FINAL RESULT
	Filed July 6, 1982		
8110IC1052	Mason v. Burlington Ind.	Industrial Commission (H-0708)	Reversed and Remanded
8125SC1001	Bank of Granite v. Tate	Caldwell (80CVD329)	Affirmed
8125SC1389	State v. Small	Caldwell (81CRS739)	No Error
813SC782	York v. York	Carteret (80CVS787)	Affirmed
813SC782	York v. Sterling	Carteret	Affirmed

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		(80CVS787)	
8115SC1079	Hofler v. Hill	Chatham (80SP18)	Reversed and Remanded
813SC1370	State v. Stevens	Craven (80CRS14649, 80CRS14651)	Affirmed
8112SC1300	State v. Peterson	Cumberland (81CRS6608)	No Error
8112SC1374	State v. Owen	Cumberland (81CRS9436)	Affirmed
811SC1105	Ramsey v. NC Farm Bureau	Dare (81CVS116)	Reversed
8114SC1318	State v. Justice	Durham (81CRS367)	No Error
8121SC1243	State v. Henry	Forsyth (80CRS50176)	No Error
819SC1384	State v. Wilkerson & Wilkerson	Franklin (80CRS55, 80CRS127)	Affirmed
8127SC1399	State v. Williams	Gaston (81CRS16404, 81CRS16405)	No Error
8127SC1414	State v. Drawdy & Black	Gaston (81CRS11429, 81CRS11782)	No Error
8127SC1415	State v. Williams	Gaston (81CRS9549)	No Error
8118SC1178	State v. Easterling	Guilford (80CRS40970)	Affirmed

8118SC1284	State v. Harris	Guilford (80CRS47983 through 80CRS47986	No Error
8118SC1375	State v. Conyers	Guilford (81CRS15719)	No Error
8118SC1382	State v. Jefferies	Guilford (80CRS40986 through 80CRS40988	No Error
8130DC1169	Caldwell v. Brigadier Ind.	Haywood (80CVD173)	New Trial
8130SC734	Melton v. Wagner	Jackson (79CVS44)	No Error
8130DC1175	Tastinger v. Tastinger	Macon (80CVD0060)	Affirmed
8124DC1075	Young v. Edwards	Madison (80CVD32)	No Error
815SC1380	State v. Bohannon	New Hanover (80CRS4355)	No Error
814SC1356	State v. James	Onslow (81CRS2442)	No Error
8115SC1421	State v. Harris	Orange (81CRS3320)	No Error
811DC1127	State v. Bunch	Pasquotank (80CVD290)	New Trial
8120SC1303	State v. Knight	Richmond (81CRS1891)	No Error
8129SC1383	State v. Morrow	Rutherford	No Error

		(81CR2148)	
8116SC1368	State v. Haulsey	Robeson (80CRS19857)	No Error
8110DC818	Wheeler v. Galloway	Wake (77CVD4834)	Modified and Affirmed
817SC1378	State v. Waller	Wilson (81CRS1296)	No Error

Filed July 20, 1982

8123SC1176	Dept. of Transp. v. Twin City Chevrolet	Ashe (78CVS56)	Affirmed
8125SC921	McGalliard v. Oglesby	Burke (80CVS563, 80CVS564)	No Error
8125SC816	State v. Jackman	Catawba (80CRS14872)	No Error
8121SC1250	State v. Doub	Forsyth (81CRS8369)	No Error
8118SC1081	State v. Proctor	Guilford (80CRS56896, 80CRS56897, 80CRS58385, 80CRS58386)	No Error
8118DC1092	Mendlovitz v. Mendlovitz	Guilford (80CVD5841)	Affirmed in part; Vacated in part; Modified
8111SC822	State v. Wilkie	Lee	No Error

		(80CRS5362)	
8126SC1409	State v. Dorsey	Mecklenburg (80CRS102213)	No Error
8110SC1262	State v. Price	Wake (81CRS12555, 81CRS12557)	No Error

Parallel Citations

293 S.E.2d 901, 1982-83 Trade Cases P 64,982

Footnotes

1 This action originally also named as defendants Cape Fear Memorial Hospital, Inc., its individual trustees and administrator. However, on 17 February 1981, the parties stipulated that "a controversy between the plaintiffs and the Cape Fear Defendants no longer exists," and entered a voluntary dismissal of the claims against those defendants with prejudice.

2 Type 2 podiatric privileges "allow a podiatrist to treat the foot by mechanical, medical and surgical means as permitted by the North Carolina General Statutes, limited only by the scope of the specific privileges granted to said podiatrist."

3 The trial judge did not allow the following portion of the minutes of the 22 April 1964 meeting into evidence, which immediately follows that which was admitted and quoted above:

> It is, however, common information to the staff that the views of Drs. Dorman and Boyes do not greatly differ from that of Drs. Thomas and Dineen. Dr. Craven has only been in town a short while and his views are not definitely known (although it is presumed that he will act in concert with his two associates in this matter).

4 New Hanover was incorporated on 26 May 1967.

5 The minutes of the 27 April 1964 Cape Fear medical staff meeting which were examined by Johnson stated, in part, as follows:

> ... A motion was made by Dr. Sinclair and seconded by Dr. Johnson to the effect that the Podiatrist service be discontinued on in-patients as of July 1, 1964. This action was taken because they had been informed that the Orthopedic surgeons would not continue to operate in our hospital so long as a Podiatrist is present in the hospital on in-patient surgery.

This and certain other exhibits offered by plaintiffs into evidence were later excluded by the trial judge.

6 The *Accreditation Manual for Hospitals* (1979 ed.), p. 81, states the following "principle" concerning the medical staff: "There shall be a single organized medical staff that has the overall responsibility for the quality of all medical care provided to patients, and for the ethical conduct and professional practices of its members, as well as for accounting therefor to the governing body."

7 The minutes of the 24 April 1963 meeting of the Cape Fear medical staff describe a program given to the staff by plaintiffs concerning the practice of podiatry in the United States. The program was "enjoyed by all."

8 The rationale of the "business records" exception, as recently stated by this Court, further supports the admission of the excluded portion of the 22 April 1964 minutes. In *State v. Young*, 58 N.C.App. 83, ---, 293 S.E.2d 209, --- (1982), Judge Hedrick wrote as follows:

> The admissibility of entries made in the regular course of business derives from circumstances which furnish a guaranty of the trustworthiness of such entries, notwithstanding the fact that the person making the entry is unavailable for cross-examination; the guaranty of trustworthiness derives from the desire of the person making the entry to provide accurate information to the business for which the records are intended.

9 Our holding that the minutes of the medical staff meetings on 22 April 1964 and 24 April 1963 should have been admitted against Dineen and Thomas, but not against New Hanover and its related defendants, under the "business records" exception to the hearsay rule does no damage to the policy of the State as stated in G.S. 131-170. Warshauer, who properly authenticated those minutes, was a witness to those meetings.

10 The portion of the minutes of the 27 April 1964 Cape Fear medical staff meeting quoted in footnote 5, *supra*, which tends to show a connection between the orthopedic surgeons and the denial of staff privileges to plaintiffs, was correctly not before the jury because it was not properly authenticated.

11 In 1981, G.S. 75-1 was amended to provide that a violation of its provisions would be a "Class H felony."

12 In 1977, G.S. 75-1.1 was revised, in part, as follows:

> (a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
>
> (b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

We decline to give retroactive effect to this version of the statute. Our conclusion is based upon the principles of *Smith v. Mercer*, 276 N.C. 329, 172 S.E.2d 489 (1970), as applied in *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F.Supp. 1049 (E.D.N.C.1980), *cert. denied*, 454 U.S. 1054, 102 S.Ct. 599, 70 L.Ed.2d 590 (1981).

13 It is purely incidental that Dineen and Thomas' opinions, and those of New Hanover and its related defendants, indicate that plaintiffs' qualifications do not meet the standards set for the provision of staff privileges there.

14 In fact, this suggestion was taken to heart by the New Hanover Board of Trustees in establishing the standards quoted from its 8 May 1979 decision.

15 The Board of Trustees evaluated plaintiffs' qualifications, in part, as follows:

> Dr. Costin and Dr. Cameron are not recent graduates of a college of podiatry medicine. They each attended and graduated from podiatry school in the early 1950's. According to their testimony, neither received an undergraduate degree prior to entering podiatry school, and neither participated in any internship upon graduation. Neither has participated in any formal residency training. Neither has received any formal training in surgery under general anesthesia. Their postgraduate education has been primarily limited to short seminars. Neither has operated in a hospital operating room and neither has performed surgery under general anesthesia since 1964.
>
> Although the American College of Foot Surgeons has been in existence and has been recognized by the American Podiatry Association for some years, offering associate and fellow membership status, Dr. Costin is not a member of the College. Dr. Cameron is an associate member of the College. Neither Dr. Cameron nor Dr. Costin are Board eligible or Board certified by the American Board of Podiatric Surgery.
>
> Dr. Cameron and Dr. Costin commenced office practices immediately upon graduation from their respective podiatry schools, and, while their office experience is extensive, it is the opinion of the Board that it lacks the academic depth, the intensive training and the skilled supervision that is characteristic of the medical residency programs as well as the residency programs that are now available to podiatrists.

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318 N.C. 76
Supreme Court of North Carolina.

Ann S. SHELTON and Robert F. Shelton, Jr.
v.
MOREHEAD MEMORIAL HOSPITAL, Linda T. Ross, Administratrix of the Estate of Robert J. Ross, J.D., Robert P. Shapiro, M.D., Stuart M. Bergman, M.D. and the Board of Trustees of Morehead Memorial Hospital, including Joseph G. Maddrey, John E. Grogan, James M. Daly, Jr., Roy C. Turner, Joyce Johnson, William O. Stone, Jesse L. Burchell, Garland S. Edwards, William R. Frazier and Gerald James, individually, and the Executive Committee of the Medical Staff of Morehead Memorial Hospital, including Shelton Dawson, J.D., Henry A. Fleishman, M.D., Edward L. Groover, M.D., Barry L. Barker, M.D., David Lee Call, M.D., John R. Edwards, M.D. and James B. Parsons, M.D., individually.

No. 563PA85. | Aug. 29, 1986.

Plaintiffs in medical malpractice action alleging corporation negligence, were prevented from discovering certain records of defendant hospital and former chief executive officer pertaining to defendant physicians by order of the Superior Court, Rockingham County, Melzer A. Morgan, Jr., J., and plaintiffs appealed. The Court of Appeals, 76 N.C.App. 253, 332 S.E.2d 499, held that records of hospital's review committee and former chief executive officer were protected by statute but records of hospital board of trustees were not, and plaintiffs and defendants appealed. The Supreme Court, Exum, J., held that: (1) records of hospital's medical review committee relating to investigation of alleged medical malpractice were protected by statute; (2) information held by former chief executive officer of hospital was only protected to the extent that those records were produced from medical review committee, but information generated from other sources were not protected; and (3) records of hospital's board of trustees were not protected by statute since board was not peer review committee.

Modified and affirmed.

Martin, J., dissented.

West Headnotes (11)

[1] **Appeal and Error**
Necessity of allowance or leave

Superior Court's discovery orders were interlocutory and did not affect substantial right of litigants, and therefore were not appealable of right. G.S. § 7A–27.

1 Cases that cite this headnote

[2] **Statutes**
Construction

Statutes
Natural, obvious, or accepted meaning

Statutes
Statute as a Whole; Relation of Parts to Whole and to One Another

Statutes
Context

In determining legislative intent, court must consider act as a whole, weighing language of statute, its spirit and that which statute seeks to accomplish, and statute's words should be given natural and ordinary meaning unless context requires otherwise.

8 Cases that cite this headnote

[3] **Health**
Purpose

Privileged Communications and Confidentiality
Medical or Health Care Peer Review

Purpose of Hospital Licensure Act protects goal of candor between medical staff members at peer review committees at cost of impairing medical malpractice plaintiffs' access to evidence, and permitting discovery of information produced at peer review proceedings would undercut purpose of Act. G.S. § 131E–95.

13 Cases that cite this headnote

[4] **Privileged Communications and Confidentiality**
Medical or Health Care Peer Review

Language of Hospital Licensure Act constitutes broad grant of immunity from liability for damages in any civil action or proceedings undertaken within scope of functions of peer review committee and protects documents and related information against discovery which resulted from matters which were the subject of evaluation and review by committee. G.S. § 131E–95(a, b).

7 Cases that cite this headnote

[5] **Privileged Communications and Confidentiality**
Medical or Health Care Peer Review

Hospital Licensure Act protects only medical review committee's proceedings, records and materials it produces, and materials it considers, but information available from original sources other than medical review committee is not immune from discovery or use at trial merely because it was presented during medical review committee proceedings; member of medical review committee should not be prevented from testifying regarding information he learned from sources other than committee itself, even though that information might have been shared by the committee. G.S. § 131E–95.

16 Cases that cite this headnote

[6] **Health**
Peer review in general

Privileged Communications and Confidentiality
Medical or Health Care Peer Review

Hospital's board of trustees does not constitute medical review committee as defined by Hospital Licensure Act, though board reviews personnel recommendations of medical review committees, and therefore, records from board of trustees are admissible. G.S. § 131E–95.

1 Cases that cite this headnote

[7] **Privileged Communications and Confidentiality**
Medical or Health Care Peer Review

Chief executive officer of hospital was not a member of medical staff committee, and therefore information in his possession was not immune from discovery or use as evidence. G.S. § 131E–95.

1 Cases that cite this headnote

[8] **Privileged Communications and Confidentiality**
Medical or Health Care Peer Review

Any common-law immunity provided to peer review committees of hospitals and physicians which protects information from discovery in medical malpractice actions has been codified by Hospital Licensure Act, and thus medical defendants could not assert immunity under common law not available under the Act. G.S. § 131E–95.

7 Cases that cite this headnote

[9] **Privileged Communications and Confidentiality**
Absolute or qualified privilege

Privileged Communications and Confidentiality
Exceptions in general

Statutory physician-patient privilege is not absolute; trial court may require disclosure of privileged information if necessary to proper administration of justice. G.S. § 8–53.

[10] **Pretrial Procedure**
Identity and location of witnesses and others

Superior Court erred in denying plaintiffs' motion in medical malpractice action to compel hospital to answer interrogatory requiring name, address and telephone number of custodian of documents pertaining to personnel decisions, disciplinary investigations, peer evaluations, credentials and competence reviews, and patient

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complaints, though Hospital Licensure Act may or may not protect some contents of these documents from discovery. G.S. § 131E–95.

5 Cases that cite this headnote

[11] **Privileged Communications and Confidentiality**
Medical or Health Care Peer Review

Chief executive officer of hospital, named defendant in medical malpractice action, may be examined about information he received pertaining to defendant physician solely in his capacity as chief executive officer as long as this material was not produced solely in peer review committee. G.S. § 131E–95.

****825** ***77** On defendants' and plaintiffs' petitions for further review of the Court of Appeals decision, 76 N.C.App. 253, 332 S.E.2d 499 (1985), which affirmed in part and reversed in part an order of Judge Morgan entered 3 August 1984 in Rockingham County Superior Court.

Attorneys and Law Firms

Graham, Cooke, Miles & Bogan by Donald T. Bogan, Greensboro, for plaintiffs.

****826** Tuggle, Duggins, Meschan & Elrod, P.A. by Joseph E. Elrod, III, J. Reed Johnston, Jr., and Sally A. Lawing, Greensboro, for defendants, Morehead Memorial Hospital, the Board of Trustees of Morehead Memorial Hospital (and various named individual members thereof) and the Executive Committee of the Medical Staff of Morehead Memorial Hospital (and various named individual members thereof).

Opinion

EXUM, Justice.

This is a medical malpractice action in which plaintiffs claim first that they were injured by the negligence of defendants, Drs. Robert J. Ross (now deceased) and Robert P. Shapiro. Second, plaintiffs claim that defendants Hospital, its Board of Trustees, and the Executive Committee of its Medical Staff were negligent in allowing Drs. Ross and Shapiro to continue to practice at the hospital after they knew or should have known that these physicians were not fit to practice medicine and had continuously failed to treat patients in accordance with ordinary standards of care pertaining to their profession. This is a claim for what has been called the “corporate negligence” of a hospital, which occurs when the hospital violates a duty owed directly by it to the patient. *Bost v. Riley,* 44 N.C.App. 638, 262 S.E.2d 391 (1980). The case ***78** involves whether and to what extent N.C.G.S. § 131E–95 precludes discovery of various records which may be in the corporate defendants' possession relating to their knowledge of the competence of the individual physicians and various personnel investigations and decisions which the corporate defendants might have made regarding the individual physicians' tenure at the hospital.

Judge Morgan, presiding in Rockingham County Superior Court, concluded that these records were privileged and could not be discovered. The Court of Appeals concluded that under N.G.C.S. § 131E–95 the records of the Medical Staff's Executive Committee were protected from discovery but the records of the Hospital's Board of Trustees were not. We modify and affirm the decision of the Court of Appeals.

I.

Plaintiffs allege in their complaint that on 5 January 1983 Dr. Ross, assisted by Dr. Shapiro, negligently performed on Mrs. Shelton a total hysterectomy. As a result of this alleged negligence, Mrs. Shelton had to undergo several additional surgical procedures, whereby she has suffered physically and mentally and incurred substantial expenses. Mr. Shelton's action is for loss of consortium due to the alleged injuries suffered by his wife. Plaintiffs also allege the corporate defendants knew or should have known of the unfitness of Drs. Ross and Shapiro to practice their profession before Mrs. Shelton's surgery; yet these defendants failed to take appropriate corrective actions against their physicians.

In March 1984 plaintiffs served interrogatories upon the corporate defendants requesting them to identify, among other things, all records relating to personnel decisions, disciplinary investigations, peer evaluations, credential and competence reviews, and patient complaints relating to Drs. Ross and Shapiro. In April 1984 plaintiffs requested production of these documents. Defendants filed objections to the interrogatories and the motion to produce on the ground the information requested was “not discoverable or

admissible by virtue of North Carolina General Statute § 131E–95."

Having noticed the deposition of Amos Tinnell, a former chief executive officer of the hospital, plaintiffs in June 1984 issued a ***79** subpoena duces tecum to Tinnell, directing him to produce at his deposition documents similar to those about which plaintiffs had inquired in their interrogatories and moved defendants to produce. Defendants, again relying on N.C.G.S. § 131E–95, moved for a protective order that plaintiffs not be permitted to question Tinnell so as to disclose "any matters considered or decided by any medical review committee." The motion also asked that the subpoena "requiring production of confidential ****827** material be stricken." Tinnell, himself, moved to quash the subpoena duces tecum on the grounds the documents sought from him were protected by N.C.G.S. § 131E–95.

Plaintiffs moved to compel the corporate defendants to answer the interrogatories relating to and produce the documents in question.

On 3 August 1984 Judge Morgan denied the motion to compel, quashed the subpoena duces tecum, and ordered that Tinnell not be questioned in his deposition regarding "any matters relating to the hospital's medical review processes, including the credentialing and investigation processes, except with the express permission of counsel for the hospital."

Judge Morgan also found that his rulings affected a substantial right of the plaintiff and that there was no reason for delay in obtaining appellate review of this order. See Civ. Proc. Rule 54(b). Plaintiffs appealed, assigning error to the trial court's: (1) denying plaintiffs' motion to compel discovery; (2) ordering that Tinnell not be questioned about matters relating to the hospital's medical review processes; and (3) quashing the subpoena duces tecum issued to Tinnell.

The Court of Appeals, without discussing the appealability of the order, concluded first that under the Bylaws of the Medical and Dental Staff of Morehead Memorial Hospital, the Executive Committee of the Medical Staff was a "medical review committee," as defined by N.C.G.S. § 131E–76(5). The Court of Appeals also concluded that the trial court properly quashed the subpoena duces tecum and properly ordered that Tinnell not be questioned regarding his participation in the Executive Staff's review processes. Finally, the Court of Appeals held that documents and proceedings before the hospital's Board of Trustees were not protected from discovery under either N.C.G.S. § 131E–95 or the ***80** common law. We allowed both parties' petitions for further review.

II.

[1] As to the appealability of Judge Morgan's rulings, we conclude his orders are interlocutory, do not affect a substantial right of the plaintiffs, and are not appealable of right. N.C.G.S. § 7A–27; *First Union Nat'l Bank v. Olive,* 42 N.C.App. 574, 257 S.E.2d 100 (1979). Nevertheless, because of the significance of the legal issues involved, we have elected under our supervisory powers and Appellate Procedure Rule 2 to entertain the appeal.

III.

The statutes in question here are contained in the Hospital Licensure Act, codified as Article 5, Chapter 131E of the General Statutes.[1] The stated purposes of the Act are "to establish hospital licensing requirements which promote public health, safety and welfare and to provide for the development, establishment and enforcement of basic standards for the care and treatment of patients in hospitals." § 75. The Act defines "medical review committee" in pertinent part as "a committee ... of a medical staff of a licensed hospital ... which is formed for the purpose of evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing." § 76(5). Section 95 of the Act provides:

> (a) A member of a duly appointed medical review committee who acts without malice or fraud shall not be subject to liability for damages in any civil action on account of any act, statement or proceeding undertaken, made, or performed within the scope of the functions of the committee.
>
> (b) The proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential and not considered public records within the meaning ****828** of G.S. 132–1, 'Public records' defined, and shall not be subject to discovery or introduction into evidence in any civil action against a hospital or a provider of

professional health services which results from matters ***81** which are the subject of evaluation and review by the committee. No person who was in attendance at a meeting of the committee shall be required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the committee or as to any findings, recommendations, evaluations, opinions, or other actions of the committee or its members. However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee. A member of the committee or a person who testifies before the committee may testify in a civil action but cannot be asked about his testimony before the committee or any opinions formed as a result of the committee hearings.

§ 95

The question before us is whether and to what extent section 95 of the Act prohibits discovery of the documents and testimony sought by plaintiffs through their interrogatories, motions to produce and compel discovery, and deposition of and subpoena duces tecum issued to Tinnell.

Plaintiffs concede that the Medical Staff's Executive Committee is a "medical review committee" as that term is used in the Act. Plaintiffs further concede that § 95 of the Act protects from discovery medical review committee proceedings which relate to the surgery forming the basis of plaintiffs' negligence claims against Drs. Ross and Shapiro. Plaintiffs argue, however, that proceedings of medical review committees which relate to plaintiffs' corporate negligence claims are not protected by § 95 because such claims do not result "from matters which are the subject of evaluation and review by the committee." Plaintiffs' argument is that when a claim is filed against the hospital itself, as a corporate entity, grounded in allegations of the hospital's own negligence in performing peer evaluations and reviews, § 95 affords no protection from discovery of the records and proceedings of the hospital's medical review committees. We disagree.

[2] Legislative intent controls the meaning of a statute; and in ascertaining this intent, a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which ***82** the statute seeks to accomplish. *Crumpler v. Mitchell,* 303 N.C. 657, 281 S.E.2d 1 (1981); *In re Arthur,* 291 N.C. 640, 231 S.E.2d 614 (1977). The statute's words should be given their natural and ordinary meaning unless the context requires them to be construed differently. *In re Arthur,* 291 N.C. 640, 231 S.E.2d 614.

[3] The stated purposes of the Hospital Licensure Act are to promote the public health, safety and welfare and to provide for basic standards for care and treatment of hospital patients. Section 95 of the Act protects from discovery and introduction into evidence medical review committee proceedings and related materials because of the fear " 'that external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity.... [The Act] represents a legislative choice between competing public concerns. It embraces the goal of medical staff candor at the cost of impairing plaintiffs' access to evidence.' " *Cameron v. New Hanover Memorial Hospital,* 58 N.C.App. 414, 436, 293 S.E.2d 901, 914, *appeal dismissed and disc. rev. denied,* 307 N.C. 127, 297 S.E.2d 399 (1982), *quoting Matchett v. Superior Court of Yuba County,* 40 Cal.App.3d 623, 629, 115 Cal.Rptr. 317, 320–21 (1974).

It would severely undercut the purpose of § 95, *i.e.,* the promotion of candor and frank exchange in peer review proceedings, if we adopted plaintiffs' construction of the statute, for it would mean these proceedings were no longer protected whenever a claim of corporate negligence was made ****829** alone or coupled with a claim of negligence against an individual physician.

[4] Neither do we think the language of the statute, considered in context, permits the construction plaintiffs urge. Subsection (a) of § 95 constitutes a broad grant of immunity from liability for damages "in *any* civil action on account of *any* act, statement or proceeding undertaken, made or performed within the scope of the functions of the committee." (Emphases supplied.) Subsection (b) of § 95 protects documents and related information against discovery or introduction into evidence "in *any* civil action against a hospital ... which results from matters which are the subject of evaluation and review by the committee." (Emphasis supplied.) A civil action against a hospital grounded on the alleged negligent performance of the hospital's medical review committees ***83** is by the statute's plain language a civil action resulting from matters evaluated and reviewed by such committees. [2]

Plaintiffs contend that the construction we adopt will make it impossible for injured persons to hold hospitals accountable for their medical review committees' negligence. Again, we disagree.

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The statute protects only a medical review committee's (1) proceedings; (2) records and materials it produces; and (3) materials it considers. But the statute also provides:

> [I]nformation, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee. A member of the committee or a person who testifies before the committee may testify in a civil action but cannot be asked about his testimony before the committee or any opinions formed as a result of the committee hearings.

§ 95

[5] These provisions mean that information, in whatever form available, from original sources other than the medical review committee is not immune from discovery or use at trial merely because it was presented during medical review committee proceedings; neither should one who is a member of a medical review committee be prevented from testifying regarding information he learned from sources other than the committee itself, even though that information might have been shared by the committee. *Eubanks v. Ferrer,* 245 Ga. 763, 267 S.E.2d 230 (1980).

The statute is designed to encourage candor and objectivity in the internal workings of medical review committees. Permitting access to information not generated by the committee itself but merely presented to it does not impinge on this statutory purpose. ***84** These kinds of materials may be discovered and used in evidence even though they were considered by the medical review committee. This part of the statute creates an exception to materials which would otherwise be immune under the third category of items as set out above.

IV.

[6] Defendants argue that the hospital's Board of Trustees is a medical review committee as defined in the Act. The plain language of § 76(5) will not permit such a conclusion. This section describes a medical review committee as "a committee ... of a medical staff of a licensed hospital, or a committee of a peer review corporation or organization...." A board of trustees of a hospital simply cannot fit within this statutory language. It is not a committee of a medical staff, nor is it a committee of a ****830** peer review corporation or organization. This is so even though, as defendants argue, the board reviews personnel recommendations of the medical review committees and has ultimate decision making authority upon these recommendations by virtue both of the hospital's bylaws and § 85 of the Act. [3]

[7] Contrary also to defendants' contention, we find nothing in the hospital's or medical staff's bylaws which makes Tinnell, as Chief Executive Officer, a member of the medical staff's committees. The medical staff's bylaws do provide that Tinnell, as Chief Executive Officer, "shall be invited to attend" meetings of the medical staff's executive committee.

Documents in the possession of and information known to the hospital's board and Tinnell are not thereby immune from discovery and use as evidence under § 95. Documents and information which are otherwise immune from discovery under § 95 do not, ***85** however, lose their immunity because they were transmitted to the board or Tinnell, or both.

V.

[8] Defendants assert on appeal, not having relied on either ground in the trial court, that any information or documents relating to peer reviews of the individual physicians not protected under § 95 are immune from discovery and use as evidence under a common law privilege and the statutory physician patient privilege. N.C.G.S. § 8–53. Our Court of Appeals in *Cameron v. New Hanover Memorial Hospital,* 58 N.C. 414, 293 S.E.2d 901, did apply what it identified as a common law privilege in holding minutes of meetings and "good faith communications of" hospital peer review committees immune from discovery and use as evidence. The cases relied on in *Cameron* for the existence of such a privilege were libel actions in which the defense of qualified privilege arises where:

> '(1) a communication is made in *good faith,* (2) the subject and scope of the communication is one in which the party uttering it has a valid interest to uphold, or in reference to which he has a legal right or duty, and (3) *the communication is made to a person or persons having a corresponding interest, right, or duty.'*

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Cameron v. New Hanover Memorial Hospital, 58 N.C.App. at 436, 293 S.E.2d at 915, *quoting Presnell v. Pell,* 298 N.C. 715, 720, 260 S.E.2d 611, 614 (1979) (emphases in original). We have found no case other than *Cameron* in North Carolina which has applied the defense of qualified privilege in libel actions to render peer review proceedings immune from discovery and introduction into evidence. Even *Cameron* appears to have limited its application to medical review committees. A federal court in *Bredice v. Doctor's Hospital, Inc.,* 50 F.R.D. 249 (D.D.C. 1970), recognized a common law medical review privilege applicable to a hospital staff's medical review committees.

In *Cameron* the statutory predecessor to § 95 was enacted after the filing of the complaint but before the case was decided on appeal. The *Cameron* court recognized that the policy in this predecessor statute "is grounded in our common law." 58 N.C. App. at 437, 293 S.E.2d at 915. The Court of Appeals in the instant ***86** case concluded that whatever common law privilege existed in North Carolina "has been codified in section 95." ****831** 76 N.C. App. at 258, 332 S.E.2d at 503. We agree with this conclusion.

[9] With regard to the statutory physician-patient privilege, suffice it to say that this privilege was never invoked in the trial court. It is impossible for us to say from the record before us which information and which documents might fall within the ambit of the privilege. The privilege is, moreover, not absolute but qualified; the trial court may require disclosure of privileged information under the statute "if in his opinion the same is necessary to a proper administration of justice." N.C.G.S. § 8–53. Consequently, we leave it to the trial court on remand to apply this privilege according to its terms to whatever information or documents it may be applicable, if the trial court considers it necessary to do so.

VI.

[10] We now proceed to apply the foregoing principles to the various discovery rulings of Judge Morgan. Judge Morgan denied plaintiffs' motion to compel the corporate defendants to answer an interrogatory that defendants "identify and state the name, address and telephone number of the custodian of the following." In the interrogatory there follows a description of various documents relating to personnel decisions, disciplinary investigations, peer evaluations, credentials and competence reviews, and patient complaints relating to Drs. Ross and Shapiro. This ruling was error. The protection afforded by § 95 is not compromised by merely identifying existing documents and giving pertinent information concerning their custodians. It is the contents of the documents which the statute may or may not protect from discovery. Indeed, as this case illustrates, it may be necessary to identify not only the document by name and its custodian, but also the document's source and the reason for its creation. Here, for example, the trial court placed under seal and forwarded to us as part of the record on appeal various documents in possession of defendants. [4]

***87** Having carefully studied the Bylaws of the Medical and Dental Staff of the hospital, we are satisfied that all of the committees of the Medical Staff mentioned above are "medical review committees" within the meaning of the Act. All of them were formed for the purpose of those kinds of evaluations or for "medical staff credentialing," as set out in § 76(5). Some of the documents identified, consequently, are obviously, by virtue of their description, protected from discovery by § 95, *e.g.,* minutes of the various medical review committees. On the other hand, minutes of the hospital's Board of Trustees and the Board's Executive Committee would appear to be discoverable, except insofar as these minutes contain information or documents otherwise protected by § 95. Section 95 offers no protection to the records and documents furnished by the individual physicians in their applications for hospital privileges. Some of the correspondence would seem to be discoverable unless, again, either it contains information generated at a medical review committee meeting or originated ****832** with or at the instance of one of the medical review committees or a member of that committee acting in his capacity as a member.

Insofar as Judge Morgan denied plaintiffs' motion to produce materials which are discoverable under the principles herein announced, it was error. We have already identified some materials which defendants may be required to produce. On remand defendants, as we have indicated, should be required to fully answer plaintiffs' interrogatories so as to identify the nature of the documents in their possession, and the custodians thereof. After the documents have been appropriately identified, the trial court may then decide, under the principles herein announced, which documents should and which should not be produced.

***88** Judge Morgan quashed plaintiffs' subpoena duces tecum issued to Tinnell in its entirety. This subpoena

commands Tinnell to produce writings which are generally described in plaintiffs' brief as follows:

(a) all direct complaints, and all direct allegations of misbehavior, unprofessional conduct, professional negligence or incompetence regarding Dr. Ross or Dr. Shapiro received by the witness from any person.

(b) all disciplinary investigations and hearings, all peer evaluations and recommendations, all personnel information, all credentials evaluations and all recommendations to grant, continue or discontinue staff privileges of Dr. Ross or Dr. Shapiro at the Hospital.

(c) all incident reports concerning Dr. Ross's and Dr. Shapiro's treatment of any patient.

(d) all meetings or hearings of the Executive Committee of the Medical Staff, or any other medical staff committee relating to Dr. Ross or Dr. Shapiro.

(e) all meetings or hearings of the Board of Trustees or any members of the Board of Trustees relating to Dr. Ross or Dr. Shapiro.

Under the principles we have set out herein, Judge Morgan erred in quashing the subpoena insofar as it commanded Tinnell to produce documents in category (a), (c) and (e), except in the latter case insofar as these documents may otherwise be protected by § 95. Judge Morgan correctly quashed the subpoena insofar as it asked for documents in categories (b) and (d).

[11] Finally, on defendants' motion for a protective order regarding Tinnell's testimony, Judge Morgan ruled he could not be "asked any questions about, nor may he give any testimony regarding, any matters relating to the hospital's medical review processes, including the credentialing and investigation processes, except with the express permission of counsel for the hospital." Insofar as Judge Morgan means that Tinnell cannot testify to the medical review processes in which he participated with one of the medical review committees, it is altogether correct. Tinnell, under the principles we have herein announced, may be examined about ***89** information he received solely in his capacity as chief executive officer so long as this material is not otherwise protected by § 95.

The decision of the Court of Appeals, except as herein modified, is affirmed.

MODIFIED and AFFIRMED.

MARTIN, J., dissents.

Parallel Citations

347 S.E.2d 824

Footnotes

1 Since all statutes referred to will be in chapter 131E, references will be only to section numbers in that chapter.

2 The following cases support our conclusion that the statute's protections apply in actions for corporate negligence: *Bost v. Riley,* 44 N.C.App. 638, 262 S.E.2d 391 (1980); *West Covina Hospital v. The Superior Ct. of Los Angeles County,* 153 Cal.App.3d 134, 200 Cal.Rptr. 162 (1984); *Matchett v. The Superior Ct. of Yuba County,* 40 Cal.App.3d 623, 115 Cal.Rptr. 317 (1974); *Elam v. College Park Hospital,* 132 Cal.App.3d 332, 183 Cal.Rptr. 156, *modified,* (1982); *Segal v. Roberts,* 380 So.2d 1049 (Fla.App.1979); *Hollowell v. Jove,* 247 Ga. 678, 279 S.E.2d 430 (1981); *Eubanks v. Ferrier,* 245 Ga. 763, 267 S.E.2d 230 (1980); *Jenkins v. Wu,* 102 Ill.2d 468, 82 Ill.Dec. 382, 468 N.E.2d 1162 (1984); *Texarkana Memorial Hospital v. Jones,* 551 S.W.2d 33 (1977).

3 The following cases from other jurisdictions support our conclusion on this point: *West Covina Hospital v. The Superior Ct. of Los Angeles County,* 153 Cal.App.3d 134, 200 Cal.Rptr. 162 (1984); *Matchett v. The Superior Ct. of Yuba County,* 40 Cal.App.3d 623, 115 Cal.Rptr. 317 (1974); *Mercy Hospital v. Dept. of Professional Regulation, Bd. of Medical Examiners,* 467 So.2d 1058 (Fla.Dist.Ct.App.3d 1985); *Segal v. Roberts,* 380 So.2d 1049 (Fla.Dist.Ct.App.1979); *Hollowell v. Jove,* 247 Ga. 678, 279 S.E.2d 430, 434 (1981); *Anderson v. Breda,* 103 Wash.2d 901, 700 P.2d 737 (1985); *State, Good Samaritan Medical Center-Deaconness Hospital Campus v. Maroney,* 123 Wis.2d 89, 365 N.W.2d 887 (1985). *But see Texarkana Memorial Hospital v. Jones,* 551 S.W.2d 33 (1977).

4 These include: (1) minutes of the hospital's (a) Board of Trustees, (b) Executive Committee of the Medical Staff, (c) Executive Committee of the Board of Trustees, (d) joint meetings between the Board of Trustees and the Medical Staff's Executive Committee, (e) Credentials Committee, (f) Joint Conference Committee, (g) Special Investigative Committee; (2) correspondence between the Board of Trustees and Dr. Ross; (3) correspondence between Tinnell and Ross and correspondence between Tinnell and others concerning Dr. Ross; (4) correspondence between Dr. Ross and the president of the Medical Staff's Executive Committee; (5) correspondence from the Medical Staff's Executive Committee to others concerning Dr. Ross; (6) memorandums to and from the

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Board of Trustees relating to the Medical Committee's Executive Staff meetings; (7) correspondence to and from the Credentials Committee and Tinnell; (8) memos regarding and report of the Special Investigating Committee, including a letter to Dr. Ross; (9) memos regarding and report of Special Concurrent Review Committee; (10) personnel records and documents concerning Dr. Ross's application for hospital privileges; (11) personnel records and documents concerning Dr. Shapiro's application for hospital staff privileges; and (12) letter to Dr. Ross from Medical Records Committee.

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319 N.C. 372
Supreme Court of North Carolina.

Davie Jean BLANTON
v.
MOSES H. CONE MEMORIAL HOSPITAL, INC.

No. 57PA86. | April 7, 1987.

Patient upon whom series of three surgical operations were performed as part of subcutaneous mastectomy brought action against hospital under doctrine of corporate negligence. The Superior Court, Guilford County, James C. Davis, J., granted hospital's motion to dismiss for failure to state claim upon which relief could be granted, and patient appealed. The Court of Appeals, 78 N.C.App. 502, 337 S.E.2d 200, reversed and remanded, and hospital's petition for discretionary review was granted. The Supreme Court, Webb, J., held that: (1) hospital owed duty of care to patient to ascertain that doctor, who was not agent of hospital, was qualified to perform operation; (2) hospital was liable for permitting agents to follow instructions of physician if instructions were so obviously negligent as to lead any reasonable person to anticipate that substantial injury would result to patient; and (3) hospital had duty to monitor and supervise physician's overall performance in hospital on ongoing basis.

Affirmed.

West Headnotes (16)

[1] **Principal and Agent**
Agent's acts in general
"Respondeat superior" is doctrine which makes principal liable for acts of agent within scope of agent's authority.

2 Cases that cite this headnote

[2] **Corporations and Business Organizations**
Respondeat superior in general
Corporation can act only through agents of corporation and thus, may be held liable for negligence only through doctrine of "respondeat superior".

5 Cases that cite this headnote

[3] **Health**
Hospitals in General
"Corporate negligence" provides that even if hospital is not liable for negligence of doctor who is not agent of hospital, hospital may still be liable through agent of hospital who has breached duty owed to patient.

5 Cases that cite this headnote

[4] **Negligence**
Elements in general
"Actionable negligence" is failure of one owing duty to another to do what reasonable and prudent man would ordinarily have done, or doing what such person would not have done, which omission or commission is proximate cause of injury to another.

[5] **Negligence**
Elements in general
Defendant is liable for "negligence" only if he owed duty of care to plaintiff, which duty was violated, proximately causing injury to plaintiff.

3 Cases that cite this headnote

[6] **Health**
Hospitals in General
Hospitals owe duty of care to patients.

1 Cases that cite this headnote

[7] **Health**
Negligent hiring or supervision
Hospitals have duty to exercise ordinary care in selection of their agents.

[8] **Health**
Lack of, or defective, equipment, supplies, or medicine

Hospital is under duty to use reasonable care in selection, inspection and maintenance of equipment.

1 Cases that cite this headnote

[9] Health

Surgery in general

Hospital owed duty of care to patient to ascertain that doctor was qualified to perform operation before granting doctor privilege to do so, even though doctor was not agent of hospital.

7 Cases that cite this headnote

[10] Health

Weight and Sufficiency, Particular Cases

Hospital's violation of standards of joint commission on the accreditation of Hospitals, which hospital purported to follow, was some evidence of negligence in medical malpractice action against hospital.

2 Cases that cite this headnote

[11] Health

Hospitals in General

Hospital was liable to patient for permitting agents to follow instructions of physician if instructions were so obviously negligent as to lead any reasonable person to anticipate that substantial injury would result to patient by following such instructions.

3 Cases that cite this headnote

[12] Health

Negligent hiring or supervision

Hospital had duty to monitor on ongoing basis performance of physician on staff, even though physician was not agent of hospital.

2 Cases that cite this headnote

[13] Health

Negligent hiring or supervision

Hospital is not required under ordinary circumstances to supervise surgeon in performance of operation.

[14] Health

Surgery in general

Hospital had duty to require that surgeon be supervised or assisted by properly qualified member of staff only if hospital actually knew surgeon was not qualified, but not if hospital was negligent in failing to ascertain through exercise of ordinary care that surgeon was unqualified.

2 Cases that cite this headnote

[15] Health

Hospitals or Clinics

Hospital was not liable for negligence for decision to perform operation which was not medically required made by physician who was not agent of hospital.

2 Cases that cite this headnote

[16] Corporations and Business Organizations

Negligence

Corporate negligence is nothing more than application of common-law negligence principles.

3 Cases that cite this headnote

****456 *373** This is an action for damages to the plaintiff for injuries she received in a series of operations performed on the premises of the defendant hospital. The plaintiff's allegations may be summarized as follows: From 12 September 1978 through 17 November 1978 three operations were negligently performed on the plaintiff on the premises of the defendant hospital, which operations proximately caused substantial injuries to the plaintiff. The hospital breached duties owed to the plaintiff and was negligent in that it, (1) granted clinical privileges to her physician to perform an operation for which the physician was not qualified, (2) failed to ascertain that the physician who performed the operations was qualified to perform them, (3) failed to enforce

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the standards of the Joint Commission on Accreditation of Hospitals relating to the quality of patient care, (4) permitted its agents, servants and employees to follow instructions of the physician which were dangerous to the plaintiff, (5) failed to monitor and oversee the treatment and care of the plaintiff by the physician on the premises of the hospital, (6) permitted an unqualified physician to perform surgery without requiring that the physician be supervised or assisted by a properly qualified member of its medical staff, and (7) permitted the physician to perform an operation on its premises that was not medically required.

The superior court allowed a motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). The Court of Appeals reversed ****457** and we granted the defendant's petition for discretionary review.

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W.C. Harris, Jr. and Samuel O. Southern, Raleigh, for the North Carolina Hosp. Ass'n Trust Fund, amicus curiae.

Opinion

WEBB, Justice.

The question on this appeal is whether it was error for the superior court to allow the defendant's motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). We hold it was error and affirm the decision of the Court of Appeals.

In the Court of Appeals the focus of the parties' briefs and the court's opinion was on whether *Bost v. Riley,* 44 N.C.App. 638, 262 S.E.2d 391, *cert. denied,* 300 N.C. 194, 269 S.E.2d 621 (1980) applies retroactively. The Court of Appeals held that it does.

In this Court the appellant argues in addition to its argument on the retroactive application of *Bost* that the complaint fails to allege corporate negligence. The term "corporate negligence" has been used in discussing the liability of hospitals to patients. *See Darling v. Hospital,* 33 Ill.2d 326, 211 N.E.2d 253, 14 A.L.R.3d 860 (1965), *cert. denied,* 383 U.S. 946, 86 S.Ct. 1204, 16 L.Ed.2d 209 (1966); *Jones v. New Hanover Hospital,* 55 N.C.App. 545, 286 S.E.2d 374, *rev. denied,* 305 N.C. 586, 292 S.E.2d 570 (1982); *Cox v. Haworth,* 54 N.C.App. 328, 283 S.E.2d 392 (1981); and *Robinson v. Dusznyski,* 36 N.C.App. 103, 243 S.E.2d 148 (1978). *See also* Redpath, *Corporate Negligence of Hospitals and the Duty to Monitor and Oversee Medical Treatment,* 17 Wake Forest L. Rev. 309 (1981). The above cases hold that it is the rule that if a doctor is not an agent of a hospital and he negligently injures his patient while on the premises of the hospital, the hospital is not liable to the patient on the theory of respondeat superior.

[1] **[2]** **[3]** The courts have sometimes said that there is a difference between a hospital's liability based on respondeat superior and liability based on corporate negligence. We believe that the use of these two labels is unfortunate when analyzing the liability of hospitals. Respondeat superior is a doctrine which makes a principal liable for the acts of an agent within the scope of the agent's ***375** authority. *See Rogers v. Black Mountain,* 224 N.C. 119, 29 S.E.2d 203 (1944). A corporation can act only through its agents. *See* Robinson, *North Carolina Corporation Law and Practice,* The Harrison Press § 13-4. If it is liable for negligence it has to be through the doctrine of respondeat superior. Even if a hospital is not liable for the negligence of a doctor because the doctor is not an agent of the hospital it still may be liable if, through a person who is an agent of the hospital it has breached a duty it owes to a patient. This is what has been called corporate negligence. This is no more than the application of common law principles of negligence and is not some recently developed doctrine upon which liability is based.

[4] **[5]** In determining whether the plaintiff has alleged sufficient facts to withstand a motion to dismiss we are guided by the standard of the reasonable man of ordinary prudence. "Actionable negligence is the failure of one owing a duty to another to do what a reasonable and prudent man would ordinarily have done, or doing what such a person would not have done, which omission or commission is the proximate cause of injury to another." S. Speiser, C. Krause and A. Gans, *The American Law of Torts* § 9.1 p. 995 (1983). The liability of the defendant to the plaintiff depends on whether

the defendant owed a duty of care to the plaintiff, which duty was violated, proximately causing injury to the plaintiff.

[6] **[7]** **[8]** We have recognized that hospitals in this state owe a duty of care to patients. ****458** *Rabon v. Hospital,* 269 N.C. 1, 152 S.E.2d 485 (1967). Hospitals have a duty to exercise ordinary care in the selection of their agents. *Hoke v. Glenn,* 167 N.C. 594, 83 S.E. 807 (1914). In *Payne v. Garvey,* 264 N.C. 593, 142 S.E.2d 159 (1965) this Court, while affirming a judgment of nonsuit in favor of the defendant hospital, said a hospital is under a duty to use reasonable care in the selection, inspection and maintenance of equipment. *Starnes v. Hospital Authority,* 28 N.C.App. 418, 221 S.E.2d 733 (1976) is to the same effect.

[9] The plaintiff has alleged the defendant granted clinical privileges to a doctor to perform operations without ascertaining whether the doctor was qualified to perform them. *Hoke* holds that a hospital is liable for negligence in the selection of its agents. The doctor in this case is not an agent of the hospital but ***376** we believe the principle of *Hoke* should apply and a hospital should be liable for negligence in allowing an unqualified doctor to perform operations in the hospital. *Duszynski* recognized this duty while holding that the action against the hospital should have been dismissed. We hold that a reasonable man of ordinary prudence in the position of the hospital owes a duty of care to its patients to ascertain that a doctor is qualified to perform an operation before granting him the privilege to do so.

[10] The plaintiff has also alleged that the defendant failed to enforce the standards of the Joint Commission on the Accreditation of Hospitals. In *Wilson v. Hardware, Inc.,* 259 N.C. 660, 131 S.E.2d 501 (1963), the plaintiff brought an action against the manufacturer for injuries caused by the breaking of a ladder. The evidence showed that the ladder was not constructed according to the American Standard Safety Code for Portable Wood Ladders. The defendant purported to follow that code in the construction of its ladders. This Court held this was some evidence of negligence on the part of the defendant. If it is some evidence of negligence for the manufacturer of ladders to violate an industry safety standard which safety standard the manufacturer had purported to follow we believe it is some evidence of negligence for a hospital to violate a safety standard which the hospital had purported to follow. The duty of a hospital to its patients should be at least as great as a ladder manufacturer to users of its ladders.

[11] The plaintiff has alleged further that the defendant permitted its agents to follow instructions of the physician which were dangerous to the plaintiff. In *Byrd v. Hospital,* 202 N.C. 337, 162 S.E. 738 (1932), while holding that a nurse who obeys the orders of a physician in charge of a patient is not ordinarily liable, the Court recognized that if an order of a physician to a nurse is "so obviously negligent as to lead any reasonable person to anticipate that substantial injury would result to the patient by the execution of such order" the nurse may be held liable. We hold that if the plaintiff can prove an agent of the hospital followed some order of the doctor which meets the test of *Byrd* the plaintiff will have a claim based on this allegation.

[12] The plaintiff has alleged that the defendant hospital failed to monitor and oversee the treatment and care of the plaintiff by the physician on its premises. The plaintiff in her brief says that ***377** she will prove pursuant to this allegation that the defendant failed to monitor and supervise the doctor's overall performance in the hospital on an ongoing basis. We believe evidence of a failure to monitor and supervise on an ongoing basis would be relevant under this allegation. We hold that pursuant to the reasonable man standard the defendant had a duty to monitor on an ongoing basis the performance of physicians on its staff and this allegation states a claim.

[13] **[14]** The plaintiff has also alleged that the defendant hospital permitted the doctor "to perform a series of surgeries ... for which she was not properly qualified without requiring that she be supervised or assisted by a properly qualified member of its medical staff." We hold that this states a claim. Under ordinary circumstances a hospital is not required to supervise a surgeon in the performance of ****459** an operation. *See Cox,* 54 N.C.App. 328, 283 S.E.2d 392. We believe that a reasonable man in the position of the hospital, if it allowed an unqualified surgeon to perform an operation, should provide supervision or assistance to such a surgeon. The plaintiff contends it is negligence not to provide such assistance although the hospital does not know the doctor is unqualified if it would have known through the exercise of ordinary care. We believe that a reasonable man of ordinary prudence in the position of the hospital, although it may have been negligent in not knowing the lack of his qualifications, would not require that the surgeon be supervised or assisted by a properly qualified member of its staff if it did not know the doctor was not qualified. Under this allegation the plaintiff will have to prove knowledge in order to prove her claim.

[15] The plaintiff has also alleged that the defendant allowed the physician to perform an operation on its premises which was not medically required. The doctor was not the agent of the defendant hospital. The hospital did not control the doctor's decision to perform the operation and is not liable for it except as indicated in other parts of this opinion.

[16] In light of the position we have taken in this opinion that the case is governed by common law principles of negligence and that what has previously been called corporate negligence is nothing more than an application of negligence principles, the question of retroactiveness does not arise.

***378** The decision of the Court of Appeals is

AFFIRMED.

Parallel Citations

354 S.E.2d 455

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350 N.C. 449
Supreme Court of North Carolina.

A. Ron VIRMANI, M.D.
v.
PRESBYTERIAN HEALTH SERVICES CORP.
In re Knight Publishing Company d/b/a The Charlotte Observer and John Hechinger.

No. 62PA97–2. | June 25, 1999.

Physician sued hospital regarding suspension of his medical staff privileges, and hospital moved to seal confidential medical peer review committee records and to close court proceedings in which those records were discussed. The Superior Court, Mecklenburg County, Marvin K. Gray, James U. Downs, and Marcus L. Johnson, JJ., granted various motions, including those for sealing of review committee records and for closing of court proceedings. Newspaper and reporter petitioned for writ of certiorari. The Court of Appeals reversed and remanded, 127 N.C.App. 629, 493 S.E.2d 310. On discretionary review and on appeal of right, the Supreme Court, Mitchell, C.J., held that: (1) newspaper's motion to intervene was properly denied; (2) documents that physician attached as exhibits to his complaint became "public records" once filed with court clerk; (3) peer review materials that hospital submitted directly to presiding judge were privileged; (4) newspaper had no state common law right of access to material and proceedings; and (5) closure of proceedings and sealing of documents did not violate open courts provision of state constitution or First Amendment.

Court of Appeals' decision affirmed in part, reversed in part, and remanded.

West Headnotes (39)

[1] **Parties**
Interest in subject of action in general

Where no other statute confers an unconditional right to intervene, the interest of a third party seeking to intervene as a matter of right must be of such direct and immediate character that he will either gain or lose by the direct operation and effect of the judgment; one whose interest in the matter in litigation is not a direct or substantial interest, but is an indirect, inconsequential, or a contingent one cannot claim the right to defend. Rules Civ.Proc., Rule 24(a), G.S. § 1A–1.

4 Cases that cite this headnote

[2] **Parties**
Interest in subject of action in general

Parties
Grounds

Where no other statute confers an unconditional right to intervene, a third party seeking to intervene as a matter of right must show that (1) it has a direct and immediate interest relating to the property or transaction, (2) denying intervention would result in a practical impairment of the protection of that interest, and (3) there is inadequate representation of that interest by existing parties. Rules Civ.Proc., Rule 24(a)(2), G.S. § 1A–1.

8 Cases that cite this headnote

[3] **Parties**
Interest in subject of action in general

Newspaper that sought to challenge trial court's closure of proceedings in physician's wrongful discharge action against hospital could not intervene as of right; there was no claim that any statute other than rule governing intervention gave newspaper unconditional right to intervene, and newspaper had no direct interest in outcome of wrongful discharge action, but rather, had no more than "indirect" or "contingent" interest—common to all persons—in seeing matters relating to all civil actions made public. Rules Civ.Proc., Rule 24(a), G.S. § 1A–1.

6 Cases that cite this headnote

[4] **Parties**
Interest in subject of action in general

Newspaper that sought to challenge trial court's closure of proceedings in physician's wrongful discharge action against hospital was not entitled to permissive intervention; newspaper's interest was only indirect or contingent, and trial court could reasonably believe that permitting

newspaper to intervene would unduly delay adjudication of rights of original parties. Rules Civ.Proc., Rule 24(b), G.S. § 1A–1.

2 Cases that cite this headnote

[5] **Appeal and Error**
Allowance of remedy and matters of procedure in general
Parties
Intervention

Permissive intervention by a private party rests within the sound discretion of the trial court and will not be disturbed on appeal unless there was an abuse of discretion. Rules Civ.Proc., Rule 24(b), G.S. § 1A–1.

1 Cases that cite this headnote

[6] **Parties**
Intervention

A trial court's ruling on a motion for permissive intervention is an abuse of discretion when that ruling is so arbitrary that it could not have been the result of a reasoned decision. Rules Civ.Proc., Rule 24(b), G.S. § 1A–1.

2 Cases that cite this headnote

[7] **Parties**
Order granting or refusing leave

Trial court was not required to record specific findings of fact and conclusions of law when denying third party's motion to intervene in civil case. Rules Civ.Proc., Rule 24, G.S. § 1A–1.

[8] **Records**
In general; freedom of information laws in general

The Public Records Act provides for liberal access to public records. G.S. § 132–1 et seq.

3 Cases that cite this headnote

[9] **Records**
Matters Subject to Disclosure; Exemptions

Absent clear statutory exemption or exception, documents falling within the definition of "public records" in the Public Records Law must be made available for public inspection. G.S. § 132–1.

4 Cases that cite this headnote

[10] **Records**
Court records
Trial
Fair and impartial trial in general

Notwithstanding the broad scope of the public records statute and the specific grant of authority to make court records open to public inspection, trial courts always retain the necessary inherent power granted them by the state constitution to control their proceedings and records in order to ensure that each side has a fair and impartial trial. Const. Art. 4, § 1; G.S. §§ 7A–109(a), 132–1.

3 Cases that cite this headnote

[11] **Records**
Court records
Trial
Publicity of proceedings

Even though court records may generally be public records under the Public Records Act, the state constitution permits a trial court, in the proper circumstances, to shield portions of court proceedings and records from the public; the power to do so is a necessary power rightfully pertaining to the judiciary as a separate branch of the government, and the General Assembly has no power to diminish it in any manner. Const. Art. 4, § 1; G.S. §§ 7A–109(a), 132–1.

1 Cases that cite this headnote

[12] **Records**
Court records
Trial
Publicity of proceedings

The necessary and inherent constitutional power of the judiciary to shield portions of court proceedings and records from the public should

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be exercised only when its use is required in the interest of the proper and fair administration of justice or where, for reasons of public policy, the openness ordinarily required of government will be more harmful than beneficial. Const. Art. 4, § 1; G.S. §§ 7A–109(a), 132–1.

1 Cases that cite this headnote

[13] **Privileged Communications and Confidentiality**
Medical or Health Care Peer Review
The purpose of the statute that shields medical review committee records and materials from discovery and prevents their use as evidence in certain civil actions is to promote candor and frank exchange in peer review proceedings. G.S. § 131E–95(b).

[14] **Privileged Communications and Confidentiality**
Medical or Health Care Peer Review
The statute that shields medical review committee records and materials from discovery and prevents their use as evidence in certain civil actions represents a legislative choice between competing public concerns; it embraces the goal of medical staff candor at the cost of impairing plaintiffs' access to evidence.

[15] **Privileged Communications and Confidentiality**
Medical or Health Care Peer Review
Application of statute that shields medical review committee records and materials from discovery and prevents their use as evidence in certain civil actions is not limited to third party malpractice plaintiffs. G.S. § 131E–95(b).

[16] **Records**
Matters Subject to Disclosure; Exemptions
A privileged document that a judge considers in determining litigants' rights does not automatically become a "public record" subject to disclosure under the Public Records Act. G.S. § 132–1(b).

1 Cases that cite this headnote

[17] **Records**
Matters Subject to Disclosure; Exemptions
Even documents which are protected from public disclosure by a statutory exemption from the definition of "public records" contained in the Public Records Act are open to the public if they are placed in the public records in a governmental agency's possession. G.S. § 132–1.

1 Cases that cite this headnote

[18] **Records**
Exemptions or prohibitions under other laws
Documents that physician attached as exhibits to his complaint in wrongful discharge action against hospital became "public records" subject to disclosure under Public Records Act once they were filed with court clerk, even if they might otherwise have been protected by statutory privilege applicable to medical review committee records and materials. G.S. §§ 131E–95(b), 132–1(b).

3 Cases that cite this headnote

[19] **Records**
Matters Subject to Disclosure; Exemptions
Even though it was improper for physician to attach medical review committee records and materials to his complaint in wrongful discharge action against hospital, and even though such documents continued to be inadmissible as evidence or as forecast of evidence, they became public records subject to disclosure under Public Records Act once complaint was filed with court. G.S. §§ 131E–95(b), 132–1(b).

2 Cases that cite this headnote

[20] **Privileged Communications and Confidentiality**

Medical or Health Care Peer Review

Statutory privilege for medical review committee records and materials applied to peer review materials that hospital submitted directly to presiding judge in support of its arguments on various pretrial motions in physician's wrongful discharge action against hospital; hospital never filed any peer review materials with clerk of court, and hospital took painstaking steps throughout motions proceedings to preserve any confidentiality afforded by law to peer review records and information it submitted to trial judge. G.S. §§ 131E–95(b), 132–1(b); Rules Civ.Proc., Rule 5(e)(1), G.S. § 1A–1.

1 Cases that cite this headnote

[21] **Privileged Communications and Confidentiality**

Medical or Health Care Peer Review

Information, in whatever form available, from original sources other than the medical review committee is not immune from discovery or use at trial merely because it was presented during medical review committee proceedings. G.S. § 131E–95(b).

1 Cases that cite this headnote

[22] **Privileged Communications and Confidentiality**

Medical or Health Care Peer Review

One who is a member of a medical review committee is not prevented from testifying regarding information he learned from sources other than the committee itself, even though that information might have been shared by the committee. G.S. § 131E–95(b).

[23] **Constitutional Law**

Access to proceedings; closure

Constitutional Law

Court documents or records

Records

Court records

Even if newspaper had federal common law right of access to proceedings and records in state court civil action, such right was no greater than any First Amendment right newspaper may have possessed. U.S.C.A. Const.Amend. 1.

[24] **Common Law**

Decisions of English courts

The common law to be applied in North Carolina is the common law of England to the extent it was in force and use within the state at the time of the Declaration of Independence; is not otherwise contrary to the independence of the state or the form of government established therefore; and is not abrogated, repealed, or obsolete. G.S. § 4–1.

1 Cases that cite this headnote

[25] **Statutes**

Statutory Alteration or Abrogation of Common Law

The common law that remains in force may be modified or repealed by the General Assembly, except that any parts of the common law which are incorporated in the state constitution may be modified only by proper constitutional amendment. G.S. § 4–1.

[26] **Common Law**

Adoption and Repeal

Because state common law originally was, and largely continues to be, a body of law discovered and announced in court decisions, the Supreme Court, as the court of last resort in North Carolina, may modify the common law to ensure that it has not become obsolete or repugnant to the freedom and independence of the state and its form of government. G.S. § 4–1.

1 Cases that cite this headnote

[27] **Common Law**

Sources and Scope

Decisions of the Supreme Court not turning on the application of statutes or constitutional principles constitute common law. G.S. § 4–1.

[28] Records

Access to records or files in general

Although there is a state common law right of the public to inspect public records, that right has been superseded to the extent that the General Assembly has dictated by statute that certain documents will not be available to the public. G.S. § 4–1.

[29] Privileged Communications and Confidentiality

Medical or Health Care Peer Review

Records

Access to records or files in general

Statutory privilege for medical review committee records and materials supplants any North Carolina common law right of public access to information regarding such records and materials. G.S. § 131E–95(b).

[30] Constitutional Law

Relation to Constitutions of Other Jurisdictions

Even where provisions of the state and federal Constitutions are identical, the North Carolina Supreme Court has the authority to construe the state constitution differently from the construction by the United States Supreme Court of the federal constitution, as long as the state's citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision.

6 Cases that cite this headnote

[31] Constitutional Law

Relation to Constitutions of Other Jurisdictions

For all practical purposes, the only significant issue for the Supreme Court when interpreting a provision of the state constitution paralleling a provision of the federal constitution will always be whether the state constitution guarantees additional rights to the citizen above and beyond those guaranteed by the parallel federal provision.

5 Cases that cite this headnote

[32] Constitutional Law

Right of access to the courts and a remedy for injuries in general

The open courts provision of the state constitution guarantees a qualified constitutional right on the part of the public to attend civil court proceedings. Const. Art. 1, § 18.

1 Cases that cite this headnote

[33] Constitutional Law

Conditions, Limitations, and Other Restrictions on Access and Remedies

The qualified public right of access to civil court proceedings guaranteed by the open courts provision of the state constitution is not absolute and is subject to reasonable limitations imposed in the interest of the fair administration of justice or for other compelling public purposes. Const. Art. 1, § 18.

2 Cases that cite this headnote

[34] Constitutional Law

Conditions, Limitations, and Other Restrictions on Access and Remedies

Records

Court records

Although the open courts provision of the state constitution gives the public a presumptive right of access to civil court proceedings and records, the trial court may limit this right when there is a compelling countervailing public interest and closure of the court proceedings or sealing of documents is required to protect such countervailing public interest. Const. Art. 1, § 18.

2 Cases that cite this headnote

[35] Records

Court records

Trial

Publicity of proceedings

In determining whether closure of civil court proceedings or sealing of documents is required in order to protect a countervailing public interest, the trial court must consider alternatives to closure; unless such an overriding interest exists, the civil court proceedings and records will be open to the public. Const. Art. 1, § 18.

[36] **Records**

Court records

Trial

Publicity of proceedings

Where the trial court in a civil case closes proceedings or seals records and documents, the court must make findings of fact which are specific enough to allow appellate review to determine whether the proceedings or records were required to be open to the public pursuant to the presumptive right of access under the open courts provision of the state constitution. Const. Art. 1, § 18.

[37] **Constitutional Law**

Conditions, Limitations, and Other Restrictions on Access and Remedies

Records

Court records

Trial

Publicity of proceedings

Order excluding public from court hearings in physician's wrongful discharge action against hospital, and orders sealing related peer review records concerning confidential information pertaining to hospital's medical peer review investigation of physician, did not violate public's qualified right of access to civil court proceedings and records under open courts provision of state constitution; public's interest in access to those court proceedings, records and documents was outweighed by compelling public interest in protecting confidentiality of medical peer review records in order to foster effective, frank and uninhibited exchange among medical peer review committee members. Const. Art. 1, § 18; G.S. § 131E–95(b).

5 Cases that cite this headnote

[38] **Records**

Court records

Trial court's findings and conclusions in physician's wrongful discharge against hospital were specific enough to allow appellate review of order excluding public from court hearings, and of orders sealing certain records; each written order included similar independent findings and conclusions to effect that, inter alia, matters at issue pertained to confidential medical peer review information and that disclosing medical review records and materials "could cause harm to [physician] and [hospital] and the peer review process if left unsealed in the public record during the course of pending litigation." Const. Art. 1, § 18; G.S. § 131E–95(b).

2 Cases that cite this headnote

[39] **Constitutional Law**

Access to proceedings; closure

Records

Court records

Trial

Publicity of proceedings

Even if qualified First Amendment right of public access applies to civil cases, the compelling public interest in protecting confidentiality of medical peer review process outweighed right of access in physician's wrongful discharge action against hospital, and thus, because no alternative to closure would adequately protect that interest, trial court properly closed hearings and properly sealed confidential materials, videotapes, and transcripts of closed hearings. U.S.C.A. Const.Amend. 1; G.S. § 131E–95(b).

1 Cases that cite this headnote

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**679 *452 On discretionary review pursuant to N.C.G.S. § 7A–31 and on appeal of right of a constitutional question pursuant to N.C.G.S. § 7A–30(1) to review a unanimous decision of the Court of Appeals, 127 N.C.App. 629, 493 S.E.2d 310 (1997), reversing and remanding orders entered in Superior Court, Mecklenburg County, by Gray, J., on 24 January 1996; by Downs, J., on 9 February 1996; by Johnson (Marcus L.), J., on 8 May 1996 and 10 May 1996; by Downs, J., on 15 May 1996; and by Downs, J., on 22 May 1996. Heard in the Supreme Court 29 September 1998.

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Opinion

MITCHELL, Chief Justice.

This appeal presents an issue of first impression for this Court. We are called upon to decide whether the public and the news media have a right of access to civil court proceedings and records pertaining to medical peer review evaluations and, if so, the extent of this right. Specifically, appellant presents questions for review regarding the Court of Appeals' decision reversing several orders entered in a civil lawsuit in Superior Court, Mecklenburg County, which orders closed courtroom proceedings and sealed various documents.

This suit was brought by Dr. Ron Virmani against Presbyterian Health Services Corporation (Presbyterian) following the suspension of Dr. Virmani's medical staff privileges at The Presbyterian Hospital and Presbyterian Hospital Matthews (jointly, the Hospital), hospitals owned and operated by Presbyterian in Mecklenburg County, North Carolina. For the reasons set forth below, we affirm in part and reverse in part the decision of the Court of Appeals.

The portions of the record open to the public and the facts set forth in the briefs submitted to this Court on which the parties **680 and the putative intervenor agree, indicate that the following events took place in connection with the instant case. After concerns were raised *454 about Dr. Virmani's competence as a physician, Presbyterian conducted a medical peer review evaluation of all of his cases at the Hospital. The medical review committee, comprised of six of Dr. Virmani's colleagues on the medical staff, reviewed the charts of the patients Dr. Virmani had admitted to the Hospital and treated there. Based on the peer review committee's evaluation, Presbyterian concluded that Dr. Virmani's medical judgment posed a serious risk to the health and safety of its patients and, therefore, suspended Dr. Virmani's medical privileges at the Hospital.

After exhausting the administrative appeals available within the Hospital, Dr. Virmani filed this lawsuit against Presbyterian on 22 January 1996, challenging the revocation of his privileges. Dr. Virmani attached numerous documents as exhibits to his complaint. These included copies of: a memo from the chairman (Chairman) of the Hospital's Obstetrics/ Gynecology (OB/GYN) Department requesting a peer review evaluation of Dr. Virmani; a memo from the Chairman summarizing a meeting in which he notified Dr. Virmani of the peer review; a letter from the Chairman and the chairman of the OB/GYN peer review committee to members of the department, informing them of the peer review process; the peer review committee's detailed report and its summary of findings regarding its evaluation of Dr. Virmani; and a letter from Presbyterian's president suspending Dr. Virmani from the active staff. Dr. Virmani included in his complaint a motion for a temporary restraining order and for a preliminary injunction ordering Presbyterian to comply with the procedures set forth in the Hospital's bylaws and to reinstate Dr. Virmani until it so complied.

On 23 January 1996, Judge Marvin K. Gray conducted a hearing on plaintiff's motion for a temporary restraining

order. Presbyterian moved to close the hearing and to seal the exhibits which were attached to the complaint and which contained confidential medical peer review records and materials. On 23 January 1996, Judge Gray signed a temporary restraining order directing the Hospital to readmit Dr. Virmani to the medical staff pending a hearing on his motion for a preliminary injunction. The temporary restraining order also directed that

> based upon the provisions contained in North Carolina General Statute § 131E–95. Medical Review Committee, the hearing on plaintiff's application for a temporary restraining order shall be confidential; that the exhibits attached to plaintiff's complaint ***455** shall be sealed by the clerk of court until further order of this court; and that all other pleadings, affidavits and motions heretofore filed with the court, shall be maintained and available to the public absent a subsequent ruling or order by this court to the contrary.

The exhibits attached to the complaint were sealed and are included in the record on appeal in an envelope marked as "Exhibit 3."

On 7 February 1996, Presbyterian submitted directly to Judge James U. Downs a legal memorandum in opposition to Dr. Virmani's motion for preliminary injunction along with supporting affidavits from various hospital personnel, all of which included medical peer review information. In its cover letter, Presbyterian noted that it had not filed these documents with the court because they were protected under the peer review statute. Presbyterian further stated in the letter, "We are providing, but not filing these documents in order that the Court might be prepared for the hearing while at the same time preserving the privilege and protection provided by statute." Thereafter, Judge Downs issued an order on 9 February 1996 sealing confidential peer review information and records in the "Court File." This order sealed Presbyterian's motion to seal confidential peer review records and materials, the affidavits of hospital personnel and exhibits attached thereto, exhibits to plaintiff's complaint, and the memorandum in opposition to Dr. Virmani's motion for preliminary injunction. In the order, Judge Downs found that: (1) Presbyterian had filed with him "sensitive and confidential information and Peer Review Committee records and materials," (2) "under N.C.G.S. § 131E–95 records and materials produced and considered by a ****681** Medical Review Committee shall be confidential and not considered public records," and (3) "Medical Review Committee records and materials could cause harm to Plaintiff and Defendant and the peer review process if left unsealed in the public record during the course of the pending litigation."

A hearing was later held on plaintiff Dr. Virmani's motion for a preliminary injunction. On 7 March 1996, Judge Downs entered an order denying injunctive relief and dissolving that part of the earlier temporary restraining order which had ordered Dr. Virmani reinstated.

On 3 April 1996, *The Charlotte Observer* published a story by reporter John Hechinger about Dr. Virmani, based on certain documents ***456** Mr. Hechinger had obtained from the court file. On 7 May 1996, Mr. Hechinger attended a calendared hearing in the Superior Court, Mecklenburg County, on Presbyterian's motion to dismiss and the parties' cross motions for summary judgment. Early in the hearing, Presbyterian's attorneys moved to close the courtroom pursuant to N.C.G.S. § 131E–95 because confidential medical peer review information would be discussed during the hearing. Judge Marcus L. Johnson ordered that the hearing be closed to the public and that confidential peer review records which Presbyterian anticipated presenting to the court be sealed. In making his oral order, Judge Johnson noted that it appeared that during a substantial part of the hearing the parties would be discussing and presenting materials pertaining to peer review information. Mr. Hechinger objected to the closing of the hearing and asked for a continuance to allow him to obtain counsel to argue against the closure. Judge Johnson noted Mr. Hechinger's objection and request for a continuance but proceeded to close the hearing and denied the continuance. Mr. Hechinger complied with the closure by leaving the courtroom.

The following morning, an attorney for Knight Publishing Company d/b/a *The Charlotte Observer* and Mr. Hechinger (jointly, the *Observer*) appeared before Judge Johnson and presented written motions to intervene and to open the proceedings to the public and the news media. Judge Johnson denied the motions without hearing arguments. On 10 May 1996, Judge Johnson entered a written order sealing confidential peer review information and records and closing courtroom proceedings involving the discussion and disclosure of peer review information during a hearing on the parties' summary judgment motions. In this order, Judge

Johnson made findings of fact virtually identical to those set forth in Judge Downs' earlier closure order. The parties and the putative intervenor all agree that Judge Johnson's order referred to the *Observer* 's motions and that it effectively, although not expressly, denied them. The order provided that (1) the documents presented or used by the parties in support of their motions which contained confidential peer review information would be sealed by the clerk of court, and (2) the summary judgment motions hearings and courtroom proceedings involving the medical review committee records, materials and findings would be closed to the public and the media. Subsequent orders were entered sealing videotapes and transcripts of those portions of the previously closed court proceedings in which medical peer review matters were discussed, presented or argued.

***457** The *Observer* filed a notice of appeal and a petition for writ of certiorari with the Court of Appeals. The Court of Appeals allowed the *Observer* 's writ of certiorari as to the orders that (1) sealed confidential information and medical review committee records and materials that were considered by the court and/or were in the court file, (2) closed the court proceedings dealing with confidential medical review committee records and materials, (3) sealed portions of transcripts and videotapes of the court proceedings, and (4) denied the *Observer* 's motions to intervene and to open court proceedings. In its decision issued 18 November 1997, the Court of Appeals reversed all of the Superior Court orders at issue and directed the court to unseal all of the documents and other materials that had been sealed pursuant to those orders. Presbyterian filed timely notice of appeal as of right with this Court pursuant to N.C.G.S. § 7A–30(1), on the theory that the Court of Appeals' decision involved real and substantial questions arising under ****682** Article I, Section 18 of the North Carolina Constitution. Presbyterian also petitioned this Court for discretionary review and for a writ of supersedeas of the judgment of the Court of Appeals, which petitions were allowed on 5 March 1998.

We first address defendant-appellant Presbyterian's argument that the Court of Appeals erred in reversing the trial court's order denying the *Observer* 's motion to intervene. On 8 May 1996, the *Observer* moved to intervene pursuant to Rule 24 of the North Carolina Rules of Civil Procedure "for the limited purpose of objecting to the court's closure of these proceedings to the public and news media." In its motions to intervene and to open the proceedings, the *Observer* asserted that because it was in the business of gathering and reporting to the public newsworthy events in the Charlotte area, it had the

> constitutional right to petition the court not to close these proceedings and to question the closure of these proceedings because closure of the proceedings to the public would deny them the protections guaranteed by the First and Fourteenth Amendments of the United States Constitution and Article I, Section 18 of the North Carolina Constitution.

The *Observer* argued in its motions that under these circumstances, it was incumbent upon the trial court to conduct a "plenary hearing" and to make findings of fact and conclusions of law in accordance with guidelines provided by the United States Supreme Court.

***458** In an oral order at the hearing on 8 May 1996, Judge Johnson denied the *Observer* 's motions, for "the same reasons as given by Judge Downs in the existing order in the file." On 10 May 1996, Judge Johnson entered a written order closing the hearings and directing the clerk of court to seal the medical review committee records and information that had been submitted to the court, including those which had been attached to the complaint. In this written order, Judge Johnson included several findings similar to those set forth in Judge Downs' prior order, including that: (1) the parties had filed with the judge "sensitive and confidential information and Medical Review Committee records, materials and findings" in support of their motions; (2) the parties would be discussing the contents of these peer review materials during the motion hearings and proceedings; (3) "under N.C.G.S. § 131E–95 records and materials produced by a Medical Review Committee and findings of a Medical Review Committee shall be confidential and not considered public records" and (4) the peer review materials "could cause harm to Plaintiff and Defendant and the peer review process if left unsealed in the public record or if open to the public or news media during the course of the pending litigation."

The Court of Appeals concluded that the trial court had erred in denying the *Observer* 's motion to intervene without holding a hearing and without making findings of fact and conclusions of law. Based on this reasoning, the Court of Appeals reversed the trial court's order denying the motion to intervene. We disagree with the Court of Appeals. We have found no authority in decisions by this Court or the

United States Supreme Court, including the cases cited by the *Observer* and the Court of Appeals, which indicates that a trial court must record specific factual findings and conclusions of law prior to denying a motion to intervene.

[1] **[2]** Intervention in North Carolina is governed by statute. Rule 24 of the North Carolina Rules of Civil Procedure determines when a third party may intervene as of right or permissively. N.C.G.S. § 1A–1, Rule 24 (1990). A third party may intervene as a matter of right under Rule 24(a):

(1) When a statute confers an unconditional right to intervene; or

(2) When the applicant claims an interest relating to the property or transaction which is subject of the action and he is so situated that the disposition of the action may as a practical ***459** matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

N.C.G.S. § 1A–1, Rule 24(a). This Court has stated that where no other statute confers an unconditional right to intervene, the interest ****683** of a third party seeking to intervene as a matter of right under N.C.G.S. § 1A–1, Rule 24(a)

> "must be of such direct and immediate character that he will either gain or lose by the direct operation and effect of the judgment.... One whose interest in the matter in litigation is not a direct or substantial interest, but is an *indirect,* inconsequential, *or* a *contingent* one cannot claim the right to defend."

Strickland v. Hughes, 273 N.C. 481, 485, 160 S.E.2d 313, 316 (1968) (quoting *Mullen v. Town of Louisburg,* 225 N.C. 53, 56, 33 S.E.2d 484, 486 (1945)) (emphasis added) (applying former N.C.G.S. § 1–73), *quoted in River Birch Assocs. v. City of Raleigh,* 326 N.C. 100, 128, 388 S.E.2d 538, 554 (1990) (applying Rule 24(a)(2)). The prospective intervenor seeking such intervention as a matter of right under Rule 24(a)(2) must show that (1) it has a direct and immediate interest relating to the property or transaction, (2) denying intervention would result in a practical impairment of the protection of that interest, and (3) there is inadequate representation of that interest by existing parties. *Alford v. Davis,* 131 N.C.App. 214, 217–19, 505 S.E.2d 917, 920 (1998); *Ellis v. Ellis,* 38 N.C.App. 81, 83, 247 S.E.2d 274, 276 (1978).

[3] In the present case, there is no claim that any statute other than N.C.G.S. § 1A–1, Rule 24(a), confers upon the *Observer* an unconditional right to intervene. Nor does the *Observer* have a direct interest in the outcome of Dr. Virmani's wrongful discharge action against Presbyterian. At most, the *Observer* has an "indirect" or "contingent" interest—an interest common to all persons—in seeing matters relating to all civil actions made public. The only parties with a direct interest in this civil action are plaintiff and defendant. Because we conclude that the *Observer* has no direct interest in Dr. Virmani's action against Presbyterian and that the *Observer* 's indirect interest may be adequately asserted in a timely manner by other means, we hold that the *Observer* was not entitled to intervene as a matter of right pursuant to N.C.G.S. § 1A–1, Rule 24(a).

[4] **[5]** **[6]** ***460** We further conclude that the trial court did not err in denying the *Observer* permissive intervention. Rule 24 "contains specific requirements which control and limit intervention." *State ex rel. Comm'r. of Ins. v. N.C. Rate Bureau,* 300 N.C. 460, 468, 269 S.E.2d 538, 543 (1980). A private third party may be *permitted* to intervene under Rule 24(b), but only "(1) When a statute confers a conditional right to intervene; or (2) When an applicant's claim or defense and the main action have a question of law or fact in common." N.C.G.S. § 1A–1, Rule 24(b) (1990). Subject to these limitations, permissive intervention by a private party under Rule 24(b) rests within the sound discretion of the trial court and will not be disturbed on appeal unless there was an abuse of discretion. *See Comm'r. of Ins.,* 300 N.C. at 468, 269 S.E.2d at 543; *see also Alford,* 131 N.C.App. at 219–20, 505 S.E.2d at 921; *State ex rel. Long v. Interstate Cas. Ins. Co.,* 106 N.C.App. 470, 474, 417 S.E.2d 296, 299 (1992). A trial court abuses its discretion under this statute " where its ruling 'is so arbitrary that it could not have been the result of a reasoned decision.' " *Alford,* 131 N.C.App. at 219, 505 S.E.2d at 921 (quoting *Chicora Country Club, Inc. v. Town of Erwin,* 128 N.C.App. 101, 109, 493 S.E.2d 797, 802 (1997), *disc. rev. denied,* 347 N.C. 670, 500 S.E.2d 84 (1998)). Our trial courts should bear in mind, however, that Rule 24(b)(2) expressly requires that in exercising discretion as to whether to allow permissive intervention, "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." N.C.G.S. § 1A–1, Rule 24(b).

In the instant case, the *Observer* 's interest is only indirect or contingent. Further, there was every reason for the trial court

to believe that permitting the *Observer* to intervene would —as it has—unduly delay the adjudication of the rights of the original parties. Accordingly, we conclude that the trial court's order denying the *Observer* 's motion to intervene was not so arbitrary that it could not have been the result of a reasoned decision.

[7] In its brief before this Court and the Court of Appeals, the *Observer* argued—and the Court of Appeals has agreed—that the ****684** trial court erred in "summarily" denying the *Observer* 's motions to intervene *and* its motion to open the proceedings and make certain records public. By posing the question presented in this manner, however, the *Observer* has mixed two different questions—(1) whether the *Observer* was entitled to intervene, and (2) whether the court proceedings and records must be made public. The United States Supreme Court has indicated that trial court proceedings in criminal ***461** cases may not be summarily closed when the trial court is faced with a First Amendment claim to a right of access, "[a]bsent an overriding interest articulated in findings." *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 581, 100 S.Ct. 2814, 2829, 65 L.Ed.2d 973, 992 (1980) (plurality opinion); *see also El Vocero de Puerto Rico (Caribbean International News Corp.) v. Puerto Rico,* 508 U.S. 147, 113 S.Ct. 2004, 124 L.Ed.2d 60 (1993); *Press–Enterprise Co. v. Superior Court,* 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (*Press–Enterprise II*); *Press–Enterprise Co. v. Superior Court,* 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (*Press–Enterprise I*). We address at other points in this opinion the issue of whether the trial court's findings were sufficient to support its closure of the proceedings and sealing of the documents in this case. That substantive issue is different, however, from the question of who should be allowed to appear and present the issue in a civil case and how it should be presented.

We do not believe that the decisions of the United States Supreme Court cited by the *Observer* required the trial court to record specific findings of fact and conclusions of law when denying the *Observer* 's *motion to intervene* in this civil case. This issue of whether a putative intervenor should be allowed to intervene is an issue separate and apart from the merits of the substantive issue the putative intervenor seeks to raise if it is allowed to intervene, and we do not find the cited cases to be controlling. The *Observer* 's argument would be more compelling if it could not raise the substantive issue of whether court proceedings and records must be made public by any reasonable manner other than intervention as a party. We note, however, that the trial court's denial of the *Observer* 's motion to intervene did not necessarily preclude the *Observer* from presenting full briefs and argument and obtaining a timely ruling on the questions of its right of access to the proceedings and documents in this case. Even if prevented from intervening directly as a party in this civil case, the *Observer* was free to attempt to raise such questions without intervening as a party by (1) extraordinary writ practice, (2) a declaratory judgment action, or (3) resort to established remedies in equity; in fact, these represent the legal methods by which questions of public access to courts and their records are most frequently and successfully raised. *See, e.g., El Vocero de Puerto Rico,* 508 U.S. 147, 113 S.Ct. 2004, 124 L.Ed.2d 60 (declaratory judgment action); *Press–Enterprise II,* 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (mandamus proceeding); *Press–Enterprise I,* 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (petition for writ of mandate); *Richmond Newspapers,* 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (petitions for writ of mandamus ***462** and prohibition). Therefore, the *Observer* had alternative means of obtaining a full and timely review of the issue it sought to raise without being allowed to intervene as a party and unduly delay the adjudication of the rights of the original parties.

For the foregoing reasons, we conclude that the trial court did not err in denying the *Observer* 's motion to intervene. Accordingly, we conclude that the Court of Appeals erred in reversing the order of the trial court denying intervention.

Having determined that the trial court did not err by denying the motion of the *Observer* to intervene in this case, it would be appropriate for us to simply reverse the decision of the Court of Appeals without reaching the other issues raised by the *Observer.* However, those issues were addressed and resolved in the decision of the Court of Appeals, are likely to be raised again in some manner with regard to the facts before us in this case, and those issues have been fully briefed and argued before the Court of Appeals and before this Court. Therefore, in the interest of judicial economy, we elect to exercise the rarely used general supervisory power granted *exclusively to this Court* by ****685** Article IV, Section 12(1) of the North Carolina Constitution in order to reach and resolve those issues. *See Lea Co. v. N.C. Bd. of Transp.,* 317 N.C. 254, 263, 345 S.E.2d 355, 360 (1986); *State v. Stanley,* 288 N.C. 19, 26, 215 S.E.2d 589, 594 (1975).

Defendant Presbyterian contends that the Court of Appeals erred in reversing the orders of the trial court closing courtroom proceedings and sealing documents and other materials in this civil action. The *Observer* first responds that

because it has an absolute right of access to the peer review documents and testimony regarding the peer review process under N.C.G.S. § 132–1 and N.C.G.S. § 7A–109, the result reached by the Court of Appeals was correct.

[8] **[9]** Access to public records in North Carolina is governed generally by our Public Records Act, codified as Chapter 132 of the North Carolina General Statutes. Chapter 132 provides for liberal access to public records. *News & Observer Publ'g Co. v. Poole,* 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992). Absent "clear statutory exemption or exception, documents falling within the definition of 'public records' in the Public Records Law must be made available for public inspection." *Id.* at 486, 412 S.E.2d at 19. The term "public records," as used in N.C.G.S. § 132–1, includes all documents and papers made or received by any agency of North Carolina government in the course of conducting its public proceedings. N.C.G.S. § 132–1(a) (1995). ***463** The public's right of access to court records is provided by N.C.G.S. § 7A–109(a), which specifically grants the public the right to inspect court records in criminal and civil proceedings. N.C.G.S. § 7A–109(a) (1995).

[10] **[11]** **[12]** Notwithstanding the broad scope of the public records statute and the specific grant of authority in N.C.G.S. § 7A–109(a), our trial courts always retain the necessary inherent power granted them by Article IV, Section 1 of the North Carolina Constitution to control their proceedings and records in order in ensure that each side has a fair and impartial trial. "The paramount duty of the trial judge is to supervise and control the course of the trial so as to prevent injustice." *In re Will of Hester,* 320 N.C. 738, 741, 360 S.E.2d 801, 804 (1987). Thus, even though court records may generally be public records under N.C.G.S. § 132–1, a trial court may, in the proper circumstances, shield portions of court proceedings and records from the public; the power to do so is a necessary power rightfully pertaining to the judiciary as a separate branch of the government, and the General Assembly has "no power" to diminish it in any manner. N.C. Const. art. IV, § 1; *see State v. Britt,* 285 N.C. 256, 271–72, 204 S.E.2d 817, 828 (1974); *Miller v. Greenwood,* 218 N.C. 146, 150, 10 S.E.2d 708, 711 (1940). This necessary and inherent power of the judiciary should only be exercised, however, when its use is required in the interest of the proper and fair administration of justice or where, for reasons of public policy, the openness ordinarily required of our government will be more harmful than beneficial.

[13] In this case, the trial court sealed medical peer review documents and closed the proceedings relating to them. N.C.G.S. § 131E–95 shields medical review committee records and materials from discovery and prevents their use as evidence in certain civil actions. The plain language of this statute excludes information and records pertaining to medical review committee proceedings from the public records law. The statute provides in relevant part:

> (b) The proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential and not considered public records within the meaning of G.S. 132–1, " 'Public records' defined," and shall not be subject to discovery or introduction into evidence in any civil action against a hospital or a provider of professional health services which results from matters which are the subject of evaluation and review by the committee.

***464** N.C.G.S. § 131E–95(b) (1997). The purpose of N.C.G.S. § 131E–95 is to promote candor and frank exchange in peer review proceedings. *Shelton v. Morehead Memorial Hosp.,* 318 N.C. 76, 82, 347 S.E.2d 824, 828 (1986). The statute attempts to accomplish this goal by preventing discovery or introduction into ****686** evidence of a medical review committee's proceedings and the records and materials produced or considered by the committee. *Id.* at 82, 347 S.E.2d at 829.

[14] N.C.G.S. § 131E–95 " 'represents a legislative choice between competing public concerns. It embraces the goal of medical staff candor at the cost of impairing plaintiffs' access to evidence.' " *Cameron v. New Hanover Memorial Hosp., Inc.,* 58 N.C.App. 414, 436, 293 S.E.2d 901, 914, *appeal dismissed and disc. rev. denied,* 307 N.C. 127, 297 S.E.2d 399 (1982) (quoting *Matchett v. Superior Court,* 40 Cal.App.3d 623, 629, 115 Cal.Rptr. 317, 320–21 (1974)), *quoted in Shelton,* 318 N.C. at 82, 347 S.E.2d at 829. The statute serves the compelling public purpose of promoting the public health by encouraging "candor and objectivity in the internal workings of medical review committees." *Shelton* at 83, 347 S.E.2d at 829; *see also Whisenhunt v. Zammit,* 86 N.C.App. 425, 428, 358 S.E.2d 114, 116 (1987); *Cameron,* 58 N.C.App. at 436, 293 S.E.2d at 914. In *Shelton,* this Court also stressed the broad scope of N.C.G.S. § 131E–95:

> Subsection (b) of § 95 protects documents and related information against discovery or introduction into evidence "in *any* civil action against a hospital ... which results from matters which are the subject of evaluation and review by the committee."

Shelton, 318 N.C. at 82, 347 S.E.2d at 829 (quoting N.C.G.S. § 131E–95(b)) (emphasis in original).

[15] Nevertheless, the *Observer* argues that the peer review materials and information at issue are not covered by N.C.G.S. § 131E–95 because the statute applies only to third party malpractice plaintiffs. There is absolutely nothing in the plain language of N.C.G.S. § 131E–95 which supports the *Observer* 's contention. Further, this Court rejected a strikingly similar argument in *Shelton. Id.* at 81–83, 347 S.E.2d at 828–29. We reject this argument as feckless.

[16] The *Observer* further argues that even if the peer review materials at issue in this case are protected by N.C.G.S. § 131E–95, they became public records once Presbyterian tendered them to the presiding judge for his consideration in support of Presbyterian's arguments. The *Observer* argues that any document or record which a ***465** judge considers in determining litigants' rights is part of the public records of the courts, regardless of whether it was actually introduced as evidence or filed with the court. We can find no case in which either this Court or the United States Supreme Court has established such a rule. We note that the *Observer* relies on several cases decided by the United States Court of Appeals for the Fourth Circuit and by appellate courts of other jurisdictions. None of those cases are binding authority for this Court when addressing this question, which is solely a question of state law. *See State v. Jarrette,* 284 N.C. 625, 654–55, 202 S.E.2d 721, 740 (1974), *death sentence vacated,* 428 U.S. 903, 96 S.Ct. 3205, 49 L.Ed.2d 1206 (1976). We reject such reasoning because there simply must be a way for a court to review documents alleged to be inadmissible and not "public records" without making them public by placing them in court records which are open to the public or by otherwise causing them to be thrust into the public domain.

[17] As noted above, North Carolina's public records act grants public access to documents it defines as "public records," absent a specific statutory exemption. N.C.G.S. § 132–1(b). A custodian of such "public records" has no discretion to prevent public inspection and copying of such records. N.C.G.S. § 132–6 (1995). This Court has previously held that even documents which are protected from public disclosure by a statutory exemption from the definition of "public records" contained in N.C.G.S. § 132–1(a) are open to the public if they are placed in the public records in a governmental agency's possession. *News & Observer Publ'g Co. v. Poole,* 330 N.C. at 473–74, 412 S.E.2d at 12–13. In *Poole, The News and Observer* sought disclosure of certain investigative records prepared by special agents of the State Bureau of Investigation (SBI). Those SBI agents were assisting a University of North Carolina commission in its investigation of alleged improprieties relating to North Carolina State University's men's basketball team, which allegations were later found to be without evidentiary basis. The ****687** SBI improperly delivered to the commission the records in question and a report summarizing its investigation. *The News and Observer* claimed a right to copies of the documents under N.C.G.S. § 132–6. The commission claimed that the documents were protected by an express statutory exemption from the public records act of records and evidence collected and compiled by the SBI. We held that once the SBI placed the investigative reports in the records of the commission, they became commission records which were subject to the public records statute and must be disclosed to the same extent as other commission materials. *Id.* We explained that:

> ***466** To extend the statutory exemption to SBI investigative reports which have been placed in the public domain is like unringing a bell—a practical impossibility. When such reports become part of the records of a public agency subject to the Public Records Act, they are protected only to the extent that agency's records are protected.

Id. at 474, 412 S.E.2d at 12.

In the instant case, the records to which the *Observer* seeks access fall into one of two categories: (1) those originally filed with the clerk of court as part of the public records of the court, or (2) those tendered only to the presiding judge for consideration on the merits of the parties' various motions. We must resolve the issues concerning each of these categories separately.

[18] Plaintiff, Dr. Virmani, attached some of the records in question as exhibits to his complaint which was filed with the clerk. These documents were made public the moment that Dr. Virmani filed his complaint. While they might otherwise

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have been protected by N.C.G.S. § 131E–95, once they were filed in the public records of the court by the plaintiff as part of his complaint they were thrust into the public domain *de facto* and became subject to the public records act. *See id.* The public and the news media have the same right to inspect and obtain copies of those records as they do with any other open court records. N.C.G.S. § 132–1(b). Further, the United States Supreme Court has affirmed the right to publish accurately information contained in such court records which are open to the public. *See Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975).

The Court of Appeals reversed all of the orders of the trial court in question on this appeal and remanded this case to the trial court, "with direction that the trial court unseal all documents previously sealed pursuant to the orders hereby reversed." *Virmani v. Presbyterian Health Servs. Corp.,* 127 N.C.App. 629, 648, 493 S.E.2d 310, 323 (1997). As we have concluded that the documents filed as exhibits attached to plaintiff's complaint entered the public domain and became "public records" once the complaint was filed with the clerk of court, we agree that members of the public, including the *Observer,* were entitled to inspect and obtain copies of *those documents attached to the complaint.* Accordingly, we affirm in part the holding of the Court of Appeals directing that the sealed documents in this case be unsealed, but we affirm that holding only to the extent that it required the unsealing of the envelope marked "Exhibit 3" in ***467** the record on appeal, which contains the documents originally attached to plaintiff's complaint when it was filed with the clerk of court.

[19] The exhibits originally attached to plaintiff's complaint included exhibits which were records and materials produced by the medical review committee and others which were materials considered by the committee. We note that because N.C.G.S. § 131E–95 expressly prohibits the introduction of such documents "into evidence in any civil action," it was improper for Dr. Virmani to attach them to his complaint as evidence or as a forecast of evidence. We emphasize that those documents continue to be inadmissible as evidence or as a forecast of evidence in this case, which is "a civil action against a hospital or a provider of professional health services which results from matters which are the subject of evaluation and review by the [medical peer review] committee." N.C.G.S. § 131E–95. However, as discussed above, once the peer review records attached to the complaint were filed with the court, they entered the public domain and were available, *de facto* and *de jure,* to the public from that source.

****688** **[20]** We next consider the documents defendant-appellant Presbyterian submitted directly to the presiding judge in support of its arguments on the various pretrial motions. Presbyterian never filed any peer review materials with the clerk of court. Instead, Presbyterian only tendered such documents directly to the trial judge. Throughout the motions proceedings, Presbyterian took painstaking steps to preserve any confidentiality afforded by law to the peer review records and information it submitted to the trial judge. At the outset of each motion hearing and before the parties made any substantive arguments based on the peer review information, Presbyterian asked the presiding judge to seal documents containing confidential medical peer review information and to close the courtroom proceedings relating to this confidential information. In a cover letter to Judge Downs accompanying Presbyterian's legal memorandum in opposition to plaintiff's motion for preliminary injunction, Presbyterian's counsel stated:

> We are providing, *but not filing,* these documents in order that the Court might be prepared for the hearing while at the same time preserving the privilege and protection provided by statute. We will need to address issues relating to confidentiality and privilege of the peer review process *prior to the commencement of the hearing.*

***468** (Emphasis added). Because N.C.G.S. § 131E–95 clearly prohibits the introduction of peer review materials into evidence, Presbyterian's technique was the proper practice for tendering purportedly confidential peer review materials protected by the statute to the court for its consideration.

Documents which Presbyterian submitted directly to the trial judge and which are included in the record on appeal as sealed exhibits include several affidavits of Presbyterian and Hospital personnel, a transcript of a hearing before a peer review committee, and a legal brief in support of Presbyterian's motion for summary judgment (hereinafter referred to collectively as "Confidential Materials"). On defendant's motions, the trial court sealed these Confidential Materials. After reviewing the Confidential Materials, we conclude that each of them is or includes records and materials either produced by the medical review committee or considered by the committee; therefore, they are excluded from the definition of "public records" contained in our public

records act by N.C.G.S. § 131E–95. *Shelton,* 318 N.C. at 83, 347 S.E.2d at 829. The trial court properly applied N.C.G.S. § 131E–95 when it ordered that these documents be sealed, as they are not "public records" and are not subject to discovery or introduction into evidence. *Id.;* N.C.G.S. § 131E–95(b).

[21] **[22]** We further note, however, that N.C.G.S. § 131E–95(b) also provides that:

> information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee. A member of the committee or a person who testifies before the committee may testify in a civil action but cannot be asked about his testimony before the committee or any opinions formed as a result of the committee hearings.

N.C.G.S. § 131E–95(b). We have previously stated:

> These provisions mean that information, in whatever form available, from original sources other than the medical review committee is not immune from discovery or use at trial merely because it was presented during medical review committee proceedings; neither should one who is a member of a medical review committee be prevented from testifying regarding information he learned from sources other than the committee ***469** itself, even though that information might have been shared by the committee.

Shelton, 318 N.C. at 83, 347 S.E.2d at 829.

We recognize that our conclusion that these and similar purportedly confidential documents are shielded from public access by N.C.G.S. § 131E–95 deprives the opposing party of the opportunity to review them in order to formulate a substantive argument about whether they are indeed confidential. However, to hold otherwise would nullify the statute, as the efforts of the party asserting the confidentiality of the records would automatically ****689** convert them into public records. As a matter of practicality, there is no other way to handle records which are alleged to be confidential or privileged than that employed here by Presbyterian and the trial court.

Rule 5(e)(1) of the North Carolina Rules of Civil Procedure provides that the presiding judge may permit parties to file papers directly with him or her. N.C.G.S. § 1A–1, Rule 5(e)(1) (Supp.1998). Under this rule, the party asserting confidentiality may submit the documents to the trial judge for the limited purpose of determining *in camera* whether they should be shielded from the public. In the present case, that was the thrust of Presbyterian's efforts and the trial court understood it to be such. The trial court's review of any such purportedly confidential materials will always be *in camera,* but its ruling will be subject to review by our appellate courts. Where the trial court decides, as here, that as a matter of law the documents are not public records and will not be made available to the public by the court, the documents should be sealed and included in the record, thereby providing a record for appellate review.

[23] The *Observer* also argues that in addition to any statutory right of access, the public has a qualified common law right to inspect and copy public records and documents, including judicial records and documents. The *Observer* does not state whether it relies on a state or federal common law right, or both. In support of this argument, the *Observer* simply relies on citations to both state authorities and *Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978) (5–4 decision). This reliance is misplaced.

The Supreme Court of the United States is uniquely a creature of the United States Constitution and enjoys a breadth of powers and of public confidence unique in the world. It is not, however, a "common law" court in any strict sense of that phrase. In 1938, the ***470** Supreme Court of the United States overruled *Swift v. Tyson,* 16 Pet. 1, 41 U.S. 1, 10 L.Ed. 865 (1842), and stated in very careful language that, "[t]here is no federal *general* common law." *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188, 1194 (1938) (emphasis added). All post-*Erie* federal common law is specialized to apply to one peculiarly federal concern or another. *Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 641, 101 S.Ct. 2061, 2067, 68 L.Ed.2d 500, 509 (1981). Post-*Erie* federal common law has its ultimate justification in the Constitution. *Erie,* 304 U.S. at 79–80, 58 S.Ct. at 823, 82 L.Ed. at 1195. Therefore,

post-*Erie* federal common law rules, unlike those of the *Swift* era, are binding on the states through the supremacy clause. George J. Romanik, *Federal Common Law Alive and Well Fifty Years After Erie: Boyle v. United Technologies Corp. and the Government Contractor's Defense,* 22 Conn. L.Rev. 239, 249 (1989); *see also Local 174, Teamsters of America v. Lucas Flour Co.,* 369 U.S. 95, 102, 82 S.Ct. 571, 576, 7 L.Ed.2d 593, 598 (1962). Recently, the Supreme Court has emphasized that in the strictest sense, federal common law rules are not simply an interpretation of a federal statute or administrative rule, but the judicial creation of a special federal rule of decision. *Atherton v. FDIC,* 519 U.S. 213, 218, 117 S.Ct. 666, 670, 136 L.Ed.2d 656, 664 (1997). The Supreme Court has also noted that whether federal power should be exercised in a given area to displace state law is primarily a decision for Congress and not the Court. *Id.* Therefore, the Court will not fashion rules of federal common law unless there is a significant conflict between some federal policy or interest and the use of state law. *Id.* Since *Erie,* the Supreme Court has recognized that the instances in which federal common law can be applied are few and restricted. *Texas Industries,* 451 U.S. at 640–43, 101 S.Ct. at 2066–68, 68 L.Ed.2d at 509–11.

Against this background, it is difficult to imagine how the Supreme Court could recognize a federal common law right of public access to *state courts* broader than the right of access already required by the First or Sixth Amendment, without engaging in the exercise of general supervisory powers over the state courts. The Supreme Court has always taken the position that it has supervisory power over cases tried in federal courts; ****690** but as to cases tried in state courts, it has said that its authority is limited to enforcing the commands of the United States Constitution. *E.g., Mu'Min v. Virginia,* 500 U.S. 415, 422, 111 S.Ct. 1899, 1903–04, 114 L.Ed.2d 493, 503 (1991); *see also Victor v. Nebraska,* 511 U.S. 1, 17, 114 S.Ct. 1239, 1248–49, 127 L.Ed.2d 583, 597 (1994). Although the Supreme Court requires no guidance from this Court, we suggest the possibility that no federal common law right of access to *state courts* should be recognized if the right of access is already protected by the ***471** First or Sixth Amendment; conversely, if the right of access is not guaranteed by the Constitution of the United States, the adoption of a federal common law rule requiring *state courts* to allow public access would amount to an exercise of supervisory power over the state courts in an area not of federal concern.

Further, the Supreme Court did not purport in *Nixon* to *apply* the common law of any state or federal common law. Instead, in an opinion for a very divided Court, Justice Powell sought, in a discussion which was *obiter dictum* in that case, to “distill from the relatively few judicial decisions a comprehensive definition of what is referred to as the common law right of access.” *Nixon,* 435 U.S. at 598–99, 98 S.Ct. at 1312, 55 L.Ed.2d at 580. Justice Powell eventually abandoned his effort to define a common law rule, saying, “we need not undertake to delineate precisely the contours of the common-law right, as we assume, *arguendo,* that it applies to the tapes at issue here.” *Id.* at 599, 98 S.Ct. at 1313, 55 L.Ed.2d at 580. Justice Powell did not speculate as to whether any such rule was a state or federal rule but reviewed state cases almost exclusively.

The “tapes at issue” in *Nixon* were tape recordings made and held by the President of the United States. The right of the public to access those tapes presented a peculiarly federal question with regard to which Congress had enacted substantial legislation. The majority actually decided the case “by giving conclusive weight to the Presidential Recordings and Materials Preservation Act, 88 Stat. 1695,” which had not been relied upon by the parties or given consideration by the lower federal courts. *Id.* at 616, 98 S.Ct. at 1321, 55 L.Ed.2d at 591 (Stevens, J., dissenting). We do not believe that *Nixon* is controlling authority for the proposition that federal or state common law provides the public a right of access to state courts or their records. In any event, we conclude that being constitutionally derived, any possible federal common law right of public access to state court proceedings and records is no greater than the First Amendment right we assume to exist and apply at a later point in this opinion. *See United States v. Kaczynski,* 154 F.3d 930 (9th Cir.1998).

[24] **[25]** We next decide whether the *Observer* has a right under the common law of North Carolina to inspect and copy public records and, if so, whether that right includes the records and documents at issue here. When adopted in 1778, before the existence of the United States of America, current N.C.G.S. § 4–1 reaffirmed principles relating to the common law which had first been statutorily recognized for the Colony of North Carolina in 1715. N.C.G.S. § 4–1 provides:

> ***472** All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of

> this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.

N.C.G.S. § 4–1 (1986). This statute appears to have survived without amendment for the 221 years from its enactment to this date. The common law to be applied in North Carolina "is the common law of England to the extent it was in force and use within this State at the time of the Declaration of Independence; is not otherwise contrary to the independence of this State or the form of government established therefore; and is not abrogated, repealed, or obsolete." *Gwathmey v. State,* 342 N.C. 287, 296, 464 S.E.2d 674, 679 (1995). The common law that remains in force by virtue of N.C.G.S. § 4–1 "may be modified or repealed by the General ****691** Assembly, except that any parts of the common law which are incorporated in our Constitution may be modified only by proper constitutional amendment." *Id.*

[26] **[27]** Further, as the common law originally was, and largely continues to be, a body of law discovered and announced in court decisions, this Court, as the court of last resort in North Carolina, may modify the common law of North Carolina to ensure that it has not become obsolete or repugnant to the freedom and independence of this state and our form of government. *Forsyth Memorial Hosp., Inc. v. Chisholm,* 342 N.C. 616, 621, 467 S.E.2d 88, 91 (1996); *Hall v. Post,* 323 N.C. 259, 264, 372 S.E.2d 711, 714 (1988). Perhaps the best example of this Court exercising its rarely used power to modify the common law was set out by Chief Justice Clark:

> Upon this common law it was held in North Carolina, by *Pearson, C.J.,* in *S. v. Black,* 60 N.C., [262 (1864)], that it was the "husband's duty to make the wife behave herself" and to thrash her, if necessary to that end, and in *S. v. Rhodes,* 61 N.C., 453 (1868), this Court sustained the charge of the judge below that a man "had the right to whip his wife with a switch no larger than his thumb," and this was cited and approved in *S. v. [Mabrey],* 64 N.C., [592 (1870)]. But in *S. v. Oliver,* 70 N.C. [60] (in 1874), this Court overruled the numerous decisions to that effect, *Settle, J.,* saying: "The courts have advanced from that barbarism." Thus passed away the vested right of the husband to thrash his wife ***473** "with a whip no larger than his thumb," without any statute to change the law.
>
> As late as 1886, in *S. v. Edens,* 95 N.C., 693, the Court again held upon the same "judge-made" law of former times, that a man could "wantonly and maliciously slander" the good name of his wife with impunity, or "assault and beat her" if he inflicted no permanent injury upon her; but a majority of this Court reversed that holding in 1908 without any statute, in *S. v. Fulton,* 149 N.C., 485, [63 S.E. 145,] since which time no man has had legal authority to slander or assault and beat his wife in North Carolina. And thus passed away another vested right, or rather another wrong.

Price v. Charlotte Elec. Ry. Co., 160 N.C. 450, 455–56, 76 S.E. 502, 504 (1912) (Clark, C.J., concurring in the result). Decisions of this Court not turning on the application of statutes or constitutional principles constitute common law. *Id.* at 455, 76 S.E. at 504; *see also* O.W. Holmes, Jr., THE COMMON LAW, 1, 35 (Boston, Little, Brown, and Co., 1881); 1 James Kent, COMMENTARIES ON AMERICAN LAW 470 (4th ed. 1840). Bearing in mind the foregoing principles of common law construction, we turn to the question at hand.

[28] **[29]** At least since 1887, this Court has recognized a common law right of the public to inspect public records. *News & Observer Publ'g Co. v. State ex rel. Starling,* 312 N.C. 276, 280, 322 S.E.2d 133, 136 (1984). However, to the extent that our General Assembly has dictated by statute that certain documents will not be available to the public, this common law right has been superseded. We have long held that when the General Assembly, as the policy-making agency of our government, legislates with respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the law of the State. *Id.* at 281, 322 S.E.2d at 137; *McMichael v. Proctor,* 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956). As noted above, the General Assembly has enacted a statute which expressly provides that the proceedings of a medical review committee and the records and materials produced and considered by such a committee "shall be confidential and not considered public records." N.C.G.S. § 131E–95(b). Therefore, N.C.G.S. § 131E–95 supplants any North Carolina common law right of public access to information regarding medical review committee proceedings and related materials. The *Observer* has no right under the common law of North Carolina to the medical peer review information and materials or to the portions of any hearings in this case pertaining to such information and materials.

***474** We must next turn to the constitutional issues presented on appeal. Defendant Presbyterian contends that the Court of Appeals ****692** erred in holding that the orders of the trial court closing the hearings in this case and sealing the Confidential Materials violated the North Carolina Constitution. The *Observer* responds that the decision of the Court of Appeals was correct because Article I, Section 18 of the North Carolina Constitution requires that all court proceedings and all records pertaining to court proceedings be open to the public. This open courts provision states that:

> All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.

N.C. Const. art. I, § 18. The Court of Appeals engaged in an extensive analysis of the history of similar provisions in the constitutions of several states in the "OPEN COURTS PROVISION" section of its opinion below. *Virmani,* 127 N.C.App. at 637–41, 493 S.E.2d at 315–18. Based on its analysis, the Court of Appeals concluded that the open courts provision of our state Constitution creates a presumption that civil court proceedings are to be open to the public and that "the occasion for closing presumptively open proceedings and sealing court records should be exceedingly rare." *Id.* at 645, 493 S.E.2d at 320. The Court of Appeals held that

> the open courts provision of our state constitution provides the public, including [the *Observer*], a constitutional right of access to the civil court proceedings at issue here, including the videotapes, tapes, and transcripts of these proceedings, and to those portions of the court records sealed by the trial court in the orders on appeal.

Id. at 644, 493 S.E.2d at 320. We do not agree.

[30] **[31]** Our task here is to determine whether a public right of access to court proceedings and records is inherent in the open courts provision of Article I, § 18 of our state's Constitution. This Court is the only entity which can answer with finality questions concerning the proper construction and application of the North Carolina Constitution. *State v. Jackson,* 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998). In *Jackson,* we discussed at length this Court's role as final interpreter of our Constitution:

> ***475** We have said that even where provisions of the state and federal Constitutions are identical, "we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision." *State v. Carter,* 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988). Strictly speaking, however, a state may still construe a provision of its constitution as providing less rights than are guaranteed by a parallel federal provision. Nevertheless, because the United States Constitution is binding on the states, the rights *it* guarantees must be applied to every citizen by the courts of North Carolina, so no citizen will be "accorded lesser rights" no matter how we construe the state constitution. For all practical purposes, therefore, the only significant issue for this Court when interpreting a provision of our state Constitution paralleling a provision of the United States Constitution will always be whether the state Constitution guarantees additional rights to the citizen above and beyond those guaranteed by the parallel federal provision. In this respect, the United States Constitution provides a constitutional floor of fundamental rights guaranteed all citizens of the United States, while the state constitutions frequently give citizens of individual states basic rights in addition to those guaranteed by the United States Constitution.
>
> States remain free to interpret their own constitutions in any way they see fit, including constructions which grant a citizen rights where none exist under the federal Constitution. *Lowe v. Tarble,* 313 N.C. 460, 462, 329 S.E.2d 648, 650 (1985). In construing the North Carolina Constitution, this Court is not bound by the decisions of federal courts, including the United States Supreme Court. [*State ex rel. Martin v.*] *Preston,* 325 N.C. [438,] 449–50, 385 S.E.2d [473,] 479 [1989].

****693** *Jackson,* 348 N.C. at 648, 503 S.E.2d at 103–04.

This Court has previously stated that Article I, Section 18 provides the public access to our courts. *See State v. Burney,* 302 N.C. 529, 537–38, 276 S.E.2d 693, 698 (1981); *In re Nowell,* 293 N.C. 235, 249, 237 S.E.2d 246, 255 (1977); *In re Edens,* 290 N.C. 299, 306, 226 S.E.2d 5, 9–10 (1976); *Raper v. Berrier,* 246 N.C. 193, 195, 97 S.E.2d 782, 784 (1957). In *Raper,* we stated:

> ***476** [T]he tradition of our courts is that their hearings shall be open. The Constitution of North Carolina so provides, Article I, Section 35 [now Section 18]. The public, and especially the parties are entitled to see and hear what goes on in the courts. That courts are open is one of the sources of their greatest strength.

Raper, 246 N.C. at 195, 97 S.E.2d at 784 (citations omitted). Our reference to the right of the public there was mere *obiter dictum* unnecessary to the decision of the case, however, as the issue presented in *Raper* was whether the trial court could accept evidence at a hearing from which a *party* to the case was excluded. This Court has never expressly held that Article I, Section 18 provides members of the general public a right to attend *civil* court proceedings or to inspect or copy the records of such proceedings.

[32] We now hold that the open courts provision of Article I, Section 18 of the North Carolina Constitution guarantees a *qualified* constitutional right on the part of the public to attend civil court proceedings. However, given the facts presented here, this qualified right of public access did not preclude the trial court from giving effect to the protections of N.C.G.S. § 131E–95 by sealing the materials in question or closing the court proceedings concerning those materials.

[33] **[34]** **[35]** **[36]** The qualified public right of access to civil court proceedings guaranteed by Article I, Section 18 is not absolute and is subject to reasonable limitations imposed in the interest of the fair administration of justice or for other compelling public purposes. *Cf. In re Belk,* 107 N.C.App. 448, 420 S.E.2d 682 (concluding that neither the United States Constitution nor the North Carolina Constitution creates a constitutional right of the public to attend civil commitment proceedings), *appeal dismissed and disc. rev. denied,* 333 N.C. 168, 424 S.E.2d 905 (1992); *State v. Lemons,* 348 N.C. 335, 349, 501 S.E.2d 309, 318 (1998) (rights in criminal cases); *Burney,* 302 N.C. at 538, 276 S.E.2d at 699 (same). Thus, although the public has a qualified right of access to civil court proceedings and records, the trial court may limit this right when there is a compelling countervailing public interest and closure of the court proceedings or sealing of documents is required to protect such countervailing public interest. In performing this analysis, the trial court must consider alternatives to closure. Unless such an overriding interest exists, the civil court proceedings and records will be open to the public. Where the trial court closes proceedings or seals records and documents, it must make findings of fact which are specific enough to allow appellate review to determine ***477** whether the proceedings or records were required to be open to the public by virtue of the constitutional presumption of access.

[37] Turning to the facts of this case, we conclude that the trial court did not err by excluding the public from the court hearings and by sealing related peer review records which concerned confidential information pertaining to Presbyterian's medical peer review investigation of Dr. Virmani. The judges in the trial court properly sealed the Confidential Materials as well as the videotapes and transcripts of the closed hearings; in doing so, they also provided a sufficient record for our appellate review.

We begin with the presumption that the civil court proceedings and records at issue in this case must be open to the public, including the news media, under Article I, Section 18. However, the legislature has determined that this right of access is outweighed by the compelling countervailing governmental interest in protecting the confidentiality of the medical peer review process. The General Assembly has recognized the public's compelling interest in such confidentiality by enacting N.C.G.S. § 131E–95 and making the confidentiality of medical peer ****694** review investigations part of our state's public policy. Neither plaintiff nor the *Observer* challenged the constitutionality of the statute on direct appeal to the Court of Appeals. As a result, no issue concerning the constitutionality of the legislature's adoption of this public policy is before this Court. However, we need not and do not rely upon the legislature's public policy judgment in this regard in order to conclude that the trial court did not err.

[38] In each of its oral orders closing motions hearings and sealing records in this case, the trial court independently recognized this compelling state interest, explaining in each instance that it closed the hearing because the arguments and records presented would involve confidential peer review information. Each of the written orders closing court proceedings and sealing documents and court records included similar independent findings and conclusions to the effect that, *inter alia,* the matters at issue pertained to confidential medical peer review information and that disclosing the medical review records and materials “could cause harm to plaintiff and defendant and the peer review process if left unsealed in the public record during the course

of pending litigation." The findings and conclusions by the trial court are specific enough to allow us to determine whether the trial court's orders sealing documents and closing court were properly entered to serve a compelling public ***478** interest. After reviewing the sealed Confidential Materials which were presented or considered in connection with the medical peer review hearings in question, we conclude that they all pertained to medical peer review matters and that the trial court properly sealed them. We reach the same conclusion as to the closing of the court hearings and the sealing of the videotapes and transcripts of the closed court hearings.

The public's interest in access to these court proceedings, records and documents is outweighed by the compelling public interest in protecting the confidentiality of medical peer review records in order to foster effective, frank and uninhibited exchange among medical peer review committee members. Because such open and honest communication in medical peer review proceedings helps to assure high quality public medical care, maintaining and protecting this confidentiality is in the public's best interest. Further, we conclude that the compelling countervailing public interest in such high quality public medical care overcomes the qualified public right to open civil court proceedings and records of those proceedings.

In order to safeguard the confidentiality of medical peer review information, it was appropriate under the circumstances of this case for the trial court to restrict access to the courtroom and to seal documents which were submitted to the presiding judge for consideration in ruling upon the motions seeking closure but which were never filed as part of the public records of the court. Further, there was no reasonable alternative to closure of the hearings and sealing of the documents in this case. The trial court could not allow such information to enter the public domain while the trial court determined whether it should be treated as confidential, then later withdraw it from the public domain and prevent its broader dissemination. *See Cox Broadcasting Corp. v. Cohn,* 420 U.S. at 496, 95 S.Ct. at 1046–47, 43 L.Ed.2d at 350. For the foregoing reasons, we conclude that the public's qualified right of access to civil court proceedings and records guaranteed by Article I, Section 18 of our state Constitution was not violated by the orders of the trial court in this case. Therefore, we reverse that part of the decision of the Court of Appeals which relates to those proceedings and records.

[39] Having concluded that our state Constitution does not mandate public access to the sealed documents and record in this case, we must consider next the question of whether the United States Constitution provides the public, including the *Observer,* the right to ***479** attend the civil court proceedings and to view the records in this case. This issue was properly presented in the Court of Appeals. As that court resolved the issue of public access to the court hearings and records on state constitutional grounds, it did not reach this question of federal law. We must address it now.

****695** The United States Supreme Court has never held that there is a constitutional right of public access to civil court proceedings or related court files. However, the Supreme Court has held that a qualified right of the public to attend *criminal* trials is implicit in the First Amendment. *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 603–07, 102 S.Ct. 2613, 2618–20, 73 L.Ed.2d 248, 255–57 (1982); *Richmond Newspapers,* 448 U.S. at 580–81, 100 S.Ct. at 2829–30, 65 L.Ed.2d at 991–93 (plurality opinion). The Supreme Court has also extended this right of access to include *voir dire* proceedings in which the jury is selected for a criminal trial, *Press–Enterprise I,* 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629, and to preliminary hearings similar to a trial before a magistrate in criminal cases, *El Vocero de Puerto Rico,* 508 U.S. 147, 113 S.Ct. 2004, 124 L.Ed.2d 60; *Press–Enterprise II,* 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1. The Supreme Court has stated that openness in criminal trials " 'enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.' " *Press–Enterprise II,* 478 U.S. at 9, 106 S.Ct. at 2740, 92 L.Ed.2d at 10 (quoting *Press–Enterprise I,* 464 U.S. at 508, 104 S.Ct. at 823, 78 L.Ed.2d at 637).

In *Press–Enterprise II,* the Supreme Court departed somewhat from its prior analysis of the public's right of access to the criminal courts as a right implicit in the First Amendment. In that case, the Supreme Court applied the twin tests of experience and logic in determining whether the First Amendment right of access attached to a trial-like preliminary hearing in a criminal case. *See Press–Enterprise II,* 478 U.S. at 8–13, 106 S.Ct. at 2740–43, 92 L.Ed.2d at 9–13. The experience test requires evaluation of "whether the place and process have historically been open to the press and general public." *Id.* at 8, 106 S.Ct. at 2740, 92 L.Ed.2d at 10. The logic test requires consideration of "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* If the proceeding in question meets both of these considerations, then a qualified

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First Amendment right of public access must be applied. *Id.* at 9, 106 S.Ct. at 2740–41, 92 L.Ed.2d at 10.

However, even if a particular court proceeding passes the tests of experience and logic, the public's *qualified* right of access under the ***480** First Amendment may be limited by overriding rights or interests. *Id.; Globe Newspaper Co.,* 457 U.S. at 606, 102 S.Ct. at 2619–20, 73 L.Ed.2d at 257. The Supreme Court has held that the circumstances in which the public may be barred from a criminal trial are limited, and that "the State's justification in denying access must be a weighty one." *Globe Newspaper Co.,* 457 U.S. at 606, 102 S.Ct. at 2620, 73 L.Ed.2d at 257. "Where ... the State attempts to deny the right of access [to criminal cases] in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Id.* at 606–07, 102 S.Ct. at 2620, 73 L.Ed.2d at 257. The presiding judge must consider reasonable alternatives to closing the proceeding. *Press–Enterprise II,* 478 U.S. at 14, 106 S.Ct. at 2743, 92 L.Ed.2d at 14. Criminal court proceedings cannot be closed unless the trial court makes findings "specific enough that a reviewing court can determine whether the closure order was properly entered." *Press–Enterprise I,* 464 U.S. at 510, 104 S.Ct. at 824, 78 L.Ed.2d at 638; *see also Press–Enterprise II,* 478 U.S. at 13–14, 106 S.Ct. at 2742–43, 92 L.Ed.2d at 13–14.

Where the State meets its burden of showing a compelling governmental interest, a trial court may "in the interest of the fair administration of justice impose reasonable limitations on access to a trial." *Richmond Newspapers,* 448 U.S. at 581 n. 18, 100 S.Ct. at 2830 n. 18, 65 L.Ed.2d at 992 n. 18 (plurality opinion). For example, the Supreme Court has made clear that the public's right of access to the criminal courts may be forced to yield to the government's interest in inhibiting disclosure of sensitive information, *Waller v. Georgia,* 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); *Globe Newspaper Co.,* 457 U.S. at 606–07, 102 S.Ct. at 2619–20, 73 L.Ed.2d at 257–59; to a criminal defendant's right to a fair trial, *Press–Enterprise* ****696** *II,* 478 U.S. at 13–14, 106 S.Ct. at 2742–43, 92 L.Ed.2d at 13–14; and to the interest of protecting victims of sex crimes from public scrutiny and embarrassment, *id.* at 9 n. 2, 106 S.Ct. at 2741 n. 2, 92 L.Ed.2d at 11 n. 2.

Although the Supreme Court has never decided the question of whether the public has a First Amendment right to attend civil court proceedings or to view civil court records, the Court has noted that civil trials historically have been presumptively open to the public. *Richmond Newspapers,* 448 U.S. at 580 n. 17, 100 S.Ct. at 2829 n. 17, 65 L.Ed.2d at 992 n. 17 (plurality opinion)*; Gannett Co. v. DePasquale,* 443 U.S. 368, 386 n. 15, 99 S.Ct. 2898, 2908 n. 15, 61 L.Ed.2d 608, 625 n. 15 (1979). Several lower federal courts have held that certain civil proceedings are presumptively open under the First Amendment. *See, e.g., Stone v. University of Md. Medical Sys. Corp.,* 855 F.2d 178, 180–81 (4th Cir.1988) (record in civil case); *Publicker Indus. Inc. v. Cohen,* 733 F.2d 1059, 1070–71 (3d Cir.1984) ***481** (hearing on motions for preliminary injunctions); *in RE continentaL ill. sec. litig.,* 732 F.2d 1302, 1308–16 (7tH cir. 1984) (hearing on motion to terminate shareholder derivative claims). Although these lower courts have emphasized the strength of the First Amendment presumption of access, they have refused to define this right of access as absolute. For example, one court has stated, "Where the First Amendment guarantees access, ... access may be denied only on the basis of a compelling governmental interest, and only if the denial is narrowly tailored to serve that interest." *Stone,* 855 F.2d at 180 (applying First Amendment access standard for criminal trials from *Press–Enterprise I,* 464 U.S. at 510, 104 S.Ct. at 824, 78 L.Ed.2d at 638, to a district court order sealing the court record of a wrongful discharge action brought by a medical school professor).

In recognizing the First Amendment right of access in criminal cases, the Supreme Court stressed "the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs.' " *Globe Newspaper Co.,* 457 U.S. at 604, 102 S.Ct. at 2619, 73 L.Ed.2d at 255 (quoting *Mills v. Alabama,* 384 U.S. 214, 218, 86 S.Ct. 1434, 1437, 16 L.Ed.2d 484 (1966)). In explaining in *Globe Newspaper* why the First Amendment guarantees a right of access to criminal trials, the Supreme Court emphasized two features of the criminal justice system. It noted that "the criminal trial historically has been open to the press and general public." *Id.* at 605, 102 S.Ct. at 2619, 73 L.Ed.2d at 256. It also observed that access to criminal trials

> enhances the quality and safeguards the integrity of the factfinding process ... [and] fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential

> component in our structure of self-government.

Id. at 606, 102 S.Ct. at 2619–20, 73 L.Ed.2d at 256–57 (footnotes omitted). Similar, but not identical, fundamental principles apply to the public's access to civil court proceedings as well.

Applying the experience and logic test set forth for criminal cases in *Press–Enterprise II,* it is questionable whether the First Amendment presumptive public right of access would attach to the matters at issue in this case. For many years now, the workings of medical review committees and the materials that they consider have been closed to the public and have been deemed confidential. In ***482** 1981, the General Assembly enacted former N.C.G.S. § 131–170, the statutory predecessor of N.C.G.S. § 131E–95, on the theory that " 'external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity.' " *Cameron v. New Hanover Mem'l Hosp.,* 58 N.C.App. at 436, 293 S.E.2d at 914, (quoting *Matchett,* 40 Cal.App.3d at 629, 115 Cal.Rptr. at 320–21), *quoted in Shelton,* 318 N.C. at 82, 347 S.E.2d at 828. Thus, it is not at all clear that the portions of the motions hearings and the documents pertaining to Presbyterian's peer review investigation of Dr. Virmani would pass the experience prong of the public access test.

It is also questionable whether these medical peer review matters would pass the logic ****697** test. By enacting N.C.G.S. § 131E–95 and its statutory predecessor, the General Assembly has recognized that public access plays a negative role in the functioning of the medical peer review process. The trial court independently reached the same conclusion in this case.

Assuming *arguendo* that the United States Supreme Court would hold that the qualified First Amendment right of public access applies to civil cases, we conclude that the compelling public interest in protecting the confidentiality of the medical peer review process outweighs the right of access in this case and that no alternative to closure will adequately protect that interest. Therefore, we conclude that the trial court properly closed the hearings and properly sealed the Confidential Materials, videotapes, and transcripts of the closed hearings. However, for reasons previously stated in this opinion, the trial court erred in ordering that the exhibits attached to the complaint when it was initially filed with the clerk of court be withdrawn from the public record and sealed.

That part of the decision of the Court of Appeals vacating the orders of the trial court which sealed the exhibits attached to the complaint when it was originally filed is affirmed; the decision of the Court of Appeals vacating the orders of the trial court is otherwise reversed. Therefore, the decision of the Court of Appeals is affirmed in part and reversed in part. This case is remanded to the Court of Appeals for its further remand to the Superior Court, Mecklenburg County, for modification of its prior orders in a manner consistent with this opinion and for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

***483** Justices MARTIN and WAINWRIGHT did not participate in the consideration or decision of this case.

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198 N.C.App. 120
Court of Appeals of North Carolina.

Bobbiejo Lee WOODS, Administratrix of the Estate of Robert Gordon Woods, Plaintiff,
v.
MOSES CONE HEALTH SYSTEM d/b/a Moses Cone Memorial Hospital and Guilford Neurosurgical Associates, P.A., Defendants.

No. COA08–1556. | July 7, 2009.

Synopsis
Background: Patient's estate brought medical malpractice action against hospital and neurosurgical professional association. The Superior Court, Guilford County, Anderson Cromer, J., granted in part and denied in part estate's motion to compel discovery, and granted in part and denied in part hospital's motion for protective order. Estate and hospital appealed.

[Holding:] The Court of Appeals, McGee, J., held that letter from the neurosurgeon responsible for patient's postoperative treatment to chairperson of hospital's surgical peer review committee was absolutely protected from discovery and admission at trial under statutory medical review committee privilege, though counsel for neurosurgical professional association made the letter available to one or more reviewing experts and the neurosurgeon sent the letter to hospital's chief operating officer.

Affirmed in part and reversed and remanded in part.

West Headnotes (11)

[1] **Appeal and Error**
Relating to witnesses, depositions, evidence, or discovery

Trial court's interlocutory order compelling production by defendant hospital, in medical malpractice action, of a letter which might be privileged under the medical peer review statute, was an order that affected a substantial right, and thus, the interlocutory order was immediately appealable. West's N.C.G.S.A. §§ 7A–27(d)(1), 131E–95.

[2] **Privileged Communications and Confidentiality**
Medical or Health Care Peer Review

Hospital's surgical peer review committee (SPRC) was a medical review committee, for purposes of statutory medical review committee privilege from discovery and admission at trial; bylaws of medical and dental staff of hospital stated that the service chief of each service must appoint a peer review committee for the service, that membership of a peer review committee must consist primarily of staff members, with only a very limited number of non-staff appointments, and must otherwise be limited such that committee's composition will qualify the committee and preserve its statutory status as a medical review committee, and that committee's duties are to work in cooperation with the service chief or section chair to establish effective systems for monitoring and evaluating the care rendered by the service or section and identify opportunities for improvement. West's N.C.G.S.A. § 131E–76(5).

1 Cases that cite this headnote

[3] **Privileged Communications and Confidentiality**
Medical or Health Care Peer Review

Privileged Communications and Confidentiality
Waiver

Letter from the neurosurgeon responsible for patient's postoperative treatment to chairperson of the surgical peer review committee (SPRC) for defendant hospital, which letter was produced at committee's request, was absolutely protected from discovery and admission at trial under statutory medical review committee privilege, in medical malpractice action brought by patient's estate, though counsel for defendant neurosurgical professional association made the letter available to one or more reviewing experts and the neurosurgeon sent the letter to

hospital's chief operating officer (COO). West's N.C.G.S.A. § 131E–95(b).

1 Cases that cite this headnote

[4] **Statutes**
Construction
Statutes
Intent
Statutes
Statute as a Whole; Relation of Parts to Whole and to One Another

In ascertaining legislative intent, a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which the statute seeks to accomplish.

[5] **Statutes**
Natural, obvious, or accepted meaning

The statute's words should be given their natural and ordinary meaning unless the context requires them to be construed differently.

[6] **Privileged Communications and Confidentiality**
Waiver

Documents and information which are otherwise immune from discovery under the statutory medical review committee privilege do not lose that privilege because they were transmitted to persons outside the medical review committee. West's N.C.G.S.A. § 131E–95.

1 Cases that cite this headnote

[7] **Appeal and Error**
Objections to evidence and witnesses

Defendant hospital failed to preserve for appellate review, on interlocutory appeal from trial court's ruling on hospital's motion for discovery protective order, a claim that expert witnesses for defendant neurosurgical professional association should not be permitted to testify at deposition or trial because they might have based their expert opinions on information contained in a letter that was privileged from discovery and admission at trial under medical review committee statute, where hospital had limited its motion for protective order to a request for protection from discovery of privileged material. West's N.C.G.S.A. § 131E–95; Rules App.Proc., Rule 10(b)(1).

[8] **Appeal and Error**
Findings of fact and conclusions of law
Appeal and Error
Effect of Failure to Assign Particular Errors

Where findings of fact are challenged on appeal, each contested finding of fact must be separately assigned as error, and the failure to do so results in a waiver of the right to challenge the sufficiency of the evidence to support the finding. Rules App.Proc., Rule 10(c)(1).

[9] **Appeal and Error**
Effect of Failure to Assign Particular Errors

Where an appellant fails to assign error to the trial court's findings of fact, the findings are presumed to be correct.

[10] **Appeal and Error**
Effect of Failure to Assign Particular Errors

Failure to assign error to a conclusion of law constitutes an acceptance of the conclusion and a waiver of the right to challenge said conclusion on appeal as unsupported by the facts.

[11] **Appeal and Error**
Scope and Effect of Assignment

Patient's estate waived right to challenge on appeal the trial court's conclusion of law that root cause analysis prepared by hospital's quality assurance committee was privileged from discovery under medical review committee statute, in medical malpractice action, where estate's assignment of error failed to specifically state which conclusions of law the estate

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contended were erroneous. West's N.C.G.S.A. § 131E–95; Rules App.Proc., Rule 10(c)(1).

1 Cases that cite this headnote

****788** Appeal by Defendant Moses Cone Health System d/b/a Moses Cone Memorial Hospital and by Plaintiff from order entered 7 July 2008 by Judge Anderson Cromer in Superior Court, Guilford County. Heard in the Court of Appeals 20 May 2009.

NOTES FROM THE OFFICIAL REPORTER

1. Appeal and Error-appealability--interlocutory order-discovery of privileged information

An interlocutory order affected a substantial right and was properly before the Court of Appeals where the order compelled production of a letter which might be statutorily privileged as part of a hospital peer review following a postoperative death.

2. Medical Malpractice-peer review committee-statutory requirements satisfied

A Surgical Peer Review Committee (SPRC) met the definition of a medical review committee within the meaning of N.C.G.S. § 131E-76(5).

3. Medical Malpractice-medical peer review committee-requested information-absolutely privileged

The trial court erred in a medical malpractice action by concluding that the physician responsible for the postoperative treatment of a deceased patient could waive the medical peer review privilege by disseminating a letter to the peer review committee to people outside the committee. The letter was produced at the request of the committee and is absolutely privileged under N.C.G.S. § 131E-95. The issue of reliance on the privileged material by the doctor's experts was not raised at trial and was not properly before the appellate court.

4. Appeal and Error-assignments of error-not sufficiently specific

Assignments of error involving information furnished to a medical peer review committee did not state specifically the findings and conclusions plaintiff contended were erroneous. The conclusion that the root cause analysis report from the committee was privileged was binding.

Attorneys and Law Firms

Law Offices of Grover C. McCain, Jr., by Grover C. McCain, Jr., Chapel Hill, for Plaintiff.

Wilson & Coffey, LLP, by G. Gray Wilson and Lorin J. Lapidus, Winston–Salem, for Defendant.

North Carolina Hospital Association, by Linwood L. Jones, Cary; and The North Carolina Association of Defense Attorneys, by Timothy P. Lehan and Deanna Davis Anderson, Raleigh, amicus curiae.

Opinion

****789** McGEE, Judge.

***121** Thirty-one-year old Robert Gordon Woods (Woods) was scheduled for ambulatory surgery on 22 February 2005 at Moses Cone Memorial Hospital and was to be discharged that same day. However, due to complications with his surgery, Woods was admitted to the hospital immediately following his surgery. Woods began complaining of difficulty swallowing and weakness in his right hand and foot. Woods' condition deteriorated over the next two days and he was returned to surgery at approximately 7:00 a.m. on 24 February 2005. Woods' medical condition continued to deteriorate and after a final respiratory arrest on 4 March 2005, Woods died.

Bobbiejo Lee Woods (Plaintiff) is the administrator of Woods' estate. Plaintiff filed a medical malpractice action on 6 February 2007 against Moses Cone Health System d/b/a Moses Cone Memorial Hospital (Defendant) and Guilford Neurosurgical Associates, P.A. (GNA), alleging Defendant and GNA were negligent in administering medical care to Woods and that their negligence caused Woods' death. GNA is not a party to this appeal. Plaintiff served Defendant with interrogatories and a request for production of documents. Defendant's answer and response included objections to Plaintiff's discovery requests, stating that the information sought by Plaintiff was privileged.

Plaintiff filed a motion to compel on 23 May 2008. In response, Defendant filed a motion for a protective order on

16 June 2008. Defendant claimed the discovery materials sought by Plaintiff were protected by N.C. Gen.Stat. § 131E–95 as materials produced by a medical review committee. In support of its motion for a protective order, Defendant filed an affidavit on 20 June 2008 of Amy Parker (Parker), a clinical risk management specialist employed by Defendant. Parker's affidavit stated:

> ***122** 1. The hospital maintains a medical review committee pursuant to North Carolina law, such that its proceedings are confidential. This committee conducted a peer review investigation into the medical care provided to [Woods] with regard to his hospitalization in February–March 2005, which is the subject matter of this lawsuit. In June 2005, the committee directed a written request to Dr. [ ] Stern for information about [the Woods case], to which Dr. Stern replied by correspondence to the committee in November 2005, which information was considered and utilized by the committee in its investigation of [the Woods case], and treated as strictly confidential at all times. In addition to responding to the written request of the committee for information, Dr. Stern was also a member of the committee at the time.
>
> 2. The hospital also has a quality assurance committee pursuant to North Carolina law, such that its proceedings are also confidential. This committee performed a root cause analysis on March 30, 2005 with regard to [Wood's] hospitalization as set forth above. The report generated by this committee was based on its investigation of this matter and is treated as strictly confidential as well.

Plaintiff's motion to compel and Defendant's motion for a protective order were heard on 26 June 2008. By stipulation of Plaintiff and Defendant, the only issues the trial court considered at the hearing were whether or not Plaintiff could compel discovery of (1) the 1 November 2005 letter (the letter) from Dr. Joseph Stern (Dr. Stern), the GNA neurosurgeon responsible for the postoperative treatment of Woods, to Dr. Mark Yates (Dr. Yates), Chairperson of Defendant's Surgical Peer Review Committee (SPRC), and (2) the root cause analysis report as described in Parker's affidavit. The trial court entered an order on 7 July 2008, in which it granted in part and denied in part Plaintiff's motion to compel, and granted in part and denied in part Defendant's motion for a protective order. The trial court held that:

> 4. ... The root cause analysis reports are the final result of [ ] quality assurance investigations or inquiries into the delivery of health services at [ ] [Defendant] Hospital. The inquiry was facilitated by the Serious Event Task Force (SETF) Committee, which is comprised of both healthcare providers and non-health care ****790** providers and that this committee is a subcommittee of the Medical Performance Improvement Committee, which ***123** qualifies as a medical review committee under G.S. §§ 90–21.22 *et seq.* The [SETF] Committee was acting pursuant to peer review activity under the auspices of the Medical Performance Improvement Committee when ordering a root cause analysis inquiry. The root cause analysis report described by [ ] Parker in her testimony and in her affidavit is confidential, privileged and not subject to discovery as a peer review document generated by a medical review committee as that term is defined in G.S. §§ 90–21.22 *et seq.*

The trial court held that “the letter from Dr. Stern to Dr. Yates, [the chairperson of the SPRC], was a part of peer review activities at [Defendant] Hospital and would, nothing else appearing, be entitled to confidentiality pursuant to peer review statutes and authority as privileged material.” However, the trial court further held:

> 6. Counsel for [GNA] has made the letter of November 1, 2005 from Dr. Stern to Dr. Yates available to one or more reviewing experts....
>
> 7. The November 2, 2005 letter from Dr. Stern to Glenn Waters, [Defendant's chief operating officer], which enclosed a copy of the November 1, 2005 letter, was not part of peer review activities and was not directed to a medical review committee or any committee entitled to claim privilege or confidentiality.
>
> 8. The disclosure of the letter of November 1, 2005 from Dr. Stern to Dr. Yates (a) to Mr. Waters, and (b) to reviewing experts by counsel for defendant [GNA] made the letter otherwise available and operated as a waiver by Dr. Stern of the confidentiality of the information contained in the letter. However, upon conducting its

> *in camera* review, some information contained in the November 1, 2005 letter refers to root cause analysis or opinions about peer review activity. The Court has redacted those parts of the letter from the November 1 letter....

The trial court sealed the original and redacted versions of the letter to be made part of the court file in the event of appellate review. Defendant filed notice of appeal on 22 July 2008. Plaintiff filed notice of appeal on 23 July 2008.

I.

[1] The trial court's order in the present case is an interlocutory order. However, N.C. Gen.Stat. § 7A–27(d)(1) permits an appeal from ***124** an interlocutory order which affects a substantial right. N.C. Gen.Stat. § 7A–27(d)(1) (2007). Our Supreme Court has held that "when ... a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right." *Sharpe v. Worland,* 351 N.C. 159, 166, 522 S.E.2d 577, 581 (1999); *see also Hayes v. Premier Living, Inc.,* 181 N.C.App. 747, 751, 641 S.E.2d 316, 318 (2007) (finding that the interlocutory discovery order compelling production of reports which might be privileged pursuant to N.C. Gen.Stat. §§ 90–21.22A and 131E–107 affected a substantial right and was therefore immediately appealable). Because the trial court's order in the present case compels the production of a letter which might be statutorily privileged, the interlocutory order affects a substantial right and is therefore properly before us.

II.

A. Defendant's appeal

Defendant assigns error to the trial court's conclusion in paragraph eight of the trial court's order that the letter from Dr. Stern to Dr. Yates was discoverable because Dr. Stern's dissemination of the letter to parties outside the medical review committee made the letter "otherwise available and operated as a waiver" of the confidentiality of the letter. Defendant argues that because the letter was produced by a medical review committee, the letter is absolutely privileged and cannot become "otherwise available."

In paragraph one of its order, the trial court concluded that the letter was "part of peer review activities at [Defendant] Hospital ****791** and would, nothing else appearing, be entitled to confidentiality pursuant to peer review statutes and authority as privileged material." However, the trial court did not specifically find whether the SPRC was a medical review committee, and if so, pursuant to which statute.

[2] Plaintiff's suit against Defendant is a civil action against a hospital and N.C. Gen.Stat. § 131E–95, part of the Hospital Licensure Act, creates protection for medical review committees in civil actions against hospitals. Therefore, N.C. Gen.Stat. § 131E is the applicable statute for determining whether the SPRC was a medical review committee and if so, the extent of protection granted to it.

N.C. Gen.Stat. § 131E–76(5) defines "medical review committee" as:

> ***125** (5) "Medical review committee" means any of the following committees formed for the purpose of evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing:
>
> a. A committee of a state or local professional society.
>
> b. A committee of a medical staff of a hospital.
>
> c. A committee of a hospital or hospital system, if created by the governing board or medical staff of the hospital or system or operating under written procedures adopted by the governing board or medical staff of the hospital or system.

N.C. Gen.Stat. § 131E–76(5) (2007). The Bylaws of the Medical and Dental Staff of Defendant Hospital (the Bylaws) state in pertinent part:

> 10.15 PEER REVIEW COMMITTEES
>
> (a) Committees. The Service Chief of each Service shall appoint a Peer Review Committee for the Service to perform the duties provided in Section 10.15(d)....
>
> (b) Membership. The membership of a Peer Review Committee shall be as determined by the Service Chief of the Service or the Section Chair of the Section ... provided that the membership shall consist primarily of members of the Staff with only a very limited number of non-Staff appointments (if any), and shall otherwise be limited,

> such that composition of the Committee shall qualify the Committee, and preserve the Committee's status, as a medical review committee as defined by N.C. Gen.Stat. § 131E–76(5).....
>
> ....
>
> d) Function. The duties of the Committee shall be to:
>
> > (1) work in cooperation with the Service Chief or Section Chair to establish effective systems for monitoring and evaluating the care rendered by the Service or Section and identify opportunities for improvement.

We find that, according to the Bylaws, the SPRC is a peer review committee of the surgical section and that the composition and function of the SPRC as defined by the Bylaws meet the definition of a "medical review committee" within the meaning of N.C.G.S. 131E–76(5). ***126** *See Shelton v. Morehead Memorial Hospital,* 318 N.C. 76, 87, 347 S.E.2d 824, 831 (1986).

Having determined that the SPRC is a medical review committee under N.C. Gen.Stat. § 131E, we next interpret the extent of the privilege given the SPRC under N.C. Gen.Stat. § 131E–95. We review the trial court's statutory interpretation *de novo. A & F Trademark, Inc. v. Tolson,* 167 N.C.App. 150, 153, 605 S.E.2d 187, 190 (2004) (citations omitted). Statutory interpretation begins with the plain meaning of the words of the statute. *Radzisz v. Harley Davidson of Metrolina,* 346 N.C. 84, 89, 484 S.E.2d 566, 569 (1997) (citation omitted). N.C. Gen.Stat. § 131E–95 states in pertinent part:

> (b) The proceedings of a medical review committee, the records and materials it produces, and the materials it considers shall be confidential and not considered public records within the meaning of G.S. 132–1 ... and shall not be subject to discovery or introduction into evidence in any civil action against a hospital ... which results from matters which are the subject of evaluation and review by the committee.

N.C. Gen.Stat. § 131E–95 (2007). By its plain language, N.C. Gen.Stat. § 131E–95 creates three categories of information protected from discovery and admissibility at ****792** trial in a civil action: (1) proceedings of a medical review committee, (2) records and materials produced by a medical review committee, and (3) materials considered by a medical review committee. Additionally, N.C.G.S. § 131E–95 states: "However, information, documents, or other records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee." N.C.G.S. § 131E–95.

[3] Plaintiff argues that the trial court correctly concluded that this exception clause applies to all three protected categories of information and that even if the letter was originally produced by a medical review committee, it has since become "otherwise available" and therefore no longer immune from discovery or use at trial. However, this interpretation of N.C. Gen.Stat. § 131E–95 is contrary to the purpose of the Hospital Licensure Act and case law interpreting N.C.G.S. § 131E–95.

[4] **[5]** "Legislative intent controls the meaning of a statute; and in ascertaining this intent, a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which the statute seeks ***127** to accomplish." *Shelton,* 318 N.C. at 81–82, 347 S.E.2d at 828 (citations omitted). "The statute's words should be given their natural and ordinary meaning unless the context requires them to be construed differently." *Id.* at 82, 347 S.E.2d at 828 (citing *In re Arthur,* 291 N.C. 640, 642, 231 S.E.2d 614, 615 (1977)).

> The stated purposes of the Hospital Licensure Act are to promote the public health, safety and welfare and to provide for basic standards for care and treatment of hospital patients. Section 95 of the Act protects from discovery and introduction into evidence medical review committee proceedings and related materials because of the fear that external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity. [The Act] represents a legislative choice between competing public concerns. It embraces the goal of medical staff candor at the cost of impairing plaintiffs access to evidence.

Id. (citations and internal quotations omitted). "It would severely undercut the purpose of § 95, i.e., the promotion of candor and frank exchange in peer review proceedings, if

we adopted [Plaintiff's] construction of the statute," *id.,* for it would mean a document, which was created solely at the behest of a medical review committee, would no longer be protected if the author chose to subsequently disseminate the document to persons or entities outside the medical review committee.

Further, the language in *Shelton* makes it clear that if the material sought to be discovered or introduced at trial falls within the first two categories of information under N.C. Gen.Stat. § 131E–95, the material is absolutely protected and cannot later become "otherwise available." Our Supreme Court in *Shelton* stated: "[I]nformation, in whatever form available, from *original sources other than the medical review committee* is not immune from discovery or use at trial merely because it was presented during medical review committee proceedings," *id.* at 83, 347 S.E.2d at 829 (emphasis added); and "[p]ermitting access to information *not generated by the committee itself* but merely presented to it does not impinge on this statutory purpose." *Id.* at 83–84, 347 S.E.2d at 829 (emphasis added).

[6] Our Supreme Court further stated in *Shelton* that "it may be necessary to identify not only the document by name and its custodian, but also the document's *source and the reason for its creation,*" *id.* at 86, 347 S.E.2d at 831 (emphasis added), and held that "[d]ocuments and information which are otherwise immune from discovery ***128** under § 95 do not, however, lose their immunity because they were transmitted" to persons outside the medical review committee. *Id.* at 84–85, 347 S.E.2d at 830.

Similarly, in *Virmani v. Presbyterian Health Services Corp.,* 350 N.C. 449, 467, 515 S.E.2d 675, 687 (1999), the plaintiff attached to his complaint records and materials produced by a medical review committee. Our Supreme Court held that once the peer review records (the records) were attached to the plaintiff's complaint and filed with the trial court, the records became available to the public. *Id.* Nonetheless, our Supreme ****793** Court stated that because N.C.G.S § 131E–95 expressly prohibited the introduction of peer review records into evidence, it was improper for the plaintiff to attach the records to his complaint and they remained inadmissible despite having becoming public record. *Id.*

In the present case, Parker's affidavit stated: "the committee *directed* a written request to Dr. [ ] Stern for information about [the Woods case], to which Dr. Stern replied by correspondence to the committee [on 1 November 2005], which information was considered and utilized by the committee in its investigation of [the Woods case]." (emphasis added). The trial court stated that the letter was "to Dr. [ ] Yates, chair[person] of the [SPRC], and they [sic] were *produced for the committee at the direction of the committee's chair [person].*" (emphasis added). Because the letter was produced at the request of a medical review committee, the letter is absolutely privileged under N.C.G.S. § 131E–95. Although the letter might be seen by persons outside the committee, it nonetheless remains protected from discovery and admissibility at trial. Therefore, the trial court erred in concluding that Dr. Stern could waive the privilege by disseminating the letter to persons outside the committee. Thus, the trial court's order partially granting Plaintiff's request to compel Defendant to produce a redacted version of the letter is reversed.

[7] In its brief, Defendant asks our Court to provide specific instructions that GNA's experts not be permitted to testify at deposition or trial because they might have based their expert opinions on information contained in the privileged letter. However, Defendant limited its motion for a protective order to protection from compelling the discovery of the privileged material. Because the issue of GNA's experts' reliance on the privileged material was not raised at the trial court, Defendant's argument is not properly before us. N.C.R.App. P. 10(b)(1).

*129 B. Plaintiff's Appeal

In Plaintiff's sole assignment of error, Plaintiff states:

> The trial court erred by not fully granting [P]laintiff's motion to compel and by granting [D]efendant['s] ... motion for a protective order in part on the grounds that "the Root Cause Analysis" of the death of ... Woods is not confidential, or privileged, or entitled to protection as a peer review document generated by a medical care committee as that term is defined in G.S. 90–21.22, *et seq.*

[8] **[9]** **[10]** N.C. R.App. P. 10(c)(1) requires that "[e]ach assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is

assigned." N.C.R.App. P. 10(c)(1). Our Court held in *Okwara v. Dillard Dep't Stores, Inc.,* 136 N.C.App. 587, 591, 525 S.E.2d 481, 484 (2000) (citations omitted), that "[w]here findings of fact are challenged on appeal, each contested finding of fact must be separately assigned as error, and the failure to do so results in a waiver of the right to challenge the sufficiency of the evidence to support the finding." We further stated that "[w]here an appellant fails to assign error to the trial court's findings of fact, the findings are 'presumed to be correct.' " *Id.* (quoting *Inspirational Network, Inc. v. Combs,* 131 N.C.App. 231, 235, 506 S.E.2d 754, 758 (1998)). "Failure to [assign error to each conclusion] constitutes an acceptance of the conclusion and a waiver of the right to challenge said conclusion as unsupported by the facts." *Fran's Pecans, Inc. v. Greene,* 134 N.C.App. 110, 112, 516 S.E.2d 647, 649 (1999).

[11] Plaintiff's assignment of error fails to specifically state which findings of facts and/or conclusions of law Plaintiff contends were erroneous. Our Court cannot determine from Plaintiff's assignment of error if Plaintiff meant to challenge the trial court's conclusion that (1) the root cause analysis was generated by a medical care committee, (2) the root cause analysis was not confidential, privileged, or protected, (3) the court utilized an incorrect statute to determine that the committee was a medical care committee, or (4) some combination of errors. Nor can we determine if Plaintiff intended to challenge the sufficiency of the findings of ****794** fact or just the trial court's conclusions of law.

The trial court found that "[t]he root cause analysis report ... is confidential, privileged and not subject to discovery as a peer review document generated by a medical review committee as that term is ***130** defined in G.S. §§ 90–21.22 *et seq.*" Because Plaintiff failed to properly assign error to the trial court's conclusions, they are binding on appeal. *See Fran's Pecans, Inc.* Therefore, the trial court's conclusion that the root cause analysis was privileged and not subject to discovery is affirmed.

Affirmed in part; reversed and remanded in part.

Judges JACKSON and ERVIN concur.

Parallel Citations

678 S.E.2d 787

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204 N.C.App. 532
Court of Appeals of North Carolina.

Aloha E. BRYSON, M.D., Ph.D., Plaintiff,
v.
HAYWOOD REGIONAL MEDICAL CENTER, Primedoc Management Services, Inc. and Primedoc of Haywood County, P.A., Defendants.

No. COA09–270. | June 15, 2010.

Synopsis

Background: Physician brought action against medical center and former employer, alleging numerous tort and breach of contract claims arising out of termination which physician believed stemmed from her documentation of patient safety issues at medical center, and filed motion to compel discovery of allegedly privileged documents. The Superior Court, Haywood County, Ronald K. Payne, J., granted the motion in part, and medical center appealed.

Holdings: The Court of Appeals, Geer, J., held that:

[1] order was appealable;

[2] two emails were not protected from discovery;

[3] memorandum was not protected from discovery; and

[4] reports and curriculum vitae of doctor who authored the reports were not protected from discovery.

Affirmed.

West Headnotes (10)

[1] **Appeal and Error**
Relating to witnesses, depositions, evidence, or discovery

Interlocutory order granting in part physician's motion to compel discovery of certain documents was immediately appealable, as order affected a substantial right of medical center, which asserted that the documents were privileged.

[2] **Appeal and Error**
Interlocutory and Intermediate Decisions

Generally, there is no right of immediate appeal from interlocutory orders and judgments.

[3] **Appeal and Error**
Relating to witnesses, depositions, evidence, or discovery

When a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right for purposes of immediate appeal. West's N.C.G.S.A. §§ 1–277(a), 7A–27(d)(1).

[4] **Appeal and Error**
Depositions, affidavits, or discovery

Pretrial Procedure
Discretion of court

Whether or not the party's motion to compel discovery should be granted or denied is within the trial court's sound discretion and will not be reversed absent an abuse of discretion.

1 Cases that cite this headnote

[5] **Privileged Communications and Confidentiality**
Objections; claim of privilege

Privileged Communications and Confidentiality
Presumptions and burden of proof

It is for the party objecting to discovery of privileged information to raise the objection in the first instance and he has the burden of establishing the existence of the privilege.

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[6] **Privileged Communications and Confidentiality**

Medical or Health Care Peer Review

Three categories of medical review committee information are protected by statute from discovery and admissibility at trial in a civil action: (1) proceedings of a medical review committee, (2) records and materials produced by a medical review committee, and (3) materials considered by a medical review committee. West's N.C.G.S.A. § 131E–95.

1 Cases that cite this headnote

[7] **Privileged Communications and Confidentiality**

Medical or Health Care Peer Review

In order to determine whether the peer review privilege applies to hospital records, a court must consider the circumstances surrounding the actual preparation and use of the disputed documents involved in each particular case; the title, description, or stated purpose attached to a document by its creator is not dispositive, nor can a party shield an otherwise available document from discovery merely by having it presented to or considered by a quality review committee. West's N.C.G.S.A. § 131E–95(b).

[8] **Privileged Communications and Confidentiality**

Medical or Health Care Peer Review

Emails were not protected from discovery as the proceedings of a medical review committee or its records and materials in light of lack of any evidence that authors or recipients were members of a medical review committee or that they were generated for such a committee's consideration. West's N.C.G.S.A. §§ 131E–76(5), 131E–95(b).

1 Cases that cite this headnote

[9] **Privileged Communications and Confidentiality**

Medical or Health Care Peer Review

Memorandum authored by medical center's chair of the intensive care unit for doctor "from the Hospital Board" was not protected from discovery as the proceedings of a medical review committee or its records and materials in light of lack of evidence which specifically identified what "the Hospital Board" was or that it was anything other than the center's board of trustees, which was not a medical review committee. West's N.C.G.S.A. §§ 131E–76(5), 131E–95(b).

1 Cases that cite this headnote

[10] **Privileged Communications and Confidentiality**

Medical or Health Care Peer Review

Six reports and curriculum vitae of doctor who authored the reports were not protected from discovery pursuant to the peer review privilege, although reports identified themselves as peer review documents, where there was no evidence that source of the documents was a peer review corporation or organization, and there was no evidence that reports were generated by a committee of such a corporation or organization. West's N.C.G.S.A. §§ 131E–76(5), 131E–95(b).

****418** Appeal by defendant Haywood Regional Medical Center from order entered 19 December 2008 by Judge Ronald K. Payne in Haywood County Superior Court. Heard in the Court of Appeals 16 September 2009.

Attorneys and Law Firms

Elliot Pishko Morgan, P.A., by Robert M. Elliot, Winston–Salem, for plaintiff-appellee.

Van Winkle, Buck, Wall, Starnes & Davis P.A., by Allan R. Tarleton, Asheville, for defendant-appellant Haywood Regional Medical Center.

Opinion

GEER, Judge.

***533** Defendant Haywood Regional Medical Center ("HRMC") appeals from the trial court's order granting in part

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plaintiff Dr. Aloha E. Bryson's motion to compel discovery of certain documents. On appeal, HRMC contends the trial court erred in concluding that the documents were not privileged under N.C. Gen.Stat. § 131E–95(b) (2009) and in ordering HRMC to produce and disclose those documents to plaintiff. Because HRMC has failed to meet its burden of showing that the documents fall into one of the three categories of privileged material under N.C. Gen.Stat. § 131E–95(b), we affirm.

Facts

On 26 February 2008, plaintiff filed a complaint in Haywood County Superior Court against HRMC, as well as Primedoc Management Services, Inc. and Primedoc of Haywood County, P.A. ("the Primedoc defendants"). Plaintiff, an internist hired by the Primedoc defendants to work at HRMC from March 2005 to December 2007, alleged that, during her time at HRMC, she became concerned about patient safety issues in the Intensive Care Unit ("ICU") and Definitive Observation Care Unit ("DOCU"). Plaintiff alleged that she observed numerous nursing errors in the ICU and DOCU, including (1) mistakes in the dosing and administration of patient medication; (2) failure to accurately and completely follow doctors' orders; and (3) instances of nurses, while on duty, text messaging, using cell phones for personal calls, sleeping, and shopping online.

Plaintiff documented these patient safety issues by filing occurrence reports with HRMC's risk manager in accordance with hospital policy. According to plaintiff, HRMC officials began pressuring her to cease filing occurrence reports. Plaintiff alleged HRMC gave false information to the Primedoc defendants about her work and directed ***534** that her employment be terminated in retaliation for her complaints about patient care.

Plaintiff asserted claims for wrongful interference with contract and defamation against HRMC. Plaintiff also asserted claims for breach of contract, breach of the covenant of good faith and fair dealing, and constructive discharge against the Primedoc defendants. Plaintiff also brought claims for civil conspiracy, punitive damages, and unfair and deceptive trade practices against all defendants.

On 29 February 2008, plaintiff served HRMC with her first set of interrogatories and her first set of requests for production of documents. In its responses, HRMC refused to respond to several of plaintiff's requests, contending that they sought disclosure of the proceedings, records, and materials produced or considered by a medical review committee, which constituted information protected from ****419** discovery under N.C. Gen.Stat. § 131E–95(b).

On 16 September 2008, plaintiff filed a motion to compel discovery. Although HRMC filed a written response to the motion to compel, it did not submit any affidavits or other evidence supporting its claims of privilege. In an order entered 24 October 2008, the trial court directed HRMC to respond to most of plaintiff's discovery requests. With respect, however, to certain interrogatories and requests for production, the trial court ordered HRMC to submit the documents and information for its *in camera* review. After conducting the *in camera* review, the trial court entered an order on 19 December 2008 granting an order protecting some of the documents and ordering others to be produced. HRMC timely appealed to this Court.

Discussion

[1] **[2]** **[3]** The trial court's order granting in part plaintiff's motion to compel discovery is an interlocutory order. "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Sharpe v. Worland,* 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999). N.C. Gen.Stat. § 7A–27(d)(1) (2009), however, authorizes an appeal from an interlocutory order that affects a substantial right. "[W]hen, as here, a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right under sections 1–277(a) and 7A–27(d)(1)." *Sharpe,* 351 N.C. at 166, 522 S.E.2d at 581. ***535** This appeal is, therefore, properly before us. *See Armstrong v. Barnes,* 171 N.C.App. 287, 290–91, 614 S.E.2d 371, 374 (holding challenged discovery order affected substantial right because "assertions of statutory privilege relate directly to the matters to be disclosed under the trial court's interlocutory discovery order"), *disc. review denied,* 360 N.C. 60, 621 S.E.2d 173 (2005).

[4] The sole issue on appeal is whether the trial court erred in compelling HRMC to disclose certain documents to plaintiff in discovery. " 'Whether or not the party's motion to compel discovery should be granted or denied is within the trial court's sound discretion and will not be reversed absent an

abuse of discretion.' " *Hayes v. Premier Living, Inc.,* 181 N.C.App. 747, 751, 641 S.E.2d 316, 318–19 (2007) (quoting *Wagoner v. Elkin City Schs. Bd. of Educ.,* 113 N.C.App. 579, 585, 440 S.E.2d 119, 123, *disc. review denied,* 336 N.C. 615, 447 S.E.2d 414 (1994)). It is well established, however, that this Court reviews questions of law, as well as questions of statutory construction, de novo. *Moody v. Sears Roebuck & Co.,* 191 N.C.App. 256, 264, 664 S.E.2d 569, 575 (2008). Thus, we review de novo whether the requested documents are privileged under N.C. Gen.Stat. § 131E–95(b).

The information that HRMC contends on appeal is protected from disclosure can be grouped into two categories. The first category contains three internal documents of HRMC. One document is an e-mail dated 17 December 2007 from Shirley Trantham, HRMC's director of Risk Management, to Janet Ledford with the subject of "Peer Review Request." In the e-mail Trantham reviews six instances of patient care at HRMC. The e-mail summarizes each incident, notes whether any occurrence reports were received, and discusses any quality concerns. It does not identify Ms. Ledford, what position she held, or even for whom she worked. Nor does the e-mail indicate who requested the information or for what purpose it was generated.

The second document is a memorandum dated 18 December 2007 with a title indicating that Shirley Harris, former director of Clinical Services at HRMC, requested a review of patient charts. The document, which contains summaries and analyses of six instances of patient care, does not indicate who authored the document, for what purpose it was generated, or who received it.

The third document is a memorandum dated 19 December 2007, authored by Dr. Harry Lipham, Chairman of the Intensive Care Unit at HRMC, and addressed to Shirley Harris and Dr. Nancy Freeman. The ***536** memorandum indicates it was authored by Dr. Lipham at the request of "Dr. Freeman from ****420** the Hospital Board for information concerning allegations that have been made by Dr. Aloha Bryson concerning [certain patients'] care." It summarizes six patient charts and analyzes the appropriateness of the care provided. The document does not identify who Dr. Freeman is or the purpose for which she requested the information.

The documents in the second category were apparently transmitted between HRMC and an outside company called MDReview. They include (1) a letter to Eileen Lipham of HRMC, written on letterhead with the name "MDReview," that thanks her "for calling on MDReview to assist [her] with [her] peer review needs"; (2) six documents entitled "Peer Review Report" authored by Scott A. Eisman, M.D.; and (3) Dr. Eisman's *curriculum vitae.* Each of the reports warn that "THIS IS A CONFIDENTIAL PEER REVIEW DOCUMENT" and state that the document "was prepared at the request of [HRMC] in order to provide an independent professional opinion of the care rendered" to a specifically-referenced patient.

[5] " 'It is for the party objecting to discovery [of privileged information] to raise the objection in the first instance and he has the burden of establishing the existence of the privilege.' " *Adams v. Lovette,* 105 N.C.App. 23, 28, 411 S.E.2d 620, 624 (quoting 8 C. Wright & A. Miller, Federal Practice and Procedure § 2016 (1970)), *aff'd per curiam,* 332 N.C. 659, 422 S.E.2d 575 (1992). HRMC, therefore, has the burden of establishing that these documents are protected.

HRMC contends the documents are protected by N.C. Gen.Stat. § 131E–95(b), which provides in part:

> The proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential and ... shall not be subject to discovery or introduction into evidence in any civil action against a hospital ... which results from matters which are the subject of evaluation and review by the committee.

N.C. Gen.Stat. § 131E–76(5) (2009) in turn defines "[m]edical review committee":

(5) "Medical review committee" means any of the following committees formed for the purpose of evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing:

***537** a. A committee of a state or local professional society.

b. A committee of a medical staff of a hospital.

c. A committee of a hospital or hospital system, if created by the governing board or medical staff of the hospital or system or operating under written

procedures adopted by the governing board or medical staff of the hospital or system.

d. A committee of a peer review corporation or organization.

[6] "By its plain language, N.C. Gen.Stat. § 131E–95 creates three categories of information protected from discovery and admissibility at trial in a civil action: (1) proceedings of a medical review committee, (2) records and materials produced by a medical review committee, and (3) materials considered by a medical review committee." *Woods v. Moses Cone Health Sys.,* ––– N.C.App. ––––, ––––, 678 S.E.2d 787, 791–92 (2009), *disc. review denied,* 363 N.C. 813, 693 S.E.2d 353 (2010). The statute also, however, provides that "information, documents, or other records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee." N.C. Gen.Stat. § 131E–95(b).

The Supreme Court construed these provisions in *Shelton v. Morehead Mem'l Hosp.,* 318 N.C. 76, 83, 347 S.E.2d 824, 829 (1986):

> These provisions mean that information, in whatever form available, from original sources other than the medical review committee is not immune from discovery or use at trial merely because it was presented during medical review committee proceedings; neither should one who is a member of a medical review committee be prevented from testifying regarding information he learned from sources other than the committee itself, even though that information ****421** might have been shared by the committee.

The Court explained further: "The statute is designed to encourage candor and objectivity in the internal workings of medical review committees. Permitting access to information not generated by the committee itself but merely presented to it does not impinge on this statutory purpose. These kinds of materials may be discovered and used in evidence even though they were considered by the medical review committee." *Id.* at 83–84, 347 S.E.2d at 829. *See also Cunningham v. Charles A. Cannon, Jr. Mem'l Hosp., Inc.,* 187 N.C.App. 732, 737, 654 S.E.2d 24, 27 (2007) ("However, § 131E–95 applies ***538** to the *information* generated by a medical review committee.... Regardless of its form, the *information* sought by plaintiff was generated by defendant [physician], not the [medical review committee]. Therefore, the information is discoverable and the trial court did not abuse its discretion in denying defendant's motion for a protective order."), *disc. review denied,* 362 N.C. 356, 661 S.E.2d 244 (2008).

HRMC argues that the e-mail and memoranda in the first category of documents are privileged because they relate to internal peer review investigations of patient charts requested by its Risk Management Department. HRMC contends that it is clear from the face of these documents that they were written for the purpose of evaluating the quality of health care and, therefore, that we can assume they were generated by or for a medical review committee. We do not agree.

[7] In *Hayes,* 181 N.C.App. at 752, 641 S.E.2d at 319, this Court stressed that mere assertions that documents constitute peer review materials and meet the requirements of *Shelton* are insufficient. A trial court properly grants a motion to compel when the "defendants [do] not present any evidence tending to show that the disputed incident reports were (1) part of the [medical review committee's] *proceedings,* (2) *produced* by the [medical review committee], or (3) *considered* by the [medical review committee] as required by N.C. Gen.Stat. § 131E–107." *Hayes,* 181 N.C.App. at 752, 641 S.E.2d at 319. As this Court explained, the statutory requirements

> are substantive, not formal, requirements. Thus, in order to determine whether the peer review privilege applies, a court must consider the circumstances surrounding the actual preparation and use of the disputed documents involved in each particular case. The title, description, or stated purpose attached to a document by its creator is not dispositive, nor can a party shield an *otherwise available* document from discovery merely by having it presented to or considered by a quality review committee.

Id. at 752, 641 S.E.2d at 319.

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In the analogous attorney-client privilege context, this Court has similarly held that “[m]ere assertions” that privilege applies “will not suffice.” *Multimedia Publ'g of N.C., Inc. v. Henderson County,* 136 N.C.App. 567, 576, 525 S.E.2d 786, 792, *disc. review denied,* 351 N.C. 474, 543 S.E.2d 492 (2000). The party claiming privilege must instead proffer “some *objective* indicia” that the privilege applies. *Id.* Here, ***539** however, HRMC did not submit any “evidence,” as required by *Hayes,* or “objective indicia,” as required by *Multimedia Publishing.* Instead, like the Court in *Brown v. Am. Partners Fed. Credit Union,* 183 N.C.App. 529, 539, 645 S.E.2d 117, 124 (2007), addressing the attorney-client privilege, “we can only determine the applicability of the privilege based upon what the [documents] reveal on their face.”

[8] Starting with the first category of documents, HRMC has pointed to no evidence in the record that Shirley Trantham, who sent the 17 December 2007 e-mail, or Janet Ledford, who received it, were members of a medical review committee. The author and recipients of the 18 December 2007 memorandum are not even identified. Neither of these documents explicitly states that it was generated by members of a medical review committee or for a medical review committee's consideration. There is absolutely no evidence in the record from which this Court can infer that either document is privileged under § 131E–95(b). *See Brown,* 183 N.C.App. at 535, 645 S.E.2d at 122 (holding ****422** that defendant failed to establish that board of directors meeting minutes were protected by attorney-client privilege because documents listed individuals as being present at meeting, but did not identify their positions and, therefore, defendant could not demonstrate that privilege had not been waived).

[9] The third document, the 19 December 2007 memorandum, indicates that it was authored by the Chair of the Intensive Care Unit at HRMC for Dr. Freeman “from the Hospital Board.” Nothing in the document itself and nothing in the record specifically identifies what “the Hospital Board” is. In plaintiff's complaint, she alleges that she composed a letter to the Hospital Authority Board of Commissioners about her concerns. Even assuming *arguendo* that this is the “Hospital Board” to which the memorandum refers, the Supreme Court in *Shelton,* 318 N.C. at 84, 347 S.E.2d at 829–30, held that a hospital's Board of Trustees does not fit the definition of a medical review committee. HRMC has, therefore, failed to present any evidence that the “Hospital Board” in the 19 December 2007 memorandum constituted a medical review committee within the meaning of N.C. Gen.Stat. § 131E–95(b).

[10] Turning to the second category of documents, HRMC contends that the six reports and Dr. Eisman's *curriculum vitae* are documents generated by a medical review committee because MDReview, the apparent source of these documents, is a “peer review corporation or organization.” HRMC has, however, failed to point to any evidence in the record showing that MDReview is a peer review organization ***540** or corporation or that it authored those documents for that purpose. Although the reports identify themselves as peer review documents, as *Hayes* stated, “[t]he title, description, or stated purpose attached to a document by its creator is not dispositive....” 181 N.C.App. at 752, 641 S.E.2d at 319. We, therefore, cannot conclude simply from a bare name that MDReview is a peer review organization or corporation. In any event, even if MDReview is a peer review organization or corporation, HRMC has not provided any evidence, as required by N.C. Gen.Stat. § 131E–76(5), that the reports were generated by “[a] *committee* of a peer review corporation or organization.” (Emphasis added.)

In sum, HRMC submitted no affidavits or other evidence to support its claim that the documents at issue were protected from discovery under N.C. Gen.Stat. § 131E–95(b). In addition, the documents on their face do not establish that they are privileged. Thus, HRMC has failed to meet its burden of proof, and accordingly, we affirm the trial court's order compelling discovery.

Affirmed.

Judges STROUD and ERVIN concur.

Parallel Citations

694 S.E.2d 416

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731 S.E.2d 462
Court of Appeals of North Carolina.

Sherif A. PHILIPS, M.D., Plaintiff,
v.
PITT COUNTY MEMORIAL HOSPITAL INCORPORATED, Paul Bolin, M.D., Ralph E. Whatley, M.D., Sanjay Patel, M.D., and Cynthia Brown, M.D., Defendants.

No. COA11–1482. | Aug. 21, 2012.

Synopsis
Background: Physician filed a complaint against hospital and others after physician's medical staff privileges at hospital were permanently revoked. The Superior Court, Pitt County, Richard L. Doughton, J., dismissed physician's claims for fraud and tortious interference, and granted hospital's motion for summary judgment on the remaining claims for breach of contract, defamation, injunctive relief, and punitive damages. Physician appealed.

Holdings: The Court of Appeals, Stephens, J., held that:

[1] physician could not state a claim for tortious interference with existing contractual relationships against second physician;

[2] physician's cause of action for fraud against hospital accrued, and the three year limitations period began to run, from the date physician met with hospital representatives to discuss an upcoding issue;

[3] the exhaustion of administrative remedies doctrine did not apply to preserve physician's claims against hospital; and

[4] two physicians' testimony before medical review committee could not serve as the basis for a defamation claim.

Affirmed.

West Headnotes (18)

[1] **Pretrial Procedure**
Privileged matters

Physician cannot rely on allegations or assertions which rest upon any of the privileged information, documents, or testimony covered by the protective order, in action challenging the revocation of physician's medical staff privileges at hospital, where physician failed to appeal from the trial court's protective order. West's N.C.G.S.A. § 131E–95(b).

[2] **Pretrial Procedure**
Torts in general

Physician could not state a claim, so as to survive motion to dismiss allegations of tortious interference with existing contractual relationships against second physician, in action challenging the revocation of physician's medical staff privileges at hospital; the trial court entered a protective order barring discovery of documents reflecting the proceedings of any relevant medical review committees, and physician's complaint alleged that the comments made by second physician before the hospital hearing panel resulted in corrective action being taken against physician.

[3] **Limitation of Actions**
Injuries to property in general

The time for physician to filed a tortious interference with contract claim against defendant accrued, and the three year limitations period began to run, from the date defendant allegedly called one of physician's patients and suggested that he find another doctor because physician had a problem at the hospital. West's N.C.G.S.A. § 1–52(1).

[4] **Limitation of Actions**
Burden of proof in general

Once a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff.

[5] Limitation of Actions

Injuries to property in general

Physician's claims for tortious interference against hospital accrued, and the three year limitations period began to run, from the date hospital began its investigation against physician. West's N.C.G.S.A. § 1–52.

[6] Action

Accrual of cause of action

When the right of a party is once violated, even in ever so small a degree, the injury at once springs into existence and the cause of action is complete.

[7] Pretrial Procedure

Torts in general

Physician could not provide any evidence so as to survive motion to dismiss on his claim that hospital tortiously interfered with contract through the corrective actions hospital took against physician following investigation, where the Board of Trustees' decisions regarding corrective action were based upon the findings and recommendations of the medical review committees, the proceedings and records of which were privileged by the trial court's protective order.

[8] Torts

Contracts

The elements of tortious interference with contract are: (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to the plaintiff.

[9] Limitation of Actions

What constitutes discovery of fraud

Physician's cause of action for fraud against hospital accrued, and the three year limitations period began to run, from the date physician met with hospital representatives to discuss an upcoding issue, which resulted in patients being charged for treatments and procedures that were not performed. West's N.C.G.S.A. § 1–52(9).

[10] Limitation of Actions

Pendency of Action or Other Proceeding

The exhaustion of administrative remedies doctrine did not apply to preserve physician's claims against hospital that were barred by the statute of limitations; the doctrine did not apply when a plaintiff sought damages and the administrative remedies were non-monetary in nature, physician sought monetary damages, and hospital bylaws, which governed the administrative review and appeals process at issue, did not provide for monetary damages.

[11] Administrative Law and Procedure

Primary jurisdiction

Administrative Law and Procedure

Exhaustion of administrative remedies

Under the exhaustion of remedies doctrine, when an effective administrative remedy exists, that remedy is exclusive; however, when the relief sought differs from the statutory remedy provided, the administrative remedy will not bar a claimant from pursuing an adequate remedy in civil court.

[12] Administrative Law and Procedure

Exhaustion of administrative remedies

The exhaustion of remedies doctrine does not apply where a plaintiff seeks damages and the administrative remedies are non-monetary in nature.

[13] Health

Suspension or termination of privileges; discipline

Hospital substantially complied with its bylaws in conducting the investigation of and applying a corrective action to physician; no evidence supported physician's claim that hospital prevented him from pursuing an appeal, and no evidence supported allegation that witnesses or medical staff who testified to the hospital committees were motivated by malicious intent. West's N.C.G.S.A. § 131E–95(a).

[14] **Libel and Slander**
Qualified Privilege

Two physicians' testimony before medical review committee, which investigated physician to determine whether to revoke his medical staff privileges at hospital, was privileged and was covered by the trial court's protective order, and thus could not serve as the basis for a defamation claim. West's N.C.G.S.A. § 131E–95(b).

[15] **Libel and Slander**
Publication

Libel and Slander
Falsity

To be actionable, a defamatory statement must be false and must be communicated to a person or persons other than the person defamed.

[16] **Limitation of Actions**
Torts

Limitation of Actions
Libel and slander

To escape the bar of the statute of limitations, an action for libel or slander must be commenced within one year from the time the action accrues, and the action accrues at the date of the publication of the defamatory words, regardless of the date of discovery by the plaintiff.

1 Cases that cite this headnote

[17] **Limitation of Actions**
Torts

Cause of action for defamation against physician accrued, and one year limitations period began to run, from the date physician allegedly made the defamatory statement regarding second physician to patient. West's N.C.G.S.A. § 1–54(3).

1 Cases that cite this headnote

[18] **Limitation of Actions**
Continuing injury in general

The one year limitations period for physician's defamation action against second physician was not tolled by the continuing wrong doctrine, which applies when the unlawful acts continue.

1 Cases that cite this headnote

***464** Appeal by Plaintiff from orders entered 31 March 2010 and 17 May 2011 by Judge Richard L. Doughton in Pitt County Superior Court. Heard in the Court of Appeals 6 June 2012.

Attorneys and Law Firms

Crouse Law Offices, Raleigh, by James T. Crouse, and Guirguis Law, P.A., Raleigh, by Nardine Mary Guirguis, for Plaintiff.

Harris, Creech, Ward and Blackerby, P.A., New Bern, by Jay C. Salsman, C. David Creech, and Luke A. Dalton, for Defendants.

Opinion

STEPHENS, Judge.

Procedural History and Factual Background

This matter arises from the suspension and then revocation of the medical staff privileges of Plaintiff Sherif A. Philips, M.D., by Defendant Pitt County Memorial Hospital ("the hospital"). During 2003 and 2004, the Risk Management Department of the hospital ***465** received complaints about Plaintiff, a nephrologist with active medical staff privileges at the hospital. The complaints involved, *inter alia,* failing to examine patients and making false entries on medical

records, and occurred at about the same time the hospital became aware of a consent order Plaintiff entered into with the North Carolina Medical Board ("NCMB"), in which Plaintiff accepted a reprimand for failing to provide assistance to a patient in cardiopulmonary arrest.[1] As a result of the consent order and the complaints, on 26 August 2004, Defendant Ralph Whatley, M.D., then chief of the internal medicine service (which included nephrology), requested an investigation prior to corrective action pursuant to Article VII, § 2 of the hospital's Medical Staff Bylaws, Rules, and Regulations ("the bylaws").[2]

Charles Barrier, M.D., then chief of staff at the hospital, notified Plaintiff in writing that the request for investigation would be presented to the hospital's medical executive committee ("the executive committee") on 20 September 2004, that he had the right to be present, and of his obligations under the bylaws. The executive committee determined that the allegations in the request for investigation, if confirmed, could warrant action regarding Plaintiff's privileges, and as a result, it directed Whatley to form an ad hoc committee ("the first ad hoc committee") to investigate four issues further: (1) documentation of Plaintiff's physical examinations of four patients, (2) billing related to those four patients, (3) the consent order entered into with the NCMB, and (4) termination of Plaintiff's privileges at another hospital. Whatley appointed the first ad hoc committee, which held multiple investigatory hearings. The first ad hoc committee presented its final written report to the executive committee on 15 November 2004. Plaintiff was again given notice of his right to attend the presentation, make a statement, ask questions, and present evidence. Plaintiff met with the executive committee on 15 November 2004, after which the executive committee issued a report recommending a letter of reprimand and a six-month suspension of Plaintiff's privileges, the latter to be "suspended."

On 17 November 2004, the executive committee notified Plaintiff that it had taken action on the recommendation of the first ad hoc committee, and advised Plaintiff of his appeal rights. When Plaintiff appealed pursuant to the bylaws, a fair hearing committee was appointed, and multiple hearings were held over the next several months. Whatley and Defendant Paul Bolin, M.D., another physician with medical staff privileges at the hospital, provided testimony during the hearings. The hearing committee issued a written report recommending a corrective action (but not a suspension of Plaintiff's privileges) which was presented to the executive committee on 4 April 2005. The executive committee took action on the same date and accepted the fair hearing panel's recommendation.

Plaintiff elected not to appeal the executive committee's decision to the Board of Trustees, which under the bylaws, retained the power to make final decisions in any corrective action proceedings. However, because it declined to accept the recommendation of the executive committee, as directed by the bylaws, the Board of Trustees then referred the matter to the chief of staff, chief of staff—elect, secretary, and chairman of the Credentials Committee ("the committee of four") for a recommendation.[3] The committee of four ***466** issued a written report and recommendation to the Board of Trustees on 21 June 2005. On the same date, the Board of Trustees made its final decision. At that time, Plaintiff's medical staff privileges were up for a regular biennial renewal. The Board of Trustees elected to renew Plaintiff's privileges, subject to certain conditions, including a 90–day suspension of his privileges, 31 days of which would be active and the remaining 59 days suspended, and requirements that Plaintiff make precise chart notes, have his practice patterns reviewed, and adhere to a call schedule.[4] Plaintiff accepted the terms of the conditional renewal of his medical staff privileges. As required by state and federal law, the hospital reported Plaintiff's suspension to the NCMB and the National Practitioners' Data Bank ("NPDB").

Subsequently, the hospital learned that Plaintiff had failed to adhere to a call schedule, one of the conditions of the renewal of his privileges. Specifically, a private investigator hired by the hospital discovered that Plaintiff was out of the county several times when he was scheduled to be on call for the hospital, and that on at least three occasions, the physician purportedly providing call coverage for Plaintiff was also outside the county. Based on this failure to comply with the conditions of renewal, another request for investigation was submitted. In addition, as provided in the bylaws,[5] the hospital's chief of staff determined that a summary suspension of Plaintiff's privileges was necessary to protect patient safety.

A second ad hoc committee was appointed to investigate Plaintiff's noncompliance with the conditions of renewal. The second ad hoc committee submitted a written report and recommendation to the executive committee, which took action on the recommendation to invoke the remaining 59 days of Plaintiff's previous suspension. Plaintiff again appealed, leading to the appointment of a second hearing committee, which again held multiple hearings on the matter.

The second hearing committee reported to the executive committee which took action on 19 December 2006. Plaintiff appealed to the Board of Trustees, which upheld the recommendation of the executive committee and permanently revoked Plaintiff's medical staff privileges.

Plaintiff has previously filed two lawsuits against Defendants [6] in the United States District Court for the Eastern District of North Carolina, each of which was dismissed pursuant to Rule 12(b)(6) and for lack of subject matter jurisdiction. *See Philips v. Pitt Cnty. Mem'l Hosp.,* 572 F.3d 176 (4th Cir.2009) (affirming the dismissals). The state action here was filed on 12 August 2009. The trial court dismissed Plaintiff's claims for fraud and tortious interference with contract pursuant to Rule 12(b)(6) on 31 March 2010, and granted Defendants' motion for summary judgment on Plaintiff's remaining claims for breach of contract, defamation, injunctive relief, and punitive damages on 17 May 2011. Plaintiff appeals.

Discussion

Plaintiff brings forward two arguments on appeal: that the trial court erred in (1) dismissing his claims for fraud and tortious interference with contract pursuant to Rule 12(b)(6), and (2) granting summary judgment for Defendants on Plaintiff's claims for breach of contract, defamation, punitive damages, and injunctive relief because there existed disputed issues of material fact. As discussed below, we affirm.

Standards of Review

Pursuant to Rule 12(b)(6),

> ***467** [d]ismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim. On appeal of a 12(b)(6) motion to dismiss, this Court conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

Burgin v. Owen, 181 N.C.App. 511, 512, 640 S.E.2d 427, 428–29 (citations and quotation marks omitted), *appeal dismissed and disc. review denied,* 361 N.C. 425, 647 S.E.2d 98, *cert. denied,* 361 N.C. 690, 652 S.E.2d 257 (2007).

> Our standard of review of an appeal from summary judgment is *de novo;* such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial.

In re Will of Jones, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citations and quotation marks omitted). Further,

> [i]n order to bear its burden, a defendant is required to present a forecast of the evidence which is available at trial and which shows that there is no material issue of fact concerning an essential element of the plaintiff's claim and that such element could not be proved by the plaintiff through the presentation of substantial evidence. An adequately supported motion for summary judgment triggers the opposing party's responsibility to come forward with facts, as distinguished from allegations, sufficient to indicate that he will be able to sustain his claim at trial.

McKeel v. Armstrong, 96 N.C.App. 401, 406–07, 386 S.E.2d 60, 63 (1989). Finally, if a trial court's grant of summary judgment can be sustained on any grounds, we must affirm

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it on appeal. *Shore v. Brown,* 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989). "If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered." *Id.*

Protective Order

[1] On 5 May 2010, Defendants moved for a protective order pursuant to section 131E–95(b) of the Hospital Licensure Act:

> The proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential and not considered public records within the meaning of G.S. 132–1, " 'Public records' defined", and shall not be subject to discovery or introduction into evidence in any civil action against a hospital, an ambulatory surgical facility licensed under Chapter 131E of the General Statutes, or a provider of professional health services which results from matters which are the subject of evaluation and review by the committee. No person who was in attendance at a meeting of the committee shall be required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the committee or as to any findings, recommendations, evaluations, opinions, or other actions of the committee or its members. However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee. Documents otherwise available as public records within the meaning of G.S. 132–1 do not lose their status as public records merely because they were presented or considered during proceedings of the committee. A member of the committee or a person who testifies before the committee may testify in a civil action but cannot be asked about the person's testimony before the committee or any opinions formed as a result of the committee hearings.

***468** N.C. Gen.Stat. § 131E–95(b) (2011). On 20 June 2010, the trial court entered a protective order pursuant to section 131E–95(b). In the order, the court provided that the following materials were privileged: "documents reflecting the proceedings of any of these committees;[7] records and materials produced by any of these committees; or materials considered by any of these committees." The order further noted that, while information from original sources other than the various medical review boards was not privileged simply because it had been presented to the committees, the privilege did extend to information or documents "generated specifically at the request of the committee[s.]" Plaintiff has failed to appeal from this order. Thus, the findings of fact, conclusions of law, and decrees contained in the protective order are binding on appeal. As a result, in arguing error in the dismissal of or summary judgment on his claims, Plaintiff cannot rely on allegations or assertions which rest upon any of the privileged information, documents, or testimony covered by the protective order.

I. Dismissal of Claims Pursuant to Rule 12(b)(6)

Plaintiff argues that the trial court erred in dismissing his claims for tortious interference with existing contractual relationships against all Defendants and for fraud against the hospital pursuant to Rule 12(b)(6). We disagree.

A. Tortious interference claims against Bolin and Whatley

[2] As noted *supra,* pursuant to section 131E–95(b), the trial court entered a protective order barring discovery of "documents reflecting the proceedings of any of [all relevant medical review] committees; records and materials produced by any of these committees; or materials considered by any of these committees[.]" Further, section 131E–95(b) specifically provides that "a person who testifies before the committee may testify in a civil action but cannot be asked about the person's testimony before the committee." Thus, Plaintiff cannot produce *any* evidence regarding the sole factual allegation that forms the basis for his tortious interference claim against Bolin, to wit, "[a]s a direct

consequence of testimony provided by Whatley and Bolin at the Fair Hearing, findings and recommendations were made by the hearing panel, and corrective action that suspended and then terminated [Plaintiff's] medical staff privileges was taken." Because Plaintiff's "complaint discloses [a] fact that necessarily defeats the [ ] claim[,]" dismissal was proper. *Burgin,* 181 N.C.App. at 512, 640 S.E.2d at 429. Likewise, to the extent Plaintiff's tortious interference claim against Whatley is based upon Whatley's testimony before the medical review committees, dismissal of that claim was proper.

[3] **[4]** Plaintiff's tortious interference claim against Whatley is also based upon the allegation that "Whatley contacted one of [Plaintiff's] patients (Patient C) and told the patient that he should look for another physician because [Plaintiff] was not available to his patients." In their motion to dismiss, Defendants asserted the three-year statute of limitations on tort actions in this State as a defense. *See* N.C. Gen.Stat. § 1–52(1) (2011). "Once a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff." *Horton v. Carolina Medicorp, Inc.,* 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996) (citation omitted).

The record on appeal reveals an affidavit by Vivian Weston, the wife of one of Plaintiff's dialysis patients, stating that Whatley called her "[i]n or around April 2005" and suggested she find her husband another doctor because Plaintiff had "a problem" at the hospital. [8] Plaintiff's complaint was not filed ***469** until 12 August 2009, more than three years after Whatley's allegedly tortious conduct, and thus this claim is barred by section 1–52(1). [9] Accordingly, the trial court did not err in dismissing Plaintiff's tortious interference claims against Whatley.

B. Tortious interference claims against the hospital

[5] Plaintiff's tortious interference claims against the hospital are based upon allegations that the hospital (1) "initiated an investigation of [Plaintiff], which resulted in subsequent corrective action that suspended and then terminated" Plaintiff's medical staff privileges, and that the hospital (2) "was not justified in taking [the] corrective action[.]" In addition, Plaintiff alleges that the hospital's conduct "was intended to induce patients not to continue seeking medical care ... from [Plaintiff] and ... to deprive [Plaintiff] of his ability to provide medical care ... to his patients."

[6] "When the right of a party is once violated, even in ever so small a degree, the injury ... at once springs into existence and the cause of action is complete." *Stewart v. Se. Reg'l Med. Ctr.,* 142 N.C.App. 456, 461, 543 S.E.2d 517, 520 (2001) (citation and quotation marks omitted). As noted, *supra,* Plaintiff did not assert these claims until August 2009. Accordingly, to the extent that Plaintiff's claim against the hospital is based on the initiation of the investigation in September 2004, it is barred by the statute of limitations. N.C. Gen.Stat. § 1–52.

[7] **[8]** As to any claim based on the allegation that the corrective actions taken by the hospital (through its Board of Trustees) was not justified, Plaintiff cannot forecast any evidence to support that claim. The elements of tortious interference with contract are:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to [the] plaintiff.

United Lab., Inc. v. Kuykendall, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988) (citation omitted). The Board of Trustees' decisions regarding corrective action were based upon the findings and recommendations of the medical review committees, the proceedings and records of which are privileged by the protective order as discussed *supra*. Without the ability to discover those materials or present them at trial, Plaintiff cannot show that any recommendations produced by the medical review committees were unjustified, and without being able to show fault in those recommendations, Plaintiff cannot show that the Board of Trustees acted without justification in relying upon those recommendations in suspending and then terminating his medical staff privileges. Accordingly, this argument is overruled, and the trial court's dismissal of Plaintiff's tortious interference with contract claims is affirmed.

C. Fraud claim against the hospital

[9] Plaintiff also contends that the trial court erred in dismissing his claim for fraud against the hospital. In his

complaint, Plaintiff asserted that the hospital "upcoded" the records of two of Plaintiff's patients, such that they were charged for treatments and procedures which were not actually performed. According to Plaintiff's complaint, these upcodings later served as a material part of the allegations against him for making false entries in patient medical records during the medical review process. However, in his deposition, Plaintiff stated that these instances of upcoding occurred in 2004 and earlier, more than three years prior to the filing of his complaint in August 2009. In ***470** addition, Plaintiff's complaint states that he met with Whatley and others in July 2004 to discuss the upcoding issue, indicating that Plaintiff was aware of the hospital's allegedly fraudulent actions at that time. As such, Plaintiff's fraud claim is barred by the three-year statute of limitations. N.C. Gen.Stat. § 1–52(9).

D. Exhaustion of Remedies Doctrine

[10] Plaintiff contends that any claims dismissed as violating the statute of limitations are saved by the exhaustion of administrative remedies doctrine. Plaintiff asserts that the statute of limitations was tolled under the doctrine until the final decision to terminate Plaintiff's medical staff privileges was made by the Board of Trustees on or about 29 December 2006. We are not persuaded.

[11] **[12]** Under the doctrine, "[w]hen an effective administrative remedy exists, that remedy is exclusive. However, when the relief sought differs from the statutory remedy provided, the administrative remedy will not bar a claimant from pursuing an adequate remedy in civil court." *Johnson v. First Union Corp.,* 128 N.C.App. 450, 456, 496 S.E.2d 1, 5 (1998) (citation and quotation marks omitted). Specifically, the doctrine does not apply where a plaintiff seeks damages and the administrative remedies are non-monetary in nature. *White v. Trew,* —— N.C.App. ——, ——, 720 S.E.2d 713, 719 (2011).

Here, Plaintiff sought monetary damages for his claims of tortious interference with contract and fraud. However, the hospital's bylaws, which govern the administrative review and appeals process at issue, do not provide for monetary damages. Accordingly, the doctrine of the exhaustion of administrative remedies is inapplicable.

II. Summary Judgment

Plaintiff also argues that the trial court erred in granting summary judgment to Defendants on Plaintiff's claims for breach of contract against the hospital; defamation against Whatley, Bolin, and the hospital; injunctive relief against the hospital; and punitive damages against Whatley, Bolin, and the hospital. [10] We disagree.

A. Breach of Contract Claim

[13] Plaintiff contends the hospital breached its contract with him by failing to comply with the bylaws in conducting the medical review of his medical staff privileges. After careful review, we reject Plaintiff's arguments.

As this Court has noted,

> [b]y statute, regulation, and case law, the authority to make corrective action decisions rests with the governing body of a hospital. It is not the role of this Court to substitute our judgment for that of the hospital governing body, which has the responsibility of providing a competent staff of physicians under N.C. Gen.Stat. § 131E–85. As long as the governing body's suspension of privileges is administered with fairness, geared by a rationale compatible with hospital responsibility and unencumbered with irrelevant considerations, this Court should not interfere.

Lohrmann v. Iredell Mem'l Hosp., Inc., 174 N.C.App. 63, 77, 620 S.E.2d 258, 266 (2005) (citations and quotation marks omitted), *disc. review denied,* 360 N.C. 364, 629 S.E.2d 853 (2006). Accordingly, summary judgment is proper where a hospital substantially complies with its bylaws in conducting a medical review process which leads to corrective action against a physician. *Id.* at 73, 620 S.E.2d at 263. Our review indicates that the hospital substantially complied with its bylaws in conducting the investigation of and applying a corrective action to Plaintiff. ***471** Further, as to the alleged breaches Plaintiff brings forward on appeal, the record evidence reveals no genuine issues of material fact.

Plaintiff asserts breach in that, as part of its investigations, the hospital allowed nurses to shadow him and report back to the medical review committees, hired a private investigator to report on Plaintiff's whereabouts during scheduled on-

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call periods, and did not interview certain patients or their spouses. Our review of the bylaws reveals no provisions relating to any of these assertions. Plaintiff also asserts that the hospital unilaterally cut short his term of appointment, so as to cause him to come up for renewal of privileges in 2005 rather than 2006. However, the evidence in the record is undisputed that the hospital reappointed all physicians in 2001, and then subjected all physicians (including Plaintiff) to the reappointment process every two years thereafter, including in 2003. Accordingly, Plaintiff, along with every other physician on the hospital's medical staff, was due for biennial renewal of privileges in 2005.

Plaintiff contends that the hospital prevented him from appealing when it notified him that a decision on his reappointment could be delayed if he appealed the executive committee's decision. However, a letter dated 16 May 2005 from Plaintiff's then-counsel to the hospital's counsel *thanks* the hospital for "its insights concerning" possible scheduling conflicts between the committee meetings for the appeal and the reappointment process, and notifies the hospital that Plaintiff has elected not to appeal. Nothing in the record suggests that the hospital attempted to prevent Plaintiff from pursuing an appeal, and nothing in the bylaws requires any different appeal process in the event that proceedings related to a corrective action coincidentally fall at the same time a physician is up for renewal of privileges.

Plaintiff also asserts breach in the Board of Trustees' decision to impose a harsher sanction than that recommended by the first fair hearing panel and accepted by the first medical review committee. However, nothing in the bylaws requires the Board of Trustees to accept such recommendations, and the bylaws explicitly give the Board of Trustees the final decision-making power in corrective actions.

Plaintiff next asserts breach by the hospital in its imposition of a 90–day suspension of his medical staff privileges with a 31–day active suspension and its later invocation of the remaining 59 days of suspension. Plaintiff also explicitly asserts that the 22 June 2005 reappointment letter containing conditions for renewal of his privileges formed a binding contract with the hospital. However, among the conditions Plaintiff explicitly agreed to were imposition of a 90–day suspension of his medical staff privileges with a 31–day active suspension and the right to invoke the remaining 59 days of suspension if Plaintiff failed to comply with the conditions of renewal. Accordingly, imposition of these two *terms* of the contract is not a breach. In addition, Plaintiff is estopped from challenging terms of the contract. *See B & F Slosman v. Sonopress, Inc.,* 148 N.C.App. 81, 88, 557 S.E.2d 176, 181 (2001) (holding that the theory of quasi-estoppel prevents a party from accepting benefits from a contract while simultaneously denying the effect of other terms of the same agreement).

Finally, section 131E–95 provides that "[a] member of a duly appointed medical review committee *who acts without malice or fraud* shall not be subject to liability for damages in any civil action on account of any act, statement or proceeding undertaken, made, or performed within the scope of the functions of the committee." N.C. Gen.Stat. § 131E–95(a) (emphasis added). In determining whether a plaintiff has adequately alleged malice or fraud under the statute, this Court has noted:

> Malice is defined as: The intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply an evil intent. A condition of mind which prompts a person to do a wrongful act willfully, that is, on purpose, to the injury of another, or to do intentionally a wrongful act toward another without justification or excuse.
>
> The North Carolina Supreme Court states "malice in law" is presumed from tortious ***472** acts, deliberately done without just cause, excuse, or justification, which are reasonably calculated to injure another or others.
>
> The essential elements of fraud [are]
>
> (1) That defendant made a representation relating to some material past or existing fact; (2) that the representation was false; (3) that when he made it, defendant knew that the representation was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that plaintiff reasonably relied upon the representation, and acted upon it; and (5) that plaintiff thereby suffered injury.

McKeel, 96 N.C.App. at 406, 386 S.E.2d at 63. In *McKeel,* the plaintiff alleged malice and fraud by a hospital and others, alleging that a medical review process had been unfair and that his economic competitors had been allowed to serve on the medical review committee. *Id.* at 407–08, 386 S.E.2d at 63–64. In affirming summary judgment for all defendants, we noted that

> [a]ll the allegations raised by [the] plaintiff point to areas of the internal investigation process where possible

> conflicts of interest could arise. As in almost any situation of this nature, opportunities existed here to compromise the investigation if the persons involved had been motivated by malicious intent. In this case, however, [the] plaintiff has failed to produce any evidence of such intent.

Id. at 408, 386 S.E.2d at 64.

Similarly, Plaintiff's contentions of malice and fraud are largely based on allegations that Whatley, Bolin, and other medical staff who served on or testified to the various committees were economic competitors and/or biased against him. However, Plaintiff presents no evidence that any person was motivated by malicious intent. Further, many of the purported actions or omissions of Whatley, Bolin, and others concern their participation with the committees involved in the investigations of and corrective actions against Plaintiff. As such, under the terms of the protective order, Plaintiff cannot discover or present evidence as to any of these allegations. Thus, Plaintiff cannot meet his "responsibility to come forward with facts, as distinguished from allegations, sufficient to indicate that he will be able to sustain his claim[s] at trial." *Id.* at 407, 386 S.E.2d at 63.

B. Defamation Claims Against Whatley and Bolin

[14] **[15]** **[16]** Plaintiff also alleged defamation by Bolin and Whatley in their testimony before the committees and by Whatley in a statement made to one of Plaintiff's patients. "To be actionable, a defamatory statement must be false and must be communicated to a person or persons other than the person defamed." *Andrews v. Elliot,* 109 N.C.App. 271, 274, 426 S.E.2d 430, 432 (1993). In addition, "[t]o escape the bar of the statute of limitations, an action for libel or slander must be commenced within one year from the time the action accrues, ... and the action accrues at the date of the publication of the defamatory words, regardless of the [date of discovery by the plaintiff]." *Gibson v. Mut. Life Ins. Co. of N.Y.,* 121 N.C.App. 284, 287, 465 S.E.2d 56, 58 (1996) (citations and quotation marks omitted).

As noted *supra,* any testimony by Bolin and Whatley before the medical review committees is privileged and covered by the trial court's protective order. *See* N.C. Gen.Stat. § 131E–95(b) ("[A] person who testifies before the committee may testify in a civil action but cannot be asked about the person's testimony before the committee."). Without the ability to introduce the allegedly defamatory statements at trial, Plaintiff patently cannot "sustain his claim[s] at trial." *McKeel,* 96 N.C.App. at 407, 386 S.E.2d at 63.

[17] Plaintiff also alleged a single incident of defamation outside the proceedings of the medical review committees, to wit, the allegedly defamatory statement by Whatley to Patient C in April 2005. Plaintiff contends that he did not discover this alleged tort until at least 8 May 2006 and notes this defamation claim was first asserted in his second federal lawsuit in March 2007. Plaintiff cites no authority for his assertion that "[d]efamation claims against individuals are not barred by the one [-] year statute of limitations for defamation [N.C. Gen.Stat. § 1–54(3),]" and ***473** we know of none. Rather, as noted *supra,* such "an action ... accrues at the date of the publication of the defamatory words, regardless of the [date of discovery by the plaintiff]." *Gibson,* 121 N.C.App. at 287, 465 S.E.2d at 58. Accordingly, because Plaintiff did not assert this claim until more than two years following Whatley's allegedly defamatory statement, this claim is barred by the one-year statute of limitations. *Id.*

[18] Plaintiff's assertion that his claim is saved by the doctrine of the exhaustion of administrative remedies is likewise unavailing, as the appeals process provided for in the bylaws concerned Plaintiff's medical staff privileges, and the alleged statement was not part of that process. Further, Plaintiff's invocation of the doctrine also fails in that Plaintiff sought monetary damages from Whatley for the purported defamation, a remedy not available under the bylaws. *See Johnson,* 128 N.C.App. at 456, 496 S.E.2d at 5 ("[W]hen the relief sought differs from the statutory remedy provided, the administrative remedy will not bar a claimant from pursuing an adequate remedy in civil court."). In addition, we reject Plaintiff's assertion that this claim is saved by the "continuing wrong doctrine," as that doctrine applies only where the unlawful acts continue, not where, as here, there are purported continual bad effects arising from a single, discrete act alleged to have been unlawful. *See, e.g., Williams v. Blue Cross Blue Shield of N.C.,* 357 N.C. 170, 179, 581 S.E.2d 415, 423 (2003). Accordingly, the court did not err in granting summary judgment to Bolin and Whatley on Plaintiff's defamation claims.

C. Defamation Claim Against the Hospital

Plaintiff's defamation claim against the hospital is based on his allegation that the hospital's reports regarding suspension of his medical staff privileges to the NPDB and the NCMB were false. Because Plaintiff cannot forecast evidence to

prevail on this claim, the trial court's grant of summary judgment was proper.

Under HCQIA, the hospital was required to report to the NPDB any professional review action adversely affecting the medical staff privileges of a physician for more than 30 days. 42 U.S.C. § 11133(a)(1)(A) (2011). The information reported includes the name of the physician, the action taken, and the reasons for the action. *Id.* § 11133(a)(3). A hospital complying with this requirement cannot be "held liable in any civil action with respect to any report made under [42 U.S.C. §§ 11131 *et seq.*] ... without knowledge of the falsity of the information contained in the report." *Id.* § 11137(c) (2011). In addition, under N.C. Gen.Stat. § 90–14.13(a)(2) (2011), hospitals must report any suspension or revocation of medical staff privileges to the NCMB.

Here, Plaintiff does not argue that the reports were false in stating that he was suspended for more than 30 days or that the reports incorrectly stated the basis for his suspension as determined during the corrective action process. Rather, he alleges that he demonstrated "during the peer review proceedings" that various allegations against him which led to the eventual corrective actions were false. As discussed *supra,* Plaintiff is barred from presenting any evidence of the proceedings or evidence before the medical review committees, and as such, he cannot establish the falsity of the decision of the committees. *See Andrews,* 109 N.C.App. at 274, 426 S.E.2d at 432. Accordingly, the trial court did not err in granting summary judgment to the hospital on this claim.

D. Injunctive Relief and Punitive Damages Claims

In light of our affirmance of the court's grant of summary judgment to Defendants on Plaintiff's claims for breach of contract and defamation, we likewise affirm summary judgment on Plaintiff's request for injunctive relief and punitive damages.

AFFIRMED.

Judges BRYANT and THIGPEN concur.

Footnotes

1 This incident occurred in May 2000 at a freestanding dialysis unit operated by Total Renal Care in New Bern and unaffiliated with the hospital. At the time, Plaintiff served as medical director for the dialysis unit.

2 In pertinent part, the bylaws provide: "Whenever the Chief of any clinical service ... believes the activities or professional conduct of any practitioner with clinical privileges is considered to be lower than the standards of the medical staff, disruptive to the operation of the hospital or could affect adversely the health or welfare of a patient, [the Chief] may request an investigation. The request must be made in writing ... to the PCMH Executive Committee ... and shall contain documentation of the specific activities or conduct which constitutes the grounds for the request." Art. VII, § 2(a).

3 "If this decision [by the Board of Trustees] is contrary to the PCMH Executive Committee's last such recommendation, the [Board of Trustees] shall refer the matter to the Chief of Staff, Chief of Staff—Elect, Secretary, and Chairman of the Credentials Committee of the Medical Staff for further review and recommendation within 30 days...." Art. VIII, § 11(a).

4 To provide continuous patient care, the hospital requires its physicians to remain in Pitt County ("the county") when scheduled on call, or to have another physician agree to "cover" the call as scheduled.

5 "[W]henever action must be taken immediately in the best interest of patient care in the hospital or of the public welfare, the Chief of Staff acting on his own authority ... may ... suspend all or any portion of the clinical privileges of a practitioner...." Art. VII, § 8(a).

6 Plaintiff's first federal lawsuit also included Sanjay Patel, M.D., and Cynthia Brown, M.D., as defendants. Brown and Patel were named defendants in this action as well, but were voluntarily dismissed with prejudice by Plaintiff on 7 May 2011, and thus, are not participants in this appeal.

7 The ad hoc and executive committees, as well as the committee of four, were covered as medical review boards. However, the Board of Trustees is not covered by section 131E–95 or the protective order, and thus, as noted therein, "[i]nformation, records, documents[,] and materials" produced by the Board of Trustees do *not* fall under the statutory privilege.

8 Although Weston's husband is not explicitly identified as "Patient C," the record before us contains no evidence suggesting that Whatley contacted any of Plaintiff's other patients or their family members.

9 Plaintiff notes that he did not discover this alleged tort until at least 8 May 2006, and asserts that his claim is saved by the discovery rule. We note that the so-called "discovery rule" is inapplicable here, as it tolls the running of the statute of limitations only for torts alleging "personal injury or physical damage to claimant's property[.]" N.C. Gen.Stat. § 1–52(16); *see also Birtha v. Stonemor, N.C.,*

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LLC, —–N.C.App. ——, ——, 727 S.E.2d 1, 7 (2012) (holding the discovery rule inapplicable where the "[p]laintiffs do not allege bodily harm or physical damage to [their] property").

10 We note that, on appeal, Plaintiff makes several different contentions in support of his argument that summary judgment was not proper, including, *inter alia,* that the hospital was not entitled to immunity under the Health Care Quality Improvement Act ("HCQIA"), 42 U.S.C. § 11111(a) (2011). Although we touch briefly on a reporting requirement contained in a different section of HCQIA in our discussion of Plaintiff's defamation claim, we uphold the trial court's grant of summary judgment on the basis of our State's statutory and case law and accordingly do not reach any question of immunity under HCQIA.

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748 S.E.2d 585
Court of Appeals of North Carolina.

Judy HAMMOND, Plaintiff,
v.
Saira SAINI, M.D., Carolina Plastic Surgery of Fayetteville, P.C., Victor Kubit, M.D., Cumberland Anesthesia Associates, P.A., Wanda Untch, James Bax, and Cumberland County Hospital System, Inc., Defendants.

No. COA12–1493. | Sept. 3, 2013.

Synopsis
Background: Patient filed a medical malpractice complaint against physician, anesthesiologist, plastic surgery office, hospital and others after she sustained first and second degree burns on her face, head, neck, upper back, right hand, and tongue during surgery to remove a possible basal cell carcinoma from her face. Patient filed a motion to compel discovery. The Superior Court, Cumberland County, Mary Ann Tally, J., granted the motion. Hospital and two nurse anesthetists appealed.

Holdings: The Court of Appeals, Davis, J., held that:

[1] the Court of Appeals had jurisdiction over hospital and nurse anesthetists' appeal of order granting patient's motions to compel discovery;

[2] the root cause analysis (RCA) report, risk management worksheets, and notes prepared by hospital's risk manager after operating room fire were not immune from discovery based on the medical review privilege; and

[3] remand was required to determine whether the notes made by hospital's risk manager concerning the fire in operating room that injured patient were prepared in anticipation of litigation, which would protect the notes from discovery under the work product doctrine, or were prepared in the ordinary course of business, which would allow the notes to be disclosed during discovery.

Dismissed in part; affirmed in part; and remanded in part.

West Headnotes (11)

[1] **Appeal and Error**
Relating to witnesses, depositions, evidence, or discovery

The Court of Appeals had jurisdiction over appeal by hospital and nurse anesthetists from order granting patient's motions to compel discovery, in medical malpractice case; defendants argued that the requested documents were immune from discovery based on the medical review privilege and the work product doctrine, and orders purportedly protecting materials based on medical review privilege or work product doctrine were immediately reviewable on appeal despite their interlocutory nature.

[2] **Appeal and Error**
Relating to witnesses, depositions, evidence, or discovery

An order compelling discovery is generally not immediately appealable because it is interlocutory and does not affect a substantial right that would be lost if the ruling were not reviewed before final judgment.

[3] **Appeal and Error**
Relating to witnesses, depositions, evidence, or discovery

Where a party asserts a privilege or immunity that directly relates to the matter to be disclosed pursuant to the interlocutory discovery order and the assertion of the privilege or immunity is not frivolous or insubstantial, the challenged order affects a substantial right and is thus immediately appealable.

[4] **Appeal and Error**
Relating to witnesses, depositions, evidence, or discovery

Orders compelling discovery of materials purportedly protected by the medical review

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privilege or work product doctrine are immediately reviewable on appeal despite their interlocutory nature.

[5] **Appeal and Error**

Relating to witnesses, depositions, evidence, or discovery

The Court of Appeals lacked jurisdiction over appeal by hospital and nurse anesthetists from order granting patient's motions to compel discovery in medical malpractice case, to extent that defendants argued that the requested documents were not relevant and the requests were overbroad; defendants' contentions did not invoke a recognized privilege or immunity, or affect a substantial right, and thus were not immediately appealable.

[6] **Appeal and Error**

Cases Triable in Appellate Court

On appeal from a trial court's discovery order implicating the medical review privilege, the Court of Appeals reviews de novo whether the requested documents are privileged. West's N.C.G.S.A. § 131E–95.

[7] **Privileged Communications and Confidentiality**

Medical or Health Care Peer Review

The root cause analysis (RCA) report, risk management worksheets, and notes prepared by hospital's risk manager after operating room fire were not immune from discovery based on the medical review privilege, in medical malpractice case; the RCA team, which allegedly issued the RCA report, was not a medical review committee as it was not comprised of medical staff from hospital and it was not formed for the purpose of evaluating the quality, cost of, or necessity for hospitalization or health care, and there was no evidence that the requested documents were part of the RCA team's proceedings or were produced by the RCA team. West's N.C.G.S.A. §§ 131E–76(5), 131E–95.

[8] **Privileged Communications and Confidentiality**

Medical or Health Care Peer Review

In order to determine whether the peer review privilege applies, a court must consider the circumstances surrounding the actual preparation and use of the disputed documents involved in each particular case. West's N.C.G.S.A. § 131E–95(b).

[9] **Appeal and Error**

Ordering New Trial, and Directing Further Proceedings in Lower Court

Remand was required to determine whether the notes made by hospital's risk manager concerning the fire in operating room that injured patient were prepared in anticipation of litigation, which would protect the notes from discovery under the work product doctrine, or were prepared in the ordinary course of business, which would allow the notes to be disclosed during discovery. Rules Civ.Proc., Rule 26(b)(3), West's N.C.G.S.A. § 1A–1.

[10] **Pretrial Procedure**

Work product privilege; trial preparation materials

The party asserting the work product doctrine bears the burden of showing (1) that the material consists of documents or tangible things, (2) which were prepared in anticipation of litigation or for trial, and (3) by or for another party or its representatives which may include an attorney, consultant, surety, indemnitor, insurer or agent. Rules Civ.Proc., Rule 26(b)(3), West's N.C.G.S.A. § 1A–1.

[11] **Appeal and Error**

Depositions, affidavits, or discovery

On appeal, the Court of Appeals reviews the trial court's application of the work product doctrine under an abuse of discretion standard. Rules Civ.Proc., Rule 26(b)(3), West's N.C.G.S.A. § 1A–1.

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***586** Appeal by defendants from orders entered 18 June 2012 by Judge Mary Ann Tally in Cumberland County Superior Court. Heard in the Court of Appeals 22 April 2013.

Attorneys and Law Firms

McGuireWoods, LLP, Raleigh, by Patrick M. Meacham and Monica E. Webb, for defendants-appellants Cumberland County Hospital System, Inc., James Bax, and Wanda Untch.

Patterson Harkavy LLP, by Burton Craige, Raleigh, and Narendra K. Ghosh, Chapel Hill; and Beaver, Holt, Sternlicht & Courie, P.A., Fayetteville, by Mark A. Sternlicht, for plaintiff-appellee.

Opinion

DAVIS, Judge.

Cumberland County Hospital System, Inc. ("CCHS"), James Bax ("Bax"), and Wanda Untch ("Untch") (collectively "defendants") appeal from the trial court's orders compelling them to produce certain documents and divulge certain information in discovery to ***587** Judy Hammond ("plaintiff"). After careful review, we dismiss in part, affirm in part, and remand in part.

Factual Background

On 28 September 2011, plaintiff filed a complaint in Cumberland County Superior Court against defendants as well as Carolina Plastic Surgery of Fayetteville, P.C.; Cumberland Anesthesia Associates, P.A.; Sairi Saini, M.D. ("Dr. Saini"); and Victor Kubit, M.D. ("Dr. Kubit"), [1] which contained the following allegations: Plaintiff reported to Cape Fear Valley Medical Center—operated by CCHS—on 17 September 2010 for a surgical procedure to remove a possible basal cell carcinoma from her face. Dr. Saini, who was employed by Carolina Plastic Surgery of Fayetteville, was responsible for performing the procedure, and Dr. Kubit, an anesthesiologist with Cumberland Anesthesia Associates, was responsible for administering anesthesia during the surgery. Bax and Untch, both registered nurse anesthetists employed by CCHS, were also involved in the provision of anesthesia to plaintiff during the surgery.

Plaintiff was given total intravenous anesthesia. During the operation, Kubit, Bax, and Untch administered supplemental oxygen to plaintiff through a face mask. Drapes were placed around plaintiff's face in such a way that oxygen escaping from the face mask built up under the drapes. When Dr. Saini used an electrocautery device to stop bleeding on plaintiff's face, the oxygen trapped under the drapes ignited and burned the drapes near plaintiff's face. Plaintiff sustained first and second degree burns on her face, head, neck, upper back, right hand, and tongue. Plaintiff also suffered a respiratory thermal injury, right bronchial edema, oral stomatitis, and nasal trauma, which left her with permanent injuries, including scarring.

An answer was filed on behalf of Bax, Untch, and CCHS, generally denying plaintiff's allegations of negligence. Plaintiff subsequently served separate sets of requests for production of documents and interrogatories on Bax, Untch, and CCHS. In their responses, each of them objected to certain aspects of these discovery requests on the grounds that they sought documents or information that was protected from disclosure based on the medical review privilege, the work product doctrine, and the attorney/client privilege. Based on these objections, defendants refused to produce the responsive documents or provide answers to the challenged interrogatories.

Plaintiff filed motions to compel discovery from defendants pursuant to Rule 37 of the North Carolina Rules of Civil Procedure. In opposing the motions, defendants' counsel filed an affidavit from Harold Maynard ("Maynard"), CCHS's risk manager, regarding the accident review process in existence at CCHS. Attached to the affidavit was a copy of an administrative policy of CCHS entitled "Sentinel Events and Root Cause Analysis" ("RCA Policy"). Defense counsel also submitted to the trial court a copy of a document labeled "Fire in Operating Room RCA" ("RCA Report") and copies of reports entitled "Risk Management Worksheets" ("RMWs").

After conducting an *in camera* review of the documents withheld by defendants, the trial court entered separate orders on 18 June 2012 granting plaintiff's motions to compel. Defendants appealed to this Court from these orders.

Analysis

I. Appellate Jurisdiction

[1] As a preliminary matter, we must determine whether this Court possesses jurisdiction over defendants' appeal. Defendants' contentions on appeal can be divided into two categories. First, they argue that a segment of the documents and information requested by plaintiff are immune from discovery based on recognized privileges—namely, the medical review privilege, the work product doctrine, and the attorney/client privilege. Second, they contend that portions of plaintiff's discovery requests are overbroad and seek information that is neither relevant nor reasonably calculated to ***588** lead to the discovery of admissible evidence pursuant to Rule 26 of the North Carolina Rules of Civil Procedure.

[2] **[3]** "An order compelling discovery is generally not immediately appealable because it is interlocutory and does not affect a substantial right that would be lost if the ruling were not reviewed before final judgment." *Sharpe v. Worland,* 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999). However, where a party asserts a privilege or immunity that directly relates to the matter to be disclosed pursuant to the interlocutory discovery order and the assertion of the privilege or immunity is not frivolous or insubstantial, the challenged order affects a substantial right and is thus immediately appealable. *K2 Asia Ventures v. Trota,* —— N.C.App. ——, ——, 717 S.E.2d 1, 4, *disc. review denied,* 365 N.C. 369, 719 S.E.2d 37 (2011).

[4] For this reason, orders compelling discovery of materials purportedly protected by the medical review privilege or work product doctrine are immediately reviewable on appeal despite their interlocutory nature. *See, e.g., Woods v. Moses Cone Health Sys.,* 198 N.C.App. 120, 123–24, 678 S.E.2d 787, 790 (2009) (medical review privilege), *disc. review denied,* 363 N.C. 813, 693 S.E.2d 353 (2010); *Boyce & Isley, PLLC v. Cooper,* 195 N.C.App. 625, 636–37, 673 S.E.2d 694, 701–02 (work product doctrine), *disc. review denied,* 363 N.C. 651, 686 S.E.2d 512 (2009). Accordingly, this Court has jurisdiction to review defendants' contentions on appeal that are based on the medical review privilege and the work product doctrine. [2]

[5] However, with regard to the arguments advanced by defendants based on overbreadth and relevancy, we do not possess jurisdiction to consider these contentions because they do not invoke a recognized privilege or immunity, and defendants have failed to otherwise show that they affect a substantial right. *See Wind v. City of Gastonia,* —— N.C.App. ——, ——, 738 S.E.2d 780, 782 (2013) (holding that only questions of whether requested files were shielded from discovery by statutory privilege were properly before appellate court); *K2 Asia Ventures,* —— N.C.App. at ——, 717 S.E.2d at 4 (concluding that only portion of discovery order concerning attorney/client privilege and work product immunity was immediately appealable).

For these reasons, we lack jurisdiction to consider defendants' arguments regarding overbreadth and relevancy. Consequently, those portions of defendants' appeal are dismissed.

II. Medical Review Privilege

We now turn our attention to those issues on appeal that are properly before us. We begin by examining the applicability of North Carolina's medical review privilege codified in N.C. Gen.Stat. § 131E–95.

A. Statutory Framework

As this Court has recognized, "N.C. Gen.Stat. § 131E–95, part of the Hospital Licensure Act, creates protection for medical review committees in civil actions against hospitals." *Woods,* 198 N.C.App. at 124, 678 S.E.2d at 791. The privilege is set out in N.C. Gen.Stat. § 131E–95(b), which provides, in pertinent part, as follows:

> The proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential and not considered public records within the meaning of G.S. 132–1 ... and shall not be subject to discovery or ***589** introduction into evidence in any civil action against a hospital ... which results from matters which are the subject of evaluation and review by the committee.

N.C. Gen.Stat. § 131E–95(b) (2011).

"By its plain language, N.C. Gen.Stat. § 131E–95 creates three categories of information protected from discovery and admissibility at trial in a civil action: (1) proceedings of a medical review committee, (2) records and materials produced by a medical review committee, and (3) materials considered by a medical review committee." *Woods,* 198 N.C.App. at 126, 678 S.E.2d at 791–92. The statute goes on

to state, however, that "information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee." N.C. Gen.Stat. § 131E–95 (b).

N.C. Gen.Stat. § 131E–76 defines the term "[m]edical review committee" as

> any of the following committees formed for the purpose of evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing:
>
> a. A committee of a state or local professional society.
>
> b. A committee of a medical staff of a hospital.
>
> c. A committee of a hospital or hospital system, if created by the governing board or medical staff of the hospital or system or operating under written procedures adopted by the governing board or medical staff of the hospital or system.
>
> d. A committee of a peer review corporation or organization.

N.C. Gen.Stat. § 131E–76(5)(a)–(d) (2011).

[6] On appeal from a trial court's discovery order implicating the medical review privilege, this Court "review[s] de novo whether the requested documents are privileged under N.C. Gen.Stat. § 131E–95(b)." *Bryson v. Haywood Reg'l Med. Ctr.,* 204 N.C.App. 532, 535, 694 S.E.2d 416, 419, *disc. review denied,* 364 N.C. 602, 703 S.E.2d 158 (2010). In the present case, defendants, as the parties objecting to the disclosure of the materials on the basis of this privilege, bear the burden of establishing that plaintiff's discovery requests fall within the scope of the privilege. *Hayes v. Premier Living, Inc.,* 181 N.C.App. 747, 751, 641 S.E.2d 316, 318 (2007). Where, as here, the trial court's order does not contain findings of fact and conclusions of law but rather simply lists the documents that are discoverable, "it is presumed that the court on proper evidence found facts to support its [decision]." *Evans v. United Servs. Auto. Ass'n,* 142 N.C.App. 18, 27, 541 S.E.2d 782, 788 (citation and quotation marks omitted), *cert. denied,* 353 N.C. 371, 547 S.E.2d 810 (2001). [3]

B. Application of Medical Review Privilege

[7] Defendants contend that North Carolina's medical review privilege shields from discovery: (1) the RCA Report; (2) the RMWs; and (3) notes prepared by Maynard (CCHS's risk manager) after the operating room fire.

The RCA Report is a document consisting of multiple pages, containing a "Brief Overview" of the incident resulting in the operating room fire, a description of the post-fire review process undertaken by the hospital's Root Cause Analysis Team ("RCA Team"), and the RCA Team's ultimate recommendations based on that review process. The two RMWs appear to be computer-generated reports containing several different "Data" sections that include set fields for entering information. In the "General Event Data" section of both RMWs is a "Comments" field, each of which contains a general description of the events surrounding the operating room fire. As for Maynard's meeting notes, while they were not submitted to either the trial court or this Court for review, Maynard's affidavit describes them as "notes reflecting the discussions that occurred" in meetings he conducted regarding the fire.

***590** Defendants invoke the medical review privilege by asserting that these documents are all connected with the investigation of the operating room fire by the RCA Team. All of defendants' contentions regarding the applicability of the medical review privilege hinge on the proposition that CCHS's RCA Team is, in fact, a medical review committee for purposes of § 131E–76(5). If the RCA Team does not constitute a medical review committee as statutorily defined, then defendants' entire argument premised on the medical review privilege fails.

Defendants do not identify in their brief which specific prong(s) of § 131E–76(5) they believe the RCA Team falls under in order to qualify as a medical review committee. At oral argument, however, counsel for defendants stated that the RCA Team would qualify as a medical review committee under either subsection (b) or (c) of § 131E–76(5). After carefully reviewing the record, we conclude that defendants failed to meet their burden of showing that the RCA Team qualifies as a medical review committee for purposes of § 131E–76 (5)(b) or (c).

In order to fall within § 131E–76 (5)(b), defendants must show that (1) the RCA Team was comprised of the "medical staff of a hospital"; and (2) it was "formed for the purpose of evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing [.]" N.C. Gen.Stat. § 131E–76 (5)(b).

Defendants have failed to meet even the first of these two prongs. Neither the RCA Report itself nor any other document presented by defendants identifies the members of the RCA Team as being part of the "medical staff of [CCHS]," as required by the statute. N.C. Gen.Stat. § 131E–76(5)(b). This omission is fatal to defendants' attempt to avail themselves of this provision of § 131E–76(5). Therefore, we conclude that defendants have not shown that the RCA Team constitutes a medical review committee under § 131E–76(5)(b).

In order to qualify as a medical review committee under § 131E–76(5)(c), the RCA Team must have been "created by the governing board or medical staff of the hospital or system or operating under written procedures adopted by the governing board or medical staff of the hospital or system." N.C. Gen.Stat. § 131E–76(5)(c). Maynard, in his affidavit, stated that "*[i]n general,* the peer review committees established to ... prepare a root cause analysis are created by the medical staff and governing board of CCHS and operate under the [RCA Policy] ..." (Emphasis added.) The inherent ambiguity of the phrase "in general" leaves open the possibility that this sequence of events does not occur in every case. Notably absent from Maynard's affidavit is any statement that the RCA Team established *in this specific case* to review the operating room fire was created by the governing board or medical staff of CCHS or that the RCA Team operated under the RCA Policy. Nor does the RCA Report itself provide these details.

Similarly, defendants have also failed to establish that the RCA Policy was, in fact, "adopted by the governing board or medical staff of the hospital or system." N.C. Gen.Stat. § 131E–76(5)(c). The policy contains a notation that it was "approved by MN"—yet nothing in the record, including Maynard's affidavit, identifies who "MN" is. For all of these reasons, we believe that defendants failed to satisfy their burden of proving that the RCA Team constitutes a medical review committee for purposes of § 131E–76 (5)(c).

[8] Even assuming *arguendo* that the RCA Team did qualify as a medical review committee, defendants would still have been required to "present ... evidence tending to show that the disputed [documents] were (1) part of the [RCA Team]'s *proceedings,* (2) *produced* by the [RCA Team], or (3) *considered* by the [RCA Team] as required by" § 131E–95. *Hayes,* 181 N.C.App. at 752, 641 S.E.2d at 319 (emphasis in original). This Court has

> emphasize[d] that these are substantive, not formal, requirements. Thus, in order to determine whether the peer review privilege applies, a court must consider the circumstances surrounding the actual preparation and use of the disputed documents involved in each particular case. The title, description, or stated purpose ***591** attached to a document by its creator is not dispositive, nor can a party shield an otherwise available document from discovery merely by having it presented to or considered by a quality review committee.

Id. (footnote and emphasis omitted).

First, with respect to the RCA Report, defendants failed to submit any evidence revealing who produced or prepared it. While the document, on its cover page, identifies the event that is the subject of the report and the members of the team, it does not list its author. Defendants assert—pointing to Maynard's affidavit—that the RCA Team produced the report. Maynard's affidavit, however, states only that "[a] Root Cause Analysis Report *was prepared*...." (Emphasis added.) It neither identifies the RCA Team members—individually or collectively—as the author of the RCA Report nor otherwise reveals the document's author.

Second, with respect to the computer-generated RMWs, defendants refer to these documents not as RMWs—the title provided on the face of the printouts—but rather as Quality Care Control Reports. Defendants maintain that these documents were prepared by Bax and Stephanie Emanuel ("Emanuel"), another nurse present in the operating room during the fire, as part of the review process outlined in the RCA Policy. Although the RCA Policy does, in fact, identify Quality Care Control Reports as a "means" for initiating a review, the RCA Policy nowhere refers to RMWs, and nothing on the face of the RMWs indicates they actually are the Quality Care Control Reports contemplated by the RCA Policy.

Nor is it clear who prepared the RMWs. Both RMWs indicate on their face that the information contained in the comments section was entered by someone with the initials "RDE"—without any further indication of that person's identity. However, other sections of the RMWs suggest that they may have been completed by Emanuel and Bax—although it is not clear that this is, in fact, what occurred. Thus, the source of the information contained in the RMWs is unclear.

Finally, with respect to Maynard's meeting notes, these notes—as discussed below—may fall within the work product privilege. However, defendants have failed to meet their burden of establishing that these documents come within the purview of the medical review privilege.

In holding that defendants have failed to sustain their burden of proving that the three categories of documents at issue are privileged under § 131E–95, we find instructive our decision in *Bryson v. Haywood Reg'l Med. Ctr.,* 204 N.C.App. 532, 694 S.E.2d 416. In *Bryson,* the plaintiff—an internist—filed suit against the hospital where she had worked, claiming that her employment had been terminated in retaliation for her reporting "patient safety issues." *Id.* at 533–34, 694 S.E.2d at 418. During discovery, the hospital refused to respond to several of the plaintiff's interrogatories and document requests, "contending that they sought disclosure of the proceedings, records, and materials produced or considered by a medical review committee, which constituted information protected from discovery under N.C. Gen.Stat. § 131E–95(b)." *Id.* at 534, 694 S.E.2d at 418–19. In response to the plaintiff's motion to compel, the hospital submitted some—but not all—of the requested materials to the trial court for *in camera* review. *Id.,* 694 S.E.2d at 419. After reviewing the filed documents, the trial court entered an order protecting some documents from disclosure but directing others to be produced. *Id.*

On appeal, the hospital argued that certain internal documents ordered by the trial court to be produced were "privileged because they relate[d] to internal peer review investigations of patient charts requested by its Risk Management Department." *Id.* at 538, 694 S.E.2d at 421. In rejecting the hospital's contention, we observed that (1) "the documents on their face do not establish that they are privileged"; and (2) the hospital "submitted no affidavits or other evidence to support its claim that the documents at issue were protected from discovery under N.C. Gen. Stat. § 131E–95(b)." *Id.* at 540, 694 S.E.2d at 422. Thus, because of the defendants' failure to provide sufficient evidence that the medical review privilege applied, *id.* at 538–39, 694 S.E.2d at 421, we were compelled to conclude that the hospital had "failed to meet ***592** its burden of showing that the documents f[e]ll into one of the three categories of privileged material under N.C. Gen.Stat. § 131E–95(b)," *id.* at 533, 694 S.E.2d at 418.

While, unlike in *Bryson,* defendants here did submit an affidavit in support of their argument based on the medical review privilege, the affidavit—as explained above—is insufficient to satisfy their burden of proving that the RCA Report, the RMWs, and Maynard's meeting notes are privileged under § 131E–95. The mere submission of affidavits by the party asserting the medical review privilege does not automatically mean that the privilege applies. Rather, such affidavits must demonstrate that each of the statutory requirements concerning the existence of the privilege have been met. Accordingly, defendants' arguments on this issue are overruled. [4]

III. Work Product Doctrine

[9] Defendants also contend that the work product doctrine—set out in Rule 26(b)(3) of the North Carolina Rules of Civil Procedure—protects from disclosure notes made by Maynard regarding his discussions with Bax, Untch, and various other individuals possessing knowledge of the operating room fire as well as information about the content of these discussions. [5]

The work product doctrine prohibits an adverse party from compelling "the discovery of documents and other tangible things that are 'prepared in anticipation of litigation' unless the party has a substantial need for those materials and cannot 'without undue hardship ... obtain the substantial equivalent of the materials by other means.' " *Long v. Joyner,* 155 N.C.App. 129, 136, 574 S.E.2d 171, 176 (2002) (quoting N.C. R. Civ. P. 26(b)(3)), *disc. review denied,* 356 N.C. 673, 577 S.E.2d 624 (2003).

[10] The party asserting the work product doctrine "bears the burden of showing (1) that the material consists of documents or tangible things, (2) which were prepared in anticipation of litigation or for trial, and (3) by or for another party or its representatives which may include an attorney, consultant, surety, indemnitor, insurer or agent." *Evans,* 142 N.C.App. at 29, 541 S.E.2d at 789 (citation and quotation marks omitted). Our Supreme Court has made clear, however, that "[m]aterials prepared in the ordinary course of business are not protected, nor does the protection extend to facts known by any party." *Willis v. Duke Power Co.,* 291 N.C. 19, 35, 229 S.E.2d 191, 201 (1976) (citing C. Wright & A. Miller, *Federal Practice and Procedure* § 2024, at 197 (1970)).

[11] On appeal, we review "the trial court's application of the work product doctrine ... under an abuse of discretion standard." *Evans,* 142 N.C.App. at 27, 541 S.E.2d at 788. Under this standard, a trial court's ruling may be reversed

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only upon a showing that it was manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision. *K2 Asia Ventures,* ––– N.C.App. at –––, 717 S.E.2d at 8 (citation and quotation marks omitted).

Defendants contend that Maynard's notes were prepared in anticipation of litigation, ***593** relying on the following statement in Maynard's affidavit:

> Because of the nature of the event (a fire in the operating room) and based on my experience as a Risk Manager, I immediately anticipated that litigation related to the event could result. In anticipation of litigation, I met with members of the plaintiff's family along with Jim Bax, CRNA, Dr. Saini, Dr. Kubit and Dr. Ruben Rivers to discuss the incident. I do not recall the date of that meeting. On September 20, 2010, in anticipation of litigation, I met with operating room personnel to discuss the event. This meeting occurred after my meeting with Ms. Hammond's family. After both of these meetings, and in anticipation of litigation, I prepared notes reflecting the discussions that occurred in the meetings.

Plaintiff counters, however, by arguing that the record is unclear whether Maynard actually prepared his notes in the ordinary course of business pursuant to CCHS's policies regarding "Quality Care Reports," "Reportable Incidents," and the "Patient Safety Response Team." If so, plaintiff contends, the notes would not qualify for work product immunity under Rule 26(b)(3) because they would have been prepared pursuant to hospital policy as a matter of course following incidents of this nature regardless of whether litigation was anticipated. *See Cook v. Wake County Hosp. Sys., Inc.,* 125 N.C.App. 618, 625, 482 S.E.2d 546, 551–52 (1997) (holding that hospital's accident report was not protected from discovery under Rule 26(b)(3) because "report would have been compiled, pursuant to the hospital's [risk management] policy, regardless of whether [plaintiff] intimated a desire to sue the hospital or whether litigation was ever anticipated by the hospital").

In this regard, we note that on at least two occasions, plaintiff requested that CCHS "[p]rovide all hospital bylaws, policies, rules, and/or procedures" relating to "the prevention of fire in operating rooms or during surgery...." CCHS, however, never provided plaintiff with the responsive policies. Nor did CCHS submit them to the trial court for consideration—despite counsel's acknowledgment during oral arguments at this Court that having the requested policies would have been helpful to the trial court in determining whether Maynard's notes were prepared in anticipation of litigation as required by Rule 26(b)(3).

We are unable to determine on the record currently before us whether the trial court abused its discretion in compelling the production of Maynard's notes in the face of defendants' work product objection. Nor do we believe that the trial court was capable of making a determination of whether these notes were made in the ordinary course of the hospital's business without first examining the policies requested by plaintiff and determining whether the notes were made pursuant to hospital policy.

In concluding that a remand to the trial court is necessary on this issue, we are guided by our decision in *Diggs v. Novant Health, Inc.,* 177 N.C.App. 290, 628 S.E.2d 851 (2006), *disc. review denied,* 361 N.C. 426, 648 S.E.2d 208 (2007). In *Diggs,* the plaintiff suffered injuries during a surgical procedure and brought a medical malpractice claim against the hospital where the procedure was performed and against the members of the medical staff involved. *Id.* at 293–94, 628 S.E.2d at 854. During discovery, the plaintiff moved to compel the defendants to produce any documents "discuss [ing]" the plaintiff's injury or "any problems ... during her ... hospitalization.' " *Id.* at 310, 628 S.E.2d at 864.

The defendants objected to the disclosure, arguing that the responsive documents—contained in their " 'Risk Management file' "—"were protected from production by the attorney-client privilege and the work product doctrine...." *Id.* After reviewing the documents *in camera,* the trial court denied in part and granted in part the plaintiff's motion to compel. *Id.* On appeal, the plaintiff contended that the trial court erred to the extent that it did not compel production of all the responsive documents.

This Court, after explaining that the work product doctrine shields from discovery only those "documents prepared 'in anticipation of litigation,' " reviewed the submitted documents in light of the hospital's "policy 'for ***594** the

reporting of all unexpected events' " in order to determine whether the documents were prepared pursuant to that policy. *Id.* at 310–11, 628 S.E.2d at 864–65. However, after "carefully examin[ing] the documents and the information provided by [the] defendants regarding the nature of those documents[,]" *id.* at 310, 628 S.E.2d at 864, we were "unable to determine from the current record whether the documents at issue were generated pursuant to [the hospital's risk management] policy[,]" *id.* at 312, 628 S.E.2d at 865.

In particular, we observed that while "certain documents appear to correspond to the reports and summaries required by the hospital's policy," they were not specifically labeled as such, and thus we could not properly determine their status. *Id.* at 312, 628 S.E.2d at 865. Thus, we "remand [ed] to the trial court for further review as to these documents," emphasizing that the "defendants b[ore] the burden of demonstrating that the specified documents" were protected. *Id.*

Similarly, here, for the reasons set out above, we remand to the trial court for it to conduct an analysis of whether Maynard's notes are protected by the work product doctrine based on its review not only of Maynard's affidavit and the other evidentiary submissions in the record but also based on its review of the pertinent policies of CCHS. We note our concern regarding the inordinate amount of time defendants have taken to provide the requested policies to plaintiff. We direct the trial court, on remand, to issue a deadline for defendants to submit the policies at issue both to plaintiff and to the trial court. After the trial court has completed its review, it shall issue a new order containing its determination of whether the work product doctrine serves as a bar to the issuance of an order compelling the production of these meeting notes. We leave it to the trial court's discretion whether defendants should be required to also submit the notes themselves to the court for an *in camera* inspection.

Finally, we reject defendants' argument that the trial court abused its discretion in compelling them to respond to plaintiff's interrogatories despite their objections based on the work product doctrine. It is well established that the work product doctrine only applies to documents or other tangible things. *See Long,* 155 N.C.App. at 136–37, 574 S.E.2d at 176 (holding that "plaintiff's interrogatories did not violate Rule 26(b)(3)" because they "did not ask defendants for documents or tangible things").

Conclusion

For the reasons stated above, we dismiss defendants' appeal in part, affirm the trial court's orders granting plaintiff's motions to compel in part, and vacate and remand that portion of the trial court's orders compelling the production of Maynard's meeting notes.

DISMISSED IN PART; AFFIRMED IN PART; REMANDED IN PART.

Chief Judge MARTIN and Judge BRYANT concur.

Footnotes

1 Defendants Carolina Plastic Surgery of Fayetteville, Cumberland Anesthesia Associates, Dr. Saini, and Dr. Kubit are not parties to this appeal.

2 An interlocutory order compelling production of documents alleged to be protected from disclosure by the attorney/client privilege also affects a substantial right and is, therefore, immediately appealable. *Evans v. United Servs. Auto. Ass'n,* 142 N.C.App. 18, 23–24, 541 S.E.2d 782, 786, *cert. denied,* 353 N.C. 371, 547 S.E.2d 810 (2001). Here, although defendants make a passing reference to the attorney/client privilege in their brief, they make no specific argument regarding the applicability of this privilege as required under Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure. Moreover, our review of the transcript of the hearing on plaintiff's motions to compel reveals that defendants likewise did not make any argument before the trial court concerning the attorney/client privilege. As such, defendants have waived any argument based on the attorney/client privilege and, accordingly, we do not address its applicability in this opinion.

3 A trial court is not required to make findings of fact or conclusions of law where no request is made by the parties. *J.M. Dev. Grp. v. Glover,* 151 N.C.App. 584, 586, 566 S.E.2d 128, 130 (2002).

4 We note that defendants' brief contains a cursory, one-sentence argument that the documents at issue are also protected by the statutory privilege afforded to quality assurance committees in N.C. Gen.Stat. § 90–21.22A. This Court has recognized that the privilege applicable to quality assurance committees pursuant to § 90–21.22A "is functionally identical" to the privilege afforded to medical review committees under § 131E–95(b). *Armstrong v. Barnes,* 171 N.C.App. 287, 294, 614 S.E.2d 371, 376, *disc. review denied,*

360 N.C. 60, 621 S.E.2d 173 (2005). Accordingly, for the reasons already discussed, we conclude that defendants failed to sustain their burden of proving the applicability of § 90–21.22A as well.

5 In their brief, defendants mention in passing other discovery requests that they contend are protected by the work product doctrine. Defendants, however, fail to advance any specific argument regarding the applicability of the work product doctrine to the documents or information sought by these discovery requests. Defendants' failure to make a particularized argument regarding these specific discovery requests constitutes waiver of the issue on appeal. *See Latta v. Rainey,* 202 N.C.App. 587, 597, 689 S.E.2d 898, 908 (2010) (holding that where "defendant fail[ed] to make any specific argument in his brief" regarding certain issue, the issue was deemed abandoned on appeal).

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NORTH CAROLINA

SMITH COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.: 99 CVS 123

BERNARD BOMBAY, M.D.,

Plaintiff,

v.

GENERAL HOSPITAL INCORPORATED d/b/a GENERAL HOSPITAL'S HEALTH CARE SYSTEM,

Defendant.

MOTION TO SEAL PEER REVIEW MATERIALS AND CLOSE PROCEEDINGS

Court Code: OTHR

NOW COMES the undersigned counsel for Plaintiff, pursuant to N. C. Gen. Stat. §131E-95, 1-72.1(d), and pursuant to the decision of Supreme Court of North Carolina in Virmani v. Presbyterian Health Services Corp., In re Knight Publishing Company, 350 N.C. 449 (1999), and moves the Court to seal confidential peer review materials submitted to the Presiding Judge for *in camera* review. The Hospital further moves the Court to close the hearing on this matter to the public, or to conduct proceedings on this matter in chambers.

In support of Plaintiff's Motion for Preliminary Injunction and in opposition to Defendant's Rule 12(b) Motion to Dismiss, the Hospital desires to submit to the Court for *in camera* inspection confidential medical peer review materials relating to the parties. During oral argument on Plaintiff's Motion for Preliminary Injunction and Defendant's Motion to Dismiss, counsel also desires to submit evidence and oral argument that will or may include reference to confidential peer review records. The Virmani decision confirmed that North Carolina's medical peer review statute, N. C. Gen. Stat. §131E-95, is intended to protect confidentiality of peer review records. The Court concluded that: (1) a trial court may close court hearings in which medical peer review documents or materials are discussed, and (2) the trial court may seal peer

review documents to protect their confidentiality as long as they are presented to the trial judge and not filed with the Clerk of Court. In reaching its conclusions, the Court confirmed that the North Carolina peer review statute provides broad protection for confidential peer review records and that protecting the confidentiality of medical peer review is a compelling state interest that outweighs the public's right of access to that information.

In support of the foregoing motion, the Hospital attaches hereto as Exhibit A, a copy of N. C. Gen. Stat. §131E-95 and as Exhibit B, a copy of N.C. Gen. Stat § 1-72-1, and as Exhibit C, a copy of the controlling case of Virmani v. Presbyterian Health Services Corp., In re Knight Publishing Company, 350 N.C. 449 (1999).

This the _______ day of April 1999.

____

Darrin Stevens
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Raleigh, NC 27611
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Facsimile: 919.333.8800

Attorneys for Bernard Bombay, M.D.

CERTIFICATE OF SERVICE

This is to certify that I have this day caused the following counsel to be served with a copy of the foregoing via hand delivery.

Larry Tate, Esq.
Law Office of Larry Tate
555 Northwest 1st Street
Winston-Salem, North Carolina 27101
Counsel for Plaintiff

This _____ day of April, 1999.

____
Darrin Stevens

NORTH CAROLINA

SMITH COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.: 99 CVS 123

BERNARD BOMBAY, M.D.,

Plaintiff,

v.

GENERAL HOSPITAL INCORPORATED d/b/a GENERAL HOSPITAL'S HEALTH CARE SYSTEM,

Defendant.

ORDER SEALING PEER REVIEW MATERIALS COURT AND CLOSING PROCEEDINGS

Code: OTHR

THIS MATTER came on for hearing before the undersigned Superior Court Judge Presiding on ____ April 1999, on the Plaintiff's Motion to Seal Peer Review Materials and to Close Proceedings. Plaintiff was represented by Darrin Stevens and Defendant was represented by Larry Tate. After considering arguments of counsel and after consideration of memoranda of law, matters of record, and matters considered *in camera* by the Court pursuant to N. C. Gen. Stat. §1-72.1(d), the Court is of the opinion that Plaintiff's motion should be allowed to the extent set forth in this Order. The Court therefore makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT:

1. Plaintiff Bernard Bombay, M.D. ("Dr. Bombay") seeks damages and injunctive relief against Defendant General Hospital, Incorporated ("Hospital") on grounds that the Hospital has wrongfully taken action to suspend him from the medical staff and wrongfully placed limitations on his medical staff privileges and taken other adverse action against him, in violation of his due process rights and in violation of the Medical Staff Bylaws.

2. Plaintiff has filed a Complaint in this action and obtained a Temporary Restraining Order on 4 April 1999 to maintain the *status quo*, and the matter is now before the Court on Plaintiff's Motion for a Preliminary Injunction.

3. Counsel for the Plaintiff has tendered to the Court for its *in camera* inspection a number of peer review documents relating to Dr. Bombay, subject to Plaintiff's Motion to Seal Peer Review Materials and Close Proceedings during discussion of peer review materials relating to Dr. Bombay.

4. Dr. Bombay's counsel has submitted for *in camera* examination, but did not file, the peer review documents. The peer review documents have been submitted to the Court for its *in camera* inspection, subject to the confidentiality requirements of N. C. Gen. Stat. §131E-95, and pursuant to the decision of Supreme Court of North Carolina in Virmani v. Presbyterian Health Services Corp., In re Knight Publishing Company, 350 N.C. 449 (1999). The decision of the North Carolina Supreme Court in Virmani specifically approved this practice as the proper mechanism for tendering confidential peer review materials to the Court for its consideration.

5. The Court has examined the documents *in camera* and has found that the same are medical review committee documents, within the scope of N. C. Gen. Stat. §131E-95(b), and accordingly are subject to the peer review protection allowed by law, are confidential, and are not considered public records.

6. Public disclosure of these peer review materials could cause harm both to Plaintiff and Defendant and to the peer review process at the Hospital. The Court has considered alternatives to closure of the Court and sealing documents offered by the Hospital, and finds none. The Court finds that redacting identifying information regarding patients and participants

in the peer review process would not prevent harm to Plaintiff, to Defendant, or to the peer review process at the Hospital.

7. The Court is mindful that civil court proceedings and records are ordinarily open to the public, but that such right is not absolute. In the case of peer review, the legislature has determined that the public right of access may be outweighed by the compelling countervailing interest in protecting the confidentiality of the medical peer review process. The General Assembly has recognized the compelling interest of such confidentiality by enacting N. C. Gen. Stat. §131-95. In this case, the Court has limited closing the proceeding to the very minimum necessary to protect the confidentiality of peer review.

Based on the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW:

1. The documents submitted by the Hospital to the Court on 4 April 1999 are appropriate documents for *in camera* inspection by the Court pursuant to N. C. Gen. Stat. §1-72.1(d). Submission of these documents to the Court, without filing or introduction into evidence, did not render them a judicial record subject to constitutional, common law, or statutory rights of access.

2. The documents reviewed by the Court *in camera* are medical review committee documents, protected by the peer review privilege of N. C. Gen. Stat. §131E-95.

3. The qualified public right of access to civil court proceedings and records in this case is outweighed by the countervailing governmental interest in protecting the confidentiality of the medical peer review process.

4. The Court has considered alternatives to closing the proceedings and sealing the peer review records tendered by the hospital for *in camera* inspection and finds there are none that would prevent harm to Plaintiff, to Defendant and to the peer review process.

5. Materials filed with the Clerk of Court by either party are in the public domain and not subject to this order.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, IT IS ORDERED that Defendant's Motion to Seal Peer Review Materials and to Close Proceedings is allowed. The proceedings shall be closed only for that period of time during which peer review materials are being addressed by testimony, by affidavits, or during arguments of counsel. It is further ORDERED that transcriptions of the closed proceedings, if any, shall be sealed and not transcribed without the order of a Superior Court Judge.

This ______ day of April, 1999.

____

Superior Court Judge Presiding

RALEIGH 470721

NORTH CAROLINA

CHEROKEE COUNTY

FILED IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07 CVS 162

2008 MAR 17 PM 1:41
CHEROKEE CO., C.S.C.

MURPHY MEDICAL CENTER, INC,

Plaintiff,

vs.

ERIC SCOTT SILLS, M.D.

Defendant.

ORDER DENYING DEFENDANT'S MOTION TO COMPEL

THIS MATTER came on for hearing before the undersigned Superior Court Judge on 19 November 2007, upon motion of Defendant Eric Scott Sills, M.D. ("Defendant") to compel Plaintiff Murphy Medical Center, Inc. ("Plaintiff") to produce Defendant's own peer review file in its entirety and to compel production of an audio-tape made during a meeting of the Medical Staff Peer Review Committee that occurred on 25 October 2006 at Murphy Medical Center, said motion having been filed pursuant to Rules 26 and 37 of the North Carolina Rules of Civil Procedure. Present at the hearing were counsel for Plaintiff, Ronald M. Cowan and Samuel O. Southern, and counsel for Defendant, Lee M. Whitman, Sarah M. Johnson, and Russell L. McLean III.

THE COURT CONSIDERED the pleadings, exhibits, affidavits of Defendant and Susann Sills, and miscellaneous documents filed by the parties. Counsel for the Plaintiff also tendered to the Court for its *in camera* inspection two sealed envelopes, one containing the contents of Defendant's peer review file and the second containing a written transcript of the audio-tape made during a Peer Review Committee meeting that occurred on 25 October 2006 (collectively "Confidential Materials"). The Confidential Materials, which are the subject of Defendant's

Motion to Compel Discovery Responses, were presented directly to the Presiding Judge and not filed with the Clerk of Court. The Court granted the Plaintiff's request for *in camera* review of the contents of the two sealed envelopes. By separate order, the Court has directed that the Confidential Materials be placed in a sealed envelope, and preserved in the Court file for possible appellate review.

AFTER CONSIDERATION of the foregoing matters, and after consideration of cases and authorities submitted by counsel, and after consideration of briefs and arguments of counsel, the Court in its discretion has determined that Dr. Sill's Motion to Compel Discovery Responses should be and the same is hereby DENIED.

At the request of counsel for Defendant, and pursuant to Rule 52(a)(2), North Carolina Rules of Civil Procedure, the Court makes the following

FINDINGS OF FACT:

1. Plaintiff operates Murphy Medical Center, a hospital located in Cherokee County, North Carolina.

2. Defendant is a former member of the Medical Staff at Murphy Medical Center. He relocated to the Cherokee County area in 2005, pursuant to the terms of a Recruitment Agreement entered into between Plaintiff and Defendant.

3. Defendant resigned from the Medical Staff of Murphy Medical Center on or about 9 November 2006, and now resides in the state of New York.

4. Plaintiff commenced this action on 14 March 2007 by filing a Complaint against Defendant, alleging breach of the aforesaid Recruitment Agreement. Defendant answered, denied the material allegations of the Complaint, and alleged affirmative defenses of estoppel, duress, disparate treatment and unclean hands. Defendant also asserted counterclaims for breach

of contract, breach of the Identity Theft Protection Act, unfair and deceptive trade practices, and rescission.

5. The Medical Staff Peer Review Policy at Murphy Medical Center which was in effect in October 2006 sets forth its policy for evaluating the quality of care and appropriateness of the delivery of health care services by Medical Staff members. It authorizes the Physician Quality Improvement Committee (also called the Peer Review Committee) to consider issues regarding the clinical competence and practice of any Medical Staff member.

6. On 25 October 2006, the Peer Review Committee met and considered information relating to Defendant's competence and practice. An audio-tape was made during the meeting.

7. The aforesaid Medical Staff Peer Review Policy at Murphy Medical Center also provides in part as follows: "Medical Staff members may request access to peer review information as it appears in their individual file. All requests must be received in writing."

8. Defendant made no written request for his peer review file at any time prior to his resignation from the Medical Staff. After Defendant's resignation from the Medical Staff and after this litigation commenced, Defendant's attorneys served written discovery seeking peer review materials.

9. On or about 22 October 2007, Defendant filed his Motion to Compel Production of Discovery, which motion is the subject of this order. The motion to compel sought "(1) Dr. Sills' peer review file in its entirety and (2) the audiotape made of the October 25, 2007 (sic) peer review meeting."

Based upon the foregoing findings of fact, the Court now makes the following

CONCLUSIONS OF LAW:

(1) The Medical Staff Peer Review Committee is a "medical review committee" as defined by N. C. Gen. Stat. §131E-76(5).

(2) Pursuant to N. C. Gen. Stat. §131E-95, the proceedings of a medical review committee, the records and materials it produces and the materials it considers are not subject to discovery or introduction into evidence in any civil action against a hospital which results from matters which are the subject of evaluation and review by the committee.

(3) The Court has examined *in camera* the Confidential Materials. The Confidential Materials constitute proceedings of a medical review committee, the records and materials produced by a medical review committee and/or the materials considered by a medical review committee.

(4) The claims asserted between the Plaintiff and Defendant constitute a civil action against the Plaintiff resulting from matters which are the subject of evaluation and review by a medical review committee.

(5) The Medical Staff Peer Review Policy regarding physicians' right to access their individual peer review files upon written request does not entitle Defendant access to his peer review file in this litigation.

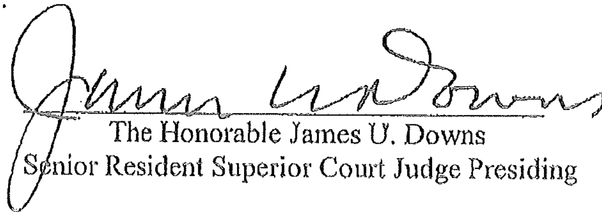
(6) The peer review privilege established by N.C. Gen. Stat. §131E-95 protects all materials and records "produced" or "considered" by the Peer Review Committee. The statute provides that "information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee." N. C. Gen. Stat. §131E-95(b). This provision means that information, in whatever

form available, from original sources other than the medical review committee is not immune from discovery or use at trial merely because it was presented during medical review committee proceedings. The language does not establish an independent basis for discovery of materials directly from the Peer Review Committee

(7) The Confidential Materials are not subject to discovery under Rule 26 and Rule 34 of the North Carolina Rules of Civil Procedure.

Based on the foregoing Findings of Fact and Conclusions of Law, and in the exercise of the Court's sound discretion, it is ORDERED by the Court that Defendant Sills' Motion to Compel Discovery Responses be and the same hereby is DENIED.

This the 12th day of March, 2008.



The Honorable James U. Downs
Senior Resident Superior Court Judge Presiding