

Pa. Ruling Equips Med Mal Patients With New Discovery Tool

By **Y. Peter Kang**

Law360 (April 4, 2018, 6:38 PM EDT) -- The Pennsylvania Supreme Court's ruling that a state law shielding medical providers' peer review proceedings does not extend to a contractor running a hospital's emergency department should provide plaintiffs' attorneys with another tool to pursue malpractice suits by making more information discoverable, experts say.

In a 4-3 decision, the state high court said the Pennsylvania Peer Review Protection Act did not shield Monongahela Valley Hospital and contractor Emergency Resource Management Inc. from handing over performance reviews that an ERMI supervisor drafted for a physician facing claims he negligently treated an emergency room patient experiencing chest pains.

The majority said they were constrained to closely follow the language of the 44-year-old Peer Review Protection Act.

"In interpreting its provisions ... we may not ignore the unambiguous statutory language of the PRPA 'under the pretext of pursuing its spirit,'" Justice Christine Donohue said in the **March 27 opinion**. "Such is particularly true in the present context since 'evidentiary privileges are not favored, as they operate in derogation of the search for truth.'"

The dispute centers around the relationship between the hospital and ERMI, an affiliate of the University of Pittsburgh Medical Center that was contracted by the facility to run its emergency department. The lawsuit alleges the hospital, ERMI and Dr. Marcellus Boggs failed to diagnose Eleanor Reginelli's heart problem during a 2011 emergency room visit, which could have prevented the patient's heart attack suffered just days after her discharge.

Reginelli sought Boggs' performance review and the state Supreme Court backed the lower appellate court's finding that the document was not entitled to protection under the act because it had been drafted by Boggs' ERMI supervisor, Dr. Brenda Walther, and not by an employee of the hospital itself. The decision also found that a business entity like ERMI was not contemplated under the PRPA and therefore could not claim the privilege itself.

"A hospital is required to report certain types of malpractice or misconduct, and outsourcing companies like ERMI have no such direct obligation," Gregory Heller, an attorney who represented amicus party the Pennsylvania Association for Justice, told Law360. "I think the court was right to respect this important distinction. Treating a private corporation just like a hospital would have created a dangerous loophole in some important patient safety rules."

Angela Boateng, general counsel for the Pennsylvania Medical Society, which filed an amicus brief in support of ERMI and the hospital, said the ruling was disappointing.

"The court has taken away an aspect of the law which may prevent physicians from having open and frank discussions for fear it could be used against them in litigation," Boateng told Law360.

The ruling effectively puts another tool in a plaintiffs' attorneys toolbox, according to Robert Sachs, managing partner at Shrager Spivey & Sachs. The Philadelphia-based plaintiffs' attorney said the issue of peer review always arises in medical malpractice depositions and written discovery requests, so high court clarification is key.

"The Pennsylvania Supreme Court is now making it very clear for practitioners about what is and what is not considered peer review under the Peer Review Protection Act," Sachs said.

"The Supreme Court has much more narrowly defined the protection under this privilege and, as a result, hospitals and other health care providers will either have to change their conduct to bring it within the narrow definition of the statute or find that in the litigation process a variety of documents that they didn't want to turn over in the past will now become fully discoverable," he added.

Medical malpractice defense lawyers will routinely instruct witnesses to not answer questions if it is vaguely related to peer review, Sachs said.

"That's not going to happen anymore, and if it does, they will be on much shakier legal footing," he said. "I'm happy to see the court addressing this because it gives us clear guidance that we never had before."

Sachs said while it's unlikely the high court decision will directly lead to trial wins or settlements, the ruling gives plaintiffs' attorneys a valuable puzzle piece in proving medical negligence.

Personal injury attorney Eric H. Weitz of The Weitz Firm LLC said the ruling will prevent hospitals from thwarting discovery by claiming privilege under the PRPA.

"Hospitals have been trying to sweep everything under the rug of peer review to try and protect the discovery of documents, and I think this was an example of overreaching and the court recognized it," the Philadelphia-based attorney said.

The state high court also took the initiative to declare that a hospital's credentialing review process for physicians is not considered privileged under the PRPA, which PAMED's Boateng said was a surprising development for the state's medical community.

"Credentialing had been protected, but in this case the court said no, so we were all taken aback by that," she said. "The majority believes that the information shared during peer review and that which is shared during credentials review ... is mutually exclusive; however, this is not always the case. There is a lot of overlap in terms of what is discussed, specifically related to the health care services ordered and performed by physicians."

Sachs said the high court's determination that a review of a doctor's credentials is not privileged under the act will help unearth information in areas previously considered off-limits for discovery. Two situations where the new case law might prove useful is when a doctor's ability to practice medicine is called into question due to Alzheimer's disease or if the physician has a drug and alcohol problem.

"That could have an impact on the outcome of cases," he said.

Sachs added that one of the reasons the Pennsylvania Supreme Court agreed to take the case is because there was a lack of clarity as to the extent of the Peer Review Protection Act.

"This provides it," he said. "It's nice to have a clear opinion, and hopefully it'll circulate among defense lawyers very quickly."

Reginelli is represented by Rudolph Massa of Massa Law Group PC.

UPMC is represented by John Conti, Justin Gottwald, Megan Block and Howard Chajson of Dickie McCamey & Chilcote PC.

MVH is represented by William James Rogers of Thomson Rhodes & Cowie PC.

The case is Eleanor Reginelli et al. v. Marcellus Boggs et al., case numbers 20 WAP 2016, 21 WAP 2016, 22 WAP 2016 and 23 WAP 2016, in the Supreme Court of the State of Pennsylvania.

--Additional reporting by Dan Packer. Editing by Philip Shea and Breda Lund.

