Supreme Court of Ohio Clerk of Court - Filed September 19, 2023 - Case No. 2023-0352

IN THE SUPREME COURT OF OHIO

CASE NO. 2023-0352

KALVYN STULL, an incompetent person, by and through his Guardian of the Estate, BRIAN ZIMMERMAN, *et al.*,
Plaintiff-Appellees,

-vs-

SUMMA HEALTH SYSTEM, *et al.*,
Defendant-Appellants.

ON APPEAL FROM THE NINTH DISTRICT COURT OF APPEALS
CASE NO. 29969

BRIEF OF *AMICI CURIAE*, OHIO ASSOCIATION FOR JUSTICE and CLEVELAND ACADEMY OF TRIAL ATTORNEYS, IN SUPPORT OF PLAINTIFF-APPELLEES

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Ohio Association for Justice ("OAJ") is devoted to strengthening the civil justice system so that deserving individuals receive justice and wrongdoers are held accountable. The OAJ comprises approximately one thousand five hundred attorneys practicing in such specialty areas as personal injury, general negligence, medical negligence, products liability, consumer law, insurance law, employment law, and civil rights law. These lawyers seek to preserve the rights of private litigants and promote public confidence in the legal system.

The Cleveland Academy of Trial Attorneys ("CATA") is dedicated to helping trial lawyers better represent their clients. CATA's membership consists of several hundred attorneys, each of whom represents a steady stream of injured citizens in all areas of personal injury law. CATA seeks to protect meaningful access to the civil justice system for all Ohioans and preserve their constitutional, statutory, and common law rights.

OAJ and CATA (collectively "*Amici*") submit this brief to offer their views as this Court's again considers and applies the peer-review committee privilege statute, R.C. 2305.252. The stakes are far higher this time, as this Court has been asked to permit hospitals with residency programs to cloak their least experienced physicians in a cloud of secrecy that would follow them through their initial practical training. The purpose of evaluating a new physician during their residency program differs markedly from the purpose of a peer review committee, and the demarcation between these two different systems should be preserved. Eliminating this distinction would detrimentally impact those who have been injured during medical treatment and who bear the burden of demonstrating they are entitled to legal relief. These Ohioans require information about their caregivers to accomplish this task, and this is an opportunity for the Court to apply

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the law as written, affording them a full measure of justice.

STATEMENT OF THE CASE AND FACTS

The *Amici* adopt and incorporate the statement of the case and facts offered in the Merit Brief of the Plaintiff-Appellees, Kalvyn Stull ("Stull") through his guardian, Brian Zimmerman, filed September 19, 2023. Of particular importance to this Court's review is that attending physician Nathan Blecker, M.D. ("Dr. Blecker") permitted first-year resident physician Mazen E. Elashi, M.D. ("Dr. Elashi") to undertake a high-stakes procedure on a rapidly decompensating patient, Kalvyn Stull ("Stull"). There is no denying that Dr. Elashi was unable to perform the procedure successfully during his first year of residency as crucial time elapsed.

ARGUMENT

On May 23, 2023, this Court accepted one proposition of law for review:

> THE PEER REVIEW PRIVILEGE SET FORTH IN OHIO REVISED CODE § 2305.252 APPLIES TO RESIDENCY FILES THAT ARE KEPT AND MAINTAINED BY A HOSPITAL FOR THE PURPOSE OF REVIEWING AND EVALUATING THE COMPETENCE, PROFESSIONAL CONDUCT, AND QUALITY OF CARE OF RESIDENT PHYSICIANS

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Defendant-Appellants' Memorandum in Support of Jurisdiction filed March 13, 2023, p. 8; 05/23/2023 Case Announcements, 2023-Ohio-1665, p. 2. For the following reasons, this Court should reject this request to hide all materials generated during a residency program under the statutory peer review privilege.

I. THE TRANSPARENT EFFORT TO TURN AN ENTIRE RESIDENCY PROGRAM INTO A PEER REVIEW COMMITTEE

Defendant-Appellants, Summa Health System, Summa Health System Corp., Summa Health System Community, Summa Health, Summa Physicians, Inc., dba Summa

Health Medical Group, Jeffrey R. Welko, M.D., Nathan R. Blecker, M.D., Mazen E. Elashi, M.D., and Lynda J. Shambaugh, RN (collectively "Summa"), have asked this Court to reward its adoption of an internal policy that was creatively structured to squeeze the entire Summa residency program into a peer review committee. *Merit Brief of Appellants filed July 31, 2023 ("Summa Brief"), pp. 5-8.* The rule that Summa has asked for is unwarranted, as it would far exceed the scope of the statutory privilege that the General Assembly enacted.

If this overzealous effort to cast a shadow of secrecy over *all* materials generated during the training of new physicians is successful, discovery in medical negligence matters will fall down a slippery judicial slope. Nothing would stop a hospital from adopting broader policies, full of definitions using the words "quality," "performance," "competence," or "peer review," to turn larger and larger segments of its operations into peer review committees. *See Summa Brief, pp. 5-8.* A hospital that can convince itself that quality of care may be impacted in some way by some distant facet of its operation, like its janitorial, laundry, or food service operations, will be totally justified in defining those departments to be " 'part of the peer/professional review program of the Hospital' " that is " 'intended to be protected by Ohio Revised Code sections ORC 2305.24, ORC 2305.25, ORC 2305.251, ORC 2305.252, ORC 2305.253, and ORC 175.21' " as Summa has tried to do with its residency program. *Summa Brief, p. 6,* quoting *R. 177, Ex. B, Martin Aff. ¶ 6, Supp. 163, and Ex. B1, Summa Administrative Manual, Quality Assessment and Performance Improvement Plan, Section 7.1 and 7.2, Supp. 174.* There is no limiting principle to Summa's argument, and if it is accepted, a hospital could go so far as to define its entire operation to be a peer review committee protected from disclosing any information by R.C. 2305.252.

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II. THE PEER REVIEW COMMITTEE STATUTE DOES NOT EXTEND ITS PROTECTIONS TO RESIDENCY PROGRAMS

This Court has held, time and time again, that courts must apply statutes as written. Through this dispute, the Court can hold true to that principle once more by affirming the ruling of the Ninth District Court of Appeals.

When considering a statute, this Court must " 'ascertain and give effect to the legislature's intent,' as expressed in the plain meaning of the statutory language." *State v. Pountney*, 152 Ohio St.3d 474, 2018-Ohio-22, 97 N.E.3d 478, ¶ 20, quoting *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 9. That rule serves the legislative process by grounding it:

> "The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction."

State v. Hairston, 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471, ¶ 12, quoting *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902), paragraph two of the syllabus. Consequently, words may not be added or deleted from a statute. *State v. Johnson*, 116 Ohio St.3d 541, 2008-Ohio-69, 880 N.E.2d 896, ¶ 15; *State v. Hughes*, 86 Ohio St.3d 424, 427, 715 N.E.2d 540 (1999). Importantly, "R.C. 1.42 guides" this Court's "analysis, providing that '[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage.' " *Pelletier v. Campbell*, 153 Ohio St.3d 611, 2018-Ohio-2121, 109 N.E.3d 1210, ¶ 14. The various parts of a statute are therefore not to be taken in isolation:

> It must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.

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State ex rel. Myers v. Bd. of Edn. of Rural School Dist. of Spencer Twp., 95 Ohio St. 367, 372-373, 116 N.E. 516 (1917). If the language of a statute "is not ambiguous," then the Court "need not interpret it" but "must simply apply it." *Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471, at ¶ 13; *see also Summerville v. Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522, ¶ 18-19; *State v. Gordon*, 153 Ohio St.3d 601, 2018-Ohio-1975, 109 N.E.3d 1201, ¶ 8.

A plain reading of R.C. 2305.25(E)(1) reveals that the General Assembly did not include "a residency program" in the list of covered hospital operations. It instead included a number of potential investigative bodies:

> "Peer review committee" means a utilization review committee, quality assessment committee, performance improvement committee, tissue committee, credentialing committee, or other committee that does either of the following:
>
> (a) Conducts professional credentialing or quality review activities involving the competence of, professional conduct of, or quality of care provided by health care providers, including both individuals who provide health care and entities that provide health care;
>
> (b) Conducts any other attendant hearing process initiated as a result of a peer review committee's recommendations or actions.

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R.C. 2305.25(E)(1). No participant in these enumerated peer review processes "shall be permitted or required to testify in any civil action as to any evidence or other matters produced or presented during the committee proceedings." *Brooks v. Ohio State Univ.*, 111 Ohio App.3d 342, 350, 676 N.E.2d 162 (10th Dist.1996). Although they could have, legislators did not include any language in this definition section that would encompass the parts of a hospital that provide "postgraduate training" through "a residency program

accredited by the Accreditation Counsel for Graduate Medical Education." *Summa Brief, p. 7.* This matters a great deal, as this Court has recognized that the General Assembly says as much by the words that it *has not* utilized as it does by the words it has chosen. *See Wilson v. Durrani*, 164 Ohio St.3d 419, 2020-Ohio-6827, 173 N.E.3d 448, ¶ 29. Without text stating that the peer review privilege extends so far as a "residency program," this Court cannot rule in favor of Summa without adding words to the statute and exceeding the role of the judiciary. *See Johnson*, 116 Ohio St.3d 541, 2008-Ohio-69, 880 N.E.2d 896, at ¶ 15; *Hughes*, 86 Ohio St.3d at 427, 715 N.E.2d 540.

Nor should this Court treat the statutory definition of "peer review committee" as a catch-all as Summa has asked, scooping up any process touching on quality of care, and somehow including every document created during residency. The peer-review process conducted by a hospital and an accredited residency program are two completely different operations. The medical literature defines "peer review" as "a process whereby a committee evaluates the quality of physicians' clinical work to ensure that prevailing standards of care are being met," and "the majority of peer review conducted across the USA occurs exclusively through retrospective chart review via peer review committees." Bader, Abdulelah, Maghnam, and Chin, *Clinical Peer Review; a Mandatory Process with Potential Inherent Bias in Desperate Need of Reform*, 817-820 (J. Community Hosp. Intern. Med. Perspect. Nov. 15, 2021)[1]. The purpose of this process is to "allow for 'immediate' improvements in 'the quality of health care' due to the particular need in the health care profession for 'immediate remedial measures.' " *Large v. Heartland-Lansing*, 2013-Ohio-2877, 995 N.E.2d 872, ¶ 34 (7th Dist.), quoting *Gates v. Brewer*, 2 Ohio

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App.3d 347, 349, 442 N.E.2d 72 (10th Dist.1981). An established peer review committee and process is required for accreditation by the Joint Commission on Accreditation of Healthcare Organizations. Bader, Abdulelah, Maghnam, and Chin at 817-820.

As Summa has explained to this Court, accreditation for resident programs and their corresponding requirements are governed entirely separately by the Accreditation Council for Graduate Medical Education ("ACGME"). *Summa Brief, p. 7.* ACGME has its own standards for training that hospitals must abide by when implementing and executing their residency programs, like the one in this case, including documentation and review of resident physicians participating in the program. ACGME, *Common Program Requirements* (accessed Sept. 19, 2023)[2]. Had the General Assembly wished to include accredited residency programs within the definition of "peer review committee," it could certainly have done so given that it included a listing of committees accredited by other medical organizations. But it did not.

III. THIS COURT'S PRIOR AUTHORITIES REQUIRE REJECTION OF SUMMA'S PROPOSITION OF LAW

Perhaps the most charitable way to summarize Summa's arguments is that it seeks to structure a hospital department through corporate documentation to charge it with completing peer review work alongside all other tasks that are essential to the department's existence—in this case both training physicians and investigating the quality of their care—to keep everything generated by that department totally secret. *Summa Brief, pp. 7-8, 19-20.* This scheme would allow a hospital to hide seemingly any function of its business from civil litigation. For instance, patients seeking to recover for

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[2] Available online at:
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corporate negligence, negligent retention or negligent hiring could be prevented from discovering whether their medical provider had completed orientation on the unit or had been properly supervised because all documentation was prepared or reviewed by a "peer."

This Court should not permit such a broad reading of R.C. 2305.252(A). The law's text directs that "[i]nformation, documents, or records otherwise available from original sources" will remain "available only from the original sources" even though they "cannot be obtained from the peer review committee's proceedings or records." *R.C. 2305.252(A).* This Court has previously described this as a "a major exception" that requires judges to "separate out nonprivileged portions" of a hospital's records. *State ex rel. Grandview Hosp. and Med. Ctr. v. Gorman*, 51 Ohio St.3d 94, 96, 554 N.E.2d 1297 (1990). But the exception will be gutted if a hospital can simply define all original sources to be part of a peer review committee irrespective of the function served when such records were generated. *See Bansal v. Mt. Carmel Health Sys., Inc.*, 10th Dist. Franklin No. 09AP-351, 2009-Ohio-6845, ¶ 16, fn. 3.

This Court has held that the crucial issue when ruling on the scope and application of the peer-review privilege is whether the work of a purported peer review committee demonstrated that it was in fact operating as one. *See State ex rel. Fostoria Daily Rev. Co. v. Fostoria Hosp. Assn.*, 44 Ohio St.3d 111, 541 N.E.2d 587 (1989). In *Fostoria Daily Rev. Co.*, a hospital attempted to withhold the minutes of meetings that had been conducted by its Joint Advisory and Quality Assurance Committee. *Id.* at 111-112. The majority examined the prior version of R.C. 2305.25, which defined the peer-review privilege, and identified the two types of committees that were then entitled to confidentiality. *Id.* at 112-113. The first category of committee was designed to comply with the Social Security Act, which permitted "creation of a utilization and quality control

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peer review organization" that would investigate "whether the services provided by the hospitals within the organization's jurisdiction are reasonable and medically necessary and whether the quality of such services meets professionally recognized standards of care." *Id.* at 113. The second kind of committee was structured to assure compliance with the Joint Commission on Accreditation of Hospitals standards, which "establishes standards for operating hospitals and accredits them according to the standards." *Id.*

The committee at issue in *Fostoria Daily Rev. Co.* had merely "received reports from a subsidiary quality assurance committee and did not undertake any initial quality assurance reviews." *Fostoria Daily Rev. Co.*, 44 Ohio St.3d at 113, 541 N.E.2d 587. Most of its operations dealt with "topics other than quality assurance." *Id.* All of these *other* proceedings were not confidential and were subject to disclosure. *Id.* at 113. Only certain information pertaining to qualifications of medical staff, their applications for admission, and communications with attorneys were redacted. *Id.* at 113-114.

Given the clarity of these prior decisions, Summa and its physicians are attempting to accomplish nothing more than an end-run around them. Both *Gorman* and *Fostoria Daily Rev. Co.* were conspicuously absent from Summa's brief. Yet the Ninth District's decision below honors what was written in *Gorman* and closely tracks the logic of *Fostoria Daily Rev. Co.*, particularly with respect to the maintenance of Summa's residency files:

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> The affidavit of Dr. Laippley establishes the existence of a resident peer review committee. Upon close review, however, the affidavit does not establish that Dr. Elashi's residency file is a "record[ ] within the scope of" such a committee. R.C. 2305.252(A). Instead, the affidavit provides that residency files are maintained by residency coordinators. Residency coordinators are described only as "administrative staff[,]" and it is not explained whether they are part of the administrative staff of the GMEC, a CCC, or some other aspect of the hospital. There are no statements that the residency files are produced, managed, kept, maintained, or created by

> the GMEC or a CCC or any other similar language. It is also not indicated whether any reviews or associated documents produced by the GMEC or a CCC are kept within a resident's file.

Stull v. Summa Health Sys., 2022-Ohio-457, 185 N.E.3d 141, ¶ 14 (9th Dist.). Since Summa has now conceded that it also provides "postgraduate training" through its "residency program accredited by the Accreditation Counsel for Graduate Medical Education," and not exclusively peer review investigations, it would be totally appropriate to summarily affirm the Ninth District's ruling on the authority of *Fostoria Daily Rev. Co. Summa Brief, p. 7.*

IV. STRICT CONSTRUCTION, PROPERLY APPLIED, DOOMS SUMMA'S VIEW OF THE SCOPE OF THE PEER-REVIEW PRIVILEGE

Because statutory privileges have been enacted in derogation of the common law, they must be strictly construed. *See Weis v. Weis*, 147 Ohio St. 416, 72 N.E.2d 245 (1947), paragraph four of the syllabus; *State v. Garrett*, 8 Ohio App.3d 244, 246, 456 N.E.2d 1319 (10th Dist.1983). Any records within the scope of a peer review committee should therefore remain available from those individuals who created them, as the text directs, unless they were prepared during or for the singular purpose of proceedings of a peer review committee. *R.C. 2305.252(A).* The United States Supreme Court has also remarked: "We have often recognized that statutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for the truth." *Pierce Cty., Washington v. Guillen*, 537 U.S. 129, 144, 123 S.Ct. 720, 154 L.Ed.2d 610 (2003); *Belichick v. Belichick*, 37 Ohio App.2d 95, 96-97, 307 N.E.2d 270 (7th Dist.1973). If this Court agrees that the entire course of a resident physician's training can be redefined by a hospital as the "proceedings of a peer review committee," with all documentation of the residency falling within the "scope" of the committee, it will serve no purpose but to hide

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the truth and impede tort victims from recovering justly. *R.C. 2305.252(A)*. Documents generated outside of a peer review process for a dual purpose are and must be discoverable from the original source, even if some peer review process may later rely upon them. *Bansal*, 2009-Ohio-6845, at ¶ 16, fn. 3.

The peer-review privilege is indeed important, but its purpose is not to hinder lawsuits. *Browning v. Burt*, 66 Ohio St.3d 544, 562, 613 N.E.2d 933 (1993). Rather, its objective is to protect the actual process of peer review and the results of the specially designated body that performs such work. *Id.* The General Assembly therefore tailored this statutory privilege to protect documents and determinations generated by the collective committee. *R.C. 2305.252(A)*; *Bansal*, 2009-Ohio-6845, at ¶ 17. This limited and defined scope does not include documentation created by an individual, rather than collectively by the committee, or those completed routinely by or for other purposes, such as an established residency program accredited by a third party. *Id.*; *see Browning* at 562. Nor can a hospital shield documents from disclosure just by circulating them during peer review proceedings. *Bansal*, 2009-Ohio-6845 at ¶ 16, fn. 3. "If all materials viewed and utilized by review committees were deemed undiscoverable, a hospital could never be held accountable for any negligent act within the purview of the committee," and that is "certainly not the purpose of the privilege." *Huntsman v. Aultman Hosp.*, 5th Dist. Stark No. 2006 CA 00331, 2008-Ohio-2554, ¶ 47 citing *Wilson v. Barnesville Hosp.*, 151 Ohio App.3d 55, 2002-Ohio-5186, 783 N.E.2d 554 (7th Dist.), and *Akers v. Ohio State Univ. Med. Ctr.*, 10th Dist. Franklin No. 04AP-575, 2005-Ohio-5160.

This more limited reading of R.C. 2305.252(A) is readily available, as many lower courts in this state have recognized, and in the spirit of strict construction, this Court should give it that meaning to allow reasonable discovery to occur when litigation arises. "The peer-

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review privilege is not a generalized cloak of secrecy over the entire peer-review process." *Smith v. Cleveland Clinic*, 197 Ohio App.3d 524, 2011-Ohio-6648, 968 N.E.2d 41, ¶ 11 (8th Dist.). A "qualifying deponent cannot be asked to reveal (1) his testimony before the peer-review committee, (2) information that he provided to the committee, or (3) opinions that he formed as a result of the committee's activities." *Giusti v. Akron Gen. Med. Ctr.*, 178 Ohio App.3d 53, 2008-Ohio-4333, 896 N.E.2d 769, ¶ 19 (9th Dist.). The only records that are off-limits are those that an internal "committee" of the health care entity generates during the peer-review process, which is typically a confidential investigation of its own physicians and staff. *See, e.g.*, *Wall v. Ohio Permanente Med. Group, Inc.,* 119 Ohio App.3d 654, 663-664, 695 N.E.2d 1233 (8th Dist.1997).

In *Smith v. Manor Care of Canton, Inc.*, 5th Dist. Stark No. 2005-CA-00100, 2006-Ohio-1182, the Fifth District Court of Appeals explained:

> We find as a bare minimum, the party claiming the privilege must bring to the court's attention the existence of such a committee and show the committee investigated the case in question. * * * The party claiming the privilege must provide the court with a list of the evidence the peer review committee had. These we find are prerequisite to invoking the privilege, and the mere disclosure of this information does not violate either the spirit or the literal reading of the statute.

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Id. at ¶ 61. Unsubstantiated assertions thus do not suffice:

> [T]o attain the benefits of the peer review privilege, a health care entity must establish that the documents at issue satisfy the criteria of R.C. 2305.252. A health care entity may attempt to meet this burden by: (1) submitting the documents in question to the trial court for an in camera inspection, or (2) presenting affidavit or deposition testimony containing the information necessary for the trial court to adjudge whether the privilege attaches. (Footnote omitted.)

Bansal, 2009-Ohio-6845, at ¶ 14; *see also Spurgeon v. Mercy Health-Anderson Hosp., LLC*, 2020-Ohio-3099, 155 N.E.3d 103 (1st Dist.) (evidence that hospital had a quality

assurance program was insufficient to establish it had a peer-review committee). Litigants must remain able to obtain evidence from original sources, just not by acquiring it directly from a *bona fide* peer-review committee. *Tenan v. Huston*, 165 Ohio App.3d 185, 2006-Ohio-131, 845 N.E.2d 549, ¶ 23 (11th Dist.); *Large*, 2013-Ohio-2877, 995 N.E.2d 872, at ¶ 46 (source documents did not become subject to peer-review privilege just because a peer-review committee analyzed them). This Court should therefore reject the idea that a hospital can meet its burden to establish peer review privilege by defining an entire category of documents as peer review materials without showing that individual records were genuinely prepared during peer review proceedings or kept only by the peer review committee itself. *See Summa Brief, pp. 19-23.*

CONCLUSION

For all of the foregoing reasons, this Court should reject the proposition of law offered by the Summa Defendants and affirm the Ninth District's unerring decision in all respects.

Respectfully Submitted,

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