

## The Peer Review Privilege: Sword or Shield?

The Ninth District Court of Appeals, in the case of *Ward v. Summa Health System* (2009), 184 Ohio App. 3d 254, 2009-Ohio-4859, issued an important ruling addressing three issues of note: (1) Hospital driven investigation of incident is a shield to discovery only where it is shown that the investigative report was made available to a Peer Review Committee which actually met to discuss the incident in question or report; (2) The physician/patient privilege from testimony does not protect a patient (a physician in this case) from being compelled to testify about his own relevant health status; and (3) It is improper for a Court to dismiss a complaint for lack of a supporting affidavit where it is shown that essential discovery is wrongfully withheld.



By: Courtney Trimacco

In May, 2006, plaintiff underwent heart valve replacement surgery at Defendant hospital and subsequently developed Hepatitis B. Approximately one month following surgery, the hospital became aware that a health care provider was exhibiting signs of jaundice. Thereafter, the care provider tested positive for Hepatitis B and the hospital instituted a "look back" program to determine patients who were at risk by reason of exposure. Plaintiff was identified as such a patient and in fact tested positive for Hepatitis B. The ensuing malpractice action was not supported by an Affidavit of Merit but was accompanied with discovery requests calling specifically for hospital reports of its internal investigation, particularly in conjunction with the look back program. The discovery was also addressed at an individual surgeon who declined to respond to questions concerning his personal health, including Hepatitis B. The Trial Court granted the Defendant's motion for protective order concerning these discovery matters and then ordered dismissal of the complaint for lack of a supporting Affidavit of Merit.

In reversing this matter on appeal, the Court of Appeals ruled that the Defendant health care system was burdened with establishing that its investigative documents were immune from discovery by virtue of the peer review privilege. Concluding that the hospital failed to demonstrate the reports had been made available to a committee, that such a committee existed, that any committee met to discuss the incident or reports, or that the reports were prepared by or for common use, the Court held that the documents were discoverable. As to the involved health care provider, the Court ruled that he could not refuse to testify as to whether he had ever had Hepatitis B, when it was contracted, and circumstances of his first knowledge. The Court reasoned that such inquiry did not violate the physician/patient privilege because the treating physician was not being asked the questions.

Finally, the Court ruled that the information sought in the denied discovery was so intertwined in the Plaintiff's ability to secure an Affidavit of Merit that dismissal under these circumstances was reversible error.

The holding in *Ward* reminds us that simply "stamping" a document privileged pursuant to peer review does not ensure confidentiality of a document. The document must be prepared for an existing committee which will consider and act upon its finding toward the universal goal of improved health care. The documents in question in this case may well qualify for the privilege but this Court simply ruled against the hospital because the criteria for establishing confidentiality had not been met on the record. With respect to the Affidavit of Merit requirement, this decision does cause concern for the notion that Plaintiff can conduct comprehensive discovery before being burdened with the Affidavit of Merit requirement. Taken to the extreme, this proposition would eviscerate the affidavit requirement.

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