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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Anderson County
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

Case No. 2020-CP-04-00008
Appeal No. 2021-000834

Wanda Human, as Personal Representative of the Estate of Evelyn Marie Wood.....Respondent,

v.

AnMed Health.....Appellant.

INITIAL BRIEF OF RESPONDENT

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s/Lane D. Jefferies
Lane D. Jefferies (SC #101764)
Jefferies Law Firm, LLC
1320 Main Street, Suite 300
Columbia, South Carolina 29201
(843) 212-6295
Attorney for the Respondent

January 10, 2022
Conway, South Carolina

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STATEMENT OF THE CASE

Respondent, Wanda Human, as the Personal Representative of the Estate of Evelyn Marie Wood, initiated this action by filing a Summons and Complaint in the 10th Judicial Circuit on January 2, 2020. The causes of action included in the Respondent's Complaint include Wrongful Death and Survival Action, and negligence. On February 6, 2020, the Appellant, AnMed Health (hereinafter "AnMed") filed an Answer denying liability and asserting affirmative defenses. AnMed amended its Answer on June 24, 2021 and asserted comparative negligence and intervening negligence as additional affirmative defenses.

Both parties exchanged written discovery. The Appellant produced a privilege log on April 22, 2020, where it identified a document that was titled, "AnMed Health Risk Management Worksheet Confidential Information Midas report/ Chrissy Shortridge statement" (hereinafter "Risk Management Worksheet"). The risk management worksheet was identified as being protected based on peer review and work product.

On March 29, 2021, Respondent filed a Motion to Compel AnMed Health's Discovery

Responses in which it was asserted that the risk management worksheet was not a protected document. Appellant filed a Memorandum in Opposition to the Plaintiff's Motion to Compel on June 11, 2021. The Honorable R. Lawton McIntosh presided over the Respondent's Motion to Compel on June 23, 2021 and ruled from the bench that he was granting the Motion. Consistent with this verbal ruling, the Court entered a Form 4 order on June 23, 2021, which directed the Respondent to prepare a formal order. The Court entered the formal order on July 12, 2021, which granted Respondent's Motion to Compel and ordered Appellant to produce the risk management worksheet within 14 days. Appellant filed a Notice of Appeal on August 4, 2021, but the Court dismissed the appeal due to discovery orders being interlocutory and not immediately appealable. Appellant filed a petition for rehearing and the Court reinstated the appeal on October 1, 2021. Appellant then served their Initial Brief on October 27, 2021.

STANDARD OF REVIEW

Whether to grant or deny a motion to compel is at the trial court's sound discretion and will not be disturbed on appeal absent a clear abuse of discretion. *See (respectively), Dunn v. Dunn,* 298 S.C. 499, 381 S.E.2d 734 (1989); *Downey v. Dixon,* 294 S.C. 42, 362 S.E.2d 317 (Ct. App. 1987); *Davis v. Parkview Apts.,* 409 S.C. 266, 762 S.E.2d 535 (2014); *Weeks v. Drawdy (In re Estate of Weeks)*, 329 S.C. 251, 495 S.E.2d 454 (Ct. App. 1997). "An abuse of discretion occurs when the judgment is controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." *Regions Bank v. Owens*, 402 S.C. 642, 647, 741 S.E.2d 51, 54 (Ct. App. 2013).

"It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling. Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. The unchallenged ruling, right

or wrong, is the law of the case and requires affirmance." *Lindsay v. Lindsay*, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct. App. 1997) (internal quotations and citations omitted).

ARGUMENT

This matter is before the Court because the Appellant contends that the trial court abused its discretion in ordering the production of a risk management worksheet. The Appellant contends that the risk management worksheet is protected because it was prepared in anticipation of litigation and as part of a peer review function of AnMed Health pursuant to 40-71-10 etc., 44-7-390 etc., and 38-33-300. The Appellant also contends that the risk management worksheet is primarily protected under S.C. Code §44-7-392, which is a peer review statute that was signed into law on June 26, 2012.

Appellant is mistaken. Instead, both the trial court and the Respondent got it right – the risk management worksheet is not protected pursuant to S.C. Code Ann. §44-7-392 for the reasons set forth in this brief. Based both on the standard of review and on the substantive law, this court should affirm the trial court's order.

Section I of this brief shows the legislature's intent when enacting these peer reviewed statutes and why the S.C. Code Ann. §44-7-392 does not protect the risk management worksheet. **Section II** shows how the order compelling the production of the risk management worksheet should be affirmed because the hospital's protections do not extend to their parking lot. **Section III** shows how the risk management worksheet is not protected due to the anticipation of litigation because completing risk management worksheets are an ordinary course of business.

I. The Risk Management Worksheet is not protected from discovery pursuant to S.C. Code Ann. §44-7-392 because the purpose of the peer review statute is to promote confidential communications between medical professionals.

The purpose of the peer review statute is to promote open discussion and improve the quality of patient care between medical professionals during the medical review process. "The overriding public policy of the confidentiality statute is to encourage health care professionals to monitor the competency and professional conduct of their peers to safeguard and improve the quality of patient care." *McGee v. Bruce Hosp. Sys.,* 439 S.E.2d 257, 259 (1993). The purpose of the peer review statute is to protect medical professions when they are reviewing issues amongst one another because candor was previously an issue. The majority of states around the country have also enacted similar peer review statutes that are similarly worded.

The legislature put these protections in place so that medical professionals could freely discuss and review issues within the healthcare system. It was not intended to be a blanket protection for hospitals. The South Carolina Court of Appeals has stated that the S.C. Code Ann. §40-71-20(A) and 44-7-392(A) peer review statutes, ". . . provide that all data and information acquired by a medical peer review committee in the exercise of its duties are confidential, both statutes explicitly state that documents available from original sources are not confidential and are not immune to discovery." *Integramed America, Inc. v. Patton*, 298 F.R.D. 326 (D.S.C. 2014). The intent of the legislature was to protect information acquired by the medical review committee but not to make documents that are available from an original source protected just because they were presented to the committee. *McGee v. Bruce Hosp. Sys.,* 439 S.E.2d 257, 259 (1993). The courts have held that information from original sources is not confidential. Therefore, just because the risk management worksheet may have been presented to a committee at the hospital, it does not make the original immune from discovery.

The whole purpose of the peer review statute is to encourage open discussions within the medical review committees. "The peer review privilege is designed to encourage candor and

objectivity in the internal workings of medical review committees." *Shelton v. Morehead Mem. Hosp.,* 318 N.C. 76, 83, 347 S.E.2d 824, 829 (1986). This statute was not meant to protect every part of the hospital and their operations. It was solely put into place to protect the medical review committees in their review process.

Although it could be argued that the production of the risk management worksheet could stifle objectivity and candor, there has to be some sort of balancing between being able to receive important discovery and not hindering the medical review process. In our case, the risk management worksheet should be produced because it gives a window into the observations of that day. This is critical to our discovery process because Ms. Wood is deceased and is no longer able to provide information regarding that day.

Therefore, the risk management worksheet is not protected by the peer review statute because the legislature did not intend for the statute to be a blanket protection that would protect the hospital in all of their operations. Instead, it was put into place to protect the medical committee and their review process.

II. The order to compel the production of the Risk Management Worksheet should be affirmed because the hospital's protections do not extend to their parking lot.

The Appellant contends that the risk management worksheet is protected because it is related to an investigation conducted by the hospital (Appellant's Initial Brief, p. 5). However, the peer review statute was put into place to protect the integrity of the medical review process with incidents that relate to the normal duties of the hospital. In this case, the incident took place in the Appellant's parking lot, where the Appellant was not acting within their official capacity as a hospital.

When an incident takes place on a hospital's premises, it should not automatically mean that the hospital can assert protections just because they are a hospital. In *Cook v. Wake County Hospital Sys*., 618, 482 S.E.2d 546 (NC Ct. App. 1997), the plaintiff was injured when he slipped and fell in the hallway of the hospital and the Court of Appeals in North Carolina ordered the hospital to produce the accident report because the Court held that it was not protected. This case illustrates how the place of an incident that occurs on the hospital's premises does not make it protected because the plaintiff fell inside of the hospital building and the accident report was not protected. If an accident report that occurred inside of the hospital building is discoverable then so should the risk management worksheet from an incident that occurred in the hospital's parking lot.

The protections that were afforded to hospitals through the peer review statute was not intended to extend to the hospital's parking lot. There is no difference between a hospital's parking lot or a store's parking lot and there should be no reason why a hospital's parking lot is afforded these protections. The Court of Appeals in North Carolina held that that an incident report from a slip and fall in the Blue Ridge Mall's parking lot was discoverable because it was prepared due to a policy of reporting incidents on the property and not in anticipation of litigation, *Saunders v. Hull Prop. Grp., LLC*, 495, 847 S.E.2d 83 (NC Ct. App. 2020). If the mall was ordered to produce their incident report from a slip and fall that occurred in their parking lot, then the hospital should be ordered to do the same. The mall's parking lot did not receive any protections and nor should the hospital's parking lot.

Therefore, the order compelling the production of the risk management worksheet should be affirmed because the hospital is not entitled to use a blanket protection to incidents that arise on their premises. Incidents that occur in a hospital parking lot should not be given special

protections that other parking lots do not receive because there is no difference between the parking lot at the hospital versus the parking lot of a store.

III. The order to compel the production of the Risk Management Worksheet should be affirmed because this document was prepared throughout ordinary business and not in the anticipation of litigation.

The hospital's risk management worksheet should be produced because it was completed throughout the ordinary course of business. ". . .even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for the purposes of litigation." *Simon v. G.D. Searle & Co.,* 816 F.2d 397 (US Ct. App. 1987). The hospital's risk management worksheet was not prepared for purposes of litigation because the document would have been completed regardless of litigation. "Ms. Shortridge completed a Risk Management Worksheet in AnMed's electronic risk management system called Midas, wherein she provided a brief description of what she witnessed." (Appellant's Initial Brief, p.3). At the time AnMed's employee completed the risk management worksheet, there was no anticipation of litigation in this matter. Completing the risk management worksheet was something the employee knew they had to do as a part of their routine reporting, which constitutes an ordinary course of business.

Although the hospital could have thought pending litigation would come when the risk management worksheet was completed, it is not protected when it is a normal reporting procedure. ". . .reports published in accordance with a company's established policy are not protected work product, even when drafted in response to an event that might foreseeably give rise to litigation." *Fulmore v.* Howell, 657 S.E.2d 437 (NC Ct. App. 2008). After a slip and fall in a hospital, the Court ruled that the accident report, which was sent to the hospital's risk department was

discoverable because it would have been prepared regardless of the anticipation of litigation due to the hospital's reporting procedures. *Cook v. Wake County Hospital Sys*., 618, 482 S.E.2d 546 (NC Ct. App. 1997). A normal reporting procedure for the hospital is considered an ordinary course of business and should not be protected from discovery.

Therefore, the order to compel the production of the risk management worksheet should be affirmed because the nurse completing a risk management worksheet was a normal procedure that she knew to do right after the incident took place. If it was not a normal procedure, then she would not have done it because litigation was not anticipated nor was she instructed by hospital's counsel to complete a report. The risk management worksheet was not prepared due to the anticipation of litigation and therefore work product protection does not apply in this case because it is a standard reporting procedure the hospital has put into place.

CONCLUSION

Wherefore, based on the aforementioned, the Trial Court's decision should be affirmed because: the Trial Court did not abuse its discretion when it ordered the production of the risk management worksheet. The risk management worksheet is not protected by the peer review statute for the reasons mentioned above. Therefore, the Respondent respectfully requests that this Court affirm the Trial Court's ruling ordering the production of the risk management worksheet.

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Respectfully submitted,

s/Lane D. Jefferies
Lane D. Jefferies (SC #101764)
Jefferies Law Firm, LLC
1320 Main Street, Suite 300
Columbia, South Carolina 29201
(843) 212-6295
Attorney for the Respondent

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PROOF OF SERVICE

I certify that Respondent's Initial Brief was served on Appellant by U.S. Mail to their attorney of record, Fred W. "Trey" Suggs, III, P.O. Box 10529, Greenville, SC 29603.

Lane D. Jefferies
Lane D. Jefferies (SC #101764)
Jefferies Law Firm, LLC
1320 Main Street, Suite 300
Columbia, South Carolina 29201
(843) 212-6295
Attorney for the Respondent

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