

Stottlemeyer v. Ghramm:



by James M. Daniel, Jr.

The Future of Peer Review in Virginia

An effective peer review process is critical to a hospital's ability to provide patient quality care and engage in a judicious process of self-assessment.

The Supreme Court of Virginia will soon decide the case of *Stottlemeyer v. Ghramm* (Record No. 031613) through which the Court has the opportunity to rule on whether a cause of action for negligent supervision or negligent credentialing can be made against a hospital based on the hospital's credentialing activities. The *Stottlemeyer* appeal also provides the Court with an opportunity to provide further guidance on the scope of Virginia's statutory privilege granted to a hospital's credentialing and peer review committees under *Virginia Code Ann.* §§ 8.01-581.16-17 (*Michie* 2003). To date, the Supreme Court of Virginia has not recognized the tort of negligent credentialing, only narrowly permits a claim of negligent supervision, and largely honors the scope of Virginia's peer review and credentialing privilege. In *Stottlemeyer*, however, the trial court recognized a cause of action for negligent credentialing and permitted discovery of a hospital's peer review documents.

The Peer Review Process

Hospitals consist of a governing body, administration and a medical staff. Each of these components has a unique function in the peer review process.

Peer review is the process through which a group of medical professionals with comparable education, skill and judgment review the professional medical services delivered by another medical professional. This review is done in an effort to evaluate the quality of medical services provided to patients and to identify steps to improve patient outcomes. An effective peer review process is critical to a hospital's ability to provide patient quality care and engage in a judicious process of self-assessment. A successful program can identify problems and reduce the potential for recurring errors.

The majority of physicians on the hospital's medical staff are not employees. They are independent of the hospital. Some of these physicians serve on the hospital's peer review committee to make recommendations to the hospital governing board on the acceptance, suspension or revocation of a physician's medical staff privileges. Although the ultimate decision remains with the hospital's governing board,¹ recommendations from a hospital peer review committee are given great weight.²

One of the committee's responsibilities is that of credentialing the physicians who work on the hospital's medical staff. The credentialing process begins when a physician applies for staff privileges. It is the peer review committee who reviews the physician's credentials and recommends whether or not the governing board should grant privileges. Generally, the committee will evaluate the physician's training, experience and certifications.³

Once a physician is granted privileges, this committee reviews the physician's performance. A variety of quality assurance data is reviewed to assess the physician's performance. The review is conducted at least every two years and, if necessary, more often.⁴

While there is a well-recognized need for effective peer-review processes, physicians generally are reluctant to participate. Fear of peer-review information being made public and retaliatory lawsuits are among the top disincentives for physicians who might otherwise participate. In response, state and federal legislatures have provided peer review participants legal immunity and confidentiality.

In 1986, the Congress enacted the Health Care Quality Improvement Act (HCQIA) to provide peer-review participants immunity from damages awarded under almost all state and federal laws for action taken in accordance with HCQIA's standards.⁵ Likewise, the Commonwealth of Virginia adopted peer-review protection in two forms: immunity for participants and confidentiality for documents and/or information generated through the peer review process.⁶ The Supreme Court of Virginia recognized this effort, commenting that "[t]he obvious legislative intent [of the statute] is to promote open and frank dis-

ussion during the peer review process among health care providers in furtherance of the overall goal of improvement of health care system as a whole."⁷

There is a tension, however, between honoring and encouraging an effective peer review process and allowing persons injured by medical malpractice to pursue compensation. Under traditional rules, a patient who is injured by his or her physician initiates a medical malpractice claim against the physician who committed the injurious act, not the hospital where the act occurred. This is because Virginia law has held hospitals liable only for acts committed by employees, not independent contractors or physicians serving on the medical staff. To affirm the circuit court's ruling in *Stottlemeyer v. Ghramm*, 60 Va. Cir. 474 (City of Winchester, 2001), therefore, would be a decisive change in direction, holding a hospital directly liable for the negligent actions of a third party.

The *Stottlemeyer* Opinion

Stottlemeyer was admitted to Winchester Medical Center for surgery to be performed by her physician. During surgery, *Stottlemeyer* allegedly suffered serious injuries and she filed a medical malpractice claim against her physician and a negligent credentialing and negligent supervision claim against the hospital.⁸ The plaintiff alleged that the hospital knew or should have known that her physician's privileges should not have been renewed and that he was not qualified to perform surgery on the plaintiff. In the alternative, the plaintiff argued that the hospital failed to provide adequate supervision of her physician to ensure her medical treatment would be successful.⁹

The trial court bifurcated the case, allowing the plaintiff to first litigate her medical malpractice claim against her physician, and then, immediately thereafter, to pursue her negligent credentialing and supervision claims against the hospital.¹⁰ In preparation for the medical malpractice trial, the plaintiff sought copies of the hospital's credentialing files on her physician, which included the minutes of all peer-review committee and board meetings regarding her physician's credentialing.¹¹ Discovery of these documents was granted over the defendant's objection but not

allowed to be introduced as evidence during the trial. The jury returned a verdict in favor of the physician and the court subsequently dismissed the case with prejudice against both the physician and the hospital.¹²

On appeal, the defendants argue that the trial court erred in recognizing the torts of negligent credentialing and permitting discovery of the hospital's credentialing file. Among other assignments of error, the plaintiff appeals the trial court's ruling rejecting a claim for negligent supervision.¹³

Negligent Supervision:

The *Stottlemeyer* court dismissed the plaintiff's negligent supervision claim ruling that Virginia does not recognize the tort of negligent supervision.¹⁴ Citing the Supreme Court of Virginia, the trial court stated, "[u]nder the weight of case authority, this Court cannot find a viable cause of action for a hospital's failure to 'supervise' a health care professional who is an independent contractor."¹⁵ The Supreme Court of Virginia had previously considered this issue in *Chesapeake & Potomac Telephone Company v. Dowdy*, 235 Va. 55 (1988). In *Chesapeake*, an employee sought to hold his employer liable for negligent supervision. The Supreme Court specifically found that there was "no duty of reasonable care imposed upon an employer in the supervision of its employees . . . and we will not create one here."¹⁶ Seeing no reason to divert from this reasoning, the *Stottlemeyer* court rejected the plaintiff's negligent supervision claim.

Negligent Credentialing:

In its opinion, the *Stottlemeyer* court did recognize negligent credentialing as a separate cause of action. The trial court began by acknowledging a split among Virginia circuits. The plaintiff relied on two circuit court cases from the City of Alexandria Circuit Court; *Carter v. Jefferson Memorial Hospital Corporation*, 9 Va. Cir. 489 (City of Alexandria, 1982) and *Alderson v. Alexandria Hospital*, 40 Va. Cir. 363 (City of Alexandria, 1996). In both cases, the trial court had found that hospitals have "a duty to exercise reasonable care to insure the competence of their medical staff and

to adequately supervise the care provided in the hospital by those staff physicians.”¹⁷

In addition to *Carter* and *Alderson*, the *Stottlemeyer* court cites two cases rejecting negligent credentialing; *Krump v. Costescu* from the Circuit Court of Alexandria and *Mason v. Potomac Hospital Corporation of Prince William*¹⁸ from the Circuit Court of Prince William County.¹⁹ Even more recently, in *Clements v. MCV Associated Physicians*, 61 Va. Cir. 673 (City of Richmond, 2002), a negligent credentialing claim was dismissed, in part, because the plaintiff did not make any allegation that the Medical College of Virginia directly employed the doctor (even as an independent contractor), but only that MCV had granted him medical privileges to practice at its facility. In the majority of cases, Virginia circuits have rejected the tort of negligent credentialing.

In its opinion, the *Stottlemeyer* court also rejected the Supreme Court of Virginia’s holding in *Stuart Circle Hospital Corporation v. Curry*, 173 Va. 136 (1939) where the Court found a hospital not responsible “for the acts of an attending physician, whether a member of its staff or an outsider . . . based on the ground that a physician is an independent contractor and alone is responsible for the exercise of professional skill and judgment, subject to no control by the hospital in the execution thereof.”²⁰ The trial court considered *Stuart Circle’s* continued viability to be questionable following the Supreme Court’s holding in *McDonald v. Hampton Training School for Nurses*, 254 Va. 79 (1997).²¹

On a theory of respondeat superior, the plaintiff in *McDonald* sued a hospital alleging that one of its pathologists “negligently interpreted [the plaintiff’s] pathology specimens and failed to timely diagnose cancer.”²² The Supreme Court reversed the trial court’s holding that the pathologist was an independent contractor as a matter of law, finding instead that this issue was one to be determined by the jury. The holding in *McDonald* calls into question *Stuart Circle’s* assertion that all physicians, *as a matter of law*, are independent contractors. *McDonald* rejects this finding and establishes a test²³ to determine whether a physician is or is not an independent contractor.²⁴

In refusing to apply *Stuart Circle’s* “blanket rule” that all physicians are independent contractors, the *McDonald* Court discusses a change in the way hospitals operate. In the past, a “hospital . . . simply . . . procure[d doctors] to act upon its own responsibility . . .”²⁵ Now, “[i]n addition to staff privileges granted physicians with private practices, hospitals ‘regularly employ on a salary basis a large staff of physicians, nurses and interns.’”²⁶ The *McDonald* Court draws a distinction between physicians granted privileges to serve on a hospital’s medical staff and those employed by the hospital on a “salar[ie]d basis,” and in that situation, finds potential hospital liability for the latter, but not the former. *McDonald* does not call into question Virginia’s well-settled legal principal that hospitals are not held directly liable for the negligent acts of third parties, but rather supports this long-standing rule by drawing the same comparison proffered many times before, and ultimately remanding the case back to the jury to determine which type of situation was at issue.²⁷

Under Virginia law, where there is no duty there can be no action for negligence.²⁸ In addressing a hospital’s duty to its patients, the *Stottlemeyer* court found the issue of duty to be “grounded on the concept of foreseeability.”²⁹

Stottlemeyer asserts that “it is clearly foreseeable that if a hospital opens its facilities to demonstrably incompetent professionals, including independent contractors, that injury to patients will occur.”³⁰ As discussed above, however, the Supreme Court of Virginia has not recognized such a duty. Rather, the general rule in Virginia is that there is “no duty to control the conduct of third persons in order to prevent harm to another,”³¹ unless there exists a “special relationship” between the parties.³² Because there was no such “special relationship” between the physician and

the hospital,³³ the hospital was under no duty to *Stottlemeyer* to control the actions of her physician.

Peer Review Documents:

In response to a pretrial motion, the *Stottlemeyer* court ordered the hospital to disclose its credentialing file on *Stottlemeyer’s* physician which included all correspondence relating to the granting, retraction, suspension, or revocation of his privileges; documents reflecting the hospital’s investigation of his credentials; minutes of all board and committee meetings related to the physician’s credentials; and any other similar documents. The hospital objected, citing the statutory privilege of the *Code of Virginia* Ann. § 8.01-591.17(B) which states “that peer review information kept by hospitals and health-related organizations ‘are privileged communications which may not be disclosed or obtained by legal discovery proceedings unless a circuit court, after a hearing and for good cause arising from extraordinary circumstances being shown, orders the disclosure’ of such information.”³⁴ The trial court granted the plaintiff’s discovery request despite the statutory language and allowed the discovery of hospital peer review documents dating back to the 1970s. The *Stottlemeyer* court erred in granting the plaintiff’s request because it ignored the recent holding by the Supreme Court of Virginia on this very issue.

In *HCA Health Services of Virginia Inc. v. Levin*, 260 Va. 215 (2000), the Supreme Court of Virginia addressed the scope of the privilege granted to hospitals under *Va. Code* Ann. § 8.01-581.17, and set the “extraordinary circumstances” bar very high. In *Levin*, the trial court ruled that the

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plaintiff met this burden by proving the records were “clearly relevant to the issue of the truth of the alleged defamatory statements, as well as the mitigation of damages suffered by plaintiff for loss of reputation income.”³⁵ The Supreme Court overturned the trial court, finding a “vast difference between the legal principle of ‘relevance’ and the term ‘extraordinary circumstances.’”³⁶

Just as there was nothing extraordinary about the “mere need to defend a lawsuit” in *Levin*, there is nothing extraordinary about Stottlemeyer’s need to establish a claim. Stottlemeyer showed that the credentialing file would be relevant to her claims, but this is not enough. There was no showing of “extraordinary circumstances” as required by law.

Conclusion

Should the Supreme Court affirm the trial court’s holding in *Stottlemeyer*, its decision will be a decisive break from Virginia’s legal precedent and potentially injurious to the peer review process developed by statute for Virginia hospitals. This system was developed in an effort to improve patient care and encourage open disclosure and discussion among physicians. *Stottlemeyer* presents an opportunity for the Supreme Court of Virginia to overturn the trial court’s ruling and clarify Virginia law on a hospital’s peer review and credentialing process. Such a ruling would be a clear step in the right direction, strengthening hospital peer review processes in Virginia. Should the Supreme Court of Virginia uphold the trial court’s decision, health-care institutions will find themselves having to grapple with a new set of challenges. ☞

Endnotes:

- 1 Federal guidelines for Medicaid/Medicare participating hospitals require a hospital’s medical staff to conduct appraisals of its members, examine credentials of candidates for medical staff membership and make recommendations to the governing body on the appointment of the candidates.” 42 C.F.R. § 482.22 (2004); See also 12 Va. Admin. Code § 5-410-210 (2004).
- 2 Hospitals participating in the Medicare or Medicaid program must provide in their bylaws a description of the “qualifications to be met by a

candidate in order for the medical staff to recommend that a candidate be appointed by the governing body.” 42 C.F.R. § 482.22.

- 3 Va. Code Ann. § 32.1-134.1 (Michie 2004) requires a hospital to rule on any physician’s application for medical staff membership or privileges within sixty days and issue a written document to the physician explaining the hospital’s reasons for any adverse action. If the hospital’s reasons are based upon anything but those specific actions listed in the statute, the action is improper.
- 4 The Joint Commission on Accreditation of Healthcare Organizations (JCAHO) has set standards applicable to the physician credentialing process and mechanisms for the appointment and/or reappointment of physicians based on professional criteria. 2003 JCAHO Standard M.S. 5.1 & 5.4.
- 5 42 U.S.C. § 11111 *et seq.* (2004).
- 6 Va. Code Ann. §§ 8.01-581.16-17.
- 7 *HCA Health Services of Virginia, Inc. v. Levin*, 260 Va. 215, 221 (2000); *Johnson v. Roanoke Mem’l Hospitals, Inc.*, 9 Va. Cir. 196 (Roanoke City, 1987) (“The major objective of these statutes granting both immunity from civil liability and privilege from disclosure is the protection intended to be conferred upon peer review... the purpose of such review in the medical setting is to improve the efficiency of medical techniques and procedures in the delivery of health care.”).
- 8 *Stottlemeyer v. Ghramm*, 60 Va. Cir. 474, 475 (City of Winchester, 2001).
- 9 Appellant’s Opening Brief at 7, *Stottlemeyer v. Ghramm*, 60 Va. Cir. 474 (City of Winchester, 2001) (No. 031613).
- 10 Appellant’s Opening Brief at 8, *Stottlemeyer* (No. 031613).
- 11 Appellant’s Opening Brief at 11, *Stottlemeyer* (No. 031613).
- 12 Appellant’s Opening Brief at 13, *Stottlemeyer* (No. 031613).
- 13 The Plaintiff also appealed the trial court’s decisions to bifurcate the trial, and to deny the plaintiff an opportunity to introduce evidence of and cross examine the physician about his past transgressions. Appellant’s Opening Brief at 1, *Stottlemeyer* (No. 031613).
- 14 *Stottlemeyer*, 60 Va. Cir. at 483.
- 15 *Id.* at 484.
- 16 *Chesapeake & Potomac Telephone Co. v. Dowdy*, 235 Va. 55, 61 (1988).
- 17 *Carter v. Jefferson Memorial Hosp. Corp.*, 9 Va. Cir. 489, 489 (City of Alexandria, 1982); *Alderson v. Alexandria Hosp.*, 40 Va. Cir. 363, 363 (City of Alexandria, 1996).
- 18 In 1997, the Virginia Supreme Court refused to hear a petition for appeal filed in *Mason v. Potomac Hosp. Corp.*, Supreme Court Record No. 962359 (1997).
- 19 *Stottlemeyer*, at 476 (stating that both courts sustained the defendant’s demurrer against a claim of negligent credentialing because it was not a recognizable cause of action in Virginia).
- 20 *Stuart Circle Hosp. Corp. v. Curry*, 173 Va. 136, 149 (1939).
- 21 *Stottlemeyer*, 60 Va. Cir. at 474 (quoting *McDonald v. Hampton Training School for Nurses*, 254 Va.

79, 84 (1997) (“these cases have undermined the principles set out in . . . *Stuart Circle*.”).

- 22 *McDonald v. Hampton Training School of Nurses*, 254 Va. 79, 81 (1997).
- 23 The test adopted includes the following factors: (1) selection and engagement, (2) payment of compensation, (3) power of termination and (4) power to control.
- 24 *Id.* at 81 (citing *Hadeed v. Medic-24, Ltd.*, 237 Va. 277, 288 (1989) (finding the power to control to be determinative) and *Baker v. Nussman & Cox*, 152 Va. 293 (1929) (defining the power to control as “control over the means and method of performing the work.”).
- 25 *Id.* at 85 (citing *Bing v. Thunig*, 143 N.E.2d 3, 8 (N.Y. 1957).
- 26 *Id.*
- 27 The Supreme Court of Virginia has limited this principle where one hires an independent contractor to perform a “highly dangerous activity.” *Philip Morris, Inc. v. Emerson*, 235 Va. 380 (1988).
- 28 *Chesapeake & Potomac Telephone Co. v. Dowdy*, 235 Va. 55, 61 (1988).
- 29 *Stottlemeyer*, 60 Va. Cir. at 478.
- 30 *Stottlemeyer*, 60 Va. Cir. at 477-78.
- 31 *Marshall v. Winston*, 239 Va. 315 (1990).
- 32 *Nasser v. Parker*, 249 Va. 172 178 (1995).
- 33 For such a “special relationship” to exist between the hospital and the physician, the hospital would have had to “take charge of or exercise control over” the physician. See *Fox v. Custis*, 236 Va. 69, 75 (1988); Restatement 2d of Agency § 315 & 319.
- 34 *Levin*, 260 Va. at 219 (citing Va. Code Ann. § 8.01-581.17)(B)).
- 35 *Id.* at 219
- 36 *Id.* at 221

Addendum

Since the submission of this article, the Virginia Supreme Court affirmed the trial court’s holding in *Stottlemeyer v. Ghramm*, No. 031613 (Va. June 10, 2004), but refrained from addressing the issues of negligent credentialing, negligent supervision, or the scope of Virginia’s peer review privilege provided in *Virginia Code Ann. §§ 8.01-581.16-17* (Michie 2003). Instead of concentrating on these issues, the Court’s decision focused on an evidentiary issue concerning the plaintiff’s right to cross-examine the defendant on his alleged prior bad acts.

On the evidentiary issue, the Court found that the trial court did not error in refusing

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to allow the plaintiff to cross-examine the defendant on his alleged prior bad "acts of misconduct and negligence relating to his former patients" or "his pattern and history of substandard care"¹ The Court found these issues to be collateral, and therefore, outside the proper scope of cross-examination. The Court also ruled that the trial court was correct in choosing to bifurcate the trial. The Court did not address the statutory privilege.

On the issues of negligent credentialing or supervision, the Court found these causes of action to be moot in light of the jury's finding at trial that Dr. Ghramm was not negligent. The Court, therefore, did not address the apparent trial court split on the issue of negligent credentialing. There are, however, some important lessons to be drawn from the Court's opinion.

While the Court did not decide whether negligent credentialing is a viable cause of action in Virginia, the Court did make clear for future litigants that negligent credentialing is not an issue absent a finding of negligence against the involved physician. Thus, hospitals faced with negligent credentialing claims in the future can at least rely on *Stottlemeyer* as authority to compel the bifurcation of any negligent credentialing claim against the hospital from the related medical malpractice claim against the physician; and the dismissal of any negligent credentialing claim if the involved physician prevails on the medical malpractice claim.

Although the Supreme Court decision left open the ultimate issue of whether negligent credentialing is a cause of action in Virginia, what is certain is that the debate over negligent credentialing and the proper scope of Virginia's peer review privilege will continue to be deliberated in the commonwealth.

—James M. Daniel Jr., June 17, 2004

Endnote:

1 *Stottlemeyer v. Ghramm*, No. 031613 (Va. June 10, 2004).

- 10 The policies of the other boards are available from their staffs and are reflected either in board minutes or as guideline documents.
- 11 *Va. Code* § 54.1-2408.1.
- 12 *Va. Code* § 54.1-2409.
- 13 *Va. Code* §§ 54.1-2915(A)(4) (for the Board of Medicine) and -3480(A)(4) (for the Board of Physical Therapy)
- 14 42 *U.S.C.* § 11132(a)(1)(A) and 45 C.F.R. §§ 60.3 and 60.8(a)(1) and (2). The NPDB regulations require reports of "any action . . . [w]hich revokes or suspends (or otherwise restricts) a physician's or dentist's license (emphasis added)." Since the opening of NPDB in 1990, DHP has reported any order containing an additional term or condition imposed on a practitioner, however minor, in connection with the retention of his or her license which is not likewise imposed on all other licensed practitioners, as a "restriction" of the license for the purposes of NPDB, although some attorneys may disagree with this interpretation.
- 15 42 *U.S.C.* § 1320(a)-7e(b)(1) and (g)(1)(A)(iii)(I) and (III) and 45 C.F.R. §§ 61.3 and .7. The HIPDB reporting provisions would not appear to be implicated by a confidential consent agreement. These regulations only require reporting of "final and adverse actions (not including settlements in which no findings of liability have been made) . . ." "Final adverse actions" are defined as "actions by [a health regulatory board] . . . including (I) formal or official actions, such as revocation or suspension . . . , reprimand, censure or probation . . . [or] (III) any other negative action or finding . . . that is publicly available" even if no sanction is imposed. A confidential consent agreement should not be considered a "formal or official action" under subsection (I), as the confidential consent agreement cannot impose any of the five separate sanctions specifically listed therein. Finally, the "other negative action or finding" concept in subsection (III) is limited to those determinations which are "publicly available," and the Virginia statute expressly states that confidential consent agreements are not to be made publicly available.
- 16 *See* §§ 54.1-2400.2(F) and 2910.1(A)(12). *See* also 18 VAC 85-20-290(B). The DHP is in the process of developing a system which will afford public access to the notices and orders of the other boards through their Web sites.
- 17 *Va. Code* § 54.1-2400(14).
- 18 *Id.* This provision obviates the need to report an agreement on the state Web sites. Further, although the Virginia Attorney General's Office, which coordinates the reporting obligations of the health regulatory boards under the NPDB and the HIPDB regulations, has not, as of the date of this publication, taken a final position on the possible need to report certain confidential consent agreements, it appears the bill's drafters intended the "consent agreements" to be "confidential," except in the limited circumstances expressly contemplated in the bill. An analysis of the language of these reporting regulations in the context of the language of the bill could support the absence of a reporting obligation to the federal data banks.
- 19 *Va. Code* § 54.1-2400(14).
- 20 *Id.*
- 21 *Id.*
- 22 *Id.*
- 23 *Id.*
- 24 *Va. Code* §§ 2.2-4019 and -4020.
- 25 *Va. Code* § 54.1-2400(15)
- 26 *Va. Code* § 2.2-3711(A)(15).
- 27 *Va. Code* § 2.2-3711(A)(28).
- 28 *Va. Code* § 54.1-2400(10). Three additional days are permitted if service is accomplished by mail.
- 29 *Va. Code* § 54.1-2400(11).
- 30 As with an informal conference, formal hearings may be convened even though a respondent's license has expired or has been "surrendered," i.e., even though the respondent has determined not to use the license any longer. A practitioner cannot, however, unilaterally surrender a license. Accordingly, ceasing use of the license or mailing it to the board does not deprive a board of the authority to conduct an administrative proceeding and render appropriate sanctions against a respondent.
- 31 *Va. Code* § 54.1-2920.

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