CHAPTER 71

Liability of Members of Professional Committees

**SECTION 40‑71‑10.** Members of certain professional committees exempt from tort liability.

(A) “Professional society” as used in this chapter includes legal, medical, osteopathic, optometric, chiropractic, psychological, dental, accounting, pharmaceutic, and engineering organizations having as members at least a majority of the eligible licentiates in the area served by the particular society and any foundations composed of members of these societies. It also includes the South Carolina Law Enforcement Accreditation Council.

(B) There is no monetary liability on the part of, and no cause of action for damages arising against, a member of an appointed committee which is formed to maintain professional standards of a state or local professional society as defined in this section or a committee appointed by the Department of Mental Health, or a committee appointed by the Department of Health and Environmental Control to review patient medical and health records in order to study the causes of death and disease for any act or proceeding undertaken or performed within the scope of the functions of the committee if the committee member acts without malice, has made a reasonable effort to obtain the facts relating to the matter under consideration, and acts in the belief that the action taken by him is warranted by the facts known to him.

(C) No person acting pursuant to subsection (B) shall be subject to any monetary liability or cause of action for damages for any action for restraint of trade, violation of the South Carolina Unfair Trade Practices Act, or other action predicated upon unfair or illegal competition unless such person acted with malice.

(D) The provisions of this section do not affect the official immunity of an officer or employee of a public corporation.

HISTORY: 1978 Act No. 524; 1989 Act No. 158, Section 1; 2004 Act No. 296, Section 1; 2005 Act No. 32, Section 12; 2012 Act No. 275, Section 2, eff June 26, 2012.

Editor’s Note

2005 Act No. 32, Section 7(B), provides as follows:

“(B) Upon approval by the Governor, this act takes effect July 1, 2005, for causes of action arising after July 1, 2005, except that as of this act’s effective date, the State Treasurer shall relinquish the management of funds in the Patients’ Compensation Fund, created pursuant to Section 38‑79‑420, to the Board of Governors of the fund, and premiums paid on or after this act’s effective date must be deposited with the Board of Governors of the fund. The fund must be fully transferred to the Board of Governors, and the State Treasurer may not hold any deposits of the fund as of ninety days after this act’s effective date.”

2012 Act No. 275, Section 3, provides as follows:

“This act take effect upon approval by the Governor and applies to any investigative action undertaken as provided herein where the underlying event giving rise to the investigation occurs on or after the effective date.”

Effect of Amendment

The 2012 amendment substituted “a committee appointed by the Department of Mental Health, or” for “an appointed member of a committee of a medical staff of a licensed hospital, provided the medical staff operates pursuant to written bylaws that have been approved by the governing board of the hospital, or” in subsection (B).

CROSS REFERENCES

Confidences of patients suffering from mental illness or emotional conditions may not be revealed, except under certain circumstances, see Section 19‑11‑95.

Expert review panel under SC Health Care Professional Compliance Act considered to be professional committee, see Section 44‑30‑60.

Library References

Health 195.

Licenses 21.

Westlaw Topic Nos. 198H, 238.

C.J.S. Licenses Sections 58 to 60.

C.J.S. Physicians, Surgeons, and Other Health Care Providers Sections 54, 71.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Appeal and Error Section 8, Original Jurisdiction of the Supreme Court.

S.C. Jur. Hospitals Section 18, Medical Review Committees.

S.C. Jur. Hospitals Section 25, Governmental Immunity.

S.C. Jur. Hospitals Section 27, Hospital Records.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual Survey of South Carolina: Equal Protection; Limitation of Actions Against Architects, Professional Engineers, and Contractors. Thomas DeWitt Rogers, III, 31 S.C. L. Rev. 21.

Annual Survey of South Carolina: Immunity From Suit; Statutory Immunity. Paul Berlin Nix, Jr., 31 S.C. L. Rev. 140.

Vital surgery or unnecessary procedure? Rethinking the propriety of hospital liability for negligent credentialing. Andrew R. deHoll, 60 S.C. L. Rev. 1127 (Summer 2009).

Attorney General’s Opinions

The relationship between the Hospital and the Network of cardiac care physicians organized through a South Carolina business operation that is wholly owned by a South Carolina business corporation which wholly owns, manages and operates several licensed South Carolina hospitals is such to assure that the Network is also encompassed by the peer review statute. S.C. Op.Atty.Gen. (June 21, 1999) 1999 WL 540717.

NOTES OF DECISIONS

In general 1

Documents protected 2

1. In general

Executive committee of hospital’s medical staff constituted “committee of a medical staff of a licensed hospital” within purview of confidentiality statute, to extent that committee operated pursuant to written bylaws approved by hospital. Code 1976, Section 40‑71‑10(B). McGee v. Bruce Hosp. System (S.C. 1993) 312 S.C. 58, 439 S.E.2d 257. Privileged Communications And Confidentiality 422(1)

2. Documents protected

Under confidentiality statute providing that documents otherwise available from original source do not become privileged merely because they are presented to the committee of medical staff of licensed hospital, “otherwise available” language means that information that is available from source other than the committee does not become privileged simply by being acquired by the review committee; accordingly, statute does not protect information if obtained from alternative sources. Code 1976, Sections 40‑71‑10, 40‑71‑20. McGee v. Bruce Hosp. System (S.C. 1993) 312 S.C. 58, 439 S.E.2d 257. Health 103

Confidentiality statute protects not only documents generated by committee of medical staff of licensed hospital, but also documents acquired by committee in course of its proceedings. Code 1976, Sections 40‑71‑10, 40‑71‑20. McGee v. Bruce Hosp. System (S.C. 1993) 312 S.C. 58, 439 S.E.2d 257.

Physicians’ applications for staff privileges and supporting documentation submitted to executive committee of hospital’s medical staff were protected by confidentiality statute. Code 1976, Sections 40‑71‑10, 40‑71‑20. McGee v. Bruce Hosp. System (S.C. 1993) 312 S.C. 58, 439 S.E.2d 257.

**SECTION 40‑71‑20.** Confidentiality of certain proceedings, records and information; reporting accidents and incidents.

(A) All proceedings of and all data and information acquired by the committee referred to in Section 40‑71‑10 in the exercise of its duties are confidential unless a respondent in the proceeding requests in writing that they be made public. These proceedings and documents are not subject to discovery, subpoena, or introduction into evidence in any civil action except upon appeal from the committee action. Information, documents, or records which are otherwise available from original sources are not immune from discovery or use in a civil action merely because they were presented during the committee proceedings, nor shall any complainant or witness before the committee be prevented from testifying in a civil action as to matters of which he has knowledge apart from the committee proceedings or revealing such matters to third persons.

(B) Confidentiality provisions do not prevent committees appointed by the Department of Health and Environmental Control from issuing reports containing solely nonidentifying data and information.

(C) Nothing in this section affects the duty of a facility or activity licensed by the Department of Health and Environmental Control to report accidents or incidents pursuant to the department’s regulations. Provided, however, anything reported pursuant to the department’s regulations shall not be considered to waive any privilege or confidentiality provided in subsection (A).

HISTORY: 1979 Act No. 171 Section 1; 1989 Act No. 158, Section 2; 2006 Act No. 372, Section 1.

CROSS REFERENCES

Confidences of patients suffering from mental illness or emotional conditions may not be revealed, except under certain circumstances, see Section 19‑11‑95.

Confidentiality of proceedings, records, and information in connection with expert review panel under SC Health Care Professional Compliance Act, see Section 44‑30‑60.

Library References

Privileged Communications and Confidentiality 422(1), 423.

Records 54, 60.

Westlaw Topic Nos. 311H, 326.

C.J.S. Records Sections 116, 118, 120, 126, 130 to 132, 139 to 142.

C.J.S. Witnesses Sections 297, 370 to 371.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Appeal and Error Section 79, Evidence at Trial.

S.C. Jur. Appeal and Error Section 145, Remand for Further Proceedings.

S.C. Jur. Hospitals Section 27, Hospital Records.

S.C. Jur. Witnesses Section 20, Privilege as Distinguished from Confidentiality.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual survey of South Carolina law: Evidence. Constance Boken, 46 S.C. L. Rev. 191 (Autumn 1994).

Vital surgery or unnecessary procedure? Rethinking the propriety of hospital liability for negligent credentialing. Andrew R. deHoll, 60 S.C. L. Rev. 1127 (Summer 2009).

Attorney General’s Opinions

Freedom of Information request for copies of 911 telephone conversations should be granted, where the subject of the 911 call is diseased and the request was made by the daughter of the diseased. S.C. Op.Atty.Gen. (May 17, 2010) 2010 WL 2320805.

The relationship between the Hospital and the Network of cardiac care physicians organized through a South Carolina business operation that is wholly owned by a South Carolina business corporation which wholly owns, manages and operates several licensed South Carolina hospitals is such to assure that the Network is also encompassed by the peer review statute. S.C. Op.Atty.Gen. (June 21, 1999) 1999 WL 540717.

NOTES OF DECISIONS

In general 1

Admissibility of evidence 4

Discovery 3

Harmless error 5

In camera review 3.5

Information from other sources 3.7

Preservation of issues 6

Purpose 2

1. In general

In breach of contract action brought by corporation that provided assets and support services to medical providers against professional association that specialized in reproductive endocrinology, and against association’s president, even if defendants had placed “at issue” topics covered by federal regulations making information reported to the National Practice Data Bank (NPDB) confidential, and South Carolina statutes making proceedings before the South Carolina Board of Medical Examiners and hospital peer review proceedings confidential, the “at issue” doctrine, which could operate as a waiver of common law privileges, did not apply to operate as a waiver of the statutory and regulatory privileges. IntegraMed America, Inc. v. Patton, 2014, 298 F.R.D. 326. Privileged Communications and Confidentiality 369; Privileged Communications and Confidentiality 422(2); Privileged Communications and Confidentiality 423

In breach of contract action brought by corporation that provided assets and support services to medical providers against professional association that specialized in reproductive endocrinology, and against association’s president, in which defendants brought claims against third‑party defendant, even if letter that third‑party defendant submitted to hospital peer review committee concerning a surgical procedure performed by association’s president that allegedly involved an adverse event initiated a peer review at the hospital and was part of the peer review record, the South Carolina statutory privilege for hospital peer review proceedings did not apply to copy of the letter that was in the possession of its original source, the third‑party defendant. IntegraMed America, Inc. v. Patton, 2014, 298 F.R.D. 326. Privileged Communications and Confidentiality 422(1)

The privilege provided by Sections 40‑71‑10 and 40‑71‑20 protects documents acquired by a committee of a medical staff of a licensed hospital in the course of its proceedings, and thus physicians’ applications for staff privileges and supporting documentation submitted to committee were protected by the confidentiality statute. McGee v. Bruce Hosp. System (S.C. 1993) 312 S.C. 58, 439 S.E.2d 257.

Under confidentiality statute providing that documents otherwise available from original source do not become privileged merely because they are presented to the committee of medical staff of licensed hospital, “otherwise available” language means that information that is available from source other than the committee does not become privileged simply by being acquired by the review committee; accordingly, statute does not protect information if obtained from alternative sources. Code 1976, Sections 40‑71‑10, 40‑71‑20. McGee v. Bruce Hosp. System (S.C. 1993) 312 S.C. 58, 439 S.E.2d 257. Health 103

Confidentiality statute protects not only documents generated by committee of medical staff of licensed hospital, but also documents acquired by committee in course of its proceedings. Code 1976, Sections 40‑71‑10, 40‑71‑20. McGee v. Bruce Hosp. System (S.C. 1993) 312 S.C. 58, 439 S.E.2d 257.

Physicians’ applications for staff privileges and supporting documentations submitted to executive committee of hospital’s medical staff were protected by confidentiality statute. Code 1976, Sections 40‑71‑10, 40‑71‑20. McGee v. Bruce Hosp. System (S.C. 1993) 312 S.C. 58, 439 S.E.2d 257.

Although confidentiality statute protects documents acquired by committee of licensed hospital’s medical staff as part of its decision‑making process, outcome of the decision‑making process is not protected. Code 1976, Section 40‑71‑20. McGee v. Bruce Hosp. System (S.C. 1993) 312 S.C. 58, 439 S.E.2d 257.

Although confidentiality statute protected applications for staff privileges and supporting documents, results of that process, the listing of clinical privileges either granted or denied, was not protected. Code 1976, Section 40‑71‑20. McGee v. Bruce Hosp. System (S.C. 1993) 312 S.C. 58, 439 S.E.2d 257.

2. Purpose

The underlying purpose behind the confidentiality statute with respect to a health care professional’s privileging file is not to facilitate the prosecution of civil actions, but to promote complete candor and open discussion among participants in the peer review process. Durham v. Vinson (S.C. 2004) 360 S.C. 639, 602 S.E.2d 760, rehearing denied. Privileged Communications And Confidentiality 422(1)

The overriding public policy of the confidentiality statute with respect to a health care professional’s privileging file 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. Durham v. Vinson (S.C. 2004) 360 S.C. 639, 602 S.E.2d 760, rehearing denied. Privileged Communications And Confidentiality 422(1)

3. Discovery

Surgeon was under no obligation to disclose entire contents of confidential privileging file to patient, in medical malpractice action. Durham v. Vinson (S.C. 2004) 360 S.C. 639, 602 S.E.2d 760, rehearing denied. Privileged Communications And Confidentiality 256

A medical malpractice plaintiff is entitled to know the clinical privileges either granted to or denied of a health care professional by the peer review. Durham v. Vinson (S.C. 2004) 360 S.C. 639, 602 S.E.2d 760, rehearing denied. Privileged Communications And Confidentiality 422(1)

Confidentiality statute does not preclude discovery of hospital’s general policies and procedures for staff monitoring. Code 1976, Section 40‑71‑20. McGee v. Bruce Hosp. System (S.C. 1993) 312 S.C. 58, 439 S.E.2d 257. Health 103

3.5. In camera review

Trial court’s finding that there was conflict of information in one document of hospital’s quality assurance file and nurse’s trial testimony, as grounds from unsealing document from file, exceeded scope of its authority on remand from appellate court which had directed trial court to conduct in camera review to determine which documents in hospital’s file were subject to disclosure, in patient’s tort action against hospital, with explanation as to why they were not protected under confidentiality statute. Prince v. Beaufort Memorial Hosp. (S.C.App. 2011) 392 S.C. 599, 709 S.E.2d 122, rehearing denied. Appeal and Error 1198

3.7. Information from other sources

Documents prepared by hospital’s quality assurance committee in investigation of patient’s fall were confidential and not subject to disclosure, in patient’s tort action against hospital, but to extent that hospital obtained information from other sources in course of its investigation, patient was entitled to seek that information from those other sources. Prince v. Beaufort Memorial Hosp. (S.C.App. 2011) 392 S.C. 599, 709 S.E.2d 122, rehearing denied. Privileged Communications and Confidentiality 422(1)

4. Admissibility of evidence

Record in medical malpractice action established that plaintiffs’ medical expert’s testimony was based on information obtained independently of any peer review committee process, and thus that testimony was not inadmissible under peer review statute. Taylor v. Medenica (S.C. 1996) 324 S.C. 200, 479 S.E.2d 35, rehearing denied. Evidence 555.10

5. Harmless error

Error in allowing patient’s attorney to question surgeon regarding surgeon’s refusal to disclose contents of confidential privileging file was harmless, in patient’s action for medical malpractice, even when error was exacerbated by counsel’s comments during argument indicating that surgeon must have had something to hide and was engaging in deceit, where other independent admissible evidence indicated that surgeon was being deceitful and evidence of surgeon’s liability was overwhelming. Durham v. Vinson (S.C. 2004) 360 S.C. 639, 602 S.E.2d 760, rehearing denied. Appeal And Error 1048(6)

6. Preservation of issues

Appellate court’s determination on initial appeal that issue of whether hospital waived patient‑physician privilege by its apparent use of documents from its quality assurance committee file in answering patient’s discovery requests, and therefore that documents were subject to disclosure in patient’s tort action, was not preserved for appellate review, was law of case on remand to trial court. Prince v. Beaufort Memorial Hosp. (S.C.App. 2011) 392 S.C. 599, 709 S.E.2d 122, rehearing denied. Appeal and Error 1195(1)

**SECTION 40‑71‑30.** Judicial review of documents claimed to be confidential; penalty against party found to be unreasonably asserting confidentiality.

When a party asserts a claim of confidentiality over documents pursuant to Section 40‑71‑20 and the party seeking the documents objects, the documents must be filed under seal with the circuit court having jurisdiction over the pending action and are subject to judicial review by the circuit court judge. If the court determines that any of the documents are not subject to confidentiality pursuant to Section 40‑71‑20 and are otherwise discoverable, the court shall provide the documents to the requesting party. In the event the court finds that a party acted unreasonably in unsuccessfully asserting the claim of confidentiality, the court shall assess attorney’s fees against that party for any fees incurred by the requesting party in obtaining the documents.

HISTORY: 2005 Act No. 32, Section 13.

Editor’s Note

2005 Act No. 32, Section 7(B), provides as follows:

“(B) Upon approval by the Governor, this act takes effect July 1, 2005, for causes of action arising after July 1, 2005, except that as of this act’s effective date, the State Treasurer shall relinquish the management of funds in the Patients’ Compensation Fund, created pursuant to Section 38‑79‑420, to the Board of Governors of the fund, and premiums paid on or after this act’s effective date must be deposited with the Board of Governors of the fund. The fund must be fully transferred to the Board of Governors, and the State Treasurer may not hold any deposits of the fund as of ninety days after this act’s effective date.”