

No. 33107

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

R. EDWARD HAMRICK, JR., M.D.,
M. ZAFRULLAH KHAN, M.D., NESTOR F.
DANS, M.D., M. HUMAYUN RASHID, M.D.,
FIRASAT MALIK, M.D., M. SALIM RATNANI,
M.D., KEE C. LEE, M.D., JAY J. KIM, M.D.,
SULAIMAN HASAN, M.D., and THORACIC &
CARDIOVASCULAR ASSOCIATES, INC.,

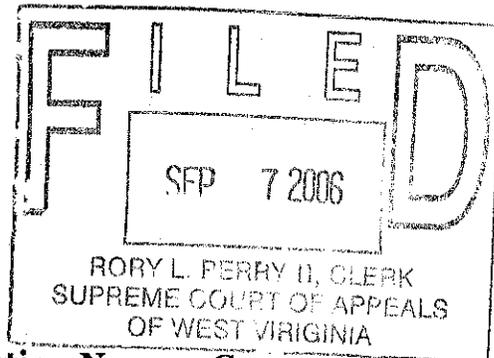
Appellants and Plaintiffs Below,

v.

Civil Action No.: 05-C-472

CHARLESTON AREA MEDICAL CENTER,
a W. Va. not-for-profit corporation,

Appellee and Defendant Below.



APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
HONORABLE JAMES C. STUCKY, JUDGE

BRIEF OF APPELLANTS R. EDWARD HAMRICK, JR., M.D. ET AL.

Karen H. Miller (State Bar No.: 1567)
Richard W. Walters (State Bar No.: 6809)
MILLER, WEILER & WALTERS
2 Hale Street
Charleston, West Virginia 25301
(304) 343-7910

Counsel for Appellants

TABLE OF CONTENTS

AUTHORITIES RELIED UPON iii

KIND OF PROCEEDING AND NATURE OF RULING BELOW 1

STATEMENT OF FACTS 2

ASSIGNMENTS OF ERROR 8

 1. The Circuit Court erred when it interpreted the OHPA to provide for only one “governing body” per organization 8

 2. The Circuit Court erred by concluding that the CAMC Medical Staff Executive Committee is not a “governing body” as defined by the OHPA 8

DISCUSSION 8

 1. The Circuit Court erred when it interpreted the OHPA to provide for only one “governing body” per organization 8

 a. The plain language of the OHPA contemplates more than one “governing body” per organization 9

 b. The legislative intent of the OHPA supports that there can be more than one “governing body” 9

 c. The OHPA, like the W. Va. Open Governmental Proceedings Act, should be given an expansive reading to contemplate more than one “governing” body and to prevent CAMC from keeping the decision making and the decision-making process closed to the public 14

 2. The material evidence of record establishes that the CAMC Medical Staff Executive Committee is a “governing body” as defined by the OHPA 17

 a. Defendant CAMC’s own documents show that the Medical Staff Executive Committee is a “governing body” 17

b. Several members of the CAMC Board of Trustees and CAMC Administration are also part of the Medical Staff Executive Committee..... 19

c. The Medical Staff Executive Committee actually makes and recommends policy 19

CONCLUSION 22

AUTHORITIES RELIED UPON

CASE LAW:

West Virginia

<u>Appalachian Power Company v. Public Service Commission,</u> 253 S.E.2d 377, 381 (W. Va. 1979).....	16
<u>Carper v. Kanawha Banking & Trust Co.,</u> 207 S.E.2d 897, 921 (W. Va. 1974)	9
<u>Hereford v. Meek,</u> 52 S.E.2d 740, 747 (W. Va. 1949)	10
<u>McComas v. Board of Education of Fayette County,</u> 475 S.E.2d 280, 289 (W. Va. 1996)	15, 16
<u>Meadows v. Wal-Mart,</u> 530 S.E.2d 676, 687 (W. Va. 1999).....	11
<u>Peters v. County Commission of Wood County,</u> 519 S.E.2d 179 (W. Va. 1999).....	15
<u>State v. General Daniel Morgan Post No. 548, VFW,</u> 107 S.E.2d 353, 358 (W. Va. 1959)	10

Other Jurisdictions

<u>Dascott v. Palm Beach County,</u> 877 So.2d 8 (Fla. 4 th DCA 2004)	16
<u>IDS Properties, Inc., v. Town of Palm Beach,</u> 279 So.2d 353 (Fla. 4 th DCA 1973).....	16
<u>News-Press Publishing, Co., Inc., v. Carlson,</u> 410 So.2d 546 (Fla. District Court 1982).....	16
<u>Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors,</u> 263 Cal.App.2d 41, 50, 69 Cal.Rptr. 480, 487 (1968).....	15

STATUTES:

W. Va. Code § 16-5G-2(3) 8, 14

W. Va. Code § 16-5G-1 1, 11

W. Va. Code § 16-5G-3 8, 11

W. Va. Code § 16-5G-2(5) 20

W. Va. Code § 16-5G-7(a)..... 11

W. Va. Code § 6-9A-1 *et seq* 14

W. Va. Code § 6-9A-2(3)..... 14

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

R. EDWARD HAMRICK, JR., M.D., et al.,

Appellants and Plaintiffs Below,

v.

Appeal No. 33107

**CHARLESTON AREA MEDICAL CENTER,
a W. Va. not-for-profit corporation,**

Appellee and Defendant Below.

BRIEF OF APPELLANTS R. EDWARD HAMRICK, JR., M.D. ET AL.

I.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

Nine Doctors, filed suit in the Circuit Court of Kanawha County to compel the Charleston Area Medical Center ("CAMC") to comply with the provisions of the Open Hospital Proceedings Act ("OHPA").¹ Specifically, the Doctors alleged that CAMC's Medical Staff Executive Committee is a "governing body" as defined by the OHPA and, thus, must hold its meetings in open session. Therefore, the Doctors argued below that the meetings of the Medical Staff Executive Committee cannot remain closed to the public. CAMC responded by maintaining that the Medical Staff Executive Committee is not a "governing body" as the OHPA contemplates only one "governing body" per non-profit hospital.

The parties exchanged discovery and agreed to submit written briefs to Judge James C. Stucky for decision. Thereafter, Judge Stucky issued a Final Order granting summary judgment in CAMC's favor.² Judge Stucky interpreted the OHPA as contemplating only one "governing body" per organization.³ Judge Stucky also

¹ See W. Va. Code § 16-5G-1 *et seq.*

² See Final Order dated February 24, 2006.

³ See Final Order at p. 2.

concluded: “[T]he Medical Staff Executive Committee answers to, and is subordinate to the Board of Trustees. Therefore, under the Act, the Board of Trustees is the only ‘governing body’ of CAMC.”⁴

Judge Stucky accordingly granted CAMC’s Motion for Summary Judgment and removed the case from the docket.⁵ The Doctors petitioned for appeal because the Circuit Court’s Final Order is without support in fact and law and fails to consider the authority of the Medical Staff Executive Committee or the reality of what actually takes place in the Medical Staff Executive Committee meetings.

II.

STATEMENT OF FACTS

The CAMC bylaws have delegated to the CAMC medical staff the responsibility of the medical and surgical care of the patients admitted to the hospital.⁶ The CAMC bylaws have delegated to the medical staff the power to create and maintain governing documents.⁷ The CAMC bylaws have delegated to the medical staff the power to make recommendations for appointment to the staff, make recommendations for the granting, revision, and delineation of any clinical privileges, and the continuing review and appraisal of the quality of professional care rendered in the hospital.⁸

Furthermore, the CAMC bylaws have delegated to the medical staff the power to make recommendations concerning appointments, reappointments, terminations of

⁴ See Final Order at p. 2.

⁵ Id.

⁶ See Dr. Hamrick’s Motion for Summary Judgment Exhibit 1 - CAMC Hospital Bylaws at p. 12.

⁷ Id. at 13.

⁸ Id.

appointments, and the granting or revision of clinical privileges.⁹ The CAMC bylaws state that the CAMC Medical Staff Executive Committee makes recommendations directly to the CAMC Board regarding matters within the Medical Staff Executive Committee's scope and responsibility.¹⁰

The CAMC Medical Staff Executive Committee is made up of officers of the medical staff, representatives from CAMC Administration, and several members of the CAMC Board of Trustees.¹¹ CAMC's Chief of Staff serves as the chairperson of the Medical Staff Executive Committee.¹² In addition, the Chief of Staff serves on the CAMC Board of Trustees.¹³

Also, CAMC's President and Chief Executive Officer, David Ramsey, is part of the CAMC Medical Staff Executive Committee although he is not a physician. CAMC's Executive Vice President and Chief Operating Officer, Glenn Crotty, Jr., M.D., is part of the Medical Staff Executive Committee.¹⁴

The CAMC Medical Staff Executive Committee is responsible for making decisions and recommendations to CAMC on issues affecting health services in West Virginia.¹⁵ It is the only committee permitted to make recommendations directly to the

⁹ See Dr. Hamrick's Motion for Summary Judgment Exhibit 1 - CAMC Hospital Bylaws at p. 13.

¹⁰ Id.

¹¹ See Dr. Hamrick's Motion for Summary Judgment Exhibit 2 - CAMC Medical Staff Governing Documents - Medical Staff Bylaws at p. 26.

¹² Id. at 16.

¹³ Id. at 3.

¹⁴ See generally CAMC Medical Staff Executive Committee Meeting Minutes.

¹⁵ See Dr. Hamrick's Motion for Summary Judgment Exhibit 2 - Medical Staff Bylaws at pp. 26-27.

Board of Trustees.¹⁶ These nine Doctors believe they have a legal right to have a voice before this Committee. They also believe the public has a right.

The CAMC Medical Staff Executive Committee, which includes several members of the CAMC Board of Trustees, meet for the purpose of deciding significant health care policies or deliberate toward decisions regarding significant health care policies.

The CAMC Medical Staff bylaws also outline the responsibilities of the CAMC Medical Staff Executive Committee. This includes, but is not limited to, making policy recommendations directly to the CAMC Board of Trustees concerning the following:

- CAMC's medical staff structure;
- CAMC's mechanism used to review credentials and to delineate individual clinical privileges;
- Recommendations for medical staff appointments;
- Recommendations for delineated clinical privileges for each eligible individual;
- Participation of the medical staff in hospital performance improvement activities;
- The mechanism by which medical staff appointment may be terminated; and
- Hearing procedures.¹⁷

The CAMC Medical Staff Governing Documents confirm that the CAMC Board of Trustees has delegated to the CAMC Medical Staff Executive Committee the primary authority over activities relating to performance improvement, patient care processes, credentialing, and peer review.¹⁸

¹⁶ Id. at 27.

¹⁷ See Dr. Hamrick's Motion for Summary Judgment Exhibit 2 - Medical Staff Bylaws at p. 27.

¹⁸ Id. at 28-29.

The CAMC Medical Staff Governing Documents confirm that the CAMC Medical Staff Executive Committee is responsible for the medical staff's participation in the measurement, assessment, and improvement of patient care processes.¹⁹

The CAMC Medical Staff Executive Committee recommends individuals for appointment to the medical staff.²⁰ Thus, the Medical Staff Executive Committee recommends to the CAMC Board of Trustees each and every doctor that will be implementing patient care at the hospital. This is likely the most important responsibility of anyone at CAMC.

Moreover, the meeting minutes of the CAMC Board of Trustees show that the CAMC Medical Staff Executive Committee has the authority to make decisions or recommendations on policy. Specifically, in August 2004, CAMC's Chief of Staff presented to the CAMC Board of Trustees the following recommendations of the Medical Staff Executive Committee: 1) Hospital Plan for the Provision of Patient Care and 2) Flu Vaccines & Immunization Protocol.²¹ The CAMC Board of Trustees adopted these recommendations without making any changes.²²

In September 2004, the Chief of Staff presented changes to the CAMC Medical Staff Rules and Regulations and the CAMC Medical Staff Governing Documents. This included changes to the Medical Staff Organization and Functions Manual, the Medical Staff Bylaws, and the Credentials Policy. These changes were designed to bring CAMC into compliance with current standards of the Joint Commission on Accreditation of

¹⁹ See Dr. Hamrick's Motion for Summary Judgment Exhibit 2 – CAMC Medical Staff Bylaws at 29.

²⁰ Id. at 27.

²¹ See Dr. Hamrick's Motion for Summary Judgment Exhibit 7 - Board of Trustees Meeting Minutes dated August 25, 2004 (p. 6) w/attached MSEC Report to Board of Trustees.

²² Id.

Health Care Organizations.²³ The CAMC Board of Trustees adopted the recommendations of the CAMC Medical Staff Executive Committee without making any changes.²⁴

In October 2004, the CAMC Board of Trustees approved a recommendation from the CAMC Medical Staff Executive Committee amending the CAMC Medical Staff Bylaws.²⁵ The Board of Trustees also adopted recommendations concerning appointment, reappointment, clinical privileges, and staff status changes.²⁶ The Board adopted the recommendations without change.²⁷

In November 2004, the Medical Staff Executive Committee recommended Chiefs and Vice Chiefs for each medical department and the recommendations were adopted by the CAMC Board of Trustees without change.²⁸

In January 2005, the Medical Staff Executive Committee recommended department section heads and amendments to the CAMC Organization and Functions Manual.²⁹ The CAMC Board of Trustees adopted the recommendations without change.³⁰

²³ See Dr. Hamrick Motion for Summary Judgment Exhibit 8 - Board of Trustees Meeting Minutes dated September 22, 2004 (p. 6) w/attached MSEC Report to Board of Trustees.

²⁴ See Dr. Hamrick's Motion for Summary Judgment Exhibit 8 - Board of Trustees Meeting Minutes dated September 22, 2004 (p. 6) w/attached MSEC Report to Board of Trustees.

²⁵ See Dr. Hamrick's Motion for Summary Judgment Exhibit 9 - Board of Trustees Meeting Minutes dated October 27, 2004 w/attached MSEC Report to Board of Trustees.

²⁶ Id.

²⁷ Id.

²⁸ See Dr. Hamrick's Motion for Summary Judgment Exhibit 10 - Board of Trustees Meeting Minutes dated November 17, 2004 w/attached MSEC Report to Board of Trustees.

²⁹ See Dr. Hamrick's Motion for Summary Judgment Exhibit 11 - Board of Trustees Meeting Minutes dated January 26, 2005 (p. 6) w/attached MSEC Report to Board of Trustees.

³⁰ Id.

In March 2005, the CAMC Board of Trustees adopted a variety of recommendations concerning amendments to the CAMC Organization and Functions Manual, Informed Consent Form, Reconciliation of Home Medications Form, Arrhythmia Protocol, and Reflex Testing.³¹ The Board adopted the recommendations without change or discussion.³²

In April 2005, the CAMC Board of Trustees adopted, without change or discussion, recommendations from the Medical Staff Executive Committee concerning the care of unassigned medical patients and recommendations concerning the total formulary review for 2005.³³

In July 2005, the CAMC Board of Trustees adopted all of the recommendations made by the Medical Staff Executive Committee.³⁴ The same occurred in August 2005, where the CAMC Board adopted the Medical Staff Executive Committee's recommendation that thoracic surgeons were to be exempted from vascular call coverage.³⁵

The CAMC Board of Trustees meeting minutes reflect that the Medical Staff Executive Committee recommendations are passed without change and with little or no discussion. The discussion, debate, and deliberation takes place at the meetings of the CAMC Medical Staff Executive Committee, which are closed to the public and closed to

³¹ See Hamrick Summary Judgment Exhibit 13 - Board of Trustees Meeting Minutes dated March 23, 2005 (pp. 6, 10) w/attached MSEC Report to Board of Trustees.

³² Id.

³³ See Hamrick Summary Judgment Exhibit 14 - Board of Trustees Meeting Minutes dated April 2005 w/attached MSEC Report to Board of Trustees.

³⁴ See Hamrick Summary Judgment Exhibit 15 - Board of Trustees Meeting Minutes dated July 2005 (pp. 8, 11) w/attached MSEC Report to Board of Trustees.

³⁵ See Hamrick Summary Judgment Exhibit 16 - Board of Trustees Meeting Minutes dated August 2005 (pp. 6, 8) w/attached MSEC Report to Board of Trustees.

the medical staff unless they are on the above committee.

III.

ASSIGNMENTS OF ERROR

- (1) **The Circuit Court erred when it interpreted the OHPA to provide for only one “governing body” per organization.**
- (2) **The Circuit Court erred by concluding that the CAMC Medical Staff Executive Committee is not a “governing body” as defined by the OHPA.**

IV.

DISCUSSION

1. **The Circuit Court erred when it interpreted the OHPA to provide for only one “governing body” per organization.**

The OHPA requires that all meetings of a governing body of a hospital be made open to the public.³⁶ A “governing body” is defined as the board of directors **or any other group of persons having the authority to make decisions for or recommendations on policy or administration** to a hospital owned or operated by a non-profit corporation.³⁷

The Circuit Court ruled that the OHPA contemplates only one “governing body” per organization. But the Circuit Court provided little, if any, findings of fact and conclusions of law in support.³⁸

The Circuit Court appeared to rely upon CAMC’s argument that the OHPA says

³⁶ See W. Va. Code § 16-5G-3.

³⁷ See W. Va. Code § 16-5G-2(3) (emphasis added).

³⁸ See Final Order dated February 24, 2006.

“governing body” not “governing bodies.”³⁹ But this is a pretty thin argument. The plain language of the statute and the underlying legislative policy shows there can be more than one “governing body.” Accordingly, the Circuit Court erred in finding there is only one “governing body” per organization.

a. The plain language of the OHPA contemplates more than one “governing body” per organization.

“[A] statute which is clear and unambiguous should be applied by the courts and not construed or interpreted.”⁴⁰ Under the OHPA, a “governing body” includes the board of directors or any other **group of persons having the authority to make decisions for or recommendations on policy** or administration.

The plain language of the statute reflects **that any group at CAMC having the authority to make decisions for or recommendations on policy** should be considered a “governing body.” There is nothing in the OHPA stating there can be only one “governing body” at a hospital. Taking into consideration the legislative policy of the OHPA, discussed more fully below, this Court should accord a reasonable reading of the statutory language. An ultra-narrow interpretation, which the Circuit Court has applied, will invite avoidance tactics by entities subject to the OHPA when these entities make important health care policy. Accordingly, the plain language of the OHPA does contemplate more than one “governing body” per organization.

b. The legislative intent of the OHPA supports that there can be more than one “governing body.”

“A statute is open to construction only where the language used requires

³⁹ See CAMC’s Memorandum in Support of Summary Judgment at p. 9.

⁴⁰ *Carper v. Kanawha Banking & Trust Co.*, 207 S.E.2d 897, 921 (W. Va. 1974).

interpretation because of ambiguity which renders it susceptible of two or more constructions of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.”⁴¹

In the present case, there is no ambiguity. Nonetheless, CAMC tried to create ambiguity by arguing that Dr. Hamrick “confuse[d] the disjunctive ‘or’ with the conjunctive ‘and’ when interpreting the OHPA.”⁴² CAMC argued that a “governing body” is either the board of directors or some other group of persons having the authority to make decisions for or recommendations on policy or administration to a hospital, but not both.⁴³

However, CAMC’s argument regarding statutory construction entirely ignores the purpose behind the OHPA. CAMC attempts to create ambiguity where none exists for the purpose of not having to comply with the intent of the statute. CAMC’s attempt to dissect the definition of “governing body” was not being done to assist the Circuit Court in interpreting the statute, but to create ambiguity so it could present its own interpretation of the statute.

Unfortunately for CAMC, its argument puts the matter squarely within the legislative intent of the OHPA. “This Court has long held that ‘[i]n the interpretation of a statute, the legislative intention is the controlling factor; and the intention of the legislature is ascertained from provisions of the statute by the application of sound and

⁴¹ *Hereford v. Meek*, 52 S.E.2d 740, 747 (W. Va. 1949).

⁴² See CAMC’s Summary Judgment Memorandum in Support at p. 10.

⁴³ See CAMC’s Summary Judgment Memorandum at p. 10.

well-established canons of construction.”⁴⁴

In the instant case, the legislative intent makes it clear that the OHPA contemplates more than one “governing body.” Specifically, the Legislature declared the intent of the OHPA as follows:

Therefore, it is in the best interest of the people of this State for **all proceedings of the board of directors or other governing bodies** of such hospitals to be conducted in an open and public manner so that the people can remain informed of the decisions and decision-making processes affecting the health services on which they so vitally depend and which they help support through tax exemptions, public funding, and other means.⁴⁵

The obvious thrust of the declaration of legislative policy of the OHPA is that citizens of West Virginia depend on publicly funded non-profit hospitals for their health and well-being. Therefore, the citizens have a vested interest in decisions made by the governing bodies that affect health care services.⁴⁶ These doctors also believe they have that vested right for the care of their patients. Because non-profit hospitals are supported “through tax exemptions, public funding, and other means,” opening the doors of their decision-making process is in the best interest of the people of West Virginia.⁴⁷

Clearly, the Legislature wanted to make sure that all proceedings of non-profit hospitals, where significant health care policy decisions are being made, be conducted in

⁴⁴ *Meadows v. Wal-Mart*, 530 S.E.2d 676, 687 (W. Va. 1999)(citing *State v. General Daniel Morgan Post No. 548, VFW*, 107 S.E.2d 353, 358 (W. Va. 1959)(citation omitted)).

⁴⁵ W.Va. Code § 16-5G-1 (emphasis added).

⁴⁶ See W.Va. Code § 16-5G-1.

⁴⁷ *Id.*

an open and public manner.⁴⁸ Evidence of the legislative intent is further set forth in W. Va. Code § 16-5G-7(a), which states that “it is a violation of this article for a governing body to hold a private meeting with the intent of transacting public business, thwarting public scrutiny, and making decisions that eventually become official action.” Thus, the Legislature demands that non-profit hospitals conduct their business in an open and public manner so that the people can remain informed of the decisions and decision-making processes affecting health services.

The Medical Staff Executive Committee must be included as a “governing body,” and not excluded, because significant health care policy decisions are being made in closed sessions at the Medical Staff Executive Committee level. There are many members of the Board of Trustees, CAMC Administration, as well as CAMC lawyers present at these meetings. As documented above, the CAMC Board of Trustees overwhelmingly adopts the policy recommendations of the Medical Staff Executive Committee without change and without much, if any, discussion. In reality, the Medical Staff Executive Committee is the “other governing body” when it comes to making all the significant health care decisions and policies at CAMC.

It is not only the public that is being shut out of these meetings. Even the doctors that practice at CAMC are regularly denied the right to attend these meetings or, on rare occasions, given limited time to speak. Thus, the doctors cannot adequately give their input on health care recommendations and policy. This raises serious public health concerns. For example, the thoracic surgeons wanted to bring to the Medical Staff

⁴⁸ Id.

Executive Committee's attention that all cardiac and thoracic aortic procedures should be performed at CAMC Memorial. This issue needed raised because doctors were being forced to operate on patients with traumatic aortic ruptures at CAMC General under less than optimal conditions.⁴⁹ CAMC General's operating room was not sufficiently equipped and did not have the experienced staff for open heart surgeries.⁵⁰ The survival rate at General was abysmal.⁵¹ The doctors were also threatened with their privileges if they transferred patients to CAMC Memorial where proper care could be given.⁵² Their desire was to discuss the facility issue with their colleagues at the Medical Staff Executive Committee meeting and the request was denied. Subsequently, due to an injunctive hearing before Judge Stucky, CAMC agreed to allow the physician's access to the committee. However, the doctors were only given fifteen minutes to address the issue. The physicians were only given fifteen (15) minutes to discuss issues directly related to the lives of their patients. The CAMC administrators are using their power to influence the Medical Staff Executive Committee, and patient care is not being sufficiently represented. Doctors are concerned about the patient care issue, and the administrators are concerned about salary raises and bonuses.

Keeping the public out of these meetings simply contradicts the legislative purpose of the OHPA. CAMC should not be permitted to hide behind the Medical Staff

⁴⁹ See Plaintiffs' Amended Verified Complaint and Motion for Preliminary Injunction dated August 30, 2005, at Exhibits 5 and 6.

⁵⁰ Id.

⁵¹ Id.

⁵² Id.

Executive Committee when discussing, debating, deliberating, recommending, and implementing health care policies that impact thousands of West Virginia citizens. CAMC should not be permitted to lock out doctors and the public from the meeting that passes recommendations to the Board of Trustees. Accordingly, the legislative policy of the OHPA supports the conclusion that there can be more than one “governing body.”

- c. The OHPA, like the W. Va. Open Governmental Proceedings Act, should be given an expansive reading to contemplate more than one “governing body” and to prevent CAMC from keeping the decision making and the decision-making process closed to the public.**

Although there is no direct case law in West Virginia interpreting the OHPA, this Supreme Court should look to the Open Governmental Proceedings Act for guidance.⁵³ The public policy behind the Open Governmental Proceedings Act is the same as the OHPA. The Open Governmental Proceedings Act seeks to make sure that government is conducted in an open and public manner so that the citizens can remain informed of the decisions and decision-making process.⁵⁴

Also, the definition of a “governing body” under the Open Governmental Proceedings Act is similar to the definition under the OHPA, in that “governing body” refers to “members of any public agency having the authority to make decisions for or recommendations to a public agency on policy or administration....”⁵⁵

The Open Governmental Proceedings Act contemplates more than one “governing body.” The State of West Virginia has multiple governing bodies, including the executive branch and legislative branch. The legislative branch has the House and

⁵³ See W. Va. Code § 6-9A-1 *et seq.*

⁵⁴ See W. Va. Code § 6-9A-1.

⁵⁵ See W. Va. Code § 6-9A-2(3).

Senate. The House and Senate have committees, all of which must follow the Open Governmental Proceedings Act. The same goes for city and county governments.

CAMC is no different in that it has two governing bodies: the Board of Trustees and the Medical Staff Executive Committee. The Board of Trustees is comparable to the executive branch and the Medical Staff Executive Committee is comparable to the legislative branch. Therefore, the Supreme Court should look to the Open Governmental Proceedings Act and related case law for guidance.

The OHPA should be given an expansive reading just like the Open Governmental Proceedings Act. The West Virginia Supreme Court, in *McComas v. Board of Education of Fayette County*, 475 S.E.2d 280, 289 (W. Va. 1996), stated the following: "From the legislative statement of policy and its constitutional underpinnings, it is clear this Court should give an expansive reading to the Act's provisions to achieve its far-reaching goals."⁵⁶ "A narrow reading would frustrate the legislative intent and negate the purpose of the statute."⁵⁷ "Moreover, we are concerned a narrow interpretation of the Act would invite avoidance tactics."⁵⁸

Further, the Supreme Court has held that a court applying the Open Governmental Proceedings Act should "push [its coverage] beyond debatable limits in order to block evasive techniques."⁵⁹ Like the Open Governmental Proceedings Act, the OHPA must apply to those committees where hospital policy recommendations are developed, debated, deliberated, and subsequently presented directly to the Board of

⁵⁶ See also *Peters v. County Commission of Wood County*, 519 S.E. 2d 179 (W. Va. 1999).

⁵⁷ *McComas* at 289.

⁵⁸ *Id.* at 289-290.

⁵⁹ *Id.*, citing *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, 263 Cal. App.2d 41, 50, 69 Cal. Rptr. 480, 487 (1968).

Trustees for adoption and implementation, especially when the Board of Trustees simply "rubber stamps" the recommendations of a committee.

In *McComas*, the Supreme Court expressed no doubt that the Open Governmental Proceedings Act applied to assemblies where discussions leading up to a decision take place. The Supreme Court cited *Appalachian Power Company v. Public Service Commission*, 253 S.E.2d 377, 381 (W. Va. 1979) for the following:

Consultations with staff, deliberation, and making a decision are steps in a *process*. For our purposes they are not separate and distinct occurrences. Consultations, deliberations, and making a decision are elements in a continuum. To attempt to separate this continuum into contrived components obstructs rather than facilitates interpretation of the Act.⁶⁰

In addition, the State of Florida has an open hospital proceedings statute that applies to public hospitals. The Florida District Court has held that when a governing authority of a hospital delegates its responsibility to a committee, the nature and function of that committee reaches the status of the board and has to comply with the statute.⁶¹

When reaching its decision, the Florida District Court looked to Florida's open government proceedings statute and cited the following:

When public officials delegate de facto authority to act on their behalf in formulation, preparation, and promulgation of plans on which foreseeable action will be taken by those public officials, those delegated that authority stand in the shoes of such public officials insofar as application of the government when sunshine law is concerned.⁶²

⁶⁰ *McComas* at 287 (emphasis in original).

⁶¹ *News-Press Publishing Co., Inc., v. Carlson*, 410 So. 2d 546 (Fla. District Court 1982).

⁶² *Id.* at 547-548, citing *IDS Properties, Inc., v. Town of Palm Beach*, 279 So. 2d 353 (Fla. 4th DCA 1973);

In the present case, the undisputed material evidence of record shows that the Medical Staff Executive Committee has the authority to make decisions on policy and recommend policy regarding health care and other issues. It is the only committee permitted to make recommendations directly to the Board of Trustees. CAMC's primary responsibility is to provide health care to the public. There is nothing in the OHPA that states there can only be one "governing body." The purpose of the OHPA is to bring out in the open the decision-making process. By locking out the public, as well as the doctors that do not fully support the CAMC's administration, the health care decision-making process is shortchanged.

Thus, considering the OHPA's declaration of legislative policy and the undisputed facts of this case, the Circuit Court should have accorded an expansive reading of the OHPA and found that there can be more than one "governing body." Like the Open Governmental Proceedings Act, the OHPA must apply to those committees where hospital policy recommendations are developed, debated, deliberated, and subsequently presented to the Board of Trustees for adoption and implementation. The rationale for such an interpretation is strengthened when, as in the instant case, the committee is the true policy and decision-making body. Therefore, the Circuit Court erred.

2. The material evidence of record establishes that the CAMC Medical Staff Executive Committee is a "governing body" as defined by the OHPA.

a. Defendant CAMC's own documents show that the Medical Staff Executive Committee is a "governing body."

In the present case, CAMC's own documents show that the Medical Staff Executive Committee is a governing body as defined by the OHPA. These documents include the following: 1) CAMC Hospital Bylaws; 2) CAMC Board of Trustees Meeting

See also *Dascott v. Palm Beach County*, 877 So. 2d 8 (Fla. 4th DCA 2004).

Minutes; 3) CAMC Medical Staff Executive Committee Meeting Minutes; 4) CAMC Medical Staff Executive Committee Reports to the Board of Trustees; and 5) CAMC Medical Staff Governing Documents - Medical Staff Bylaws.

These documents show that the Medical Staff Executive Committee has the authority to make decisions and recommendations on CAMC policy. These documents show that the CAMC Board of Trustees has delegated significant authority to the Medical Staff Executive Committee to recommend and make policy. These documents show that the Medical Staff Executive Committee is responsible for making decisions and recommendations to the hospital on issues affecting health care services in West Virginia. These documents show that the Medical Staff Executive Committee is the only committee permitted to make policy recommendations directly to the Board of Trustees.

The CAMC Hospital Bylaws give the CAMC Board of Trustees the power to appoint agents and committees to carry out its business. The CAMC Board has delegated to the Medical Staff Executive Committee the most significant part of CAMC's business: the responsibility of the medical and surgical care of the patients admitted to the hospital.

In addition, the CAMC Board of Trustees has delegated to the medical staff the power to make recommendations for the following: 1) appointment to the staff; 2) making recommendations for the granting, revision, and delineation of any clinical privileges; and 3) the continuing review and appraisal of the quality of professional care rendered in the hospital.

Also, the CAMC Hospital Bylaws specifically state that the CAMC Medical Staff Executive Committee makes recommendations directly to the CAMC Board of Trustees regarding matters within the Medical Staff Executive Committee's scope and responsibility.

Thus, CAMC's own documents show that the Medical Staff Executive Committee is a "governing body." The Circuit Court erred by not finding that the Medical Staff Executive Committee is a "governing body."

b. Several members of the CAMC Board of Trustees and CAMC Administration are also part of the Medical Staff Executive Committee.

Further, the records show that the CAMC Medical Staff Executive Committee includes many members of the Board of Trustees and several representatives from CAMC's Administration, including the President/Chief Executive Officer and Vice President/Chief Operating Officer. Several members of the CAMC Board of Trustees and CAMC Administration are meeting outside the public eye to make policy and to recommend policy. In essence, a CAMC Medical Staff Executive Committee meeting is tantamount to a CAMC Board of Trustees meeting. Therefore, the Medical Staff Executive Committee meetings should be open to the public in order to comply with the strong public policy component of the OHPA.

c. The Medical Staff Executive Committee actually makes and recommends policy.

As discussed above, the meeting minutes of CAMC's Board of Trustees and CAMC Medical Staff Executive Committee show that the Medical Staff Executive Committee actually makes policy. The Medical Staff Executive Committee also recommends policy, albeit in a perfunctory fashion. The OHPA makes it clear that the health care policy recommendation process must be open to the public. Otherwise, the OHPA would have been written to say that only the policy making be kept open to the public and not the policy recommendation process.

4 7 8

The records show that the CAMC Board of Trustees overwhelmingly adopts the policy recommendations from the Medical Staff Executive Committee without change. There is little evidence of discussion taking place among the Board of Trustees when the policy adoptions are made. Unquestionably, the Medical Staff Executive Committee is heavily involved in the health care policy making process. Thus, it is evident the Medical Staff Executive Committee is a "governing body" as defined by the OHPA.

Moreover, the meetings of the Medical Staff Executive Committee are within the definition of "meetings" as set forth in the OHPA.⁶³ A "meeting" under the OHPA is defined as "a convening of a governing body of a hospital for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter."⁶⁴ The OHPA goes on to state that a "medical staff conference" is not a "meeting" as defined in the statute.⁶⁵

In the present case, the undisputed material facts show that the Medical Staff Executive Committee requires a quorum in order to make a decision or to deliberate toward a decision on any matter. This is spelled out in the CAMC Medical Staff Bylaws.⁶⁶ Further, notice is given, meeting minutes are prepared, and the Robert's Rules of Order are followed.⁶⁷ Also, the Medical Staff Executive Committee frequently goes into "executive session."

⁶³ See W. Va. Code § 16-5G-2(5).

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ See Dr. Hamrick's Motion for Summary Judgment Exhibit 2 - CAMC Medical Staff Governing Documents - Medical Staff Bylaws at p.33.

⁶⁷ Id. at 33-35.

In addition, these meetings are not medical staff "conferences" because members of the CAMC Board of Trustees attend, as well as CAMC Administration and CAMC lawyers. CAMC's medical staff conference as contemplated in the OHPA is held by the CAMC medical staff only once a year.⁶⁸ Accordingly, the meetings of the Medical Staff Executive Committee meet the definition of "meetings" as set forth in the OHPA.

Even assuming, for the sake of argument, that only one "governing body" is contemplated by the OHPA, the facts clearly show that CAMC's "governing body" is using the Medical Staff Executive Committee meetings to circumvent the requirements of the OHPA. The fact that the Medical Staff Executive Committee makes recommendations to the Committee is not dispositive of the issue at hand. This does not change the fact that the true policy making process is carried out at the Medical Staff Executive Committee level with participation from the CAMC Board of Trustees, CAMC Administration, and CAMC lawyers. Thereafter, these policies are essentially "rubber stamped" by the full Board of Trustees. The Medical Staff Executive Committee is a "governing body" as defined by the OHPA.

Accordingly, the Circuit Court erred by not finding that the Medical Staff Executive Committee makes policy. CAMC cannot be allowed to hide behind the Medical Staff Executive Committee when discussing, debating, recommending, and implementing health care policies that impact thousands of West Virginia citizens. CAMC cannot be allowed to continue to lock out the public, including its own medical staff.

⁶⁸ See Dr. Hamrick's Motion for Summary Judgment Exhibit 3 - CAMC Medical Staff Governing Documents - Medical Staff Bylaws at p. 32.

CAMC is circumventing the OHPA by using the "closed" Medical Staff Executive Committee meetings to make health care policy. The declared legislative policy of the OHPA contemplates more than one "governing body." The evidence in this matter proves that CAMC's Medical Staff Executive Committee falls within the definition of "governing body" as set forth in the OHPA.

V.

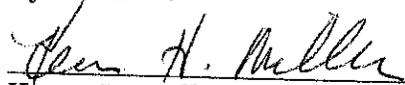
CONCLUSION

For all the foregoing reasons, these nine Doctors pray that the Circuit Court Order be reversed for the well being of their patients and this medical community. The Circuit Court erred in finding that that OHPA contemplates only one "governing body" per organization. The Circuit Court erred in finding that the CAMC Medical Staff Executive Committee is not a "governing body" as defined by the OHPA. The CAMC Medical Staff Executive Committee is a "governing body" and its meetings must comply with the OHPA and be made open to the public.

Dated this 7th day of September, 2006.

**R. E. HAMRICK, JR., M.D., M. ZAFRULLAH KHAN,
M.D., NESTOR F. DANS, M.D., M. HUMAYUN
RASHID, M.D., FIRASAT MALIK, M.D., M. SALIM
RATNANI, M.D., KEE C. LEE, M.D., JAY J. KIM,
M.D., SULAIMAN HASAN, M.D., AND THORACIC &
CARDIOVASCULAR ASSOCIATES, INC.**

By Counsel:



Karen H. Miller (WV State Bar 1567)
Richard W. Walters (WV State Bar 6809)
MILLER, WEILER & WALTERS
Attorneys at Law
2 Hale Street
Charleston, West Virginia 25301
(304) 343-7910

No. 33107

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

R. EDWARD HAMRICK, JR., M.D., *et al.*,

Appellants and Plaintiffs Below,

v.

Civil Action No.: 05-C-472

CHARLESTON AREA MEDICAL CENTER,
a W. Va. not-for-profit corporation,

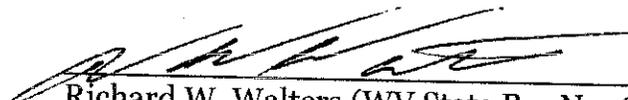
Appellee and Defendant Below.

Certificate of Service

I, Richard W. Walters, counsel for the Plaintiffs, do hereby certify that I have served a true and exact copy of the foregoing "Brief of Appellants R. Edward Hamrick, Jr., M.D., *et al.*" upon counsel of record, via hand delivery, to the following:

James S. Crockett, Jr.
Spilman, Thomas & Battle, PLLC
Attorneys at Law
300 Kanawha Boulevard East
Post Office Box 273
Charleston, West Virginia 25332-0273

Dated this 7th day of September, 2006.


Richard W. Walters (WV State Bar No. 6809)
MILLER, WEILER & WALTERS
Attorneys at Law
2 Hale Street
Charleston, West Virginia 25301
(304) 343-7910