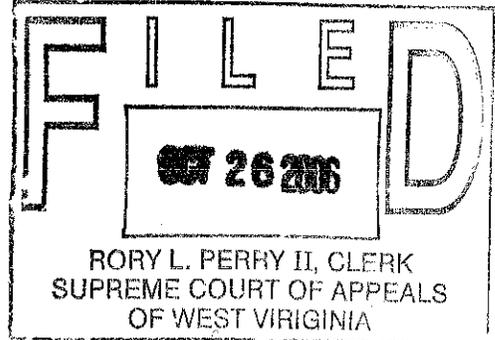


No. 33107

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

REPLY TO RESPONSE BRIEF OF CHARLESTON AREA
MEDICAL CENTER

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CHARLESTON AREA MEDICAL CENTER,
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Appellee and Defendant Below.

REPLY TO RESPONSE BRIEF OF CHARLESTON AREA MEDICAL CENTER

COME NOW the Appellants, by counsel, and in reply to the Response Brief filed by Charleston Area Medical Center, Inc., ("CAMC") state as follows.

DISCUSSION

I. The OHPA contemplates more than one "governing body" per hospital.

In its Response Brief, CAMC asserts that the trial court below properly concluded that the Open Hospital Proceedings Act ("OHPA") permits a hospital to have only one governing body.¹ Further, CAMC asserts that its sole governing body is the Board of Trustees.² In support of these assertions, CAMC argues that the plain language of the OHPA allows for only one governing body per hospital.³ This argument certainly supports CAMC's desire to exclude the public from the meetings and operations of the Medical Staff Executive Committee. However, this argument is based on an ultra-narrow interpretation of the OHPA that neither reflects a reasonable reading of the OHPA nor follows the legislative intent behind the creation of this legislation.

¹ See CAMC Response Brief at p. 9.

² *Id.*

³ *Id.*

a. The plain language of the OHPA allows for more than one “governing body.”

The OHPA defines “governing body” as the Board of Directors or any other group of persons with the authority to make decisions for or recommendations on policy or administration to a hospital owned or operated by a non-profit corporation.⁴ Thus, the plain language of the OHPA shows that any group at CAMC with the authority to make decisions for or recommendations on policy is a “governing body.” That is the plain meaning of the OHPA. It does not need to be interpreted. The OHPA simply needs to be read and applied. CAMC argues that the language of the OHPA needs to be interpreted to arrive at an application that is contrary to the intent of the statute.

b. The legislative intent behind the OHPA shows that the OHPA allows for more than one “governing body.”

The plain meaning of the OHPA clearly provides for more than one “governing body” per hospital. However, the legislative intent behind this legislation serves to reinforce the fact that there can be more than one “governing body” per institution. The West Virginia Legislature has declared that “it is in the best interest of the people of this State for all proceedings of the **boards of directors or other governing bodies** of such hospitals to be conducted in an open and public manner[.]”⁵ This requirement has been set forth by the Legislature so “the people can remain informed of the decisions **and decision-making processes affecting the health services . . .** which they help support through tax exemptions, public funding, and other means.”⁶

Clearly, the intent of the Legislature was to assure that all proceedings where significant health care policy decisions are being made are conducted openly and in public. The Legislature felt so strongly about public access that the Legislature made it a violation of the OHPA for a “governing body” to hold a private meeting to transact

⁴ See W. Va. Code § 16-5G-2(3).

⁵ See W. VA. Code § 16-5G-1 (emphasis added).

⁶ Id. (emphasis added).

public business, as this would prevent public scrutiny of decisions.⁷ Therefore, in order to satisfy the legislative intent behind the OHPA, the public must be granted access to the meetings of the Medical Staff Executive Committee since that body makes decisions on or recommendations regarding health care policy and administration at CAMC.

These nine doctors have come forward to express their discontent with the lack of input in the decision-making process for patient care. It is their belief that their patients are suffering because administrators are deciding health care issues rather than the health care professionals. The doctors, as well as the public, are being locked out of the process, so there is no accountability for the hospital's actions. These serious health care issues are merely being rubber-stamped by the Board of Trustees. The OHPA was enacted by the Legislature to stop such actions. As U.S. Supreme Court Justice Louis Brandeis said:

Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.⁸

These doctors have come to this Honorable Court because CAMC has denied them the access they need to stop these diseases. These doctors want you to let the sunlight in so the public is protected and their patients are protected. This community based hospital should be properly policed so that the intent of the OHPA is fulfilled.

Allowing only a single "governing body" per hospital would also permit the use of avoidance tactics by CAMC and other hospitals. These avoidance tactics further deny the public appropriate access to important health care policy decisions made by hospitals operated with significant public funding. In addition, limiting the application of the OHPA to a single "governing body" would go against the legislative intent behind

⁷ See W. Va. Code § 16-5G-7(a).

⁸ See *Buckley v. Valeo*, 424 U.S. 1, 67 (1976), citing Louis D. Brandeis, *Other People's Money*, 62, (National Home Library Foundation 1933).

the creation of the OHPA. Therefore, the OHPA must be read to contemplate more than one “governing body.”

II. The legislative intent behind the OHPA is not satisfied by allowing public access to only the CAMC Board of Trustees meetings.

CAMC argues that the legislative intent of the OHPA is satisfied by simply allowing the public to have access to the meetings of the CAMC Board of Trustees.⁹ Reviewing the legislative intent, CAMC’s position would be more persuasive if CAMC, in fact, had only one “governing body.” If all health care decisions and decision-making processes occurred before the Board of Trustees, then public access to these meetings would, in fact, satisfy the OHPA. However, this is clearly not the case. CAMC’s brief acknowledges that the Medical Staff Executive Committee makes recommendations to the Board.¹⁰ The Medical Staff Executive Committee makes significant health care policy decisions in closed sessions. The CAMC Board of Trustees regularly adopts the policy recommendations of the Medical Staff Executive Committee without change and with little, if any, discussion.¹¹ Therefore, public access must be granted to these Medical Staff Executive Committee meetings.

III. The OHPA exemption of medical staff conferences does not excuse the Medical Staff Executive Committee from conducting public meetings.

CAMC also attempts to support its position by pointing to a provision of the OHPA that exempts medical staff conferences.¹² CAMC asserts that this exclusion of conferences from the requirement of the OHPA means that the policy decisions and recommendations made by the Medical Staff Executive Committee should not be open to the public.¹³ However, this is simply not accurate. While the OHPA certainly does

⁹ See CAMC Response Brief at p. 12-13.

¹⁰ See, for example, CAMC Response Brief at p. 6.

¹¹ See Brief of Appellants at p. 2-8.

¹² See CAMC Response Brief at p. 13.

¹³ Id.

contain a provision excluding medical staff conferences¹⁴, this does not serve to eliminate the Medical Staff Executive Committee from public scrutiny. A medical staff conference where physicians gather to exchange ideas or continue their education in the practice of medicine is a far cry from a meeting of the Medical Staff Executive Committee.

The Medical Staff Executive Committee makes decisions and recommendations on significant issues regarding health services in West Virginia. The Medical Staff Executive Committee makes policy recommendations directly to the CAMC Board of Trustees on issues including, but not limited to, CAMC's medical staff structure, medical staff appointments, and clinical privileges.¹⁵ The Medical Staff Executive Committee is responsible for the medical staff's participation in assessing and improving patient care processes.¹⁶ Further, the attendance of CAMC Administration officials and CAMC lawyers shows that these meetings are not medical staff "conferences." They are meetings regarding policy and administration. The OHPA clearly applies to the meetings of a Medical Staff Executive Committee, as significant policy decisions and/or recommendations on policy or administration are made at these meetings.

IV. CAMC's reliance on additional authorities to support the existence of a single "governing body" is unpersuasive.

The plain meaning of the OHPA and the legislative intent behind this legislation clearly support a finding that there can be more than one "governing body" per hospital. Therefore, CAMC looks to additional sources to support its contention to the contrary. CAMC attempts to point to certain standards set forth by the Joint Commission on the Accreditation of Health Care Organizations and certain state regulations which use the

¹⁴ See W. Va. Code § 16-5G-2(5).

¹⁵ See Brief of Appellants at p. 3-4.

¹⁶ Id. at p. 5.

term “governing body.”¹⁷ CAMC attempts to use these items as proof that CAMC has but a single “governing body.”¹⁸ However, while they may, in fact, define a single “governing body” for their purposes, these sources do not trump the clear language and legislative intent behind the OHPA.

The cardinal rule of statutory construction is that statutes are open to interpretation only if the language is vague and ambiguous.¹⁹ The OHPA is neither vague nor ambiguous. The OHPA clearly allows for there to be more than one “governing body.” Any group that makes decisions for or recommendations on policy or administration must do so in an open manner. Thus, the fact that CAMC has opted to place authority with the Medical Staff Executive Committee to make decisions for or recommendations on policy or administration subjects this body to the requirements of the OHPA.

V. The OGPA and related case law are relevant to the proper reading of the OHPA.

CAMC next argues that the Open Governmental Proceedings Act (“OGPA”) provides no guidance as to the proper interpretation of the OHPA.²⁰ CAMC essentially argues that the public did not create CAMC, did not delegate its authority to CAMC, and, therefore, unlike governmental bodies, the public does not retain any control over CAMC.²¹ However, CAMC is a quasi-public, non-profit hospital that exists only because the people of West Virginia, through their government, permit CAMC to operate as a quasi-public hospital that is supported to a large degree by public funding.

¹⁷ See CAMC Response Brief at p. 13-14.

¹⁸ Id.

¹⁹ See *Hereford v. Meek*, 52 S.E. 2d 740 (W.Va. 1949).

²⁰ See CAMC Response Brief at page 15-17.

²¹ Id.

- a. **The public policy behind the OGPA and OHPA are the same, and, therefore, case law interpreting the OGPA is relevant to the OHPA.**

In addition, to argue that the OGPA is of no guidance completely ignores the fact that the public policy behind the OGPA is the same as that behind the OHPA. The OGPA seeks to assure that government is conducted in an open, public manner so citizens can remain informed of the decisions and the decision-making processes.²² This is clearly the same as the legislative intent behind the OHPA. Thus, interpretation of the OGPA in West Virginia is clearly relevant in defining how the OHPA is to be read.

The OGPA's definition of a "governing body" is very similar to the definition of a "governing body" in the OHPA.²³ The OGPA, like the OHPA, contemplates more than one "governing body."²⁴ Thus, the OGPA and case law interpreting the OGPA are certainly instructive when interpreting the OHPA.

CAMC also argues that West Virginia case law interpreting the OGPA cited by the Appellants has no bearing because such case law is factually distinct from the present matter.²⁵ Specifically, CAMC states that the *McComas* decision²⁶ should not be considered because it involves issues other than what constitutes a governing body.²⁷ However, the *McComas* case is, in fact, relevant. *McComas*, interpreting the OGPA, tells us that "[f]rom 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."²⁸ "A narrow reading would frustrate the legislative intent and negate the purpose of the statute."²⁹ "Moreover, we are concerned

²² See W. Va. Code § 6-9A-1.

²³ See W. Va. Code § 6-9A-2(3).

²⁴ See Brief of Appellants at p. 14-15.

²⁵ See CAMC Response Brief at p. 16.

²⁶ See *McComas v. Board of Education of Fayette County*, 475 S.E.2d. 280 (W. Va. 1996).

²⁷ See CAMC Response Brief at p. 16-17.

²⁸ See *McComas* at p. 289.

²⁹ *Id.* at p. 289.

a narrow interpretation of the Act would invite avoidance tactics.”³⁰ Such statements regarding the proper interpretation of the OGPA are certainly instructive as to the proper manner in which to interpret the OHPA. This is especially true given the similarity in the legislative intent behind these two pieces of legislation that deal with the same issue of public access.

VI. Florida statutes and case law cited by the Appellants are also relevant to the reading and application of the OHPA

CAMC’s reply brief references Florida statutes and case law cited in the Appellant’s brief and argues that these items have no bearing on this case.³¹ However, this is not the case. For example, as admitted by CAMC, the *Carlson* decision addresses a public hospital Board of Trustees delegating authority to a committee and holds that the committee should have meetings open to the public.³² The Florida District Court looked to Florida’s open government proceedings statute, concluding that when public officials delegate authority “those delegated that authority stand in the shoes of such public officials” and are subject to open meeting requirements.³³ Such precedent is clearly relevant to the issues in the case presently before this Court.

VII. CAMC’s governing documents show that there is more than one “governing body” at CAMC.

CAMC next argues that its governing documents support that the Board of Trustees is CAMC’s only “governing body” because the Board, not the Medical Staff Executive Committee, makes decisions for or recommendations on policy or

³⁰ See *McComas* at p. 289-290.

³¹ See CAMC Response Brief at p. 17, fn. 58.

³² *Id.* at 17, fn. 58, citing *News-Press Publ’g Co., Inc. v. Carlson*, 410 So. 2d 546, 549 (Fla. Dist. Ct. App. 1982).

³³ See *News-Press Publishing Co., Inc. v. Carlson*, 410 So. 2d 546, 547-548 (Fla. District Court 1982), citing *IDS Properties, Inc. v. Town of Palm Beach*, 279 So. 2d 353 (Fla. 4th DCA 1973).

administration.³⁴ However, a review of these governing documents shows that the Medical Staff Executive Committee is the only committee within CAMC with the authority to make recommendations directly to the Board.³⁵ Further, these governing documents show that the Medical Staff Executive Committee is a “governing body” under the OHPA.

The CAMC Bylaws give the Board of Trustees the power to appoint agents and committees to carry out its business. The Board of Trustees has delegated responsibility for the medical care of patients admitted to CAMC to the Medical Staff Executive Committee. The Board has also delegated to the medical staff the power to make recommendations regarding issues such as staff appointments and the quality of professional care rendered at CAMC.³⁶ The CAMC Bylaws specifically empower the Medical Staff Executive Committee to make recommendations directly to the Board regarding matters within the scope and authority of the Medical Staff Executive Committee.³⁷ CAMC argues that the Credentials Committee also makes recommendations to the Board.³⁸ However, the Credentials Committee only makes such recommendations when requested by the Board.³⁹ Clearly, CAMC’s own documents show that the Medical Staff Executive Committee is a unique committee within CAMC that reports directly to the hospital on issues that are key to the day-to-day operations of CAMC and the health care of the community.

CAMC contends that the Medical Staff Executive Committee cannot be a “governing body” because it reports to the Board of Trustees. According to CAMC, a

³⁴ See CAMC Response Brief at p. 18-21.

³⁵ See Brief of Appellants at p. 17-19.

³⁶ Id. at p. 2-3.

³⁷ Id. at p. 3.

³⁸ See CAMC Response Brief at p. 7.

³⁹ See Medical Staff Organization and Functions Manual at p. 11, Section 3.E.2.(f) (attached as Exhibit D to CAMC’s Motion for Summary Judgment, i.e. Doc. No. 5 of the Appellants’ Designated Record).

“governing body” cannot report to another “governing body.”⁴⁰ However, the OHPA makes no such contention. The OHPA requires that such decisions for or recommendations on policy or administration be made to a hospital by any “governing body.”⁴¹ The Medical Staff Executive Committee makes decisions for CAMC and makes recommendations to the Board of Trustees. There is no entity beyond the Board of Trustees to which it is responsible. The Board of Trustees is CAMC. CAMC’s argument would only have merit if the Board reported to some other superior entity.

VIII. Overlapping membership shows that there is more than one “governing body” at CAMC.

CAMC next attempts to argue that there is no significance to the fact that there is overlapping membership between the Board of Trustees and the Medical Staff Executive Committee.⁴² However, records show that the Medical Staff Executive Committee includes members of the Board of Trustees and the CAMC Administration, including the President/Chief Executive Officer and the Vice President/Chief Operating Officer. CAMC contends that there are only two voting members of both the Medical Staff Executive Committee and the Board of Trustees.⁴³ However, the fact remains that members of the Board of Trustees and CAMC Administration are meeting in private to make and recommend policy when they gather at the closed meetings of the Medical Staff Executive Committee. Thus, these meetings must be open to the public in order to comply with the OHPA.

Finally, CAMC argues that the Appellants are attempting “to create a need to include the [Medical Staff Executive Committee] within the scope of OHPA by suggesting that doctors are barred from attending these meetings.”⁴⁴ CAMC contends

⁴⁰ See CAMC Response Brief at p. 18-19.

⁴¹ See W. Va. Code § 16-5G-2(3).

⁴² See CAMC Response Brief at p. 21.

⁴³ *Id.* at p. 21.

⁴⁴ See CAMC Response Brief at p. 22.

that the Appellants are free to seek election to the Medical Staff Executive Committee, and, even as nonmembers, they are permitted to attend the meetings.⁴⁵ CAMC further argues that doctors have always been allowed to attend and speak at these meetings.⁴⁶ Of course, this argument ignores the fact that doctors are denied the right to attend meetings.⁴⁷ If doctors were, in fact, permitted to attend, it would never have been necessary to seek court intervention to gain access to these meetings. It also ignores the requirements of the OHPA, which guarantees public access to these meetings.

CONCLUSION

The plain language of the statute shows that there can be more than one “governing body” per hospital for purposes of the OHPA. In the present matter, the Medical Staff Executive Committee at CAMC certainly qualifies as a “governing body” since it makes decisions on or recommendations regarding important health care policy and hospital administration at CAMC. Thus, the meetings of the Medical Staff Executive Committee should be open to the public under the OHPA.

However, if one does look beyond the plain language of the statute, the legislative intent behind the OHPA merely reinforces the concept that there can be more than one “governing body.” The intent of the OHPA is to provide public access to policy making and policy-making processes in hospitals that are supported by public funds. In order to satisfy this intent, the meetings of the Medical Staff Executive Committee, where important policy decisions and recommendations are made, must be accessible to the public. To hold otherwise would allow hospitals such as CAMC to avoid the legislative intent of the OHPA by hiding decision making from the public through the use of the Medical Staff Executive Committee or similar bodies.

⁴⁵ See CAMC Response Brief at p. 22.

⁴⁶ Id.

⁴⁷ See Brief of Appellants at p. 12-14.

The Medical Staff Executive Committee at CAMC has been delegated significant power by the Board of Trustees. The Medical Staff Executive Committee makes decisions on and recommendations regarding significant policy issues. The recommendations of the Medical Staff Executive Committee are typically approved by the Board of Trustees with no debate. The plain meaning of the OHPA, the legislative intent behind the OHPA, and sound public policy dictate that the Medical Staff Executive Committee be considered a “governing body” of CAMC subject to the requirements of the OHPA.

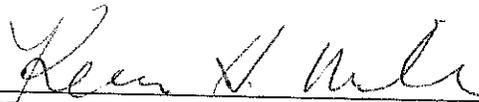
CAMC should not be permitted to pervert legislative intent through convoluted, statutory interpretation when no interpretation is needed. The Appellants respectfully request that this Honorable Court lift the shroud of darkness and illuminate the decision-making process that affects the many members of this community and beyond.

For the foregoing reasons, as well as the reasons set forth in the previously filed Brief provided by the Appellants, this Court should reverse the Order of the Circuit Court in this matter. The Circuit Court erred in finding that the OHPA permits only one “governing body” per organization. The Circuit Court also erred in finding that the CAMC Medical Staff Executive Committee is not a “governing body” under the OHPA. Thus, the Order of the Circuit Court should be reversed.

Dated this 26th day of October, 2006.

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