

IN THE SUPREME COURT OF TEXAS

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No. 03-0497
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DOLORES ROMERO, ET AL., PETITIONERS

v.

KPH CONSOLIDATION, INC. D/B/A COLUMBIA KINGWOOD MEDICAL CENTER,
RESPONDENT

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ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS
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Argued September 9, 2004

JUSTICE O'NEILL, joined by JUSTICE MEDINA, concurring.

I agree with the Court that the evidence is legally insufficient to support a malicious credentialing verdict against the Hospital. The peer-review privilege prevented the Romeros from knowing what actions the Hospital took or failed to take to protect the public from a physician whose own former chief of staff, a member of the credentialing committee, thought was a menace to patients. While I fully join the Court's opinion, I write separately because I am deeply troubled by the head-in-the-sand approach the various hospitals and health-care professionals in this case appeared to take in dealing with a drug-impaired physician. Unless health-care institutions and providers are in fact, rather than theory, vigilant and proactive in performing the critical competence analysis that the peer-review privilege was intended to promote, the purposes that prompted the

privilege's creation will prove to be illusory. Clearly, the privilege's purposes were not served in this case.

As the Court notes, during Dr. Baker's initial credentialing and while he maintained privileges at the Hospital before Mr. Romero's grievous injury, the Hospital should have learned from its own sources and various others that Baker (1) had been sued ten times within an approximate five-year period, (2) was a suspected drug addict, (3) had improperly cared for and treated at least four named patients, and (4) was suspended from another hospital for operating on the wrong leg of a patient, a mistake he had made before. Dr. Ronald Kerr, the Hospital's chief of staff and a member of its executive committee, testified that, based on what he had heard and been told, he had formed the view that Baker presented a safety risk to patients. But Kerr relied on the State Board of Medical Examiners to investigate Baker's alleged drug use. Baker's former office manager testified that Baker constantly displayed erratic moods and engaged in other behavior that should have prompted the health professionals around him to take action to protect his unsuspecting patients. According to the record, there were numerous warning signs, but there appears to have been a reluctance to share vital information.

The purposes that underlie the peer-review privilege are commendable and, as our opinion today again illustrates, the protection the privilege affords is strong. The privilege was designed to foster uninhibited and "exacting critical analysis of the competence and performance of physicians and other health-care providers" to improve standards of medical care. *Mem'l Hosp.-The Woodlands v. McCown*, 927 S.W.2d 1, 3 (Tex. 1996). Here, though, the Hospital seems to view the privilege as a shield to protect itself from injured patients rather than a vehicle for improving patient care; its

brief castigates the Romeros for “attempt[ing] to get around the privilege with bits and pieces of information, rumors, innuendo, gossip, and second-hand information,” even though the privilege left the Romeros no other option.

Certainly hospitals should be wary of interfering with a doctor’s practice based merely upon rumor or innuendo, but neither should they look the other way and refuse to heed indications of danger. It has been noted that drug- and alcohol-impaired physicians are a growing threat to patients in this country, and the medical community’s will to adequately self-police is increasingly the subject of public criticism. *See, e.g.,* Thompson, *Special Treatment: Disciplining Doctors: Medical Boards Let Physicians Practice Despite Drug Abuse*, WASH. POST, Apr. 10, 2005, at A1; SUNSET ADVISORY COMMISSION, TEXAS STATE BOARD OF MEDICAL EXAMINERS, TEXAS STATE BOARD OF PHYSICIAN ASSISTANT EXAMINERS, TEXAS STATE BOARD OF ACUPUNCTURE EXAMINERS, STAFF REPORT 1 (Oct. 2004). The Sunset Advisory Commission’s recent report evaluating the Board of Medical Examiners noted that the use of private rehabilitation orders does not protect the public, and recommended that private orders not be used when physicians have violated the standard of care. SUNSET ADVISORY COMMISSION, *supra*, at 47. But the same report also noted that the Board of Medical Examiners often has difficulty enforcing violations of the Medical Practice Act because the peer-review privilege is frequently asserted in contested-case hearings. *Id.* at 41.

The Legislature’s primary purpose in conferring the peer-review privilege on health-care institutions was to enhance the quality of medical care by encouraging forthright and thorough analysis of providers’ competence. And the primary purpose in creating exceptions to the privilege that allow disclosure to other medical peer-review committees, appropriate state or federal agencies,

and national accreditation and state licensing bodies, was presumably to encourage the free exchange of information between them without losing the protections the privilege affords. TEX. OCC. CODE § 160.007(c). When doctors and hospitals fail to engage in the free exchange of information that the privilege was designed to promote, the Legislature's purpose is thwarted and the privilege's underpinnings erode. Should such erosion become pervasive, the privilege deserves to be swept away.

Harriet O'Neill
Justice

OPINION DELIVERED: May 27, 2005