WESLEY MEDICAL CENTER v. CLARK

234 Kan. 13 (1983) | Cited 13 times | Supreme Court of Kansas | September 12, 1983

The opinion of the court was delivered by

This is an original action in mandamus filed by The WesleyMedical Center (Wesley) seeking an order to compel the trialjudge in a medical malpractice action to deny discovery ofmedical staff committee meeting minutes and other information inthe possession of and belonging to the petitioner,

[234 Kan. 15]

Wesley. It is the position of Wesley that the documents soughtare privileged and not subject to discovery. The respondent Dr.Medo Mirza is aligned in interest with and asserts the sameposition as Wesley. The Kansas Hospital Association has filed abrief amicus curiae supporting the position and argumentsasserted by Wesley.

The underlying medical malpractice action was brought by Edwardand Tonie LeStage, the parents of Joshua LeStage, deceased,against Dr. Medo Mirza and The Wesley Medical Center. Joshua wasborn with severe internal birth defects. Shortly after his birthat Wesley, Dr. Mirza attempted to surgically correct Joshua'sproblems. During the fourth operation, while attempting to locateand repair an esophageal atresia, Dr. Mirza allegedly severed thebaby's mainstem bronchus. Sometime after the damaged bronchus wasrepaired and the operation was completed, the baby sufferedcardiac arrest but was resuscitated. A second arrest occurred ashort time later and this time Joshua failed to respond toresuscitation efforts and died.

The action brought against Dr. Mirza and Wesley alleged theirnegligence caused the death of Joshua LeStage. In part, theplaintiffs, claim Wesley was negligent in allowing Dr. Mirza tohave staff and surgical privileges at its facility. Plaintiffsclaim the hospital was aware of Dr. Mirza's incompetence yetnegligently allowed him to operate on Joshua. Plaintiffs alsoalleged other undefined acts of negligence on the part of Wesley.

The plaintiffs filed a motion for production of the followingdocuments: "1. Any and all reports of the circumstances surrounding the death of Joshua LeStage on January 6, 1980; 2. Any and all reports, records and documents pertaining to investigations of the defendant Medo Mirza; 3. Any and all documents pertaining to restrictions on the practice of the defendant Medo Mirza at Wesley Medical Center, including all records, reports and documents pertaining to the restrictions and limitations of Medo Mirza as a staff member at Wesley Medical Center."A hearing was held on the motion and Wesley resisted productionon the theory that the documents in toto were privileged. Thetrial court

nevertheless ordered that the hospital produce thedocuments allowing only the excision of the names and addressesof patients or their representatives other than plaintiffs'decedent. The trial court subsequently denied the hospital's

[234 Kan. 16]

request for permission to take an interlocutory appeal. Thisoriginal proceeding in mandamus followed.

Wesley, like other accredited and licensed medical facilities,is required to monitor and evaluate the members of its staff. TheWesley Medical staff is an entity within The Wesley MedicalCenter, and its membership consists of all doctors and dentistsauthorized by Wesley to practice in its institution. Dr. Mirzawas a member of the Wesley staff. All staff members are subjectto periodic review by various peer committees as to theirpractice and functions. The Joint Commission on Accreditation ofHospitals requires: "The medical staff shall provide mechanisms for the regular review, evaluation, and monitoring of medical staff practice and functions. Such mechanisms shall be designed to maintain high professional standards of care."The mechanisms usually adopted, and those utilized by Wesley, arepeer review committees whose members include staff doctors anddentists who evaluate their fellow practitioners. The documentssought to be protected from discovery are the peer reviewcommittee records, minutes, etc., which pertain to Dr. Mirza.Committee records are considered confidential by Wesley and theparticipating members of the committee.

Ordinarily, mandamus is not a proper action to controldiscovery proceedings in the trial court, which are subject tothe broad discretion of the trial court. K.S.A. 60-801; Procter& Gamble Co. v. Howard, 233 Kan. 1025, 666 P.2d 728 (1983). InBerst v. Chipman, 232 Kan. 180, 653 P.2d 107 (1982), this courthad occasion to consider the propriety of a mandamus action tocorrect alleged error in a trial court discovery proceeding.Chief Justice Schroeder, speaking for the majority, said:

"At the outset we note that the trial court is vested with broad discretion in supervising the course and scope of discovery. Vickers v. City of Kansas City, 216 Kan. 84, Syl. ¶ 2, 531 P.2d 113 (1975). Though the trial court's discretion cannot be controlled by mandamus, where an order of the trial court denies a litigant a right or privilege which exists as a matter of law, and there is no remedy by appeal, mandamus may be invoked. Hulme v. Woleslagel, 208 Kan. 385, 493 P.2d 541 (1972). In addition, where a petition for mandamus presents an issue of great public importance and concern, the court may exercise its original jurisdiction in mandamus and settle the question. See Mobil Oil Corporation v. McHenry, 200 Kan. 211, 239-43, 436 P.2d 982 (1968); A.T. & S.F. Hospital Ass'n v. State Commission of Revenue & Taxation, 173 Kan. 312, 316, 246 P.2d 299 (1952)." p. 183.

[234 Kan. 17]

The privileged status of hospital committee records is a matterof first impression in Kansas appellate

courts>. It appears thereare different views and conflicting rulings on this question inour own trial courts>. Under the circumstances the matter is ofsufficient public importance and concern to warrant ourconsidering the question on the merits in this proceeding.

Several arguments are raised by Wesley in support of itscontention that the requested documents are not subject todiscovery. Initially Wesley asserts that its peer reviewdocuments are absolutely privileged as a matter of law and insupport thereof relies upon K.S.A. 65-431 and K.A.R. 28-34-6. Thestatute provides in part: "The licensing agency [the Department of Health and Environment] shall adopt, amend, promulgate and enforce such rules and regulations and standards with respect to the different types of medical care facilities to be licensed hereunder as may be designed to further the accomplishment of the purposes of this law in promoting safe and adequate treatment of individuals in medical care facilities in the interest of public health, safety and welfare."Pursuant to the authority granted in the statute, the Departmentof Health and Environment promulgated K.A.R. 28-34-6, whichWesley contends creates an absolute privilege from discovery. Theregulation states in part: "Medical Staff. (a) The hospital shall have an organized medical staff, responsible to the governing authority of the hospital for the quality of all medical care provided patients in the hospital and for the ethical and professional practices of its members. "(b) In any hospital, a group comprised of the medical staff, with the approval of and subject to final action by the governing authority, shall formulate and adopt bylaws, rules, regulations, and policies for the proper conduct of its activities and recommend to the governing authority physicians considered eligible for membership on the medical staff. "(c) The medical staff shall hold regular meetings for which records of attendance and minutes shall be kept. "(d) Medical staff committee minutes and information shall not be a part of individual patient records nor subject to review by other than medical staff members. "(e) The medical staff shall review and analyze at regular intervals the clinical experience of its members in the various departments of the hospital and the medical records of patients on a sampling or other basis. All techniques and procedures involving diagnosis and treatment of patients shall be reviewed periodically and shall be subject to change by the medical staff." (Emphasis added.)Wesley contends that subsection (d) of the regulation prohibits

[234 Kan. 18]

discovery of the requested documents and creates an absolutestatutory privilege. We do not agree.

The statutory provision under which civil discovery proceedingsare conducted reads in pertinent part as follows: "Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) In general: Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter." K.S.A. 60-226(b).

In Alseike v. Miller, 196 Kan. 547, Syl. ¶ 11, 412 P.2d 1007(1966), we held:

"Privilege, within the meaning of our statutes governing discovery, is the privilege as it exists in the law of evidence."Our evidence code is quite specific as to privileges. K.S.A.60-407 is a general abolition of privileges. That section states: "Except as otherwise provided by statute (a) every person is qualified to be a witness, and (b) no person has a privilege to refuse to be a witness, and (c) no person is disqualified to testify to any matter, and (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing, and (f) all relevant evidence is admissible." (Emphasis added.)K.S.A. 60-423 et seq. set forth the specific statutoryprivileges. Nowhere in the statutes is there a privilege forhospital committee records or staff committee minutes or anyother self-evaluation or self-policing information or peer reviewnotes. Because K.A.R. 28-34-6(d) was duly adopted pursuant tostatutory authority and has the force and effect of law (seeCarpenter v. Johnson, 231 Kan. 783, 789, 649 P.2d 400 [1982]),Wesley contends that a valid statutory privilege from discoverywas created. Furthermore, since the legislature did not modifythe regulation, as it had authority to do under K.S.A. 1982 Supp.77-426, the petitioner asserts the legislature has approved andadopted this privilege. The same argument was found to be withoutmerit in Grauer v. Director of Revenue, 193 Kan. 605, 608,396 P.2d 260 (1964). An administrative agency which has the power toadopt regulations does not have authority to adopt regulationswhich exceed the statutory authority granted in the firstinstance. As

[234 Kan. 19]

said in Grauer, "water cannot rise above its source." 193 Kan.at 608. See also Woods v. Midwest Conveyor Co., 231 Kan. 763,Syl. ¶ 3, 648 P.2d 234 (1982).

Nowhere in the statutes is authority granted to the Departmentof Health and Environment to expand the scope of evidentiaryprivileges or limit the scope of discoverable matter. Whateverelse K.A.R. 28-34-6(d) might accomplish, it does not rise to thelevel of a privilege created or "provided by statute." K.S.A.60-407; Alseike v. Miller, 196 Kan. 547; McKillop v. Regentsof University of California, 386 F. Supp. 1270 (N.D. Cal. 1975).To hold otherwise would permit every administrative agency withauthority to adopt regulations to avoid our code of civilprocedure and other statutes by the simple procedure of adoptingregulations which are not subjected to the legislative scrutinyusually applied to the enactment of statutes.

Petitioners have cited a number of cases from our sister statesin support of their position but an examination of the casesindicates that most of those states have enacted statutesspecifically addressing the confidentiality of medical staffcommittee or peer review records and minutes. Kansas, however,has not enacted such a statute. On at least four occasions billswhich would limit or prohibit discovery of hospital committeerecords have been before legislative committees and none has everbeen presented to the full legislature for a vote. We find nostatutory privilege protecting the

requested documents fromdiscovery.

Wesley next asserts that portions of the information sought inthe malpractice case relate to medical records of persons otherthan plaintiffs' decedent and that such information and documentsare subject to the physician-patient privilege under K.S.A.60-427. Mr. and Mrs. LeStage, as respondents, assert thephysician-patient privilege does not apply as Wesley is not the"holder of the privilege" and therefore has no authority toassert it. K.S.A. 60-427(a)(3) provides: "`[H]older of the privilege' means the patient while alive and not under guardianship or conservatorship or the guardian or conservator of the patient, or the personal representative of a deceased patient."The physician attending the patient is not the holder of theprivilege. State v. Humphrey, 217 Kan. 352, 362-363, 537 P.2d 155(1975). K.S.A. 60-427(b) provides the conditions under whichthe "holder of the privilege" may assert the privilege or prevent

[234 Kan. 20]

others from revealing the privileged information. While it istrue that the physician, or in this case the hospital, is not the"holder of the privilege" that does not mean that a physician,absent statutory authority, may reveal, ex parte, informationsubject to the privilege without the knowledge and consent of thepatient or holder of the privilege. Similar restraints apply toconfidential records of hospitals and other treatment facilitiesunless otherwise provided by statute. Records in the possessionof Wesley which are subject to the physician-patient privilegeunder K.S.A. 60-427(b) would not ordinarily be discoverablewithout notice to and the consent of the holder of the privilege.In any instance where there is a valid question as to whether theprivilege applies, the court should hold an in camera inspectionto determine if the information sought is actually subject to theprivilege and what protective orders should be issued. However,the existence of a valid physician-patient privilege as to someof the documents or proceedings of the peer review committeesdoes not compel or justify a blanket protective order refusingdiscovery of all records and documents. The determination of theexistence of the physician-patient privilege must be determinedupon a case-by-case or document-by-document basis after theassertion is made that the requested information is actuallysubject to the privilege. The use of reaction, as ordered here bythe trial court, may or may not afford sufficient protection andanonymity to make information, which would otherwise beprivileged, discoverable.

Wesley next asserts that as a matter of public policy, theinformation sought is confidential, necessary for the maintenanceand improvement of the quality of health care, and therefore isprotected regardless of any statutory privilege. It asks that weestablish by judicial fiat an absolute privilege preventingdiscovery of the records. In Berst v. Chipman, 232 Kan. 180, werecognized that in certain situations a qualified privilegeagainst disclosure of confidential matter may exist independentof a specific statutory privilege. Berst was an originalproceeding in mandamus filed in this court seeking an orderdirecting the trial judge to deny discovery of certain allegedconfidential information and documents. The documents soughtrelated to confidential investigations conducted by the

NationalCollegiate Athletic Association and the Southeastern Conferenceof possible infractions

[234 Kan. 21]

of NCAA recruiting rules by the University of Alabama. Thedocuments were sought for use in a libel action against theBirmingham Post Company filed by a high school principal and oneof the school's basketball stars. The court recognized thatpursuant to K.S.A. 60-226(c), the trial court has the power tolimit discovery and to issue such protective orders as may benecessary to protect the conflicting interests of the parties.The court stated: "Where the parties have conflicting interests in material sought to be discovered, the protective power of the court may be sought by a party . . . and the court must balance the litigant's interest in obtaining the requested information with the resisting party's interest, as well as the public interest in maintaining the confidentiality of the material. [Citations omitted.] . . . . "In balancing the interests involved herein it must be recognized the parties involved in the lawsuit have a great interest in the revelation of all pertinent facts. It is an oft-quoted doctrine that the public has a right to every man's evidence; there is a general duty to give what information one is capable of and any exemptions are exceptional, being in derogation of a positive general rule [citations omitted]. . . . . "Additional guidelines considered in balancing claims of privilege with the need for disclosure include the degree of harm that would be caused by disclosure and the type of controversy before the court. [Citations omitted.] Also, the public interest may be a reason for not permitting inquiry as to particular matters by discovery." 232 Kan. at 187-89.Thus, it is clear that under certain circumstances the trialcourt, under its general supervisory powers, may limit discoveryof material not specifically subject to a statutory privilege.

That the instant case involves a controversial and importantarea of the law is evidenced by the number of cases cited by theparties on the subject and the number of states having statutesaddressing medical peer review records. Petitioner, in its briefto this court states:

"Hospitals are responsible for improving the quality of care in the institution. As previously stated. Federal and Kansas statutes and regulations, JCAH requirements, and the hospital internal rules, require such efforts. As a practical matter only medical staff members can carry out these responsibilities. As a matter of public policy, the deliberations and free discussions of these physician committees should not be subject to discovery or introduction into evidence at trial. The committee deliberations are part of a process required of physicians keeping their professional practice up to acceptable standards. If they are to be effective in this endeavor they cannot and must not have their consideration subject to scrutiny by outsiders. Simply stated, if these minutes in any form are to

[234 Kan. 22]

be subject to discovery or introduction into evidence, there will result total erosion of an efficient system of peer review. Not only will quality of care directly suffer, but medical education will suffer.

To permit discovery will defeat attainment of the goals of the committees and will run contrary to legal requirements."

Perhaps the leading case, relied upon by Wesley, on the subjectof confidentiality and privilege for hospital staff reviews isone cited in Beast. In Bredice v. Doctors Hospital, Inc.,50 F.R.D. 249 (D.D.C. 1970), aff'd 479 F.2d 920 (D.C. Cir. 1973),it was said: "This committee work is performed with the understanding that all communications originating therein are to be confidential. "Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practices is a sine qua non of adequate hospital care. To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations. Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit. "The purpose of these staff meetings is the improvement, through self-analysis, of the efficiency of medical procedures and techniques. They are not a part of current patient care but are in the nature of a retrospective review of the effectiveness of certain medical procedures. The value of these discussions and reviews in the education of the doctors who participate, and the medical students who sit in, is undeniable. This value would be destroyed if the meetings and the names of those participating were to be opened to the discovery process. "The public interest may be a reason for not permitting inquiry into particular matters by discovery.' 4 Moore, Federal Practice ¶ 26.22(2) at 1287 (2d ed. 1969). As doctors have a responsibility for life and death decisions, the most up-to-date information and techniques must be available to them. There is an overwhelming public interest in having those staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded. Absent evidence of extraordinary circumstances, there is no good cause shown requiring disclosure of the minutes of these meetings. Further, `what someone * * * at a subsequent date thought of these acts or omissions is not relevant to the case.' Richards v. Maine Central R., 21 F.R.D. 590 (D.C. Me. 1957). These committee meetings, being retrospective with the purpose of self-improvement, are entitled to a qualified privilege on the basis of this overwhelming public interest." pp. 250-251.The District of Columbia court operates under discovery rulessimilar to those in Kansas and, like Kansas, does not have astatute exempting this material from liberal discovery. Thepetitioner urges us to follow Bredice. Wesley cites severaladditional

[234 Kan. 23]

decisions in support of its position but an examination of thosecases discloses that most, if not all of them, are based uponvarious state statutes which establish a privilege or some degreeof protection for records similar to those sought in this case.As those decisions are based upon specific statutory authority,we do not deem them persuasive. Indeed, we are advised in thevery informative amicus brief of the Kansas HospitalAssociation that "at least 46 states provide some degree ofprotection [of peer review committee records] from discoverythrough statutory law."

On the other hand, Mr. and Mrs. LeStage assert that absentstatutory protection there is no overwhelming public policy thatprecludes the discovery of the sought-after records so long asthey are relevant to the issues before the trial court. InNazareth Literary & Benevolent Inst. v. Stephenson, 503 S.W.2d 177(Ky. 1973), the court held that reports of staff doctorsconcerning the professional activities of a defendant doctor in amalpractice action were discoverable. The hospital in that casewas also a defendant and similar arguments to those presented byWesley, including reliance upon Bredice, were presented to thecourt. The court, in allowing discovery, stated: "The second proposition advanced by the hospital is addressed to considerations of public policy. It is argued that this court should engraft an exception to the procedural rules for discovery that such reports as are sought here must remain confidential because their revelation would impede the freedom of communication between physicians and hospital authorities concerning proper methods of treatment and the corrections of mistakes. Although this might be regarded as an initially appealing argument, on reflection, one might well debate wherein the public interest lies. Claims of privilege are carefully scrutinized, and impediments to the discovery of truth are afforded validity in relatively few instances in the common law. In any event, we find no applicable privilege expressed in either the general law of evidence existing in this state or in the statutes of this state expressing any protection of confidentiality in the situation presented.

"Under CR 26.02, as presently formulated, the expressed policy is that parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, and this includes the existence, description, nature, custody, condition and location of any documents and the identity and location of persons having knowledge of any discoverable matter. It is unnecessary to consider whether the limiting word `relevant' is used in the sense of the law of evidence or whether it is used in the common dictionary sense. The expression in the rule is `relevant to the subject matter involved in the pending action.' There can be no question in the case before us that the requested material is surely relevant to the subject matter involved in the

[234 Kan. 24]

personal injury suit which asserts liability against the hospital for the alleged incompetent action or omission of the physician who possessed staff privileges.

"The only authority favorable to the hospital's contention is the two decisions of the Federal District Court for the District of Columbia in Bredice v. Doctors' Hospital, Inc., 50 F.R.D. 249 (1970), and Bredice v. Doctors' Hospital, Inc., 51 F.R.D. 187 (1970). We consider that the applicability of those decisions to the situation presented in this case was seriously undermined in Gillman v. United States, 53 F.R.D. 316 (D.C.S.D.N.Y. 1971). "In Bredice the trial judge judicially created a qualified privilege under the federal rules of procedure as they then existed with respect to staff conferences and reports concerning a patient's death. In Gillman, however, the trial judge, although paying decent respect to the decision in Bredice, refused to extend it beyond its precise facts and held that although the plaintiff was not entitled to production of reports of a board of inquiry set up by the

director of a hospital after a patient's suicide to determine whether hospital personnel should be disciplined or hospital procedures changed, the plaintiff was, nevertheless, entitled to the testimony of hospital personnel given before the board of inquiry relating to what actually happened on the occasion that was the subject of plaintiff's pending civil action for damages allowable under the Federal Tort Claims Act. "In our view, the correct disposition is declared in Kenney v. Superior Court, 255 Cal.App.2d 106, 63 Cal.Rptr. 84 (1967). In the Kenney case, the court considered an application for extraordinary relief in the form of an order of mandamus. The court held that the plaintiff who had sued a physician for medical malpractice was entitled to discovery of any hospital records of the physician's disciplinary proceedings, status on the hospital staff, and removal therefrom. For a general discussion see Annotation: Discovery — Medical Malpractice Action, 15 ALR 3d 1446. "It is interesting to note that we are not here dealing with the question of a request for a protective order. The hospital did not seek a protective order for control or limitation or deletion of portions of the written material. It espoused the argument that the written material was simply not discoverable." pp. 178-179. Judge Gard, in his informative work, states: "At common law there was no physician-patient privilege and the physician as well as the client could be compelled to testify as to communications even though they were confidential. The privilege is strictly a creature of statute. For this reason the statute has been strictly construed in Kansas. See Armstrong v. Topeka R. Co., 93 Kan. 493, 144 P. 847. Some states do not have such a privilege at all." 1 Gard's Kansas C. Civ. Proc.2d Annot. § 60-427, (1979) pp. 140-141.

The United States Supreme Court in United States v. Nixon,418 U.S. 683, 41 L.Ed.2d 1039, 94 S.Ct. 3090 (1974), was facedwith a determination of whether confidential communicationsbetween a president of the United States and his closest personaladvisors was subject to a nonstatutory privilege and thereforenot discoverable as a matter of public policy. In orderingdiscovery the court stated:

[234 Kan. 25]

"The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. . . . . "The privileges referred to by the Court are designed to protect weighty and legitimate competing interests. Thus, the Fifth Amendment to the Constitution provides that no man `shall be compelled in any criminal case to be a witness against himself.' And, generally, an attorney or a priest may not be required to disclose what has been revealed in professional confidence. These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor

expansively construed, for they are in derogation of the search for truth." pp. 708-710. (Emphasis supplied.)

While it may be true that some members of the medicalprofession might seek to shirk their duties to others in theprofession and to the public by refusing to participate in peerreview functions or, in doing so, might be less than candid intheir comments and evaluations, we do not ascribe such a lack ofintegrity to the vast majority of the members of the medicalprofession. The integrity of the medical profession is held inhigh esteem by the public and by the courts> and we are notconvinced that the occasional revelation, under appropriateprotective and limiting orders of the trial court, of some peerreview committee proceedings will result in the drastic collapseof the system as envisioned by Wesley. As indicated, many of thedecisions relied upon by Wesley involve statutes whichspecifically protect hospital peer review records and minutesfrom discovery. Absent statutory protection it appears that mostjurisdictions do not give blanket protection to such proceedings.Numerous cases, pro and con, on the public policy arguments ofwhether alleged confidential communications are subject to anonstatutory qualified privilege are cited and discussed inBerst. We see no reason to repeat here what has been said inthat opinion. Suffice it to say the court adopted the positionthat a balancing test is appropriate in determining whether thetrial court should assert its supervisory powers to protectconfidential information not subject to a statutory privilegefrom discovery.

[234 Kan. 26]

We deem the instant case to be analogous to Berst and that theprocedures set forth therein are equally applicable andappropriate for the control of the discovery of peer reviewcommittee proceedings.

While there may be instances where peer review committeeminutes and records and other confidential hospital documentsshould be denied discovery under the broad supervisory powers ofthe court, we decline to adopt an absolute statement of publicpolicy declaring all such records to be protected in toto. Ifsuch a privilege is to be established it should be done by thelegislature. In individual cases the balancing test discussed inBerst should be followed. In the instant case, the trial court,in a lengthy and well-reasoned opinion, stated: "Now to the `public policy' issue. Defendant and the hospital are joined. Good hospital care requires review of medical procedures used by the hospital's medical staff. It would seem that those best qualified to review medical procedures used by a medical staff would be that body itself. The patient is the ultimate beneficiary of this peer review of diagnostic and treatment procedures. For that reason the licensing authority has enacted certain rules and regulations requiring that the hospital's medical staff police itself with the ultimate authority and responsibility coming to the governing authority of the hospital. The regulations require that a record be kept by the medical staff of its actions in this policing of itself through peer review. Staff findings are not part of the patient's records and they are not open for view other than by medical staff. "As aforesaid, in carrying out its duty of peer review, the hospital's medical staff has reviewed the defendant's methods of diagnosis and treatment through a special investigation which

reviewed care and treatment rendered plaintiffs' decedent and other patients of defendant who were diagnosed and/or treated in the hospital. The hospital is of the position that public policy would dictate that the materials gathered and minutes kept by that investigative body be kept confidential. Discovery ought to be denied, they say. "Plaintiffs, on the other hand, say that their right to search out the truth through the judicial process is the consideration that weighs most under these facts. "There is a public interest served by the regulation (supra) that restricts access to minutes of medical staff meetings to medical staff. There is a public interest served by the Kansas Rules of Discovery that allow a party litigant access to relevant material in the control of a party opponent. "Under the facts here presented, the public interest will be best served by allowing these plaintiffs access to the materials sought under certain guidelines established by the Court to protect all interests involved (Rules of the Supreme Court relating to District Courts> . . . 1, 2, 3 and 4 - 230 Kan. lxvi, Gleichenhaus v. Carlyle, [226 Kan. 167, 597 P.2d 611 (1979)]).

"This is the Court's order: the hospital shall on or before fourteen (14) days from the date of this order, produce legible copies of all documents or things in its possession or under its control that:

[234 Kan. 27]

1. Relate in any way to the circumstances surrounding the January 6, 1980, death of plaintiff's decedent, Joshua LeStage. 2. Relate in any way to an investigation or investigations conducted by any person, group or entity under the control of the hospital or its medical staff; into the techniques and procedures involving diagnosis and treatment of patients by defendant Medo Mirza, M.D. 3. Relate in any way to any restrictions or limitations placed by the hospital or recommended by its medical staff upon the activities of defendant Medo Mirza, M.D. "All names and addresses of patients or representatives thereof, other than plaintiffs' decedent, shall be removed from all documents or things produced by the hospital. "The hospital may comply with this order by delivering to its attorney of record three copies of the documents or things herein ordered produced together with a statement for cost of reproduction of each copy. Upon payment of cost, the defendant and plaintiffs shall have their respective copies. The hospital's attorney shall keep the third. "Each page or part of each copy ordered produced shall be marked by the hospital in such a way as to identify the particular copy and each page or part of that particular copy. The hospital's attorney shall inform, the Court in writing which party received which copy. "It is ordered that the documents and things ordered produced here or the contents thereof shall not be disclosed to any other person or entity without prior court approval, nor shall they be used for any purpose other than discovery, preparation for trial and of this lawsuit." In Berst we said: "Where the parties have conflicting interests in material sought to be discovered, the protective power of the court may be sought by a party under this provision, and the court must balance the litigant's interest in obtaining the requested information with the resisting party's interest, as well as the public interest in maintaining the confidentiality of the material." 232 Kan. at 187. (Emphasis added.)Thus, it is obvious that the trial court recognized itsresponsibility under Berst and, having weighed the interests ofall parties, applied the balancing test of Berst and determinedthat the sought after documents were discoverable. We

find noabuse of discretion in that determination.

The trial court did not conduct an in camera inspection in thiscase. Wesley had not sought a protective order as to particulardocuments but merely contended in the trial court, as it doeshere, that all records and minutes of the peer review committeeswere privileged and therefore not subject to discovery. InBerst the court considered the advisability of an in camerainspection and stated:

[234 Kan. 28]

"For this reason the trial court erred in failing to conduct an in camera inspection of the NCAA's file to determine which documents were not relevant and thus not discoverable. An in camera inspection is an appropriate and useful proceeding to ensure that the balance is properly struck between a petitioner's claim of irrelevance and privilege, and a plaintiff's need for the documents. [Citations omitted.] When a trial court orders production of confidential records, it has a duty to limit the availability and use of documents by carefully drawn protective provisions. [Citations omitted.] We believe when a claim of privilege, confidentiality or irrelevance is raised the court has a duty to conduct an in camera inspection to separate and permit discovery of only the relevant documents, thereby protecting against unnecessary and damaging disclosure of irrelevant confidential material." pp. 186-187.Even though the confidential information may be relevant, thetrial court is still under a duty, when properly requested, toconduct an in camera inspection and apply the balancing test todetermine if the sought-after information is discoverable. If,upon further proceedings, Wesley is of the opinion that certainof the subpoenaed documents are subject to the physician-patientprivilege or require protection under K.S.A. 60-226(c) itshould seek an in camera inspection and the same should beconducted by the trial court. On the other hand, it may be thatthe order already issued will be considered adequate protectionby all parties.

Finally, Wesley asserts that the documents and informationsought are not relevant. The trial court in its memorandumopinion and order specifically found that the sought-afterinformation was relevant to material issues in the case. Thetrial court is vested with broad discretion in supervising thecourse and scope of discovery and the trial court's discretioncannot be controlled by mandamus. Berst v. Chipman, 232 Kan. at183. The allegation of Wesley that K.S.A. 65-442(b) controls isfound to be without merit under the factual allegations of thiscase.

The petition for a writ of mandamus is denied.