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**DISTRICT II**

August 11, 2021

To:

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You are hereby notified that the Court has entered the following opinion and order:

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2020AP289

Joseph Barsuli v. Virtual Radiologic Corp. (L.C. #2017CV163)

Before Gundrum, P.J., Neubauer and Reilly, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

In this medical malpractice case, Wayne Liou, M.D., Virtual Radiologic Corp. (VRad), and Virtual Radiologic Professionals, LLC (VRP) appeal from a judgment entered in favor of Joseph and Lisa Barsuli. They contend that the circuit court erred in allowing privileged information to be discovered and used at trial. Based upon our review of the briefs and record,

we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).<sup>1</sup> We affirm.

On September 17, 2014, Joseph Barsuli was admitted to St. Catherine’s Medical Center in Pleasant Prairie with an elevated fever, numbness in his left arm and index finger, and a loss of sensation. His neurologist ordered a CT scan, which was completed that night.

Upon completion of the CT scan, Dr. Wayne Liou performed a preliminary read of it. Liou was a radiologist based in Hong Kong. Through a series of contractual relationships involving VRad and VRP, Liou provided remote, overnight teleradiology coverage for St. Catherine’s. His report did not identify any acute issues with Mr. Barsuli, so the neurologist took no further action that night.

The next morning, Dr. Douglas Port, a local radiologist, performed a final read of the same CT scan. Port’s report was described by the neurologist as “much more abnormal” and “alarming.” That is because Port identified a golf ball-sized abscess in Mr. Barsuli’s spine. Barsuli was transferred to another hospital where he underwent emergency surgery to drain the abscess.

Following surgery, Barsuli had no movement or sensation in his lower extremities. He worked hard in rehab and was eventually able to walk with a walker. He could move his upper extremities, but they were still weak, especially on the left side. Barsuli believed that his injuries

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version.

were caused by the delay in identifying and removing the abscess. Accordingly, he and his wife filed a lawsuit against Liou, VRad, and VRP.

During litigation, the parties fought over the discoverability and admissibility of a so-called “discrepancy report.” The report was a screenshot of Port’s notification to VRad that a discrepancy in readings existed and Liou’s response expressing agreement. Liou, VRad, and VRP maintained that the report, which was required by VRad’s contract,<sup>2</sup> was privileged information under WIS. STAT. § 146.38. The circuit court disagreed.

The matter proceeded to trial, and a jury found Liou casually negligent along with several nonparty health care providers. After the verdict, Liou, VRad, and VRP moved for a new trial, arguing that the report was erroneously discovered and admitted into evidence. Again, the circuit court denied the motion. This appeal follows.

WISCONSIN STAT. § 146.38 governs “[h]ealth care services review” and the confidentiality of the information resulting from such a review. It provides in part that “[n]o person who participates in the review or evaluation of the services of health care providers ... may disclose an incident or occurrence report or any information acquired in connection with such review or evaluation ....” WIS. STAT. § 146.38(1m).

“The purpose of the privilege created by [WIS. STAT.] § 146.38 is ‘to protect the confidentiality of the peer review process, in the hope that confidentiality would encourage free and open discussion, among physicians knowledgeable in an area, of the quality of treatment

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<sup>2</sup> VRad’s contract required the client to report “any discrepancies” that came to the client’s attention.

rendered by other physicians.” *Braverman v. Columbia Hosp., Inc.*, 2001 WI App 106, ¶14, 244 Wis. 2d 98, 629 N.W.2d 66 (citation omitted). “The review contemplated by the statute is intended to aid physicians on the hospital staff in maintaining and improving the quality of their work, and the review lies at the core of the protection afforded by the statute.” *Id.*

A party asserting the health care services review privilege bears the burden of establishing it. *Phelps v. Physicians Ins. Co. of Wis.*, 2005 WI 85, ¶53, 282 Wis. 2d 69, 698 N.W.2d 643. We narrowly construe privileges created by statute. *Braverman*, 244 Wis. 2d 98, ¶13. The determination of privilege is ultimately one for the courts, not for the professionals involved. *Id.*

Here, the circuit court was not persuaded that Liou, VRad, and VRP met their burden of establishing the health care services review privilege. We agree. As noted by the court, there is a distinction between records made by those evaluating health care services and documents received by them. The report at issue fell into the latter category. It was not the product of a peer review process to improve the quality of treatment rendered by physicians. Rather, it was created because VRad’s contract required notice of *any* discrepancies, regardless of whether they affected the patient’s care. Given this purpose and the narrow construction accorded privileges, we are satisfied that the court properly allowed the report to be discovered and used at trial.<sup>3</sup>

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<sup>3</sup> To the extent we have not addressed any other argument raised by Liou, VRad, and VRP on appeal, the argument is deemed rejected. See *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*