STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: March 9, 2012)

BRENDA L. GOULD and WAYNE M. FOUGERE	:	
vs.	:	**C.A. No. PC 2011-2085**
MING L. CHENG, M.D., NEUROSURGERY FOUNDATION, INC., and RHODE ISLAND HOSPITAL	:	

DECISION

GIBNEY, PJ. Before this Court are two Motions to Compel, pursuant to Super. R. Civ. P. Rules 34 and 37, requesting this Court to enter an Order compelling Defendant Rhode Island Hospital ("Defendant") to more responsively answer interrogatories contained in Plaintiff's First Interrogatories and compelling Defendant to more responsively answer the requests contained in Plaintiff's First Request for Production of Documents. This Motion was filed on January 17, 2012 and heard by this Court on January 18, 2012. This Court made a ruling on two other motions that day, but held the remaining motions for decision. Defendant has since filed an Objection to the Motions to Compel and Plaintiff has filed a response to such Objection.

I

Facts & Travel

The instant Motions arise out of a medical malpractice case involving the alleged negligent treatment of Plaintiff Brenda L. Gould ("Plaintiff") by Ming L. Cheng, M.D. ("Cheng") in May 2009 at Rhode Island Hospital. (Compl.) In the underlying Complaint,

Plaintiffs Brenda L. Gould and Wayne M. Fougere allege that Cheng failed to meet accepted standards of care when he left an infected piece of spinal stimulation hardware in Plaintiff's thoracic spine for weeks before finally removing it, paralyzing her. Id. There is also a direct claim made against Defendant, alleging that Cheng should never have been on staff at Rhode Island Hospital and never been put in a position to treat Plaintiff. Id. Cheng's privileges have since been revoked.

II

Standard of Review

A party may obtain discovery on "any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . {or} reasonably calculated to lead to the discovery of admissible evidence." R.I. Super. Ct. R. Civ. P. 26(b). The scope of discovery includes "any matter, *not privileged*, which is relevant to the subject matter involved in the pending action." Super. R. Civ. P. Rule 26(b)(1) (emphasis added). Relevance includes information relating "to the claim or defense of the party seeking discovery or to the claim or defense of any other party. . . ." Id. The materials sought need not be admissible at trial so long as they are reasonably calculated to lead to admissible evidence. See id.

The burden of showing that information sought is discoverable rests with the requesting party. Borland v. Dunn, 321 A.2d 96, 99 (R.I. 1974); DeCarvalho v. Gonsalves, 262 A.2d 630 (R.I. 1970). An order to defendants to produce private business records should be limited to those of the period involved in the controversy. Id. Under circumstances where the court finds the discovery request unduly burdensome or expensive, the court may limit discovery. R.I. Super. Ct. R. Civ. P. 26(b).

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information privileged or protected, will enable other parties to assess the applicability of the privilege or protection. R.I. Super. Ct. R. Civ. P. 26(b)(5). A requesting party may move for an order compelling discovery if a party fails to respond to a request for production or inspection submitted under Rule 34. In granting or denying discovery orders, a justice of the Superior Court has broad discretion. See Corvese v. Medco Containment Servs., 687 A.2d 880, 881 (R.I. 1997).

III

Analysis

A

Peer Review Privilege

In opposition to Plaintiff's Motions, Defendant claims that the interrogatories and documents are exempt from discovery under the "peer review privilege," codified under G.L. 1956 § 23-17-25(a). Section 23-17-25(a) states:

> "(a) Neither the proceedings nor the records of peer review boards as defined in § 5-37-1 shall be subject to discovery or be admissible in evidence in any case save litigation arising out of the imposition of sanctions upon a physician. However, any imposition or notice of a restriction of privileges or a requirement of supervision imposed on a physician for unprofessional conduct as defined in § 5-37-5.1 shall be subject to discovery and be admissible in any proceeding against the physician for performing, or against any health care facility or health care provider which allows the physician to perform the medical procedures which are the subject of the restriction or supervision during the period of the restriction or supervision or subsequent to that period. Nothing contained in this section shall apply to records made in the regular course

> of business by a hospital or other provider of health care information. Documents or records otherwise available from original sources are not to be construed as immune from discovery or used in any civil proceedings merely because they were presented during the proceedings of the committee."

Concisely, the proceedings and records of peer review boards are privileged from discovery. "Peer review boards" are defined as:

> "Peer review board means any committee of a state or local professional association or society including a hospital association, or a committee of any licensed health care facility, or the medical staff thereof, or any committee of a medical care foundation or health maintenance organization, or any committee of a professional service corporation or nonprofit corporation employing twenty (20) or more practicing professionals, organized for the purpose of furnishing medical service, or any staff committee or consultant of a hospital service or medical service corporation, the function of which, or one of the functions of which is to evaluate and improve the quality of health care rendered by providers of health care service or to determine that health care services rendered were professionally indicated or were performed in compliance with the applicable standard of care or that the cost of health care rendered was considered reasonable by the providers of professional health care services in the area and shall include a committee functioning as a utilization review committee under the provisions of 42 U.S.C. § 1395 et seq. (Medicare law) or as a professional standards review organization or statewide professional standards review council under the provisions of 42 U.S.C. § 1301 et seq. (professional standards review organizations) or a similar committee or a committee of similar purpose, to evaluate or review the diagnosis or treatment of the performance or rendition of medical or hospital services which are performed under public medical programs of either state or federal design."
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> . . .
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> "Peer review board also means the board of trustees or board of directors of a state or local professional association or society, a licensed health care facility, a medical care foundation, a health maintenance organization, and a hospital service or medical service corporation only when such board of trustees or board of directors is reviewing the proceedings, records, or recommendations of a peer review board of the above enumerated organizations." § 5-37-1(11)(i)-(ii).

Essentially, a peer review board is almost any committee set up to evaluate or review the quality of healthcare service rendered.

In Cofone v. Westerly Hospital, 504 A.2d 998, 1000 (R.I. 1986), the Rhode Island Supreme Court held that "the statute [§ 23-17-25] explicitly dictates that only the records and the proceedings which originate with[in] the peer-review board are immune from discovery and inadmissible." What must be determined is whether these documents constitute "proceedings or records" of a peer review board. Also, a request for review cannot constitute a "proceeding" or "record" originating within a peer review board, as they, at the most, begin the creation of the peer review board. See Cofone, 504 A.2d at 1000.

When determining the scope of this privilege, the Rhode Island Supreme Court in Moretti v. Lowe stated:

> "In enacting our peer-review statute, the Legislature recognized the need for open discussions and candid self-analysis in peer-review meetings to ensure that medical care of high quality will be available to the public. That public purpose is not served, however, if the privilege created in the peer-review statute is applied beyond what was intended and what is necessary to accomplish the public purpose. The privilege must not be permitted to become a shield behind which a physician's incompetence, impairment, or institutional malfeasance resulting in medical malpractice can be hidden from parties who have suffered because of such incompetence, impairment, or malfeasance." Moretti v. Lowe, 592 A.2d 855, 857-58 (R.I. 1991).

The public purpose of the privilege allows colleagues of medical professionals to speak freely in frank discussion, allowing for better review and eventually better practices. See, e.g., 1986 R.I. Pub. Laws 730 (In preamble to current enactment of § 23-17-25, "WHEREAS, The General Assembly declares it is the policy of this state to promote the free flow of information between health care providers and the various peer review and

disciplinary organizations in the health care field."); Pastore v. Sampson, 900 A.2d 1067, 1074 (R.I. 2006) (Emphasizing the social importance of "open discussions and candid self-analysis in peer-review meetings to ensure that medical care of high quality will be available to the public.") (quoting Moretti, 592 A.2d at 857); Mahmoodian v. United Hospital Center, Inc., 185 W. Va. 59, 65, 404 S.E.2d 750, *cert. denied*, 502 U.S. 863 (1991) (peer review privilege "evinces public policy encouraging health care professionals to monitor the competency and professional conduct of their peers in order to safeguard and improve the quality of patient care").

The burden of establishing entitlement to nondisclosure rests on the party resisting discovery; thus, here, Defendant has the obligation to demonstrate its entitlement to the privilege. Many of Defendant's descriptions in its privilege log were too vague and conclusory to qualify for the peer review privilege, as Defendant simply declared that the documents are protected as Peer Review records and proceedings and were documents originating with a Peer Review Board, making the assumption that the Credentialing Board was a Peer Review Board.

It is well settled that the "determination of the proper scope of a privilege demands a delicate balancing . . . ." Pastore v. Samson, 900 A.2d 1067, 1074 (R.I. 2006). Privileges "are designed to protect weighty and legitimate competing interests," but they are also "in derogation of the search for truth." Id. at 1074 (quoting United States v. Nixon, 418 U.S. 683, 709, 710 (1974)). Accordingly, privileges are not favored in the law and are strictly construed. Gaumond v. Trinity Repertory Co., 909 A.2d 512, 516 (R.I. 2006). "When a party who is resisting discovery of so-called confidential or protected information asserts a privilege, '[t]he burden of establishing entitlement to

nondisclosure rests on the party resisting discovery.'" Id. at 517 (quoting Moretti v. Lowe, 592 A.2d 855, 857 (R.I. 1991) (brackets in original)).

Sections 23-17-25(a) and 5-37.3-7(c) define the peer review privilege. Section 23-17-25(a) provides that, with certain exceptions, "[n]either the proceedings nor the records of peer review boards as defined in § 5-37-1 shall be subject to discovery . . . ." Sec. 23-17-25(a). The privilege does not apply to any information related to restrictions imposed on a physician for unprofessional conduct; regular hospital business records; or documents otherwise available from original sources. Id.; Pastore, 900 A.2d at 1076 (noting that a physician is required to disclose whether his staff privileges have ever been "restricted, revoked, or curtailed" (citation omitted)); Moretti, 592 A.2d at 858 (explaining that privilege "does not render immune information otherwise available from original sources even if the information was presented at a [peer review] committee meeting").

In addition, any person who attends a medical peer review meeting is precluded from testifying "as to any matters presented during the proceedings of that board or as to any findings, recommendations, evaluations, opinions, or other actions of that board or any members of the board." Id. Thus, under the peer review privilege, a hospital is entitled "to withhold 'all records and proceedings' before the [peer review] board, even those pertaining to the plaintiff in that case." Pastore, 900 A.2d at 1076 (quoting Cofone v. Westerly Hosp., 504 A.2d 998, 1000 (R.I. 1986)).

In its argument Defendant simply rests on the bold repeated assertion that the privilege only applies to action taken that results in a suspension or revocation of a doctor's privileges in a medical service center; thus, only negative findings of a peer

review board are not privileged. However, Defendant fails to describe the committee involved here with sufficient detail in order to show that such committee was actually a "peer review board." Defendant also fails to describe the withheld documents with enough specificity to demonstrate that the documents were "proceedings and records" subject to the peer review privilege. See Babcock v. Bridgeport Hosp., 742 A.2d 322, 356 (Conn. 1999) (declining to find entitlement to peer review privilege where defendant "asserted conclusorily that the documents were privileged pursuant to the peer review and medical studies statutes").

Instead, Defendant just asserts that a credentialing committee performed a review of Cheng and that such committee is a peer review board protected by the peer review privilege. Defendant fails to demonstrate how the committee qualifies as a peer review board. Mere labels are insufficient to allow a conclusion that such committees are in fact "peer review boards." See Moretti, 592 A.2d at 857; see also Babcock, 742 A.2d at 356. Although Defendant need not describe the contents of the committee's discussions or its conclusions, it must do more than make naked assertions that the committee is a "peer review committee." See Pastore, 900 A.2d at 1076; see also Babcock, 742 A.2d at 356.

Furthermore, Defendant fails to actually describe the documents that it chooses to withhold from Plaintiff, as it gives mere general and vague descriptions in its privilege log. See Babcock, 742 A.2d at 356 (suggesting that party resisting discovery must convey "nature or purpose of the documents in question" to receive peer review privilege). Defendant simply asserted that the documents produced as a consequence of committee meetings are protected from discovery as records of the peer review committee. See Pastore, 900 A.2d at 1080 (hospital fails to point the Court to the portion

of the transcript that discusses the doctor's possible deviation from an appropriate standard of medical care; thus, such documents cannot be protected by the privilege). Defendant's barren declarations of a right to nondisclosure are insufficient to carry its burden of establishing entitlement to the privilege. Pastore, 900 A.2d at 1076; see Babcock, 742 A.2d at 356 (noting that defendant failed to demonstrate "the nature or purpose of the documents in question").

Based on the reasoning above, this Court grants Plaintiff's Motion to Compel more responsive answers to Interrogatories 10 and 16. Interrogatory 10 asks: "Was the care and treatment of Plaintiff . . . the subject of a peer review committee meeting or process? If your answer is yes, please identify the date, location, all persons in attendance and describe all actions taken as a result of said meeting or meetings." Interrogatory 16 asks: "Does Ming L. Cheng, M.D. maintain privileges at Rhode Island Hospital today? If not, please describe the reason." Neither of these Interrogatories are protected under the peer review privilege, as Plaintiff is not requesting any records or proceedings of a peer review board. What actions were taken and the reason behind Cheng's loss of privileges are both unprotected by the privilege, as these questions are not asking for records of the proceedings. Furthermore, Defendant has still failed to establish whether the committee was a peer review committee in the first place.

This Court next examines Plaintiff's Motion to Compel further responses to Request for Production of Documents, numbers 5, 8, 14 and 15. This Court must reference Exhibits 1 and 2 of Defendant's Objection, which are the privilege logs.[1] Under the privilege log for Requests for Production 7 and 8, Plaintiff requests this Court

[1] Defendant states that it has updated and expanded the privilege logs; however, such logs still do not provide much guidance as to whether the documents fall under the privilege.

to Compel Defendant to provide documents three, four, and five.[2] Documents three and four are described by Defendant as being Peer Review Memorandums, prepared by a Peer Review Committee, which summarize the key items discussed in the peer review of the care and treatment of the patient. Such a description is still vague and may be covered by the peer review privilege; however, an in camera review, as suggested by both sides, may be necessary to determine whether to disclose such documents. Furthermore, Defendant has still failed to demonstrate that the committee is a peer review board, from which such documents allegedly originated. Thus, since it is unclear whether these documents did originate with a peer review board, an in camera review may be necessary. Document four is a Peer Review Memorandum, prepared by the Risk Management Coordinator, which requests that a peer review be conducted. This Court compels Defendant to produce this document, as there is no privilege protecting such document.

Under the privilege log for Requests for Production 5, 14, and 15, Plaintiff requests this Court to Compel Defendant to provide documents one through four.[3] Defendant's assertion is that the documents requested, which are from the Credentialing file for Cheng, are protected by the peer review privilege because the committee is a peer review board and such documents originated with the committee. However, Defendant again has failed to demonstrate that the Credentialing Committee is a peer review board/committee and its reports are protected under the privilege. Thus, this Court is

[2] To date, Plaintiff has made no argument regarding Defendant's assertion that documents one and two are protected under the communication with the Department of Health privilege. Thus, absent such an opposition to Defendant's assertion that documents one and two are protected by this privilege, this Court will not consider these documents.

[3] To date, Plaintiff has made no argument regarding Defendant's assertion that document five is protected under 42 U.S.C.A. 11137(b). Thus, absent such an opposition to Defendant's assertion that document five is protected from disclosure, this Court will not consider this document.

inclined to grant Plaintiff's Motion to Compel as to all documents in this privilege log, since all seem to be regarding assessments by the credentialing committee, although such privilege log is very vague on the description of the documents.

In camera review of the four documents may be appropriate to determine their discoverability, as it is unclear if certain documents are discoverable or if they are protected by the peer review privilege. This Court may determine such documents are discoverable if it determines that the committee fails to qualify as a peer review committee. An in camera review is needed to make such a determination. The Rhode Island Supreme Court has supported such reviews when close issues of privilege arise: "[A] hearing justice should conduct an in camera review of the documents before issuing a ruling. Otherwise, it is impossible for the hearing justice to determine whether the content of the communications is in fact integral to the outcome of an issue in the case." Mortgage Guarantee & Title Co. v. Cunha, 745 A.2d 156, 158 (R.I. 2000).

Subsequent to an in camera review, this Court will determine whether to compel Defendant's production of documents per Requests 5 and 14. However, this Court denies Plaintiff's request for further responses as to Request 15, which requests a copy of any other file on Cheng. Such a request will be limited to the privilege log provided by Defendant. This Request is overly broad and unduly burdensome as it does not provide Defendant with a scope of discovery.

IV

Conclusion

In light of the foregoing analysis, this Court finds that the peer review privilege does not protect Defendant from providing more responsive answers to Interrogatories 10 and 16 or from providing further responses to Plaintiff's Request for Production of Documents as to those requests outlined above. However, in order to determine whether Defendant has any protection from disclosure, under the peer review privilege, an in camera review will be conducted. Counsel shall schedule an in camera review with this Court. Plaintiff's request for further responses as to Request 15, which requests a copy of any other file on Cheng, is denied.

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