

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: May 23, 2013)

PAULINE R. HALL

:

v.

:

C.A. No. PC-2008-2420

:

RITA SHIFF, PA-C,

:

BROWN UNIVERSITY in Providence

:

in the State of Rhode Island and

:

Providence Plantations, and

:

QUEST DIAGNOSTICS, LLC

:

DECISION

GIBNEY, P. J. Before this Court are three Motions to Compel, pursuant to Super. R. Civ. P. Rule 37. Defendant Quest Diagnostics, LLC (Quest) moves to compel further deposition testimony and further responses to Quest’s Third Supplemental Request for Production of Documents and Fourth Supplemental Request for Production of Documents. At issue is whether a document (case review) prepared by members of Defendant Brown University’s (Brown) Health Services Quality Improvement Committee (QIC) is protected under a claim of privilege. Jurisdiction is pursuant to G.L. 1956 § 8-2-14.

I

Facts and Travel

The Motions arise out of a suit alleging negligent treatment of Plaintiff Pauline Hall (Hall) at Brown University Health Services (Health Center). Pursuant to a professional services agreement, Brown retained Quest as “a licensed independent contractor to perform certain clinical laboratory testing for students and employees” at the Health Center. On May 10, 2006, Hall, who then was a Brown graduate student, presented to the Health Center with complaints of

a sore throat, ear pain, and nausea. Hall was seen by Defendant Rita Shiff (Ms. Shiff), a physician's assistant, employed by Brown at the Health Center. Ms. Shiff ordered a Rapid Strep Test to be performed by Quest, but the test was not performed.¹ Hall returned to the Health Center on May 12, 2006, at which point she was diagnosed with toxic shock syndrome. This resulted in a prolonged illness from which she suffered permanent injury. In March 2008, Hall commenced the instant action against Ms. Shiff, Brown, and Quest. Hall alleged negligent treatment and diagnosis by Ms. Shiff and Brown, as well as negligent laboratory testing by Quest.

On December 10, 2010, Brown filed a cross-complaint (Cross-Complaint) against co-defendant Quest in which Brown alleged that Quest caused Hall's injuries because Quest negligently failed to properly process the Rapid Strep Test, failed to obtain the results of the test, and failed to communicate the test results to the Health Center. Brown also claimed that Quest breached the professional services agreement and that the agreement entitled Brown to indemnification and contribution from Quest in relation to Hall's claims.

During the course of discovery, Quest propounded certain interrogatories to Brown and deposed Health Center employees. In response to requests contained in Quest's Third Supplemental Request for Production of Documents and Fourth Supplemental Request for Production of Documents, Brown identified a "three page document entitled 'Case review May 2006'" that "constitutes peer review material that is statutorily protected from disclosure." Quest deposed Health Center employees Barbara Fields (Ms. Fields), Lynn Dupont (Ms. Dupont), and Dr. Edward Wheeler (Dr. Wheeler and, collectively, Deponents) on August 23, November 7, and December 7, 2012, respectively. At all times relevant, the Deponents were members of the

¹ Brown and Quest dispute responsibility for failure to perform the test.

Health Center's QIC.² Quest's counsel questioned each about the case review; Brown's counsel, citing peer-review privilege, instructed them not to answer questions relating to the substance of the case review. Brown asserts that the Deponents "unquestionably engaged in a peer review when they investigated and reviewed the circumstances of the Pauline Hall incident[.]"

Quest filed these Motions on February 21, 2013, Brown filed objections on March 15, 2013, and this Court heard argument on March 22, 2013. Quest argues that its Motions to Compel should be granted because the case review and testimony pertaining thereto are not protected by peer-review privilege. Quest specifically contends that the privilege is inapplicable because, although Dr. Wheeler, Ms. Dupont, and Ms. Fields were members of the QIC, the case review was not prepared for the QIC, and the QIC never considered the Hall matter.

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, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party[.]" R.I. Super. R. Civ. P. 26(b)(1). A party may withhold information otherwise discoverable by claiming that it is privileged provided the resisting party makes the claim expressly, and describes the nature of the material so as to enable other parties to assess the applicability of the privilege. R.I. Super. R. Civ. P. 26(b)(5). A party may move for an order to compel discovery if another party asserts a privilege in response to a request for production. R.I. Super. R. Civ. P. 34(a).

Although, generally, 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), when a privilege is asserted, the burden of establishing entitlement to nondisclosure rests on the party resisting

² Ms. Fields has since retired, and Ms. Dupont assumed her position.

discovery. Moretti v. Lowe, 592 A.2d 855, 857 (R.I. 1991). Privileges “are not favored in the law and therefore should be strictly construed.” Gaumond v. Trinity Repertory Co., 909 A.2d 512, 516 (2006) (quoting Moretti, 592 A.2d at 857). Furthermore, “the recognition of a privilege based on a confidential relationship [. . .] should be determined on a case-by-case basis.” Upjohn Co. v. United States, 449 U.S. 383, 396 (1981).

III

Analysis

It is undisputed that Brown’s QIC is a “peer review board” within the meaning of § 5-37-1(12)(i) and that Dr. Wheeler, Ms. Dupont, and Ms. Fields were members of the QIC. A “peer review board” is defined, in pertinent part, as

“a committee of any licensed health care facility, or the medical staff thereof [. . .] or any staff committee [. . .] 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.” Sec. 5-37-1(12)(i).

Brown and Quest, however, dispute whether the case review is a protected record of the QIC such that deposition questions relating to the case review, and the case review itself, are exempt from discovery pursuant to peer-review privilege. Rhode Island law affords peer review privilege to health care providers as follows:

“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. [. . .] 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.” Sec. 23-17-25(a) (emphasis added.)

Section 5-37.3-7(c) further provides:

“[t]he proceedings and records of medical peer review boards shall not be subject to discovery or introduction into evidence. No person who was in attendance at a meeting of that board shall be permitted or required to testify 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. Confidential health care information discoverable or admissible from original sources shall not be construed as immune from discovery or use in any proceeding merely because that information was presented during proceedings before that board, nor is a member of that board or other person appearing before it to be prevented from testifying as to matters within his or her knowledge and in accordance with the other provisions of this chapter, but that witness cannot be questioned about his or her testimony or other proceedings before that medical peer review board or about opinions formed by him or her as a result of those proceedings.” (Emphasis added.)

Our Supreme Court has “acknowledged 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.’” Pastore v. Samson, 900 A.2d 1067, 1074 (R.I. 2006) (quoting Moretti, 592 A.2d at 857). Accordingly, the peer-review privilege entitles “a hospital to withhold ‘all records and proceedings’ before the peer-review board, even those pertaining to the plaintiff in [a particular] case.” Pastore, 900 A.2d at 1076 (quoting Cofone v. The Westerly Hospital, 504 A.2d 998, 1000 (R.I. 1986)). Importantly, “only the records and the proceedings which originate with the peer-review board are immune from discovery and inadmissible.” Pastore, 900 A.2d at 1076 (quoting Cofone, 504 A.2d at 1000). “A party may not hide behind confidentiality to avoid disclosure of unfavorable evidence.” Gaumond, 909 A.2d at 517.

In its Third Supplemental Request for Production of Documents, Quest requested production of “[a]ny and all documents relating in any way to any investigation of the care afforded to Pauline Hall at Brown University Health Services” and in its Fourth Supplemental Request for Production of Documents, Quest requested production of the case review prepared “following the investigation of the Polly Hall matter, as testified to by Ms. Dupont in her deposition of November 7, 2012.” Brown replied to both requests as follows:

“Without in any way waiving the objection, the defendant is in possession of a three page document entitled ‘Case review May 2006 — Account 25322’ authored by Edward Wheeler, Jr., M.D., the Medical Director of Brown University Health Services and a member of the Brown University Health Services Quality Improvement Committee. This document was shared only with the two other members of the Brown University Health Services Quality Improvement Committee. The document was created and used entirely as a function of evaluating and improving quality of health care rendered by providers of health care services at Brown, and to determine that health care services rendered were professionally indicated and were performed in compliance with the applicable standard of care. This document constitutes peer review material that is statutorily protected from disclosure; and it is withheld on the basis of the medical peer review privilege afforded by G.L. 1956 § 23-17-25(a).”

Brown’s counsel repeatedly advised deponents not to answer questions concerning matters that were “part of the [Quality Improvement] process.” (Wheeler Dep. Tr. 61-65; Dupont Dep. Tr. 22, 29-30; Fields Dep. Tr. 42-48.)

The Health Center’s QIC was established as mandated by the Joint Committee on Accreditation of Hospitals. A “Quality Improvement Plan” authorized the QIC, set forth policies and procedures, defined membership, and stated the following objectives:

“To objectively and systematically examine the structure of Brown University Health Services health care system, the process of health care provision, and the outcomes of health care provision in order to continuously improve patient health outcomes. This is achieved through improving process design, performance

measurement, performance assessment and performance improvement.” (Emphasis omitted.)

The Deponents were members of the QIC by virtue of holding the following positions at the Health Center: Dr. Wheeler, Medical Director; Ms. Fields, Associate Director; and Ms. Dupont, Assistant Director. Dr. Wheeler held the highest position within the staff hierarchy at the Health Center, and Ms. Dupont served as Chairperson of the QIC. The following Health Center positions also comprised the QIC: Pharmacy Director, Health Education Director, EMS Director, Systems Manager, Office Manager, as well as a member of the nursing staff and a member of the provider staff. The Quality Improvement Plan indicated that the QIC “meets monthly during the school year and as needed in the summer for planning and review purposes” and that minutes of meetings would be distributed to members. Ms. Fields testified that the QIC met monthly, while Ms. Dupont testified that it met at least twice per semester. (Fields Dep. Tr. 38; Dupont Dep. Tr. 16-17.) The Quality Improvement Plan listed one subcommittee, the “Continuous Quality Improvement Steering Committee.”

The case review was not prepared for the QIC, and the Hall matter was not considered by the QIC. Brown argues that this is immaterial because peer-review privilege applies not only to the full QIC as set forth by the Quality Improvement Plan, but also to a smaller, unofficial embodiment of the QIC. Specifically, Ms. Dupont testified that she, along with Ms. Fields and Dr. Wheeler, constituted the “Executive Committee” of the QIC. (Dupont Dep. Tr. 9-13.) A fourth deponent and member of the QIC also stated that Dr. Wheeler, Ms. Dupont, and Ms. Fields acted as the Executive Committee. (Hodhgon Dep. Tr. 10-17.) Ms. Dupont testified that, “from time to time,” there “were occasions when the three [Executive Committee members] would make decisions without involving the other members of the Quality Improvement Committee,” and that in the Hall matter, “we chose not to bring it to the committee.” (Dupont

Dep. Tr. 46, 53, 57-58.) Dr. Wheeler likewise testified that “on occasion” a limited number of members would participate in a particular quality improvement investigation. (Wheeler Dep. Tr. 70-71.) The testimony also indicated that Ms. Dupont filed the case review in her Quality Improvement files; minutes were not maintained in relation to the Case Review or other Executive Committee matters. (Dupont Dep. Tr. 24-25, 47-49; Fields Dep. Tr. 31-32.) Although this subcommittee operated in practice, the deposition testimony and parties’ memoranda uniformly indicate that the Executive Committee was an informal designation and was not contemplated by the Quality Improvement Plan. In addition, Dr. Wheeler testified that he had never heard the term, “Executive Committee.” (Wheeler Dep. Tr. 18.)

Brown contends that the Deponents’ intent in considering the Hall matter and in drafting the case review necessitates application of peer-review privilege. Brown argues that the Deponents testified that they considered the Hall matter and drafted the case review in their capacities as members of the QIC for quality improvement purposes. Even if Deponents intended to perform a peer-review and equated the Executive Committee to the full QIC, however, mere labels are insufficient to allow a conclusion that such a subcommittee is a “peer-review board.” See Pastore, 900 A.2d at 1076; Moretti, 592 A.2d at 857. Moreover, Brown’s contention does not fully reflect the inconsistent testimony of Ms. Fields, who testified that she requested information about the Hall matter only when Dr. Wheeler and Ms. Dupont discussed it in front of her during a weekly meeting attended by the three. (Fields Dep. Tr. 59-60.) At that point, Ms. Fields “didn’t know enough about the situation,” and requested the information by saying, “[y]ou’ve got to fill me in on what’s going on.” (Fields Dep. Tr. 59.) Dr. Wheeler disagreed with this aspect of Ms. Fields’ account, asserting that Ms. Fields participated in the preparation of the case review; Ms. Dupont could not recall Ms. Fields’ role, if any. (Wheeler Dep. Tr. 15-16, 50-

51, 70-72; Dupont Dep. Tr. 24-25.) Ms. Fields otherwise stated that she did not know if the case review “was generated specifically in connection with and for the function of the” QIC, but also asserted that it was correct that she “didn’t participate at all in any investigation or review of the circumstances surrounding Hall’s treatment at Health Services other than potentially in [her] capacity as a member of the [QIC].” (Fields Dep. Tr. 56, 60.) Ms. Fields also testified that it was her “best belief that Ms. Hall’s care [came] before the [QIC], but [Ms. Fields could not] specifically recall the fact that it did.” (Fields Dep. Tr. 41.) In addition, Ms. Dupont and Dr. Wheeler testified that quality improvement was a daily concern shared by the Deponents. (Dupont Dep. Tr. 50-51; Wheeler Dep. Tr. 47-48.) Brown cites the Deponents’ intent and Ms. Dupont’s record-keeping practices to distinguish daily duties from the Hall investigation and case review.

As the party resisting discovery, Brown bears the burden of establishing that the Executive Committee is entitled to the same peer-review protections afforded to the records and proceedings of the full QIC. Moretti, 592 A.2d at 857. The Quality Improvement Plan set forth, inter alia, the QIC’s objectives, membership, meeting frequency, and record-keeping. The full, ten-member QIC played no role in the Hall matter. Instead, the three Executive Committee members—or, perhaps, only Dr. Wheeler and Ms. Dupont—considered the case and produced the case review. The Executive Committee, whether constituting two or three members, was an unofficial group without formal procedures that reviewed cases on an ad hoc basis. Although the Deponents’ intentions to improve quality may comport with the purpose of the peer-review privilege, the Quality Improvement Plan did not confer peer-review authority on the Executive Committee or individual members of the QIC. See Kopolovic v. Shah, 967 N.E.2d 368, 378-79 (Ill. 2012) (notwithstanding quality improvement intentions, privilege cannot apply because

“actions of individual members of a committee are not the same as the actions of that committee itself”) (citing Roach v. Springfield Clinic, 623 N.E.2d 246, 252 (Ill. 1993) (declining to impute peer-review board chairman’s investigatory actions to the board where bylaws did not confer to board members such authority and full board investigation had yet to commence)). And, given the grey area between Deponents’ ongoing quality improvement concerns and their desire to conduct peer-review investigations, it bears noting that use of the Health Center’s formal peer-review board—i.e., the full QIC—would have protected against the disclosure Brown now resists.

Considering the Executive Committee’s ad hoc nature and the conflicting deposition testimony, Brown’s assertion of privilege requires expansive constructions of “peer-review board,” “records,” and “proceedings.” Although privileges serve a “vitally important public good,” the peer-review privilege must be strictly construed because “privileges, in general, are not favored in the law” and such “immunity from discovery is in derogation of both common-law and the general policy favoring discovery.” Pastore, 900 A.2d at 1074; Moretti, 592 A.2d at 857. Brown’s assertion of privilege under these circumstances cannot be reconciled with our Supreme Court’s repeated statement that “only the records and the proceedings which originate with the peer-review board are immune from discovery and inadmissible.” Pastore, 900 A.2d at 1074; Cofone, 504 A.2d at 1000; Moretti, 592 A.2d at 857. The peer-review privilege “must not be used as a shield to obstruct proper discovery of relevant information generated outside peer-review committee meetings.” Moretti, 592 A.2d at 858. Because the case review was generated outside the QIC, the case review and associated testimony cannot enjoy peer-review protection.

IV

Conclusion

In light of the foregoing, this Court finds that the peer-review privilege does not protect Brown from providing further deposition testimony or from producing the case review in response to Quest's Third Supplemental Request for Production of Documents and Fourth Supplemental Request for Production of Documents. Quest's Motions to Compel are therefore granted. Counsel shall submit the appropriate order for entry.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: Pauline R. Hall v. Rita Shiff, PA-C, et al.

CASE NO: PC-2008-2420

COURT: Providence Superior Court

DATE DECISION FILED: May 23, 2013

JUSTICE/MAGISTRATE: Gibney, P.J.

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