STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: January 10, 2012)

MICHAEL NELSON and BRUCE NELSON, as Co-Administrators of the Estate of NOTA NELSON, and on Behalf of all Legal Beneficiaries of NOTA NELSON	:	
V.	:	**C.A. No. PC 2010-6446**
LANDMARK MEDICAL CENTER, JOHN DOE, and ABC CORPORATION	:	

DECISION

GIBNEY, P.J. In this wrongful death action, Defendant Landmark Medical Center ("Defendant") has filed a Motion for Reconsideration and Other Relief regarding this Court's Decision on September 26, 2011 to grant Plaintiffs' Motion to Compel Production of Documents ("September 26 Decision"). Nelson v. Landmark Med. Ctr., No. PC-2010-6446, at 8–11 (R.I. Super. Sept. 26, 2011). Defendant requests that this Court reconsider its September 26 Decision and deny Plaintiffs' Motion. Alternatively, Defendant asks this Court to conduct an in camera review of the documents in question before compelling their release or to stay the Order compelling production so that Defendant may petition our Supreme Court for a writ of certiorari. Jurisdiction is pursuant to Super. R. Civ. P. 60(b)(6) ("Rule 60(b)(6)"). For the reasons stated herein, this Court denies Defendant's Motion.

I

Facts & Travel

On June 13, 1994, the Plaintiffs' Decedent, Nota Nelson, sustained a hip injury while being treated in Defendant's emergency department. She subsequently died and Plaintiffs filed the instant action for wrongful death. During the course of discovery, Plaintiffs propounded certain interrogatories to Defendant. Specifically, in Interrogatory No. 9, Plaintiffs posed the following question to Defendant:

> "'Was the care and treatment of the decedent ever the subject of a peer review meeting or process?' If so, identify
> a. the date or dates of each meeting;
> b. where said meeting(s) took place;
> c. identify the name of each person present at each meeting;
> d. identify all documents submitted or prepared for said meeting(s); and
> e. identify all documents produced as a result of said meeting(s)."

In its answer to Interrogatory No. 9, Defendant identified sixteen documents that it had listed in a Privilege Log and for which it claimed a "Peer Review records/proceedings" privilege under G.L. 1956 § 23-17-25(a) (2008).[1] Plaintiffs objected and filed a Motion to Compel Production.

In a Decision filed on September 26, 2011, this Court granted Plaintiffs' Motion. Recognizing that "[t]he burden of establishing entitlement to nondisclosure rests on the party resisting discovery[,]" this Court concluded that Defendant's descriptions of the withheld documents were too "vague and conclusory" to qualify for the peer review privilege. Nelson, No. PC-2010-6446, at 5, 10–11 (brackets in original). This Court

[1] For a more detailed description of Defendant's response to Interrogatory No. 9, see Nelson, No. PC-2010-6446, at 8–11.

reasoned that "Defendant simply declared that the documents are protected as 'Peer Review records and proceedings'" and "grouped the documents under labels such as: Root Cause Committee Meeting; Mortality Review; Physician Peer Review meeting; Emergency Department Physician Case Review; and Department of Surgery Review meeting." Id. at 10. As such, this Court determined that Defendant "failed to meet its burden of establishing its entitlement to the nondisclosure of its Privilege Log documents" and granted Plaintiffs' Motion to Compel. Id. at 10–11. Defendant filed the instant Motion for Reconsideration and Other Relief.

II

Standard of Review

The Superior Court Rules of Civil Procedure do not provide for a "Motion for Reconsideration." Such motions are treated as motions for relief from judgment under Rule 60(b)(6). Sch. Comm. of City of Cranston v. Bergin-Andrews, 984 A.2d 629, 649 (R.I. 2009).

Rule 60(b)(6), in pertinent part, provides: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment." Rule 60(b)(6) vests "the Superior Court with broad power to vacate judgments whenever that action is appropriate to accomplish justice." Bendix Corp. v. Norberg, 122 R.I. 155, 158, 404 A.2d 505, 506 (1979). This discretion, however, is "not without limitations." Id. Rule 60(b)(6) is "not intended to constitute a catchall." Greco v. Safeco Ins. Co. of Am., 107 R.I. 195, 198, 266 A.2d 50, 51 (1970). Rather, the Rule is used sparingly as an equitable remedy to prevent manifest injustice

and is available in only the most extraordinary of circumstances. Id. at 198, 266 A.2d at 52. Accordingly, the party moving for such relief must show conditions establishing "a uniqueness that puts the case outside of the normal and usual circumstances accompanying failures to comply with the rules." Bendix Corp., 122 R.I. at 158, 404 A.2d. at 506 (quoting Greco, 107 R.I. at 198, 266 A.2d at 52); see Latshaw v. Trainer Wortham & Co., Inc., 452 F.3d 1097, 1103 (9th Cir. 2006) ("a party who moves for . . . relief [pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure] 'must demonstrate both injury and circumstances beyond his control that prevented him from proceeding with . . . the action in a proper fashion.'" (second ellipsis in original) (quoting Cmty. Dental Srvs. v. Tani, 282 F.3d 1164, 1168 (9th Cir. 2002))."

III

Analysis

Defendant asks this Court to reconsider its September 26 Decision finding the withheld documents outside the peer review privilege and to subsequently deny Plaintiffs' Motion to Compel. Alternatively, Defendant asks this Court to review the documents in camera before compelling their release or to stay the September 26 Decision so that Defendant may petition our Supreme Court for a writ of certiorari.

A

Privilege

Defendant's principal contention is that this Court erroneously concluded that the withheld documents were beyond the scope of the peer review privilege set forth in § 23-17-25(a) and G.L. 1956 § 5-37.3-7(c) (2009). This Court thoroughly discussed the privilege question in the September 26 Decision. Nelson, No. PC-2010-6446, at 2–11.

Nonetheless, for the purposes of resolving this Motion and for the benefit of the parties, this Court will clarify its analysis where appropriate.

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).[2] The privilege does not apply to any information related to restrictions

[2] Section 5-37-1(11)(i) defines a peer review board as

> "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

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").

Section 5-37.3-7(c) provides that "the proceedings and records of medical peer review boards shall not be subject to discovery or introduction into evidence." Sec. 5-37.3-7(c). In addition, any person who attends a medical peer review meeting is

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> 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."

Section 5-37-1(11)(ii) defines a peer review board as

> "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."

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 September 26 Decision, this Court found Defendant's response to Plaintiffs' Interrogatory No. 9 "vague and conclusory." Nelson, No. PC-2010-6446, at 10–11. It therefore concluded that Defendant had not met its burden to establish entitlement to the peer review privilege and determined that the withheld documents were subject to discovery. This Court is satisfied that no unique or extraordinary circumstances exist to justify departure from the September 26 Decision. See Bendix Corp., 122 R.I. at 159, 404 A.2d. at 507.

Defendant's response to Plaintiffs' Interrogatory No. 9 did not describe the committees at issue with sufficient detail to show that the committees were "peer review boards," nor did it 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"). In its response to Interrogatory No. 9, Defendant listed the alleged peer review boards under headings like "Root Cause Committee Meeting," "Mortality Review," "Physician Peer Review meeting," "Emergency Department Physician Case

Review," and "Department of Surgery Review meeting." Mere labels, however, 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. Save one exception, Defendant's response made no reference to hospital bylaws and/or sworn statements by hospital officials indicating the "nature or purpose" of the committees. 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). Rather, Defendant simply asserted that the documents produced as a consequence of committee meetings "are protected from discovery as 'records' of the peer review committee."[3] 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.

Moreover, even if this Court had concluded that the various committees referenced were peer review boards, the withheld documents would still not qualify for the privilege. Throughout its answer, Defendant simply provided the names of documents coupled with assertions that such papers were "protected from discovery" or "protected from discovery as 'records' of the peer review committee."[4] Again, however,

[3] Further, in the one instance where Defendant did provide additional information about a committee, it simply stated that a "Root Cause Committee Meeting was conducted in accordance with Landmark By-Laws on June 23, 2009 [sic] because Ms. Nelson sustained a broken hip (a Sentinel Event) in the Emergency Department." Defendant did not include a recitation of the pertinent by-laws or any other description as to the purpose of the Root Cause Committee Meeting. Left with only conclusory assertions, this Court could not find that the Root Cause Committee was a "peer review board" within the statutory definition. See Babcock, 742 A.2d at 356.

[4] Defendant represents that the September 26 Decision erroneously stated that Documents 9 and 12 in Defendant's Privilege Log were not presented during a peer review board meeting when they actually were. Nonetheless, Defendant's descriptions of these

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").[5]

Upon consideration of the conditions giving rise to Defendant's Motion, this Court is "unable to say that the circumstances in this case [are] so unique and manifest injustice so likely to result" that it should grant Defendant's Motion for relief under Rule 60(b)(6). See Bendix Corp., 122 R.I. at 159, 404 A.2d. at 507. This Court granted Plaintiffs' Motion to Compel because Defendant did not respond to Plaintiffs' Interrogatory No. 9 with sufficient detail to obtain the peer review privilege. Defendant's instant Motion, therefore, amounts to little more than an attempt to "redo" its response to Interrogatory No. 9. This Court cannot now permit Defendant to take a proverbial second bite at the apple. See Brown v. Amaral, 460 A.2d 7, 11 (R.I. 1983) (holding that trial court properly denied relief under Rule 60(b)(6) where appellant sought such relief to advance new theories of law). A failure to present sufficient facts to support a claim of privilege simply does not constitute the "unique" or "extraordinary" circumstances

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documents and the committees that they allegedly were presented before still amount to nothing more than vague and conclusory assertions of entitlement to nondisclosure. Defendant cannot obtain the privilege by simply claiming that both documents were created for the sole purpose of reviewing the care provided to Plaintiffs' Decedent. See Babcock, 742 A.2d at 356; Moretti, 592 A.2d at 857; see also supra at 7–8.

[5] Defendant cites a pair of cases in support of its claim to the protection of the peer review privilege. Powell v. Cmty. Health Sys. Inc., 312 S.W.3d 496, 505–08 (Tenn. 2010); Jackson v. Scott, 667 A.2d 1365, 1369 (D.C. 1995). However, both the Jackson and Powell Courts had substantial information as to the nature of the committees and documents in issue from which to draw their respective conclusions that their jurisdictions' respective peer review privileges applied. Powell, 312 S.W.3d at 505–08; Jackson, 667 A.2d at 1367–1368. Unlike in Jackson and Powell, Defendant's response to Interrogatory No. 9 only consisted of conclusory assertions that the documents were privileged. Therefore, Defendant's reliance on these cases is unavailing.

necessary for Rule 60(b)(6) relief. See Bendix Corp., 122 R.I. at 159, 404 A.2d at 507; Greco, 107 R.I. at 198, 266 A.2d at 52. As such, Defendant's Motion for Reconsideration is denied.[6]

B

Request for in Camera Review

Defendant asks this Court to review the documents in camera before ordering their release to ensure that only nonprivileged documents are disclosed. The time for Defendant to make such a request has passed. A court may perform in camera review to help decide whether a document is privileged. Here, however, this Court has already concluded—without such a review—that the withheld documents were not privileged because Defendant did not demonstrate why the documents deserved the privilege and

[6] Before discussing Defendant's request for in camera review, this Court will address the apparent confusion surrounding the September 26 Decision as it relates to § 23-17-40. Pursuant to § 23-17-40, hospitals are required to review and report certain statutorily defined incidents to the State Department of Health ("DOH"). Sec. 23-17-40. Section 23-17-40(g) states that "all reports under this section, together with the peer review records and proceedings related to events and incidents so reported and the participants in the proceedings shall be deemed entitled to all the privileges and immunities for peer review records set forth in § 23-17-25." In other words, § 23-17-40(g) extends the § 23-17-25 peer review privilege to § 23-17-40 reports.

In the September 26 Decision, this Court found that Defendant "did not file a § 23-17-40 report of the incident to the DOH" and therefore held that Defendant could not claim that any of the "documents are protected from discovery as records of a peer review committee pursuant to § 23-17-40." Nelson, No. PC-2010-6446, at 10 (brackets and internal quotation marks omitted). Defendant asserts that it did, in fact, file a report with the DOH and argues that the grant of Plaintiffs' Motion to Compel was based on an erroneous finding to the contrary. Focus on § 23-17-40, however, obscures the basis for the grant of Plaintiffs' Motion to Compel: Defendant's failure to adequately describe the documents to fit within § 23-17-25's peer review privilege. Regardless of whether Defendant filed a report, it still could not claim any protection under § 23-17-40 because it failed to meet the requirements for the peer review privilege as defined in § 23-17-25. Section 23-17-25, not § 23-17-40, creates the peer review privilege and Defendant's failure to fall within § 23-17-25 resulted in the grant of Plaintiffs' Motion to Compel. Defendant's alleged filing of a report with the DOH is therefore irrelevant to the present Motion.

did not move for in camera review when opposing Plaintiffs' Motion to Compel. See Fulmore v. Howell, 657 S.E.2d 437, 442–43 (N.C. Ct. App. 2008) (affirming trial court's decision to compel production where defendant failed to submit the allegedly privileged documents for in camera review to trial court and did not offer "a specific explanation as to why the documents are protected" prior to trial court's decision).

Defendant suggests that this Court might now grant Defendant's Rule 60(b)(6) Motion or perform an in camera review. To conduct an in camera review at this stage of the litigation however, this Court would, by necessity, need to grant Defendant's Motion for Reconsideration first and undo the September 26 Decision's resolution of the privilege question. Nelson, No. PC-2010-6446, at 2–11. Such an outcome is not warranted because grounds justifying Rule 60(b)(6) relief do not exist. Supra at 7–10. Defendant had an opportunity to request in camera review prior to the September 26 Decision and passed on the opportunity to do so, preferring to rely solely on its response to Interrogatory No. 9. See Fulmore, 657 S.E.2d at 442–43.[7] This Court will not turn back the clock so that Defendant may refine and reargue its Objection to Plaintiffs' Motion to Compel. See Brown, 460 A.2d at 11. Defendant's request for in camera review is thus denied.

C

Request for Stay

Finally, Defendant asks this Court to stay execution of the Order compelling production so that Defendant may petition our Supreme Court for a writ of certiorari. Super R. Civ. P. 62 grants this Court the authority "to stay execution upon motion and for

[7] It bears noting that Defendant also could have supplemented its response to Interrogatory No. 9 with more detail before Plaintiffs' Motion to Compel was granted.

cause shown." The party seeking a stay must make "a 'strong showing' that (1) it will prevail on the merits of its appeal; (2) it will suffer irreparable harm if the stay is not granted; (3) no substantial harm will come to other interested parties; and (4) a stay will not harm the public interest." Narragansett Elec. Co. v. Harsch, 367 A.2d 195, 197 (R.I. 1976). The language of the test is in the conjunctive, and therefore, failure to show any one of the elements necessitates denial of the motion.

Defendant has not shown to this Court's satisfaction that a stay is warranted. Defendant contends that it "believes that the Court's Decision violates § 5-37-1(11) and § 23-17-25(a)." However, Defendant's sheer assertion that the September 26 Decision violates these statutory provisions does not constitute a "strong showing" that Defendant "will prevail on the merits of its appeal." Harsch, 367 A.2d at 197; see Babcock, 742 A.2d at 356 (holding that conclusory assertions of entitlement to peer review privilege are insufficient to receive protection). Moreover, this Court resolved the privilege question against Defendant in the September 26 Decision and has declined to reverse that outcome today. Supra at 4–10. As such, this Court concludes that Defendant has not made a strong showing that it will prevail on the merits of its appeal.

Defendant does not indicate how release of the documents will cause it irreparable harm beyond an assertion that if it "is compelled at this time to produce the documents in question, its ability to defend this lawsuit will be irreparably harmed and compromised." This claim is insufficient to satisfy the second Harsch element. As the District of Columbia Court of Appeals recently explained regarding the irreparable harm inquiry:

> "The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other

> corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim or [sic] irreparable harm." Zirkle v. District of Columbia, 830 A.2d 1250, 1257 (D.C. 2003) (emphasis in original) (quoting Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958)).

Denial of a stay here could possibly cost Defendant additional time and money, depending on the outcome of trial. Such a loss does not constitute "irreparable harm." Id. Further, the availability of adequate corrective relief through the ordinary appellate process—in the form of suppression of privileged documents at retrial—"weighs heavily against a claim of irreparable harm." Va. Petroleum Jobbers Ass'n, 259 F.2d at 925. Therefore, Defendant fails the second element of the Harsch test.

Defendant does not address the third and fourth prongs of the Harsch standard, but these too dictate against grant of a stay of the September 26 Decision. A stay would prejudice Plaintiffs, substantially inhibiting their ability to complete discovery and prepare for impending mediation. A stay would also harm the public interest by encouraging hospitals and other prospective medical defendants to respond to discovery requests with vague and conclusory assertions of entitlement to the peer review privilege. See Gaumond, 909 A.2d at 516 (noting that the burden of establishing entitlement to nondisclosure rests on the party resisting discovery). As such, this Court concludes that the final two prongs of the Harsch test have not been satisfied. 367 A.2d at 197. Defendant's request for a stay is therefore denied.

IV

Conclusion

For the foregoing reasons, this Court denies Defendant Landmark Medical Center's Motion for Reconsideration and Other Relief. Counsel shall submit an appropriate order for entry.