2017 IL App (1st) 163212-U

FIRST DIVISION
December 18, 2017

No. 16-3212

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

EVA PENALOZA, as Independent Administrator and Personal Representative of the Estate of ADELFO PENALOZA, Deceased and EVA PENALOZA, Individually,	)	Appeal from the Circuit Court of Cook County, Law Division
Plaintiffs-Appellees,	)	
v.	)	No. 15 L 005362
THC-NORTH SHORE, INC. d/b/a KINDRED CHICAGO LAKE SHORE,	)	Honorable John P. Callahan Judge Presiding.
Defendant-Appellant.	)	

JUSTICE SIMON delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: We reverse the trial court's discovery order and remand the case where the court erred by finding the disputed documents were not privileged. We further vacate the contempt order.

¶ 2 Defendant THC-North Shore, Inc. d/b/a Kindred Chicago Lake Shore (Kindred), appeals from the trial court's order holding it in contempt for refusing to produce certain documents requested in discovery. Kindred argues the documents were privileged under the portion of the

Code of Civil Procedure (Code) commonly known as the Medical Studies Act (Act) (735 ILCS 5/8–2101 *et seq.* (West 2014)). Kindred also argues the court's contempt finding should be vacated. For the following reasons, we reverse the trial court's discovery order, we vacate the contempt finding, and remand the case for further proceedings.

¶ 3 BACKGROUND

¶ 4 On June 19, 2013, Adelfo Penaloza was admitted to Kindred and remained there through June 23, 2013. He was readmitted to Kindred on July 2, 2013. On July 3, 2013 at about 3 a.m., he was found on the floor by his bed with a bump on his forehead. He was transferred to St. Francis Hospital where he died the next day.

¶ 5 Plaintiff Eva Penaloza, individually and as special administrator of Adelfo's estate, filed suit against Kindred and its employees alleging wrongful death, survival and loss of consortium arising out of the negligent care provided by Kindred and its employees to Adelfo. Plaintiff alleged, *inter alia*, that Kindred: failed to properly supervise Adelfo while he was under its medical care and treatment; failed to perform a proper intake or examination of Adlefo Penaloza when he was admitted to Kindred; failed to provide and issue appropriate and necessary medical orders to safeguard Adelfo from falling; failed to use rails or bed rails for Adelfo, and failed to follow recognized policies and procedures to prevent injury to Adelfo when he was a fall risk.

¶ 6 Kindred served plaintiffs with a Privilege Log pursuant to Illinois Supreme Court Rule 201(n) (eff. July 30 2014). Kindred claimed that two documents, an Event Summary Report and a Timeline/Summary of Interviews of the Subcommittee of Kindred's Quality Council, were privileged under the Medical Studies Act (Act), 735 ILCS 5/8–2101 (West 2014). Subsequently, the trial court entered an order, *sua sponte* directing Kindred to submit the documents for *in camera* review.

¶ 7 On March 18, 2016, the trial court issued a written order directing Kindred to produce the two documents to plaintiff. The court determined that the documents were created in close proximity to the events of July 3, 2013, and before the peer review committee could have met and requested an investigation. The court held the documents were not created at the request of the Subcommittee of Kindred's Quality Council and ordered Kindred to produce the documents to plaintiffs by May 26, 2016.

¶ 8 On May 23, 2016, Kindred filed a motion to reconsider the court's order, arguing that on their face, the two documents indicated that the Quality Council Subcommittee at Kindred's was convened on the morning of July 3, 2013, immediately after the arrival of the acting Director of Quality Management (DQM), Melvin Hobbs, at Kindred at approximately 10:40 a.m. Kindred argued that the documents were created by DQM Melvin Hobbs pursuant to, and during the quality control investigation of the Subcommittee. Later, Kindred acknowledged that only the DQM narrative portion of the report was subject to the privilege since the first two pages of the report were generated at, or around 3:40 a.m. on July 3, 2013, which was before the Quality Council Subcommittee at Kindred was convened at 10:40 a.m. that same day. A redacted copy of the Event Summary Report, without the DQM narrative portion, was disclosed to plaintiff. The DQM narrative portion is not dated but references interviews and events that took place at 10:45 a.m. on July 3 through July 5, 2013. Thus, the narrative portion was created after the Subcommittee was convened.

¶ 9 On June 1, 2016, the court entered an order allowing Kindred to supply an affidavit in support of its motion to reconsider. Kindred supplied the affidavit of Karen Farley, Kindred's Director of Quality Management. In her affidavit, Farley stated that in her role as current DQM, she serves on the Quality Council Subcommittee at Kindred and was familiar with Kindred's

policies and procedures relating to the Quality Council Subcommittee. She indicated and referred to Kindred Policy H-PC 05-002, as reflective of the manner in which the Quality Council Subcommittee at Kindred was to be convened. Pursuant to the policy, the DQM facilitates the investigation of serious adverse events on behalf of the Subcommittee by conducting "staff interviews of employees who cared for the patient prior to and at the time of the serious adverse event." The goal of the investigation as listed in the policy is to collect information that would be utilized in a root cause analysis with the purpose of reducing similar events in the future by identifying potential changes to systems and processes in place.

¶ 10 Farley also attached a copy of Kindred's Patient Safety/Risk Management policy addressing Event Summaries to her affidavit. These summaries were periodically reviewed by the Quality Council Subcommittee for purposes of quality improvement and patient safety at Kindred. The policy stated that the DQM was responsible for completing an initial review of the Event Summary and follow-up section that the Subcommittee receives at least quarterly.

¶ 11 Farley also stated that on July 3, 2013, Hobbs was the acting DQM because she was on vacation. She reviewed Hobbs "investigation timeline and summary and narrative from the Event Summary." She stated that, as shown by that document, Hobbs convened the Subcommittee with CEO Vivian White on July 3, 2013, at about 10:40 a.m., before initiating any investigation. Farley stated that after convening the Subcommittee, DQM Hobbs began to investigate the sentinel event through a series of interviews. Hobbs discussed the status of his investigation with other members of the Subcommittee, including CEO Vivian White, Senior Director of Clinical Operations Carol Jones, Regional Vice President of Clinical Operations Deb Graves, State Director of Risk Management Benneta Robinson, and Vice President of Patient Safety & Regulatory Compliance Patricia McGillian at about 2:30 p.m. on July 3, 2013. According to

Farley, DQM Hobbs then continued his investigation and held a second conference call with the members of the Subcommittee at 10:00 a.m. on July 5, 2013. Farley also stated that the investigation completed by Hobbs between July 3, 2013 and July 5, 2013, was intended to be confidential and was conducted for purposes of improving patient safety and reducing comorbidity at Kindred.

¶ 12 Plaintiff filed a response to Kindred's motion to reconsider arguing that the Event Summary Report and Timeline/Summary of Interviews were prepared in the ordinary course of business regarding an event, and were not privileged under the Act. Following a hearing on Kindred's motion to reconsider, the court denied the motion and ordered Kindred to tender the remaining portion of the Event Summary Report and the Timeline/Summary of Interviews by November 22, 2016. On November 28, 2016, the court held Kindred in "friendly" contempt of court for violating the court's order by failing to produce the remaining portion of the documents. This appeal followed.

¶ 13 ANALYSIS

¶ 14 On appeal, Kindred argues that the trial court erred by finding the documents were not privileged under the Act. According to Kindred, the DQM Narrative portion of the Event Summary Report and the Timeline/Summary of Interviews were created after the Quality Council Subcommittee was convened. Kindred contends that the court erred when it determined that the two documents were created in close temporal proximity to plaintiff's decedent's fall but before the peer review committee could have met. Kindred maintains that the investigation conducted by DQM Hobbs was initiated for the purposes of improving patient safety and reducing comorbidity at Kindred and the two documents were protected from disclosure pursuant to the Act.

¶ 15 We recently determined that different standards of review apply before this court on this issue. *Eid v. Loyola Univ. Med. Ctr*., 2017 IL App (1st) 143967, ¶ 40. The legal determination of whether the privilege under the Act applies to certain types of information is a question of law, which we review *de novo*. *Id.* citing *Niven v. Siqueira*, 109 Ill. 2d 357, 368 (1985). "However, we review under the manifest weight of the evidence standard the trial court's factual determination that the specific communications at issue were part of a peer review study covered by the Act." *Id*.

¶ 16 Section 8–2101 of the Act provides, in relevant part, that*:*

> "[a]ll information, interviews, reports, statements, memoranda, recommendations, letters of reference or other third party confidential assessments of a health care practitioner's professional competence, or other data of *** committees of licensed or accredited hospitals or their medical staffs *** or their designees (but not the medical records pertaining to the patient), used in the course of internal quality control or of medical study for the purpose of reducing morbidity or mortality, or for improving patient care *** shall be privileged." 735 ILCS 5/8–2101 (West 2014).

¶ 17 Section 8–2102 of the Act further provides that such privileged information "shall not be admissible as evidence, nor discoverable in any action of any kind in any court." 735 ILCS 5/82102 (West 2014). The burden of establishing the applicability of the Act's privilege is on the party seeking to invoke it. *Eid v. Loyola Univ. Med. Ctr*., 2017 IL App (1st) 143967, ¶ 40. A party may meet its burden by submitting the allegedly privileged materials for an *in camera* inspection or by submitting affidavits setting forth facts sufficient to establish the applicability of the privilege to the particular documents being withheld. *Anderson v. Rush–Copley Medical Center, Inc.*, 385 Ill. App. 3d 167, 174 (2008).

¶ 18 The Act's purpose is to ensure that medical professionals "will effectively engage in self-evaluation of their peers in the interest of advancing the quality of health care." *Roach v. Springfield Clinic*, 157 Ill. 2d 29 at 40 (1993). The Act is premised on the belief that, absent the confidentiality privilege, health care practitioners would be reluctant to participate in peer-review committees and engage in frank evaluations of their colleagues. *Id.* The purpose of the Act is not, however, **"**to shield hospitals from potential liability" (*Eid*, 2017 IL App (1st) 143967, ¶ 45) or to facilitate the prosecution of malpractice cases (*Jenkins v. Wu*, 102 Ill. 2d 468, 479 (1984)).

¶ 19 Documents that are "initiated, created, prepared, or generated by a peer-review committee" are privileged, even if those documents are "later disseminated outside of the peer-review process." (Internal quotation marks omitted.) *Webb v. Mount Sinai Hospital and Medical Center of Chicago, Inc.*, 347 Ill. App. 3d 817, 825 (2004). On the other hand, the Act does not protect against disclosure of documents generated in the ordinary course of a hospital's medical business or to render legal opinions or weigh potential liability or for later corrective action, even if the documents are subsequently used by a committee in the peer-review process. *Id.* The supreme court has explained that "[i]f the simple act of furnishing a committee with earlier-acquired information were sufficient to cloak that information with the statutory privilege, a hospital could effectively insulate from disclosure virtually all adverse facts known to its medical staff, with the exception of those matters actually contained in a patient's records." *Roach v. Springfield Clinic*, 157 Ill. 2d 29, 41 (1993). The Act does, however, protect "against disclosure of the mechanisms of the peer review process, including information gathering and deliberations leading to the ultimate decision rendered by a peer-review committee." *Pietro v. Marriott Senior Living Services, Inc.*, 348 Ill. App. 3d 541, 549 (2004).

¶ 20 In *Eid v. Loyola University Medical Center*, we recently held that information generated for use by a hospital peer-review committee was privileged where a committee designee, pursuant to his authority under hospital bylaws, began an investigation of a patient's treatment and instructed another committee member to collect information. *Eid v. Loyola Univ. Med. Ctr*., 2017 IL App (1st) 143967, ¶ 39. Specifically, after a child died following surgery, the hospital's risk manager, who was also a member of the peer-review committee, began contacting individuals to preserve records. *Id.*, ¶ 16. She also contacted the chair of the peer-review committee, who instructed her to investigate the incident on the committee's behalf, from a quality perspective. *Id.* The chair averred that the committee directed and empowered individuals to assemble information about incidents and to report the information back to the committee for its use in evaluating and improving the quality of patient care. *Id.* ¶ 18. The risk manager, he further averred, was such a designee in this instance. *Id.*

¶ 21 We upheld the trial court's finding that the privilege applied to documents generated by the risk manager after she obtained the chair's directive on the committee's behalf. *Id.* We noted that the 1995 amendment to the Act provided that " 'designees' " could create or generate information covered by the statute. *Id.* ¶ 43. Thus, if the risk manager and the chair were designees under the Act, the documents were privileged. *Id.* ¶ 44.

¶ 22 In assessing this question, we rejected the plaintiffs' argument that the privilege does not apply to information generated before the peer-review committee, acting as a whole, either becomes aware of an incident or is engaged in the peer-review process. *Id.* ¶ 49. We noted that the statute was amended after the *Roach* decision and that subsequent cases citing *Roach* either do not acknowledge the 1995 amendment or do not involve situations where an individual was authorized to act on behalf of a peer-review committee. *Id.* citing *Chicago Trust Co. v. Cook*

County Hospital, 298 Ill. App. 3d 396, 402-04 (1998); *Pietro v. Marriott Senior Living Services Inc.*, 348 Ill. App. 3d 541, 550 (2004); *Anderson v. Rush-Copley Medical Center, Inc.*, 385 Ill. App. 3d 167, 175-76 (2008), and *Kopolovic v. Shah*, 2012 IL App (2d) 110383, ¶ 28. We concluded that the privilege applied to the documents generated by the risk manager after she obtained the chair's directive on the committee's behalf, where the risk manager's and the chair's affidavits established that the committee was a peer-review committee covered by the Act and where the chair used his authority to commence the committee's investigation after being informed that the incident at issue might warrant peer-review proceedings. *Id.* ¶ 53.

¶ 23 Similarly here, the record indicates that, although a peer committee as a whole did not meet before the investigation began, after considering Farley's affidavit in conjunction with our own review of the disputed documents, we conclude that the two documents were generated after the Quality Council Subcommittee, a peer committee covered by the Act, was convened by DQM Hobbs and CEO Vivian White. The affidavit submitted by Kindred's current DQM, Karen Farley, together with the policies attached to it established the manner in which the Quality Council Subcommittee at Kindred was to be convened and the duties of the Subcommittee. Specifically, the Subcommittee was charged with routinely reviewing serious adverse events for purposes of improvement and patient safety and the DQM facilitates the investigation of serious adverse events on behalf of the Subcommittee, including conducting staff interviews of employees who cared for the patient prior to and at the time of the serious adverse event.

¶ 24 Plaintiff's decedent fell at about 3:00 a.m. on July 3, 2013, at Kindred and it was considered a Level 3, or a Major or Serious Event. Farley stated that this event was considered a serious adverse event and the investigation that followed "was intended to be confidential and for purposes of improving patient safety and reducing comorbidity at Kindred." The two disputed

documents on their face indicate that DQM Hobbs and CEO Vivian White convened the Subcommittee at about 10:40 a.m. on July 3, 2013, and then an investigation began. DQM Hobbs discussed the status of his investigation with other members of the Quality Council Subcommittee, including CEO Vivian White, Senior Director of Clinical Operations Carol Jones, Regional Vice President of Clinical Operations Deb Graves, State Director of Risk Management Benneta Robinson and Vice President of Patient Safety & Regulatory Compliance Patricia McGillian at about 2:30 p.m. on July 3, 2013. Hobbs continued his investigation and a second phone conference with the members of the Subcommittee occurred at 10:00 a.m. on July 5, 2013.

¶ 25 We recognize that the investigation took place in close proximity with the triggered event. But under *Eid*, "a designee of a peer review committee who is authorized to gather information for the committee's use can act expeditiously while the matter is still fresh in the minds of the participants without waiting for the whole committee to convene to formally declare the start of an investigation." *Eid v. Loyola Univ. Med. Ctr.*, 2017 IL App (1st) 143967, ¶ 45. In other words, the two documents were privileged and protected from disclosure pursuant to the Act when DQM Hobbs started a timely investigation into a potential quality issue following the plaintiff's decedent's death after convening the Subcommittee with CEO White.

¶ 26 Plaintiff challenges Kindred's submission of Farley's affidavit with its motion for reconsider, characterizing the affidavit as untimely. However, we conclude that under the circumstances of this case, Kindred's inclusion of Farley's affidavit with its motion to reconsider was not improper. In *Ardisana*, the trial court directed a hospital to provide, for an *in camera* review, a privilege log, a copy of the documents in dispute, and a copy of the complaint. *Ardisana*, 342 Ill. App. 3d 741, 744 (2003). The hospital filed the requested documents and, in addition, filed the affidavit of its risk manager. *Id.* The trial court

subsequently ruled that all of the disputed documents were discoverable, in part because the hospital failed to establish when the peer-review process commenced and ended. *Id.* Thereafter, the hospital filed a motion to reconsider, attaching additional affidavits with information regarding the start and end dates of the internal review processes and information as to the steps taken to preserve the confidentiality of the documents generated during the process. *Id.* at 745.

¶ 27 On appeal, the *Ardisana* court found the hospital's submission of the additional affidavits with its motion to reconsider was not improper. *Id.* at 747. The *Ardisana* court observed that although the trial court rejected the hospital's claim of privilege in part because the hospital failed to provide evidence of the start and end dates of the peer-review process, the court did not initially request such documentation, asking only that the hospital provide a privilege log, the disputed documents for *in camera* inspection, and a copy of the complaint. *Id.* at 747–48. Nonetheless, the hospital also provided the affidavit of its risk manager, who averred the disputed documents were generated in the process of investigations by the review committees, were prepared solely for the two committees, and used exclusively by those two committees (with the exception of one document). *Id.* The appellate court found "it was the trial court that *sua sponte* raised a challenge to the sufficiency of an affidavit that it did not require in the first place" and "[u]nder these circumstances, [the hospital] was entitled to submit and have considered additional affidavits along with its motion to reconsider." *Id.*

¶ 28 Similarly here, we find that it was not improper for Kindred to submit Farley's affidavit with its motion to reconsider in an attempt to provide more clarification regarding the disputed documents. The affidavit along with Kindred's policies established the manner in which the Quality Council Subcommittee at Kindred was to be convened and the duties of the DQM. Even if we conclude that Farley's statements regarding DQM Hobbs's investigation timeline were

hearsay, as plaintiff suggests, the same information is contained in the two disputed documents that we reviewed on appeal.

¶ 29 Based on the foregoing, we find the trial court erred by finding the disputed documents were not privileged. Accordingly, we reverse the court's decision and remand for further proceedings.

¶ 30 In reaching our conclusion, we reject plaintiff's assertion that Kindred failed to meet its burden of establishing the Act's privilege applied. In this regard, plaintiff relies on *Chicago Trust Co. v. Cook County Hospital*, 298 Ill. App. 3d 396 (1998). However, in *Chicago Trust*, the affidavits submitted by the hospital suffered from numerous deficiencies. For example, none of the affidavits indicated when the peer-review process commenced or ended, one affidavit indicated documents such as those in dispute were requested for the rendering of legal opinions, and some of the affidavits contradicted each other. *Id.* at 400, 403–404. Accordingly, *Chicago Trust* is distinguishable, as are the other cases on which plaintiff relies. See *Roach*, 157 Ill. 2d at 40 (there was no dispute the oral discussions at issue had nothing to do with any peer-review committee); see also *Webb*, 347 Ill. App. 3d at 822 (affidavits were internally inconsistent and contradicted by the documentary evidence).

¶ 31 Finally, Kindred argues the trial court's contempt be vacated. Requesting the court to enter a contempt order is a proper procedure to seek immediate appeal of a discovery order. *Klaine v. Southern Illinois Hospital Services*, 2014 IL App (5th) 130356, ¶ 41. Where a party seeks a contempt order in good faith and was not contemptuous of the trial court's authority, we may vacate the contempt order even if we find the circuit court's discovery order was proper. *Id.* The record indicates the trial court entered its contempt order not because Kindred's conduct was contemptuous but because Kindred requested a contempt finding for

purposes of taking an immediate appeal. Kindred's refusal to tender the documents was in good faith and based on sound legal arguments. Accordingly, we vacate the trial court's contempt order.

¶ 32 Conclusion

¶ 33 For the foregoing reasons, we find that the trial court erred in allowing for discovery of the disputed documents. We accordingly reverse the trial court's discovery ruling, vacate the contempt order, and remand this case for further proceedings.

¶ 34 Reversed and remanded.