2020 IL App (1st) 190370-U

SIXTH DIVISION
February 28, 2020

No. 1-19-0370

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GAYE RITTER, as Special Administrator of the Estate of JAMES RITTER, Deceased, Plaintiff-Appellee, v. 2014 HEALTH, LLC, d/b/a CHICAGO BEHAVIORAL HOSPITAL, CHICAGO BEHAVIORAL HOSPITAL, and DR. SANJAY PATEL, Defendants (2014 Health, LLC, d/b/a Chicago Behavioral Hospital, Defendant-Contemnor-Appellant).	)	Appeal from the Circuit Court of Cook County. No. 17 L 10003 Honorable James O'Hara. Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Mikva and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Documents were not protected by Medical Studies Act privilege or the insurer-insured privilege; trial court judgment affirmed and contempt order vacated.

¶ 2 Defendant, 2014 Health, LLC, d/b/a Chicago Behavioral Hospital (Chicago Behavioral Hospital or hospital), appeals a civil contempt order that was entered after it refused to produce three documents that it asserted were privileged from discovery: a Sentinel Event Report, Investigation Summary, and Narrative of Investigatory Findings. All three were allegedly created after the death of plaintiff's son, James Ritter, who had been a patient at the hospital. On appeal, Chicago Behavioral Hospital contends that: (1) the Sentinel Event Report and Investigation Summary are privileged under section 8-2101 of the Code of Civil Procedure (known as the Medical Studies Act) (735 ILCS 5/8-2101 *et seq.* (West 2016)); and (2) the Narrative of Investigatory Findings is protected by the insurer-insured privilege. We affirm the trial court's finding that none of the three documents are privileged.

¶ 3 I. BACKGROUND

¶ 4 On May 4, 2018, plaintiff filed an amended complaint alleging a wrongful death action related to James's death. James had been a patient at the hospital between July 14 and July 21, 2016. While exchanging written discovery, the hospital claimed that the Sentinel Event Report, Investigation Summary, and Narrative of Investigatory Findings were privileged and confidential. The trial court held an *in camera* inspection of the three documents, along with an accompanying privilege log that indicated the specific privilege asserted for each document. On July 12, 2018, the court entered an order stating that the hospital had not met its burden to establish that the documents were privileged.

¶ 5 On August 15, 2018, Chicago Behavioral Hospital filed a motion to reconsider, asserting that the Sentinel Event Report and Investigation Summary were privileged under the Medical Studies Act, and the Narrative of Investigatory Findings was privileged under the insurer-insured privilege. In support, Chicago Behavioral Hospital included its policy and procedure manual for

investigating sentinel events and an affidavit from Anthony King, the hospital's director of performance improvement and risk management.

¶ 6 The policy and procedure manual uses different terms for various documents than the hospital used in the trial court and on appeal, making the manual's applicability unclear. However, King's affidavit stated as follows. The hospital defined a "sentinel event" as "an unexpected event involving death or serious physical or psychological injury or the risk thereof." Sentinel events are investigated to reduce morbidity and mortality and improve patient care. When a sentinel event occurs, the hospital's "review process is automatically triggered." King serves as a member of the performance improvement oversight committee and oversees the quality assurance review process for every sentinel event. Linda Barker, Senior Vice President of Clinical for the hospital's corporate parent, investigates each sentinel event and prepares a corresponding Sentinel Event Report. The investigation occurs within the quality review committee setting. On July 28, 2016, a Sentinel Event Report was created for James, who died a week earlier. Barker authored the Sentinel Event Report and prepared it as part of the hospital's investigation and evaluation of the facts surrounding James's death. The Sentinel Event Report was prepared for and reviewed by the hospital's quality review committee to increase knowledge about the event, its contributing factors, strategies for prevention, and to improve patient safety. The hospital's quality assurance and review process started immediately after James's death on July 21, 2016. The quality review committee completed its investigation within 10 days of the incident, on July 30, 2018.

¶ 7 King's affidavit further stated that an Investigation Summary is "automatically prepared" in relation to every sentinel event involving death or serious injury at the hospital. King authored the Investigation Summary for the performance improvement and risk management department in connection with, and during the investigation of, the hospital's quality review process. The purpose

of the Investigation Summary was to investigate and evaluate the hospital's quality assurance process and make any necessary changes to improve patient safety and reduce patient morbidity and mortality. The Investigation Summary was provided to the hospital's quality improvement committee to summarize the investigative process that was used to review James's death.

¶ 8 King's affidavit also stated that Barker authored the Narrative of Investigatory Findings, which included findings from interviews Barker conducted with care providers knowledgeable of the facts and circumstances of James's death. The document was prepared "with the primary purpose of submitting [Barker's] investigation findings to ARCH Specialty Insurance Company," which was the hospital's liability insurance provider. Further, the document was provided to ARCH to summarize the events at issue and the care provided, "and as a means to ensure that Chicago Behavioral Hospital would receive liability insurance coverage in relation to the underlying lawsuit."

¶ 9 The hospital's privilege log indicates that the recipient of the Sentinel Event Report was King, the recipient of the Investigation Summary was "Internal Document for File," and the recipient of the Narrative of Investigatory Findings was King.

¶ 10 On December 11, 2018, the trial court issued a written order denying the hospital's motion to reconsider. The hospital did not meet its burden to establish that the documents were privileged under either the Medical Studies Act or the insurer-insured privilege. Chicago Behavioral Hospital was ordered to tender the documents to plaintiff's counsel on or before December 18, 2018.

¶ 11 On January 16, 2019, when the documents were still not produced, plaintiff filed an emergency motion to compel production of the Sentinel Event Report, Investigation Summary, and Narrative of Investigatory Findings. At a hearing on that motion, counsel for the hospital declined to produce the documents and orally moved for a finding of friendly contempt to facilitate

an interlocutory appeal. The court granted the request, finding that the hospital had intentionally refused to comply with the orders compelling the production of the documents. The court also found that the hospital was acting in good faith for the purpose of seeking appellate review under Illinois Supreme Court Rule 304(b)(5) (eff. Mar. 8, 2016). The court held the hospital in civil contempt and imposed a $1 penalty.

¶ 12 II. ANALYSIS

¶ 13 The Sentinel Event Report, Investigation Summary, and Narrative of Investigatory Findings have been provided to this court under seal. On appeal, Chicago Behavioral Hospital first contends that the Sentinel Event Report and Investigation Summary are privileged under the Medical Studies Act. The hospital argues that these two documents were prepared in the course of the hospital's quality review process. Further, Barker created the Sentinel Event Report to provide information to the hospital's quality review committee and the Investigation Summary was prepared for the quality improvement committee.

¶ 14 The Medical Studies Act (Act) states in part:

> "All information, interviews, reports, statements, memoranda, recommendations, letters of reference or other third party confidential assessments of a health care practitioner's professional competence, *** or committees of licensed or accredited hospitals or their medical staffs, including Patient Care Audit Committees, Medical Care Evaluation Committees, Utilization Review Committees, Credential Committees and Executive Committees, 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, strictly confidential and shall be

> used only for medical research, *** the evaluation and improvement of quality care, or granting, limiting or revoking staff privileges or agreements for services ***." 735 ILCS 5/8-2101 (West 2016).

The Act also provides:

> "Such information, records, reports, statements, notes, memoranda, or other data, shall not be admissible as evidence, nor discoverable in any action of any kind in any court or before any tribunal, board, agency or person. The disclosure of any such information or data, whether proper, or improper, shall not waive or have any effect upon its confidentiality, nondiscoverability, or nonadmissibility." 735 ILCS 5/8-2102 (West 2016).

¶ 15 As an aside, a 1995 amendment to section 8-2101 added "or their designees" after the description of the committees. Pub. Act. 89-393 (eff. Aug. 20, 1995); *Nielson v. SwedishAmerican Hospital*, 2017 IL App (2d) 160743, ¶ 33. Not all recent cases acknowledge that change. *Nielson*, 2017 IL App (2d) 160743, ¶ 33.

¶ 16 "The purpose of the Act is to encourage candid and voluntary studies and programs used to improve hospital conditions and patient care or to reduce the rates of death and disease." (Internal quotation marks omitted.) *Anderson v. Rush-Copley Medical Center, Inc.*, 385 Ill. App. 3d 167, 173 (2008). The Act is premised on the belief that, without the statutory peer-review privilege, "physicians would be reluctant to sit on peer-review committees and engage in frank evaluations of their colleagues." (Internal quotation marks omitted.) *Richter v. Diamond*, 108 Ill. 2d 265, 269 (1985). Accordingly, the Act protects the information of specific committees capable of evaluating patient care. *Pietro v. Marriott Senior Living Services, Inc.*, 348 Ill. App. 3d 541, 548-49 (2004). "[T]he Act protects 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," but does not protect against the discovery of information generated before the peer-review process begins or after the peer-review process ends. *Id*. at 549. To be clear, the Act does not protect any information of a hospital's medical staff that is used for peer review—the Act protects information of peer review committees or their designees. *Eid v. Loyola University Medical Center*, 2017 IL App (1st) 143967, ¶ 45. A hospital committee must be engaged in the peer-review process for the privilege to apply. *Webb v. Mount Sinai Hospital & Medical Center of Chicago, Inc.*, 347 Ill. App. 3d 817, 825 (2004).

¶ 17 The burden of establishing the privilege rests with the party seeking to invoke it (*Roach v. Springfield Clinic*, 157 Ill. 2d 29, 41 (1993)), which in this case is Chicago Behavioral Hospital. A party can meet its burden by submitting the allegedly privileged materials for an *in camera* inspection or by submitting affidavits that set forth facts sufficient to establish that the privilege applies to the particular documents being withheld. *Anderson*, 385 Ill. App. 3d at 174. If the facts within an affidavit are not contradicted with a counteraffidavit, they must be taken as true despite the existence of contrary unsupported allegations. *Flannery v. Lin*, 176 Ill. App. 3d 652, 658 (1988). Yet, a counteraffidavit is not the only way to contradict an affidavit. *Webb*, 347 Ill. App. 3d at 826. An affidavit may also be contradicted by other documentary evidence. *Id*.

¶ 18 Whether a discovery privilege applies is a matter of law that is subject to *de novo* review. *Mnookin v. Northwest Community Hospital*, 2018 IL App (1st) 171107, ¶ 23. However, whether specific materials are part of an internal quality control or medical study is a factual determination that will not be reversed unless it is against the manifest weight of the evidence. *Id*. Although it would have been helpful for the trial court to have supplied its reasons for finding the documents were not privileged, we may affirm the trial court's judgment, regardless of its reasoning, on any

basis in the record. *Central Illinois Electrical Services, L.L.C. v. Slepian*, 358 Ill. App. 3d 545, 550 (2005).

¶ 19 The parties' briefs essentially present this appeal as a choice between applying one of two cases. Chicago Behavioral Hospital urges this court to follow *Ardisana v. Northwest Community Hospital, Inc.*, 342 Ill. App. 3d 741 (2003), while plaintiff asserts that this court should follow *Nielson*, 2017 IL App (2d) 160743. However, neither case sufficiently answers whether the Sentinel Event Report and Investigation Summary are privileged under the Act.

¶ 20 In *Ardisana*, the disputed documents were privileged because each document established, "by its own content, that it served an integral function in the peer-review information-gathering and decision-making process." 342 Ill. App. 3d at 748. Minutes from two committees "self-evidently" constituted "investigative and deliberative materials generated by a hospital committee in formulating its recommendations." (Internal quotation marks omitted.) *Id*. at 749. Based on their content, a set of quality management/improvement worksheets "were authored for the use of a peer-review committee." *Id*. And, a letter "by its own terms" was privileged where it was a request from a department chair, on behalf of a committee, for additional information to be used by the committee in its ongoing investigation. *Id*.

¶ 21 In *Nielson*, the disputed documents, known as quality control reports, were not privileged because the reports merely began a process but not an investigation. 2017 IL App (2d) 160743, ¶ 74. The decision whether to investigate was only made after the completed reports were forwarded to other personnel. *Id*. The court also noted that the reports were used for the dual purposes of quality assurance and risk management. *Id*. ¶ 75.

¶ 22 *Ardisana* is not helpful to the hospital's argument. There, the contents of the documents themselves indicated that the Act's privilege applied. In this case, the contents of the Sentinel

Event Report and Investigation Summary do not by themselves indicate whether the documents are "investigative and deliberative materials generated by a hospital committee in formulating its recommendations." *Ardisana*, 342 Ill. App. 3d at 749. Plaintiff's primary source of support, *Nielson*, is also not helpful. The reason for denying privilege here is not that the documents served the wrong purpose. Instead, the documents are not privileged because the hospital has not shown that they were sufficiently connected to a peer-review committee or its designee, as that requirement has been interpreted in our case law.

¶ 23 The Act does not protect from discovery documents "that were generated before a peer-review committee or its designee authorized an investigation of a specific incident." *Grosshuesch v. Edward Hospital*, 2017 IL App (2d) 160972, ¶ 26. *Grosshuesch* illustrates this limitation. There, after a patient's death, the hospital's liaison to the medical staff quality committee consulted two peer reviewers and entered her notes into a database. *Id*. ¶ 4. Later, the committee considered those notes. *Id*. The court found that the notes were not privileged because they "were generated before any peer-review committee or its designee authorized an investigation into a specific incident." *Id*. ¶ 28. When the liaison wrote her notes, the committee was not engaged in an investigation of the care that the plaintiff and decedent had received. *Id*. ¶ 35.

¶ 24 In contrast, in *Eid*, 2017 IL App (1st) 143967, information was privileged where it was first requested by a peer review committee. After a patient's death, the hospital's risk manager, who was also a member of a peer review committee, began contacting people to preserve records. *Id*. ¶ 16. The risk manager also paged the chairperson of the peer review committee, who returned the page and instructed the risk manager to investigate the incident on the committee's behalf from a quality perspective. *Id*. The court found that 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." *Id*. ¶ 45. Accordingly, the court concluded that the Act's privilege applied, but only to the documents generated by the risk manager after she obtained the chairperson's directive on behalf of the peer review committee. *Id*. ¶ 53. Indeed, the hospital had already disclosed the documents that were created before the chairperson issued the directive to investigate. *Id*.

¶ 25 Unlike in *Eid*, there is no evidence here that Barker and King, the authors of the Sentinel Event Report and Investigation Summary, were directed to create those documents by a peer review committee. King's affidavit indicates that the documents were drafted as a matter of course after James's death, and there is no mention that anyone from a peer review committee first requested the documents. Although the Sentinel Event Report was prepared for and reviewed by the quality review committee, and the Investigation Summary was provided to the quality improvement committee, the genesis of those documents was their respective authors and not a committee. In its reply brief, the hospital asserts that Chicago Behavioral Hospital designated Barker and King to investigate James's death. That is insufficient. A peer review committee—not the hospital broadly speaking—must have designated or directed Barker and King to investigate the specific incident. See *Pietro*, 348 Ill. App. 3d at 550 (the information must be initiated, created, or generated by a committee). There is no evidence that the required process occurred here. If furnishing a peer review committee with earlier-acquired information—which was essentially what happened here—could invoke the privilege, a hospital "would be able to effectively insulate from disclosure virtually all adverse facts known to its medical staff, except for those matters actually contained in the patient's medical records." *Id*. ¶ 45 (citing *Roach*, 157 Ill. 2d at 41-42).

The Sentinel Event Report and Investigation Summary are not privileged under the Act and must be disclosed.

¶ 26 Next, Chicago Behavioral Hospital contends that the insurer-insured privilege applies to the Narrative of Investigatory Findings. The hospital asserts that Barker prepared the document for the purpose of obtaining insurance coverage for this lawsuit and thus protect the hospital's interests. According to the hospital, Barker submitted her investigation findings to the insurer under the assumption that the insurer had a duty to defend the hospital against any lawsuit that arose from James's death.

¶ 27 The insurer-insured privilege is an offshoot of attorney-client privilege (*Chicago Trust Co. v. Cook County Hospital*, 298 Ill. App. 3d 396, 409 (1998)), which is found in Illinois Supreme Court Rule 201(b)(2) (eff. May 29, 2014) and applies to certain communications between a party or his agent and the party's attorney. Attorney-client privilege extends to communications between an insurer and an insured where the insurer has a duty to defend. *Id.* at 407. For the privilege to apply, the party asserting the privilege must prove: (1) the identity of the insured; (2) the identity of the insurance carrier; (3) the duty to defend the lawsuit; and (4) that a communication was made between the insured and an agent of the insurer. *Id.* The attorney-client privilege is extended to communications between an insurer and the insured where there is a duty to defend because "the insured may properly assume that the communication is made to the insurer as an agent for the dominant purpose of transmitting it to an attorney for the protection of the interests of the insured." *People v. Ryan*, 30 Ill. 2d 456, 461 (1964). Because the privilege, and not the duty to disclose, is the exception, the privilege should be "strictly confined within its narrowest possible limits." *Buckman v. Columbus-Cabrini Medical Center*, 272 Ill. App. 3d 1060, 1066 (1995).

¶ 28 As an aside, King's affidavit stated that the Narrative of Investigatory Findings was provided to ARCH, the insurer, while the privilege log stated that King was the recipient of the Narrative of Investigatory findings. The trial court is in a better position to resolve conflicts in the evidence (*Webb*, 347 Ill. App. 3d at 826), but we will assume that the Narrative of Investigatory Findings was ultimately submitted to ARCH.

¶ 29 Still, the insurer-insured privilege does not apply because the hospital did not sufficiently prove a duty to defend this lawsuit. To review, King's affidavit stated that Barker prepared the Narrative of Investigatory Findings with the primary purpose of submitting the investigation findings to the hospital's liability insurance provider. The affidavit also stated that the Narrative of Investigatory Findings was provided to the insurer "to summarize the events at issue and the care provided, and as a means to ensure that Chicago Behavioral Hospital would receive liability insurance coverage in relation to the underlying lawsuit." More than these broad assertions, in cases where the privilege has applied, specific evidence was presented that the statements at issue were made in the context of a duty to defend the specific lawsuit. In *Exline v. Exline*, 277 Ill. App. 3d 10, 11 (1995), an employee of the insurer recorded a statement from the defendant's wife. To establish that the statement was privileged, the insurer's employee completed an affidavit stating that the insurer was obligated to defend the defendant's wife under the terms of the policy and that the employee spoke to the wife to investigate a claim made on the policy. *Id*. at 14. The court also found that the insurer took the statement for the purpose of preparing a defense. *Id*. at 15. Further, in *Rapps v. Keldermans*, 257 Ill. App. 3d 205, 207 (1993), the defendant's decedent gave statements to an independent contractor retained by the insurer to investigate a claim. Facts supporting a duty to defend included that an affidavit from the insurer's employee stated that the decedent was an insured covered by the policy, the policy required the insured to cooperate with

the insurer in regard to the investigation and defense of claims, and the investigating firm was instructed by the insurer to obtain statements from the parties. *Id.* at 211. While the affidavit sufficiently established a duty to defend, the court added that "it would have been preferable for [the] defendant to have presented the trial court with a copy of the insurance policy." *Id.*

¶ 30 In *Exline* and *Rapps*, the party asserting the privilege provided facts showing that there was a duty to defend and the statements were obtained as part of carrying out that duty. Though not determinative, the insurers in both cases requested the statements at issue, which further supports that the statements were obtained as part of a duty to defend. See *Lower v. Rucker*, 217 Ill. App. 3d 1, 4 (1991) (whether statement is given to insurer or independent contractor, key factor is that statement is given "at the request of the insurer who had an obligation to defend the insured"). The hospital's assertion in its brief that Barker assumed that ARCH had a duty to defend is not enough to invoke the privilege—our case law requires a party to provide specific facts showing a duty to defend. Those facts were missing here. The hospital did not provide the terms of its insurance policy and it is unknown whether ARCH was even aware of a potential claim when the Narrative of Investigatory Findings was submitted. Based on the lack of support for a duty to defend, the hospital has failed to establish that the Narrative of Investigatory Findings is protected by the insurer-insured privilege.

¶ 31 Lastly, the contempt order is vacated. Requesting a contempt order is a proper way to seek immediate appeal of a trial court's discovery order. *Anderson*, 385 Ill. App. 3d at 185. Chicago Behavioral Hospital was not contemptuous of the trial court's authority and made a good-faith refusal to produce the documents because it sought appellate review of its assertions of privilege. Thus, we vacate the trial court's finding of contempt and the $1 penalty. See *Grosshuesch*, 2017 IL App (2d) 160972, ¶ 36; *Pietro*, 348 Ill. App. 3d at 553.

¶ 32 III. CONCLUSION

¶ 33 For the foregoing reasons, the judgment of the trial court is affirmed with respect to the disputed documents and the contempt order is vacated.

¶ 34 Affirmed in part and vacated in part.