

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3017-14T3

DAVID BLUM,

Plaintiff-Respondent,

v.

MORRISTOWN MEDICAL CENTER
d/b/a MORRISTOWN MEMORIAL HEALTH,
ATLANTIC HEALTH SYSTEM, INC.,

Defendant-Appellant,

and

DEMESVAR JEAN-BAPTISTE, M.D.,

Defendant.

Argued October 19, 2015 - Decided October 30, 2015

Before Judges Sabatino, Accurso, and
O'Connor.

On appeal from the Superior Court of New
Jersey, Law Division, Morris County, Docket
No. L-1534-12.

Anthony Cocca argued the cause for appellant
(Bubb, Grogan & Cocca, LLP, attorneys; Mr.
Cocca and Katelyn E. Cutinello, of counsel
and on the brief).

Lawrence R. Cohan argued the cause for
respondent (Anapol Schwartz, attorneys; Mr.
Cohan, of counsel; David J. Carney, on the
brief).

James P. Flynn argued the cause for intervenor The Community Hospital Group, Inc., t/a JFK Medical Center (Epstein, Becker & Green, attorneys; Mr. Flynn, of counsel and on the brief; Daniel R. Levy, on the brief).

PER CURIAM

This interlocutory appeal by co-defendant Morristown Medical Center ("MMC")¹ challenges a small sub-set of the trial court's confidentiality rulings issued after the court's in camera review of dozens of documents produced from MMC's files. In particular, MMC argues that the court erroneously classified as non-confidential four specific documents (corresponding to Bates-stamped pages 0001, 0159, 0160, and 0199), and improperly ordered their turnover to plaintiff David Blum in this medical negligence case.

For the reasons that follow, we affirm the trial court's rulings in part as to certain portions of the documents at issue and remand in part for further consideration as to other portions.

I.

Although discovery in this case has not been completed, the basic facts and allegations germane to our review are as

¹ According to its answer the proper entity name for MMC is "AHS Hospital Corp./Morristown Memorial Medical Center," which slightly differs from its name as set forth in the caption to plaintiff's complaint.

follows. Plaintiff received gastric bypass surgery at MMC initially on February 23, 2011. The surgery was performed by co-defendant, Demesvar Jean-Baptiste, M.D.² Dr. Jean-Baptiste had staff privileges at that time to perform surgeries at MMC, but he was not an employee on MMC's payroll.

Immediately following the initial operation, plaintiff experienced significant post-surgical complications. A CT scan revealed that plaintiff's gastric pouch was leaking, requiring a second surgery the following day, which was also performed by Dr. Jean-Baptiste.

Approximately two weeks later, further examination determined that plaintiff's gastric pouch was still leaking. Dr. Jean-Baptiste consequently performed a third surgery on March 6, 2011 in an attempt to repair the leak. In that operation, he also removed a significant portion of plaintiff's colon that Dr. Jean-Baptiste perceived to have developed necrosis. Then, on March 18, 2011, while plaintiff was comatose, Dr. Jean-Baptiste informed plaintiff's sister that plaintiff required a fourth emergency surgery to repair his colon, which was then leaking waste into his abdomen.

² Dr. Jean-Baptiste has since passed away. He was dismissed from the action without prejudice. Neither he nor his estate are participating in this appeal.

Before giving consent on her brother's behalf to perform the further operation, plaintiff's sister requested a second medical opinion. That second opinion concurring in the need for the procedure was provided by the chair of MMC's Department of Surgery.

Apparently, plaintiff's sister not only was concerned due to the number of surgeries he had already undergone, but also because she believed Dr. Jean-Baptiste was under the influence of alcohol. Due to the sister's allegation of impairment, Dr. Jean-Baptiste was asked by MMC's Director of Operations to submit to an alcohol test. While the result of that test was still pending, the sister consented to the further surgery.

The surgery was performed by a different surgeon, with Dr. Jean-Baptiste observing. During the operation, the alcohol test result came back positive. Dr. Jean-Baptiste was immediately terminated by the hospital before the surgery was completed.

Despite his numerous surgeries, plaintiff alleges that he is still suffering from post-surgical complications due to the alleged negligence of Dr. Jean-Baptiste. He claims that he has been left bedridden with an ileostomy bag and continues to be in substantial pain. Plaintiff also notes — and it is apparently undisputed — that Dr. Jean-Baptiste's malpractice liability insurance had lapsed prior to the surgeries.

Plaintiff filed a complaint in the Law Division against MMC, Dr. Jean-Baptiste, and unnamed fictitious defendants. As amended, the complaint alleges in Count I that defendants acted negligently in numerous respects, including allegations that MMC negligently allowed Dr. Jean-Baptiste to practice medicine in the hospital without proper and necessary liability insurance and failed to confirm that he possessed such coverage.

In Count III, which is labeled "Corporate Negligence," plaintiff further alleges that MMC failed "to exercise reasonable care in the appointment, re-appointment, and hiring of their medical staff[] and to the granting of privileges of their medical staff[.]" Although Count III also mentions Dr. Jean-Baptiste's lack of malpractice insurance, it more broadly alleges that MMC was negligent "in failing to properly and truly determine the qualifications and proficiencies of their medical staff[] prior to appointing them[.]" Plaintiff further avers that MMC was negligent "in failing to supervise and monitor the medical care and treatment rendered to plaintiff . . . and knew, or should have known, that their medical staff[] did not possess the medical training, experience, care, technical skills, and judgment to properly treat and care for [p]laintiff" in connection with his multiple gastric surgeries.

The limited record supplied to us reflects that Dr. Jean-Baptiste previously had surgical privileges at another hospital, the JFK Medical Center ("JFK")³ before he was granted privileges at MMC in or about August 2010. JFK terminated Dr. Jean-Baptiste's privileges in or about March 2010.

As part of MMC's credentialing process, MMC's legal department sought records from JFK concerning Dr. Jean-Batiste's work at that hospital. Dr. Jean-Baptiste signed confidentiality releases authorizing his personnel records from JFK to be furnished to MMC, and they were accordingly supplied to MMC. Meanwhile, the credentialing decision-makers at MMC approved extending privileges to Dr. Jean-Baptiste, and he began performing surgeries there some time in 2010.

During the course of discovery, plaintiff served a request for documents upon MMC. MMC asserted privilege as to 300 Bates-stamped pages of those documents, ultimately providing to plaintiff at the court's direction a thirty-nine-page privilege log. The log identified the dates and parties to each of those contested communications and the asserted grounds for protection. Plaintiff challenged MMC's assertion of privilege, and MMC cross-moved for a protective order. Among other things,

³ By invitation of this court, JFK is participating as an intervenor in this appeal. Its corporate name is "The Community Hospital Group, Inc., t/a JFK Medical Center."

MMC contended that the documents are protected by statutes and case law, and reflect deliberative matters that warrant confidentiality.

The trial court then performed an in camera review of the contested documents. Following that review, the court issued a ruling on September 16, 2014 declaring some of the documents privileged but ordering disclosure of a portion of the documents. With respect to the latter category, the court observed that the documents to be disclosed are "simply not deliberative, and not protected." MMC moved for reconsideration, which the court denied on January 5, 2015.

We then granted MMC's motion for leave to appeal the trial court's decision solely with respect to four documents.⁴ Plaintiff has not cross-appealed the court's rulings in any respect.

II.

Our scope of review of the trial court's discovery ruling is circumscribed. "An appellate court applies an 'abuse of discretion standard to decisions made by [the] trial courts relating to matters of discovery.'" C.A. v. Bentolila, 219 N.J. 449, 459 (2014) (citations omitted) (applying these principles

⁴ We have been provided with and reviewed the contested documents in a confidential appendix, which has been sealed.

to discovery and confidentiality rulings implicating the Patient Safety Act). The appellate court "generally defer[s] to a trial court's disposition of discovery matters unless the court has abused its discretion or its determination is based on a mistaken understanding of the applicable law." Ibid. (citations omitted). That said, appellate courts are to "conduct a de novo review of a trial court's construction of a statute" in this context. Ibid. (citation omitted).

MMC contends that the trial court erred in ordering the turnover of the four contested documents, variously invoking statutory confidentiality protections in the Patient Safety Act ("PSA"), N.J.S.A. 26:2H-12.23 to -12.25, and the Health Care Professional Responsibility and Reporting Enhancement Act ("HCPRE," also known as "the Cullen Act"), N.J.S.A. 26:2H-12.2a to -12.2d, 45:1-28 to -41, 45:9-22.23.

MMC also relies upon the common law "self-critical analysis" privilege recognized in case law such as Payton v. New Jersey Turnpike Authority, 148 N.J. 524 (1997), and Christy v. Salem, 366 N.J. Super. 535 (App. Div. 2004). Specifically, MMC argues that the trial court construed the holding in Christy too narrowly when it declared that the four documents at issue were not "evaluative and deliberative." MMC contends that the documents in question do reveal the "thought processes and final

conclusions of MMC relating to credentialing, peer review and associated confidential internal processes," and are thus "evaluative and deliberative" in nature. MMC further argues that the court failed to apply the balancing test set forth in Payton and Christy requiring a weighing of the plaintiff's need for disclosure against the policies favoring confidentiality.

Two of the contested documents, #0159-0160, were generated and transmitted by JFK to MMC as part of the MMC credentialing process for Dr. Jean-Baptiste. JFK has intervened with respect to those documents in order to oppose disclosure of at least portions of them, contending that those portions must be kept confidential under both the Cullen Act and under the common law. MMC endorses JFK's arguments, contending that hospital-to-hospital communications during a credentialing process must be kept privileged in order to promote candor and thoroughness in that process. Plaintiff opposes these contentions and urges us to defer to the trial court's determinations based upon its in camera review.

III.

Before we turn to the four documents in dispute, we first comment on the scope of plaintiff's negligent credentialing claim because that potentially affects the relevancy of the documents to plaintiff's case.

MMC argues that plaintiff's negligent credentialing claim is confined to a theory that MMC should not have allowed Dr. Jean-Baptiste to perform surgeries at the hospital without first confirming that he carried malpractice liability insurance. We do not read plaintiff's complaint that narrowly. To the contrary, Count Three of the complaint more broadly asserts negligence in the overall decision-making process at MMC that led to the grant of privileges to Dr. Jean-Baptiste. Plaintiff also alleges a failure, after Dr. Jean-Baptiste was credentialed at MMC, to monitor his performance there sufficiently.

As our Supreme Court very recently recognized in Jarrell v. Kaul, ___ N.J. ___, ___ (2015) (slip. op. at 39), "granting privileges to a physician without the appropriate credentials . . . exposes the health care facility to liability for hiring an incompetent contractor." As the court noted in Jarrell, various State regulations, see N.J.A.C. 8:43A-4.1, -7.2 to -7.4, govern the process for hospitals granting privileges to medical providers in their facilities "in accordance with . . . adopted standards and procedures, and reviewing the granted privileges on a periodic basis." Jarrell, supra, slip op. at 40. Although Jarrell factually involved a defendant hospital's granting of privileges to a physician who failed to meet statutorily-required insurance requirements, we do not foreclose plaintiff,

at least at this juncture, from pursuing a broader theory of negligent credentialing liability. We leave those substantive legal issues concerning liability to future assessment by the trial court, either in motion practice or at trial.

IV.

We now address, seriatim, the four documents at issue.

Document # 0001. This is a December 12, 2011 letter from the State Board of Medical Examiners ("BOME") to MMC's Director of Clinical Affairs concerning Dr. Jean-Baptiste after he was discharged by MMC. Although all parties already know that the BOME investigated Dr. Jean-Baptiste after he was discharged by MMC, the hospital particularly objects to the contents of the second and third paragraphs of the letter. Those paragraphs allude to certain information provided by MMC, and are thus arguably substantive in nature.

The discoverability of this letter from the BOME is potentially curtailed by the Cullen Act. In particular, N.J.S.A. 45:1-36 within that statute provides:

Any information provided to the division or a board concerning the conduct of a health care professional, pursuant to section 2 of P.L.2005, c.83 (C.26:2H-12.2b), section 5 of P.L.1978, c.73 (C.45:1-18) or any other provision of law, shall be treated as confidential pending final disposition of the inquiry or investigation, except for that information required to be shared with the Attorney General, Department of Health

and Senior Services or any other government agency.

If the result of the inquiry or investigation is a finding of no basis for disciplinary action, the information shall remain confidential[.]

[(Emphasis added).]

We cannot tell from our appellate record whether this statutory provision controls here because the record does not document whether or not the BOME rendered a "final disposition" as to Dr. Jean-Baptiste before he died. If it did and Dr. Jean-Baptiste was exonerated, the second and third paragraphs of the letter are absolutely privileged. If, conversely, the BOME rendered a final disposition adverse to Dr. Jean-Baptiste, the absolute privilege in this statute does not apply, but the disputed contents of the letter might still be subject to common-law protection under Payton and Christy.⁵ For these multiple reasons, we therefore remand the discoverability of Document #001 to the trial court for further consideration.

Documents # 0159 and 0160. These two related documents consist of a fax cover sheet and a transmittal letter, both dated August 18, 2010, from JFK's legal counsel to MMC's legal

⁵ If Dr. Jean-Baptiste died before the BOME issued a final disposition, we need not resolve the un-briefed legal question as to whether the confidentiality provision within N.J.S.A. 45:1-36 applies. Instead, we defer that novel issue to the trial court in the first instance.

counsel providing documents concerning Dr. Jean-Baptiste that had been in JFK's possession and sent to MMC with Dr. Jean-Baptiste's authorization. The transmitted documents are all identified individually in MMC's privilege log, and the trial court ruled that each of them is privileged. Plaintiff has not cross-appealed that determination. To the extent that Documents #0159 and #0160 merely reiterate identifying information already contained in the privilege log, we discern no basis to withhold those portions of them from plaintiff.

MMC and JFK object, however, to the disclosure of other portions of #0159 and #0160 that go beyond a mere listing of the transmitted documents. They contend those other portions deserve statutory protection under the PSA or the Cullen Act or, alternatively, warrant protection under the common-law self-critical analysis privilege. The trial court did not provide a specific analysis of those specific portions of the documents under the criteria of Payton and Christy. Nor did the trial court explicitly address the possibility of redaction of privileged portions of the documents. Consequently, we remand these issues to the trial court for further consideration. We affirm, however, the court-ordered disclosure of the remainder of these documents containing the same information already

revealed in the privilege log. We stay the turnover of those non-privileged portions, pending the disposition of the remand.

Document #0199. This composite document consists of a string of e-mail communications — all dated April 13, 2010 — between and among persons within MMC involved in the credentialing of Dr. Jean-Baptiste, including the hospital's Medical Director of Clinical Affairs. From our own review of these e-mails, it appears they have potential relevance to plaintiff's claims of negligent credentialing, and also perhaps the defense of those claims. It further appears that the contents of the e-mails contain a mixture of factual and arguably subjective statements.

Under the self-critical analysis privilege as we explained it in Christy, disclosure of factual statements is generally permitted, but disclosure of subjective or "evaluative" communications is not. Supra, 366 N.J. Super. at 543-44; see also C.A., supra, 219 N.J. at 465-66 (reiterating the Christy standards). The Christy balancing analysis also calls for the court to consider whether a plaintiff can show a "compelling need" to obtain discovery of the evaluative, non-factual portions of the disputed material. Ibid.⁶

⁶ We do not, however, find that these documents are protected under the PSA (which MMC concedes) nor the Cullen Act.

We consequently remand these issues concerning Document #0199, and the string of e-mails contained within it, for further consideration by the trial court, consistent with the criteria established in Christy.

V.

In sum, we affirm the trial court's decision in part and remand it in part for further consideration. Intervenor JFK, which had not been notified of these confidentiality issues when the matter was previously before the trial court, may participate at its election in the remand proceedings. Counsel shall forthwith provide to the trial court, under seal as may be appropriate, courtesy copies of their appellate submissions. The trial court in its discretion may allow additional briefing and oral argument.

We therefore remand this matter in accordance with this opinion. During the remand proceedings the stay of disclosure shall remain in effect. The trial court is requested to provide a written statement of reasons addressing the issues we have identified for its reconsideration. Any party aggrieved by the ruling on remand, including intervenor JFK, may seek appellate review by filing a timely new motion for leave to appeal. We do not retain jurisdiction.

Affirmed in part and remanded in part.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION