2019 IL App (1st) 181541-U
Order filed: April 5, 2019

FIRST DISTRICT
Fifth Division

No. 1-18-1541

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MAGEN WILLIS, as Special Administrator of the Estate of Towanda Willis, Plaintiff-Appellee, v. HIGHLAND MEDICAL CENTER, SOUTH SHORE HOSPITAL CORP., SOUTH SHORE HOSPITAL, and CHEN WANG, M.D., Defendants (South Shore Hospital Corp., Defendant-Appellant).	)	Appeal from the Circuit Court of Cook County. No. 18 L 4634, renumbered from 15 L 4664 Honorable Moira S. Johnson, Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: We vacate the circuit court's order finding defendant in friendly contempt for its failure to comply with underlying discovery orders, and reverse those underlying discovery orders, where the relevant documents sought by plaintiff were all privileged pursuant to the Medical Studies Act.

¶ 2 Defendant-appellant, South Shore Hospital Corporation (South Shore), appeals from the circuit court's order finding South Shore in friendly contempt for its failure to comply with underlying discovery orders, as well as from the underlying discovery orders themselves. For the

following reasons, we reverse the trial court's underlying discovery orders, vacate the finding of contempt, and remand for further proceedings.[1]

¶ 3 I. BACKGROUND

¶ 4 Plaintiff, Magen Willis, as Special Administrator of the Estate of Towanda Willis, filed this medical negligence suit against defendants to recover for the allegedly improper medical treatment that decedent, Ms. Willis, received in 2013. During discovery, plaintiff sought production of a "credentialing file" held by South Shore with respect to defendant, Dr. Chen Wang, a member of South Shore's Department of Surgery. South Shore ultimately asserted that nearly 150 pages of this file were privileged pursuant to sections 8-2101 and 8-2102 of the Medical Studies Act (Act) (735 ILCS 5/8-2101, 8-2012 (West 2016)), and refused to produce them to plaintiff. The claim of privilege was supported by submission to the circuit court of South Shore's privilege log, the documents in question filed under seal, and the affidavit of Alison Sharpe, the manager of South Shore's Medical Staff Offices.

¶ 5 Thereafter, the circuit court reviewed these submissions, including an *in camera* inspection of the documents in question, and on October 13, 2016, ordered South Shore to produce over 100 pages of documents for which South Shore had claimed a privilege. South Shore filed a motion to reconsider this order. This motion was denied in a written order entered on December 15, 2016. In the same order, the matter was continued to January 13, 2017, for status on South Shore's compliance with the court's discovery order.

¶ 6 Thereafter, South Shore filed a "Motion for Order of Friendly Civil Contempt." Therein, South Shore indicated that it respectfully disagreed with the circuit court's decision, refused to

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[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order stating with specificity why no substantial question is presented.

comply with the court's discovery orders, and asked the circuit court to find it in friendly contempt and sanction it $50 for its refusal. South Shore asked for this course of action so that it could file an immediate appeal challenging the circuit court's discovery orders. See Ill. S. Ct. R. 304(b)(5) (eff. Mar. 8, 2016) (making "[a]n order finding a person or entity in contempt of court which imposes a monetary or other penalty" immediately appealable as a final order); *Almgren v. Rush–Presbyterian–St. Luke's Medical Center*, 162 Ill. 2d 205, 216 (1994) (noting that when a party appeals contempt sanctions imposed for violating, or threatening to violate, a pretrial discovery order, the underlying discovery order is subject to review).

¶ 7 On January 13, 2017, the circuit court denied South Shore's motion in a written order that stated: "Defendant[']s motion for Friendly Civil Contempt is denied for the reasons stated in the record. The court[']s ruling is contained in the court reported transcript." A review of that transcript reveals that the circuit court denied South Shore's motion for friendly contempt after finding that South Shore's refusal to comply with the discovery order was "willful and contumacious." The circuit court therefore entered "sanctions against this defendant for failing to comply with this Court's order" pursuant to Illinois Supreme Court Rule 219(c) (eff. July 1, 2002). The circuit court added that "[i]t will be a hundred dollar a day sanction pending further order of court."

¶ 8 Thereafter, South Shore filed a "Motion for Clarification, Reconsideration, and to Vacate [the] Order entered on January 13, 2017." Therein, South Shore asserted that the nature of the circuit court's January 13, 2017, order was unclear, with South Shore further indicating its understanding that the circuit court had denied the motion for friendly contempt and imposed discovery sanctions pursuant to Supreme Court Rule 219(c). South Shore therefore requested that the circuit court reconsider, and: (1) grant the motion for friendly contempt, and (2) vacate

the order imposing sanctions upon South Shore for a discovery violation. Alternatively, South Shore asked the circuit court to certify for interlocutory appeal, pursuant to Illinois Supreme Court Rule 308 (eff. Feb. 26, 2010), the question of the propriety of the circuit court's discovery rulings.

¶ 9 South Shore's motion was denied in a written order entered on February 23, 2017. South Shore then filed a prior notice of appeal on March 22, 2017, purporting to appeal from an order holding it in contempt and imposing a sanction for its discovery violations, as well as the discovery orders underlying that contempt finding, pursuant to Supreme Court Rule 304(b)(5).

¶ 10 In an order entered by this court on December 22, 2017, this court dismissed South Shore's prior appeal for a lack of jurisdiction, where: (1) the circuit court did not enter a finding of contempt, the traditional method of seeking immediate review of an underlying discovery order, but rather appeared to simply enter an interlocutory and unappealable monetary fine as a discovery sanction, and (2) even if a finding of contempt was entered against South Shore, no final and appealable contempt order was entered because the circuit court repeatedly refused to enter a judgment actually imposing a sanction for such a finding of contempt. *Willis v. Highland Medical Center*, 2017 IL App (1st) 170807-U.

¶ 11 Following dismissal of South Shore's prior appeal, this matter was remanded to the circuit court and renumbered. Thereafter, South Shore again asked the circuit court to find it in friendly contempt for its refusal to comply with the circuit court's discovery orders and fine it $50, so as to permit South Shore to file an immediate appeal pursuant to Rule 304(b)(5).

¶ 12 In a June 25, 2018, order, the circuit court granted South Shore's request by: (1) finding South Shore in civil contempt for its refusal to comply with the October 13, 2016, discovery order and imposing a $50 fine for that refusal, (2) vacating the prior January 13, 2017, and

February 27, 2017, orders imposing sanctions, and (3) staying any further proceedings in the circuit court "pending appellate resolution of the contempt finding and underlying objections to the production of documents." South Shore thereafter filed a timely notice of appeal and an amended notice of appeal from the finding of contempt and the underlying discovery orders.

¶ 13 II. ANALYSIS

¶ 14 On appeal, South Shore contends that the underlying discovery orders should be reversed, and the finding of contempt vacated, because the documents ordered to be produced by the circuit court are all privileged pursuant to sections 8-2101 and 8-2102 of the Act. We agree.[2]

¶ 15 Section 8-2101 of the Act provides, in relevant 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 other data of *** 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 or increasing organ and tissue donation, shall be privileged, strictly confidential and shall be used only for medical research, increasing organ and tissue donation, 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).

[2] There is no question of this court's jurisdiction over the instant appeal. *Supra* ¶ 5.

¶ 16 In turn, section 8-2102 of the Act 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." 735 ILCS 5/8-2102 (West 2016).

¶ 17 The Act's purpose "is [neither] to facilitate the prosecution of malpractice cases" (*Jenkins v. Wu*, 102 Ill. 2d 468 (1984)), nor to shield hospitals from potential liability (*Roach v. Springfield Clinic*, 157 Ill. 2d 29, 42 (1993)). "Rather, it is to ensure that members of the medical profession will effectively engage in self-evaluation of their peers in the interest of advancing the quality of health care. [Citation.] The statute is premised on the belief that, absent the statutory peer-review privilege, physicians would be reluctant to sit on peer-review committees and engage in frank evaluations of their colleagues. [Citation.] The Act also serves 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. [Citation.]" (Internal quotation marks omitted.) *Nielson v. SwedishAmerican Hospital*, 2017 IL App (2d) 160743, ¶ 35.

¶ 18 "The privilege does not apply to all information used for internal quality control or peer review, but only to the 'information of' such committees. [Citation.] 'Information of' has a specific meaning here: it encompasses only information initiated, created, prepared or generated by a peer-review or quality-control committee. [Citation.]" (Internal quotation marks omitted.) *Id.*, ¶ 36. As such, information that is generated by a committee of a hospital engaged in any form of internal quality control or peer-review *during the process of peer review* is privileged, while information that is obtained *before the initiation or following the conclusion of* an internal quality control or peer-review process is not transformed into "information of" such a committee

merely because the information is at some point reported to that body. *Klaine v. Sothern Illinois Hospital Services*, 2014 IL App (5th) 130356, ¶ 38.[3]

¶ 19 The reason for this restriction on the privilege granted under the Act is obvious: "[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*, 157 Ill. 2d of 41. "For this reason, blanket conclusions that information was generated at the request of a reviewing committee are not enough to invoke the protections of the [Act]." *Klaine*, 2014 IL App (5th) 130356, ¶ 38 (citing *Cretton v. Protestant Memorial Medical Center, Inc.*, 371 Ill. App. 3d 841, 856–57 (2007)). Nevertheless, the act does 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." *Anderson v. Rush–Copley Medical Center, Inc.*, 385 Ill. App. 3d 167, 174 (2008) (citing *Pietro v. Marriott Senior Living Services, Inc.*, 348 Ill. App. 3d 541, 549 (2004)).

¶ 20 The party seeking to invoke a privilege under the Act has the burden of establishing that such a privilege applies. *Roach*, 157 Ill. 2d at 41. The assertion of a privilege under the Act may be supported either by submitting the purportedly privileged materials for *in camera* inspection, which South Shore did here, or by submitting affidavits in an attempt to set forth facts sufficient to establish the application of the privilege to the materials, which South Shore also did here. *Nielson*, 2017 IL App (2d) 160743, ¶ 39. When the facts in an affidavit are uncontradicted, "they must be taken as true notwithstanding the existence of contrary unsupported allegations." *Flannery v. Lin*, 176 Ill. App. 3d 652, 658 (1988). Nevertheless, a counteraffidavit is not the only

[3] As the Act specifically indicates, this also includes information generated by a committee's "designees." 735 ILCS 5/8-2101 (West 2016).

means by which an affidavit can be contradicted, as an affidavit can also be contradicted by other documentary evidence. *Nielson*, 2017 IL App (2d) 160743, ¶ 39.

¶ 21 Whether the Act's privilege applies is a question of law, which we review *de novo*, while the question of whether the specific materials at issue are part of an internal quality control or peer-review process covered by the Act is a question of fact within that legal determination. *Niven v. Siqueira*, 109 Ill. 2d 357, 368 (1985); *Chicago Trust Co. v. Cook County Hospital*, 298 Ill. App .3d 396, 401 (1998). A circuit court's factual determination will not be reversed unless it is against the manifest weight of the evidence. *Nielson*, 2017 IL App (2d) 160743, ¶ 28. A decision is against the manifest weight of the evidence if it is unreasonable, arbitrary, or not based upon the evidence. *Id.*

¶ 22 We begin by considering the circuit court's decision to overrule South Shore's claim of privilege under the Act, and order South Shore to produce a number of specific categories of documents contained in Dr. Wang's credentialing file. Specifically, we refer to those documents contained in a sealed supplemental record provided to this court, and identified as Bates-stamped pages 13, 14, 78, 79, 159, 160, 523-530, 583, 589,-590, 707-708, 710, 884-886, 945, 964, 965, 1067 and 1069. These documents are identified in the privilege log as including letters to and from physicians listed as references in connection with an application for reappointment, confidential professional peer references and responses, a letter to another hospital regarding a reappointment application, physician responses to requests for confidential peer reviews, and reappointment questionnaires. Our review of the sealed supplemental record reflects that the privilege log contains accurate descriptions of these documents.

¶ 23 Moreover, our review of the documents and the record also makes clear that all of these documents contain responses to requests to doctors for letters of reference for Dr. Wang or peer

evaluations of Dr. Wang's professional qualifications. In addition, it is evident that all of these peer references and evaluations were sought and received in connection with Dr. Wang's original application for appointment and privileges at South Shore in 1976, Dr. Wang's semi-annual reapplications for appointment and privileges at South Shore in 1989, 2003, 2005, 2007, 2009, 2011 and 2013,[4] or an application Dr. Wang made for appointment and privileges at another hospital in 1994. See *Ardisana v. Northwest Community Hospital, Inc.*, 342 Ill. App. 3d 741, 748 (2003) (noting that after the appellate court's own review of disputed documents supplied under seal, "each of the documents establishes, by its own content, that it served an integral function in the peer-review information-gathering and decision-making process."). Lastly, it is apparent that all of these references and evaluations were sought or provided by South Shore's Credentials Committee, its Executive Committee, or a designee of those committees.

¶ 24 The plain text of the Act and the case law cited above clearly establish that all letters of reference or other third party confidential assessments of a health care practitioner's professional competence initiated, created, prepared or generated by a Credential Committees or Executive Committees, or the designee of such a committee, used in the course of internal quality control or for improving patient care, shall be privileged, strictly confidential and shall be used only for the evaluation and improvement of quality care, or the granting, limiting or revoking staff privileges or agreements for services. 735 ILCS 5/8-2101 (West 2016); *Nielson v. SwedishAmerican Hospital*, 2017 IL App (2d) 160743, ¶ 35. In addition, this court has specifically recognized that letters of reference and confidential peer evaluations, sought and obtained in contexts such as are presented here, are clearly privileged under the Act. See *Toth v. Jensen*, 272 Ill. App. 3d 382,

[4] One reappointment questionnaire is undated (Bates-stamped page 1069), but it remains evident to this court that this document was produced as part of one of Dr. Wang's semi-annual reapplications for appointment to and privileges at South Shore.

386 (1995). Finally, we note that plaintiff herself concedes on appeal that, if this court's review of the sealed supplemental record reveals that the above referenced documents are in fact "letters of recommendation" utilized by a "committee engaged in the peer-review process," then the circuit court would have erred in ordering the disclosure of those documents.

¶ 25 In light of this discussion, we find that the above referenced documents were all responses to requests to doctors for letters of reference for Dr. Wang or peer evaluations of Dr. Wang's professional qualifications—sought or provided by South Shore's Credentials Committee, its Executive Committee, or a designee of those committees in the context of granting staff privileges —and therefore privileged pursuant to the Act.

¶ 26 We now turn to another set of documents ordered to be disclosed by the circuit court; specifically, those documents contained in a sealed supplemental record provided to this court, and identified as Bates-stamped pages 16-19, 86-93, 535-546, 591-600, 605-616, 714-722, 897-907, 968-970, 1010-1011, 1040-1044, 1072, 1074-1075, 1077, and 1090-091. These documents are identified in the privilege log as including reappointment provider profiles, reappointment status reports, a medical staff reappointment profile, two reappointment worksheets, and a reappointment profile of clinical performance. Our review of the sealed supplemental record once again reflects that the privilege log contains accurate descriptions of these documents.

¶ 27 Moreover, in Ms. Sharpe's affidavit, it is averred that all of these documents—with the exception of the two one-page reappointment worksheets, which are not specifically mentioned therein—"contain information which was generated originally by the Surgical Quality Review Committee of South Shore Hospital during a peer review process for the purposes of reducing morbidity and mortality and improving patient care, and which was subsequently reviewed by the Credentialing Committee for the purpose of internal quality control and evaluation of Dr.

Wang for re-credentialing at South Shore Hospital." These facts are uncontradicted, and "they must be taken as true notwithstanding the existence of contrary unsupported allegations." *Lin*, 176 Ill. App. 3d at 658. Taking these facts as true, these documents—with the exception of the unmentioned reappointment worksheets—would clearly fall within the privilege provided by the Act, as they are comprised of information generated originally by a hospital committee during a peer review process for the purposes of reducing morbidity and mortality and improving patient care, with that information subsequently reviewed by a credentialing committee for the purpose of internal quality control and evaluation of a doctor for re-credentialing. 735 ILCS 5/8-2101 (West 2016).

¶ 28 Nevertheless, we again note that South Shore has the burden of establishing that a privilege under the Act applies (*Roach*, 157 Ill. 2d at 41), and a counteraffidavit is not the only means by which an affidavit can be contradicted, as an affidavit can also be contradicted by other documentary evidence (*Nielson*, 2017 IL App (2d) 160743, ¶ 39). However, we have carefully reviewed these documents and the record, and find nothing that calls into question South Shore's assertion that these documents are privileged for the reasons discussed above.

¶ 29 The documents all clearly establish, by their own content, that they are—at a minimum—summaries of information gathered by South Shore committees or their designees *during and in the context of* deciding upon Dr. Wang's semi-annual reapplications for appointment and privileges at South Shore in 1985, 1991, 1993, 1995, 1997, 2001, 2003, 2005, 2007, 2009, 2011 and 2013. *Ardisana*, 342 Ill. App. 3d at 748 (a document may establish, by its own content, that it served an integral function in the peer-review information-gathering and decision-making process). In light of our own review of the record, this includes the two worksheets that were not specifically mentioned in Ms. Sharpe's affidavit. *Id.* at 749 (appellate court's own review of

worksheets established that it was "clear from their content that they were authored for the use of a peer-review committee and are thus entitled to protection from disclosure."). All of these documents are therefore privileged under the Act, "as the Act has been interpreted to protect against disclosure of the mechanisms of the peer-review process, including information gathering and deliberation leading to the ultimate decision rendered by a hospital peer-review committee." *Green v. Lake Forest Hospital*, 335 Ill. App. 3d 134, 137 (2002). We therefore reverse the circuit court's discovery orders to the extent they require South Shore to disclose to plaintiff those documents.

¶ 30 Next we address another set of documents ordered to be disclosed by the circuit court; identified as Bates-stamped pages 22-24, 98-100, 551-553, 601-603, 1066, 1080, 1081, 1082-1085, 1088 and 1089. Our review of the sealed supplemental record reflects that the privilege log accurately identified these documents as including a number of reports entitled "primary responsibility-conclusions statistics by indicator," a physician activity profile, two medical staff member privileges and performance records, a professional activity study, and two physician activity profiles. All of these documents are *specifically* referenced in Ms. Sharpe's affidavit as containing "information which was generated originally by the Surgical Quality Review Committee of South Shore Hospital during a peer review process for the purposes of reducing morbidity and mortality and improving patient care, and which was subsequently reviewed by the Credentialing Committee for the purpose of internal quality control and evaluation of Dr. Wang for re-credentialing at South Shore Hospital." For the same reasons discussed above (*supra*, ¶ 27), these uncontradicted facts alone tend to establish that these documents are privileged under the Act. Moreover, our own independent review of these documents has revealed nothing to contradict South Shore's assertion that these documents are privileged.

¶ 31 In so finding, we reject plaintiff's argument that a different result is mandated by the decisions in *Klaine*, 2014 IL App (5th) 130356, and *Zangara v. Advocate Christ Medical Center*, 2011 IL App (1st) 091911. While a claim of privilege under the Act was rejected in each decision, that conclusion was reached in markedly different factual contexts. For example, in *Klaine*, 2014 IL App (5th) 130356, ¶¶ 36-39, the court rejected a claim of privilege only after noting that none of the documents at issue were specifically mentioned in the affidavits offered in support of the claim of privilege, and the affidavits and documents themselves therefore did not establish that the information contained within the documents was not kept in the ordinary course of the defendant's business prior to being provided to hospital committees for credentialing and peer-review. And, in *Zangara v. Advocate Christ Medical Center*, 2011 IL App (1st) 091911, ¶¶ 44, the claim of privilege was rejected only after the court noted that the plaintiffs were not seeking "documents or analyses generated specifically for the use of a review committee to reduce morbidity or mortality or for improving patient care," and that the deposition of one of defendant's nurses revealed that the information sought by plaintiffs "was available outside of the committee."

¶ 32 This is in sharp contrast to the situation presented here, where: (1) Ms. Sharpe's affidavit specifically referenced the documents at issue and indicated those documents contained "information which was generated originally by the Surgical Quality Review Committee of South Shore Hospital during a peer review process for the purposes of reducing morbidity and mortality and improving patient care, and which was subsequently reviewed by the Credentialing Committee for the purpose of internal quality control and evaluation of Dr. Wang for re-credentialing at South Shore Hospital," and (2) there is no evidence to support a contention that this information was generated or available outside of South Shore's committees.

¶ 33 Lastly, we address a final set of documents ordered to be disclosed by the circuit court, identified as Bates-stamped pages 280, 445, and 452-454. Our review of the sealed supplemental record reflects that the privilege log accurately identified these documents as including: (1) a letter to Dr. Wang dated October 12, 1978, and (2) a letter to Dr. Wang dated February 19, 2010.

¶ 34 With respect to the October 12, 1978, letter, our review indicates it is a letter to Dr. Wang from the Chair of the Department of Surgery at South Shore. The letter discussed a preliminary copy of an "aggregate quality improvement report," and indicated that the attached report (not included in the record before this court) was not final "pending peer review." This report was one of those specifically identified in Ms. Sharpe's affidavit as containing "information which was generated originally by the Surgical Quality Review Committee of South Shore Hospital during a peer review process for the purposes of reducing morbidity and mortality and improving patient care, and which was subsequently reviewed by the Credentialing Committee for the purpose of internal quality control and evaluation of Dr. Wang for re-credentialing at South Shore Hospital." For all the reasons discussed above, we find this letter is therefore privileged under the Act.

¶ 35 The February 19, 2010, letter, discusses an ongoing inquiry by South Shore's Executive Committee into Dr. Wang's charting and references the scheduling of a future meeting of the Executive Committee to discuss the matter. We reiterate that the Act specifically protects from disclosure all information and statements of a hospital's Executive Committee used in the course of internal quality control (735 ILCS 5/8-2010 (West 2016)), and the Act has been interpreted "to protect against disclosure of the mechanisms of the peer-review process, including information gathering and deliberation leading to the ultimate decision rendered by a hospital

peer-review committee" (*Green*, 335 Ill. App. 3d at 137). Because we find that this letter self-evidently falls within this protection, we find it is also privileged under the Act.

¶ 36 In sum, we find each of the documents South Shore refused to produce were privileged under the Act, and therefore we reverse the discovery orders entered by the circuit court requiring South Shore to disclose them. Moreover, it is well recognized that if a discovery order is improper, any finding of contempt for the failure to comply with that order must be reversed. *Klaine*, 2014 IL App (5th) 130356, ¶ 9. We therefore vacate the circuit court's order finding South Shore in contempt and imposing a $50 fine for South Shore's refusal to comply with the improper discovery orders.

¶ 37 III. CONCLUSION

¶ 38 For the foregoing reasons, we reverse the circuit court's discovery orders requiring South Shore to disclose portions of Dr. Wang's credentialing file, vacate its order finding South Shore in contempt and imposing upon South Shore a $50 fine, and remand for further proceedings consistent with this order.

¶ 39 Reversed and remanded. Contempt order vacated.