STATE OF NEW YORK

SUPREME COURT COUNTY OF ST. LAWRENCE

NICOLE JOHNSTON, Individually and as Mother and Natural Guardian of A.S., an infant,

Plaintiff,

- against -

BARBARA D. HILLIS, C.N.M.; JEFFREY GREENBERG, M.D.; MASSENA MEMORIAL HOSPITAL d/b/a NORTH COUNTRY WOMEN'S HEALTH; and MASSENA MEMORIAL HOSPITAL,

Defendants.

Index No. 150897

DECISION & ORDER

IAS #44-1-2019-0108

Appearances: Bottar Law, PLLC (Michael A. Bottar, Esq., of counsel), attorney for Plaintiff; Martin, Ganotis, Brown, Mould & Currie, P.C. (Charles E. Patton, Esq., of counsel), attorney for Defendants.

FARLEY, J. During the course of the examination before trial of Defendant Barbara D. Hillis, C.N.M. ("Hillis"), counsel for Plaintiff Nicole Johnston ("Johnston"), as parent and natural guardian of A.S., an infant, asked Hillis whether she was present at a quality assurance meeting ("Meeting") held at Defendant Massena Memorial Hospital ("MMH") concerning the labor and delivery at issue in this medical malpractice action. After stating she did not remember what she said at the Meeting, Hillis then testified that another named defendant – treating physician Jeffrey Greenberg, M.D. ("Greenberg") – was also present and spoke at the Meeting. After Hillis testified she remembered what Defendant Greenberg said, Plaintiff's counsel then asked her to recount what Greenberg said. Defense counsel then objected based on the "quality assurance" privilege in N. Y. Education Law § 6527 (3), and instructed Hillis

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not to answer. Plaintiff now moves for an Order directing a supplemental deposition of Hillis as to what Greenberg said at the Meeting about Johnston's labor and delivery.[1] For the reasons which follow, the Court grants Plaintiff's motion.

SUMMARY OF FACTS

In her Complaint [Ex. A to Bottar aff.], Plaintiff alleges that she was admitted to MMH on December 27, 2016, for induction of labor, and that A.S. was delivered by emergency cesarean section later that day. Complaint at ¶¶ 18-19. She alleges Defendant Hillis was her treating nurse midwife, and Defendant Greenberg was her treating physician. Id. at ¶¶ 3, 6. Johnston further alleges that, as result of Defendants' alleged medical malpractice during the course of labor and delivery, A.S. sustained severe and permanent bodily injury, including brain damage. Id. at ¶ 28.

In her deposition, Hillis testified that she was present at the Meeting[2] – which she described as a "case review" – "about the labor and delivery for Mrs. Johnston." Hillis EBT [Ex. B to Bottar aff.] at 99-100. After testifying she did not remember what *she* said at the Meeting, Hillis testified that Greenberg also spoke there. Id. at 100. When asked if she recalled what *Greenberg* said, Hillis initially responded: "I would rather if he spoke for himself." Id. at 101. After then testifying that she did

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1 The Court has considered the following papers:
1. Affirmation of Michael A. Bottar, Esq. ("Bottar"), dated February 14, 2019, with Exhibits A & B ("Bottar aff.");
2. Affirmation in Opposition of Charles E. Patton, Esq., dated April 4, 2019 ("Patton aff."); and
3. Bottar Reply Affirmation dated April 9, 2019, with Exhibit A ("Bottar Reply aff.")

2 The parties agree that the Meeting was a "medical or quality assurance review proceeding" under N.Y. Education Law § 6527 (3). See Bottar aff. at ¶¶ 18, 21; Bottar Reply aff. at ¶ 3; Patton aff. at ¶ 3.

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remember what Geenberg said, the following colloquy then ensued:

> Q. Okay. What did [Greenberg] say?
>
> MR. PATTON: So now I'm going to object to the form. You and I will disagree on the law on this but I'm going to instruct her not to answer based upon my understanding of what you're entitled to there.
>
> . . . .
>
> I don't think you're entitled to ask this [defendant] witness what she heard another person say, even if [the other person is] a defendant at that. Id. at 101-02.

Defense counsel asserted he and Plaintiff's counsel had a "legitimate disagreement on the law," and acknowledged he "may well be incorrect." Id. at 102, 105. "You and I have read the law. We interpret it differently." Id. at 108. Based on his interpretation, Defense counsel "claim[ed] privilege and instruct[ed Hillis] not to answer." Id. at 102, 105. Defense counsel stated the attorneys "need to work [the issue] out with the judge." Id. at 108. Hillis' deposition then concluded.

ISSUE PRESENTED

Counsel agree that the motion before the Court presents a single, discrete, issue: May one defendant in a medical malpractice action be compelled to testify about statements made by another defendant who was in attendance at a meeting covered by Education Law § 6527 (3)? See Patton aff. at ¶ 5; Bottar Reply aff. at ¶ 6. Defense counsel acknowledges that, despite "significant review of the case law relating to the issue", he was not able to identify any decision which supported Plaintiff's position. Patton aff. at ¶ 5. In response, Plaintiff's counsel does not cite any case directly on point, pointing instead to Defendants' inability to "cite a single case stating

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that the inquiry at issue is prohibited." Bottar Reply aff. at ¶ 11. The Court's research has not found any decision specifically addressing the question at hand. Accordingly, the issue is one of first impression.

DISCUSSION

Both parties point to and rely upon the language of Education Law § 6527 (3) to support their respective, divergent positions. In pertinent part, this section provides:

> Neither the proceedings nor the records relating to performance of a medical or a quality assurance review function or participation in a medical and dental malpractice prevention program nor any report required by the department of health pursuant to section twenty-eight hundred five-l of the public health law described herein [ ] shall be subject to disclosure under article thirty-one of the civil practice law and rules except as hereinafter provided or as provided by any other provision of law. No person in attendance at a meeting when a medical or a quality assurance review or a medical and dental malpractice prevention program or an incident reporting function described herein was performed [ ] shall be required to testify as to what transpired thereat. The prohibition relating to discovery of testimony shall not apply to the statements made by any person in attendance at such a meeting who is a party to an action or proceeding the subject matter of which was reviewed at such meeting.
> Id. (emphasis added); see also Public Health Law § 2805-m.

Plaintiff argues that the final sentence – "[t]he [§ 6527 (3)] prohibition relating to discovery of testimony shall not apply to the statements made by any person in attendance at such a meeting who is a party to an action or proceeding the subject matter of which was reviewed at such meeting" – expressly permits questioning of *one defendant* [Hillis] as to what *another defendant* [Greenberg] said at the Meeting. Bottar aff. at ¶¶ 16-17.

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In response, counsel for Defendants asserts the final sentence of Education Law § 6527 (3) permits a defendant to testify only about what *that defendant* stated at such a meeting. Patton aff. at ¶ 5. According to Defendants, testimony by one defendant as to what *any other defendant* said at a Quality Assurance meeting remains privileged. Id. Defendants assert that Plaintiff's position calls for an unwarranted expansion of the exception to Education Law § 6527 (3)'s quality assurance privilege. Patton aff. at ¶ 12. Defendants further argue that Plaintiff's interpretation of Education Law § 6527 (3) runs contrary to the legislative intent behind that provision, and would both: (1) have a "chilling effect upon the willingness of physicians and medical providers to participate in [ ] Quality Assurance meetings"; and, (2) "would create an incentive for the plaintiff's bar to identify all attendees at Quality Assurance meetings and then name them as defendants to circumvent the protections afforded [ ] by the Education Law." Id. at ¶¶ 12, 13.

The rules and general policy of discovery in New York and the "quality assurance privilege" further different purposes. New York encourages "open and far-reaching pre-trial discovery." Kavanagh v. Ogden Allied Maintenance Corp., 92 N.Y. 2d 952, 954 (1998) (internal quotation marks and citation omitted). In pertinent part, N.Y. C.P.L.R. § 3101 (a), titled "Scope of disclosure," "entitles parties to 'full disclosure of all matter material and necessary in the prosecution or defense of an action.'" Cascade Bldrs. Corp. v. Rugar, 154 A.D. 3d 1152, 1154 (3d Dep't 2017) (emphasis added) (*quoting* § 3101 [a]). "The words, 'material and necessary', are [ ] to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and

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prolixity." Allen v. Crowell-Collier Publ. Co., 21 N.Y. 2d 403, 406 (1968); accord: Galasso v. Cobleskill Stone Prods., Inc., 169 A.D. 3d 1344, 1345 (3d Dep't 2019). "The statute [C.P.L.R. § 3101 (a)] embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise." Forman v. Henkin, 30 N.Y. 3d 656, 661 (2018) (internal quotation marks and citation omitted).

Consistent with the policy favoring liberal discovery, Third Department law is clear: "In conducting depositions, questions should be freely permitted unless a question is clearly violative of a witness' constitutional rights, or of some privilege recognized in law, or is palpably irrelevant." Kaye v. Tee Bar Corp., 151 A.D. 3d 1530, 1531 (3d Dep't 2017) (internal quotation marks and citations omitted). "All questions posed at depositions should be fully answered unless they invade a recognized privilege or are palpably irrelevant." Tardibuono v. County of Nassau, 181 A.D. 2d 879, 881 (2d Dep't 1992). This Court has broad discretion in supervising discovery. DiCostanzo v. Schwed, 146 A.D. 3d 1044, 1045 (3d Dep't 2017) (granting protective order with respect to information privileged under Education Law § 6527 [3]). "[A]bsent an abuse of discretion or unreasonable interference with the disclosure of relevant and necessary material [the Appellate Division] will not disturb [Supreme Court's] determinations with regard thereto." Czarnecki v. Welch, 23 A.D. 3d 914, 914 (3d Dep't 2005).

While CPLR § 3101(a) provides that there shall be full disclosure of all matter material and necessary in the prosecution of an action, it does not permit unlimited disclosure. As pertinent here, Education Law § 6527 (3) creates a statutory

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"quality assurance privilege ... [that] shields from disclosure certain records and reports generated by a hospital in performing either a medical malpractice or quality assurance review." Daly v. Brunswick Nursing Home, Inc., 95 A.D.3d 1262, 1263 (2d Dep't 2012) (internal quotation marks and citation omitted) (*quoted in* Bluth v. Albany Med. Ctr., 132 A.D. 3d 1131, 1131 [3d Dept 2015]). "[I]nformation which is privileged [under Education Law § 6527 (3)] is not subject to disclosure no matter how strong the showing of need or relevancy." Stalker v. Abraham, 69 A.D. 3d 1172 , 1175 (3d Dep't 2010) (internal quotation marks and citations omitted). The party asserting this statutory privilege bears the burden of establishing its applicability. Bellamy v. State of New York , 154 A.D. 3d 1239, 1340 (3d Dep't 2017).

As a general matter, Education Law § 6527(3) "shields from disclosure the proceedings [and] the records relating to performance of a medical or a quality assurance review function or participation in a medical and dental malpractice prevention program [and] any report required by the department of health." Dicostanzo, 146 A.D. 3d at 1145-46 (internal quotation marks and citations omitted). "Education Law § 6527 (3) [ ] protect[s] from disclosure records relating to performance of a medical or quality assurance review function or participation in a medical malpractice prevention program." Estate of Savage v. Kredenster, 150 A.D. 3d 1452, 1454 (3d Dep't 2017) (citations omitted). As stated by the Court of Appeals: "The purpose of the discovery exclusion [contained in Education Law § 6527 (3)] is to 'enhance the objectivity of the review process' and to assure that medical review committees 'may frankly and objectively analyze the quality of health services rendered' by hospitals."

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Logue v. Velez, 92 N.Y. 2d 13, 17 (1998) (quoting Bill Jacket). "The purpose of the legislative policy which affords such confidentiality [pursuant to Education Law § 6527(3)] is to encourage hospitals to review the shortcomings of their physicians." Aldridge v. Brodman, 49 A.D. 3d 1192, 1193 (4th Dep't 2008) (internal quotation marks and citations omitted).

In Logue v. Velez, 92 N.Y. 2d at 16-17, the Court of Appeals addressed whether and to what extent Education Law § 6527 (3)'s exception to confidentiality applied to documents related to defendant surgeon's application for hospital privileges. The Court of Appeals made plain both the scope and purpose of this exception to confidentiality. As to scope, Logue stated: "As written, the exception is narrow and limited to [1] statements given at an otherwise privileged peer review meeting [2] by a party to a lawsuit which [3] involves the same underlying conduct that is the topic of discussion at the meeting." Id. at 18 (emphases added). The Court of Appeals stated the "purpose of this [exception] is to permit discovery of statements given by a physician or other health professional in the course of a hospital's review of the facts and circumstances of an earlier incident which had given rise to a malpractice action." Id. at 19. Logue held the documents at issue were not discoverable because they were not "made in connection with a peer review of any malpractice claim." Id.

In Carroll v. Nunez, 137 A.D. 2d 911 (3d Dep't 1988) [*cited in* Patton aff. at ¶ 8], the Third Department addressed the discoverability of documents containing statements made by a defendant treating physician at defendant hospital's peer review committee proceeding "regarding the subject matter of [the malpractice] action [ ]." 137 A.D. 2d at 912. Carroll squarely held that these statements were discoverable. Id.

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Carroll further stated that in the event discoverable material "cannot be separated from the undiscoverable material" contained in the documents at issue, the documents "should be provided to Supreme Court for appropriate redaction." Id. at 913. "[S]tatements of a defendant doctor made before a peer review board or for quality assurance evaluation are not privileged when they relate to the subject matter of the litigation." D'Angelis v. Buffalo Gen. Hosp., 2 A.D. 3d 1477, 1478 (4th Dep't 2003) (citation omitted). Accord: Feness v. St. Joseph Intercommunity Hosp., 152 A.D. 2d 965, 965 (4th Dep't 1989) (portion of minutes of medical review committee containing statements of defendant doctor subject to disclosure); see also: Swartzenberg v. Triveldi, 189 A.D. 2d 151, 153-54 (4th Dep't 1993) (letter by physician under review to quality assurance committee discoverable because within "exception to [§ 6527 (3)] immunity"), lv dismissed, 82 N.Y. 2d 749 (1993).

In Lieblich v. St. Peter's Hosp. of the City of Albany, 112 A.D. 3d 1202 (3d Dep't 2013) [*cited in* Patton aff. at ¶ 7], the Third Department addressed whether a defendant treating physician may be asked whether he "ever g[ave] any written or recorded statements concerning [his] involvement in the care of [decedent] to any mortality or morbidity conference." 112 A.D. 3d at 1203. Lieblich held that *whether* the physician gave such statements was discoverable, and, in so ruling, relied on the proposition that "'[a]ll questions posed at depositions should be fully answered unless they invade a recognized privilege or are palpably irrelevant.'" Id. at 1204 (*quoting* Tardibuono). Lieblich did not address whether a defendant witness must testify as to the *substance* of his statements (if any) given in connection with any quality assurance review. Id. at 1205.

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Logue, Carroll, D'Angelis, Feness, and Swartzenberg are not directly on point, because each case concerned production of documents allegedly containing statements by defendant treatment providers, rather than deposition questions to a defendant regarding what a defendant to the malpractice action – either the deponent or another defendant -- said at a quality assurance meeting. Lieblich does not control, because it: (1) held only that the physician may be questioned at deposition as to whether the physician *himself* – not another defendant – made statements at a quality assurance meeting under Education Law § 6527 (3); and, (2) did not decide whether the deponent may be questioned as to the substance of his statements.

The issue before the Court – the meaning and extent of the limited exception to Education Law's § 6527 (3)'s quality assurance privilege – is one of statutory construction. Here, the principles are clear. "[T]he main goal in statutory construction is to discern the will of the Legislature and, as the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." Matter of Soriano v. Elia, 155 A.D. 3d 1496, 1498 (3d Dep't 2017) (internal quotation marks and citations omitted), lv denied, 31 N.Y. 3d 913 (2018). "Generally, courts look first to the statutory text, which is the clearest indicator of legislative intent." Matter of Anonymous v Molik, 32 N.Y. 3d 30, 37 (2018) (internal quotation marks and citation omitted). "[W]hen the plain language of the statute is precise and unambiguous, it is determinative." People ex rel. Negron v. Superintendent, Woodbourne Corr. Facility, 170 A.D. 3d 12, 15 (3d Dep't 2019) (internal quotation marks and citations omitted).

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The plain language of Education Law § 6527 (3) provides the answer to the question before the Court. In this regard, the final sentence states that the prohibition relating to discovery of testimony does not apply to: "[1] statements made [2] by any person in attendance at such a meeting; [3] who is a party to an action or proceeding; [4] the subject matter of which [action or proceeding] was reviewed at such meeting." Id. (emphases added). Section 6527 (3) does not specify that a defendant witness may only be required to testify as to what *he* or *she* – as opposed to *another* defendant treatment provider – said at a quality assurance meeting, and the Court declines to graft such an additional requirement onto its clear language. As stated by the Third Department, the discovery exclusion in Education Law § 6527 (3) "[is] not automatically available and do[es] not prevent full disclosure when it should otherwise be provided." Estate of Savage, 150 A.D. 3d at 1455 (citations omitted).

The Court addresses two additional arguments by Defendants. First, Defendants argue that Plaintiff's interpretation of Education Law § 6527 (3) "would create an incentive for the plaintiff's bar to identify all attendees at Quality Assurance meetings and then name them as defendants in an effort to circumvent the protections afforded to the Quality Assurance review function by the Education law." Patton aff. at ¶ 13. The Third Department directly addressed this argument in Hasbrouck v. Caedo, 296 A.D. 2d 740 (3d Dep't 2002). In that case, plaintiff moved to further depose defendant Caedo, a physician member of a hospital peer review committee, regarding what transpired before the committee. Although a named defendant, Caedo's "only involvement [with plaintiff's decedent] was as a member of the peer review committee." 296 A.D. 2d at 740. Caedo "did not treat decedent or have any other contact with

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[plaintiff's decedent]." Id. In denying plaintiff's motion, the Third Department expressly "conclud[ed] that plaintiff cannot circumvent the confidentiality provision of Education Law § 6527(3) merely by inserting a claim against Caedo in the complaint." Id. at 741 (citation omitted). Thus, Hasbrouck makes clear that the mere naming as a defendant of a physician or care provider who merely *attended* a meeting covered by Education Law § 6527 (3), but who did not herself *participate* in the medical treatment at issue, does not entitle plaintiff to depose a meeting attendee as to what the non-treating defendant said at that meeting. See also N.Y.Ct.Rules, § 130-1.1-a (signing of papers by attorney as not frivolous).

Second, Defendants argue that the Court should deny Plaintiff's motion because Greenberg, who has not yet been deposed, may himself be asked what he said at the Meeting and, thus, "plaintiff's counsel has full access to the information he seeks [ ]." Patton aff. at ¶ 10. Defendants' counsel also avers "no [ ] demand [for statements by Defendants made at the Meeting] has been served upon [Defendant Hospital]." Id. at ¶ 8.[3] In essence, Defendants assert that because the information at issue (statements by Greenberg at the Meeting concerning the labor and delivery at issue) might be obtained through other discovery methods, the method chosen by Plaintiff here – questioning Hillis regarding the content of Greenberg's statements – is improper. The Court finds this argument unconvincing.

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At oral argument on Plaintiff's motion, counsel for Defendants stated he had recently been served with written discovery demands for documents relating to the Meeting, but had not yet responded. The propriety of those demands and/or Defendants' responses thereto are not before the Court.

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A party to litigation is entitled to utilize whatever discovery means and methods the law allows. That a particular document or fact may be obtained by one discovery method does not foreclose use of another. As pertinent here, Hillis' recollection of what Greenberg said at the Meeting may differ from what Greenberg, in his deposition, recalls saying there. Witnesses often have different memories of the same meeting or event. Plaintiff is not bound by Greenberg's recollection. Similarly, that documents now requested by Plaintiffs *might* contain discoverable statements by Greenberg does not bar Plaintiff from asking one Defendant (Hillis) what another Defendant (Greenberg) said at the Meeting. The requested documents may be incomplete or contradict Hillis' memory of what Greenberg said. In short, Plaintiff is not required either: (1) to take Greenberg's "word" at *his* deposition as to what he (Greenberg) said at the Meeting; or (2) to rely on discoverable documents – or redacted portions of the same [see Carroll, 137 A.D. 3d at 913; Feness, 152 A.D. 2d at 965] – as the complete and sole account of what Greenberg said there.

In summary, the clear statutory language of Education Law § 6527 (3) – particularly when coupled with New York's liberal policy and rules regarding discovery – controls. On its face, this section allows deposition testimony [1] by a party [Hillis], regarding [2] statements made by "any person in attendance" [including Greenberg] who is [3] a "party" to the action [Greenberg]; regarding [4] the subject matter – Johnston's labor and delivery – at issue in this malpractice action. Plaintiff may conduct a supplemental deposition of Hillis as to what Greenberg said at the Meeting about Johnston's labor and delivery.

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CONCLUSION

Plaintiff's motion to conduct Hillis' supplemental deposition as to what Greenberg said at the Meeting regarding the labor and delivery at issue is granted.

SO ORDERED.

DATED: May 8, 2019, at Chambers, Canton, New York.

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ENTER:

{Decision & Order, and moving papers filed}

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