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Litigating Discovery Of Personnel Files In Medical Malpractice Cases

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In the prosecution of a medical malpractice case, plaintiff's counsel may seek to discover the personnel files of health care providers. Defense counsel will seek to prevent this disclosure by claiming that such records are privileged. Recent case law clarifies the circumstances under which these records are discoverable.

Duty

In *Bleiler v. Bodnar*, 65 N.Y.2d 65, 73 (1985), the Court of Appeals recognized the validity of a claim for breach of duty to use due care in the selection of doctors and nurses, and to furnish competent medical personnel.... The Court noted that the requisite elements of a cause of action for negligently hiring staff are markedly different from a malpractice cause of action: the plaintiff would have to establish that the hospital failed to use due care in selecting and furnishing personnel–that is, that it failed to make an appropriate investigation of the character and capacity of the agencies of service (citations omitted) - and that such failure was a proximate cause of his injury. Id.

In *Mercer v. State*, 125 A.D.2d 376, 377 (2nd Dept. 1986), the Appellate Division held that, The extent of an employer's duty to investigate those who apply to it for employment is subject to considerations of public policy.... There is a public policy to protect a patient from the deliberate and malicious abuse of power and trust by a physician when the patient entrusts to the physician his or her body in the hope the physician will use his or her best efforts to effect a cure.

Thus, the negligent hiring of an employee who subsequently commits acts of malpractice does not constitute a breach of an integral part of rendering medical treatment, but rather derives from the hospital's failure to fulfill a different, more general, duty to the patient. (citations omitted). If plaintiffs can meet the burden of establishing that the hospital failed in its duty to select and provide personnel and that this failure was the proximate cause of the injuries alleged, then they should prevail in their negligence cause of action. *DeLeon v. Hospital of the Albert Einstein College of Medicine*, 164 A.D.2d 743, 749-750 (1st Dept. 1991).

When a plaintiff asserts a claim for negligent hiring, such a cause of action sounds in negligence and not medical malpractice, and is therefore subject to a three-year statute of limitations under CPLR 214; moreover the infancy toll [CPLR 208], expands to 21 years. *DeLeon v. Hospital of the Albert Einstein College of Medicine*, 164 A.D.2d 743, 746 (1st Dept. 1991); *Bleiler v. Bodnar*, 65 N.Y.2d 65, 74 (1985).

Discoveryability

Where a defendant negligently allows a health care provider to assist in the treatment of a patient and knew about prior claims of negligence against the provider, the defendant may be liable for its negligent hiring or supervision, and as such, the employee's personnel file may be discoverable. *Raschel v. Rish*, 110 A.D.2d 1067, 1068 (4th Dept. 1985), app. dis., 65 N.Y.2d 923 (1985)(failure to develop and adhere to reasonable procedures for reviewing a physician's qualifications creates a foreseeable risk of harm, thus establishing an independent duty to such patients). In *Byork v. Carmer*, 109 A.D.2d 1087 (4th Dept. 1985), the court held that where the patient's theory of liability involves allegations of a hospital furnishing an unqualified physician, knowledge that the hospital may have regarding the physician's incompetence, including prior incidents of negligence, is relevant and subject to disclosure.

Where the defendant hospital never undertook a review of the negligent employee, the exemption from discovery does not apply and the information is discoverable. *Bush v. Dolan*, 149 A.D.2d 799, 800 (3rd Dept. 1989). In order to claim the exemption from discovery, the hospital is required, at minimum, to show that it has a review procedure and that the information for which the exemption is claimed was obtained or maintained in accordance with that review procedure. Id. Witnesses may be deposed as whether a hospital afforded a physician privileges and failed to inquire into his background or credentials, without questioning them as to the proceedings of the credentials committee. *Larsson v. Mithallal*, 72 A.D.2d 806 (2nd Dept. 1979).

While certain information about a defendant physician may be exempt from disclosure, this does not apply to personnel files, complaints, reports of prior similar incidents, admonitions or reprimands in those files. Where the hospital's personnel files on the defendant doctor may contain information relevant and material to plaintiff's claim, the records must be disclosed. *Meder v. Miller*, 173 A.D.2d 392 (1st Dept. 1991).

While a physician's application for privileges was previously considered discoverable, *Crawford v. Lahiri*, 250 A.D.2d 722 (2nd Dept. 1998), that may no longer be the case. *Logue v. Velez*, 92 N.Y.2d 13 (1998). While *Logue v. Velez*, supra, limits disclosure of initial and renewal applications, it does not offer the blanket immunity to all records. 92 N.Y.2d at 17; *Mong v. Children's Hosp. of Buffalo*, 259 A.D.2d 1038, 1039 (4th Dept. 1999).

Questions concerning the competence of an assisting physician are proper because information regarding prior incidents of negligence by a physician, the hospital staff's knowledge of those incidents and the actions taken are discoverable. *Bryant v. Bui*, 265 A.D.2d 848, 849 (4th Dept. 1999).

Documents concerning an incident that appear in the records of disciplinary action taken against an employee may be discoverable. *Carter v. County of Erie*, 255 A.D.2d 984, 985 (4th Dept. 1998), lv. to app. den., -A.D.2d-, 689 N.Y.S.2d 596 (4th Dept. 1999).

In *Megrelishvili v. Our Lady of Mercy Medical Center*, -A.D.2d-, 739 N.Y.S.2d 2, 6 (1st Dept. 2002), the Appellate Division reconciled the statutes with the case law and held that:

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The allegation that OLM was negligent in its failure to restrict Dr. Chiuten's staff privileges since he no longer was covered by such insurance is sufficient to state a cause of action against OLM. While a hospital is not responsible for the actual treatment of a patient by a private physician with staff privileges, the failure of a hospital to develop and adhere to reasonable procedures for reviewing a physician's qualifications creates a foreseeable risk of harm thus establishing an independent duty to such patients. (*Raschel v. Rish*, 110 A.D.2d 1067, 1068, 488 N.Y.S.2d 923, app. dis., 65 N.Y.2d 923; see, *Logue v. Velez*, 92 N.Y.2d 13, 19, 677 N.Y.S.2d 6, 699 N.E.2d 365.) Here, while the doctor's lack of coverage did not, in itself, cause the alleged physical injuries, had OLM followed its own procedures in seeing that he met its affiliation requirements, the fact that he was unable to obtain coverage would have put OLM on notice that he had lost his privileges at other hospitals and, as the facts, when developed, are likely to show, that he had a history of malpractice claims against him, thus placing those patients of his using OLM's facilities at risk.

With respect to what discovery was permissible, the court noted that [t]here are, however, significant issues as to the adequacy of OLM's review, prior to Dr. Chiuten's appointment, of his credentials, as to when he was last certified for staff privileges, as to whether there was an inquiry at that time into the status of his malpractice insurance and, if so, the outcome of that inquiry, and as to whether there were any procedures for denying recertification to physicians who were not in compliance with the requirement that physicians with staff privileges carry malpractice insurance. 739 N.Y.S.2d at 7.

The court concluded that: OLM argues that plaintiffs' request to depose Patricia Hajnosz, Esq. was intended as a harassment device and that the information sought could have been obtained from other sources. Ms. Hajnosz, however, was the only person currently employed who was identified by OLM as someone who might have knowledge of credentialing procedures in effect in 1993. While she denies having personal knowledge ... in July of 1993 or anytime prior thereto as to whether Dr. Chiuten had ever submitted an application for hospital privileges or whether he had malpractice insurance at that time, she does not deny having knowledge of these circumstances at the present time. Nor does she deny having knowledge as to OLM's procedures in 1993 regarding recertification. We modify to grant plaintiff a deposition of Ms. Hajnosz as to the circumstances, as noted, relating to OLM's last recertification of Dr. Chiuten prior to 1993 and OLM's procedure with respect to the denial of recertification for physicians no longer covered by malpractice insurance. Id.

The court then directed that the defendant produce Ms. Patricia Hajnosz to give testimony as to when, prior to July 21, 1993, defendant last recertified Dr. Chiuten for staff privileges, whether that recertification included inquiry into the status of his malpractice insurance, the outcome of that inquiry, and what, if any, procedure was in place for denying recertification to physicians who were not in compliance with its by-laws requiring physicians with staff privileges to carry malpractice insurance. See also, *Megrelishvili v. Our Lady of Mercy Medical Center*, 2002 WL 234733 (1st Dept. 2002).

The defendant physician's personnel file may also be relevant to the issue of informed consent. What did the defendant represent or misrepresent about her credentials when she convinced the plaintiff to engage her services? Did the defendant disclose all relevant information to the plaintiff in order to obtain her informed consent to the treatment rendered? Did the defendant make material misrepresentations to the plaintiff?

Burden of Proof

The defendant will rely upon Education Law section 6527(3) and Public Health Law section 2805-m for the proposition that personnel files and employee reviews are clothed in a veil of secrecy and confidentiality and thus exempt from disclosure. These sections apply to independent medical review committees, so-called peer review committees, whose function is to aid a hospital in implementing a medical malpractice prevention program and assure quality care of its patients. *Byork v. Carmer*, 109 A.D.2d 1087 (4th Dept. 1985).

The defendant must meet its burden of proving that the items sought by the plaintiff are confidential and protected from disclosure. The defendant's failure to do so will result in the disclosure of said records. *Little v. Highland Hosp. of Rochester*, 280 A.D.2d 908 (4th Dept 2001)(perinatal database concerning a physician and a letter written by a nurse anesthetist to the Chairman of the Anesthesia Department was properly discoverable); *Maisch v. Millard Fillmore Hosp.* 262 A.D.2d 1017 (4th Dept. 1999), mot. for rearg. or lv. to app. den., -A.D.2d-, 697 N.Y.S.2d 455 (4th Dept. 1999)(letter report written by Chairperson of Depart of Obstetrics & Gynecology discoverable); *Mong v. Children's Hosp. of Buffalo*, 259 A.D.2d 1038 (4th Dept. 1999) (conversations between a nurse, her nurse manager and the charge nurse concerning an incident were discoverable); *Van Caloen v. Poglinco*, 214 A.D.2d 555, 557 (2nd Dept. 1995)(applications for hospital privileges and personnel file). See, *Kymissis v. Rozzi*, 1997 WL 278055 (93 Civ. 8609, S.D.N.Y. 1997) (privilege waived).

Moreover, merely because some documents in a personnel file are placed in a hospital's quality assurance program file does not render the documents immune from disclosure. *Spradley v. Pergament Home Centers*, 261 A.D.2d 391 (2nd Dept. 1999); *Heitman v. Mango*, 237 A.D.2d 330 (2nd Dept. 1997). There is no blanket cloak of confidentiality as to a hospital's files concerning the doctors and others who work there. Aside from a peer or medical review committee, there are many ways in which a hospital may acquire knowledge of the negligence, malfeasance or incompetence of a defendant doctor. *Byork v. Carmer*, 109 A.D.2d 1087, 1088 (4th Dept. 1985).

With respect to it's claim of alleged privilege, the defendant must submit an affidavit containing evidentiary facts to prove that the doctors' personnel files are part of the hospital's quality review and malpractice prevention program, and are therefore exempt from disclosure. Where the defendant moves for a protective order or to vacate a discovery demand for these items, and fails sustain its burden of proof by submitting affidavits or documentary evidence in some admissible form, the court is left solely with the conclusory and speculative affirmation of counsel, which is worthless; such a motion should be denied.

In Camera Review

Where the defendant makes a timely and proper challenge to the discovery sought by the plaintiff, an in camera review of the allegedly confidential documents may be warranted. *Heitman v. Mango*, supra. In *Sonsini v. Memorial Hospital for Cancer and Diseases*, 262 A.D.2d 185, 186 (1st Dept. 1999), the Appellate Division remanded the matter for the court's in camera examination of the New York City and State licensing and inspection reviews, the Department of Health Form 1975 Laboratory Evaluation Reports, and the reports issued by the American College of Radiologists or the Joint Commission on Accreditation of Health Care Facilities, to determine whether these documents are privileged under Education Law S 6527(3) ...

Conclusion

Recent changes in the law have affected which personnel records of health care providers plaintiff's counsel may obtain during discovery in a medical malpractice case. These records may contain a smoking gun that helps the injured patient receive his just compensation.