

Bovee v. Champlain Val. Physicians Hosp. Med. Ctr.

2017 NY Slip Op 51046(U)

Decided on August 14, 2017
Supreme Court, Warren County

Muller, J.

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Decided on August 14, 2017
Supreme Court, Warren County

**Aaron Bovee, AS ADMINISTRATOR OF THE ESTATE
OF THOMAS M BOVEE, AND LISA BOVEE, Plaintiffs,**

against

**Champlain Valley Physicians Hospital Medical Center,
CHAMPLAIN VALLEY HEALTH NETWORK, INC.,
COMMUNITY PROVIDERS, INC., FLETCHER ALLEN
PARTNERS, INC., THE UNIVERSITY OF VERMONT
HEALTH NETWORK INC., JEAN-PAUL MENOSCAL,
M.D., HOWARD L. YEATON, M.D., VICTOR W.
LUDEWIG, M.D., EDWARD J. HANNAN, M.D., WAYNE
A. ABRAHAMS, M.D. and STEPHEN G. HAUSRATH,
M.D., Defendants.**

LaFave, Wein & Frament, PLLC, Guilderland (Matthew T. Fahrenkopf of counsel), for plaintiffs.

Stafford, Owens, Piller, Murnane, Kelleher & Trombley, PLLC, Plattsburgh (Justin R. Meyer of counsel), for defendants Champlain Valley Physicians Hospital Medical Center, Champlain Valley Health Network, Community Providers, Inc., Fletcher Allen Partners, Inc. and The University of Vermont Health Network, Inc.

Thuillez, Ford, Gold, Butler & Monroe, LLP, Albany (Donald P. Ford Jr. of counsel), for

defendant Stephen G. Hausrath, M.D.

Burke, Scolamiero, Mortati & Hurd, LLP, Albany (Peter M. Scolamiero of counsel), for defendant Jean-Paul Menoscal, M.D.

Phelan, Phelan & Danek, LLP, Albany (Ryan Perry of counsel), for defendant Howard L. Yeaton, M.D.

Napierski, Vandenburg, Napierski & O'Connor, LLP, Albany (Shawn F. Brousseau of counsel), for defendant Victor W. Ludewig, M.D.

Maguire Cardona, P.C., Albany (Kathleen Barclay of counsel), for defendant Edward J. Hannan, M.D.¹

Robert J. Muller, J.

The facts of this matter are fully set forth in the Court's May 27, 2016 Decision and Order and will not be repeated at length (51 Misc 3d 1227[A], 2016 NY Slip Op 50832[U] [2016]). Briefly stated, Thomas M. Bovee (hereinafter decedent) was seen at the emergency room of defendant Champlain Valley Physicians Hospital Medical Center (hereinafter CVPH) on October 23, 2012 with severe abdominal pain. He was evaluated by defendant Jean-Paul Menoscal — an emergency physician — who ordered several tests, including an electrocardiogram (EKG). The EKG came back abnormal with "nonspecific intraventricular conduction delay" and "inferior infarct." These results, however, were never reported to decedent. He was admitted to CVPH for four days and discharged with a diagnosis of colitis.

Decedent returned to the emergency room of CVPH on May 5, 2013, this time complaining of shortness of breath, nausea and fatigue. Another EKG was ordered and it revealed 100% occlusion of the left anterior descending artery, 100% occlusion of the mid-right coronary artery and 99% occlusion of the circumflex artery. Decedent was immediately sent for cardiac catheterization, which was unsuccessful, and he ultimately expired in the catheterization lab.

As relevant here, plaintiff Lisa Bovee (hereinafter Bovee) — decedent's wife — met with Debbie Stewart — CVPH's Director of Risk Management — on March 3, 2014 to discuss her concern that decedent did not receive appropriate care. Bovee had discovered the October 2012 EKG and was concerned that decedent was having a cardiac issue at that time, but was treated only for colitis. Stewart then contacted the Medical Director of CVPH's Emergency Department to commence a quality assurance review relative to Bovee's concerns. According to Stewart, "[o]ver the next [11] days, [she] communicated with various medical personnel at the hospital who were part of the quality assurance review process for [decedent], and acted as the hospital's point of contact with [plaintiff]." On March 14, 2014, Stewart met again with plaintiff, this time advising her "that the quality assurance investigation had not revealed any reason to believe that [decedent] was having a specific cardiac event during his admission to CVPH . . . in October of 2012." In response, plaintiff indicated that she nonetheless blamed CVPH for decedent's death

because no one advised him of the abnormal results of the October 2012 EKG. This medical malpractice action was thereafter commenced.

Presently before the Court is (1) the motion of defendants CVPH, Champlain Valley Health Network, Community Providers, Inc., Fletcher Allen Partners, Inc. and The University of Vermont Health Network, Inc. (hereinafter collectively referred to as defendants) for a protective Order barring plaintiffs from deposing Stewart and, further, from obtaining the contents of her file; (2) the cross motion of plaintiffs for an Order directing defendants to produce Stewart for deposition, to disclose the contents of her file and to produce the audit trail records pertaining to decedent's October 2012 treatment at CVPH; and (3) the cross motion of defendant Stephen G. Hausrath — decedent's primary care physician — for an Order directing defendants to produce Stewart for a deposition relative to her March 3, 2014 meeting with Bovee and, further, to produce any notes or records created by her to memorialize the March 3, 2014 meeting. The motion and cross motions will be addressed *ad seriatim*.

Defendants' Motion

Defendants contend that plaintiffs are precluded from deposing Stewart and obtaining the contents of her file under Education Law § 6527 (3) and Public Health Law § 2805-m.

"Education Law § 6527 (3) and Public Health Law § 2805-m protect 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 Kredentser](#), 150 AD3d 1452, 1454 [2017]; see [Logue v Velez](#), 92 NY2d 13, 16-17 [1998]; [Daly v Brunswick Nursing Home, Inc.](#), 95 AD3d 1262, 1263 [2012]; [Powers v Faxton Hosp.](#), 23 AD3d 1105, 1106 [2005]; [Orner v Mount Sinai Hosp.](#), 305 AD2d 307, 310 [2003]; see also [Katherine F. v State of New York](#), 94 NY2d 200, 203-205 [1999]). "[T]he purpose of the Education Law and Public Health Law discovery exclusions is to encourage a candid peer review of physicians, and thereby improve the quality of medical care and prevent malpractice, but such protections are not automatically available . . ." ([Estate of Savage v Kredentser](#), 150 AD3d at 1455; see [Logue v Velez](#), 92 NY2d at 17; [DiCostanzo v Schwed](#), 146 AD3d at 1046-1047; [Aldridge v Brodman](#), 49 AD3d 1192, 1193 [2008]). Rather, "[t]he party asserting these statutory privileges bears the burden of establishing their applicability by demonstrating that a review procedure was in place and that the requested documents were prepared in accordance with such procedure" ([Estate of Savage v Kredentser](#), 150 AD3d at 1454; see [DiCostanzo v Schwed](#), 146 AD3d 1044, 1046 [2017]; [Bluth v Albany Med. Ctr.](#), 132 AD3d 1131, 1132 [2015]; [Slayton v Kolli](#), 111 AD3d 1314, 1314 [2013]; [Stalker v Abraham](#), 69 AD3d 1172, 1173 [2010]).

Here, defendants submitted a copy of Stewart's file for *in camera* review, as well as an affidavit attaching copies of CVPH's "Risk Management Program" and its "Integrated Performance Improvement Plan" for 2012-2013. In her affidavit, Stewart explains that her duties as the Director of Risk Management "include oversight of CVPH's Risk Management program, including aspects of Risk Management as they relate to the integration of the hospital's risk management and quality assurance (which CVPH references as Performance Improvement) functions." She further explains that she is responsible for "coordinating quality assurance investigations and serving as the hospital's point of contact with patients or their representatives

where, like here, a quality assurance investigation is triggered by a patient complaint." Finally, Stewart describes in detail — as set forth above — her handling of the quality assurance review relative to decedent.

A review of Stewart's file, together with her affidavit and the attachments thereto, makes clear that the file was created and maintained in strict conformance with CVPH's review procedures — specifically its Risk Management Program and Integrated Performance Improvement Plan — which it "link[s] together due to the shared goals of improving the quality of care and avoiding adverse patient care occurrences." The Court thus finds that defendants have established that a review procedure was in place and that Stewart's file was prepared in accordance with this procedure (*see DiCostanzo v Schwed*, 146 AD3d at 1046; *Stalker v Abraham*, 69 AD3d at 1173-1174). Indeed, Stewart's file falls squarely within the materials that are made confidential by Education Law § 6527 (3) and Public Health Law § 2805-m.

Under the circumstances, defendants' motion for a protective Order barring plaintiffs from deposing Stewart and from obtaining the contents of her file is granted in its entirety.²

Plaintiffs' Cross Motion

In accordance with the discussion set forth above, that portion of plaintiffs' cross motion which seeks an Order directing defendants to produce Stewart for deposition and to disclose the contents of her file is denied.

Insofar as that portion of plaintiffs' cross motion which seeks an Order directing defendants to produce the audit trail records pertaining to decedent's October 2012 treatment at CVPH is concerned, defendants have not opposed this aspect of the cross motion and it is therefore granted. Defendants shall produce such records within **thirty (30) days** of the date of this Decision and Order.

Hausrath's Cross Motion

Hausrath contends that Stewart's meeting with Bovee on March 3, 2014 "preceded the initiation of [the] quality assurance review" and, as such, is not privileged under Education Law § 6527 (3) and Public Health Law § 2805-m. The Court, however, is not persuaded.

CVPH's Risk Management Program provides a "Four Step Approach to Incident Follow-Up" once an incident has been "[r]eported via written report, oral notification . . . or patient complaint". These four steps are:

"1. Immediate response

"2. Further investigation

"3. Loss control and loss prevention

"4. Evaluation of defensibility prior to settlement or litigation"

The Risk Management Program then enumerates the tasks to be completed for each step, stating as follows with respect to step 1 — immediate response:

"• Verify that the patient and/or involved party currently is receiving appropriate medical management.

"• Review the documentation for completeness, contradictions, and clues to the cause. Secure the medical record. Interview those involved.

"• Involvement of medical staff, department directors, committee chairpersons, as appropriate.

"••Communicate, as appropriate, with the patient/family with physician involvement as necessary".

Based upon this, the Court finds that Stewart's March 3, 2014 meeting with Bovee did not precede CVPH's quality assurance review. Rather — as set forth in the Risk Management Program — this meeting was part of CVPH's immediate response to Bovee's complaint and the first step in undertaking a quality assurance review. In this regard, the Court notes that CVPH's Integrated Performance Improvement Plan is expressly linked to its Risk Management Program, with both utilizing the same review processes.

To the extent that Stewart's March 3, 2014 meeting with Bovee was part of the quality assurance review, it is protected from disclosure under Education Law § 6527 (3) and Public Health Law § 2805-m. Hausrath's cross motion is therefore denied in its entirety.

The parties' remaining contentions, to the extent not specifically addressed herein, are either without merit or have been rendered academic.

The within constitutes the Decision and Order of this Court.

Therefore, having considered the Affirmation of Justin R. Meyer with exhibits attached thereto, dated February 15, 2017, submitted in support of defendants' motion; Affidavit of Deborah K. Stewart with exhibits attached thereto, sworn to February 14, 2017, submitted in support of defendants' motion, Affirmation of Matthew T. Fahrenkopf, Esq. with exhibits attached thereto, dated February 28, 2017, submitted in support of plaintiffs' cross motion and in opposition to defendants' motion; Affidavit of Donald P. Ford, Jr., Esq. with exhibits attached thereto, dated February 28, 2017, submitted in support of Hausrath's cross motion and in opposition to defendants' motion; Memorandum of Law of Justin R. Meyer, Esq. with exhibits attached thereto,³ dated March 9, 2017, submitted in further support of defendants' motion and in opposition to plaintiffs' cross motion and Hausrath's cross motion; Affirmation of Matthew T. Fahrenkopf, Esq. with exhibit attached thereto, submitted in further support of plaintiffs' cross motion; Reply Affidavit of Donald P. Ford, Jr., Esq., sworn to March 16, 2017, submitted in

further support of Hausrath's cross motion; correspondence of Matthew T. Fahrenkopf, Esq., dated July 19, 2017; and correspondence of Justin R. Meyer, Esq., dated July 27, 2017, and oral argument having been heard on August 10, 2017 with Justin R. Meyer, Esq. appearing on behalf of defendants, Matthew T. Fahrenkopf, Esq. appearing on behalf of plaintiffs and Daisy Paglia, Esq. appearing on behalf of Hausrath, it is hereby

ORDERED that defendants' motion for a protective Order barring plaintiffs from deposing Stewart and from obtaining the contents of her file is granted in its entirety; and it is [*4]further

ORDERED that the portion of plaintiffs' cross motion which seeks an Order directing defendants to produce Stewart for deposition and to disclose the contents of her file is denied; and it is further

ORDERED that the portion of plaintiffs' cross motion which seeks an Order directing defendants to produce the audit trail records pertaining to decedent's October 2012 treatment at CVPH is granted; and it is further

ORDERED that defendants shall produce the aforementioned audit trail records within **thirty (30) days** of the date of this Decision and Order; and it is further

ORDERED that Hausrath's cross motion is denied in its entirety.

The original of this Decision and Order has been filed by the Court together with the

Notice of Motion dated February 15, 2017, Notice of Cross Motion dated February 28, 2017, Notice of Cross Motion dated February 28, 2017 and the submissions enumerated above. Counsel for defendants Champlain Valley Physicians Hospital Medical Center, Champlain Valley Health Network, Community Providers, Inc., Fletcher Allen Partners, Inc. and The University of Vermont Health Network, Inc. is hereby directed to promptly obtain a filed copy of the Decision and Order for service with notice of entry upon all parties in accordance with CPLR 5513.

Dated: August 14, 2017

Lake George, New York

ROBERT J. MULLER, J.S.C.

Footnotes

¹ The action has been discontinued as against defendant Wayne A. Abrahams, M.D.

² To the extent that neither Education Law § 6527 (3) nor Public Health Law § 2805-m (2) applies to statements made by a person in attendance at a quality review meeting who "is a party to an action . . . the subject matter of which was reviewed at [the] meeting," the Court notes that Stewart's file does not contain any such statements.

³ These exhibits included a copy of Stewart's file which — as noted above — was submitted for *in camera* review. This exhibit has been sealed by the Court.