

**Martel v Southampton Hosp.**

2011 NY Slip Op 33197(U)

November 23, 2011

Sup Ct, Suffolk County

Docket Number: 07-24175

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 17 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. PETER H. MAYER  
Justice of the Supreme Court

MOTION DATE 2-22-11 (#009)  
MOTION DATE 3-1-11 (#010)  
MOTION DATE 5-24-11 (#011)  
MOTION DATE 6-7-11 (#012 & #013)  
ADJ. DATE 6-21-11  
Mot. Seq. # 009 - MotD # 010 - XMotD  
# 011 - MD # 012 - XMG  
# 013 - XMG

-----X  
MELINDA MARTEL, as surviving spouse and :  
Administratrix of the goods, chattels and credits :  
which were of ROGER M. MARTEL, deceased, :  
MELINDA MARTEL, as mother and natural :  
guardian of infant plaintiff MITCHELL S. BEYEL, :  
and SARAH M. MERRITT, individually, :  
Plaintiff, :  
:  
:  
- against - :  
:  
:  
SOUTHAMPTON HOSPITAL, MECIKO :  
MUHAREMOVIC, M.D., LOUIS JOHN :  
AVVENTO, M.D., ALEXANDER ZUHOSKI, :  
M.D., and STEVEN PAUL OUZOUNIAN, M.D. :  
and DARIN G. WIGGINS, M.D., :  
Defendants. :  
-----X

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant Southampton Hospital, dated February 8, 2011, and supporting papers 1 - 10; (2) Notice of Motion/Order to Show Cause by the plaintiff, dated April 27, 2011, and supporting papers 24 - 48; (3) Notice of Cross Motion by the plaintiff, dated February 24, 2011, supporting papers 11 - 19; (4) Notice of Cross Motion by the defendants Dr. Avvento, Dr. Zuhoski, and Dr. Ouzounian, dated May 26, 2011, supporting papers 49 - 59; (5) Notice of Cross Motion by the defendant Dr. Muharemovic, dated May 23, 2011, supporting papers 60 - 74; (6) Reply Affirmation by the defendant Southampton Hospital, dated March 15, 2011, and supporting papers 20 - 24; (7) Reply Affirmation by the plaintiff, dated June 6, 2011, and supporting papers 75 - 77; (8) Reply Affirmation by the defendants Dr. Avvento, Dr. Zuhoski, and Dr. Ouzounian, dated June 20, 2011, and supporting papers 78 - 79; (9) Reply Affirmation by the defendant Dr. Muharemovic, dated June 20, 2011, and supporting papers 80 - 81; (10) Other \_\_\_ (and after hearing counsels' oral arguments in support of and opposed to the motion); and now

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UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

**ORDERED** that the motion (009) by the defendant Southampton Hospital for a protective order and the motion (011) by the plaintiff to compel are consolidated for the purposes of this determination and are considered together with the cross motion (010) by the plaintiffs to compel, the cross motion (012) by the defendants Louis John Avvento, M.D., Alexander Zuhoski, M.D., and Steven Paul Ouzounian, M.D. for a protective order, and the cross motion (013) by the defendant Meciko A. Muharemovic, M.D. s/h/a Meciko Muharemovic, M.D. for a protective order; and it is further

**ORDERED** that the motion (009) by the defendant Southampton Hospital for a protective order finding that any incident or accident reports concerning an alleged fall or occurrence by the decedent during his hospital stay from July 11, 2006 through July 15, 2006 and any hospital protocols regarding patient falls or the reporting and/or recording of such incidents in effect in July 2006 are privileged and confidential and not subject to disclosure pursuant to Public Health Law §§ 2805-j, 2805-l, 2805-m, and Education Law § 6527 is held in abeyance pending an in camera inspection of said records, reports and protocols; and it is further

**ORDERED** that the cross motion (010) by the plaintiff to compel the defendant Southampton Hospital to produce any and all incident and/or accident reports generated at the hospital as a result of any falls or other occurrences during the decedent's hospital stay from July 11, 2006 through July 15, 2006, and any and all hospital protocols regarding patient falls and the reporting and recording of such incidents effective in July 2006 or, in the alternative, to compel production of said records, reports and protocols for in camera inspection is granted solely with respect to an in camera inspection of said records, reports and protocols and is otherwise held in abeyance; and it is further

**ORDERED** that the motion (011) by the plaintiff to compel the defendant Meciko Muharemovic, M.D. to produce his cellular and home telephone and answering service or beeper service records for July 15, 2006 and to identify the answering service or beeper service used by him on July 15, 2006; to compel the defendant Louis John Avvento, M.D. and the defendant Alexander Zuhoski, M.D. to produce their cellular and home telephone and answering or beeper service records for July 14 through July 15, 2006 and to identify the answering service or beeper service used by them from July 14 through July 15, 2006; or to compel said defendants to produce said records for an in camera inspection is denied; and it is further

**ORDERED** that the cross motion (012) by the defendants Louis John Avvento, M.D., Alexander Zuhoski, M.D., and Steven Paul Ouzounian, M.D. for a protective order pursuant to CPLR 3103 denying the plaintiff's discovery demands for beeper service, cellular and home phone records for Drs. Avvento and Zuhoski is granted; and it is further

**ORDERED** that the cross motion (013) by the defendant Meciko A. Muharemovic, M.D. s/h/a Meciko Muharemovic, M.D. for a protective order pursuant to CPLR 3103 prohibiting the disclosure of the items sought in the plaintiff's discovery motion is granted; and it is further

**ORDERED** that the defendant Southampton Hospital is directed to submit complete copies of any incident or accident reports generated at the Hospital as a result of any falls or other occurrences during Mr. Martel's hospital stay from July 11, 2006 through July 15, 2006, and any and all hospital protocols regarding patient falls and the reporting and recording of such incidents effective in July 2006 to the Chambers of the undersigned located at One Court Street, Riverhead, New York 11901 by December 20, 2011 for an in camera

inspection.

This is an action to recover damages for alleged medical malpractice and wrongful death of the 37-year-old plaintiff's decedent, Roger M. Martel (Mr. Martel), who was admitted for treatment of symptoms of hemolytic anemia at Southampton Hospital (Hospital) from July 11, 2006 through July 15, 2006, when he died. The plaintiff commenced this action on August 6, 2007 alleging, among other things, that the defendants failed to properly monitor and treat Mr. Martel's hemolytic anemia, failed to perform a splenectomy, improperly performed contraindicated blood transfusions, failed to diagnose signs and symptoms of pulmonary emboli, and failed to promptly and properly perform resuscitation measures upon Mr. Martel following cardiac arrest, which caused and contributed to his death.

The plaintiff served upon the Hospital a Notice to Produce Incident and Accident Reports and Protocols dated November 22, 2010 seeking 1) all incident and accident reports generated at the Hospital as a result of any falls or other occurrences during the decedent's hospital stay from July 11, 2006 through July 15, 2006 and 2) all hospital protocols regarding patient falls, as well as reporting and recording of incidents involving patient falls that were effective in July 2006. The Hospital served a Response to Plaintiff's Notice to Produce Incident and Accident Reports and Protocols dated December 7, 2010 stating that all of the requested items were privileged and confidential pursuant to Public Health Law §§ 2805 J, L, M [sic] as well as Education Law § 6527.

The Hospital requests a protective order with respect to the items sought in the Notice to Produce Incident and Accident Reports and Protocols dated November 22, 2010. The Hospital asserts that any reports concerning falls, the underlying protocols which require such reporting, and any other information and materials obtained for said process are privileged and protected under the governing statutes and case law. The Hospital's submissions include the plaintiff's Notice to Produce, the Hospital's Response to Plaintiff's Notice to Produce, and the affidavit dated February 2, 2011 of Sharon DiSunno (Ms. DiSunno), the Vice President of Quality Assurance for the Hospital.

Ms. DiSunno states in her affidavit that pursuant to Article 28 of the Public Health Law, the Hospital has established a Quality Assurance Committee and Program which oversees and coordinates the Medical Malpractice Prevention Program. In addition, she indicates that as part of the Medical Malpractice Prevention Program, a protocol at the Hospital requires Hospital personnel to provide information in an incident report concerning certain events at the Hospital including patient falls that were witnessed or not witnessed. She also states that a review of the decedent's medical records maintained by the Hospital indicate that on July 13, 2006 at 4:00 a.m. the decedent was found on his hands and knees outside of the bathroom and that the decedent stated that he felt weak and dizzy returning to his bed and that he fell. According to Ms. DiSunno, the decision to create an incident report is governed by the Hospital's Quality Assurance and Medical Malpractice Prevention Program and if a report is generated, the information is collected solely to comply with the statutory requirements of the Public Health Law, Mental Hygiene Law, and Education Law, and is subsequently reviewed by the Quality Assurance Program so as to improve the quality of medical care rendered to patients and to prevent a similar occurrence.

The plaintiff seeks to compel the Hospital to produce the items sought in the Notice to Produce Incident and Accident Reports and Protocols dated November 22, 2010. She explains that her request for said items was precipitated by the deposition testimony of the defendant Darin G. Wiggins, M.D. (Dr. Wiggins) from October 22, 2010 that he was informed during the code on July 15, 2006 that Mr. Martel had been found on the ground a day or two earlier following a fall, and that he was concerned that Mr. Martel, who had an enlarged spleen, may

have suffered a splenic rupture, and by the nurse's progress note of July 13, 2006 that Mr. Martel had been found on his hands and knees on the floor outside of the bathroom. The plaintiff argues that the Hospital has failed to meet its burden of demonstrating that the requested incident and accident reports were prepared for or supplied to the Department of Health pursuant to Public Health Law § 2805-l or that the reports were generated for, and at the behest of, and actually reviewed by the medical malpractice prevention committee or quality assurance committee pursuant to Public Health Law § 2805-m and Education Law § 6527 (3), such that the claimed privilege applies to the requested reports. In addition, the plaintiff argues that the privilege does not apply to protocols, which are material and necessary to the prosecution of this action. The plaintiff's submissions include a portion of the deposition transcript of Dr. Wiggins, and Hospital progress notes dated July 13, 2006 for Mr. Martel which include the aforementioned nurse's notes from 4:00 a.m.

In reply, the Hospital contends that since the requested information, accident report and protocols regarding falls, is obviously privileged, the Hospital did not specify the nature of the contents of the documents, and there is no indication in the Hospital records that Mr. Martel suffered any injury from the fall, including internal bleeding and splenic rupture, nor did the autopsy report show evidence of internal organ injury including splenic rupture, rendering such an injury mere speculation. In addition, the Hospital contends that since there was no injury sustained by Mr. Martel when he was found on the hospital room floor, the incident was not required to be reported to the Department of Health. The Hospital alleges that protocols are privileged pursuant to Public Health Law § 2805-m as "incident reporting requirements." The Hospital submits a portion of the deposition transcript of Dr. Wiggins and another affidavit from Ms. DiSunno, dated March 11, 2011. The new affidavit from Ms. DiSunno expressly states that an incident report concerning Mr. Martel and an incident that occurred on July 13, 2006 at approximately 4:00 a.m. was specifically prepared as part of the Hospital's Quality Assurance Committee and Program, and that the report was reviewed by the Quality Assurance Committee and Program to improve the overall quality of care given to patients and to prevent a similar reoccurrence. In addition, she states that since Mr. Martel did not sustain any injury with respect to the July 13, 2006 incident, the matter was not required to be reported to the Department of Health. Ms. DiSunno adds that the protocols concerning the reporting of incidents were specifically generated by the Hospital and established by the Quality Assurance Committee to comply with Public Health Law § 2805-j to improve the quality of medical care and prevent medical malpractice.

While CPLR 3101 (a) provides for full disclosure of all evidence material and necessary to the prosecution or defense of an action, unlimited disclosure is not required, and supervision of disclosure is generally left to the trial court's broad discretion (*see Conte v County of Nassau*, 87 AD3d 558, 929 NYS2d 741 [2d Dept 2011]). A motion to compel responses to demands and interrogatories is properly denied where the demands and interrogatories seek information which is irrelevant, overly broad, or burdensome (*see Accent Collections, Inc. v Cappelli Enterprises, Inc.*, 84 AD3d 1283, 1283, 924 NYS2d 545 [2d Dept 2011]; *Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408, 873 NYS2d 145 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531, 845 NYS2d 124 [2d Dept 2007]). While the failure of a party to challenge the propriety of a notice for discovery and inspection within the time prescribed by the CPLR forecloses inquiry into the propriety of the information sought, there is an exception with regard to requests that are palpably improper (*see Accent Collections, Inc. v Cappelli Enterprises, Inc.*, 84 AD3d 1283, 1284, 924 NYS2d 545; *Otto v Triangle Aviation Servs.*, 258 AD2d 448, 684 NYS2d 612 [2d Dept 1999]).

The "quality assurance privilege" set forth in Education Law § 6527 (3) shields from disclosure certain records and reports generated by a hospital in performing either a medical malpractice or quality assurance review (*see Logue v Velez*, 92 NY2d 13, 15-17, 677 NYS2d 6 [1998]; *Leardi v Lutheran Med. Ctr.*, 67 AD3d 651, 651, 888 NYS2d 168 [2d Dept 2009]). The statute confers confidentiality on three categories of

documents: records relating to the performance of medical review and quality assurance functions; records reflecting “participation in a medical and dental malpractice prevention program” pursuant to Public Health Law § 2805-j; and reports required by the New York State Department of Health pursuant to Public Health Law § 2805-l (Education Law § 6527 [3]; see *Katherine F. v State of New York*, 94 NY2d 200, 204, 702 NYS2d 231 [1999]; *Leardi v Lutheran Med. Ctr.*, 67 AD3d at 651, 888 NYS2d 168). Reports required by the New York State Department of Health pursuant to Public Health Law § 2805-l concerning any incident which led to the impairment of a patient’s bodily functions due to circumstances unrelated to the natural course of an illness, disease or proper treatment are exempt from disclosure pursuant to CPLR article 31 (see Public Health Law § 2805-l [2] [a]; *Fernekes v Catskill Regional Med. Ctr.*, 75 AD3d 959, 960, 906 NYS2d 167 [3d Dept 2010]).

Statements made by any person in attendance at a meeting when a medical or quality assurance review or a medical and dental malpractice program was performed, who is a party to an action or proceeding the subject matter of which was reviewed at such meeting, are discoverable (Education Law § 6527 [3]; Public Health Law § 2805-m [2]). In addition, merely because documents are placed in a quality assurance file does not “per se render these documents privileged from disclosure under the Education Law § 6527 (3)” (*Heitman v Mango*, 237 AD2d 330, 331, 654 NYS2d 413 [2d Dept 1997]; see *Spradley v Pergament Home Ctrs.*, 261 AD2d 391, 392, 689 NYS2d 516 [2d Dept 1999]). Moreover, records simply duplicated by a quality assurance committee are not necessarily privileged (see *Marte v Brooklyn Hosp. Ctr.*, 9 AD3d 41, 48, 779 NYS2d 82 [2d Dept 2004]; see also *Kivlehan v Waltner*, 36 AD3d 597, 598, 827 NYS2d 290 [2d Dept 2007]). It is the burden of the entity seeking to invoke the privilege to establish that the documents sought were prepared in accordance with the relevant statutes (see *Marte v Brooklyn Hosp. Ctr.*, 9 AD3d at 46, 779 NYS2d 82; *Orner v Mount Sinai Hosp.*, 305 AD2d 307, 761 NYS2d 603 [1st Dept 2003]; *Crawford v Lahiri*, 250 AD2d 722, 673 NYS2d 189 [2d Dept 1998]; *Van Caloen v Poglinco*, 214 AD2d 555, 625 NYS2d 245 [2d Dept 1995]).

Here, the Hospital failed to meet its initial burden to invoke the privilege. The Hospital admitted that it prepared an incident report concerning Mr. Martel and an incident that occurred on July 13, 2006 at approximately 4:00 a.m., but the affidavits of Ms. DiSunno are too conclusory in nature to determine whether the incident report or any other documents rendered by the Hospital related to this matter are privileged (see *Ross v Northern Westchester Hosp. Assn.*, 43 AD3d 1135, 1136, 842 NYS2d 543 [2d Dept 2007]; *Kivlehan v Waltner*, 36 AD3d at 599, 827 NYS2d 290; see also *Leardi v Lutheran Med. Ctr.*, 67 AD3d at 652, 888 NYS2d 168). Notably, the affidavits of Ms. DiSunno do not state that the incident report does not include any statements by the defendant physicians. In addition, the Hospital failed to demonstrate that the requested “hospital protocols regarding patient falls and the reporting and recording of such incidents” are all privileged based on the narrow provision in Public Health Law § 2805-m that “any incident reporting requirements imposed upon diagnostic and treatment centers pursuant to the provisions of this chapter” ... “shall be kept confidential and shall not be released except to the department or pursuant to subdivision four of section twenty-eight hundred five-k of this article [Investigations prior to granting or renewing privileges],” and are not subject to disclosure under article 31 of the civil practice law and rules subject to certain exceptions (see Public Health Law §§ 2805-m [1], [2]). Based on the foregoing, the Hospital is directed to submit to the Court complete copies of any incident or accident reports generated at the Hospital as a result of any falls or other occurrences during Mr. Martel’s hospital stay from July 11, 2006 through July 15, 2006, and any and all hospital protocols regarding patient falls and the reporting and recording of such incidents effective in July 2006 for an in camera inspection in order to assist the Court in determining whether the documents in fact are protected from disclosure by the statutory privileges (see *Fray v Fulton Commons Care Ctr., Inc.*, 51 AD3d 968, 860 NYS2d 543 [2d Dept 2008]; *Klingner v Mashioff*, 50 AD3d 746, 747, 855 NYS2d 628 [2d Dept 2008]; *Ross v Northern Westchester Hosp. Assn.*, 43 AD3d at 1136, 842 NYS2d 543; *Spradley v Pergament Home Ctrs.*, 261 AD2d at 392, 689 NYS2d 516). Therefore, the Hospital’s motion for a protective order and the portion of the

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plaintiff's cross-motion to compel are held in abeyance pending the in camera inspection upon completion of which, the Court will render its decision on the Hospital's motion for a protective order and the plaintiff's cross-motion to compel.

The plaintiff also seeks to compel the defendant Meciko Muharemovic, M.D. to produce his cellular and home telephone and answering service or beeper service records for July 15, 2006 and to identify the answering service or beeper service used by him on July 15, 2006; to compel the defendant Louis John Avvento, M.D. and the defendant Alexander Zuhoski, M.D. to produce their cellular and home telephone and answering or beeper service records for July 14, 2006 and July 15, 2006 and to identify the answering service or beeper service used by them on July 14, 2006 and July 15, 2006; or to compel said defendants to produce said records for an in camera inspection. The plaintiff had requested said records by Notice of Discovery and Inspection dated November 5, 2010 as well as by Amended Notices of Discovery and Inspection dated January 5, 2011.

The defendant physicians request protective orders contending that the plaintiff's demands are overly broad, involve irrelevant, private or privileged information, will not lead to meaningful discovery, and are not material and necessary for the prosecution of this action.

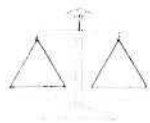
Here, the plaintiff is seeking said cellular and telephone records and beeper and answering service records to find support for her claims that the defendants had notice of, and communications concerning, Mr. Martel's fall and resultant injuries. She asserts that the disclosure is necessary following the defendants' unresponsive or vague deposition testimony. However, the plaintiff has not sufficiently demonstrated entitlement to such a broad discovery request with potentially confidential and privileged information, or for an in camera inspection of said records. Therefore, the plaintiff's motion to compel production of said records is denied, and the cross motions by the defendants Louis John Avvento, M.D., Alexander Zuhoski, M.D., Steven Paul Ouzounian, M.D. and Meciko Muharemovic, M.D. for a protective order are granted.

Dated: \_\_\_\_\_

11/23/11



PETER H. MAYER, J.S.C.

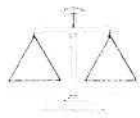


**INTEROFFICE MAIL**

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**FROM: CHERYL ZIMMER  
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County Court Building - 4th Floor  
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**DATE: November 18, 2011**



SUPREME/COUNTY COURT LAW DEPARTMENT  
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\* M E M O R A N D U M \*

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**TO:** Ray Voorhees  
**FROM:** *CZ* Cheryl Zimmer, Law Department  
**SUBJECT:** Martel v Southampton Hospital  
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**DATE:** November 18, 2011

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In accordance with your request, enclosed please find re-drafted decision in the above-reference matter.

If you have any further questions, please don't hesitate to contact either me or Esin Kulahcioglu, the court attorney who drafted the decision.

CZ/bh