

**Salentino v Villella**

2011 NY Slip Op 33353(U)

December 8, 2011

Supreme Court, Nassau County

Docket Number: 4372/11

Judge: Ute W. Lally

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 3

Present: HON. UTE WOLFF LALLY  
Justice

MD, MG, MD

TINA SALENTINO and MICHAEL SALENTINO,  
Plaintiffs,

Motion Sequence #1, #2, #3  
Submitted September 26, 2011

-against-

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JEANNINE A. VILLELLA, D.O., LONG ISLAND  
GYNECOLOGIC ONCOLOGISTS, P.C.,  
WINTHROP GYNECOLOGIC ONC ASSOCIATION,  
WINTHROP LONG ISLAND GYNECOLOGIC  
ONCOLOGY ASSOCIATES, MICHAEL E. KHALIFE,  
M.D., NASSAU SURGICAL ASSOCIATES, P.C.,  
WINTHROP-UNIVERSITY HOSPITAL ASSOCIATION,  
EDWARD A. JIMENEZ, D.O. and FRANCES E.  
CASEY, M.D.,

Defendant.

The following papers were read on this motion:

Notice of Motion and Affs.....	1-3
Notice of Cross-motion and Affs.....	4-7
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Upon the foregoing, it is ordered that this motion by plaintiffs, Tina Salentino and Michael Salentino, for an Order pursuant to CPLR 3124 compelling defendant, Winthrop-University Hospital, to produce for discovery, certain reports prepared in the regular course

of defendant's business pertaining to care and treatment of plaintiff, Tina Salentino, and for a further Order directing defendant to produce for discovery and inspection, the transcript and/or synopsis of any statements made by any of the individual defendants in connection with any Peer Review or similar proceedings regarding the care and treatment of the plaintiff, cross-motion by defendants, Frances E. Casey, M.D. and Winthrop University-Hospital Association ("Winthrop"), for an order pursuant to CPLR 3102, granting a protective Order precluding the discovery of quality assurance documents and a protective order striking plaintiff's demands for such documents and a cross-motion by defendants, Jeannine A. Vilella, D.O., Winthrop Long Island Gynecologic Oncologists, P.C., Winthrop Gynecologic Onc Association, Winthrop Long Island Gynecologic Oncology Associates, Michael E. Khalife, M.D., Nassau Surgical Associates, P.C., and Edward A. Jimenez, D.O. ("Vilella and et al defendants") for an Order pursuant to CPLR 3103, Education Law § 6527(3) and Public Health Law §2805 (l), precluding the discovery of quality assurance documents and striking plaintiff's demands for Discovery and Inspection and related documents are disposed of as follows:

The instant motion and cross motions emanate from an underlying malpractice action in which plaintiffs seek money damages as the result of the alleged negligent medical care of the various defendants rendered to plaintiff, Tina Salentino, which resulted in a perforated colon and deep vein thrombosis. Plaintiff's husband Michael Salentino asserts a derivative cause of action claiming the loss of his wife's services and society.

In May, 2011, plaintiffs served discovery demands upon all defendants, specifically requesting discovery and inspection of the entire medical record maintained by Winthrop pertaining to Tina Salentino's care and treatment and the inclusion of records maintained

outside the medical chart, which included documents denominated as an "Accident Report", "Incident Report", "Investigation Report", "Medication Event Report", "Peer Review Report", "Complication Report", and "Sentinel Event Report".

The defendants responded to the demands by issuing general objections which included but were not limited to: the scope of disclosure was beyond the scope of Article 31 of the CPLR; certain documents were protected by the attorney/client privilege, and the disclosure request was overly broad and plainly improper in that it sought privileged and confidential attorney/client communication pursuant to Education and Public Health Laws.

The plaintiffs then issued a request to Winthrop and Dr. Casey, by letter dated June 16, 2011, that, pursuant to CPLR 3122 (b), defendants cite the legal ground to support the withholding of the requested documents. Plaintiffs issued a similar letter to the Villella and the et al defendants in a letter dated August, 9, 2011. Winthrop and Dr. Casey responded by letter dated July 22, 2011 requesting clarification of certain issues while informing the plaintiffs that they have appropriately responded to their discovery requests. The Villella and et al defendants responded that not only have they already appropriately responded to certain discovery requests, they contend that such requests should be directed to Winthrop.

The plaintiffs contend that the defendants have failed to comply with the statutory requirements to invoke the discovery protection provided under Education Law and Public Health Law. Further, plaintiffs argue that the defendants are required to report the subject incident to the Department of Health and their failure to do so, precludes their ability to qualify for the aforementioned statutory protection. Plaintiffs submit the pleadings and

written correspondence between the parties, as evidence.

The defendants argue that they qualify for the statutory exemption under either statute and there is no requirement to comply with both Education Law §6527(3) and Public Health Law §2805-1. Winthrop and Dr. Casey, in addition to the pleadings, submit an affidavit from Winthrop's quality assurance officer. Villella and the et al defendants contend that discovery requests for documentation regarding quality assurance, should be directed to Winthrop.

Education Law § 6527(3) provides in pertinent part that:

"...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-1 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... 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..."

It is apparent that the Education Law § 6527(3) exempts three categories of documents from disclosure: records relating to medical review and quality assurance functions; records reflecting participation in a medical malpractice prevention program; and reports required by the Department of Health pursuant to Public Health Law § 2805- 1. In sum, the quality assurance privilege, contained therein, shields from disclosure certain records and reports generated by a hospital in performing either a medical malpractice or quality assurance review. (*Leardi v Lutheran Med. Ctr.*, 67 AD3d 651).

The purpose of the discovery exclusion is to “enhance the objectivity of the review process” and to assure that medical review committees analyze and assess the quality of health services rendered by hospitals. By guaranteeing confidentiality to quality review and malpractice prevention procedures, this provision is designed to encourage thorough and candid peer review of physicians, and thereby improve the quality of medical care (*Logue v Velez*, 92 NY2d 13 [1998] citing Mem. of Assembly Rules Comm., Bill Jacket, L. 1971, ch. 990, at 6).

In order to assert the privilege, a hospital is required, at a 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 (*Kivlehan v Waltner*, 36 AD3d 597). Defendants, Winthrop and Dr. Casey, through the affidavit of Monica Santoro, Chief Quality Officer at Winthrop, satisfied the foregoing by setting forth therein that when the event occurred giving rise to underlying action and instant motion, a quality improvement report was generated to review and evaluate the medical care given to patients. She further stated that a “Quality Improvement Report” and “Quality Improvement Program Minutes”, were an integral part of the critical review to improve medical care and treatment and such reports were prepared only for purposes of the quality review function.

As to plaintiffs’ reliance on *Marte v Brooklyn Hosp. Ctr.*, 9 AD3d 41, this Court has determined that their interpretation of that case and its application to the instant motion, is misplaced. Plaintiffs aver that the statutory provisions of Public Health Law § 2805-1 require that the defendants file a report of the subject incident with the Department of Health within a time certain. Their alleged failure to do so, precludes their right to the

discovery protection under the law.

The Court notes the following language of *Marte*:

“...A review of the affirmation in support of the Hospital's motion for a protective order and the attached documents does not reveal any statement by the Hospital that it actually prepared any committee review incident reports for the Department of Health as required under Public Health Law § 2805 / . The Hospital thus failed to establish its burden that any documents were prepared under Public Health Law § 2805- / and/or Education Law § 6527 (3)(emphasis added)...”.

The foregoing indicates that relief does not require compliance under both statutes. The plain language as set forth in the foregoing, indicates that the party must comply with either statute. Further, Courts have routinely granted such relief solely under Education Law (*Estate of Teta v Mercy Med. Ctr.*, 60 AD3d 624; *LaPierre v Jewish Bd. of Family & Children Servs., Inc.*, 47 AD3d 896). Additionally, there is absolutely no basis for the argument that the defendants are required to file a report in order to invoke the provisions of Education Law §6527(3). Whether the defendants are required to file such a report by law, is not at issue in the instant motion.

Finally, CPLR §3103(a) in pertinent part, provides that the court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts. Based on the foregoing, this Court determines that the protections under Education Law and Public Health Law were set in place for this essential purpose. Moreover, the Court has broad discretion in limiting or regulating the use of disclosure devices (see *Brignola v*

*PeiFei Lee, M.D., P.C.*, 192 AD2d 1008). As to Winthrop and Dr. Casey, their request for a protective order regarding the discovery of quality assurance documentation, pursuant to CPLR 3103, is granted.

Although Villella and et al defendants argue that the discovery requests in dispute, should be directed to Winthrop, it is noted that these defendants cross move to invoke the same protective statutory provisions as their co-defendants, Winthrop and Dr. Casey. Implicit in their cross motion is an acknowledgment that such requests could be made of them as individual physicians and practicing associates, as well as the defendant hospital.

As already stated herein, the proceedings and records of a medical review committee are not subject to discovery when such committee is performing any medical or quality assurance review function; however, statements 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 (see *D'Angelis v Buffalo Gen. Hosp.*, 2 AD3d1477). Here, the record is devoid of sufficient evidence to support the context under which documents were prepared and/or statements were made by these defendants, if any (*Fray v Fulton Commons Care Center, Inc.*, 51 AD3d 968).

Accordingly, their cross-motion is denied with leave to renew upon proper papers since it would be improper to grant the plaintiff's motion for an order to compel discovery at this time. Upon renewal, Villella and et al defendants shall submit evidence for this Court to consider as to whether they are protected from the requested discovery demands under the relevant Education Law and Public Health provisions. If they fail to submit such evidence or if the same is insufficient, then this Court will compel these defendants to

comply with the discovery demands as requested.

As to defendants, Winthrop and Dr. Casey, the cross motion is granted in its entirety and plaintiffs' motion as to these defendants is denied.

Dated: **DEC 08** 2011

  
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UTE WOLFF LALLY, J.S.C.

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**ENTERED**  
**DEC 12 2011**  
**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**

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