SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 105575/2007
MCKENZIE, NERVELIA
VS.
TERENCE CARDINAL COOKE HEALTH
SEQUENCE NUMBER : 004
QUASH SUBPOENA, FIX CONDITIONS

INDEX NO. _____
MOTION DATE 3/15/11
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that defendant's motion pursuant to CPLR 2304 to quash a subpoena served upon Mattie Smith, R.N., and for a protective order pursuant to CPLR 2304 and 3103 with respect to Smith's deposition, is granted. And it is further

ORDERED that plaintiff's cross-motion to strike defendant's Answer or compel defendant to produce witness statements of the accident investigation, plus costs and sanctions is denied.

This constitutes the decision and order of the Court.

Dated: 4/25/11

HON. CAROL EDMEAD J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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RUTH MILLS, as Administratrix of the Estate of NERVELLA MCKENZIE, deceased,

Index No. 105575/2007

Plaintiff,

-against-

TERENCE CARDINAL COOKE HEALTH CARE CENTER,

Defendant.

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HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

In this negligence action, defendant Terence Cardinal Cooke Health Care Center ("defendant") moves pursuant to CPLR 2304 to quash a subpoena served upon defendant's former Quality Improvement Nurse, Mattie Smith, R.N. ("Smith"), and for a protective order pursuant to CPLR 2304 and 3103 with respect to Smith's deposition.

Factual Background

Ruth Mills ("plaintiff") commenced this action as guardian of the decedent, Nervelia McKenzie ("McKenzie") for personal injuries McKenzie sustained while a resident at defendant Terence Cardinal Cooke Health Care Center from July 25, 2001 through December 6, 2005. Plaintiff alleges that defendant violated various sections of the Public Health Law from January 1, 2004 to December 6, 2005, by, *inter alia*, negligently causing McKenzie to sustain unexplained leg fractures and failing to prevent and treat her ulcers (Bill of Particulars, ¶¶3, 10, 18), which allegedly led to her death.

Pursuant to a June 22, 2010 compliance conference order, defendant provided plaintiff with Smith's last known address, advising that Smith had conducted the investigation into

McKenzie's leg injuries.

Thereafter, defendant served a judicial subpoena dated November 24, 2010 upon Smith for her deposition and served notice of the such deposition upon defendant. It is noted that the subpoena served on Smith did not include a demand upon her to produce any documents (Motion, Exh. J).

Defendant now moves to quash the deposition subpoena and for a protective order as to such deposition. Defendant argues that a protective order pursuant to CPLR §3103 against plaintiff taking Smith's deposition is warranted as plaintiff s judicial subpoena is facially defective, because it neither contained, nor was accompanied by a notice setting forth the reason why such disclosure was sought as required pursuant to CPLR 3101(a)(4).

In any event, argues defendant, plaintiff cannot establish special circumstances to warrant Smith's deposition, which is established by showing that the information sought cannot be obtained from other sources. Plaintiff has a copy of the Department of Health's report regarding the agency's investigation into the incident. The Department of Health conducted its own investigation, and would have been privy to the results of the defendant's quality assurance internal investigation. Thus, plaintiff cannot claim that the information sought from Smith is not obtainable from any other source.

Plaintiff's only reason for seeking Smith's deposition is to obtain information regarding the internal investigation she conducted as part of her quality assurance duties and mandatory reporting to the NYS Department of Health, which, is shielded from disclosure under federal and state law pursuant to 42 U.S.C.S. § 1395i-3(b)(1)(B)(ii), Education Law §6527(3) and NYPHL §2803-d(6)(e), which protects from disclosure those records created or generated for quality

assurance purposes. The sole purpose of her investigations into accidents and incidents was to identify any deficiencies in care, which would then be discussed only at the Quality Improvement Committee meetings, in order to devise a plan of correction and to prevent any future recurrence. Requiring Smith to testify about her subsequent investigation and action would be in contravention of that which the above statutes and public policy seeks to avoid, namely, the facility being penalized for encouraging the review of errors or shortcomings by having records relating to the quality review function used by the plaintiff to demonstrate the facility's liability in a negligence action. Since the information plaintiff seeks to obtain from Smith is protected by statute, plaintiff is not entitled to it despite any showing of special circumstances.

Since Smith conducted the internal investigation, her deposition will reveal the circumstances surrounding the decedent's injuries. That plaintiff does not have a theory as to the cause of the decedent's leg injuries does not entitle plaintiff to disclosure of testimony and materials which are protected by statute.

Defendant further argues that given that Smith was not an observer or participant with respect to the decedent's leg injuries, and that any knowledge she may possess came from a second-hand source and after the fact due to her internal investigation into the incident, Smith has no first hand knowledge of the incident, and thus, plaintiff cannot show that Smith would provide testimony that is unavailable from other sources. Plaintiff has already had a full and complete opportunity to inquire as to the events that transpired on the date of the incident from the witnesses who were present, including C.N.A. Sonia Oates and C.N.A. Simone John. According to her deposition, Ms. Oates was the certified nurse's aide who discovered the

resident's leg injuries on September 7, 2005, and immediately reported it to the nurse in charge. Plaintiff deposed defendant's employee, Simone John, the certified nurse's aide who was assigned to the decedent on the shift prior to Ms. Oates. Plaintiff also deposed the defendant's supervising administrator, Peter Karow, about his involvement in reporting the decedent's injuries to the Department of Health in September 2005. Smith's name was not mentioned by any of the employees who were deposed as a fact witness to the incident involving the decedent or contained in the decedent's nursing home record as a staff member who rendered any care or treatment to the decedent during her residency. Smith's sole involvement was limited to conducting the internal investigation into the decedent's bilateral leg injuries at the direction of the quality improvement team and within her role as the quality improvement nurse. Therefore, the plaintiff s basis for seeking the deposition of Smith is improper, as any documents and testimony concerning the nursing home's quality review process is privileged by state and federal laws.

Plaintiff opposes defendant's motion, and cross moves to strike defendant's Answer or compel defendant to produce witness statements of the accident investigation, plus costs and sanctions.

Plaintiff contends that courts have allowed plaintiffs to obtain personnel records, negative outcome incident reports even if the accident did not involve the plaintiff, and other discovery to show an overall neglect of the entire facility. Defendant's argument based on the quality assurance privilege was struck down by the First Department where the document demanded was not kept for quality assurance purposes only. The witness statements were taken to discover what occurred as required by law, not quality assurance. The Department of Health issued a

letter, dated October 20, 2005, mandating that witness statements be taken when there is an injury of unknown origin. Defendant concedes that the administrator reported this incident to the Department of Health because of the suspicion of abuse and/or neglect, and the administrator was obligated to report the incident pursuant to the Department of Health mandates. The Department of Health requires and describes how nursing homes are to investigate injuries of unknown origin, and the investigation must be reported to the administrator, who in turn must report the incident to the Department of Heath. Thus, the witness statements were not kept or taken for the sole purpose of quality assurance.

Smith's job duties, including investigating injuries of unknown origin, are required to be done by the Department of Health, and thus, were performed to satisfy the Department of Health's requirements. Defendant cannot hide Smith's investigation and statements generated within that investigation by having the quality assurance committee review the investigation. The statements at issue and investigation would have been done even if defendant did not have a quality assurance committee.

Nor has defendant produced an accident report as required to be generated pursuant to 10 NYCRR 415.30(f), even though such document is not a quality assurance document.

Plaintiff is entitled to the witness statements as they are not quality assurance documents. Further, the Court previously ordered that Smith be deposed, and under the doctrine of the law of the case, Smith must be deposed. When defendant signed the "consent order" (Exhibit 9) to allow the person who led the investigation (*i.e.*, Smith) to be deposed, the privilege was waived. Defendant did not move for a protective order within 20 days of the court order. And, Smith never so moved. Nor did Smith move for a protective order sought within 20 days from service

of the subpoena. The only fact that changed was that Smith is no longer employed by defendant, and if Smith was still employed, defendant would be required to produce her.

Further, plaintiff argues that defendant cites uncontrolling caselaw, rejected by the First Department to support his position.

Finally, defendant cannot claim that subpoena is facially defective because defendant lacks standing to make such an argument. Smith herself has not moved within 20 days for a protective order on this ground, and waived her right to do so. In any event, First Department caselaw permits a party to establish in opposition papers the need for disclosure in order to defeat a motion to quash on the ground that it does not state the reasons for the disclosure in the subpoena. Plaintiff contends that he needs the deposition of Smith since she conducted the investigation as to what caused McKenzie's fractures, and defendant's chart is silent on what occurred. Nor does the First Department require special circumstances. Plaintiff need only show relevance, and Smith's deposition may reveal what documents were generated. And, the burden rests on defendant and Smith to show that the information sought is irrelevant, which they have failed to show. The Department of Health's report included staff interviews, employee witness statements, a record review and root cause analysis. Such statements stem from Smith's investigation, which defendant seeks to shield from discovery. Plaintiff contends that the Department of Health and medical director agree that the use of the Hoyer lift (used to transfer immobile residents) was likely involved at the time of the accident causing fractures to McKenzie's legs. However, no document in McKenzie's chart and no discovery exchanged mentions this, but are silent on how the Department of Health and defendant's medical director concluded that the Hoyer lift caused the fractures.

And, defendant should be sanctioned for failing to comply with all discovery orders and demands. The Court's order directed defendant to produce for a deposition the person who conducted the accident investigation. Plaintiff requests the deposition of Smith to not only identify witnesses to the accident, but to also show how the accident occurred. Defendant failed to provide plaintiff with the names of the people who gave statements and the statements that would let plaintiff know of potential witnesses to depose. Such failure has delayed discovery, and the Court warned that costs could be levied on the party who lost a motion for disclosure if it was clear one side was correct. Defendant has made frivolous claims of privilege, relying on uncontrolling Second Department caselaw, and plaintiff is required to file the note of issue. Plaintiff has moved to extend the time to file the note of issue, which created for delay and expense to the plaintiff. Thus, the Court should award costs and sanctions to the plaintiff.

In reply, defendant argues that the cross-motion to compel and for sanctions is unwarranted, as defendant has complied with all required demands and orders and has asserted a good faith basis to withhold privileged discovery, such as witness statements and Smith's deposition, over which defendant has no control. Further, certain items requested at the close of the deposition of Peter Karow (defendant's administrator) was not followed by a written demand.

Further, defendant adds that it has standing to challenge the subpoena since Smith agreed to be represented by defendant's counsel, defendant's motion was timely, the First Department has applied the "special circumstances" requirement.

Discussion

Defendant's motion to quash the subpoena pursuant to CPLR 3103 and 2304 is granted.

Pursuant to CPLR 2304, governing motions to quash a subpoena, "A motion to quash, fix

conditions or modify a subpoena shall be made promptly in the court in which the subpoena is returnable." Thus, there is no express time limit within which a motion to quash a subpoena must be made.[1]

"CPLR 3103 provides for a protective order that can be used to limit, condition or regulate the disclosure device used" (*Velez v Hunts Point Multi-Service Ctr., Inc.*, 29 AD3d 104, 110, 811 NYS2d 5 [1st Dept 2006]). The party seeking to quash the subpoena bears the burden of showing the entitlement to the protection it seeks (*id.* at 112; *148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486, 878 NYS2d 727 [1st Dept 2009] ("The burden of establishing any right to protection is on the party asserting it")).

Defendant's motion to quash premised on the failure to the subpoena to state the circumstances for which disclosure is sought pursuant to CPLR 3101(a)(4) is denied. CPLR 3101(a)(4) provides for "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by . . . any other person, upon notice stating the circumstances or reasons such disclosure is sought or required." While this section requires that a subpoena state the circumstances for which disclosure is sought, the failure to so state is not fatal to a subpoena, the lack of such notice is not fatal and may be remedied by the showing of circumstances and reasons made in response to a motion to quash the subpoena (*see Velez v Hunts Point Multi-Service Ctr., Inc.*, 29 AD3d 104, 110, 811 NYS2d 5 [1st Dept 2006]).

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[1] Such a motion may be made by the non-party witness, the non-party witness's lawyer, a party, or a party's lawyer *(see McDaid v Semegran*, 2007 WL 1746877 (Sup. Ct., Nassau County 2007) ("[a] 'motion to quash may be made on behalf of a non-party witness by the witness or the witness' lawyer, or by one of the parties or a party's lawyer'")). Further, defendant's reply papers indicate defendant moved to quash the subpoena on December 17, 2009, immediately after Smith contacted defendant regarding the subpoena and consented to representation by defendant's counsel. The subpoena was returnable on January 6, 2011. Therefore, the motion to quash was promptly made.

In *Velez*, the Court held that, "although the better practice, indeed the mandatory requirement of CPLR 3101(a)(4), is to include the requisite notice on the face of the subpoena or in a notice accompanying it, given the evidence presented by [the party] in opposition, the motions to quash the subpoenas should have been denied" (*id.* at 111). Thus, defendant's failure to include in the subpoena the reasons such disclosure is sought, in and of itself, does not warrant quashing of the subpoena.

Defendant's next basis to quash the subpoena based on plaintiff's alleged failure to establish special circumstances to warrant Smith's deposition, *i.e.*, that the information sought cannot be obtained from other sources, is likewise unwarranted. Under First Department caselaw, the party seeking disclosure from a non party must show special circumstances *or* that the information sought is relevant and could not be obtained from other sources (*see Tannenbaum v City of New York*, 30 AD3d 357, 819 NYS2d 4 [1st Dept 2006]; *see also, Reich v Reich*, 36 AD3d 506, 830 NYS2d 29 [1st Dept 2007] (quashing defendant's nonparty subpoena where "Defendant has not shown that the information sought from [the nonparty] is not obtainable from other sources")).[2] Thus, as the movant, defendant must show that the subpoena is unsupported by any special circumstances and that the information sought is utterly irrelevant and may be obtained from other sources, which defendant failed to so establish. Instead, plaintiff has shown that the deposition testimony of Smith is both relevant and unobtainable from other sources. The record indicates that defendant's records of McKenzie's chart is silent as to how

[2] Plaintiff's reliance on *Velez* for the proposition that special circumstances need not be shown to support a non party subpoena is misplaced. The First Department noted that the party which served the subpoena "articulated *the need for the discovery sought* and that "the majority of the items sought are relevant to the defense of the litigation herein" (emphasis added).

her fractures occurred and there are no disclosed witnesses to the alleged incident. Further, the Department of Health records indicate that Smith's investigative report contains such information. The Department of Health report is inconclusive as to the manner in which the accident occurred.

That Smith was not an eyewitness to the alleged injuries does not render her testimony irrelevant, as such testimony may lead to relevant evidence (*Fell v Presbyterian Hosp.*, 98 AD2d 624, 469 NYS2d 375 [1st Dept 1983]("pretrial disclosure extends not only to admissible proof but also to testimony or documents which may lead to the disclosure of admissible proof")). Further, that plaintiff deposed three of defendant's employees, two of which were McKenzie's direct caregivers, does not render Smith's deposition irrelevant or unnecessary, since such depositions fail to yield evidence as to how the injuries occurred.

However, plaintiff's basis to quash the subpoena based on the quality assurance privilege found in 42 U.S.C.S. § 1395i-3(b)(1)(B)(ii), Education Law §6527(3) and Public Health Law §2803-d(6)(e)[3] to shield Smith's testimony from disclosure is warranted under 42 U.S.C.S. § 1395i-3(b)(1)(B)(ii) and Education Law.

Under the Federal Nursing Home Reform Act (42 NYS 1395 i-3[b][1][B]), nursing

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[3] Public Health Law §2803-d(6)(e) also provides that "Except as hereinafter provided, any report [by a nurse, a nursing home employee, or employee of a residential health care facility], record of the investigation of such report and all other information related to such report shall be confidential and shall be exempt from disclosure under article six of the public officers law." There appears to be no caselaw applying Public Health Law §2803-d(6)(e) to the issues raised herein, except that in *Marten v Eden Park Health Services Inc.* (250 AD2d 44, 680 NYS2d 750 [3d Dept 1998]), where the Third Department stated, in a whistle blower case, "that nothing in Public Health Law § 2803-d(6)(e) bars pretrial discovery." (*See also Barcelar v Pan*, 12 Misc 3d 1162, 819 NYS2d 208 [Supreme Court, Westchester County] [stating the general principle that a party asserting immunity or a privilege "bears the burden of establishing that the information sought is immune from disclosure," . . . " by showing that the requested material is privileged . . . or protected under Public Health Law § 2803-d(6)(e) or some other statute or regulation which provides confidentiality)).

facilities accepting Medicare or Medicaid funding "must maintain a quality assessment and assurance committee . . . which (i) meets at least quarterly to identify issues with respect to which quality assessment and assurance activities are necessary and (ii) develops and implements appropriate plans of action to correct identified quality deficiencies. A State or the Secretary may not require disclosure of such records of such committee except insofar as such disclosure is related to the compliance of such committee with the requirements of this subparagraph."

Similarly, Education Law § 6527(3) provides that "Neither the proceedings *nor the records relating to . . . 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 [Public Health Law § 2805-1][4] 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" (emphasis added); *Megrelishvili v Our Lady of Mercy Medical Ctr.*, 291 AD2d 18, 739 NYS2d 2 [1st Dept 2002] (stating "Education Law § 6527 (3) exempts from disclosure 'records relating to performance of a medical or a quality assurance review function'")). Education Law §6527(3) applies to nursing home facilities where the disclosure is sought pursuant to Article 3 of the CPLR.[5]

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[4] Section 2805-l of the Public Health Law, entitled "Incident reporting," provides that
All hospitals, as defined in subdivision ten of section twenty-eight hundred one of this article, shall be required to report incidents described by subdivision two of this section to the department in a manner and within time periods as may be specified by regulation of the department" Subdivision 10 entitled "General Hospital" "shall not include a residential health care."

Further, it has been held that Section 2805-l does not apply to nursing facilities" *(Hale v Odd Fellow & Rebekah Health Care Facility*, 188 Misc 2d 498, 728 NYS2d 649 [Supreme Court, Niagara County 2001] citing *Matter of Grand Jury Subpoena [People--New York City Health & Hosps. Corp.]*, 272 AD2d 214 [1st Dept 2000]).

[5] See *Matter of Subpoena Duces Tecum*, 293 AD2d 231, 233 [4th Dept 2002] (agreeing that section 6527 (3) applies to nursing home facilities to the extent disclosure is sought pursuant to CPLR article 31)); *see also Hale v Odd Fellow, et al. (supra)* (stating that information contained in the minutes of the regular meetings of the quality

The purpose of quality assurance committees in nursing homes is "to ensure the proper delivery of services and the maintenance and improvement in quality of care" (*In re Subpoena Duces Tecum to Jane Doe, Esq.*, 99 NY2d 434, 757 NYS2d 507 [2003]). The State Education Law privilege which attaches to the proceedings and work product of hospital quality assurance committees "promote[s] the quality of care through self-review without fear of legal reprisal" (*id. citing Katherine F. v State of New York*, 94 NY2d 200, 205 [1999] [discussing Education Law § 6527 (3)]). Such protections "'enhance the objectivity of the review process'" and "ensure that the committees 'may frankly and objectively analyze the quality of health services rendered'" (*In re Subpoena Duces Tecum to Jane Doe, Esq., citing Logue v Velez*, 92 NY2d 13, 17 [1998]).

Defendant has established that the documents generated as a result of Smith's investigation were conducted at the behest of the Quality Assurance Committee concerning the nursing home's quality review process and as such, are privileged.

Nursing homes are required to establish and maintain a quality assurance program pursuant to 10 NYCRR 415.27. 10 NYCRR 415.27 provides that nursing homes/residential care facilities "shall establish and maintain a coordinated quality assessment and assurance program which integrates the review activities of all nursing home programs and services to enhance the quality of life and resident care and treatment." Further, nursing homes/residential care facilities are required to "maintain a quality assessment and assurance committee . . . ." (415.27(b)). Pursuant to 10 NYCRR 415.27(c)(3)(ii), the committee must "define methods for identification

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footnote 5 contd.

assurance committee of the defendant facility in which the decedent resided appears to be privileged under Education Law § 6527 (3). Section 6527(3) applies to "the evaluation and improvement of the quality of care rendered in a hospital as defined in article twenty-eight of the public health law." The definition of a "hospital" under NYPHL § 2801(1) specifically includes nursing homes")).

and selection of clinical and administrative problems to be reviewed" with such process including "regularly scheduled reviews of clinical records, resident complaints and suggestions, reported incidents and other documents pertinent to problem identification; . . . ."

Here, Smith attests that she was a Quality Improvement Nurse and a member of defendant's Quality Improvement Team. As the Quality Improvement Nurse, Smith was required by the defendant's Quality Improvement Committee to investigate and follow up on all incidents and accidents within the facility involving the quality of care given to the residents. The sole purpose of her investigations into accidents and incidents was to identify any deficiencies in care, which would then be discussed only at the Quality Improvement Committee meetings, in order to devise a plan of correction and to prevent any future recurrence. Any suspicion of abuse, neglect or mistreatment and any injury of unknown origin were to be mandatorily reported the Department of Health. Smith investigated McKenzie's leg injuries in her capacity as the Quality Improvement Nurse and at the direction of defendant's Quality Improvement team, for the sole purpose of identifying any quality of care issues which needed to be addressed and corrected by the Quality Improvement Committee, to prevent future recurrence. After her investigation was completed, she shared the results of her investigation, including any reports and documents she created, with the members of the Quality Improvement Committee only, during the Quality Improvement meeting. The purpose of that meeting was to address any quality of care issues that were identified during the investigation and to devise a plan of corrective action, if necessary, to prevent recurrence.

Based on her affidavit, defendant has established that Smith's investigation (including her resulting documents and testimony of such investigation), was performed by and at the

behest of the Quality Improvement Committee, and thus, is protected from disclosure (*see e.g.*, *Bielewicz v Maplewood Nursing Home, Inc.*, 4 Misc 3d 475, 778 NYS2d 666 [Supreme Court, Monroe County 2004] (holding that reports and documents prepared by nursing home quality assurance committee were privileged under Federal Nursing Home Reform Act and Public Health Law); *cf. In re Subpoena Duces Tecum to Jane Doe, Esq.*, 293 AD2d 231, 742 NYS2d 465 [4th Dept 2002] ("Although the federal privilege extends to petitioner because under federal law nursing home facilities are required to maintain quality assessment and assurance committees . . . records sought . . . do not fall within the scope of the federal privilege. The privilege is 'exceedingly narrow' and 'protects the committee's own records-its minutes or internal working papers or statements of conclusions-from discovery'; and that it does not extend to 'records and materials generated or created outside the committee and submitted to the committee for its review'"), *affd as modified*, 99 NY2d 434, 441 [2003] (expanding the privilege based on a reading of the language "records of such committee" (42 USC § 1396 [b][1][B][ii]) as encompassing within its parameters any reports generated by or at the behest of a quality assurance committee for quality assurance purposes")).

Plaintiff's reliance on *Simmons v Northern Manhattan Nursing Home, Inc.* is misplaced, as the Court therein expressly denied plaintiff's demand for "all Quality Assessment and Assurance Committee reports prepared in accordance with 10 NYCRR 415.27(c)(6) relating to the types and conditions and *occurrences* alleged in the complaint" as "such reports are statutorily immune from disclosure" (52 AD3d 351, 352, 860 NYS2d 512 [1st Dept 2008]). *Clement v Kateri Residence*, on which plaintiff also relies for disclosure, does not support plaintiff's request. In *Clement*, plaintiff's demand for negative outcome and incident reports

involving conditions and occurrences like those alleged in the complaint were not protected by the quality assurance privilege, since such reports, although utilized by defendant's quality assurance committee, *were not prepared by or at the behest of such committee, but rather were of the type routinely prepared and maintained pursuant to 10 NYCRR 415.15 (a) (3) (i)*[6] (60 AD3d 527, 875 NYS2d 66 [1st Dept 2009]). Here, Smith attests that she investigated McKenzie's leg injuries in her capacity as Quality Improvement Nurse *and at the direction of the Committee* (¶¶ 7,8), and at the close of her investigation, the results of her investigation was discussed at a Quality Improvement Committee meeting to devise a plan of corrective action, if needed, to prevent recurrence. Smith reiterated that all the records she generated and all the information she obtained during her investigation were done "at the behest" of defendant's Quality Improvement Committee (¶ 9). The Court notes that the incident report involving McKenzie was exchanged.

Since Smith's investigation was performed under the direction and behest of defendant's quality assurance committee, by a quality assurance committee member, and the incident was reported to the Department of Health for suspected abuse, neglect and mistreatment, plaintiff is precluded from obtaining the deposition of Smith (*see also, Smith v Delgado,* 2 AD3d 1259, 770 NYS2d 445 [3d Dept 2003] (stating that documents made available to DOH were privileged

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[6] Section 415.15(a)(3)(i) provides that the medical director shall be responsible for:

(3) coordinating the review, prior to granting or renewing professional privileges or association, of any physician, dentist or podiatrist as required by Public Health Law, section 2805-j. . . . Such review shall be coordinated with the activities of the Quality Assessment and Assurance Committee established in section 415.27 of this Part and shall:

(i) provide for the maintenance and continuous collection of information concerning the facility's experience with negative health care outcomes and incidents injurious to residents . . . .

where they were generated from interviews in furtherance of its internal quality assurance review obligations)).

And, the law of the case doctrine does not preclude this Court from denying plaintiff's request to depose Smith based on the Court's previous order directing the deposition of the person who conducted the investigation. "[E]very court retains continuing jurisdiction to reconsider its [own] prior interlocutory orders during the pendency of the action" *(Kleinser v Astarita*, 61 AD3d 597, 878 NYS2d 28 [1st Dept 2009] (stating, "even if plaintiff's motion for leave to add the four partners were a belated motion to reargue the prior order dismissing the action as against those partners for failure to state a cause of action, the court had discretion to reconsider its prior order, sua sponte, and correct it")).

Further, in light of the merit of defendant's assertion of privilege discussed above, plaintiff's cross-motion to strike defendant's Answer or compel defendant to produce witness statements of the accident investigation, plus costs and sanctions is unwarranted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendant's motion pursuant to CPLR 2304 to quash a subpoena served upon Mattie Smith, R.N., and for a protective order pursuant to CPLR 2304 and 3103 with respect to Smith's deposition, is granted. And it is further

ORDERED that plaintiff's cross-motion to strike defendant's Answer or compel defendant to produce witness statements of the accident investigation, plus costs and sanctions is denied.

This constitutes the decision and order of the Court.

Dated: April 25, 2011

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD