

Jousma v Kolli
2015 NY Slip Op 32913(U)
September 8, 2015
Supreme Court, Niagara County
Docket Number: 148417
Judge: Ralph A. Boniello III
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Court/County: _____

Case Title: _____

Docket Number: 148417/12Judge: Ralph A. Boniello, III

EXPERT(s): _____

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF NIAGARA

**THOMAS P. JOUSMA and
ELLENE PHUFAS-JOUSMA**

Plaintiffs,

vs.

Index No. 148417

**DR. VENKATESWARA R. KOLLI and
KALEIDA HEALTH d/b/a DEGRAFF
MEMORIAL HOSPITAL**

Defendants.

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DECISION & ORDER / BONIELLO



Wayne F. Jagow, Niagara County Clerk

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Clerk: DS

DECISION & ORDER**Boniello, III, J.**

By Notice of Motion, the Plaintiffs, Thomas P. Jousma and Ellene Phufas-Jousma, seek an Order compelling the Defendants, Dr. Venkateswara R. Kolli (hereinafter, "Kolli") and Kaleida Health d/b/a DeGraff Memorial Hospital (hereinafter, "Kaleida Health"), to comply with Plaintiffs' March 10, 2015 Notice to Produce and granting permission to depose Defendant Kolli regarding all previously undisclosed information which is opposed by Defendants. Further, Defendant Kaleida Health has cross moved seeking a protective order precluding the examination before trial of Kaleida Health's representative, Patricia L. Vorpahl, Vice President of Physician Services and Medical Staff office previously noticed by Plaintiffs.

It is well settled that rights of discovery are broadly construed under our civil procedure as the purpose of disclosure procedures is to advance the function of a trial to ascertain truth and to accelerate the disposition of actions (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]). However, documents generated in connection with the "performance of a medical or a quality assurance review function" are not subject to disclosure (*see*, Education Law § 6527 [3]; Public Health Law § 2805-m; *Powers v Faxon Hosp.*, 23 AD3d 1105 [4th Dept 2005]). Such rule does not apply to statements of a doctor made before a peer review board or for quality assurance evaluation when they relate to the subject matter of litigation (*D'Angelis v Buffalo Gen. Hosp.*, 2 AD3d 1477 [4th Dept 2003]).

From a reading of the papers, the Court cannot determine whether the material demanded is subject to discovery. Specifically, it is unclear whether certain documents may have been simply placed in a quality assurance file. In such case, those documents would not be privileged

from disclosure under Education Law § 6527 (3) and Public Health Law § 2805-m (*Park Assocs. v N.Y. State Ag*, 99 NY2d 434 [2003]; *Matter of Coniber v United Mem. Med. Ctr.*, 81 AD3d 1329 [4th Dept 2011]; *Grieco v Kaleida Health*, 79 AD3d 1764 [4th Dept 2010]; *Heitman v Mango*, 237 AD2d 330 [2nd Dept 1997]). The documents must have been “prepared by or at the behest” of a quality assurance committee rather than simply prepared and maintained pursuant to regulation to be entitled to statutory privileges (*Park Assocs. v N.Y. State Ag*, *supra*; *Clement v Kateri Residence*, 60 AD3d 527 [1st Dept 2009]; *Aldridge v Brodman*, 49 AD3d 1192 [4th Dept 2008]; *Little v Hicks*, 236 AD2d 794 [4th Dept 1997]).

The law is clear that where the Court cannot determine from the record whether the disputed documents are subject to discovery, the appropriate action to take is for the Court to direct that the documents along with a privilege log be produced for an *in camera* inspection to determine whether such material is protected by statutory privileges (*see, Slayton v Kolli*, 111 AD3d 1314 [4th Dept 2013]; *Andolina-Stovcsik v Conesus Lake Nursing Home, LLC*, 105 AD3d 1377 [4th Dept 2013]; *Szmania v State of New York*, 82 AD3d 1688 [4th Dept 2011]; *Learned v Faxton-St. Luke's Healthcare*, 70 AD3d 1398 [4th Dept 2010]).

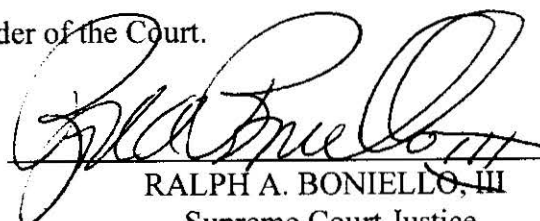
Defendant Kaleida Health’s request for a protective order precluding the deposition of Kaleida Health’s representative, Patricia L. Vorpahl, Vice President of Physician Services and Medical Staff office is granted, in part. Specifically, Ms. Vorpahl cannot be questioned regarding matters involving the hospital’s quality assurance and credentials files (*see, Scinta v Van Coevering*, 284 AD2d 1000 [4th Dept 2001]). However, information regarding prior incidents of negligence by Defendant Kolli, the hospital staff’s knowledge of those incidents and whether the hospital took any action to limit the duties of Dr. Kolli are relevant and discoverable (*see, Bryant*

by *Bryant v Bui*, 265 AD2d 848 [4th Dept 1999]; *Byork v Carmer*, 109 AD2d 1087 [4th Dept 1985]).

Accordingly, the Court directs that the documents along with a privilege log be produced for an *in camera* inspection; the deposition of Patricia L. Vorpahl shall be conducted in accordance with this decision; and the Plaintiff's request for a further deposition of Dr. Kolli will be deferred until after the *in camera* review of the documents is completed.

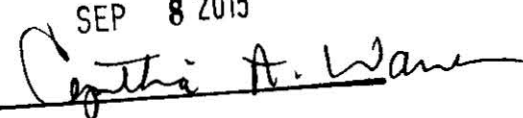
The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

This Decision shall constitute the Order of the Court.


RALPH A. BONIELLO, III
Supreme Court Justice

Dated: September 8, 2015
Niagara Falls, New York

GRANTED

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