

<b>Whitehead v Kaleida Health</b>
2015 NY Slip Op 32997(U)
May 11, 2015
Supreme Court, Niagara County
Docket Number: Index No. E-155019/2015
Judge: Sara Sheldon
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF NIAGARA

---

GREGORY WHITEHEAD AND AMANDA WHITEHEAD,  
INDIVIDUALLY AND AS ADMINISTRATORS OF THE  
ESTATE OF AVA WHITEHEAD,

Plaintiffs,

DECISION AND ORDER

v.

Index No. E-155019/2015

KALEIDA HEALTH, WOMEN & CHILDREN'S  
HOSPITAL OF BUFFALO, ASHLEY N. FALCO, M.D.,  
JOSETTE A TEUSCHER, M.D., UNIVERSITY AT  
BUFFALO PEDIATRIC ASSOCIATES, INC., KIDZ  
XPRESS NP PEDIATRICS AFTER HOUR, P.C.,  
WHEATFIELD PEDIATRICS, LLP,  
DOUGLAS SCHULTZ, M.D., LISA REICHERT, M.D.,  
PEDIATRIC & ADOLESCENT URGENT CARE OF  
WESTERN NEW YORK, PLLC.,  
SUSAN WEIPERT, M.D., KATHLEEN LILLIS, M.D.,  
QUEST DIAGNOSTICS INCORPORATED,  
CATHOLIC HEALTH SYSTEMS, INC. AND  
TWIN CITY AMBULANCE CORP.

Defendants.

---

SHELDON, J.

Plaintiffs, Amanda and Gregory Whitehead, individually and as Administrators of the Estate of Ava Whitehead (hereinafter referred to as Plaintiffs) brought a Motion to Compel, through their attorneys Brown Chiari, LLP (Michelle A. Braun, Esq. of Counsel), Defendants

Kaleida Health and Women and Children's Hospital of Buffalo (hereinafter the "Defendants") to provide additional responses to Plaintiff's Notice to Produce. Specifically, the Plaintiffs seek to compel the Defendants to produce all documents utilized by the Defendants in the medical peer review of Plaintiff Ava Whitehead's case as well as the complete file of the Defendants' relating thereto. Additionally, Plaintiffs seek the production of the "Sepsis Protocols" created by the Defendants from February 3, 2013 up to and including the present date. Further, the Plaintiffs demand the User Log, Audit Trail Electronic Medical Records of the Defendants for the same time period.

Defendants, through their attorneys Connors LLP (Mollie McGorry, Esq. of Counsel), oppose the production of any documents utilized in the peer review of Plaintiff Ava Whitehead's case as being privileged under New York Public Health Law §§ 2805-1 and 2805-m and New York Education Law § 6527. Defendants further assert that the demand for the production of protocols for fever and sepsis are irrelevant as they were created after the alleged claimed malpractice, and that Plaintiff has not demonstrated good cause for the production of the user logs, audit trail and electronic medical record data demanded, and that such information is not relevant or material to the claims made by Plaintiffs.

This Court has received and reviewed the Notice of Motion of Plaintiffs dated May 2, 2018; the Attorney Affirmation in support of Plaintiffs' Motion to Compel of Michelle Braun, Esq. with attached exhibits dated May 2, 2018; the Affidavit in Opposition to Plaintiffs' Motion to Compel on behalf of Defendants Kaleida Health, Women & Children's Hospital of Buffalo and Ashley N. Falco, M.D. by Mollie McGorry, Esq. and attached exhibits dated May 17, 2018; and the Reply Affirmation on behalf of Plaintiffs by Michelle Braun, Esq. and attached Exhibits

dated June 8, 2018.

The Motion was argued before the Court on June 14, 2018, with Plaintiffs appearing by Brown Chiari, LLP (Michelle A. Braun, Esq. of Counsel) and Defendants having appeared by their attorneys Connors LLP (Mollie McGorry, Esq. of Counsel) and this Court having reserved judgment on the issues.

Now, after due deliberation and consideration of all papers submitted and the arguments of counsel, this Court does hereby DENY the Plaintiffs' Motion in part and does GRANT Plaintiffs' motion in part.

The fact that this Court had ruled previously that the Plaintiffs waived any privilege attached to notes created in anticipation of litigation by publishing them at the Defendants' peer review of Plaintiffs' case is not dispositive on the issue of the Defendants' asserted privilege regarding the peer review notes and file. New York State Public Health Law §§2805-1, 2805-m and Education Law §6527 protect as confidential any materials relating to the medical or quality assurance and peer review to "enhance the objectivity of the review process and to assure that medical review committees may frankly and objectively analyze the quality of health services rendered by hospitals" and to "encourage thorough and candid peer review of physicians, and thereby improve the quality of medical care." *Logue v. Velez*, 92 N.Y.2d 13, 16, 677 N.Y.S.2d 6, 7-8 (1998). Any information utilized in the peer review process is considered to be privileged. Plaintiffs' utilization of her notes in the peer review process was a waiver of HER privilege and has no impact on the Defendants' right to assert their privilege under New York State Public Health Law §§2805-1 and 2805-m and Education Law §6527. Plaintiffs' demand for peer review documents and notes is hereby DENIED.

The Plaintiffs demanded sepsis and fever protocols from February 3, 2013 to the present date. The Defendants' indicated in their response to the demands that they were not in possession of any document that was responsive to this demand. Plaintiff, Ava Whitehead was treating with the Defendants on February 3, 2013 and subsequently died February 4, 2013. Defendants, in response to the demand and in argument to this Court, asserted that no protocols existed on the date of Ava Whitehead's treatment and that any such protocols were created after the demise of Ava Whitehead and were therefore subsequent remedial measures that are not admissible in trial upon this matter.

Disclosure in civil actions is generally governed by CPLR 3101(a), which directs: "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." The Court of Appeals has emphasized that "[t]he words, 'material and necessary', are ... to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. *Forman v. Henkin*, 70 N.Y.S.3d 157, 162 (2018). Whether the information sought by Plaintiffs is admissible is a decision that will be determined at trial. Plaintiffs are entitled to a review of the sepsis and fever protocols from February 3, 2013 to the present date and Defendants are hereby ORDERED to turnover same within Twenty (20) days of entry of this Decision and Order.

Finally, Plaintiffs have demanded the production of "User Logs, Audit Trail and Other Electronic Medical Record Data" asserting that the data will help the Plaintiffs "better understand and confirm who performed and analyzed tests." System data may be discoverable if the evidence will lead to information about who received specific information and when, if it is

relevant to the defense or prosecution of an action. *See Gilbert v. Highland Hospital*, 31 N.Y.S.3d 397 (Sup. Ct. Monroe Cnty 2016) *citing Aquilar v. Immigration & Customs Enf't Div of U.S. Dep't of Homeland Sec.*, 255 F.R.D. 350, 354 (S.D.N.Y 2008). Here Plaintiffs have not sufficiently demonstrated the need for such information. Further, to require the production of system data by the Defendants would be unduly burdensome as the Plaintiffs have already identified Ann Buckowski MacNeil, R.N. as the individual who performed the rapid swab test, the influenza swab and the urinalysis of Ava Whitehead on February 3, 2013 and when those tests were performed. As such, Plaintiffs' Demand for the production "User Logs, Audit Trail and Other Electronic Medical Record Data" is hereby DENIED.

Therefore, it is hereby ORDERED the Plaintiffs' Motion to Compel is hereby DENIED in part and GRANTED in part as set forth above.



HON. SARA SHELDON

Entered: 5/10/15