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| <b>Gurbuzturk v Jamron</b>   |
| 2016 NY Slip Op 30920(U)   |
| May 9, 2016  |
| Supreme Court, New York County   |
| Docket Number: 805284/2013   |
| Judge: Joan B. Lobis   |
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

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 SADAN GURBUZTURK, as Administrator of the ESTATE  
 OF SAIT KOC, Deceased, and on behalf of his Distributees  
 and Next of Kin,

Plaintiff,

-against-

Index No. 805284/2013

**Decision and Order**

LISA JAMRON, M.D., LISA JAMRON, M.D., P.C., JOHN  
 SHERMAN M.D., JOHN SHERMAN, M.D. P.C., and  
 RICHARD P. COHEN, M.D. P.C.,

Defendants.  
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This wrongful death case stems from a liposuction procedure which defendant Dr. Sherman performed on Sait Koc. Defendant Dr. Jamron was responsible for plaintiff's anesthetic care. According to plaintiff, defendants did not monitor and ventilate Mr. Koc properly, and this malpractice resulted in Mr. Koc's death due to ventilatory insufficiency. Plaintiff contends that Dr. Sherman negligently retained Dr. Jamron to provide anesthetic services. In the current discovery motion, plaintiff contends that defendants have not provided Dr. Jamron's personnel file despite numerous requests.<sup>1</sup> Plaintiff argues that this discovery has delayed depositions and otherwise severely prejudiced his case.

In their cross-motion, defendants Dr. Sherman and John Sherman, M.D., P.C. argue that there is no obligation to provide the discovery because quality assurance reviews are exempt from disclosure under Education Law § 6527(3), and that Public Health Law § 2805-m insulates

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<sup>1</sup> Originally, plaintiff sought seventeen discovery items. However, at a January 12, 2016 discovery conference the parties resolved all disputes except the one the Court discusses in its decision.

materials gathered in connection with hospital malpractice prevention programs. This protection, they state without contradiction, applies to surgical centers such as the one Dr. Sherman operated. They cite several cases for the proposition that quality assurance reviews are not discoverable. Dr. Jamron and Lisa Jamron, M.D., P.C. separately cross-move for a protective order, raising the same arguments as the Sherman defendants. They add that plaintiff has not set forth a claim which makes the personnel file relevant to this action.

Plaintiff argues in reply that the personnel file is discoverable and relevant to the case. Plaintiff states that the autopsy report and other reports relating to Mr. Sait's death raise serious questions about Dr. Jamron's training and her competence. In addition, plaintiff argues, Mr. Sait did not know which anesthesiologist was going to participate in the surgery so he was unable to investigate Dr. Jamron's credentials and quality. Further, plaintiff says, in response to the demand for Dr. Jamron's personnel file, defendants did not submit an affidavit stating the only material in the file related to privileged materials such as a medical or quality assurance review. Plaintiff cites to Logue v. Velez, 92 N.Y.2d 13 (1998), in which the Court of Appeals relied on such an affidavit in deciding the documents the plaintiff sought were exempt from disclosure. In the absence of a similar affidavit, plaintiff argues, the personnel file must be provided. Plaintiff clarifies that he only seeks information relating to the doctor's training, experience, and competency – the information, he alleges, upon which Dr. Sherman based his decision to retain her as an anesthesiologist. He does not request her personal information such as her social security number or date of birth.

The Sherman defendants do not directly address plaintiff's argument about the requirement of an affidavit in their reply, but state that they have no burden of proof here because, in response to their objection, plaintiff did not articulate a valid basis for the discovery in the first place. The Jamron defendants agree with this position and in addition point out that they have provided Dr. Jamron's curriculum vitae (CV). Plaintiff will have the opportunity to question the doctor regarding her CV at deposition, they argue, after which he may move for the disclosure if there is an adequate basis.

Section 3101(a) of the CPLR provides for "full disclosure of all matter material and necessary in the prosecution or defense of an action." Courts interpret this provision very liberally and allow the disclosure "of any facts bearing on the controversy which will assist preparation for trial . . ." Allen v. Crowell-Collier Pub. Co., 21 N.Y.2d 403, 406-07 (1968). Although exceptions to this principle exist, the party seeking a protective order has the burden of showing that one of these exceptions apply. See Rosario v. North General Hosp., 40 A.D.3d 323, 323-24 (1st Dep't 2007).

As is relevant here, under Education Law § 6527(3), documents a hospital generates in connection with a quality assurance review, records that reflect the hospitals participation in a medical malpractice prevention program, and those required under Public Health Law § 2805-l (which requires an investigation of reportable incidents) are not subject to disclosure. Daly v. Brunswick Nursing Home, Inc., 95 A.D.3d 1262, 1263 (2nd Dep't 2012). Similarly, Public Health Law § 2805-m exempts information a hospital gathers in connection with quality assurance reviews, with the granting and renewal of hospital privileges, and with programs to identify and

prevent malpractice. Aldridge v. Brodman, 49 A.D.3d 1192, 1194 (4th Dep't 2008). The exemption "applies only to information obtained in the course of a hospital's review proceedings." Bush v. Dolan, 149 A.D.2d 799, 800 (3rd Dep't 1989). In order to "invoke the privileges of Education Law § 6527(3)" a party must demonstrate "that the documents sought were prepared in accordance with the relevant statutes." Kneisel v. OPH, Inc., 124 A.D.3d 729, 730 (2nd Dep't 2015). At a minimum, it must show that a review procedure exists pursuant to which it obtained the evidence in question. Stalker v. Abraham, 69 A.D.3d 1172, 1173 (3rd Dep't 2010)(finding that detailed affidavit by hospital's credentialing specialist satisfied this burden. If, in response, the party seeking disclosure shows that some of the information in the files, such as records the committee duplicated in connection with the review, may not be privileged under the above laws, then an in camera review by the Court is appropriate. See Gabriels v. Vassar Bros. Hosp., 135 A.D.3d 903, 905-06 (2nd Dep't 2016).

Here, plaintiff has carried his minimal burden of showing that material in Dr. Jamron's personnel file may be relevant to issues relating to Dr. Sherman's notice of and liability for Dr. Jamron's alleged lack of competence. Plaintiff's original demand, for Dr. Jamron's entire file, was overbroad for this purpose. In his current papers, however, plaintiff has limited the scope of the request to include only those documents and papers Dr. Sherman considered in determining that Dr. Jamron was competent to oversee Sait Koc's anesthetic care during his surgery. This demand, as clarified, is sufficiently tailored to achieve plaintiff's purpose. See Heitman v. Mango, 237 A.D.2d 330, 331 (2nd Dep't 1997). In support of their cross-motions, moreover, defendants do not satisfy their burdens of showing that all responsive materials are protected under the statute. Instead, they incorrectly suggest that a blanket exclusion applies to the entire personnel file under

the relevant statutes. Accordingly, they must respond to the demand, including a privilege log listing any materials they withhold under Education Law § 6527(3) and Public Health Law § 2805-m. If the entire request involves protected material, they must provide a detailed affidavit by a party with personal knowledge which attests to this fact.

Based on the above, therefore, it is

ORDERED that the motion is granted to the extent of directing defendants to comply with the contested demand, as limited by plaintiff in his motion and reply papers, within twenty-one days of the filing of this order in the Court's electronic filing system; and it is further

ORDERED that the Sherman defendants' cross-motion and the Jamron defendants' cross-motion are denied.

Dated: *May 9*, 2016

ENTER:



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JOAN B. LOBIS, J.S.C.