

Whitehead v Kaleida Health
2017 NY Slip Op 33471(U)
April 6, 2017
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.,
SUSAN WEIPERT, M.D., KATHLEEN LILLIS, M.D.,
QUEST DIAGNOSTICS INCORPORATED,
CATHOLIC HEALTH SYSTEMS, INC. AND
TWIN CITY AMBULANCE CORP.

Defendants.

Defendants Kidz Express NP Pediatrics After Hour, Kaleida Health, Women &
Children's Hospital of Buffalo and Ashley N. Falco, M.D. brought a Motion to Compel the
production of notes prepared by Plaintiff, Amanda Whitehead, which were identified and
described in her deposition testimony. Plaintiff opposes the production of such notes upon the
ground that the document was created in anticipation of litigation and is therefore protected
pursuant to CPLR §3101(d)(2). This Court has received and reviewed the Affirmations and
Memorandums of Law from Defendants Kidz Express NP Pediatrics After Hour. Kaleida Health,

Women & Children's Hospital of Buffalo and Ashley N. Falco, M.D. as well as the Memorandum of Law and Affirmation of the Plaintiff, Amanda Whitehead.

The parties appeared and argued the Motion on March 23, 2017 and this Court reserved judgment on the issue.

Amanda Whitehead testified during deposition that the notes were prepared under the advice of a coworker . . . "it was along the lines that in case there were ever a time that you needed to recall events, that you had it down on record." This was followed by pages of argument between and amongst the lawyers, in the presence of the plaintiff, on whether the notes were privileged or not. Plaintiff was not permitted to be questioned further at that point. The notes were created in the form of a typed summary prepared by Amanda Whitehead and ostensibly were later shared with her attorney. These notes were submitted to the Court for an *in-camera* review of the contents. At a later date, the Court inquired from the plaintiff about the purpose of making the notes. Plaintiff responded as follows: "...at some point around then a coworker had said, you should write down everything that happened as you remember it now in case you need to ever pursue legal advice." When asked about the language in the notes that suggested they were drafted to share with an audience, plaintiff responded: "...we built off of that document, we built off that the presentation-notes for ourselves for the presentation that we had a meeting-for the meeting that we had at Kalieda Health and incorporated cues for our personal use for that discussion."

The burden of establishing that a document is privileged and therefore protected from disclosure is upon the party asserting the privilege. *See Matter of Priest v. Hennessy*, 51 N.Y.2d 62 (1980). In order to qualify as privileged under CPLR §3101(d)(2) the party asserting the

privilege must establish that the material was prepared exclusively in anticipation of litigation.

See Tenebruso v. Toys R. Us, 256 A.D.2d 1236 (4th Dept. 1998).

Amanda Whitehead presented an Affidavit in Opposition to the Motion to Compel by the Defendants in which she explained the timing and creation of the notes. In her Affidavit Amanda Whitehead asserts that the notes were prepared several months after her daughter's death and were created so that she could provide them to an attorney so that the attorney could investigate any potential legal claim. Amanda Whitehead goes on to state that she added some introductory information and comments to the summary at a later date to assist her in presenting her daughter's case to a peer review conference. Amanda Whitehead, along with her husband were invited to participate in a peer review conference after the creation of the notes. Due to the fact that it was unknown to Amanda Whitehead that she would be invited to speak at this peer review at the time the notes were created, this Court is unpersuaded that the notes were drafted in anticipation of speaking at the peer review. However, Amanda Whitehead's statements on their own are insufficient to prove that the notes were created solely in anticipation of litigation. *Graf v. Aldrich*, 94 A.D.2d 823 (3d Dept. 1983).

Even if the assertions in Amanda Whitehead's Affidavit, that the notes were created in anticipation of litigation are accepted as true, in spite of the fact that she did not mention that fact in her sworn testimony of December 2016, the Court's inquiry into a claim of privilege does not end with a party's conclusory statement of the intention of the communication at the time it was created. *Id*; *See also Bombard v. Amica Mut. Ins. Co.*, 783 N.Y.S.2d 85 (2nd Dept. 2004). Rather, the Court must look at what was done with the material or communication after it was created.

When potentially privileged material is disclosed to a third party, any privilege that may have been present is waived. *See People v. Harris*, 57 N.Y.2d 335 (1982). Amanda Whitehead in her Affidavit to the Court and in her Deposition testimony stated that she added the introductory comments to the notes to assist her in presenting her case to a peer review board. The notes themselves appear to have been altered not only in the beginning but throughout the body of the text in a way that suggests the document was re-created for the purpose of reading the contents to an audience. In presenting her daughter's case at the peer review Mrs. Whitehead disclosed the contents of the of the notes to a third party thereby waiving any privilege under CPLR §3101(d)(2). *See Seiger v. Zak*, 60 A.D.3d 661 (2d Dept 2009).

Therefore, this Court finds that notes are not privileged material due to their disclosure to a third party and Orders that Plaintiff shall disclose the notes to Defendants within Ten Days of this Decision and Order.

Defendants Kidz Express NP Pediatrics After Hour, Kaleida Health, Women & Children's Hospital of Buffalo and Ashley N. Falco, M.D. Motion to Compel is hereby granted.

GRANTED

4/6 2017

Joanne Sullivan
COURT CLERK

Sara Sheldon
Honorable Sara Sheldon