

15-0558

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

STEPHANIE MILLS,

Plaintiff,

CIVIL ACTION NO. 13-C-338

vs.

DAVID GHAPHERY, M.D., A.D.
GHAPHERY PROFESSIONAL
ASSOCIATION AND WHEELING
HOSPITAL, INC.,

Defendants.

MEMORANDUM ORDER ON PLAINTIFF'S MOTION TO COMPEL

The matter before the Court is the Plaintiffs Motion to Compel. The Plaintiff is seeking to compel additional or more detailed responses to various Interrogatories and Requests. The Defendant Wheeling Hospital, Inc., has objected to the Motion to Compel because the information sought by counsel is peer review material. This court, after considering the parties' briefs and their compliance with the court's request for additional information, finds that the legal arguments have been adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the briefs, and the documents presented, the court addresses in this Memorandum Order the issues presented by the Plaintiff's Motion to Compel.

The court has now reviewed all of the documents specifically identified in Plaintiff's Reply in Support of Motion to Compel Discovery Responses from Defendant Wheeling Hospital, Inc. They are set forth in this Memorandum Order in the same arrangement in which they were addressed in plaintiff's reply in support of motion to compel.

In conducting this review the court used as its relevancy guideline the different negligence theories advanced by counsel for the plaintiffs in this litigation. Plaintiff's negligence theories, pertinent to this Court's review of the documents in issue, include the following: (1) the hospital failed to exercise reasonable care in selecting and supervising Dr. David Ghaphery; (2) Dr. Ghaphery's surgical track record at Wheeling Hospital proves that Wheeling Hospital negligently hired him, negligently continued to reappoint him as a Wheeling Hospital surgeon, and over a period of several years, negligently failed to supervise him and that Dr. Ghaphery was negligent in treating the plaintiff which caused her to be damaged.

Many of the documents now being ordered disclosed are centered on their relevance to the allegations in this lawsuit and would not necessarily be subject to disclosure in other medical malpractice lawsuits. The court also notes that many of the documents appear only to be marginally relevant. However, because of plaintiff's negligent crediting and re-crediting claim against Wheeling Hospital and the liberal discovery rule that relevance in the context of discovery means that the information sought is admissible evidence or is "reasonably calculated to lead to the discovery of admissible evidence," it is difficult for a judge to draw the line between what may lead to the discovery and what is clearly relevant. *State ex rel. Erie Ins. Prop. & Cas. Co. v. Mazzone*, 218W.Va. 593, 597, 625 S.E.2d 355, 359 (2005). Many of these records may not be relevant to plaintiff's cause of action. However it is difficult for the court to decide what is relevant for this negligent hiring – credentialing cause of action, based in part upon the physicians competence and complete track record, and the hospitals care or lack of care in hiring and reappointing Dr.

Ghaphery and the fact that many of these records are certainly relevant to the hospital and perhaps Dr. Ghaphery's defense. Therefore, they appear to be relevant at this stage of the case and it also appears that counsel for plaintiff needs to know about them.

The defendants argue that the plaintiff has failed to identify any expert who can testify in support of the negligent credentialing claim against Wheeling Hospital. The obvious response to that argument is that the plaintiff needs these documents to find out whether there is any expert to support her claim of negligent hiring – credentialing. The court is willing to set a reasonable deadline for plaintiff to disclose the name of an expert witness who is prepared to testify in support of plaintiff's claim.

It turns out that forcing Wheeling Hospital to disclose the documents may be a two-edged sword. The hospital's continuous gathering of the physicians' performance information, in the ordinary course of its business, or pursuant to regulations, for quality control to help it decide which physicians will be permitted to continue to be credited to practice at Wheeling Hospital, is an obvious benefit to the public and to Wheeling Hospital's patient care. Now that same information is being used in this lawsuit to prove that, in the case of Dr. Ghaphery, the hospital negligently permitted him to remain on staff. However, it may also turn out that the information will benefit Wheeling Hospital because the information in the documents may disprove plaintiff's allegations against the hospital.

The nucleus of the court's decision to permit the disclosure of many of these documents was an acceptance of the plaintiff's legal argument that the documents now ordered to be disclosed were not created solely for Wheeling Hospital's crediting committee

but are otherwise available from original sources extraneous to that committee and these documents contain information that the hospital gathers in the ordinary course of its business, or pursuant to regulations, that the crediting committee then uses in its work. The peer review statute does make the specific point that the information, documents or records otherwise available from original sources are not to be construed as immune from discovery or use in any civil action merely because they were presented during proceedings of such organization. The court accepts as correct the plaintiff's argument that "the language of the statute grants a privilege to the proceedings and records of a review organization, but only if that information is not "otherwise available from original sources." *State ex rel. Shroades v. Henry*, 180 W. Va. 723, 728, 420 S.E.2d 264, 269 (1992).

By accepting the plaintiff's argument the court has rejected the defendant's contention that these documents that remain in dispute are privileged and protected from disclosure under applicable West Virginia and federal law.

The court has attempted to be sensitive to the privacy rights of other patients by ordering that their names be redacted from all documents to be disclosed to plaintiff's counsel and has also ordered that only information pertinent to Dr. Ghaphery be provided to plaintiff's counsel in the documents ordered to be disclosed. The court has not permitted any document to be disclosed that was generated after October 13, 2011 when Dr. Ghaphery performed a thyroidectomy on the plaintiff at Wheeling Hospital. The court has also attempted to address the defendant's concern that many of the documents requested concern and are related to other patients and/or are for time periods prior to or following the incident in this case, which allegedly occurred on or about October 13, 2011.

Obviously, for the reasons stated in this order the court believes that time periods prior to the incident in this case are relevant and that time periods following the incident are not relevant. The court has also attempted to be sensitive to the defendant's concern for the chilling effect of public disclosure of these documents. Disclosure has been ordered only for Dr. Ghaphery's patients and all patient names, including Dr. Ghaphery's patients are Ordered to be deleted and the documents covered by this order are not to be disclosed for any purpose other than their limited use during this litigation and at the end of this litigation counsel for the plaintiff is ordered to destroy all documents provided by this order. No photocopying of the documents is permitted. The exception to this requirement would be any document admitted into evidence at trial and the Court will order those documents sealed at the conclusion of the trial.

Therefore, it is the Order of this Court that the following documents are **ORDERED** to be disclosed except where the Court has instructed defense counsel in this Order to take specific action concerning a document or documents:

168 – 170

297 – 298

650 – 651

817

71 – 173

176 – 208

302 – 337

432 – 460

517 – 541

209 – 210

211

339
215
216 – 217
340 – 346
348 – 349
464 – 470
215
544
214
224 – 225
226 – 227
234 – 242
347
350 – 365
471 – 485
546
550 – 552
218 – 219
229 – 233
366 – 370
545
679 – 688
775 – 777
338
461 – 463
542 – 543
755 – 756
486 – 487
488

489 – 490

500 – 503 · Only the laparoscopic gastric bypass numbers are shown. Other procedures are blacked out. If the other procedures are Dr. Ghaphery's they are to be disclosed to plaintiff's counsel

515 – 516

661 – 674

739 – 752

505

553· Information on 533 from January through March 2006, for Dr. Ghaphery's "reason for denial" and "responsibility for the denied days" to be furnished on a separate document to plaintiff's counsel. Document 553 is not Ordered disclosed

555 – 556

675 – 678

753

689

778

754

1000

1001

1002

1003 –1010. Defense counsel has a responsibility to review these documents and give to plaintiff's counsel those documents with complaints involving Dr. Ghaphery in any way – directly or not – and to remove the names of all complainants and the names of other doctors on those documents prior to their disclosure.

It is further **ORDERED**, for each document ordered to be disclosed, that Counsel for the Hospital redact:

1. all patient identification information;
2. all information about any other physicians other than Dr. Ghaphery; and
3. all information reported on any document that occurred after October 13, 2011.

The following documents were not readable by this Court. The Defendants are **ORDERED** to furnish a readable copy to the Plaintiff's counsel if the documents pertain to Dr. Ghaphery.

210

240

554

The following documents were determined by this Court to be not relevant and therefore, as to these documents, the Motion to Compel is **DENIED**.

212

213

243 – 244

506 – 507

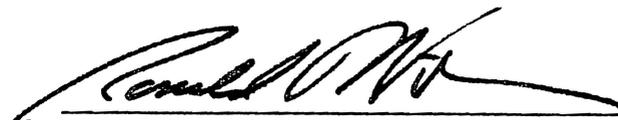
553 (except as noted above)

1011 – 1013

If either party chooses to attempt to appeal, this Order will be stayed for the time permitted in the Appellate Rules to attempt the appeal

Copies of this Order have been provided to all Counsel by the court.

IT IS SO ORDERED this 26th day of February, 2015.


Hon. Ronald E. Wilson, Judge