

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

TIFFANY CARTWRIGHT, ET AL.,)

Plaintiffs,)

v.)

C.A. No. N17C-09-272 CEB

DELAWARE INTEGRATIVE)
MEDICINE, LLC, ET AL.,)

Defendants.)

Submitted: August 8, 2018
Decided: December 4, 2018

MEMORANDUM OPINION

*Upon Consideration of the Motion of Beebe Medical Center
to Quash Subpoena*

DENIED

Timothy E. Lengkeek, Esq., Young Conaway Stargatt & Taylor, LLP, 1000 North King Street, Wilmington, DE 19801. Attorney for Plaintiff, Tiffany Cartwright.

Bradley J. Goewert, Esq., Lorenza A. Wolhar, Esq., Marshall Dennehey Warner Coleman & Goggin, 1007 N. Orange Street, Suite 600, P.O. Box 8888, Wilmington, DE 19899. Attorneys for Defendant, Beebe Medical Center.

BUTLER, J.

INTRODUCTION

In this matter, the Court will consider a question in a discrete area of the law. It came to the Court by way of a discovery dispute.

FACTS AND PROCEDURAL HISTORY

Plaintiff filed suit alleging medical negligence by Dr. Henry Childers, M.D. At one time in the past, Dr. Childers had privileges at Beebe Hospital.¹

Dr. Childers has been deposed in this litigation. During his deposition, he testified that he was previously employed by Beebe, but left in 2012 as a result of an injury to his finger.² He testified that he had never been subject to any attempts to suspend or revoke his medical license.³

Subsequent to his deposition, Plaintiff's counsel learned that the Delaware Board of Medical Practice had filed a Complaint for Revocation and Motion for Emergency Suspension of Childers' medical license.⁴ The complaint by the Board recited that Dr. Childers' privileges had been suspended by Beebe in June, 2012, thus calling into question the credibility of Dr. Childers' deposition testimony.⁵

¹ Mot. to Quash Subpoena at 2.

² Pl.'s Opp'n to Mot. to Quash Subpoena, Ex. A, at 16:19-24 and 17:1-9.

³ *Id.* at 27.

⁴ Pl.'s Opp'n to Mot. to Quash Subpoena at 3.

⁵ *Id.*

Plaintiff's counsel then caused a subpoena to issue to Beebe Hospital, seeking information concerning Dr. Childers' departure from Beebe. In response, Beebe produced, *inter alia*, a Privilege Log, identifying certain documents that it claimed were privileged from disclosure.⁶ Three of these documents require a ruling from the Court.

The first is identified as "Letter to Dr. Childers dated June 5, 2012 from V.P. Human Resources re terms and conditions of employment."⁷ A second document is identified as "Letter to Dr. Childers dated May 18, 2012 re privileges."⁸ Finally, there is what is identified as a "Subpoena, dated June 19, 2012."⁹

While this matter was under consideration by the Court, Beebe provided the full documents to the Court for *in camera* review and clarified that its claim of privilege from disclosure of the June 5th letter concerning Dr. Childers' employment was a claim that the document was privileged "per the express terms of the agreement." Resolution of that question is fairly straightforward.

⁶ *Id.* at 3—4; Pl.'s Opp'n to Mot. to Quash Subpoena, Ex. H, Ex. I, and Ex. J.

⁷ Pl.'s Opp'n to Mot. to Quash Subpoena at 4; Letter from Catherine Halen, V.P. Human Res., Beebe Med. Ctr., to Dr. Childers (Jun. 5, 2012) (Beebe-Childers 00011-13).

⁸ Pl.'s Opp'n to Mot. to Quash Subpoena at 4; Letter from Med. Exec. Comm., Beebe Med. Ctr., to Dr. Childers Re Privileges (May 18, 2012) (Beebe-Childers 00015).

⁹ Pl.'s Opp'n to Mot. to Quash Subpoena at 4; Subpoena Duces Tecum from J. Kay Warren, Deputy Dir., Div. of Prof'l Regulation, to Med. Affairs Dept., Beebe Medical Ctr. (Jun. 19, 2012) (Beebe-Childers 00010).

DISCUSSION

Even if the Court accepts the somewhat dubious proposition that the parties can create a privilege from disclosure by agreement that can defeat a third party's discovery subpoena, the document in question does not do so. Rather, at paragraph 8 regarding "Confidentiality," the letter states that *Childers* agrees not to disclose the content of the letter to anyone.¹⁰ But no reciprocal duty is imposed on Beebe. Moreover, Childers is bound to maintain confidentiality *except* pursuant to "legal process," and a subpoena is a legal process.¹¹ So Beebe is not bound by the confidentiality provision at all and neither is Childers, as the document is requested by legal process. The June 5th, 2012 letter is subject to disclosure and Beebe's claim of privilege is not persuasive.

As to the remaining two documents, Beebe claims the "peer review privilege," codified at 24 Del. C. §1768. The peer review statute protects the "records and proceedings" of a peer review organization from discovery in civil litigation.

The letter withheld from production dated May 18th, 2012 is addressed to Dr. Childers concerning his privileges at Beebe.¹² It is signed by three doctors on the

¹⁰ Letter from Catherine Halen, V.P. Human Res., Beebe Med. Ctr., to Dr. Childers (Jun. 5, 2012) (Beebe-Childers 00011-13).

¹¹ *Id.*

¹² Letter from Med. Exec. Comm., Beebe Med. Ctr., to Dr. Childers Re Privileges (May 18, 2012) (Beebe-Childers 00015).

hospital staff. While not addressed in the pleadings, we will assume that these three staff doctors constituted a “peer review organization” writing to Dr. Childers. Whether a peer review document remains privileged when it is issued to a doctor who is not himself a member of the committee was laid to rest in *Connolly v. Labowitz*.¹³ There, Judge Bifferato said, “the detailed findings of the Credential Committee which were provided to defendants is discoverable... 24 *Del. C.* § 1768 extends the privilege only to actual committee members, and publication of the document to nonmembers waives the privilege.”¹⁴ Dr. Childers was not a member of the peer review committee, rather he was the subject of the correspondence. The letter therefore falls within the holding of *Connolly v. Labowitz* and must be disclosed.

I will note, somewhat parenthetically, that while the document must be provided in discovery, that does not settle the question of relevance or admissibility at trial, which we will leave for another day.

¹³ *Ronald G. Connolly, M.D., P.A. v. Russell J. Labowitz, M.D., P.A.*, No. C.A. 83C-AU-1, 1984 WL 14132, at *1 (Del. Super. Ct. Dec. 17, 1984).

¹⁴ *Id.*

This leaves us with the subpoena, issued by a “peer review organization” to which Beebe claims privilege.¹⁵ It is notable that the controversy here is not over the documents supplied pursuant to the subpoena, but only the subpoena itself.

With due regard for the protective umbrella provided by the peer review statute, the Court rejects the proposition that the very existence of a peer review inquiry is itself privileged. Peer review is not Fight Club.¹⁶ While the statute certainly does protect the process, deliberations, and persons participating in peer review, the fact that a peer review took place is not privileged. The subpoena is not privileged.

In light of the foregoing, Beebe’s Motion to Quash the Subpoena is **DENIED**.

IT IS SO ORDERED.



Charles E. Butler, Judge

¹⁵Subpoena Duces Tecum from J. Kay Warren, Deputy Dir., Div. of Prof'l Regulation, to Med. Affairs Dept., Beebe Medical Ctr. (Jun. 19, 2012) (Beebe-Childers 00010).

¹⁶ “The first rule of Fight Club is: You do not talk about Fight Club.” FIGHT CLUB (20th Century Fox 1999).