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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-940

Filed 2 July 2024

Wake County, No. 21 CVS 4015

HARITHA NADENDLA, M.D., Plaintiff,

v.

WAKEMED d/b/a WAKEMED CARY HOSPITAL, Defendant.

Appeal by plaintiff from judgment entered 5 May 2023 by Judge Vince M. Rozier Jr. in Wake County Superior Court. Heard in the Court of Appeals 1 May 2024.

*Zaytoun & Ballew, PLLC, by Robert E. Zaytoun, Paul J. Puryear, Jr., and Matthew D. Ballew, for plaintiff-appellant.*

*Fox Rothschild LLP, by Elizabeth Sims Hedrick, Matthew Nis Leerberg, and Jeffrey R. Whitley, for defendant-appellee.*

ARROWOOD, Judge.

Haritha Nadendla (“plaintiff”) appeals from the trial court’s order denying plaintiff’s motion to compel and partially granting WakeMed’s (“defendant”) motion to strike. Plaintiff contends the trial court erred in its application of the Peer Review Statute of the Hospital Licensure Act, N.C.G.S. § 131E-95(b) (“the Statute”), or

alternatively that defendant waived protections of the Statute “by contractually promising due process rights, the judicial enforcement of which can only be achieved through discovery and evidentiary consideration of records otherwise protected by the Statute.” For the following reasons, we affirm the trial court.

I. Background

Plaintiff is an OB/GYN doctor that has worked at Triangle Women’s Center in Cary, North Carolina since 2010. Plaintiff applied for reappointment to the medical staff at defendant’s hospital at the end of the normal two-year cycle for reappointment in 2017. In the course of the credentialing review process, defendant notified plaintiff that her request for reappointment had been denied and her privileges would not be renewed due to “clinical concerns.” Plaintiff requested a hearing to contest the decision which defendant provided; however, defendant affirmed the decision to deny plaintiff’s application for clinical privileges.

On 24 March 2021, plaintiff filed a complaint against defendant alleging breach of contract and arbitrary and capricious conduct. Plaintiff filed an amended complaint on 18 March 2022 further alleging breach of covenant of good faith and fair dealing. In her complaint, plaintiff made several allegations regarding the hearing and review process, including: (1) defendant’s decision “was not based on any credible or reliable evidence and did not include any evidence from any providers or patients actually involved in any . . . patient events”; (2) defendant did not provide a single witness with “actual knowledge of the alleged events”; (3) no members of defendant’s

credentials committee or the Medical Executive Committee (“MEC”) reviewed any medical records related to patient care events; (4) no medical records were presented by the MEC in its case in chief; (5) defendant did not interview any patients or other providers involved in the alleged events; and (6) defendant instead relied on “a three-page hearsay summary of ‘peer reviewed’ patient case reports prepared by a physician who practices at the hospital.”

Defendant filed an answer on 17 May 2022 and moved to strike portions of plaintiff’s amended complaint, alleging violations to the Statute. In support of the motion to strike, defendant filed an affidavit of Dr. Seth Brody (“Dr. Brody”) that included as an attachment defendant’s bylaws which set forth defendant’s processes for evaluating applications for privileges and membership.

The membership credentialing process at WakeMed is carried out by a multi-disciplinary Credentials Committee, and physicians are generally required to apply for reappointment every two years. The Credentials Committee makes recommendations to the MEC which makes its own recommendation to defendant’s Board of Directors (“the Board”).

Applicants that receive an adverse recommendation are entitled to certain hearing rights; a hearing panel may be formed to receive evidence from both the MEC and the applicant physician and make a recommendation whether to affirm or reject the MEC’s recommendation. If an adverse recommendation is made to the Board, the applicant may request an appellate review panel consisting of three Board

members. The Board has final say on all credentialing decisions but relies heavily on medical staffs to provide expertise on appropriate clinical considerations. Appeals to the Board are governed by Section 7 of the bylaws; subsection 7.18 specifically incorporates the Peer Review Statute.<sup>1</sup>

In addition to membership credentialing, defendant uses a quality improvement process to review a physician's clinical care at the hospital and determine clinical privileges. The process begins at the departmental level; in this case, the quality improvement committee was comprised of other OB/GYN physicians with similar education and familiarity with clinical procedures likely to come before the committee. Cases are referred to the committee by complaint or may be automatically reviewed under certain pre-determined criteria. Once referred, a member of the committee reviews the case and provides an anonymous report to the rest of the committee; at this point, the only committee member aware of the identity of the physician under review is the anonymous reviewer. The OB/GYN committee can make adverse recommendations to the medical staff quality improvement committee, which in turn can make recommendations to the MEC. The MEC reviews all adverse action recommendations and decides whether to make an adverse

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<sup>1</sup> "All information created, produced, or considered during the investigation and/or fair hearing process (including any appeal), including but not limited to notes, records, minutes, documents, exhibits, transcripts, or materials of any kind, relating to Medical Staff credentialing, membership, or clinical privileges, shall be confidential and privileged, shall not be admissible or discoverable in any legal proceedings, and shall be subject to all other protection afforded to such documents or proceedings by law including N.C. Gen. Stat. § 131E-95 and the United States Health Care Quality Improvement Act."

recommendation to the Board. Adverse action may include revoking a doctor's privileges.

In addition to Dr. Brody's affidavit, defendant submitted the declaration of Dr. Karen Bash, which detailed the medical review committees involved in plaintiff's case, as well as several categories of documents set forth in defendant's privilege log. A comprehensive privilege log was also provided, identifying every withheld electronically-stored document, the medical review committee at issue for each document, the author and recipient(s) of any communications, and a description of the basis for the privilege.

On 10 November 2022, plaintiff filed a motion to compel discovery of all materials defendant withheld pursuant to its interpretation of the Statute. Plaintiff asserted the Statute did not apply to a claim by a physician against a hospital, or alternatively that defendant waived privilege by contract and its bylaws and that defendant had not provided the required information for the trial court to assess its privilege claim.

On 3 April 2023, the trial court conducted a hearing on plaintiff's motion to compel and defendant's motion to strike. On 5 May 2023, the trial court issued an order granting in part and denying in part defendant's motion to strike and denying plaintiff's motion to compel. The trial court concluded that the Statute applied to the action, because it was a "civil action against a hospital . . . which results from matters which are the subject of evaluation and review by [a medical review] committee."

Further, the court concluded plaintiff's amended complaint contained certain allegations seeking confidential information that was undiscovered and inadmissible, but "that answering some of the allegations subject to [defendant]'s Motion to Strike would not require [defendant] to disclose information that is confidential under the Statute such that [defendant] should be required to answer these allegations."

Plaintiff filed notice of appeal on 30 May 2023.

## II. Discussion

Plaintiff contends the Statute does not apply to her claims, or alternatively that defendant waived the protections of the Statute through contractual obligations that could only be upheld through disclosure of records otherwise protected by the Statute. Plaintiff further argues the trial court erred by applying the Statute "to broadly protect information that Defendant has not proven is covered and of which the trial court did not review *in camera*." We first address the interlocutory nature of the appeal.

### A. Interlocutory Discovery Order

Parties have the right to appeal to this Court from an interlocutory order in a civil action where that order or judgment affects a substantial right. N.C.G.S. § 7A-27(b)(3) (2023). "An order compelling discovery is generally not immediately appealable because it is interlocutory and does not affect a substantial right that would be lost if the ruling were not reviewed before final judgment." *Sharpe v. Worland*, 351 N.C. 159, 163 (1999) (citations omitted).

However, “when . . . a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right . . .” *Id.* at 166. Additionally, such orders “are immediately appealable when the desired discovery would not have delayed trial” or caused “any unreasonable annoyance, embarrassment, oppression or undue burden or expense” for the opposing party, and “if the information desired is *highly material to a determination of the critical question* to be resolved in the case.” *Stokes v. Crumpton*, 369 N.C. 713, 719 (2017) (emphasis in original) (citation and internal quotation marks omitted).

Because plaintiff’s appeal asserts a statutory privilege under N.C.G.S. § 131E-95, which relates to the matter to be disclosed, the discovery order implicates a substantial right, and we proceed to the merits of plaintiff’s appeal.

B. Standards of Review

When reviewing “the extent of the privilege given [defendant] under N.C. Gen. Stat. § 131E–95[.]” this Court reviews the trial court’s statutory interpretation *de novo*. *Woods v. Moses Cone Health Sys.*, 198 N.C. App. 120, 126 (2009) (citation omitted). We review the trial court’s decisions on motions to strike or to compel discovery for abuse of discretion. *See Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 25 (2003) (motion to strike); *Maldjian v. Bloomquist*, 245 N.C. App. 222, 226 (2016) (motion to compel discovery).

C. Peer Review Statute

Plaintiff first contends the Peer Review Statute does not apply to her breach of contract claim because her suit challenges “the fairness of the committee’s review process” rather than the underlying “subject of evaluation and review of the committee.” Alternatively, plaintiff contends defendant waived its protections under the Statute “through its guarantee of robust due process rights that are only enforceable through disclosure.” We disagree.

“Statutory interpretation begins with the plain meaning of the words of the statute.” *Woods*, 198 N.C. App. at 126 (citation omitted).

The proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential and not considered public records . . . and shall not be subject to discovery or introduction into evidence *in any civil action* against a hospital . . . or a provider of professional health services *which results from matters which are the subject of evaluation and review by the committee . . . .* However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee. Documents otherwise available as public records within the meaning of G.S. 132-1 do not lose their status as public records merely because they were presented or considered during proceedings of the committee.

N.C.G.S. § 131E-95(b) (2023) (emphasis added). Additionally, “[l]egislative intent controls the meaning of a statute; and in ascertaining this intent, a court must consider the act as a whole, weighing the language of the statute, its spirit, and that



which the statute seeks to accomplish.” *Shelton v. Morehead Mem’l Hosp.*, 318 N.C. 76, 81–82 (1986) (citation omitted).

In *Shelton*, our Supreme Court conducted such an analysis. “The stated purposes of the Hospital Licensure Act are to promote the public health, safety and welfare and to provide for basic standards for care and treatment of hospital patients.” *Id.* at 82. The Statute protects “medical review committee proceedings and related materials because of the fear that external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity,” which reflects “a legislative choice between competing public concerns. It embraces the goal of medical staff candor at the cost of impairing plaintiffs’ access to evidence.” *Id.* (cleaned up).

The Court noted that plaintiffs’ construction of the Statute “would severely undercut the purpose of § 95, *i.e.*, the promotion of candor and frank exchange in peer review proceedings; it would mean these proceedings were no longer protected whenever a claim of corporate negligence was made alone or coupled with a claim of negligence against an individual physician.” *Id.* (cleaned up). Furthermore, “[a] civil action against a hospital grounded on the alleged negligent performance of the hospital’s medical review committees *is by the statute’s plain language* a civil action resulting from matters evaluated and reviewed by such committees.” *Id.* at 82–83 (emphasis added).

Furthermore, the Court affirmed the applicability of the Statute to cases

involving the suspension of medical staff privileges in *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449 (1999). In *Virmani*, a plaintiff physician sued a hospital regarding suspension of privileges, and an intervenor party requested copies of peer-review material submitted at trial, arguing the Statute was limited to medical malpractice cases. *Id.* at 453–56. The Court disagreed, rejecting the argument as “feckless” and concluding “[t]here is absolutely nothing in the plain language of N.C.G.S. § 131E-95 which supports the [intervenor’s] contention” that the Statute is so limited. *Id.* at 464.

Applying this statutory analysis to the present case, the trial court correctly determined that the documents plaintiff sought were protected by the Statute. Plaintiff sought to compel discovery on all documents, records, and materials produced and considered by the medical review committees during the review, denial, and appeal of her application. By the plain language of the Statute, these materials “shall be confidential . . . and shall not be subject to discovery or introduction into evidence in any civil action against a hospital . . . which results from matters which are the subject of evaluation and review by the committee.” N.C.G.S. § 131E-95(b). The Statute thus applies, and no statutory exceptions otherwise permit discovery.

Plaintiff’s alternative argument that defendant waived privilege suggests that enforcing the contractual obligations set forth in the bylaws “requires disclosure of committee procedures and materials,” and that all essential elements of waiver are met. We disagree. As previously noted, defendant’s bylaws specifically incorporate

and adopt the Statute—practically the opposite of an “intentional relinquishment of a known right” as required for waiver. *See Danville Lumber & Mfg. Co. v. Gallivan Bldg. Co.*, 177 N.C. 103 (1919).

Of the elements for waiver, although the peer review privilege could be characterized as “the existence . . . of a right, advantage, or benefit” in defendant’s favor, there is nothing in the record to indicate “an intention to relinquish such right, advantage, or benefit” on the part of defendant. *See Clemmons v. Nationwide Mut. Ins. Co.*, 267 N.C. 495, 504 (1966) (citation omitted). Again, defendant’s bylaws specifically referenced the Statute and the reservation of confidentiality. Plaintiff’s arguments that defendant waived the Statute “through its guarantee of robust due process rights that are only enforceable through disclosure” have no basis. The trial court correctly applied the Statute in its determination of the parties’ motions.

D. *In Camera* Inspection of Documents

Plaintiff contends the trial court should have reviewed defendant’s documents *in camera* before ruling on her motion to compel discovery. However, plaintiff did not present a timely request to the trial court to conduct an *in camera* review; the motion to compel instead sought complete production of the withheld documents.

“The decision to conduct an *in camera* inspection, without a request for such inspection, lies within the discretion of the trial court[.]” *Sessions v. Sloane*, 248 N.C. App. 370, 387 (2016) (finding no record evidence the defendants requested an *in camera* inspection). Furthermore, pursuant to Rule 10(a)(1) of our Rules of Appellate

Procedure, “[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” N.C.R. App. P. 10(a)(1) (2023). Failure to do so waives the issue on appeal. *In re A.B.*, 272 N.C. App. 13, 16 (2020).

Here, there is no record evidence that plaintiff requested an *in camera* inspection—to the contrary, plaintiff’s trial counsel argued privilege did not apply and that the discovery of the sought documents was “either all or none. That’s the way the court has to rule based upon the information that it has.” In the absence of any request at trial for an *in camera* inspection and considering plaintiff’s arguments, plaintiff has waived the issue on appeal. Accordingly, the trial court did not abuse its discretion by not conducting an *in camera* inspection.

### III. Conclusion

For the foregoing reasons, we affirm the trial court.

AFFIRMED.

Judges TYSON and CARPENTER concur.

Report per Rule 30(e).