IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Marilyn Stagno,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Alexian Brothers Medical Center, Inc.,	)	
Alexian Brothers Medical Center,	)	No. 17 L 5147
Amita Health Alexian Brothers Rehabilitation	)	
Hospital Elk Grove Village, in partnership with	)	
Rehabilitation Institute of Chicago a/k/a	)	
Alexian Brothers Rehabilitation Hospital,	)	
Touchpoint Support Services, LLC, and	)	
Lillibridge Healthcare Services, Inc.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Illinois Supreme Court Rule 201(c)(2) authorizes a circuit court to supervise all aspects of discovery. Neither the Medical Studies Act nor the Patient Safety and Quality Improvement Act prohibits the disclosure of discovery material to a court for *in camera* inspection or from production if a privilege is inapplicable. Since the plaintiff was not a patient at the time of her injury, neither statute prevents this court from inspecting one of the defendant's documents *in camera* or ordering its production.

Facts

On May 25, 2015, Marilyn Stagno slipped on an allegedly wet floor adjacent to a sink near the patient dining area at Alexian Brothers Rehabilitation Hospital (ABRH) in Elk Grove Village, Illinois. Stagno fell and sustained injuries, including a fractured fibula. On May 17, 2017, she filed a three-count

complaint sounding in negligence against various defendants. The complaint alleges that at the time of her injury, Stagno "was using said dining area and sink for its intended and usual purpose, which was to wash her hands between evaluation of patients that were admitted to this hospital." Cmplt. count II at ¶ 5.[1] Based on those facts, Stagno claimed that the defendants breached their duty of care owed to her by, among other things, permitting the floor to remain wet and failing to warn of the condition or remediate it. After her fall, Stagno was taken to and admitted through the hospital's emergency department.

The case proceeded to written discovery. On January 4, 2018, in response to Stagno's request for production of documents, Alexian Brothers Medical Center (ABMC) served on the parties an amended privilege log. *See* Ill. S. Ct. R. 201(n). ABMC claimed privilege over a so-called Quantros report pursuant to the Medical Studies Act (MSA), 735 ILCS 5/8-2101 – 2105, and the Patient Safety and Quality Improvement Act of 2005 (PSQIA), 42 U.S.C. §§ 299b-21 through 299b-26 (amending the Public Health Service Act) & 42 C.F.R., part 3. The same day, ABMC delivered to this court a letter explaining its position that the PSQIA prohibits ABMC from providing the Quantros report to this court for *in camera* inspection or producing it to Stagno in discovery. According to ABMC:

> The Quantros Report is not an incident report. It is a report collected as part of Alexian Brothers' Patient Safety Evaluation System with the intent and purpose of use by its federally approved patient safety organization (PSO) certified by the Agency for Healthcare Research and Quality. Reports of patient safety and quality improvement made by members of a federally qualified PSO are not subject to discoverability in any matter, even in regulatory investigations or criminal actions brought by the

[1] A "Fall Incident Report Form" produced in discovery indicates that Stagno is a physician.

> government, because they are patient safety work product. [Citation omitted.] In addition to the federal law (PSQIA), Illinois courts and law recognize patient safety work product is protected from discovery. In *The Department of Financial and Professional Regulation v. Walgreen Company*, Illinois recognized the protection of patient safety work product from any discovery, even a regulatory investigation. [Citation omitted.]
>
> The alleged occurrence in this case was on May 25, 2015. Well prior thereto, Ascension Health established the Ascension Health Patient Safety Organization (AHPSO). Since May 11, 2011, the AHPSO has been and is a certified and qualified federally approved PSO under the Patient Safety and Quality Improvement Act. In April 2012, Alexian Brothers became a member and participant in the federally qualified AHPSO. Therefore, Alexian Brothers is a member of a federally qualified patient safety organization. The AHPSO uses the Quantros System, which is a patient safety and quality improvement reporting software system under its Patient Safety Evaluation System. Staff are directed to complete Quantros Reports for the purpose of patient safety and quality improvement at the direction of the Patient Safety Quality Program.

Letter from Riley C. Mendoza to this court, Jan. 4, 2018, p. 2.

At a January 12, 2018 case management conference, this court expressed concern that ABMC was reading the statutes, particularly the PSQIA, too broadly. This court ordered ABMC to submit a brief in response to Stagno's motion to compel and address various cases the court had cited as relevant to the PSQIA privilege claim. On January 26, 2018, ABMC filed its brief.

Attached as an exhibit to ABMC's brief is the affidavit of Christine Johns, the Corporate Vice President of Patient Safety

and Quality with oversight of Patient Safety and Quality. Johns avers that she held a similar title at the time of Stagno's alleged fall. Johns avers that ABRH and ABMC are members of and participants in the Ascension Healthcare Patient Safety Organization [AHPSO], a federally certified patient safety organization (PSO), as a result of the membership and participation of the Alexian Brothers Health System (ABHS). According to Johns, ABHS seeks to "promote quality improvement by sharing events and learning from a system of analysis." To that end, employees and staff are encouraged to report events that "may lead to improved safety practices and quality of care." ABHS participates in these quality control measures "in reliance upon the legal protections offered by the [PSQIA]."

Johns further avers that ABHS maintains its patient safety evaluation system for the purpose of reporting to the PSO:

> with a view to improve quality and efficiency of patient care, collect and evaluate data as an assessment of the quality of care, assess the delivery and outcome of care provided, resolve identified problems and search for ways to enhance the level of care and integrate review and analysis of significant outcomes into the overall quality management program to improve the safety and quality of patient care.

Johns further avers that Quantros is a patient safety evaluation system used by ABHS for reporting events "to improve the quality of patient care and for use by the Patient Safety Organization." "The data contained in the Quantros Report at issue was assembled, developed and prepared solely for quality improvement purposes with the intent of use by and submission to the PSO." Johns avers that the Quantros report for Stagno was used only for the "evaluation, improvement of patient safety and quality of care and for no other purpose" and was not produced in any other format.

ABMC's brief presents a far more cursory argument as to why the MSA protects the Quantros report from disclosure. ABMC begins with the unremarkable statement that documents "generated specifically for the use of a peer-review committee receive protection under the Act." Resp. Br. at 14, *quoting Chicago Trust Co. v. Cook Cty. Hosp.*, 298 Ill. App. 3d 396, 402 (1st Dist. 1998). From that premise, ABMC concludes that the MSA protects the Quantros report because it was:

> generated solely for, and at the direction of, Alexian Brothers' Patient Safety Quality Program and was only used to improve the quality of patient care through the internal quality control process and for the use by the Ascension Health PSO. . . . The Report was used in the course of internal quality control and for the purpose of improving patient safety and quality.

Resp. Br. at 14.

Analysis

ABMC's claim of privilege is based on one state statute – the MSA – and one federal statute – the PSQIA. If a party claims a statutory privilege over the production of documents in discovery, the resolution of questions by the court are purely legal in nature and are accomplished by applying the rules of statutory construction. *See Norskog v. Pfiel*, 197 Ill. 2d 60, 70-71 (2001) (addressing the Mental Health and Developmental Disabilities Confidentiality Act). The cardinal rule of statutory construction is to "ascertain and effectuate the legislature's intent. . . ." *McElwain v. Illinois Sec'y of State*, 2015 IL 117170, ¶ 12. The primary source from which to infer this intent is the statute's language. *See id.* "If the language of the statute is clear, the court should give effect to it and not look to extrinsic aids for construction." *Bogseth v. Emanuel*, 166 Ill. 2d 507, 513 (1995).

It is also plain that a court may not, "depart from plain statutory language by reading into [a] statute exceptions,

limitations, or conditions not expressed by the legislature." *McElwain*, 2015 IL 117170, ¶ 12. A statute is to be viewed as a whole, construing words and phrases in light of other relevant statutory provisions. *See Chicago Teachers Union v. Board of Ed.*, 2012 IL 112566, ¶ 15 (citing cases). Words, clauses, and sentences are to be given a reasonable meaning and not rendered superfluous. *See id.* (citing cases). In construing a statute, a court may consider, "the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another." *Id.* Finally, "[e]ven if a statute has remedial features but is in derogation of the common law, it will be strictly construed when determining what persons come within its operation." *In re W.W.*, 97 Ill. 2d 53, 57 (1983) (citing cases).

With these legal principles in mind, it is possible to evaluate ABMC's two claims of statutory privilege.

I. Medical Studies Act

The MSA provides in relevant part that:

> All information . . . [or] reports . . . used in the course of internal quality control or of medical study for the purpose of reducing morbidity or mortality, or for improving patient care . . . shall be privileged, strictly confidential and shall be used only for medical research, increasing organ and tissue donation, the evaluation and improvement of quality care, or granting, limiting or revoking staff privileges or agreements for services . . . .
>
> Such information . . . [or] reports . . . shall not be admissible as evidence, nor discoverable in any action of any kind in any court or before any tribunal, board, agency or person. The disclosure of any such information or data, whether proper, or improper, shall not waive or have any effect upon its confidentiality, nondiscoverability, or nonadmissability.

735 ILCS 5/8-2101 & 2102. The Illinois Supreme Court has explained that the purpose of the MSA is "to ensure that members of the medical profession can maintain effective professional self-evaluation and to improve the quality of healthcare." *Klaine v. Southern Ill. Hosp. Servs.*, 2016 IL 118217, ¶ 30, *quoting Frigo v. Silver Cross Hosp. & Med. Cntr.*, 377 Ill. App. 3d 43, 65 (1st Dist. 2007).

Based on the statute's unambiguous terms and its purpose, it is evident for at least three reasons that ABMC cannot claim that the MSA privilege extends to the Quantros report. First, the Quantros report does not qualify as a report related to "internal quality control," "medical study for the purpose of reducing morbidity or mortality," or "improving patient care" – the only three categories of documents privileged under the MSA. ABMC's privilege claim is fundamentally flawed because it presupposes a patient designation before the incident in question. In other words, Stagno was not a patient at the time of her fall; rather, she was a physician working at ABMC who was washing her hands at a sink between patient evaluations. Given Stagno was a physician, not a patient, at the time of her slip and fall, a Quantros report cannot "improve the quality of healthcare," *Klaine*, 2016 IL 118217, ¶ 30, since ABMC was not providing healthcare to Stagno at the time she fell.

Second, the Quantros report has nothing to do with morbidity or mortality. "Morbidity" is defined as "a diseased state or symptom," "the incidence of disease: the rate of sickness," or as a collection of statistics on an illness. "Morbidity," *Webster's Third New Int'l Dict.* (unabr. ed. 2002). "Mortality" can have a number of meanings, including "the death of large numbers: a heavy loss of life (as by war or disease)," either the whole sum of deaths or a proportion of deaths per population, or a "rate of loss or failure in a field of human endeavor." "Mortality," *id.* In this case, there is simply nothing in the record to even suggest that Stagno was diseased, dying, or died either at the time of her slip and fall or while hospitalized at ABMC; consequently, any report related to

the incident does nothing to reduce morbidity or mortality either in general or specifically as it relates to her.

Third, the MSA does not shield the Quantros report since the statute "does not insulate from discovery documents that were generated *before* a peer-review committee or its designee authorized an investigation of *a specific incident*." *Grosshuesch v. Edward Hosp.*, 2017 IL App (2d) 160972, ¶ 26 (emphasis added). Neither of those requirements is satisfied in this instance. Initially, no peer-review committee or designee ordered the generation of the Quantros report. ABMC's argument that the report was "generated solely for, and at the direction of, Alexian Brothers' Patient Safety Quality Program," Resp. Br. at 14, misses the point because a "program" is not a peer-review committee or its designee. Further, the "program" did not authorize the investigation of Stagno's slip and fall. ABMC focuses exclusively on the report but overlooks who generated it. ABMC admits that Quantros merely collects information and transfers it up the data gathering chain since it is a "patient safety and quality improvement reporting software." Software is not a substitute for a human being who supplies the necessary information to create a Quantros report. And there is nothing in the record to indicate that the person who reported Stagno's slip and fall did so at the behest of a peer-review committee or its designee.

Lastly, the suggestion that the MSA precludes ABMC from providing the Quantros report to this court for an *in camera* inspection is borderline frivolous. There exists no language in the statute to permit such a conclusion. Further, Illinois Supreme Court Rule 201 certainly contemplates *in camera* inspections by authorizing circuit court supervision of the discovery process. *See* Ill. S. Ct. R. 201(c)(2). Indeed, under the right circumstances, an *in camera* inspection is positively encouraged. *See Brown v. Advocate Health & Hosps. Corp.*, 2017 IL App (1st) 16191, ¶ 23 ("This power includes the authority to review discovery materials *in camera* to determine any possible relevance."), *quoting Youle v. Ryan*, 349 Ill. App. 3d 377, 381 (4th Dist. 2004), *citing, in turn, In re Estate of Bagus*, 294 Ill. App. 3d 887, 891 (2d Dist. 1998).

Indeed, courts of appeal have consistently approved of circuit court's undertaking such a review in cases raising questions of privilege under the MSA. *See, e.g., Grosshuesch*, 2017 IL App (2d) 160972, ¶¶ 6-8; *Nielson v. SwedishAmerican Hosp.*, 2017 IL App (2d) 160743, ¶ 22; *Zangara v. Advocate Christ Med. Ctr.*, 2011 IL App (1st) 91911, ¶ 13; *Webb v. Mount Sinai Hosp. & Med. Ctr. of Chicago, Inc.*, 347 Ill. App. 3d 817, 821 (1st Dist. 2004).

In sum, the MSA's plain language does not protect the Quantros report from either an *in camera* inspection by this court or from production to the defendants. The facts and the law do not support ABMC's arguments to the contrary.

II. Patient Safety and Quality Improvement Act of 2005

Congress enacted the PSQIA to move beyond "the existing culture of blame and punishment that suppresses information about health care errors to a 'culture of safety' that focuses on information sharing, improved patient safety and quality and the prevention of future medical errors." S. Rep. No. 108-196, at 2 (2003). The legislation achieves this goal by "providing peer review protection of information reported to patient safety organizations for the purposes of quality improvement and patient safety." H.R. Rep. No. 109-197, at 9 (2005). To that end, the PSQIA extends a privilege over information, *see* 42 U.S.C. § 299b-22, if that information constitutes "patient safety work product" and other procedural requirements have been met.

The statute provides a detailed and highly qualified definition of "patient safety work product." As set forth by the statute:

> (A) In General
> Except as provided in subparagraph (B), the term "patient safety work product" means any data, reports, records, memoranda, analyses (such as root cause analyses), or written or oral statements—
> (i) which—

(I) are assembled or developed by a provider for reporting to a patient safety organization and are reported to a patient safety organization; or

(II) are developed by a patient safety organization for the conduct of patient safety activities;

and which could result in improved patient safety, health care quality, or health care outcomes; or

(ii) which identify or constitute the deliberations or analysis of, or identify the fact of reporting pursuant to, a patient safety evaluation system.

(B) Clarification

(i) Information described in subparagraph (A) does not include a patient's medical record, billing and discharge information, or any other original patient or provider record.

(ii) Information described in subparagraph (A) does not include information that is collected, maintained, or developed separately, or exists separately, from a patient safety evaluation system. Such separate information or a copy thereof reported to a patient safety organization shall not by reason of its reporting be considered patient safety work product.

(iii) Nothing in this part shall be construed to limit—

(I) the discovery of or admissibility of information described in this subparagraph in a criminal, civil, or administrative proceeding;

(II) the reporting of information described in this subparagraph to a Federal, State, or local governmental agency for public health surveillance, investigation, or other public health purposes or health oversight purposes; or

(III) a provider's recordkeeping obligation with respect to information described in this subparagraph under Federal, State, or local law.

42 U.S.C. § 299b-21(7)(A) & (B).

Congress expressly provided three significant limitations on the application of the PSQIA privilege. *See Johnson v. Cook Cty.*, 2015 U.S. Dist. Lexis 115868, at *17-20. First, the Senate report explains that the protections apply *only* to "*certain* categories of documents and communications termed 'patient safety work product' *that are developed in connection with newly created patient safety organizations*." S. Rep. No. 108-196, at 2 (2003) (emphasis added); *see also* 42 U.S.C. § 299b-21(7)(A). In other words, if the information was made or gathered by anyone else, for example, a hospital's risk manager or pursuant to preexisting policies and procedures in the normal course of business, the privilege does not apply. *See Johnson*, at *21-23. Second, the statute expressly provides that the information constitutes "patient safety work product" *only* if it has actually been reported to a PSO or patient safety evaluation system. *See id.* at 18-20; *see also* 42 U.S.C. § 299b-21(7)(A). If, for example, a hospital gathered information for a PSO but did not report it to a PSO, the information is not subject to privilege. Third, the privilege extends to patient safety work product only if the Secretary of Health and Human Services has certified the PSO. In one instance, a court refused to recognize a PSQIA privilege claim because the PSO to which the hospital disclosed information was not federally certified. *See Dunn v. Dunn*, 163 F. Supp. 3d 1196 (M.D. Ala. 2016). As noted:

> [t]here are currently 81 certified patient safety organizations; MHM, however, is not one of them, and there is no indication that MHM reports to a certified patient safety organization. *See* "Federally-Listed PSOs," Agency for Healthcare Research and Quality [AHRQ], https://pso.ahrq.gov/listed. MHM's quality-assurance mechanisms are, as it has repeatedly noted, purely internal; the privilege created by the PSQIA covers a particular form of (certified) *external* review.

Id. at 31-32 (emphasis added).

Given the PSQIA's plain language and its interpretation by

federal courts, it is plain that ABMC's arguments against *in camera* inspection and production are wholly unsupported. First, there is nothing in the statute prohibiting a federal or state court from conducting an *in camera* inspection of documents over which there is a question of privilege. Indeed, just the opposite is true since "[n]othing in this part shall be construed to limit [either] . . . the discovery of or admissibility of information described in this subparagraph in a criminal, civil, or administrative proceeding." 42 U.S.C. § 299b-21(7)(B)(iii)(I). Given such plain statutory language, numerous federal and state courts have not hesitated to conduct *in camera* inspections of documents over which defendant medical providers claimed a PSQIA privilege. *See, e.g., Quimbey v. Community Health Sys.*, 2017 U.S. Dist. Lexis 193823, *3 (D.N.M. Nov. 22, 2017); *Morshed v. St. Barnabas Hosp.*, 2017 U.S. Dist. Lexis 19610 (S.D.N.Y. Feb. 10, 2017), *2-3; *Thomas v. Kaven*, 2016 U.S. Dist. Lexis 71193 (D.N.M. June 1, 2016); *Dunn*, 163 F. Supp. 3d 1196, 1201; *Johnson*, 2015 U.S. Dist. Lexis 115868, at *4; *Brown v. St. Mary's Hosp.*, 2015 U.S. Dist. Lexis 179597, *3 & 7 (D. Conn. Aug. 26, 2015); *Tinal v. Norton Healthcare, Inc.*, 2014 U.S. Dist. Lexis 191995, *5 & 8 (W.D. Ky. July 14, 2014); *Warren v. Dart*, 2013 U.S. Dist. Lexis 155445, *9-10 (N.D. Ill. Oct. 30, 2013); *Strini v. Edwards Lifesciences Corp.*, 2006 U.S. Dist. Lexis 91447, *3 (N.D.N.Y. Dec. 19, 2006); *Edwards v. Thomas*, 229 So. 3d 277, 280 (Fla. 2017); *Charles v. Southern Baptist Hosp. of Fla., Inc.*, 209 So. 3d 1199, 1206 (Fla. 2017); *Bill v. Orlando Reg'l Healthcare Sys.*, 2007 Fla. Cir. Lexis 381, *3 (Fla. Cir. Ct. Jan. 18, 2007); *Baptist Health Richmond, Inc. v. Clouse*, 497 S.W.3d 759, 766 (Ky. 2016); *Counts v. Johnston Mem'l Hosp., Inc.*, 2014 Va. Cir. Lexis 159, *1-2.

As to the disclosure of documents in discovery, it is plain that the PSQIA privilege does not extend to the Quantros report at issue. Cutting through the redundant healthcare speak in the January 4, 2018 letter and the Johns affidavit, it is doubtless that, to paraphrase Gertrude Stein, an incident report is an incident report is an incident report. Saying otherwise does not make it so.

First, as noted in Section I concerning the MSA, Stagno was not a patient when she slipped and fell. Given that factual predicate, the Quantros report over which ABMC claims a PSQIA privilege cannot relate to patient care. The inexorable conclusion is that a Quantros report not concerning patient care cannot qualify for privilege from disclosure under the PSQIA.

Second, ABMC is attempting to protect from disclosure under the PSQIA that which it cannot protect under the MSA. In essence, ABMC is seeking to declare in advance that certain records are subject to PSQIA privilege rather than make that determination based on the specific record and the reason for its creation. Such a procedure is certainly unacceptable under the MSA. *See, e.g., Nielson*, 2017 IL App (2d) 160743, ¶ 52. In this case, the record does not establish that the Quantros report of Stagno's slip and fall was "specifically generated or assembled for the purpose of reporting to a PSO or patient safety evaluation." *Johnson*, 2015 U.S. Dist. Lexis 115868, *21. The *Johnson* court explained that: "[i]nformation generated or assembled for some other purpose, even if the information relates to quality improvement measures, is not considered patient safety work product." *Id.* As in *Johnson*, ABMC here has failed to present any evidence that the report of Stagno's slip and fall "was generated or the information in the Report gathered for a PSO *within the meaning of* the PSQIA." *Id.* at *24 (emphasis added).

Third, the cases cited and discussed by ABMC in its brief defeat the very argument ABMC attempts to make. For example, in *Department of Fin. & Prof. Reg'l v. Walgreen Co.*, the court addressed a claim of PSQIA privilege over pharmacy records identifying medication errors. *See* 2012 IL App (2d) 110452, ¶ 5. Plainly, there is a substantial difference between the records of patients receiving improper medication versus a record of a non-patient who is suing for premises liability. Further, the evidentiary record in *Department* established that Walgreens created the records for no purpose other than reporting the errors as required by the PSQIA. *See id.* at ¶¶ 6 & 8.

Fourth, this court conducted extensive 50-state surveys on the Lexis electronic database for federal and state decisions in which courts accepted or rejected a claim of privilege under the PSQIA. In not a single case did any court even consider a scenario involving a premises slip and fall of a patient or non-patient, let alone whether the report of such an incident would be protected from disclosure by the PSQIA. To accept ABMC's argument and protect its Quantros report under a claim of PSQIA privilege would mean that a state circuit court, absent any controlling precedent, is extending a federal statutory privilege beyond its plain language. This court simply does not have that sort of chutzpah.

As with the MSA, the PSQIA does not protect the Quantros report from either an *in camera* inspection by this court or from production to the defendants. The facts and the law do not support ABMC's argument to the contrary.

Conclusion

For the reasons presented above, this court grants Stagno's motion to compel and orders that ABMC provide the record to this court for *in camera* inspection and ultimate production to Stagno.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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Circuit Court 2075