

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Girraj K. Bansal,	:	
Plaintiff-Appellant,	:	
v.	:	No. 09AP-351 (C.P.C. No. 07CVH03-4421)
Mount Carmel Health Systems, Inc. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on December 24, 2009

James H. Banks, for appellant.

Vorys, Sater, Seymour & Pease LLP, William J. Pohlman and Michael J. Hendershot, for appellees.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Plaintiff-appellant, Girraj K. Bansal, appeals from a judgment of the Franklin County Court of Commons Pleas granting summary judgment in favor of defendants-appellees, Mount Carmel Health Systems ("Mount Carmel"), Joe Calvaruso, Thomas Kramer, Randall Miller, James Smith, Larry D. Swanner, and Ronald E. Whiteside (collectively "defendants"). For the following reasons, we reverse and remand.

{¶2} On March 29, 2007, Bansal filed suit against defendants, alleging claims for race, color, national origin, and/or age discrimination in violation of 42 U.S.C. 1981 and R.C. 4112.02, et seq.; tortious interference with business and contractual relationships; defamation; and violation of the First Amendment of the United States Constitution. Bansal is an internal medicine physician. From 1987 until 2005, Mount Carmel East included Bansal on its internal medicine call schedule for unassigned emergency room patients. If a patient who did not already have a physician arrived at Mount Carmel East's emergency room, Mount Carmel East personnel would contact Bansal (or another physician on the call schedule) to provide the patient with internal medicine care. After Mount Carmel East removed Bansal from the call schedule, Bansal brought the instant lawsuit.

{¶3} In the course of discovery, Bansal requested that defendants produce the following documents:¹

6. Produce all documents which reflect any of the information set forth in your answers to interrogatory numbers 4[, which reads, "[s]tate each and every date which you had contact with plaintiff * * *"] and/or 5[, which reads, "[f]or each date set forth in [interrogatory number 4], state * * * [t]he type of contact (i.e. in person, by telephone, etc.), * * * [w]ho initiated the contact, [and] * * * [t]he reason for the contact"].

* * *

9. Produce all documents which reflect any of the information set forth in your answers to interrogatory numbers 7[, which reads, "[s]tate each and every date which you had contact with anyone regarding plaintiff * * *"] and/or 8[, which reads, "[f]or each date set forth in [interrogatory number 7], state * * * [t]he type of contact (i.e. in person, by telephone, etc.), * * * [w]ho initiated the contact, [and] * * * [t]he reason for

¹ We quote from the document requests propounded on Mount Carmel. Bansal submitted virtually identical document requests to the other defendants.

the contact"] and/or which relate to your contact with and/or statements to the individuals/entities identified.

* * *

11. Produce all documents which reflect any of the information set forth in your answer to interrogatory numbers 10[, which reads, "[s]tate in detail the basis for your demand that Dr. Bansal seek psychological help * * * "] * * *.

* * *

13. Produce all documents which reflect any of the information set forth in your answer to interrogatory numbers 12 [, which reads, "[i]dentify each employee or physician affiliated with Mt. Carmel whom you have referred for psychological help at any time from January, 2001 to the present and state the race and national origin of each."].

* * *

16. Produce all documents which reflect any of the information set forth in your answers to interrogatory numbers 14[, which reads, "[s]tate each and every date which Dr. Bansal discussed problems with you which he was having with nurses/nursing staff * * *"] and/or 15[, which reads, "[f]or each date set forth in [interrogatory number 14], state * * * [t]he type of discussion (i.e. in person, by telephone, etc.), * * * [w]ho initiated the discussion, [and] * * * [t]he reason for the discussion"] * * *.

* * *

18. Produce all documents which reflect any of the information set forth in your answer to interrogatory number 17[, which reads, "[s]tate whether you have suggested or encouraged any patient of Dr. Bansal to see another physician * * * [and,] [i]f so, identify the patient and state the date and reason for the suggestion."].

* * *

20. Produce all documents which reflect any of the information set forth in your answer to interrogatory number 19[, which reads, "[s]tate the number of times you have required and/or suggested to Dr. Bansal that he see another

doctor or health care provider and state for each time: * * * [t]he date, * * * [t]he name of the doctor or health care provider, * * * [t]he reason for the suggestion or requirement, [and] * * * [t]he result".

* * *

24. Produce all documents which reflect any of the information set forth in your answer to interrogatory number 23[, which reads, "[f]or each occasion when Dr. Bansal was discussed at a committee or group meeting involving Mt. Carmel, its managers and/or directors, state * * * [t]he date, * * * [t]he identity of persons at the meeting, [and] * * * [t]he reason for the meeting"].

25. Produce all documents which relate to plaintiff Girraj K. Bansal, including but not limited to any personnel file, memo and/or any document in which Dr. Bansal was the subject.

* * *

27. Produce all documents which reflect any of the information set forth in your answer to interrogatory number 26[, which reads, "[s]tate in detail the reason(s) which support the decision to require that Dr. Bansal see a psychiatrist in 2007 or have his privileges terminated."].

* * *

29. Produce all documents which reflect any of the information set forth in your answer to interrogatory number 28[, which reads, "[s]tate in detail the circumstances which resulted in the suggestion that Dr. Bansal was a terrorist."].

* * *

31. Produce all documents which reflect the procedure described in your answer to interrogatory number 30[, which reads, "[s]tate the procedure used for nurses to contact doctors at any time from January, 2000 to the present."].

* * *

34. Produce all documents which reflect any of the information set forth in your answer to interrogatory number 33[, which reads, "[i]dentify each doctor who has been

suspended from Emergency Room call duties at any time from January, 2000 to the present and state for each: * * * [t]he date, * * * [t]he reason for the suspension, [and] * * * [t]he term of the suspension."].

{¶4} Defendants objected to each of these document requests on multiple grounds, including the ground that the peer review privilege set forth in R.C. 2305.25, et seq., protected some or all of the requested documents. Despite their objections, defendants ultimately produced some documents in response to Bansal's discovery requests. In response to document request number 6, defendants produced all responsive documents, except for internal Mount Carmel memoranda regarding communications with Bansal. Although defendants first objected to the production of certain letters responsive to document request number 16, defendants later produced those letters.

{¶5} In subsequent correspondence with Bansal's counsel, defendants' counsel explained that defendants never possessed documents responsive to document request numbers 18, 20, or 27. Thus, defendants' objections to these document requests became moot.

{¶6} Defendants, however, affirmatively stood by their refusal to produce any documents responsive to document request numbers 13, 22, 24, and 34. Additionally, with the exception of correspondence with Bansal's former attorney, defendants also refused to produce documents responsive to document request number 9.

{¶7} Although defendants never explicitly addressed their objections to document request numbers 11 and 29, defendants apparently never produced any documents responsive to those document requests. With respect to document request numbers 25 and 31, defendants produced certain non-privileged documents, but

apparently continued to assert their objection to disclosing any privileged documents responsive to those requests.

{¶8} Thus, after the completion of discovery, defendants admittedly possessed, but refused to produce, documents responsive to document request numbers 6, 9, 13, 22, 24, and 34. Defendants asserted the R.C. 2305.252 privilege as the basis for withholding these documents. Moreover, given the ambiguity in defendants' responses, they might possess documents responsive to document request numbers 11, 25, 29, and 31 that they retained based upon the asserted privilege.

{¶9} On November 17, 2008, Bansal filed a motion to compel discovery. Bansal claimed that defendants had failed to respond to the majority of his document requests based upon the peer review privilege, and he disputed defendants' contention that the withheld documents were privileged. In response, defendants pointed out that they had produced over 130 pages of non-privileged documents during the course of discovery. Defendants then argued that the privilege set forth in R.C. 2305.252 protected documents: (1) evidencing instances when Bansal was discussed during Mount Carmel peer review or quality assurance meetings, (2) regarding other employees or physicians that Mount Carmel has recommended see a health care provider or psychologist, and (3) regarding whether Mount Carmel has suspended other physicians from the call schedule for unassigned emergency room patients. In support of their argument, defendants submitted affidavit testimony establishing the existence of two Mount Carmel East entities—the Medical Executive Committee and the Clinical Department Council—that conduct peer reviews of the physicians of Mount Carmel East and take other quality assurance measures.

{¶10} In its January 9, 2009 decision, the trial court did not address whether any of the documents Bansal sought fell within the peer review privilege. Rather, the trial court assumed that all the requested documents were privileged, and it focused on whether Bansal could obtain any documents protected by R.C. 2305.252. Concluding that he could not, the trial court denied Bansal's motion to compel.

{¶11} On March 6, 2009, the trial court granted defendants summary judgment on all of Bansal's claims. Bansal now appeals and assigns the following errors:

[1.] THE TRIAL COURT ERRED IN DENYING PLAINTIFF-APPELLANT'S MOTION TO COMPEL DISCOVERY.

[2.] THE TRIAL COURT'S CONCLUSIONS OF LAW ON THE FACTUAL ISSUES BELOW ARE CONTRARY TO LAW AND THE RULES OF EVIDENCE AND CIVIL PROCEDURE, SUCH THAT THE JUDGMENT BELOW MUST BE REVERSED.

[3.] THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON PLAINTIFF-APPELLANT'S CLAIM FOR INTERFERENCE WITH BUSINESS RELATIONSHIPS.

[4.] THE TRIAL COURT ERRED IN ITS ANALYSIS OF PLAINTIFF-APPELLANT'S DEFAMATION CLAIM.

[5.] THE TRIAL COURT ERRED IN FINDING NO FIRST AMENDMENT VIOLATION.

{¶12} By Bansal's first assignment of error, he argues that the trial court erred in denying his motion to compel production of documents that defendants claim are privileged pursuant to R.C. 2305.252. We agree.

{¶13} Appellate courts generally apply the abuse of discretion standard when reviewing discovery rulings. *State ex rel. Sawyer v. Cuyahoga Cty. Dept. of Children and Family Servs.*, 110 Ohio St.3d 343, 2006-Ohio-4574, ¶9. However, "whether the

information sought is confidential and privileged from disclosure is a question of law that is reviewed de novo." *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, ¶13.

{¶14} According to R.C. 2305.252:

Proceedings and records within the scope of a peer review committee of a health care entity shall be held in confidence and shall not be subject to discovery or introduction in evidence in any civil action against a health care entity or health care provider, including both individuals who provide health care and entities that provide health care, arising out of matters that are the subject of evaluation and review by the peer review committee. * * * Information, documents, or records otherwise available from original sources are not to be construed as being unavailable for discovery or for use in any civil action merely because they were produced or presented during proceedings of a peer review committee, but the information, documents, or records are available only from the original sources and cannot be obtained from the peer review committee's proceedings or records. * * *

A health care entity asserting the R.C. 2305.252 privilege bears the burden of establishing the applicability of the privilege. *Lowrey v. Fairfield Med. Ctr.*, 5th Dist. No. 08 CA 85, 2009-Ohio-4470, ¶35; *Giusti v. Akron Gen. Med. Ctr.*, 178 Ohio App.3d 53, 2008-Ohio-4333, ¶17. "Simply labeling a document 'peer review,' 'confidential,' or 'privileged' does not invoke the statutory privilege." *Selby v. Fort Hamilton Hosp.*, 12th Dist. No. 2007-05-126, 2007-Ohio-2413, ¶14. Rather, to attain the benefits of the peer review privilege, a health care entity must establish that the documents at issue satisfy the criteria of R.C. 2305.252.² A health care entity may attempt to meet this burden by:

² A trial court may refuse to compel compliance with certain document requests, such as a request for all the documents contained in a peer review committee's records, because that sort of request, on its face, only asks for documents privileged under R.C. 2305.252. A health care provider must carry its burden to prove the R.C. 2305.252 privilege when a dispute arises as to whether the documents requested are privileged.

(1) submitting the documents in question to the trial court for an in camera inspection, or
(2) presenting affidavit or deposition testimony containing the information necessary for the trial court to adjudge whether the privilege attaches.

{¶15} To prove the privilege, the health care entity must first establish the existence of a committee that meets the statutory definition of "peer review committee" contained in R.C. 2305.25(E). *Ward v. Summa Health Sys.*, 9th Dist. No. 24567, 2009-Ohio-4859, ¶17; *Manley v. Heather Hill, Inc.*, 175 Ohio App.3d 155, 2007-Ohio-6944, ¶22; *Smith v. Manor Care of Canton, Inc.*, 5th Dist. No. 2005-CA-00100, 2006-Ohio-1182, ¶61. Second, the health care entity must establish that each of the documents that it refuses to produce in response to a discovery request is a "record[] within the scope of a peer review committee." R.C. 2305.252. The health care entity must provide evidence as to the specific documents requested, not generalities regarding the types of documents usually contained in a peer review committee's records.

{¶16} R.C. 2305.252 explicitly delineates one type of "record [] within the scope of a peer review committee" when it permits health care entities to refuse to answer discovery requests for "information, documents, and records otherwise available from original sources * * * produced or presented during proceedings of a peer review committee." Based upon this provision, we conclude that documents sought from a health care entity are peer review records if the health care entity proves that those documents were generated by an original source, and that they were produced or presented to the peer review committee.³

³ If a health care entity itself is the original source, it cannot shield documents from disclosure just by circulating them during peer review proceedings. In other words, a health care entity must produce documents responsive to a document request if it created the document, the document was *not* generated by and/or exclusively for a peer review committee, and the document is available outside of any peer review

{¶17} Additionally, in providing limited protection for records generated by an original source, R.C. 2305.252 implicitly extends full and unconditional protection to records generated by the "non-original source," i.e., the peer review committee. Thus, we conclude that documents sought from a health care entity are peer review records if the health care entity proves that those documents were created by and/or exclusively for a peer review committee. See, e.g., *Selby* at ¶15-25 (holding that EKG discrepancy reports were not privileged peer review documents because the health care entity used the reports for patient care, and not necessarily for peer review purposes); *Trangle v. Rojas*, 150 Ohio App.3d 549, 2002-Ohio-6510, ¶34 ("[A]ny documents generated by the hospital for peer review purposes are privileged under the statute."); *McCarthy v. Western Reserve Care Sys.* (June 11, 1999), 7th Dist. No. 97 CA 76 (holding that an audit report used exclusively for quality assurance purposes was privileged).⁴

{¶18} Absent evidence that the requested documents were created by and/or exclusively for a peer review committee, or generated by an original source and produced or presented to a peer review committee, the party asserting the R.C. 2305.252 privilege has not met its burden. In the case at bar, it is not clear on the face of the disputed discovery requests that all of the documents requested by Bansal are subject to the peer review privilege. Therefore, defendants had the burden of proving that the requested documents were privileged. However, the trial court did not analyze the evidence submitted by defendants to determine if the privilege actually attached to the documents

committees' records (i.e., employees, affiliates, officers, or directors of the health care entity can access the document for non-peer review purposes).

⁴ Although the *Trangle* and *McCarthy* courts reached the foregoing holdings under R.C. 2305.251, the holdings in those cases provide insight into the scope of the peer review privilege by explicating what kind of documents the General Assembly intended to protect under that privilege.

at issue. Nor did the trial court require defendants to submit the disputed documents to it for an in camera inspection to decide whether the privilege applied. Rather, the trial court simply interpreted Bansal's document requests as seeking "records within the scope of a peer review committee" without any analysis. We conclude that the trial court erred in failing to adjudge whether R.C. 2305.252 protects the documents Bansal requested. Accordingly, we sustain Bansal's first assignment of error.

{¶19} Having sustained Bansal's first assignment of error, we must find the remainder of Bansal's assignments of error moot. Bansal's second through fifth assignments of error challenge the trial court's ruling on defendants' motion for summary judgment. If, upon remand, the trial court determines that defendants must produce the allegedly privileged documents, Bansal may obtain the evidence necessary to prevent summary judgment on some or all of his claims. Therefore, at best, judgment on Bansal's second through fifth assignments of error would be premature and, at worst, it would constitute an advisory opinion.

{¶20} For the foregoing reasons, we sustain Bansal's first assignment of error, and we find Bansal's second, third, fourth, and fifth assignments of error moot. We reverse the judgment of the Franklin County Court of Common Pleas, and we remand this matter to that court for further proceedings consistent with law and this opinion.

Judgment reversed and cause remanded.

BRYANT and McGRATH, JJ., concur.
