[Cite as *Lowrey v. Fairfield Med. Ctr.*, 2009-Ohio-4470.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CHARLES LOWREY, M.D.

Plaintiff-Appellant

-vs-

FAIRFIELD MEDICAL CENTER, et al.

Defendants-Appellees

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. John W. Wise, J.
Hon. Julie A. Edwards, J.

Case No. 08 CA 85

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 04 CV 1196
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 28, 2009

APPEARANCES:

For Plaintiff-Appellant

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Wise, J.

{¶1} Appellant Charles Lowrey, M.D. appeals the decision of the Fairfield County Court of Common Pleas granting summary judgment in favor of Fairfield Medical Center.

STATEMENT OF THE FACTS AND CASE

{¶2} After a series of incidents involving Dr. Lowrey's conduct at Fairfield Medical Center (“the Hospital”), the Hospital Board of Directors recommended that Dr. Lowrey's medical staff privileges be suspended. The parties subsequently entered into a January 8, 2003, Settlement Agreement which provided, *inter alia,* that Dr. Lowrey could reapply for staff privileges and that his application "will be evaluated on the same basis as any other physician applying for Medical Staff Appointment and Clinical Privileges."

{¶3} On December 17, 2004, Dr. Lowrey filed the initial Complaint in this case alleging, among other claims, various breaches of the Settlement Agreement by the Hospital. Through amending his Complaint, Dr. Lowrey eventually alleged eleven counts against the Hospital and former defendants. All but two of these Counts were eliminated via voluntary dismissal, summary judgment, or both. This left only Counts One and Six. In Count One, Dr. Lowrey alleged that the Hospital breached Paragraphs 4(a) and 4(b)(1)(2) of the Settlement Agreement by "failing to supply [his] patients with appropriate contact information and by failing to inform [him] of patient requests." In Count Six, he alleged that the Hospital breached Paragraph Two of the Settlement Agreement by failing to consider his application for medical

staff appointment and clinical privileges at the Hospital "on the same basis as any other physician applying for medical staff appointment and clinical privileges."

{¶4} On September 26, 2003, Dr. Lowrey signed a Consent and Release of Applicant and reapplied for Medical Staff privileges on October 2, 2003.

{¶5} On March 3, 2004, Dr. Dominquez advised Dr. Lowrey that "the Credentials Committee has completed its review for appointment and privileges and has forwarded a recommendation to the Medical Executive Committee not recommending employment and privileges."

{¶6} On March 18, 2004, Dr. Lowrey was sent a Notice of Adverse Recommendation.

{¶7} On March 23, 2004, Dr. Lowrey's counsel questioned the basis of the Credentials Committee's recommendation to not grant privileges to Dr. Lowrey and on April 12, 2004, Dr. Lowrey requested a hearing to take place after June 12, 2004, relating to the Credential Committee's recommendation to not grant medical staff privileges.

{¶8} On April 21, 2004, Mina Ubbing, President and CEO of the Hospital, advised Dr. Lowrey by certified mail that the requested hearing was scheduled to take place June 15 - 18, 2004. Dr. Lowrey's counsel requested a continuance of the hearing, which was rescheduled to August 23 - 27, 2004.

{¶9} On August 18, 2004, Dr. Lowrey submitted written notice withdrawing his application and cancelling the August 23 - 27, 2004 hearing.

{¶10} In the nine months following the time Dr. Lowrey withdrew his staff privileges application and cancelled the August 23 - 27, 2004 hearing, he filed four separate lawsuits against Fairfield Medical Center.

{¶11} The case at issue before this Court is the third and only remaining of these four lawsuits.

{¶12} In the litigation below, Dr. Lowrey sought discovery of certain peer review materials, to which the Hospital asserted the peer review privilege and filed a Motion for Protective Order based on R.C. §2305.252.

{¶13} On May 30, 2006, the trial court issued a Protective Order, which remained in place throughout the litigation.

{¶14} Prior to trial, on August 29, 2008, the Hospital filed a Motion in Limine based on the peer review privilege.

{¶15} On September 23, 2008, the date of the scheduled jury trial, the parties submitted an Agreed Entry Continuing Trial, signed by the trial court and journalized on September 26, 2008, wherein the parties agreed as follows:

{¶16} “The Court should reconsider Defendant's prior Motion for Summary Judgment if the Court determines that there has not been a waiver of the peer review privilege of R.C. §2305.252. The Court hereby continues the trial of this matter until a decision is reached on the admissibility of said peer review documents.”

{¶17} On October 28, 2008, the Court sustained the Hospital's Motion in Limine based on R.C. §2305.252, and on October 29, 2008 issued the following Entry:

{¶18} “Upon consideration of this Court's ruling in its Entry filed on October 28, 2008 and pursuant to this Court's Entry of September 26, 2008, the parties are hereby

ordered to submit Memorandum fully briefing the issue(s) to be considered by this Court [i.e., whether summary judgment should be granted on the two remaining counts] on or before November 17, 2008."

{¶19} In Plaintiff's Memoranda Contra to the Hospital's Motion for Reconsideration submitted pursuant to the Court's October 29, 2008 Entry, Dr. Lowrey did not contest the Hospital's Motion for Reconsideration of the ruling on Count One, only contesting the Entry as to Count Six.

{¶20} On December 3, 2008, after consideration of the Hospital's Motion for Reconsideration and Plaintiff's Memorandum Contra, the trial court sustained the Hospital's Motion for Summary Judgment and dismissed remaining Counts One and Six.

{¶21} Appellant now appeals, assigning the following errors for review:

ASSIGNMENTS OF ERROR

{¶22} "I. THE TRIAL COURT ERRED IN RECONSIDERING AND GRANTING SUMMARY JUDGMENT AS TO COUNT SIX OF DR. LOWREY'S COMPLAINT.

{¶23} "II. THE TRIAL COURT ERRED IN RECONSIDERING AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO COUNT ONE OF APPELLANT'S COMPLAINT.

{¶24} "III. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION IN LIMINE AS TO CERTAIN PEER REVIEW MATERIALS DUE TO THE FACT THAT PRIVILEGE WAS WAIVED IN THE INSTANT CASE."

{¶25} Appellant has failed to comply with Local App.R. 4(A) which requires appellant to attach to his brief a copy of the judgment entry appealed from. Although

failure to comply with these rules is failure to prosecute for which dismissal may be entered *sua sponte,* we decline to dismiss on procedural grounds and proceed to address the merits of this appeal.

{¶26} For clarity and ease of analysis, we shall address Appellant's assignments of error out order.

III.

{¶27} In his third assignment of error, Appellant argues that the trial court erred in granting defendant's motion in limine as to certain peer review materials. We disagree.

{¶28} Revised Code §2305.252 and §2305.253 set forth the confidentiality of records and proceedings in the peer review process. R.C. §2305.252 provides an umbrella of protection to information which is collected and maintained by a peer review committee during a peer review process. R.C. §2305.252 addresses the confidentiality of peer review committee proceedings and provides in pertinent part as follows:

{¶29} "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. No individual who attends a meeting of a peer review committee, serves as a member of a peer review committee, works for or on behalf of a peer review committee, or provides information to a peer review committee shall be permitted or required to testify in any civil action as to any evidence or other matters

produced or presented during the proceedings of the peer review committee or as to any finding, recommendation, evaluation, opinion, or other action of the committee or a member thereof. 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. An individual who testifies before a peer review committee, serves as a representative of a peer review committee, serves as a member of a peer review committee, works for or on behalf of a peer review committee, or provides information to a peer review committee shall not be prevented from testifying as to matters within the individual's knowledge, but the individual cannot be asked about the individual's testimony before the peer review committee, information the individual provided to the peer review committee, or any opinion the individual formed as a result of the peer review committee's activities. An order by a court to produce for discovery or for use at trial the proceedings or records described in this section is a final order."

{¶30} R.C. §2305.25(E)(1) defines "peer review committee" in part as follows:

{¶31} " 'Peer review committee' means a utilization review committee, quality assessment committee, performance improvement committee, tissue committee, credentialing committee, or other committee that does either of the following:

{¶32} "(a) Conducts professional credentialing or quality review activities involving the competence of, professional conduct of, or quality of care provided by

health care providers, including both individuals who provide health care and entities that provide health care;

{¶33} "(b) Conducts any other attendant hearing process initiated as a result of a peer review committee's recommendations or actions...."

{¶34} The language in R.C. §2305.252, "manifests the legislature's clear intent to provide a complete shield to the discovery of any information used in the course of a peer review committee's proceedings." *Tenan v. Huston,* 165 Ohio App.3d 185, 2006-Ohio-131, 845 N.E.2d 549, at paragraph 23. However, the purpose of the statute is not to hinder lawsuits, but to provide limited protection to individuals who provide information to review committees or boards, thereby encouraging a free flow of information without fear of reprisal in the form of civil liability. *Browning v. Burt* (1993), 66 Ohio St.3d 544, 562, 613 N.E.2d 993.

{¶35} A party asserting the privilege set forth in R.C. §2305.252 has the burden of establishing that the privilege is applicable. See, e.g., *Waldmann v. Waldmann* (1976), 48 Ohio St.2d 176, 178, 358 N.E.2d 521; *Svoboda v. Clear Channel Commun., Inc.,* 156 Ohio App.3d 307, 2004-Ohio-894, 805 N.E.2d 559; *Perfection Corp. v. Travelers Cas. & Sur.,* 153 Ohio App.3d 28, 2003-Ohio-2750, 790 N.E.2d 817.

{¶36} Generally, the review of a trial court's discovery order is pursuant to an abuse of discretion standard; but when the trial court's order contains an error of law in misconstruing or misapplying the law, then the appellate court reviews the matter de novo. *Quinton v. MedCentral Health Sys.,* Richland App. No. 2006CA0009, 2006-Ohio-4238, 2006 WL 2349548, at paragraph 13. The issue of the confidentiality of information pursuant to R.C. §2305.252 is one of law. *Id.* See also, *Smith v. Manor Care of Canton,*

Inc., Stark App. Nos. 2005-CA-00100, 2005-CA-00160, 2005-CA-00162, and 2005-CA00174, 2006-Ohio-1182; *Huntsman v. Aultman Hospital,* Stark App. Nos. 2004CA00124 and 2004CA00142, 2005-Ohio-1482, 160 Ohio App.3d 196, 826 N.E.2d 384.

{¶37} Specifically, Appellant argues that the Hospital waived the peer review privilege by failing to object to, move to strike or otherwise respond to Appellant's Motion of Extension of Time which was filed under seal and which attached certain peer review documents. Appellant argues that once the trial court had reviewed the privileged documents, such privilege was waived.

{¶38} Upon review, we find Appellant's waiver argument unpersuasive. We do not find that Appellee's alleged inaction in not objecting to the peer review documents Appellant attached to his Motion for Extension of Time, which was filed under seal, resulted in a waiver of the peer review privilege.

{¶39} The trial court in this matter had granted a protective order which prohibited Appellant from seeking "any evidence or other matters produced or presented during the proceedings of the peer review committee or as to any finding, recommendation, evaluation, opinion, or other action of the committee or member thereof." The trial court never modified or withdrew such protective order. There was no reason for Appellee to object to the documents which Appellant attached to his Motion as the trial court had already granted a protective order as to same.

{¶40} Ohio courts have recognized that such a broad concept of waiver would negate the purpose of the peer review confidentiality statute. *Atkins v. Walker* (1981), 3 Ohio App.3d 427, 445 N.E.2d 1132.

{¶41} Based on the foregoing, we find Appellant's waiver argument not well-taken and hereby overrule same.

{¶42} Appellant's third assignment of error is denied.

I., II.

{¶43} In his first and second assignments of error, Appellant claims the trial court erred in granting summary judgment in favor of Appellee as to Counts One and Six of his Complaint. We disagree.

"Summary Judgment Standard"

{¶44} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36. Civ.R. 56(C) provides, in pertinent part:

{¶45} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor."

{¶46} Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. The party moving for

summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107.

{¶47} It is based upon this standard that we review Appellant's assignments of error.

{¶48} Upon review, we find that the issues in this case are governed by the Supreme Court's decision in *Nemazee v. Mt. Sinai Medical Ctr.* (1990), 56 Ohio St.3d 109, where the syllabus states:

{¶49} "A physician in a private hospital whose employment and/or hospital privileges have been terminated must exhaust all internal administrative remedies prior to seeking judicial review."

{¶50} In the instant case, Appellant, like the doctor in *Nemazee*, originally requested a hearing under the hospital's due process policy to contest the termination or non-renewal of his privileges, but later withdrew that request and brought suit for breach of contract. *Id.* at 110.

{¶51} The Supreme Court held that the doctor was required to exhaust the administrative remedies provided in his employment contract prior to initiating suit. After

analyzing the general doctrine of exhaustion of remedies from administrative agencies, the Court noted that the same principle applied to decisions on staff competence under administrative due process procedures in hospitals, stating:

{¶52} "[t]he great weight of case authority in the United States is that a board of trustees of a private hospital has the authority to appoint and remove members of the medical staff of the hospital and to exclude members of the medical profession in its discretion from practicing in the hospital." ***

{¶53} Based upon *Nemazee*, supra, we find that Appellant failed to exhaust all internal administrative remedies provided by the Hospital prior to seeking judicial review. "The purpose of the exhaustion doctrine is to afford the hospital the ability to correct its own errors; to provide a trial court with an adequate factual record upon which to make an informed decision as established by the expert testimony of the medical staff; and to promote judicial economy through the resolution of these disputes without the premature need for judicial intervention." *O'Neill v. St. Luke's Medical Center,* (1996) Cuyahoga App. No. 70372.

{¶54} Additionally, we find that Appellant failed to produce any evidence in support of Counts One and Six of his Complaint.

{¶55} Appellant's first and second assignments of error are denied.

{¶56} For the foregoing reasons, the judgment of the Court of Common Pleas of Fairfield County, Ohio, is hereby affirmed.

By: Wise, J.

Hoffman, P. J., concurs in part and dissents in part.

Edwards, J., concurs separately.

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JUDGES

JWW/d 721

Hoffman, P.J., concurring in part and dissenting in part

{¶57} I concur in the majority's analysis and disposition of Appellant's Assignments of Error I and III. With respect to the first assignment, I reject Appellant's argument exhaustion of administrative remedies was not necessary because Appellant's claim was for breach of the Settlement Agreement. Because the Settlement Agreement required Appellant's application for privileges to be considered on the same basis as the application of any other physician, and all such other applications were subject to administrative review, as set forth in the Consent and Release of Applicant executed by Appellant, I find Appellant was also required to exhaust all administrative remedies before initiating his lawsuit with respect to Count Six.

{¶58} I respectfully dissent from the majority's disposition of Appellant's Assignment of Error II. Unlike Count Six, I do not find Count One subject to the exhaustion of administrative remedies requirement.

{¶59} I disagree with Appellees' assertion Appellant's failure to specifically address Count One in his reply to Appellees' Motion for Reconsideration of the trial court's previous denial of summary judgment waives his right to raise the issue in this appeal. Appellant's initial reply to Appellees' original summary judgment motion must still be considered.

{¶60} Appellant states in his Affidavit, his contact information was not shared with his patients in breach of the Settlement Agreement.[1] While Appellees have

[1] In the absence of a motion of strike Appellant's Affidavit for lack of personal knowledge or hearsay, such averment should be accepted when offered in defense of a motion for summary judgment. Had a motion to strike been filed, Appellant would have had the opportunity to cure any deficiency with additional affidavits from his patients. That is not

submitted the Affidavits of Connie Fisher and Kevin Schmelzer to prove otherwise, a genuine issue of this material fact remains in dispute. As such, I would sustain Appellant's Assignment of Error II.

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HON. WILLIAM B. HOFFMAN

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to say a motion to strike the movant's affidavit based upon lack of personal knowledge or hearsay is necessary to defeat summary judgment.

EDWARDS, J., CONCURRING OPINION

{¶61} I concur with the analysis and disposition of this case by Judge Wise with one exception.

{¶62} The exception is that I do not agree that Count I is subject to the exhaustion of administrative remedies requirement. However, this disagreement does not lead to a different disposition of the second assignment of error. This is because I find that appellant waived his right to raise the second assignment of error on appeal by not addressing the issue in his reply to appellee's Motion for Reconsideration of the trial court's previous denial of summary judgment.

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Judge Julie A. Edwards

JAE/rmn

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CHARLES LOWREY, M.D.	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
FAIRFIELD MEDICAL CENTER, ET AL.	:	
Defendant-Appellees	:	Case No. 08 CA 85

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Fairfield County, Ohio, is affirmed.

Costs assessed to Appellant.

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JUDGES