Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-309

MARCH TERM, 2008

Irina Assur	}	APPEALED FROM:
	}	
v.	}	Washington Superior Court
	}	
Central Vermont Hospital	}	DOCKET NO. 669-11-05 Wncv
		Trial Judge: Helen M. Toor

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals pro se from the trial court's order, after remand, granting in part and denying in part her motion to enforce a subpoena against defendant, Central Vermont Hospital (CVH). She argues that the court erred by failing to following the directives of this Court and by refusing to consider her arguments. We affirm the court's decision in part.

The record indicates the following. In March 2002, as required by statute, CVH reported to the Office of Professional Regulation (OPR) that CVH had taken disciplinary action taken against plaintiff, a nurse at its facility. Plaintiff thereafter resigned from her employment with CVH. In December 2003, OPR filed charges against plaintiff, alleging numerous instances of inappropriate conduct while she was at CVH. In May 2004, in connection with proceedings before the State Board of Nursing, plaintiff's then-attorney served CVH with a subpoena duces tecum seeking thirty-three separate categories of documents. CVH responded in part, but objected to the bulk of the requests on the grounds of relevance, overbreadth, undue burden, patient-physician privilege, and the peer-review privilege.

Plaintiff's attorney withdrew, and approximately one year later, in March 2005, plaintiff issued a pro se subpoena to CVH. CVH responded that plaintiff, as a pro se litigant, had no authority to issue a subpoena and refused to comply with her requests. CVH also stated that it had made clear to plaintiff's former attorney that it would not release patient records absent patient waivers or a court order. In an April 2005 letter, plaintiff asked the Board to issue a subpoena on her behalf. OPR was provided with a copy of this request. OPR further took the position that plaintiff's subpoena was unduly burdensome and ill-crafted on its face and concluded that neither the Board nor its designee should recognize the validity of the subpoena. OPR requested a status conference before presiding officer and asked the Board not to issue the subpoena. After a status conference in September 2005, the presiding officer declined to issue the subpoena until such time as plaintiff attempted to enforce her subpoenas in superior court. The officer noted that plaintiff was asserting that the documentation she was requesting was critical to her defense. He gave plaintiff sixty days to file a motion to compel the two subpoenas, and he placed the case on hold until the superior court ruled on the motion to compel.

In November 2005, plaintiff filed a motion to enforce in the superior court. She reiterated her assertion that the documents she sought were essential to her defense, and she asked the court to compel CVH to respond to the first subpoena and either to compel the hearing officer to issue the second subpoena or to issue the second subpoena itself. The trial court denied plaintiff's request in two very short entry orders. With respect to the motion to enforce, the court ruled that the first subpoena was overbroad, sought privileged information regarding patients without their consent, and failed to establish the relevance of much of the materials sought. See Assur v. Cent. Vt. Hosp., No. 2006-106, slip op. at 2 (Vt. Dec. 1, 2006) (unreported mem.). As to the motion to compel issuance of the second subpoena, the trial court found that the only authority cited by the parties governing the power to issue subpoenas in such disciplinary proceedings was 3 V.S.A. § 809, which, in the court's view, did not authorize pro se parties to issue subpoenas. Id.

We reversed and remanded the trial court's decision on appeal, finding that the court failed to explain adequately the basis for its decision or to consider if means short of complete nondisclosure—such as the redaction of privileged information or the creation of summaries omitting irrelevant or objectionable material—might be practical. Id. We rejected the remaining arguments that plaintiff raised on appeal, however, which involved a variety of due process claims regarding the disciplinary action instituted against her, finding that these arguments had been waived. Id. at 3. We further determined that, because the hearing officer had deferred ruling on whether the second subpoena should issue, any arguments involving the second subpoena were not yet ripe for decision. We noted that plaintiff could renew her request with the hearing officer for issuance of the second subpoena after the trial court's decision on remand, if it appeared to still be necessary. Id.

After remand, the trial court issued several orders. In a February 2007 order, the court stated that it had denied plaintiff's motions in the first instance because she was pro se, and therefore was not entitled to issue a subpoena or move to enforce a subpoena under 3 V.S.A. § 809(h). Nonetheless, the court went on to address the merits of plaintiff's first subpoena in greater detail, although not the second subpoena in light of this Court's decision above. The court found that several of plaintiff's requests sought peer review committee minutes, which were protected by statute from discovery except as disclosed directly to a board. See 26 V.S.A. § 1443. The court also found that plaintiff sought records of patient treatment in item three of her subpoena, and concluded these records were subject to the patient-physician privilege. The court noted, however, that items eighteen to twenty-one, twenty-four to twenty-eight, and thirty to thirty-two, also sought information about patients, but the requests were limited to "non-privileged information." CVH asserted that it had fully responded to these requests as limited above, and the court found that plaintiff did not dispute this assertion. The court denied plaintiff's request for certain other items on relevancy grounds, including plaintiff's request for information about disciplinary actions taken against other nurses. It noted that CVH asserted that it had fully responded or would fully respond to numerous itemized requests, subject to any applicable privileges, and that it had no documents responsive to requests ten and eleven. The court again found that plaintiff did not dispute these assertions. Finally, the court indicated that, because it had it not already ruled that the subpoena was unenforceable, it would order CVH to respond to items seven and nine.

In July 2007, the court issued an order responding to a motion to reconsider and a motion to correct a clerical mistake. Finding that the parties agreed that the subpoena at issue was in fact issued by an attorney, the court ruled that the subpoena was enforceable. The court therefore ordered CVH to respond to the specific requests noted above. The court denied plaintiff's motion to reconsider as untimely, however, and noted that she was raising entirely new arguments that were not addressed in the original motions on which the court was ruling. This appeal followed.

On appeal, plaintiff maintains that the trial court failed to make adequate findings to support its decision. She appears to argue that the court erred in concluding that certain information was shielded by the patient-physician privilege. Plaintiff also asserts that the court committed reversible error by failing to consider the feasibility of ordering CVH to produce redacted records. Additionally, plaintiff argues that the court erred in denying one of her requests on relevancy grounds. Plaintiff also raises various due process arguments concerning the institution of professional conduct charges against her, which we have already concluded were waived.

As discussed below, we affirm the trial court's decision in part and direct the State Board of Nursing to evaluate plaintiff's request to issue a second subpoena on her behalf. In connection with disciplinary proceedings such as these, "[s]ubpoenas may be issued ex parte by the chair of the board, the director, or any attorney representing a party." 3 V.S.A. § 129(a)(2).

It is very difficult to discern from this record what information has been provided to plaintiff, what information remains to be provided, and, to a lesser extent, what information CVH will not provide. Plaintiff continues to assert that she has a right to certain patient records, and a question remains whether redaction could render the information non-privileged. In her second subpoena, plaintiff indicated that, to the extent that deletion of patient identities or the assignment of initials in the place of full names would render the documents she requested unprivileged, she would consider her requests fulfilled if such redactions or substitutions were made without rendering the document unusable for its intended purpose. In the same subpoena, plaintiff sought very detailed information regarding the patients identified by initials in the charges against her, including, for example, a certain patient's admitting diagnosis and discharge diagnosis, all doctor's notes on the patient, and documentation showing medication given to the patient.

In its filings with the trial court prior to the court's decision on remand, CVH indicated that its hesitation in producing redacted patient records in this case arose because the patients' identities could be determined if the medical records were read in conjunction with the OPR's specification of charges. CVH also stated that its attorney had anticipated discussing with plaintiff's then-attorney a resolution whereby patients' records could be produced in redacted form, but CVH's initial response to plaintiff's first subpoena was met with nearly a year of silence, followed only by the instant motion to enforce rather than by further communications with plaintiff's counsel or plaintiff to discuss an amicable resolution to any outstanding requests under the subpoena.

The trial court held that 3 V.S.A. § 809(h) does not authorize a pro se party to issue a subpoena. We agree. In the case of a pro se party, the Board must evaluate the need for the subpoena and issue it where appropriate to protect the party's interests. Cf. Langlois v. Dep't of Employment & Training, 149 Vt. 498, 504 (1988) (discussing subpoena power of hearing officer in unemployment proceedings in connection with requirements of due process). Plaintiff originally had an attorney, and that attorney issued the first subpoena in issue before the court. That attorney is long gone, and it no longer makes sense to treat the subpoena as issued by a lawyer. For example, the lawyer was not present to negotiate with CVH as the hospital expected, and that inability to negotiate has exacerbated this dispute.

At this point, the Board, not the trial court, is in the best position to evaluate what information plaintiff has, and what additional information, if any, should be sought from CVH by subpoena. We note, moreover, that under 3 V.S.A. § 131(e), a licensee has "the right to inspect and copy all information in the possession of the office pertaining to the licensee . . . except investigatory files which have not resulted in charges of unprofessional conduct and attorney work product." It is not clear from the record if plaintiff has availed herself of this opportunity, and if so, what material she

thereby obtained. While many of the requests in plaintiff's subpoena, as currently drafted, appear, as the trial court found, irrelevant to the specific allegations against plaintiff or subject to the patient privilege or other privilege, we leave it to the Board to determine in the first instance what materials could be sought from CVH so as to ensure that plaintiff is afforded a fair hearing.

Because plaintiff is likely to reiterate her arguments concerning alleged exceptions to the patient-physician privilege later, we nonetheless briefly address some of these contentions. The patient-physician privilege is described in relevant part as follows:

> Unless the patient waives the privilege or unless the privilege is waived by an express provision of law, a person authorized to practice medicine, . . . [or] registered professional or licensed practical nurse . . . shall not be allowed to disclose any information acquired in attending a patient in a professional capacity, including joint or group counseling sessions, and which was necessary to enable the provider to act in that capacity.

12 V.S.A. § 1612(a); see also V.R.E. 503.

Contrary to plaintiff's assertion, a court order does not constitute an "express provision of law" within the meaning of 12 V.S.A. § 1612(a) sufficient to waive the patient-physician privilege. Similarly, it is of no moment that CVH is claiming that the materials are privileged rather than having the patients claim the privilege themselves. Nor does CVH's inadvertent disclosure of privileged materials mean that plaintiff is now entitled to obtain other privileged material as well. Finally, this case is not like Haverly v. Kaytec, Inc., 169 Vt. 350 (1999) cited by plaintiff. In that case, the plaintiff filed suit against his employer, claiming retaliatory discharge, and a jury found in favor of his employer. On appeal, the plaintiff argued that a certain statement he made in support of an application for unemployment benefits should not have been admitted at trial because the statement was confidential under 21 V.S.A. § 1314(d)(1). This Court rejected plaintiff's argument, finding that, by initiating the litigation and putting his reasons for leaving his employment at issue, the plaintiff waived any protection that he may have had with respect to the confidentiality of his own statements. Id. at 353. Unlike the plaintiff in Haverly, CVH is not the plaintiff in this case, did not initiate the proceedings against plaintiff, and is not claiming that its own statements are privileged. The Haverly case does not support plaintiff's assertion that the materials she requested must be disclosed notwithstanding the patient-physician privilege.

We recognize that plaintiff has raised other contentions as to why the patient-physician privilege is inapplicable to some or all of the records she seeks and why redaction can resolve the patient-physician privilege barrier to disclosure. We leave it to the Board to resolve those issues in the first instance.

Finally, we address other rulings made by the superior court with respect to the first subpoena that originally issued by plaintiff's lawyer. We affirm the court's decision regarding the applicability of the peer review privilege to Items 1 and 2 requested by plaintiff, see 26 V.S.A. § 1443(a), and we affirm its decision that CVH must respond to Items 7 and 9. We also agree with the trial court that the materials requested in Items 4, 8, 16, 17 were irrelevant. See State v. Simoneau, 2003 VT 83, ¶ 21, 176 Vt. 15 (the enforcement of subpoenas is entrusted to the sound discretion of the trial court, and Supreme Court will not disturb trial court's decision absent a showing that such discretion was withheld or exercised on clearly unreasonable or untenable grounds). We reject plaintiff's challenge to the court's evaluation of Item 8, which requested information about disciplinary actions taken against

other nurses. Plaintiff maintains that the court erred by offering a rationale for its decision that differed from the one offered by plaintiff. According to plaintiff, the requested information was relevant to her argument that there were false rumors circulating that she was responsible for the death of a patient. The record shows that none of plaintiff's professional conduct charges relate to her alleged involvement in the death of a patient, and the trial court did not abuse its discretion by stating that the question of the disciplinary action taken against other nurses had nothing to do with whether plaintiff's conduct violated professional conduct standards. We also agree with the court's analysis of the request made in Item 33 for documents setting forth standards of acceptable and prevailing nursing practice to which plaintiff failed to conform as reported to the Board. It will be the State's burden to prove the charges against plaintiff at a hearing before the Board—CVH is not prosecuting this case against plaintiff and the question of how CVH views plaintiff's conduct in relation to nursing standards is not at issue before the Board. Nonetheless, as discussed above, some of the material requested in Item 33 may be subsumed by other requests in a new subpoena or it may be available to plaintiff under 3 V.S.A. § 131(e). Finally, the trial court found that CVH asserted, and plaintiff did not dispute, that CVH had responded to Items 18-21, 24-28, and 30-32, as limited to non-privileged information. Plaintiff offers no basis to disturb this finding.

The trial court's decision is affirmed in part, and plaintiff's request for a subpoena is remanded to the State Board of Nursing for evaluation and decision consistent with this order.

BY THE COURT:

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice