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JODIE K. LEVITT, M.D., Plaintiff/Appellant, v. IASIS HEALTHCARE HOLDINGS, INC., ET AL., Defendants/Appellees. : Reply Brief

Utah Court of Appeals

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No. 20180260–CA

IN THE UTAH COURT OF APPEALS

JODIE K. LEVITT, M.D.,
Plaintiff/Appellant,

v.

IASIS HEALTHCARE HOLDINGS, INC., ET AL.,
Defendants/Appellees.

APPELLANT'S REPLY BRIEF

On appeal from a summary judgment entered in Third District Court, the Honorable Andrew Stone presiding.
District Court case no. 160900952.

Oral Argument Requested

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INTRODUCTION

Jodie Levitt, M.D. was temporarily suspended from practice by IASIS Healthcare, Salt Lake Regional Medical Center, Dr. Davis, and Dr. Updike (collectively, the Hospital) without the benefit of due process. During and after the suspension, the Hospital refused to disclose the specific grounds for Levitt's summary suspension, which undermined the entire process. Further, the Hospital used the specter of adding a permanent record of the suspension to her national file if she chose to exercise her right to a Fair Hearing, which she was entitled to under the Medical Staff Bylaws, to discourage her from doing so. Seeking the only recourse available to her, Levitt filed this lawsuit in an attempt to discover the basis for her summary suspension and to vindicate her professional reputation.

Her attempt was frustrated by the Hospital's refusal to produce the documentation behind the suspension—the very documents that would allow Levitt to understand the basis of her suspension or argue that the suspension was improper. In effect the Hospital's took the position that, because she chose to comply with criteria for reinstatement from the suspension, Levitt could not obtain information about her suspension or have a Fair Hearing.

Once Levitt challenged its disciplinary process in this suit, the Hospital took the position that all information relevant to her suspension could be withheld as privileged under the peer and care review privileges. Over Levitt's objection, the district court ratified the Hospital's position and allowed the Hospital to withhold almost all of its disciplinary file. The court thus entered summary judgment in favor of the Hospital because, without access to the documents underlying her suspension, Levitt could not prevail.

The court, however, allowed the Hospital to withhold its trove of evidence without substantively examining the evidentiary bases for the claimed privilege. In fact, the district court failed to conduct any analysis of the purportedly privileged documents—it neither examined the evidentiary bases for the claimed privilege nor conducted an in camera review of any documents. The root cause of the error was this: the court mistakenly reversed the burden.

Under Utah law, the party seeking to withhold documents must establish that a privilege applies. But here, the district court imposed the burden on Levitt and required her to overcome the assertion of privilege. The court thus abused its normally-wide discretion by applying the wrong legal standard to case, and this Court should remand so the correct legal standard can be applied.

ARGUMENT

I. This Court should reverse because the district court applied the wrong legal standard to the Hospital's assertion of the privilege.

The party asserting a privilege bears the burden of properly invoking it. In this case, Levitt moved the court to compel the Hospital to disclose documents relevant to its disciplinary actions. In response, the Hospital asserted the privilege almost categorically. *See* Aplee. Br. at 11 (discussing the 137-page privilege log). Although the trial court did require the Hospital to create a privilege log in response to Levitt's motion, the log lacked the information necessary to determine whether the Hospital properly justified its invocation of privilege.

Instead of grappling with the substance of the purportedly privileged documents, the privilege log relied almost exclusively on verbatim quotations of the statutory language of the care review privilege. And more importantly, it failed to tie the verbatim rule language to the substance of the related document in any meaningful way. *See generally*

r. 435–571 (the privilege log).[1] Indeed, the Hospital claimed the privilege over huge numbers of documents that don't appear to fall within he scope of any privilege. For example, the Hospital withheld a "SLRMC Checklist of Clinical Privileges for Jodie K. Levitt, MD." R. 560. But the log contains no explanation of why a list of Levitt's clinical privileges is subject to the privilege. The Hospital also withheld "Various versions of Jodie K. Levitt Curriculum Vitae." R. 558. Likewise, it's not at all clear from the log how Levitt's own CV could be considered privileged. In essence, the log on its face shows that the Hospital claimed the privilege over everything in its disciplinary file without regard to whether any privilege actually applied.

Nonetheless, the district court allowed the Hospital to withhold all the documents it wanted to. R. 1065 ("Defendants have properly invoked the peer and care review privileges."). In support of that decision, the Hospital on appeal argues that "Levitt never challenged a single document on the privilege log, though the onus was on her to do so." Aplee. Br. at 27. That argument relies on procedural fact is technically correct, but in a

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[1] The privilege log appears to be corrupted in the record on appeal. It seems that some sort of error cut off the right side of the log when it was converted from its original landscape orientation into a portrait orientation for transmission to this Court. That issue is the subject of a motion to correct the record file concurrently with this brief, and the entire privilege log is attached to that motion for the Court's convenience.

way that misperceives the legal issue in this case. And in any event, the onus was not on Levitt.

Instead of challenging individual documents, Levitt challenged the sufficiency of the privilege log in total. *See generally* r. 1191–95 (arguing that the log, as a whole, lacked evidentiary basis); *see also, e.g.*, r. 1192 (noting that, although Levitt had requested them, "I cannot find any reference whatsoever in the privilege log for any claimed privilege of either the quality file or the credentialing file of plaintiff"); Aplee. Br. at 27 n.13 (conceding that "Levitt challenged 'all' the documents").

Thus, the Hospital's argument on appeal misses the thrust of Levitt's legal contentions below—her point was that the Hospital's privilege log was insufficient as a matter of law. *See* r. 690–94. The Hospital's contrary assertion—that Levitt bore the burden of challenging each individual document—is therefore unpersuasive, and the district court's decision suffers from the same legal flaw. This Court should reverse for two reasons.

A. The district court improperly required Levitt to overcome the privilege, which is contrary to Utah law.

The party seeking discoverable information does not need to prove that it is not privileged. Indeed, the opposite is true: in Utah, "the burden [is] on the party asserting a privilege to establish that the material sought is protected from discovery." *Allred v. Saunders*, 2014 UT 43, ¶ 25, 342 P.3d 204. The burden flows from the rules of civil procedure, which presume a

party is entitled to information relevant to her claims. In the event a party withholds discoverable information by claiming a privilege, that party "shall describe the nature of the documents ... in a manner that ... will enable other parties to evaluate the claim." Utah R. Civ. P. 26(b)(8)(A).

Like happened here, the party asserting the privilege will typically produce a privilege log with the necessary details. However, to meet the requirements of rule 26, the log must have real substance: "a proper privilege log must provide sufficient foundational information for each withheld document or item to allow an individualized assessment as to the applicability of the claimed privilege." *Allred*, 2014 UT 43, ¶ 27. The reasoning behind that requirement is clear. It is because "there is danger in construing the peer review privilege too broadly." *Benson v. I.H.C. Hosps., Inc.*, 866 P.2d 537, 540 (Utah 1993).

Here, the court appears to have assumed that that the log was per se adequate without considering the danger of overbroad application of the privilege. Indeed, the record does not show that the court ever reviewed the privilege log to reach any initial conclusion about the log's adequacy. And in any event, the court explicitly placed the burden on Levitt to overcome the Hospital's assertions: "It strikes me as it's your burden to come forward and say, 'I don't think this is a legitimate claim of privilege.'" R. 1196.

The court's presumption of adequacy, and its incorrect burden shifting, are contrary to our law however. As the supreme court has

explained, the privilege "protects only those documents *prepared specifically* to be submitted for review purposes." *Wilson v. IHC Hosps., Inc.*, 2012 UT 43, ¶ 114, 289 P.3d 369 (simplified). "It does not extend to documents that *might* or *could* be used in the review process." *Id.* (simplified). And because "the burden [is] on the party asserting a privilege to establish that the material sought is protected from discovery," *Allred*, 2014 UT 43, ¶ 25, the mere existence of a privilege log is not enough to justify withholding documents. Instead, the "privilege log must contain sufficient individualized information" so that the court and parties can evaluate whether the privilege actually applies. *Id.* ¶ 27. Specifically, the log must be robust enough "to ensure that any non-privileged documents or items (such as patient medical records) that have made their way into a care-review or peer-review file are not shielded from discovery." *Id.*

In the district court, Levitt objected to the privilege log and argued it was insufficient on its face. *See* r. 1190–95. Instead of examining the log as required by *Allred*, though, the court shifted the burden to Levitt and required her to attack individual documents. R. 1196, 1065. The district court thus erred as a matter of law, and this Court should reverse so that the court can conduct the *Allred* analysis and test whether the Hospital met its burden.

B. The court's improper burden shifting resulted in obvious evidentiary mistakes, and it materially prejudiced Levitt on summary judgment.

The problem with district court's erroneous burden shifting was that it allowed the Hospital to protect wide swaths of material that are not entitled to any privilege. Indeed, the privilege log contains many entries that demonstrate the overbreadth of the Hospital's assertions (and thus demonstrate the harm to Levitt's case caused by the court's decision to sustain the blanket privilege). Here are several examples, which stand out against backdrop of the privilege's purpose, which is "to protect health care providers who furnish information regarding the quality of health care rendered by any individual or facility." *Benson v. I.H.C. Hosps., Inc.*, 866 P.2d 537, 539–40 (Utah 1993) (simplified).

First, the Hospital claimed privilege on documents that were actually disclosed to Levitt herself. For example, Levitt was granted access shown a list of cases giving rise to her suspension. R. 1222 ("And at that point, she was allowed to see what Dr. Levitt characterized as a cursory list of the cases giving rise to the suspension."); *see also* r. 1232 (explaining that the Hospital shared a "cursory list of those peer reviewed cases ... for about 20 seconds"). At minimum, any potential privilege regarding actually-disclosed documents would have been waived when they were shown to Levitt. *See* Utah R. Evid. 510(a) ("A person ... waives the privilege if the person ... : (1) voluntarily discloses or consents to the disclosure of any significant part of the matter or communication."). Nonetheless, the

Hospital later withheld the list of peer reviewed cases. *See* r. 1004 (explaining that the short viewing of peer review cases was all Levitt ever learned about the basis for the Hospital's action).

Second, the Hospital claimed privilege on documents that Levitt herself provided to the Hospital. One group of examples are emails that Levitt sent to the Hospital as part of the process. *See, e.g.*, r. 480 (claiming as privileged an email from Levitt "regarding reappointment"). Another example is a "handwritten note" that Levitt delivered to the chairperson of the Medical Executive Committee in response "to a request for questions in writing." R. 444.

Third, the Hospital claimed privilege on documents that substantially predated the peer review or care review. For example, the Hospital withheld a letter from Brian Dunn to Levitt regarding "Initial Approval for Associate Status" dated in 2002. R. 435; *see also id.* (claiming privilege over a "letter from a physician re: recommendation for staff appointment").

Fourth, the Hospital claimed privilege on documents originating from and going to the Medical Executive Committee (Executive Committee). It did so by characterizing the Executive Committee as a peer review body that performed peer review functions. *E.g.*, r. 444. However, it's not clear the Executive Committee engages in peer review, because the group actually conducting the peer review was the "Credentials Committee." *See* r. 440 (claiming Credentials Committee minutes and recommendation as privileged). Thus, it appears that the Hospital conflated the two different

committees. But in any event, there is a logical problem with conflating the separate bodies, which is apparent in the Hospital's argument on appeal. In its brief, the Hospital asserts that Levitt's hospitalization for depression, which was disclosed to the chair of the Executive Committee, was not disclosed to the Credentials Committee. Aplee. Br. at 6. According to the Hospital, that failure to disclose the hospitalization obstructed Levitt's peer review. *See id.* However, if the Executive Committee's knowledge of a fact cannot be imputed to the Credentials Committee, then the Executive Committee cannot have been part of the peer review process in the first instance—the two are mutually exclusive.

Fifth, the Hospital claimed privilege over documents that would have informed Levitt of what she was suspended for. As the Hospital argued to the district court, "there has been nothing cited that she's entitled to know those things. That's not provided in the bylaws and, in fact, it happens all the time that investigations are undertaken without informing the physician." R. 1244. But here the Hospital suspended Levitt—this was not some run of the mill investigation that resulted in no action. And given that the purpose of peer review is to "improve health care rendered," *see Benson*, 866 P.2d at 540, the idea that Levitt was precluded from understanding the nature of her suspension doesn't make sense. Although the deliberative process may be privileged, its result and reasoning cannot be. "*Results* of the peer-review process are *not* privileged and are

discoverable." *Nielson v. ZwedishAmerican Hosp.*, 2017 IL App (2d) 160743, ¶ 38, 80 N.E.3d 706.

And finally, the Hospital withheld Levitt's own professional files. For example, she requested her credentialing and quality control files as part of discovery in this case. R. 1192. Yet the Hospital declined to produce the records, even though they were not listed as privileged in the log. *Id.*

These examples prove the overbreadth of the district court's privilege decision. Levitt's quality file is a prime example, because the quality file was created as part of the Hospital's normal course of business—the fact that the file was later used by the Credentialing Committee doesn't matter. *See Nielson*, 2017 IL App (2d) 160743, ¶¶ 74–75(concluding "that the [quality control files] are not privileged" because they serve a "dual purpose" of aiding "medical-professional self-evaluation").

Likewise, documents that far predate the peer review illustrate the same point. Levitt's "Initial Approval for Associate Status" dated in 2002, for instance, cannot be privileged because documents cannot be "prepared specifically" for something that hasn't happened yet. *See Wilson*, 2012 UT 43, ¶ 114; *accord Ardisana v. Nw. Cmty. Hosp., Inc.*, 342 Ill. App. 3d 741, 748, 795 N.E.2d 964 (2003) (explaining the privilege "does not protect against disclosure of information generated before a peer-review process begins or after it ends"). And of course it is self evident that documents like Levitt's CV, which the Hospital also withheld, fall outside the scope of any privilege.

In short, it appears on the face of the privilege log that the Hospital asserted the privilege over everything that the Credentialing Committee had access to regardless of whether the material was "*prepared specifically* to be submitted for review purposes." *See Wilson*, 2012 UT 43, ¶ 114. And that's the problem: the Hospital created a black box around its entire process that prevented Levitt from meaningfully understanding the actions taken against her, and prevented her from meaningfully engaging at the summary judgment phase. But as explained above, obscuring the entire process is not the point of the privilege. Instead, the privilege protects certain aspects of the Hospital's deliberative process—but not the whole thing. *See Wilson*, 2012 UT 43, ¶ 114 (explaining the privilege "does not extend to documents that *might* or *could* be used in the review process (simplified)); *see also Benson*, 866 P.2d at 540 ("[T]here is danger in construing the peer review privilege too broadly.").

Taken together the Hospital's overbroad assertion of the privilege created, in the words of the district court, a "shroud of secrecy." R. 1247. The privilege log, however, did not justify the broad assertion of privilege that created the shroud. And when the district court overruled Levitt's objections to the legal sufficiency of the privilege log, that decision had the effect of stifling Levitt's ability to withstand summary judgment. This Court should reverse so that district court can conduct a review of the privilege log in light of the correct burden, which Utah law places on the Hospital.

II. Because the court erred on the privilege issue, summary judgment was inappropriate as a matter of law.

A nonmoving party never bears a burden of proof on summary judgment. On appeal the Hospital suggests the opposite, namely that this Court should affirm in part because Levitt would need to prove bad faith or malice with clear and convincing evidence at trial, which the Hospital argues she cannot do. *See* Aplee. Br. at 15–16. Specifically, the Hospital cites *Andalex Resources, Inc. v. Myers*, 871 P.2d 1041, 1046 (Utah Ct. App. 1994), for the proposition that "a party must prove a claim with clear and convincing evidence at the summary judgment stage if that is the burden required at trial." Aplee. Br. at 16.

But that is not the rule from *Andalex*. Indeed, the language that the Hospital quotes only appears in a parenthetical describing the holding of a different case. That other case is the United States Supreme Court's opinion in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and it says nothing about the nonmovant having a burden of proof on summary judgment. Instead, *Anderson* stands for the proposition that "the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case." 477 U.S. at 254.

As the Supreme Court went on to say, its holding "does not denigrate the role of the jury. It by no means authorizes trial on affidavits." *Id.* at 255. Even when the burden of proof is clear and convincing, "[c]redibility

determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.*

On summary judgment, then, the trial court must determine whether there is a genuine issue of disputed fact such that a jury applying the relevant evidentiary standard "could reasonably find for either the plaintiff or the defendant." *Id.* And just like with summary judgment on the more common preponderance standard, "[t]he evidence of the non-movant [Levitt] is to be believed, and all justifiable inferences are to be drawn in [her] favor." *Id.*

The Hospital's argument about Levitt's burden on summary judgment thus fails to persuade because it misconstrues the nature of the summary judgment inquiry. To defeat summary judgment, Levitt only had to come forward with was enough evidence from which, along with justifiable inferences, a juror could find clear and convincing proof of malice or bad faith. *See id.*

That said, the Hospital's argument about the summary judgment burden does not affect the outcome of this appeal. That is because the district court's legal error described above—its improper shifting of the burden, which allowed the Hospital to withhold far too many documents—made it impossible for Levitt to defend against summary judgment. That is, the court's pre-summary judgment decision to sustain

the Hospital's overbroad privilege assertion prevented Levitt from discovering the very evidence she needed to prove her case.

Under *Benson v. I.H.C. Hosps., Inc.*, 866 P.2d 537 (Utah 1993), the proper remedy in such circumstances is to remand. "If indeed there are documents that should be in the medical record that are not found there, then the statutory privileges are being abused, and that information and those documents are discoverable." *Id.* at 540. "Because [Defendants] are asserting privileges, it is their burden to show that nothing is missing from the medical record," and this Court should remand so that the trial court can "review all the documents at issue" and "determine ... which documents are privileged and not subject to discovery and which are nonprivileged and therefore discoverable." *See id.* After that determination is made, the district court will be able to meaningfully apply the correct summary judgment standard from *Anderson*.

CONCLUSION

The district court's erroneous privilege analysis made it impossible for Levitt to dispute facts on summary judgment, and this Court should therefore vacate the judgment and remand for further proceedings that properly analyze the Hospital's claim of privilege in accordance with Utah law.

Dated: February 12, 2019

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CERTIFICATE OF COMPLIANCE

This brief complies with rules 21 and 24 of the Utah Rules of Appellate Procedure because it contains 3501 words (as counted by Microsoft Word 2016), and it contains no information other than public information.

CERTIFICATE OF SERVICE

I certify that I filed the above reply brief with the Utah Court of Appeals and served on counsel of record as follows:

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