V I R G I N I A :

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND
John Marshall Courts Building

, Plaintiff,

v. Case. No.:

Defendant.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF INCIDENT REPORT

Plaintiff, by counsel, submits this Memorandum in support of her Motion to Compel.

Background

This is a wrongful death action arising out of the death of plaintiff's decedent,. Plaintiff's decedent was a patient at the Hospital in January of 1997, when she suffered a fatal head injury after falling in the Hospital.

In a bid to gather facts of the incident, counsel for plaintiff propounded *Plaintiff's First Interrogatories to Defendant* and *Plaintiff's First Request for Production of Documents and Things to Defendant* (attached as exhibits to *Plaintiff's Motion to Compel*) seeking information and documents related to Plaintiff's decedent's fall.

Interrogatory Number 4 asks the defendant to "[s]tate all facts of which you are aware as to how, where, and when Plaintiff's decedent fell, and identify all persons with knowledge of such facts, and describe all documents containing or referencing any such facts." Defendant objected to this Interrogatory on the grounds of work product and privilege under §§ 8.01-581.16 and .17 (Va. Code Ann.).

Request Number 1 of *Plaintiff's First Request for Production of Documents and Things to Defendant* seeks all documents and things relating to, concerning, or describing Plaintiff's decedent's fall on January 12, 1997, including, but not limited to, any incident report(s). The defendant again objected on the basis of work product and privilege under §§ 8.01-581.16 and .17 (Va. Code Ann.).

In response to the propounded discovery, defendant has disclosed that Plaintiff's decedent's hospital roommate rang the nurse's call button, and an unidentified nurse found Plaintiff's decedent on the floor in her room. It is believed that Plaintiff's decedent's roommate died while a patient at The Hospital. At this time, it is also believed that no individuals currently living witnessed the fall.

Counsel for defendant has disclosed that an incident report was written by a nurse employed at The Hospital and identified as xxx, R.N.. Defendant has not produced the incident report claiming that it is protected by the work product doctrine and the privilege pursuant to § 8.01-581.17.

Argument & Authorities

A. The Defendant Has the Burden of Proving Facts Sufficient To Establish A Claim of Privilege

Defendant has asserted claims of work product and privilege pursuant to Va. Code §§ 8.01-581.16 and .17. With respect to both claims of privilege asserted by the defendant, it is incumbent upon the defendant to produce facts establishing its entitlement to protection from disclosure of the information sought by the plaintiff.

A privilege from discovery "is an exception to the general duty to disclose, is an obstacle to investigation of the truth, and should be strictly construed." *Commonwealth v. Edwards*, 235 Va. 499, 509 (1988); *See also, United States v. Nixon*, 418 U.S. 683, 709-10 (1974)("exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.")

The party resisting discovery and asserting the protection of a privilege bears the burden of proving that the documents at issue fall under the protection of the privilege asserted. *Commonwealth v. Edwards*, 235 Va. at 509; *Robertson v. Commonwealth*, 181 Va. 520, 540 (1943)(party asserting work product doctrine must produce some evidence that the documents were created to be used with pending or threatened litigation). *See also*, *Swink v. Talba*, 10 Va. Cir. 122, 123 (Va. Beach Cir. Ct. 1987)(work product privilege); *State of Missouri v. Darnold*, 939 S.W.2d 66 (Mo. Ct. App. 1997)(abuse of trial court's discretion to deny plaintiff's discovery requests of hospital on the bare assertion by the hospital that the documents requested were covered by the peer review statutes.).

The proponent of a privilege has the burden to establish not only that the asserted privilege applies, but the proponent must also prove that the privilege has not been waived. *See, Commonwealth v. Edwards*, 235 Va. at 509. There can be an express waiver of the privilege or an implied waiver by conduct. *See Grant v. Harris*, 116 Va. 642, 649-51 (1914).

Accordingly, the defendant must prove the following facts as to the asserted privileges:

Rule 4:1 (b)(3) Work Product Doctrine

(1) The incident report was prepared in anticipation of litigation;

(2) by or for the party or that party's representative.

§§ 8.01-581.16 and .17 Limited Privilege

(1) The incident report constitutes the proceedings, minutes, records, and reports of a committee specified in § 8.01-581.16 or a nonprofit entity providing a centralized credentialing service.

(2) The report is not a hospital medical record kept in the ordinary course of business of operating a hospital or evidence relating to hospitalization or treatment of any patient in the ordinary course of hospitalization or treatment of hospitalization of such patient.

(3) Any such privilege has not been waived by disclosure or the dissemination of the report's contents beyond the confines of the work of the committee or centralized credentialing service.

B. The Incident Report is Not Work Product.

The author of the incident report stated in her deposition[1] that she wrote approximately ten incident reports at The. The reports cover incidents such as transfers into the Intensive Care Unit and bed sores indicating that such reports are written for events unlikely to lead to litigation. There were never any lawsuits over the incidents on which she reported, excepting this one. In fact, the author does not even recall writing this incident report. There is no evidence whatsoever that at the time the author wrote the incident report she anticipated litigation. As it is defendant's burden to establish that the incident report was created in anticipation of litigation, and this burden cannot be met, the objection to production based on the work product doctrine must be overruled.

Furthermore, the work product doctrine both by history and the wording of Rule 4:1 (b)(3) only affords protection from disclosure to documents. It does not prevent disclosure of

[1] The deposition of Elizabeth Diana, R.N. was taken on November 11, 1998, in Winchester, Virginia. At this time no transcript it available, but the transcript is expected to be available prior to November 20, 1998, the date of the hearing on this matter.

facts contained in such documents. *See, Mead Corporation v. Riverwood Natural Resources Corporation,* 145 F.R.D. 512, 516-17 (D. Minn. 1992). *Hickman v. Taylor*, 329 U.S. 495 (1947), the case which created the work product doctrine, makes its inapplicability to facts sought by interrogatories clear:

> Denial of production of [work product documents] does not mean that any material can be hidden from the petitioner in this case. He need not be unduly hindered in the preparation of his case, in the discovery of facts or in his anticipation of his opponent's position. Searching interrogatories...serve to reveal the facts....Id. at 329 U.S. at 513.

Therefore, even if the Court finds the work product doctrine applicable, the defendant should still be required to disclose the facts contained in the report.

C. Even If The Incident Report Was Created in the Anticipation of Litigation, Substantial Need Exists for Its Discovery.

Pursuant to Rule 4:1(b)(3) of the Rules of Virginia Supreme Court, even if a document is prepared in anticipation of litigation, its discovery will be ordered if the seeking party has substantial need for it and is unable without undue hardship to obtain the substantial equivalent by other means.

Plaintiff's decedent's fall occurred almost two years ago. After Plaintiff's decedent fell striking her head and suffering a subdural hematoma it is believed that she was unable to explain the events surrounding her fall. The nurse who investigated the fall and wrote the incident report does not have any recollection of the event. Defendant has also disclosed that the identity of the nurse who found Plaintiff's decedent is unknown. It is uncertain whether or not Plaintiff's decedent's hospital roommate witnessed the fall, however, it is believed that she passed away

shortly thereafter. Therefore, there is little evidence at this time as to the circumstances surrounding the fall, and there is substantial need for discovery of the incident report to provide details which are unable to be obtained from any other source.

D. The Incident Report is Not Protected From Discovery by § 8.01-581.17.

Incident reports are made in the hospital's routine course of business. An incident report usually contains not only a factual accounting of the events that transpired, but a list of the witnesses as well.

The fact that an incident report is not traditionally part of the medical record does not afford it any protection from discovery. Other relevant documents and materials such as electroencephalograms, fetal heart tracings, X-rays, scans, tissue specimens, slides, and patient logs are not traditionally part of the medical record, yet they are subject to discovery.

Close scrutiny of the factual basis of a claim of § 8.01-581.17 privilege is especially appropriate. A frequent strategy employed by hospitals is to route otherwise unprivileged documents through a committee protected by § 8.01-581.17 in order to prevent discovery of the documents. This tactic was rejected in *Benedict v. Community Hospital of Roanoke Valley*, 10 Va. Cir. 430, 437 (1988), in which the court reasoned that "almost anything could come within such broad and limitless sweep." *See also, Manthe v. VanBolden*, 133 F.R.D. 497 (N.D. Tex. 1991)(documents gratuitously provided to committee not statutorily protected).

Many courts have rejected the assertion of privilege under § 8.01-581.17, and have ruled that incident reports are discoverable. *See, e.g., Bradburn v. Rockingham Memorial Hospital*, Law No. 10636 (Rockingham April 17, 1998)(incident report not quality assurance

deliberative documents, and more akin to ordinary hospital records)(a copy of the Order is attached hereto as Exhibit A); *Huffman v. Beverly California Corp*., 42 Va. Cir. 205 (Rockingham 1997)(incident reports are simple factual reports which do not rise to the level of quality assurance or deliberative type documents, and are more akin to exempted ordinary hospital records); *Messerley v. Avante Group, Inc*., 42 Va. Cir. 26 (Rockingham 1996)(incident reports are simple factual reports and do not contain any broad based quality assurance recommendations or discussions); *Wendel v. Richmond Memorial Hospital*, Medical Malpractice Panel (1991)(a copy of the Order is attached hereto as Exhibit B); *Shaw v. Richmond Memorial Hosp*., Law No. LS-11-12-2 (Richmond 1990)(a copy of the Order is attached hereto as Exhibit C); *Boyd v. Commonwealth*, Law No. LM 1155-3 (Richmond 1988)(a copy of the Order is attached hereto as Exhibit D); *Samuel v. Commonwealth*, Medical Malpractice Panel (Richmond 1988)(a copy of the Order is attached hereto as Exhibit E); *Benedict v. Community Hospital*, 10 Va. Cir. 430 (Medical Malpractice Review Panel 1988)(incident report is a medical record kept in ordinary course of business); *Atkinson v. Thomas*, 9 Va. Cir. 21 (1986)(Virginia Beach 1986)(incident report is a hospital record kept with respect to the patient in the ordinary course of business, and also not work product as not prepared in anticipation of litigation).

The incident report forms contain information regarding the description of the event, whether or not a physician was notified, and whether or not a supervisor was notified. This information is more akin to an ordinary hospital record regarding the care and treatment of a patient, or the course of the patient's hospitalization, rather than any quality assurance recommendations to which the statute provides protection.

E. Even if the Incident Report is a Document of the Type Protected by § 8.01-581.17, Extraordinary Circumstances Exist for its Discovery.

Even if this Court finds the privilege contained in § 8.01-581.17 to be applicable, the incident report is discoverable as plaintiff has good cause arising from extraordinary circumstances to discover the documents. Good cause exists based upon the same facts and circumstances giving rise to plaintiff's substantial need for the report as discussed supra.

F. In Camera Review of the Incident Report Should Be Made If The Report is Of the Type Protected By Privilege.

If this Court finds that the incident report may be protected by § 8.01-581.17, then in order to determine the bonafides of the claimed privilege, the Court should require the defendant to provide details about the report and a supporting affidavit establishing the factual basis for each of the privilege's elements. *See generally*, Spahn, *Virginia's Attorney-Client Privilege and Work Product Doctrine* 120-23 (2d Ed. Virginia CLE 1997). As an example of the types of details required in a privilege log, Spahn quotes *Bowne of New York City, Inc. v. AmBase*, 150 F.R.D. 465, 474:

> If the court chooses to rely on adequate privilege logs, typically the logs will identify each document and the individuals who were parties to the communications, providing sufficient detail to permit a judgment as to whether the document is at least potentially protected from disclosure. Other required information, such as the relationship between the individuals listed in the log and the litigating parties, the maintenance of confidentiality and the reasons for any disclosures of the document to individuals not normally within the privileged relationship, is then typically supplied by affidavit or deposition

testimony.

In camera review of the report is also necessary for to hold otherwise would "leave the determination of whether a given document was required to be produced to the unfettered discretion of the party possessing it . . . . [S]uch a rule has obvious potential for abuse." *Menoski v. Shih*, 612 N.E.2d 834, 836 (Ill. 1993). "[T]he trial court [has] a duty to dig behind the labels [the] hospital put[s] on its documents and the conclusory statements contained in the [hospital's] affidavit. The court should have conducted an in camera review on a document-by-document basis to determine whether the materials sought were protected by the peer review privilege." *Ray v. St. John's Health Care Corp.*, 582 N.E.2d 464, 474 (Ind. Ct. App. 1991).

Conclusion

For the foregoing reasons and grounds, this Court should enter an Order overruling the defendant's objections to the propounded discovery, and requiring the defendant to respond fully to the Interrogatory seeking information regarding the fall, to produce the incident report, and to produce any similar documents being withheld on the same bases.

By:_____
Counsel

Thomas W. Williamson, Jr., VSB No. 15699
Anthony V. Agudelo, VSB No. 39039
Williamson & Lavecchia, L.C.
6800 Paragon Place; Suite 233
Richmond, Virginia 23230
Phone: (804) 288-1661
Fax: (804) 282-1766

Counsel for Plaintiff

This brief, authored by Tom Williamson, was filed to compel a defendant to produce its incident in a wrongful death action. To learn more about our practice areas please visit our website or click here to contact Tom Williamson.