LexisNexis®

1 of 100 DOCUMENTS

**JENS MUENKEN, AS EXECUTOR OF THE ESTATE OF NANCY TEITELBAUM MUENKEN, Plaintiff-Appellant, v. DR. KENNETH TONER, Defendant-Respondent.**

**DOCKET NO. A-1949-09T1**

**SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION**

***2011 N.J. Super. Unpub. LEXIS 1876***

**March 15, 2011, Argued**
**July 13, 2011, Decided**

**NOTICE:** NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

**SUBSEQUENT HISTORY:** Certification denied by *Muenken v. Toner, 2012 N.J. LEXIS 192 (N.J., Feb. 7, 2012)*

**PRIOR HISTORY:** [*1]
On appeal from the Superior Court of New Jersey, Law Division, Sussex County, Docket No. L-591-06.

**COUNSEL:** William F. Mueller argued the cause for appellant (Clemente Mueller, P.A., attorneys; Mr. Mueller, of counsel, Nicole A. Spence, on the brief).

Philip F. Mattia argued the cause for respondent (Philip F. Mattia & Associates, P.C., attorneys; Mr. Mattia and Ronald A. White, on the brief).

**JUDGES:** Before Judges Carchman, Messano and Waugh.

**OPINION**

PER CURIAM

Nancy Teitelbaum Muenken,[1] who suffered from a blood disorder known as polycythemia vera, was diagnosed with gallstones and referred to defendant Kenneth Toner, M.D., for treatment. Dr. Toner performed surgery on Nancy to remove her gallbladder and discharged her later that day. In the early morning hours of the following day, Nancy was readmitted to the emergency room, where she was pronounced dead on arrival.

1 For ease of reference, we refer to the deceased and plaintiff Jens Muenken by their first names.

Plaintiff, Jens, Nancy's widower, filed a negligence action against defendant alleging that defendant's professional negligence proximately caused Nancy's death. Following a jury trial, the jury rendered a verdict in favor of defendant. Plaintiff's subsequent [*2] motion for a new trial was denied.

Plaintiff appeals and asserts that the trial judge abused his discretion in ruling on evidentiary and discovery issues. We affirm.

These are the relevant facts adduced at trial. Nancy was diagnosed with polycythemia vera in 2001. Polycythemia vera is a disease wherein the bone marrow produces too many red blood cells or there is an overproduction of white blood cells and platelets. She

was subsequently diagnosed with gallstones and a hernia and was referred to defendant for a treatment evaluation in July 2005. Defendant determined that surgery would be appropriate for Nancy, and because he was not familiar with Nancy's underlying blood disorder, defendant requested a hematological consult with Dr. Charles Farber, M.D., her hematologist. Dr. Farber had treated her previously for the underlying condition. Dr. Farber's consultation recommended that the patient be administered Lovenox, a blood thinner, following the surgery. According to Dr. Farber's notes:

> For perioperative management I am recommending that the patient have aggressive antiembolic treatment. This should include either Venodyne boots or antiemblic stockings. I believe prophylactic Lovenox [*3] is quite reasonable. The patient can have a dose immediately after surgery if this is the custom for the routine surgical management of patients at risk of thromboembolic events. I have advised the patient not to take aspirin or aspirin-like products for one week prior to the procedure. There is no specific need for FFP infusion or platelet transfusion. Patients such as this are at increased risk for both bleeding as well as thrombotic event. Thus I believe she can be managed in a conventional fashion with all reasonable antiembolic measures. It is not necessary for the patient to receive any blood products prophylactically.

On September 7, 2005, Nancy underwent a laparoscopic cholecystectomy at Newton Memorial. Present at the surgery along with defendant was Elizabeth Falco, a registered nurse, and Dr. Villafania, an anesthesiologist. After the surgery, Nancy was transferred to a recovery area known as the Post Anesthesia Care Unit, where she was monitored. She was then transferred to the same day surgical area and was discharged from the hospital that day.

In the early morning hours of September 8, 2005, Nancy was admitted to emergency department at Newton Memorial Hospital, where [*4] she was pronounced dead on arrival. According to an autopsy performed by Dr. Tarik Kumral, M.D., a pathologist, the cause of death was internal hemorrhaging at the site of the laparoscopy incision.

Jens filed an action on behalf of Nancy's estate. During discovery, plaintiff filed a motion to enforce litigant's rights pursuant to *Rule 1:9-1*, seeking to obtain discovery of information discussed at a meeting of the Mortality and Morbidity Committee (the Committee) at Newton Memorial, which addressed Nancy's treatment. Both defendant and Newton Memorial Hospital, which was not a party to the action, opposed the motion. The motion judge determined that factual information from the Committee's review should be provided to plaintiff, but ordered the redaction of "evaluative and deliberative materials."

Plaintiff produced Dr. Kumral to testify as to the autopsy he performed and the cause of Nancy's death. During Dr. Kumral's testimony, plaintiff sought to secure an opinion from the doctor as to clotting and the effect of the Lovenox administered to Nancy on clotting time. The trial judge barred the testimony, concluding that Dr. Kumral was not a treating physician.

Dr. Richard Nitzberg, M.D., [*5] defendant's expert in general and vascular surgery, noted the applicable standard of care in a clinical scenario similar to Nancy's post-surgery condition, and opined that "most surgeons who did that procedure . . . would have sent her home" as opposed to keeping her in the hospital. He concluded that defendant's treatment of Nancy, and his decision to discharge her on the same day as the surgery, was consistent with accepted standards of general surgical practice.

Dr. William Diehl, M.D., another expert in general surgery, opined "that Dr. Toner complied with accepted standards of medical care" in his treatment of Nancy. He observed that as to polycythemia vera and its risks, the patients with the disorder have a lower life expectancy than those without the disorder. Dr. Diehl stated "the median life expectancy of these patients is somewhere between . . . ten to twelve years" from the time of diagnosis. Plaintiff was, thereafter, barred from utilizing learned treatises to impeach the witness.

Defendant testified at trial. He stated that he had operated on two patients diagnosed with polycythemia vera prior to treating Nancy. Nothing "untoward" took place during the operation, and that [*6] Nancy's

condition immediately after the surgery was "excellent." According to defendant, Nancy was given discharge instructions, and he did not admit her for an overnight hospital stay because "there was no real reason to do [so]."

After the jury rendered a verdict in favor of defendant on September 18, 2009, plaintiff filed a motion for a new trial, which was denied. This appeal followed.

On appeal, Jens asserts that the trial court made significant errors as to pretrial and trial rulings. The first focuses on defendant's testimony that he possessed limited knowledge as to polycythemia vera at the time of the surgery, and in retrospect, probably would have kept Nancy in the hospital overnight. In addition, Jens claims that the judge erred in permitting defendant's expert to testify as to his involvement as a member of the Committee, and erred in barring Dr. Kumral from opining as to the effect of Lovenox. Finally, he claims the trial court erred in barring him from utilizing learned treatises to impeach Dr. Diehl, even though they were not provided during discovery. Plaintiff also suggests, as a policy matter, that the doctrine of self-critical analysis should be reformed.

We first address [*7] our standard of review. On appeal, plaintiff claims that the trial judge made erroneous evidentiary and discovery rulings. As to evidentiary rulings, our review "is limited to examining the decision for abuse of discretion." *Hisenaj v. Kuehner, 194 N.J. 6, 12, 942 A.2d 769 (2008)*. *See also Fitzgerald v. Stanley Roberts, Inc., 186 N.J. 286, 319, 895 A.2d 405 (2006)* ("[A] reviewing court grants substantial deference to the evidentiary rulings of a trial judge."). Unless a trial judge has misconstrued the applicable law or abused his discretion, we will generally defer to a judge's discovery rulings. *Rivers v. LSC P'ship, 378 N.J. Super. 68, 80, 874 A.2d 597 (App. Div.), certif. denied, 185 N.J. 296, 884 A.2d 1266 (2005)*.

Our deference to the judge's discretionary rulings also considers whether the judge's "mistaken exercise prejudiced the substantial rights of a party." Pressler & Verniero, *Current N.J. Court Rules*, comment 4 on *R. 2:10-2* (2011). *See also Gillman v. Bally Mfg. Corp., 286 N.J. Super. 523, 528, 670 A.2d 19 (App. Div.), certif. denied, 144 N.J. 174, 675 A.2d 1122 (1996)*. "The error must have been of sufficient magnitude to raise a reasonable doubt as to whether it led the jury to a result it would otherwise not have reached." Pressler & Verniero, *Current* [*8] *N.J. Court Rules*, comment 2.1 to *Rule 2:10-2*; *Fitzgerald, supra, 186 N.J. at 318*.

We first consider plaintiff's claim of error regarding defendant's alleged admissions. Plaintiff sought to read into the record a portion of defendant's deposition comparing his knowledge of polycythemia vera at the time he operated on Nancy in 2005 as opposed to his later knowledge at the time of the 2008 deposition. This is the relevant portion sought to be admitted:

> Q. What have you learned about PV subsequent to the surgery that you didn't know prior to the surgery?
>
> . . . .
>
> A. The risk of bleeding is somewhat higher than the risk of thromboembolic phenomenon.
>
> Q. Based on that, would you do anything differently today?
>
> . . . .
>
> A. I would probably keep her overnight. I would probably discuss the risk of bleeding and blood clots more thoroughly with the family.

On two occasions during the trial, the judge barred plaintiff from reading the deposition to the jury. The judge concluded that defendant's knowledge of polycythemia vera subsequent to Nancy's death was irrelevant because it did not "tend to prove a fact in issue at the time." The judge stated that even if defendant's subsequent knowledge was relevant, [*9] "it would otherwise be excludable under *Evidence [Rule] 403* because it is in effect evidence of a remedial measure taken by the doctor to learn something more . . . [and] remedial measures are not admissible." Citing *Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 691 A.2d 321 (1997)*, the judge then weighed the private interests of plaintiff against the public interest in "having the doctor engage in a thoughtful and deliberative analysis without fear of disclosure," and concluded that the public interest outweighed plaintiff's interest. The judge concluded by noting the chilling effect that disclosure of this subsequent remedial measure would have on doctors and the undue prejudice that would result against

defendant.

On appeal, plaintiff argues that the relevant portion of deposition testimony was 1) relevant; 2) not unduly prejudicial as a subsequent remedial measure; and 3) not protected by the self-critical analysis privilege.

Relevant evidence is that which has "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." *N.J.R.E. 401*. The relevancy of evidence is determined by its probative value, which is the tendency of the evidence "to establish [*10] the proposition that it is offered to prove." *State v. Burr, 195 N.J. 119, 127, 948 A.2d 627 (2008)* (quotation omitted).

When evaluating the probative value of evidence, the court's "inquiry focuses on the logical connection between the proffered evidence and a fact in issue." *Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 15, 860 A.2d 435 (2004)* (quotation omitted). Further,

> the notion of relevance has to do with whether the evidence proffered renders the desired inference more probable than it would be without the evidence. To say that evidence is irrelevant in the sense that it lacks probative value means that it does not justify any reasonable inference as to the fact in question. Conversely, if evidence does support the existence of a specific fact, even obliquely, it is relevant and admissible.
>
> [*Verdicchio v. Ricca, 179 N.J. 1, 33-34, 843 A.2d 1042 (2004)* (internal citations and quotations marks omitted).]

As we have noted, in determining the whether evidence is relevant, the trial court has "broad discretion[.]" *Id. at 34*.

"[A] plaintiff in a malpractice action must prove the applicable standard of care, that a deviation has occurred, and that the deviation proximately caused the injury." *Id. at 23* (citations omitted). Additionally, [*11] doctors "must act with that degree of care, knowledge, and skill ordinarily possessed and exercised in similar situations by the average member of the profession practicing in the field," and will be liable for deviations from the applicable standard of care. *Marshall v. Klebanov, 188 N.J. 23, 33-34, 902 A.2d 873 (2006)*.

Defendant's deposition testimony was offered to prove he deviated from the standard of care by failing to hospitalize Nancy for twenty-four hours post-surgery, which plaintiff alleges was due to his lack of knowledge about polycythemia vera at that time of the surgery. Plaintiff sought to introduce the testimony to show that defendant failed to act with the degree of knowledge "ordinarily possessed and exercised in similar situations by the average member of the profession[.]" *Marshall, supra, 188 N.J. at 33*.

Even if defendant's deposition testimony could be viewed as rendering more probable the inference that he lacked sufficient knowledge to treat Nancy, or that this lack of knowledge contributed to a deviation from the standard of care, the testimony was properly excluded. Ultimately, it was not relevant to the issues before the jury.

"[R]elevant evidence may be excluded if its [*12] probative value is substantially outweighed by the risk of . . . undue prejudice," and as otherwise provided in the Rules of Evidence or by law. *N.J.R.E. 403*; *N.J.R.E. 402*. Pursuant to *N.J.R.E. 407*, "[e]vidence of remedial measures taken after an event is not admissible to prove that the event was caused by negligence or culpable conduct."

Plaintiff analogizes the present case to *Brown v. Brown, 86 N.J. 565, 432 A.2d 493 (1981)*, where evidence of ditch reconstruction immediately after plaintiffs' accident was admitted to show the "practicability of preventing the accident." *Id. at 582*. Plaintiff argues that defendant's deposition testimony similarly demonstrates the feasibility of learning more about polycythemia vera, which, he argues, would have prevented Nancy's death. *See Kane v. Hartz Mountain Indus., Inc., 278 N.J. Super. 129, 148, 650 A.2d 808 (App. Div. 1994)* (stating evidence of subsequent remedial measures has been admitted "to show that a feasible alternative for avoiding the danger existed at the time"), *aff'd, 143 N.J. 141, 669 A.2d 816 (1996)*.

However, contrary to his argument on appeal, at trial plaintiff did not offer the deposition testimony to demonstrate the feasibility of a preventive measure. Plaintiff focused [*13] on the standard of care and what defendant "should have known" at the time of the surgery. He offered the testimony to prove defendant's negligence. The purpose of *N.J.R.E. 407* is to exclude evidence of remedial measures because admission "might

discourage corrective action and induce perpetuation of the damage and condition that gave rise to the lawsuit." *Harris v. Peridot Chem., Inc., 313 N.J. Super. 257, 292, 712 A.2d 1181 (1998)*. "The theory behind the Rule is that a person should not be penalized for correcting a potentially deleterious situation." *Ibid.* (quotation omitted).

Here, defendant admitted to remedial measures, namely, learning more about polycythemia vera after performing Nancy's surgery and that he would have altered her treatment post-surgery based on this knowledge. We conclude that *N.J.R.E. 407*, excluding evidence of remedial measures to encourage corrective act, governs here.

Plaintiff next argues that the court's decision to bar the deposition testimony under the self-critical analysis privilege was error. This privilege "exempts from disclosure deliberative and evaluative components of an organization's confidential materials," and has not been adopted as a full privilege in [*14] this state. *Payton v. N.J. Tpk. Auth., 148 N.J. 524, 544-45, 691 A.2d 321 (1997)*. Instead, a court must engage in a case-by-case balancing of a party's need for disclosure against public interests in confidentiality. *Id. at 546-49*.

The public interest at issue here is in "nondisclosure of self-criticism" and "improv[ing] the quality of care and help to ensure that inappropriate procedures, if found, are not used on future patients." *Christy v. Salem, 366 N.J. Super. 535, 541, 841 A.2d 937 (App. Div. 2004)*. The patient, on the other hand, has a right to know the nature of the treatment received while in the hospital. *Ibid.* (citing *N.J.S.A. 26:2H-12.8(c)*). Here, plaintiff's right to discover information regarding Nancy's treatment "arises from his private interest in prosecuting a personal injury malpractice suit." *Ibid.* The analysis requires a balancing plaintiff's private interest in prosecuting the medical malpractice claim and the public interest in doctors improving the quality of the care they administer by engaging in self-critical analysis.

Here, the trial court weighed the plaintiff's private interests against the "public interests of having the doctor engage in thoughtful and deliberative analysis without [*15] fear of disclosure" and concluded the latter outweighs the former. The judge followed the Court's mandate in *Payton, supra, 148 N.J. at 545-49*, and "accommodated the confidentiality concerns arising from potential disclosure of deliberative and evaluative processes by employing a balancing test instead of a more rigid privilege." *Id. at 545*. We conclude the judge did not err in barring this testimony.

We reach the same result regarding Dr. Kumral's testimony. The trial judge barred plaintiff's counsel from eliciting testimony from Dr. Kumral, the pathologist who performed Nancy's autopsy, regarding the effect of the medication Lovenox on clotting time. The trial judge concluded that Dr. Kumral was not a treating physician and, therefore, was a fact witness, not an expert witness.

Plaintiff argues that 1) the trial judge's conclusion that Dr. Kumral was not a treating physician was error, and 2) barring plaintiff's questions regarding the effect of Lovenox on Nancy was error because defense counsel "opened the door" by cross-examining as to that subject.

Plaintiff first contends that Dr. Kumral was a treating physician and should have been permitted to testify regarding the effect of Lovenox [*16] on Nancy. "It is well settled that treating physicians may testify as to any subject relevant to the evaluation and treatment of their patients." *Ginsberg v. St. Michael's Hosp., 292 N.J. Super. 21, 32, 678 A.2d 271 (App. Div. 1996)* (citing *Stigliano v. Connaught Lab, 140 N.J. 305, 658 A.2d 715 (1995))*. A treating physician may testify about the cause of a patient's disease "because the determination of the cause of a patient's illness is an essential part of diagnosis and treatment[.]" *Id. at 33* (quotation omitted).

A treating physician is defined as a doctor who has consulted with or examined a patient "for the purpose of treatment or diagnosis preliminary to treatment." *Carchidi v. Iavicoli, 412 N.J. Super. 374, 383-84, 990 A.2d 685 (App. Div. 2010)* (holding doctors were not treating physicians where they "did not arrive at a determination of the cause of plaintiff's injuries" by previous treatment or examination of plaintiff, but rather by reviewing materials and rendering opinions as to causation for the purpose of litigation).

Dr. Kumral did not treat Nancy for the purpose of treatment or diagnosis, but examined her to determine cause of death. He reviewed Nancy's clinical history and discussed his findings with defendant. [*17] His focus was on cause of death as revealed by the autopsy. *Cf. Stigliano, supra, 140 N.J. at 315*. Plaintiff did not identify Dr. Kumral as an expert and the judge did not err in limiting his testimony to "the four corners of the [autopsy] report."

There is an additional reason for concluding there was no error. Another of plaintiff's witnesses, Dr. Hornyak, was proffered on the issue of the administration of Lovenox. The issue of Lovenox was before the jury and Dr. Kumral's testimony would have been cumulative.

Plaintiff also maintains that "defense counsel opened the door to [questioning on] the effects of Lovenox" on Nancy. On cross-examination, after plaintiff raised the issue of Lovenox on direct examination, defense counsel asked Dr. Kumral whether defendant informed him that Nancy was taking Lovenox, and whether Dr. Toner informed him Lovenox was indicated for thromboembolism.

"'The "opening the door doctrine" is essentially a rule of expanded relevancy and authorizes admitting evidence which otherwise would have been irrelevant or inadmissible in order to respond to (1) *admissible evidence* that generates an issue, or (2) *inadmissible evidence* [*18] admitted by the court over objection.'" *Alves v. Rosenberg, 400 N.J. Super. 553, 564, 948 A.2d 701 (App. Div. 2008)* (quoting *State v. James, 144 N.J. 538, 554, 677 A.2d 734 (1996)*). Here, defense counsel's limited questioning on cross regarding Lovenox remained within the scope of direct examination. The "opening the door" doctrine was not applicable, as defendant did not seek to "selectively introduce[]" evidence for his own advantage. *State v. Brown, 170 N.J. 138, 153, 784 A.2d 1244 (2001)*. We find no error here.

We now address the issue of Dr. Nitzberg's involvement with the Quality Assurance Committee. While questioned on direct examination regarding his qualifications as an expert, Dr. Nitzberg indicated he was "involved with the Quality Assurance Committee for a number of years" at Overlook Hospital in Summit. Plaintiff objected to questioning regarding Nitzberg's involvement with the Quality Assurance Committee (Q.A. Committee). The trial judge overruled the objection and permitted the testimony. Prior to cross examination, plaintiff's counsel sought permission to question Nitzberg regarding the Q.A. Committee. The judge stated:

> [Dr. Nitzberg] testified that in his hospital, which is not the same hospital involved here, [*19] that he is a member of a committee that reviews practices. It goes to the issue of his qualifications as an expert, but it doesn't open the door to getting in any such information that might have been created as a result of this matter in another hospital on a case that he had no control over.

Plaintiff now argues it was error to bar cross-examination of Nitzberg regarding the Q.A. Committee after he was permitted to testify on direct regarding his involvement on the Committee. He maintains it was error in light of the pretrial ruling barring discovery of the Newton Memorial Hospital Committee's deliberative materials because it "created the false impression in the jury's mind that no such meeting was conducted[.]" Plaintiff also argues that Nitzberg's testimony "open[ed] the door to a complete production of the mortality and morbidity committee report" from Newton Memorial regarding Mrs. Muenken's surgery. We disagree.

"[T]he scope of cross-examination is a matter for the control of the trial judge and an appellate court will not interfere with such control unless clear error and prejudice is shown." *Graf v. Folarno, 99 N.J. Super. 173, 176, 239 A.2d 15 (App. Div.), certif. denied, 51 N.J. 463, 242 A.2d 12 (1968)*. [*20] However, it is error to permit cross-examination where it does "not of itself relate to any legitimate question of the doctor's credibility or qualifications[.]" *Id. at 177*.

Here, defense counsel questioned Nitzberg regarding any appointed positions he held at Overlook Hospital in an effort to demonstrate his qualifications as an expert. Defense counsel did not question Nitzberg regarding morbidity or mortality committees; instead, it was plaintiff's counsel who, during voir dire, questioned Nitzberg regarding a "Mortality and Morbidity Committee." Defense counsel did not open the door regarding the contents of the Committee held at Newton Memorial regarding Mrs. Muenken. Nitzberg only briefly referenced the Quality and Assurance Committee at a different hospital. The judge did not abuse his discretion in allowing Nitzberg to testify as to his credentials without admission of the Newton Quality Assurance Committee action regarding defendant.

Although not asserted as error, plaintiff maintains that the current state of law on self-critical analysis in New Jersey should be reformed because it stifles the litigation process and does not promote candor. Specifically, he argues that it 1) [*21] prevents parties

from obtaining truthful information; 2) is disproportionately benefits medical facilities and practitioners; and 3) does not prevent any chilling effect that disclosure may cause.

The Supreme Court has stated that

> disclosure of the materials involved in an internal investigation into health-care service invokes serious and important questions of public policy deserving careful consideration by the courts. An applicant seeking the opinions, conclusions, sources of information and investigative techniques of the agency should demonstrate a need more compelling than the agency's recognized interest in confidentiality.
>
> [*McClain v. Coll. Hosp., 99 N.J. 346, 359, 492 A.2d 991 (1985)*.]

*McClain* involved a medical malpractice action in which plaintiff sought disclosure of the contents of an investigation conducted by the State Board of Medical Examiners into the facts, circumstances and possible causes of death that occurred in a department of the defendant hospital. *Id. at 352*. The Board's investigation included testimony of numerous physicians and staff, and resulted in a report from an executive committee of the Board containing evaluation and recommendations. *Ibid*.

The Court held that in [*22] order for such information to be disclosed,

> the standard is a showing of particularized need that outweighs the public interest in confidentiality of the investigative proceedings, taking into account (1) the extent to which the information may be available from other sources, (2) the degree of harm that the litigant will suffer from its unavailability, and (3) the possible prejudice to the agency's investigation.
>
> [*Id. at 351*.]

Since *McClain*, the Court has "decline[d] to adopt the privilege of self-critical analysis as a full privilege, either qualified or absolute," and instead requires that a "'case-by-case balancing approach'" be applied "when considering confidentiality of internal investigative reports such as . . . peer committee report[s.]" *Christy, supra, 366 N.J. Super. at 540-41* (quoting *Payton, supra, 148 N.J. at 545, 549)*. This requires a balancing of "plaintiff's right to discover information concerning his care and treatment [, which] arises from his private interest in prosecuting a personal injury malpractice suit" with the "public interest [in] improv[ing] the quality of care and help[ing] to [*23] ensure that inappropriate procedures, if found, are not used on future patients." *Id. at 541*.

The concerns plaintiff raises on appeal were previously addressed by us in *Christy, supra, 366 N.J. Super. at 543*:

> both *Payton* and *McClain* focus on the public interest concerns associated with self-critical analysis arising from the disclosure of "evaluative and deliberative materials" as opposed to disclosure of purely factual material. The search for truth is paramount in the litigation process. *Kernan v. One Washington Park, 154 N.J. 437, 713 A.2d 411 (1998)*. Likewise, factual material must be relied upon in self-critical analysis to support deliberative factual findings, conclusions, and opinions. We are not convinced that hospital peer review committees will intentionally leave out purely factual information, which otherwise would provide the basis for their deliberative findings and opinions, simply because it is discoverable.

Applying the particularized need standard set forth in *McClain* and balancing the plaintiff and defendant hospital's interests, we concluded that the factual material found in peer review committee report was discoverable. *Ibid*. We then admitted another portion of the report "notwithstanding [*24] its deliberative nature." *Id. at 544*.

The privilege is not all-encompassing. It applies to limited portions of self-critical evaluations and reports, specifically those evaluative, deliberative non-factual portions that would have a chilling effect on doctors taking steps to improve their procedures. Furthermore, as

in *Christy, supra*, the balancing approach has not resulted in a systematic barring of deliberative and evaluative material that unfairly prevents parties from obtaining truthful information.

In sum, the balancing approach used to determine the applicability of the self-critical analysis privilege upholds the public policy of promoting candid self-evaluation to help prevent future inappropriate procedures and improve treatment, without sacrificing a litigants "search for the truth." We conclude that plaintiff's arguments are without merit.

Finally, although plaintiff asserts error in the refusal of the judge to allow plaintiff to utilize learned treatises to impeach Dr. Diehl, we need not address that issue as it focused on an issue of damages rather than liability, which the jury decided adverse to plaintiff. In this procedural context, even if the judge did err in his ruling, [*25] any error was harmless as it was not capable of producing an unjust result. *R. 2:10-2*.

Affirmed.