KEN BORRERO and NANCY BORRERO, as parents and natural guardians of JIZZELLE ESTRELIA BORRERO, a minor, Plaintiffs	:	IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
V.	:	CIVIL DIVISION
LAKE ERIE WOMEN'S CENTER, P.C. and PEG BOYD, Certified Nurse Midwife, Defendants	:	
V.	:	
PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE, Intevenor	:	NO. 12060 – 2004

OPINION AND ORDER

The case comes before this Court on the plaintiffs' Petition To Show Cause Why Sanctions Pursuant to Pa.R.C.P. 4019 and 42 Pa.C.S. § 2503(7) Should Not Be Awarded filed against the defendants on July 20, 2010. After affording the parties a lengthy discovery period, this Court conducted a hearing on July 27, 2011.

BACKGROUND OF THE CASE

The plaintiffs, Ken and Nancy Borrero are the parents and natural guardians of the minor-plaintiff, Jizzelle Borrero. She was born on March 12, 2003 at Hamot Medical Center in the City of Erie. Defendant Peg Boyd, a nurse-midwife performed the delivery. Ms. Boyd was employed with Defendant Lake Erie Women's Center (LEWC) from 2001 to 2009. Plaintiffs allege that as a result of the defendants' negligence, the child's delivery was complicated by a condition known as "shoulder dystocia" that resulted with an injury to her brachial plexus leaving her with limited use of her left upper arm.

On June 1, 2001, LEWC was created by a merger of Levinson & Townsend, Inc. d/b/a Contemporary Women's Healthcare (CWH) and Lakeside Obstetricians and Gynecologists (Lakeside). Respondent Mark Townsend, M.D. is not a party to this action but was a shareholder of LEWC.

During the course of this lawsuit, plaintiffs served Hamot and LEWC with discovery requests including a request for production of any "written policies in place in 2000 that pertain to or relate to...shoulder dystocia". See Answers and Objections To First Set Of Interrogatories and Request For Production Of Documents directed to Defendant Lake Erie Women's Center, P.C., Interrogatories ## 26 and 27. Diane Zenewicz, the corporate designee of LEWC, objected to the relevancy of the request and responded "not applicable". *Id.* Paul Huckno, Hamot's corporate designee responded, "None". *Id.* During Boyd's January 13, 2005 deposition, when asked if there were any guidelines that dictated the maneuver she used as part of the delivery, her only specific reference was to Varney's Midwifery. She could not think of any other guidelines "off the top of her head". See Boyd 1/13/05 Deposition at 51 – 52. Dr. Townsend's position is that LEWC did not have an approved shoulder dystocia protocol. 7/27/11 Hearing Transcript at 125, 146 – 147. Furthermore, if asked, he would not have referred anyone to any specific policies/procedures. *Id.* at 155 – 156.

Plaintiffs voluntarily discontinued their claim against Hamot. In August 2007, a jury trial commenced before the Honorable Shad Connelly. It resulted in a mistrial. This Court attempted to try the case a second time. However, on October 16, 2007, it declared a mistrial. The reasons for the mistrials are not relevant to the instant inquiry.

In and around April 2010, plaintiffs' counsel became involved in the unrelated case of *Decker v. Hamot, Lake Erie Women's Center, P.C., et al.*, No. 10589 – 2002. He learned that as part of the discovery process in *Decker,* Hamot produced 56 pages of policies and procedures that included a protocol for shoulder dystocia.[1] They were titled "Contemporary Women's Healthcare"; with the names of doctors Levinson and Townsend preprinted at the top. They were signed by Dr. Townsend. (See, Petition For Sanctions, Exhibit 1). Armed with this information, and believing that material information had not been disclosed during the course of the *Borrero* case, petitioners filed the instant petition on July 20, 2010.

In defense, Boyd, Townsend and LEWC assert that LEWC was not in existence in 2000 and that the 56 pages of policies and procedures were developed by CWH and had not been formally approved by LEWC after the merger. Hamot argues that it did not violate the discovery rules because the policies and procedures were not its policies, but were those of CWH which were obtained solely for credentialing purposes. Boyd claims that she truthfully answered the discovery inquiry concerning guidelines for the management of shoulder dystocia. However, she has admitted that she was aware of the 56 pages of policies and did refer to them from time-to-time after she was hired by CWH. She also admitted that during her employment with LEWC she undertook to update the policies in cooperation with the other midwives and physicians, but that the

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[1] In *Decker,* Hamot and Dr. Townsend were asked whether on June 21, 2000 it had in effect any written or oral internal procedures, policies, guidelines, rules,...protocols, manuals and/or directives of any sort, whether maintained in documentary form or by computer, applicable to or governing any of the following areas of concern?:

(a) the conduct and scope of midwifery and the procedures to be followed by nurse-midwives in the office and/or the hospital generally.

Plaintiff Decker's Interrogatory 1 and 2. See also, Hamot's Answers, Responses, Objections To First Set Of Interrogatories And Request For Production of Documents..., Interrogatory # 26, 7/27/11 Hearing Exhibit 5.

revisions were abandoned in favor of protocols recommended by the American College of Nurse-Midwives. Dr. Townsend claims that no protocols existed for LEWC.

DISCUSSION

There are two issues before this Court. First, whether the defendants intentionally or negligently failed to disclose material evidence regarding the existence of the shoulder dystocia protocol during the discovery process? Second, if so, what is the remedy?

Generally,

> A party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, content, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

Pa.R.Civ.P. 4003.1. It is not objectionable that the information sought would be inadmissible at trial. Rather, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence, it is generally discoverable. *Id.* at (b). As one author has stated:

> Discovery has a three-fold purpose:
>
> 1. To narrow the issues to a point at which it is necessary for the court to consider only such evidence as concerns matters actually disputed and controverted;
>
> 2. To obtain and preserve evidence for subsequent use at trial;
>
> 3. To elicit information as to the existence of evidence for possible use at trial, from whom and by what method it may be elicited – such information as, for example, the

> names and addresses of persons who might reasonably be expected to have knowledge of relevant facts, or the existence, location and custody of pertinent documents or other things.

Charles B. Gibbons, Discovery Practice, West's Pennsylvania Practice, Vol. 5 § 1.2 at 2. It is axiomatic that the one from whom discovery is sought is under an obligation to respond to the discovery request truthfully.

At the July 27, 2011 evidentiary hearing, Hamot's Mr. Huckno admitted that the 56 page policies/practices were in Hamot's possession and used by Hamot to credential midwives, including Boyd. Furthermore, they, or a portion of them, were available to any credentialing agency which asked Hamot to provide substantiation for the credentialing process. See, 7/27/11 Hearing Transcript at 59, 64 – 66, 85 – 86.

As to Boyd, the evidence established her (and LEWC's) knowledge and the effect of the policies/practices. *Id.* at 162 - 164. See also, Boyd 1/18/11 Deposition at 37, 39 – 40. She oriented new midwives/employees and referred them to the LEWC library that included the protocols among its publications. 7/27/11 Hearing transcript at 173, 178. Furthermore, she undertook their revision. *Id.* at 165; Boyd 1/18/11 Deposition at 20, 40, 81 and 97. Irrespective of Dr. Townsend's position that LEWC never approved the protocols, it is clear that he was aware of the protocols and had acknowledged their existence as early as the discovery phase *Decker* case when he co-referenced the co-defendant's (Dr. Levinson) discovery responses in his own response. In brief, he knew that the protocols existed after the merger between CWH and LEWC and had no reason to believe that they had been withdrawn or suspended. Townsend 10/31/05 Deposition at 110. He also knew that the protocols were part of the information relied upon by Hamot as part of the credentialing hospital. Townsend

1/19/11 Deposition at 61. Therefore, Boyd, LEWC, Townsend and Hamot each had knowledge of the policies/practices at the time of plaintiffs' discovery request and pretrial depositions.

As to Townsend, Boyd and LEWC, the fact that the policies/practices were not formally adopted by the corporation after the merger is not dispositive. They were *de facto* protocols that were clearly available to anyone working for LEWC. Townsend, Boyd and LEWC should have disclosed their existence during the course of discovery. As to Hamot, although the documents were utilized for a different reason (credentialing), they were within Hamot's possession and knowledge and should have been disclosed.

The policies/practices were of particular significance to the plaintiffs as they attempted to establish their burden that those involved in the child's delivery violated the relevant standard of care. Absent disclosure, plaintiffs' ability to fully develop its case was impaired. Although the impact of Townsend's and Hamot's failure to disclose the evidence may be problematical as to their potential liability,[2] their failure to disclose foreclosed an avenue of discovery that would have assisted the plaintiffs in developing their case against Boyd and LEWC.

Townsend's, Boyd's and LEWC's discovery responses were made with knowledge that the policies/practices existed. Given the facts, the assertion that LEWC had not adopted them is a hyper-technical argument, better raised in a motion for protective order or motion *in limine*. It does not excuse their duty to disclose.

Hamot was charged with the knowledge of the protocols because they were within its possession. It had a duty to ascertain and disclose information located within

[2] Plaintiffs assert that Hamot failed to disclose the protocols in order to protect it employee, Nurse Paula Petroff, from liability (as well as itself). Petroff acted as the "birth assistant". See, Plaintiffs' Proposed Findings Of Facts And Conclusions Of Law at ¶ 261.

its files. By comparison, Hamot's and Townsend's handling of the discovery request in the *Decker* case is noteworthy. In that case they disclosed the existence of the information (even though they questioned whether they had a duty to do so). That was the appropriate discovery response.

CONCLUSION

Based upon the above, the Court finds that defendants LEWC and Boyd, as well as Dr. Townsend and Hamot failed to properly respond to plaintiffs' discovery requests. Sanctions shall be determined by the Court after argument.

Dated: October 24, 2011

BY THE COURT,

E. DiSantis

Ernest J. DiSantis, Jr. Judge

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V.	:	
PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE, Intevenor	:	NO. 12060 – 2004

ORDER

AND NOW, this 24th day of October, 2011, for the reasons set forth in the accompanying opinion, this Court finds that the defendants, as well as, Dr. Mark Townsend and Hamot Medical Center committed discovery violations in this case. It is ORDERED that argument to determine the nature of sanctions shall be conducted by this Court on the **3rd day of November, 2011 at 1:30 p.m.**

BY THE COURT:

E. DiSantis

Ernest J. DiSantis, Jr., Judge

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ORDER

AND NOW, this 12th day of December 2011, in conjunction with this Court's Opinion issued October 24, 2011, and after argument of counsel conducted November 22, 2011 and review of the plaintiffs' counsels' affidavit regarding fees and costs, sanctions shall be imposed pursuant to Pa.R.C.P. No. 4019 as follows:

1. Lake Erie Women's Center P.C. (LEWC), Peg Boyd (Boyd), Hamot Medical Center (Hamot), and Mark Townsend, M.D. (Townsend) shall, within thirty (30) days from the date of this order, reimburse the plaintiffs twenty-nine thousand six hundred eighty dollars ($29,680.00) for attorneys' fees and fourteen thousand five dollars and seventy-six cents ($14,005.76) for costs associated with the Rule To Show Cause proceeding that is the subject of this action. Liability for these items shall be as follows: LEWC, Boyd and

Townsend, shall each pay thirty percent (30%) of the above amounts. Hamot shall pay ten percent (10%).[1]

2. Defendants Lake Erie Women's Center, P.C., Peg Boyd, Hamot Medical Center and Mark Townsend, M.D. shall, within thirty (30) days from the date of this order, reimburse the plaintiffs sixteen thousand eight hundred dollars ($16,800.00) for attorneys and twelve thousand three hundred seventy-five dollars and seventy-seven cents ($12,375.77) for costs related to the trial conducted before this Court on October 8, 2007 to October 16, 2007. Liability for these items shall be as follows: LEWC, Boyd and Townsend, shall each pay thirty percent (30%) of the above amounts. Hamot shall pay ten percent (10%).[2]

3. At time of trial, the Court shall fashion a jury instruction indicating that the jury may consider the fact that Peg Boyd and Lake Erie Women's Center, P.C., or its agents, intentionally, or with a gross disregard for the existence of discoverable evidence (i.e., the shoulder dystocia policy/protocol), failed to disclose that evidence to the plaintiffs during the discovery process.[3]

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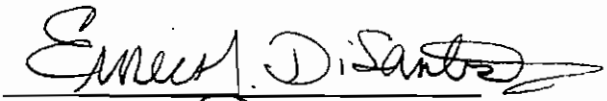
[1] Percentages correspond to the degree of culpability reflected in the October 24, 2011 Opinion.

[2] Dr. Edelberg was the only "live" medical expert called by the plaintiffs at the trial conducted before this Court. The case ended in a mistrial because the jury was deadlocked. This Court was prepared to award the plaintiffs reimbursement for Dr. Edelberg's in-court testimonial fees, as well as a separate monetary punitive sanction unrelated to attorneys' fees and costs. However, given the nature of the itemized expenses contained in plaintiffs' counsel's affidavit regarding fees and costs, this Court believes that the amounts awarded by this order constitute adequate sanctions without being draconian.

[3] The first trial ended in a mistrial before the case was submitted to the jury. Therefore, this Court is reluctant to assess any fees, etc. related to that case. As to the second trial, although it cannot be accurately determined whether the outcome of the trial would have been different if the discovery violation had not occurred, it is clear that the violation deprived the plaintiffs of material evidence that would have significantly enhanced their theory of the case that was presented to the jury, in particular as it related to the defendants' duty of care. Therefore, as to that trial, an assessment is appropriate.

BY THE COURT:



Ernest J. DiSantis, Jr., Judge

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