Not Reported in A.3d, 2013 WL 709298 (N.J.Super.A.D.)
(Cite as: 2013 WL 709298 (N.J.Super.A.D.))

Superior Court of New Jersey,
Appellate Division.
N.E., as Legal Guardian for the infant Ja. V., Plaintiff–Respondent,
v.
NEWARK BETH ISRAEL MEDICAL CENTER, Stephen Amaefuna, M.D., Fidel Garcia Fernandez, M.D., Francis Viejo, M.D., Jeffrey Lautin, M.D., Suzanne Aquino, M.D., Nighthawk Radiology Holdings, Inc., Nighthawk Radiology Services, LLC, Newark Diagnostic Radiologists, P.A., Defendants–Respondents,
and
State of New Jersey, Department of Children and Families, Division of Youth and Family Services,[FN1] Nussette Perez, and Felix Umetiti, Defendants–Appellants.

FN1. On June 29, 2012, the Governor signed into law A–3101, reorganizing the Department of Children and Families, which includes the renaming of the Division as the Division of Child Protection and Permanency. *L.* 2012, *c.* 16, eff. June 29, 2012.

Argued Nov. 15, 2012.
Decided Feb. 28, 2013.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Essex County, Docket No. L–3980–10.

Carla S. Pereira, Deputy Attorney General, argued the cause for appellants (Jeffrey S. Chiesa, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel; Ms. Pereira and Esther Bakonyi, Deputy Attorney General, on the brief).

David A. Mazie argued the cause for respondent N.E. (Mazie, Slater, Katz & Freeman, LLC, attorneys; Mr. Mazie, of counsel and on the brief).

Vasios, Kelly & Strollo, P.A., attorneys for respondents Newark Beth Israel Medical Center, Stephen Amaefuna, M.D., and Francis Viejo, M.D., rely upon the brief of respondent N.E. Marshall, Dennehey, Warner, Coleman & Goggin, attorneys for respondents NightHawk Radiology Services, LLC, NightHawk Radiology Holdings, Inc ., and Suzanne Aquino, M.D.[FN2]

FN2. By order dated September 19, 2012, defendants, NightHawk Radiology Services, LLC, NightHawk Radiology Holdings, Inc., and Suzanne Aquino, M.D., were granted leave to appear at oral argument. These defendants, in their certification, state they "would leave it to this [c]ourt to decide the matter based on ... plaintiff's opposition[,]" but "do not wish to officially join in ... plaintiff's brief" so as not "to run the risk of being charged with adoptively admitting any fact in contention in this litigation or being held to have conceded to any legal or factual point by virtue of joining in the brief." They proposed to appear only to "address any questions ... regarding NightHawk and Dr. Aquino, and ... address any issues which may arise at argument which directly and uniquely concern[ ] NightHawk and Dr. Aquino." The panel had no questions for these defendants.

Before Judges SAPP–PETERSON and HAAS.

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PER CURIAM.

***1** We granted leave to defendants, Division of Youth and Family Services ("Division") and its case workers, Felix Umetiti and Nussette Perez (collectively "defendants"), to appeal the interlocutory order granting plaintiff, N.E., as legal guardian for the infant, Ja. V.(Jay),[FN3] access to two internal memos [FN4] the Division created after a July 2009 incident that left Jay, plaintiff's grandson, severely disabled. Defendants also appeal the additional provision in the order denying their request to quash the subpoena to depose the author of one of the memos. We affirm the order denying defendants' motion to quash the subpoena to depose Edward Thompson, but reverse that portion of the order directing the disclosure of portions of the two memos.

FN3. Fictitious name is used to protect the privacy of the minor and for ease of reference.

FN4. The Division, in a confidential appendix, provided the two memos to this court.

Defendants argue the memos are confidential documents subject to the privilege of self-critical analysis, which, if revealed, would create a chilling effect on the Division's ability or willingness to engage in thorough introspection of its policies and procedures. Plaintiff, in turn, maintains the documents are not privileged and are essentially probative to the central issue of whether the Division and its agents negligently, recklessly or deliberately breached a duty of care owed to Jay and violated his civil rights. In approving the partial discovery of the memos, the trial judge applied the balancing test devised by the New Jersey Supreme Court in *Payton v. New Jersey Turnpike Authority*, 148 *N.J.* 524 (1997).

I.

Following plaintiff's May 28, 2009 report to the Division that she suspected Jay, her three-month-old grandson, was being abused because she had noticed blood in his eyes and bruises on his cheeks, the Division launched an investigation. The Division assigned Umetiti to conduct the investigation. Doctors at Newark Beth Israel Medical Center examined Jay. They did not find definitive indications of abuse. Umetiti nonetheless suspected child abuse, but he permitted Jay to be returned to his parents pending further investigation.

The Division continued its investigation over the next six weeks, during which it learned: (1) Jay's father, Jo. V., suffered from untreated bipolar disorder, although there had been previous hospitalizations for the condition; (2) Jay had blood in his eyes after being left alone with his father; (3) Jo. V. had engaged in domestic violence, bruising the arms of Jay's mother, and he had also been violent towards his most recent girlfriend; (5) Jo. V. had a history of substance abuse; and (6) a crack pipe was found in Jay's diaper bag. Despite these revelations, the Division took no action to remove Jay from his parents' custody.

On July 16, 2009, Jo. V. attacked Jay, leaving the then four-month-old with severe and permanent brain injury, limited use of his arms and legs, blindness, inability to speak, as well as an inability to eat except through an intravenous tube. Subsequently, the Division conducted an internal review of Jay's case to evaluate the caseworkers' performance and adherence to protocols. That evaluation yielded two internal memos detailing the strengths and weaknesses of the Division's involvement with Jay's family, as well as corrective measures to prevent such incidents in the future.

***2** The first memo, authored on July 24, 2009 by Edward Thompson, the Union County Area Director, provided an overview of the Division's involvement with Jay and his family and contained opinions regarding the Division's involvement as well as rec-

ommendations. On July 27, 2009, Gale Hunter, Manager of the Union County East Local Office, wrote the second memo, which responded to Thompson's memo.

Plaintiff's original complaint, filed on behalf of Jay in 2010, was later amended in 2011. Of the four counts alleged in the amended complaint, the third and fourth counts were specifically directed against defendants. In the third count, plaintiff alleged negligence, carelessness, recklessness or otherwise palpably unreasonable conduct on the part of defendants in (1) conducting the investigation, (2) failing to protect Jay, and (3) breaching mandated policies, practices, procedures and protocol. The fourth count alleged defendants violated Jay's civil rights by acting with deliberate indifference towards his care and safety.

During the course of discovery, plaintiff learned of the existence of the two memos and moved to compel their production. Defendants filed a motion to quash the notice to produce Thompson for deposition and the notice to produce documents. The court conducted oral argument, during which defense counsel argued that plaintiff's counsel conceded the Division acknowledged, through the testimony of a supervisor, Debra Powell, that there had been a deviation from "its policies and procedures in numerous aspects[.]" In response, plaintiff's counsel argued defendants had not conceded liability and plaintiff was therefore entitled to the documents, noting that it was Umetiti who made his credibility an issue during his deposition. The court interjected, acknowledging that Umetiti testified during the deposition that he had been "commended" for how he conducted the investigation. Plaintiff's counsel responded:

> [A]nd he made this an issue. He's gonna stand before this jury if we don't win summary judgment and he's gonna tell them[,] by the way, I did a great job here, I didn't breach any policies, I don't care what my supervisor says, when they did a review I was commended, and that's what he said. I gave him a chance and everyone in the room, I don't care what his file says, this is a man that was demoted at one point, Judge, I don't know if that was in his file, sat with their mouths open, aghast, this was a three[-]day deposition, when he said that in that room. Ten lawyers, ten lawyers had faces looking at each other, rolling their eyes, and it's amazing to us that this man would actually say he was commended when in fact it appears he wasn't, but we're entitled to find out. He's the one who made this an issue, I'm entitled to this information.

The court considered the matter "a fairly close issue" but agreed that Umetiti made it an issue, and following an in-camera review, ordered the release of portions of the two memos. The court supplemented its oral decision with a letter opinion in which it analogized the Division's role as protector of at-risk youth to a hospital's role as "protector[ ] of ill patients." The court noted the Supreme Court, in *McClain v. College Hospital*, 99 *N.J.* 346 (1985), "discussed the desirability of a broad self-critical analysis privilege ... but left to the Legislature the decision as to how broad a privilege should be granted." Likewise noting the Legislature has yet to address this issue, the court concluded that its disposition of the dispute would be guided by the balancing test the Court laid out in *Payton*. The court determined:

> ***3** I admit that the balancing test was difficult because it is not clear if the numerous deficiencies noted in the July 24 and July 27 memoranda have been, or would be discovered by plaintiff without access to the two memoranda. I posed this dilemma to counsel at oral argument, but counsel could not easily provide useful information (obviously plaintiff's counsel could contribute no information because he was not allowed to see the memoranda). However, the balancing act became easier once it became clear that a critical issue in the case was breached by Felix Umetit[i], a key [Division] employee. Mr. Umetit[i] claimed that he was praised for his conduct in this matter. One of his supervi-

> sors, Ms. Powell, disagreed. To have the jury speculate ... as to that major issue, when the dispositive data is available, strikes this court as wrong.[1]
>
> Based on that decision, I have ruled that [the Division] does not have to turn over the entire second sentence on item 8 in the July 24 memorandum. Similarly, [the Division] does not have to turn over the section entitled Plan of Action which runs from the middle of page 5 to the top of page 6 in the July 24 memorandum. In addition, [the Division] may delete the third sentence in item 15 in the July 27 memorandum. The closest issue concerned the two items identified as Systemic Issues on page 5 of the July 24 memorandum and the four items denominated Systemic Issues on the last page of the July 27 memorandum. I have decided that item 1, but not item 2 of the Systemic Issues section of the July 24 memorandum must be turned over. As to the July 27 memorandum, I have determined that none of the four items should be turned over.

In a footnote, the court continued: "I characterize the issue as major for several reasons, the most obvious of which is that it directly impacts Mr. Umetit[i]'s credibility."

The court stayed its decision for ten days in order to afford defendants the opportunity to seek interlocutory review. We granted defendants' motion for leave to appeal the court's interlocutory ruling by order dated June 13, 2012.

On appeal, defendants contend the two memos should be protected in their entirety rather than in the limited manner ordered by the trial court because: (1) the factual information is intermingled with analysis and recommendations, (2) the factual information contained in the memos has already been disclosed through plaintiff's access to investigative files, pertinent portions of Umeteti's personnel records and review of Division policies and procedures which were provided, and (3) depositions that have been taken.

II.

We review a trial court's discovery decisions under an abuse of discretion standard of review. *See Bender v. Adelson*, 187 *N.J* . 411, 428 (2006). We defer to the trial court's determination unless its discretion has been misapplied. *Terrell v. Schweitzer–Mauduit*, 352 *N.J.Super.* 109, 115 (App.Div.2002). In other words, we will " 'generally defer to a trial court's disposition of discovery matters unless the trial court has abused its discretion or its determination is based on a mistaken understanding of the applicable law.' " *Pomerantz Paper Corp. v. New Cmty. Corp.*, 207 *N.J.* 344, 371 (2011) (quoting *Rivers v. LSC P'ship.*, 378 *N.J.Super.* 68, 80 (App.Div.), *certif. denied*, 185 *N.J.* 296 (2005)).

***4** The liberality with which discovery is permitted in New Jersey is well-established, therefore, barring a claim of privilege, "[p]arties may obtain discovery regarding any matter ... which is relevant to the subject matter involved in the pending action." *R.* 4:10–2; *see also McKenney v. Jersey City Med. Ctr.*, 167 *N.J.* 359, 372 (2001); *Pfenninger v. Hunterdon Cent.*, 167 *N . J.* 230, 237 (2001). Such treatment comports with the purpose of the discovery rules, which is "to eliminate, as far as possible, concealment and surprise in the trial of law suits...." *Oliviero v. Porter Hayden Co.*, 241 *N.J.Super.* 381, 387 (App.Div.1990). Given this liberal discovery standard, privileges are highly disfavored. *See State v. Mauti*, 208 *N.J.* 519, 531 (2012) (noting that privileges stand in the way of the truth seeking process). Nonetheless, our courts will uphold assertion of a privilege where the need for confidentiality outweighs the need for disclosure. *Payton, supra*, 148 *N.J.* at 539.

The privilege of self-critical analysis, which the Division urges is being threatened here by the trial court's order directing disclosure of portions of the

two internal memos, shields from discovery "evaluative components of an organization's confidential materials." *Payton, supra*, 148 *N.J.* at 543 (citing *Tharp v. Sivyer Steel Corp.*, 149 *F.R.D.* 177, 179–80 (S.D.Iowa 1993)). Where recognized, courts consider the following factors in applying the privilege: (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. *McClain, supra*, 99 *N .J.* at 351. New Jersey has not formally recognized this privilege. As the Court, in *Payton*, expressly stated:

> We decline to adopt the privilege of self-critical analysis as a full privilege, either qualified or absolute.... Instead, we perceive concerns arising from the disclosure of evaluative and deliberative materials to be amply accommodated by the "exquisite weighing process[ ]" ... that our courts regularly undertake when determining whether to order disclosure of sensitive documents in a variety of contexts.
>
> [*Id.* at 545 (quoting *Beck v. Bluestein*, 194 *N.J. Super* . 247, 263 (App.Div.1984)).]

The Court also "disavowed the statements in those lower court decisions that have accorded materials covered by the supposed privilege near absolute protection from disclosure." *Id.* at 545.

Recognizing, however, the existence of warring public interests to "protect the confidentiality of those involved in the investigation if a loss of confidentiality would otherwise undermine the efficacy of investigations" on one hand, and "a party's need to know" on the other, the court favored a "conditional privilege" which permits the trial court to undertake protective actions such as "redaction, issuance of confidentiality or gag orders, and sealing of portions of the record," when a competing interest favors disclosure. *Id.* at 542. In sum, while New Jersey does not recognize self-critical analysis as a privilege, the *Payton* Court instructs trial courts to "accord significant weight" to self-critical analysis to determine whether the presumption of public access is outweighed by a party's interest in non-disclosure, albeit with a caveat that only in "truly extreme cases" will wholesale suppression of relevant confidential information be proper. *Id.* at 542–48.

***5** Here, although guided by the balancing test articulated in *Payton*, the trial court's balancing did not expressly include its consideration of *N.J.S.A.* 9:6–8.10a, governing disclosure of Division child abuse or neglect records. The statute provides that records of child abuse are confidential and may only be released under limited circumstances. *Ibid.* Such circumstances may include disclosure to a court, "upon its finding that access to such records may be necessary for determination of an issue before it, and such records may be disclosed by the court ... to the law guardian, attorney, or other appropriate person upon a finding that such further disclosure is necessary for determination of an issue[.]" *N.J.S.A.* 9:6–8.10(b)(6).

The court, in both its oral and supplemental written opinion, determined that disclosure of the two internal memos was "influenced to some extent by the apparently conflicting testimony of Mr. Umetit[i] and Ms. Powell on whether [the Division] believed Mr. Umetit[i] acted properly in the matter." The court believed that whether Mr. Umetiti was "praised for his conduct in this matter" when one of his supervisors "disagreed" was a "major issue" in the case and "[t]o have the jury speculate ... as to that major issue, when the dispositive data is available, strikes this court as wrong." The court stated further that it characterized the conflicting testimony as "major for several reasons, the most obvious of which is that it directly impacts Mr. Umetit[i]'s credibility."

We disagree with the court's characterization that

the conflicting testimony is a major issue. When balanced against the express legislative mandate that child abuse records are confidential and the fact that the information sought was readily available through other sources, we are satisfied the trial judge misapplied the balancing test in ordering the release of portions of the two internal memos.

First, the court felt that its balancing analysis had been impeded "because it is not clear if the numerous deficiencies noted in the July 24 and July 27 memoranda have been, or would be, discovered by plaintiff without access to the two memoranda[,]" and when its dilemma was posed, defense counsel "could not easily provide useful information[.]" Discovery of the "numerous deficiencies" surrounding the investigation was not, however, the reason advanced by plaintiff for disclosure of the contents of the two memos. Rather, plaintiff argued disclosure was relevant to the issue of Umetiti's credibility, namely his claim that he was commended for how he conducted the investigation. Attacking Umetiti's credibility on this issue can be achieved without disclosure of otherwise confidential records.

As defense counsel pointed out during oral argument before the trial court, plaintiff's counsel conceded the Division had already acknowledged there had been deviations from policy and procedure during the investigation. The court quoted portions of the brief plaintiff's counsel submitted: " 'Debra Powell, one of [the Division] supervisors, clearly testified the case worker responsible for plaintiff's case deviated from [Division] policy and procedure in numerous respects[.]' " Additionally, earlier during that same oral argument, the court commented that Umetiti's claim that he had been commended was "not in those records[,]" meaning Umetiti's personnel records. Further, plaintiff did not dispute that the Division had provided its investigation file, along with its policies and procedures.

***6** Second, Umetiti's deposition testimony stating that he had been commended for how he handled the investigation of suspected child abuse of Jay, while relevant on the issue of his credibility, was collateral to the material issues before the jury. In other words, proving or disproving that Umetiti was commended for his handling of the matter is not a fact of consequence to resolving whether defendants were negligent, reckless, acted palpably unreasonably or violated Jay's civil rights. *See* N.J.R.E. 401 (defining relevancy as a "tendency in reason to prove or disprove any fact of consequence to the determination of the action."). *See also Payton, supra*, 148 *N.J.* at 535 (noting that "relevancy" for discovery purposes is congruent with its definition under N.J.R.E. 401).

Plaintiff also claims the memos were critical to rebutting defendants' good faith immunity defense. Specifically, plaintiff contends that if the memos show Umetiti failed to comply with the Division's statutory obligation to take immediate action to insure Jay's safety once it received a report of child abuse, failed to conduct both a safety assessment, risk assessment, and to take appropriate actions, including Jay's removal from the home and an alert to the local county prosecutor, then "[Umetiti's] good faith immunity defense fails as a matter of law." We disagree. In order to overcome a public employee's assertion of a good faith immunity defense in the performance or failure to perform his or her duties, more than a failure to adhere to statutory investigative responsibilities or failure to alert the local county prosecutor must be shown. *Alston v. City of Camden*, 168 *N.J.* 170, 187 (2001) (finding that while public employee defendant's actions may have been negligent, "negligence does not necessarily prevent a finding of good faith.")

Finally, defendants seek reversal of the court's order denying its motion to quash the notice to depose Thompson. Plaintiff's brief makes no specific argument to support its contention that Thompson should not be deposed. Thompson authored one of the memos at issue in this appeal. Our determination that the memos are not subject to disclosure does not preclude

plaintiff from deposing Thompson concerning *other* matters related to the Division's actions in connection with its handling of the abuse allegations, particularly in view of defendants' failure to raise any argument to support this contention. *Sklodowsky v. Lushis*, 417 *N.J. Super* . 648, 657 (App.Div.2011) (noting an issue not briefed on appeal is deemed waived).

To summarize, the trial court mistakenly exercised its discretion in this instance when it ordered the partial disclosure of the memos as relevant to resolving Umetiti's credibility, an issue we determine is collateral to the central issues implicated in plaintiff's complaint. We are satisfied the conflict in the deposition testimony as to whether Umetiti was commended for how he handled the investigation can be addressed through alternative and less intrusive means. Further, the factual portions of the memos the court ordered disclosed are so intertwined with the evaluative aspects and recommendations, that disclosure would prejudice the Division's ability to engage in full and unhampered self-critical analysis. Therefore, when balanced against the strong legislative policy against disclosure of confidential child abuse records, disclosure to assist in the resolution of a collateral credibility issue is not warranted. We do, however, affirm, as modified, that portion of the order denying defendants' motion to quash the notice to produce Thompson for deposition.

***7** Reversed in part, affirmed in part, as modified.

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