Frye Reg'l Med. Ctr., Inc. v. Blue Cross Blue Shield of N.C., Inc., 2020 NCBC Order 19.

STATE OF NORTH CAROLINA COUNTY OF CATAWBA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 18 CVS 783
FRYE REGIONAL MEDICAL CENTER, INC., Plaintiff, v. BLUE CROSS BLUE SHIELD OF NORTH CAROLINA, INC., Defendant.	**ORDER ON MOTIONS TO FILE UNDER SEAL**

THIS MATTER comes before the Court on nine (9) separate motions to file under seal, filed by Plaintiff Frye Regional Medical Center, Inc. ("Frye") and Defendant Blue Cross Blue Shield of North Carolina, Inc. ("BCBSNC"), that seek to file under seal virtually every word, and other information, contained in the parties' respective briefs and evidentiary materials filed in support of and in opposition to their respective motions for summary judgment and BCBSNC's Motion to Exclude Expert Testimony. ("Motions to Seal," ECF Nos. 66, 71, 76, 85, 88, 91, 96, 102, 107.)

I. BACKGROUND

Frye operates a private acute care hospital in Hickory, North Carolina. BCBSNC provides medical insurance coverage to BCBSNC members. This case arises out of Frye's allegations that BCBSNC failed to properly pay certain claims submitted by Frye to BCBSNC, pursuant to a Network Participation Agreement ("NPA"), under which Frye provided medical care services to BCBSNC's members. Frye alleges claims for, *inter alia*, breach of contract. Both parties filed motions for

summary judgment, along with briefs and extensive evidentiary materials.[1] In addition, BCBSNC filed a Motion to Exclude Expert Testimony (ECF No. 68), along with a brief and evidentiary materials in support (ECF Nos. 69–69.1). Frye filed a response in opposition to the Motion to Exclude Expert Testimony (ECF No. 86), and evidentiary material in support of its opposition (ECF No. 86.1–86.4).

In this case, the parties seek to seal every page of six briefs, 35 separate deposition excerpts, seven affidavits, and over one dozen other documents filed in at least seven different filings with the Court. The evidentiary materials that the parties wish to seal were marked confidential by the producing party pursuant to the Protective Order Regarding Confidentiality (ECF No. 17), and the parties consent to one another's respective motions to seal.

The information that the parties seek to file under seal falls into two broad categories: (1) health care information regarding specific, individual patients including medical charts, notes, and diagnosis and treatment information, and compilations and summaries of such information (Protected Health Information or "PHI"), protected from disclosure under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"); and (2) information, including the entirety of the Network Participation Agreement ("NPA") at the very center of this dispute,

[1] The evidentiary materials consist of thousands of pages of documents and are filed in at least seven different places in the electronic docket. (ECF Nos. 73.1, 80.1, 90.1, 95, 99, 105, 109.1.)

based on the claim that it constitutes "competitive health care information" under N.C.G.S. §§ 131E-97.3(a) and 131E-99.[2]

The Court has no qualms about permitting the evidentiary materials and references in briefs to PHI, and information contained in the summaries of such information, to be sealed. On the other hand, the Court concludes that the parties' requests to effectively seal the entirety of every brief and every evidentiary exhibit filed in conjunction with the summary judgment motions overreaches, particularly where much of the confidential information directly relevant to the motions for summary judgment has already been revealed on the record through the pleadings and through the two publicly-filed, redacted briefs submitted by BCBSNC. (Complaint, ECF No. 3; BCBSNC's Answer, ECF No. 15; BCBSNC's Redacted Br. Supp. Mot. to Exclude Expert Testimony, ECF No. 82; BCBSNC's Redacted Br. Supp. Mot. Summ. J., ECF No. 84.) Accordingly, the Court concludes that the Motions to Seal should be GRANTED, in part, and DENIED, in part, for the reasons, and in the manner, explained below.

II. ANALYSIS

Generally, documents filed in the courts of the State of North Carolina are "open to the inspection of the public," except as prohibited by law. N.C.G.S. § 7A-109(a); *see also Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 463, 515 S.E.2d 675, 685 (1999) (noting that N.C.G.S. § 7A-109(a) "specifically grants the

[2] The Court previously entered an order permitting the NPA, and its amendments, to be filed under seal. (ECF No. 35.) The Court now overrules and amends that order as provided herein.

public the right to inspect court records in criminal and civil proceedings."). Nevertheless, "a trial court may, in the proper circumstances, shield portions of court proceedings and records from the public." *France v. France*, 209 N.C. App. 406, 413, 705 S.E.2d 399, 405 (2011) (emphasis omitted).

This Court starts with the "presumption that the civil court proceedings and records at issue . . . must be open to the public." *Id.* at 414, 705 S.E.2d at 406. The party seeking to have a filing sealed bears the burden of overcoming this presumption "by demonstrating that the public's right to open proceedings [is] outweighed by a countervailing public interest." *Id*. The determination of whether evidence should be filed under seal is within the discretion of the trial court. *See In re Investigation into Death of Cooper*, 200 N.C. App. 180, 186, 683 S.E.2d 418, 423 (2009).

Information that is "a trade secret or other confidential research, development, or commercial information" can be sealed by the Court upon motion by the parties, in the interest of protecting confidential and proprietary business information. *See* N.C.G.S. § 1A-1, Rule 26(c)(vii); s*ee France*, 209 N.C. App. at 416, 705 S.E.2d at 407 (noting that "[c]ertain kinds of evidence may be such that the public policy factors in favor of confidentiality outweigh the public policy factors supporting free access of the public to public records and proceedings," including "trade secret" information) (citing N.C.G.S. § 66-156).

A court, however, is not bound by the parties' designation of material as "confidential," even if the designation is made in accordance with a confidentiality agreement executed by the parties. *France*, 209 N.C. App. at 415–16, 705 S.E.2d at

407 ("Evidence otherwise appropriate for open court may not be sealed merely because an agreement is involved that purports to render the contents of that agreement confidential."). Therefore, "[a party] cannot, by contract, circumvent established public policy—the qualified public right of access to civil court proceedings. [That party] must show some independent countervailing public policy concern sufficient to outweigh the qualified right of access to civil court proceedings." *Id*. at 415, 705 S.E.2d at 407.

Preliminarily, the Court notes that the Motions to Seal, if granted in full, would make it practically impossible for this Court to release an order and opinion for the public docket in this case. The North Carolina Court of Appeals, addressing the impact of far-reaching orders sealing court files, recently has stated that "[t]he public has an interest in learning not only the evidence and records filed in connection with summary judgment proceedings but also the [ ] court's decision ruling on a summary judgment motion and the grounds supporting its decision. Without access to judicial opinions, public oversight of the courts, including the processes and the outcomes they produce, would be impossible." *Doe v. Doe*, 823 S.E.2d 583, 600 (N.C. Ct. App. 2018) (citing, *inter alia, Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975)). In *Doe*, the Court further opined that:

> Calling a [document] confidential does not make it a trade secret, any more than calling an executive's salary confidential would require a judge to close proceedings if a dispute erupted about payment (or termination). Many a litigant would prefer that the subject of the case—how much it agreed to pay for the construction of a pipeline, how many tons of coal its plant uses per day, and so on—be kept from the curious (including its business rivals and

> customers), but the tradition that litigation is open to the public is of very long standing. People who want secrecy should opt for arbitration. When they call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials. Judicial proceedings are public rather than private property, and the third-party effects that justify the subsidy of the judicial system also justify making records and decisions as open as possible. What happens in the halls of government is presumptively public business. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.

Id. at 602 (quoting *Union Oil Co. v. Leavell*, 220 F.3d 562, 567–68 (7th Cir. 2000)). With this recent appellate guidance in mind, the Court will address the Motions to Seal.

A. Personal Health Information (PHI)

Both parties have filed voluminous amounts of information regarding individual patients who received services from Frye including, but not limited to, records from the patient's medical files, records regarding the charges made to the patient, and communications between Frye and BCBSNC regarding the patient's diagnosis and treatment. Both parties also have filed lists and charts containing the names, dates of treatment, diagnosis, charges to, and payments by specific patients. The Court concludes that this highly private and confidential patient medical information, which is protected from disclosure by both federal and state law, should be sealed. Accordingly, to the extent the Motions to Seal seek leave to file PHI under seal, the Motions to Seal should be GRANTED.

B. Competitive Health Care Information

Both parties also ask the Court to seal their briefs and all of the evidentiary materials filed in support of and in opposition to the motions for summary judgment on the grounds that the information constitutes "competitive health care information" that should be protected from disclosure. Both parties contend that there is no reasonable means by which they can make redactions from the documents.

The term "competitive health care information" is contained in N.C.G.S. §§ 131E-97.3 and 131E-99. Both of these statutes apply to certain information possessed by public hospitals and public hospital authorities, and protect from disclosure information when requested under the North Carolina Public Records Act, N.C.G.S. §§ 132-1 *et seq*. Frye is not a public hospital, but the parties argue that the provisions of these statutes should inform the Court's decision as to whether the information they seek to seal should be shielded from public view.

Section 131E-97.3 provides, in relevant part, that "[f]or the purposes of this section, competitive health care information means information relating to competitive health care activities by or on behalf of hospitals and public hospital authorities. . . Competitive health care information shall be confidential and not a public record under Chapter 132 of the General Statutes." In addition, § 131E-99 provides, in relevant part that "the financial terms and other competitive health care information directly related to the financial terms in a health care services contract between a hospital or a medical school and a managed care organization, insurance

company, employer, or other payer is confidential and not a public record under Chapter 132 of the General Statutes."

The information the parties seek to seal as "competitive health care information" derives almost exclusively from the NPA, testimony about the terms of the NPA, and limited other information regarding Frye's sale of its assets to another health care provider in 2018 and the assignment of the NPA to the new owner of the assets.

There is little appellate authority interpreting the meaning of "competitive health care information" as used in the statutes, and only one decision interpreting that term under the current version of the statutes. *See Carter-Hubbard Publ'g Co. v. WRMC Hosp. Operating Corp.*, 178 N.C. App. 621, 633 S.E.2d 682 (2006). In *Carter-Hubbard*, the Court of Appeals considered whether a contract under which a public hospital purchased a private medical practice constituted "competitive health care information" as used in N.C.G.S. §§ 131E-97.3 and 131E-99. Preliminarily, the Court held

> "competitive health care information" is not specifically defined in our statute. "Health care" is defined in the American Heritage Dictionary as "[t]he prevention, treatment, and management of illness and the preservation of well-being through the services offered by the medical and allied health professions." Pursuant to [N.C.G.S.] § 131E-99 "competitive health care information" includes "financial terms" of a contract and any "health care information directly related to financial terms in a contract." North Carolina General Statutes, Section 131E-99 is the only statute that gives some indication of what the legislature intended by its use of the term "competitive health care information."

Id. at 625, 633 S.E.2d at 685 (internal citations omitted). Interpreting §§ 131E-97.3 and 131E-99 together, the Court concluded that "the contract terms that are not financial nor financially related would not be considered competitive health care information and therefore would not be exempt" from disclosure under the Public Records Act. *Id*. at 627, 633 S.E.2d at 686.

Finally, the Court of Appeals rejected the defendants' argument for a broader definition of "competitive health care information," holding as follows:

> Defendants cite contract terms such as price, assets and liabilities, future obligations (e.g. performance bonuses) and other financial information as "competitive health care information." Defendants claim disclosure of such information would place the hospital at a future competitive disadvantage, impair the ability to acquire future confidential information and is a type of information that would not customarily be released between two non-public entities. Defendants argue that the public may be outraged at learning the purchase price without understanding future profit implications.
>
> We decline defendant's offer to more broadly define the term "competitive health care information." Defendant's definition is based on competitive business aspects of public hospital operations, aspects which, unless they involve trade secret information, are also likely subject to disclosure. We do not think the legislature intended such business dealings – which do not involve trade secret information nor competitive price lists – to be kept confidential. We do not read N.C.G.S. § 131E-97.3 nor 131E-99 separately or *in para materia* to require such secrecy.

Id. at 627–628, 633 S.E.2d at 686.

The Court finds the decision in *Carter-Hubbard* to be helpful guidance. The "financial terms" and competitive health care information directly related to the

"financial terms" likely constitute highly confidential business information or trade secrets that should be protected from disclosure to the public. Unfortunately, in this case, the parties broadly claim that the entirety of the NPA should be sealed, but do not explain why specific, non-financial information contained in the NPA should be sealed. For example, while BCBSNC contends that "the parties' claims grouping, coding, billing and payment processes" is competitive health care information (ECF No. 67, at p. 2), it fails to explain how knowledge of this information, particularly from a long-since terminated NPA, could provide a competitive advantage to other health care providers. The ICD-9 codes and DRG grouping numbers are public record and are widely used by hospitals and insurers in the United States. While the particular rates to be paid for claims billed under particular ICD-9 codes and DRG groupings agreed upon by the parties might provide valuable business information to competitors, the very few DRG groupings at issue in this lawsuit have already been disclosed by the parties and need not be sealed.[3]

In addition, the Court concludes that the method and internal processes used by Frye to code, map, and then bill claims, and BCBSNC's processes for mapping and paying claims received from Frye, which are based on publicly available and widely-used coding and grouping information, are not trade secret or proprietary information. On the other hand, the Court concludes that the specific mapping software the parties use is potentially valuable information to a competitor.

[3] The specific ICD-9 codes associated with the DRG groupings have not been disclosed by the parties.

The Court also concludes, in its discretion, that certain other specific information in the NPA, including the provisions regarding a parties' right to challenge payment decisions and the time in which they must do so, also is potentially valuable competitive health care information that should be protected.

Finally, with regard to the NPA, the Court recognizes that the parties have agreed to maintain the confidentiality of the agreement, and both seek to seal the NPA. Under the circumstances, there is no compelling public interest in disclosing the terms of the NPA other than those directly necessary and relevant to the Court's decision on the motions for summary judgment and Motion to Exclude Expert Testimony. Therefore, the Court concludes, in its discretion, that the parties should only be required to disclose the portions of the NPA necessary and relevant to the Court's decision on the motions for summary judgment.

As to the other information the parties ask to seal, including depositions, affidavits, the briefs, and other documents, the Court has reviewed the materials and concludes, in its discretion, that certain other information potentially constitutes competitive health care information or other type of confidential information that should be protected from disclosure.

III. CONCLUSION

Frye and BCBSNC's decision to seek the sealing of the entire contents of nearly all but two briefs and all of the evidentiary exhibits, filed in conjunction with the motions for summary judgment and BCBSNC's Motion to Exclude Expert Testimony, has placed this Court in an extremely difficult position. First, the Court has an

obligation to keep the filings in North Carolina's courts open to the public, and to produce orders and opinions that can be filed on the public docket, explaining its decisions that are not so redacted as to be rendered meaningless. On the other hand, the Court wishes, when necessary and practical, to protect litigants' legitimate confidential information when the need for confidentiality outweighs the public interest. In addition, the sheer volume of the documents and information the parties wish to seal makes it burdensome for the Court to review and determine the requests to seal and creates the potential that requiring the parties to refile the documents would significantly delay the Court's decision on the motions for summary judgment and BCBSNC's Motion to Exclude Expert Testimony.

Taking all of these competing interests into consideration, the Court has concluded, in its discretion, that under these undesirable circumstances and for purposes of deciding the Motions to Seal in this case, it will not require the refiling of unredacted versions of the briefs and exhibits. Such a requirement would likely require a significant amount of time, and potentially lead to further need to refine the redactions from any newly-filed documents. However, because they contain some information the Court believes should not be disclosed, the Court also will not order that the provisionally sealed documents be unsealed. Instead, to preserve the Court and the parties' resources, and in the interests of deciding the motions for summary judgment and BCBSNC's Motion to Exclude Expert Testimony without significant further delay, the Court holds as follows:

NOW THEREFORE, the Court concludes that the Motions to Seal should be GRANTED, in part, and DENIED, in part, and it is ORDERED that:

1. To the extent the Motions to Seal seek leave to file under seal exhibits and briefs containing PHI, the Motions to Seal are GRANTED.
2. To the extent the Motions to Seal seek leave to file under seal exhibits and briefs containing competitive health care information or other highly confidential information, the Motions to Seal are GRANTED, in part, and DENIED, in part. To the extent information from exhibits and briefs that the parties seek to file under seal are disclosed in the Court's Order and Opinion on Motions for Summary Judgment (ECF No. 118), the Motions to Seal regarding such information is DENIED. To the extent information from exhibits and briefs that the parties seek to file under seal are not disclosed in the Court's Order and Opinion on Motions for Summary Judgment, the Motions to Seal regarding such information is GRANTED.
3. The parties are not required to file unredacted versions of the exhibits and briefs, and those documents shall remain under seal.
4. To the extent not otherwise GRANTED by this Order, the Motions to Seal are DENIED.

SO ORDERED, this the 17th day of April, 2020.

/s/ Gregory P. McGuire
Gregory P. McGuire
Special Superior Court Judge for
Complex Business Cases