

STATE OF MAINE
MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET NO. CUM-18-445

CAROL A. KENNELLY,

Appellee

v.

MID COAST HOSPITAL

Appellant

**ON APPEAL FROM THE SUPERIOR COURT'S DISCOVERY ORDER
COMPELLING DEFENDANT/APPELLEE TO PRODUCE DOCUMENTS**

BRIEF OF APPELLEE CAROL A. KENNELLY

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STATEMENT OF FACTS

On September 2, 2015, Mia Marietta, M.D., a surgeon and employee at Mid Coast Hospital (“Mid Coast”), misidentified critical anatomy during a gallbladder removal surgery (“laparoscopic cholecystectomy”). A. 5. Dr. Marietta’s error caused her to cut Carol Kennelly’s (“Carol”) common bile duct, which caused Carol to leak bile into her abdomen.¹ A. 5, 27. As a result, Carol had to undergo a complex surgery to repair her biliary system. A. 5, 27.

A. Dr. Marietta’s Operative Reports And Training Materials

For well over a decade, there has been a consensus among general surgeons about the safest way to remove a patient’s gallbladder. A. 27. This approach, referred to as the “critical view of safety” (“CVS”), requires a surgeon to clearly identify biliary anatomy before clipping and cutting biliary anatomy. A. 27. The CVS technique has been recommended by leading medical societies; adopted by major medical textbooks, including the American College of Surgeons; and promoted in peer reviewed publications as the safest technique. A. 27.

Mid Coast concedes that Dr. Marietta failed to obtain the CVS before she clipped and cut Carol’s biliary anatomy. A. 27. Dr. Marietta testified that she uses her own, “Mia Marietta,” approach to gallbladder surgery. A. 11, 27, 81. Dr. Marietta

¹ On November 16, 2018, Carol Kennelly died. Although Christina Wentworth is now the Personal Representative of the Estate and the Plaintiff/Appellee, this brief refers to Carol as the Appellee.

also testified that she performed approximately 200 surgeries in 2015 and 150 of those surgeries were laparoscopic cholecystectomies: "It's the most common operation I do." A. 83-84.

Mid Coast's standard of care expert in this action, David Schwaitzberg, M.D., testified that he personally uses the CVS technique and that he teaches all his residents and fellows to use the CVS technique. A. 5, 28. He further testified that the CVS is the standard of care for surgeons practicing in any major city, such as New York, Boston, or Chicago; however, he does not believe knowledge of the CVS has spread to places like Maine to the extent that it has become standard of care. A. 5, 28. In other words, in Dr. Schwaitzberg's opinion, the applicable standard of care depends on a surgeon's level of familiarity with the CVS in the medical community. A. 5, 28.

In determining whether to accept Dr. Schwaitzberg's assertion that the standard of care did not require Dr. Marietta to use the CVS technique in this instance, a reasonable fact finder would want to consider Dr. Marietta's knowledge, training, and experience with respect to this technique. If Dr. Marietta has no relevant knowledge, training, or experience, that may support Dr. Schwaitzberg's opinion that Dr. Marietta did not violate the standard of care. If, however, Dr. Marietta was trained in the CVS and has used the CVS in other gallbladder surgeries, that would constitute evidence that, under Dr. Schwaitzberg's own formulation, Dr.

Marietta breached the standard of care in Carol's surgery. A. 15-16. Moreover, to the extent these records contradict Dr. Marietta's assertion that she always uses the "Mia Marietta" approach when removing gallbladders, they may be used to impeach Dr. Marietta at trial. A. 27, 81.

B. Dr. Marietta's Personnel Records

When Dr. Marietta was deposed on April 25, 2017, Mid Coast employed her. A. 78, 82. At the pre-litigation screening panel on January 24, 2018, Dr. Marietta testified that she left Mid Coast "to re-stratify and restructure [her] career" because she had two small children. A. 78-79. She denied that her leaving Mid Coast was connected to the pending litigation. A. 79.

On October 31, 2018, Dr. Marietta was disciplined by the State of Maine Board of Licensure in Medicine and entered into a Consent Agreement.² The Consent Agreement arose from Mid Coast's report to the Board that it had terminated Dr. Marietta's employment on May 26, 2017, for issues including "Dr. Marietta's clinical performance during surgery." *Supra* at n.2. The Board's

² State of Maine Board of Licensure in Medicine, Consent Agreement In re Mia H. Marietta, M.D., <https://www.pfr.maine.gov/ALMSOnline/ALMSQuery/ShowCaseCommDetail.aspx?TOKEN=BBFEAEF277D9EBE024CFB30AA074B3ACC4B3D740DF564E44171AA8706B6B1B6>. The Consent Agreement is a public record within the meaning of 1 M.R.S. § 402 and is available for inspection and copying by the public pursuant to 1 M.R.S. § 408-A. This Court may review public documents presented on appeal when the authenticity of such documents is not challenged on appeal. *Estate of Robbins v. Chebeague & Cumberland Land Trust*, 2017 ME 17, ¶ 2, 154 A.3d 1185 ("The following facts derive from the Estate's complaint, the deed of the conservation easement at issue, **and other public documents presented on appeal, the authenticity of which was not challenged on appeal.**" (emphasis added)).

discipline involved limiting Dr. Marietta's "surgical medical practice to minor outpatient office-based procedures involving local anesthesia only with no sedation." *Supra* at n.2. The Board further placed her on probation for two years and required her to obtain pre-approval from the Board before working in any medical practice in Maine. *Supra* at n.2.

To the extent records in Dr. Marietta's personnel file state that she was terminated for substandard or negligent care related to Carol's surgery or other surgeries, those documents are relevant to Carol's claim. A.14-15. Moreover, production of Dr. Marietta's personnel file may contradict her testimony that her leaving Mid Coast was unrelated to the care she provided to Carol.

PROCEDURAL HISTORY

This claim was initiated well over two years ago, on November 18, 2016. After the pre-litigation screening panel process concluded, Carol filed a Complaint on January 31, 2018. A. 1, 18-21. The Superior Court issued a Scheduling Order that set the discovery deadline on October 16, 2018. Carol propounded document requests, including requests for (1) the production of operative notes for twenty-five³ laparoscopic cholecystectomies that Dr. Marietta performed prior to Carol's surgery on September 2, 2015, and twenty-five operative notes for laparoscopic

³ Originally, Carol requested the production of fifty operative notes before her surgery and fifty operative notes after her surgery; however, Carol subsequently limited her request.

cholecystectomies that Dr. Marietta performed after Carol's surgery; (2) Dr. Marietta's personnel file, and (3) documents regarding Dr. Marietta's training and continuing education.⁴ A. 20-26.

Mid Coast refused to produce any responsive documents. A. 22-26. On June 12, 2018, Carol requested a hearing with the Superior Court to resolve this discovery dispute. A. 22-26. On July 16, 2018, the Superior Court ordered the parties to file written arguments related to the discovery dispute. A. 54.

On August 30, 2018, the Superior Court held a telephonic hearing regarding the parties' discovery dispute. A. 3-4. The hearing was not recorded. A. 3-4.

On October 15, 2018, Justice Walker entered a 13-page order (the "Order") carefully analyzing the issues presented by the parties and granting Carol's Motion to Compel the production of documents. A. 4, 5-17. The Order fashioned a remedy that balanced Carol's need for the requested documents, the burden of production on Mid Coast, and the privacy rights of non-party patients. In ordering the production of the requested operative reports, Justice Walker concluded that "[t]he Court is satisfied that these significantly redacted records will not identify any non-parties and that their identification will not be able to be discerned from the records or otherwise." A. 16. The Court concluded that Carol's efforts were "[m]ore than a mere fishing expedition for irrelevant surgical errors in other surgeries," but instead

⁴ Carol also requested audit trail materials, but those materials were produced. A. 3, 5.

sought “to better establish what procedures would be consistent with the applicable standard of care and whether the procedure Dr. Marietta used in Plaintiff’s surgery breached that standard.” A. 12 (emphasis added).

The Court also rejected Mid Coast’s arguments related to the production of Dr. Marietta’s personnel file, training materials, and continuing education materials. A. 16. The Court concluded that these materials were relevant to whether Dr. Marietta was negligent in her treatment of Carol and relevant to her surgical training. A. 14-16.

On November 5, 2018, Mid Coast filed a Notice of Appeal. A. 4.

SUMMARY OF ARGUMENT

Absent a narrow exception based in federal common law, discovery orders are interlocutory and not appealable. Both the United States Supreme Court and this Court have concluded that discovery orders compelling allegedly privileged materials do not constitute an “irreparable loss” under the collateral order or death knell exceptions to the final judgment rule. *Mohawk Indus. v. Carpenter*, 558 U.S. 100 (2009); *In re Motion to Quash Mercy Hosp. Evidence*, 2012 ME 66, 43 A.3d 965. Therefore, Mid Coast’s appeal should be dismissed as interlocutory. Should this Court rule otherwise, it will find itself inundated with requests to review and supervise the trial courts’ discovery orders. Moreover, litigants will be emboldened

to use the appellate process to delay trial in civil matters, which is precisely what this Court has sought to prevent.

Even if this Court reaches the merits of this appeal, it should reject Mid Coast's contention that federal or state law creates a privilege in de-identified medical records. Federal law and state law expressly authorize the disclosure of the operative records. *See* 45 C.F.R. §§ 164.512(e)(1)(i) & 164.514(a)-(b); 22 M.R.S. 1711-C(6)(F-1). This Court should decline Mid Coast's invitation to rewrite Maine law and usurp powers reserved to Maine's Legislature and Congress.

Likewise, the Superior Court's narrowly tailored Order, which balances the privacy interests of the non-party patients and Carol's right to discover potentially probative evidence, demonstrates that the Superior Court did not abuse its discretion in ordering the production of 50 non-party, de-identified operative notes. The compelled documents are relevant to whether (1) Dr. Marietta met the standard of care in Carol's surgery, (2) Dr. Marietta is trained to use the CVS; (3) Dr. Marietta has experience using the CVS; and (4) Dr. Marietta always uses the "Mia Marietta" approach.

The Superior Court did not abuse its discretion in ordering the production of Dr. Marietta's personnel file. Neither state statute nor case law creates a privilege that precludes the production of personnel files. Although such records may be

confidential, the Maine Rules of Civil Procedure allow for the production of confidential documents. *See Pinkham v. DOT*, 2016 ME 74, ¶¶ 4, 14, 139 A.3d 904.

Finally, the Superior Court did not clearly err when it ordered the production of non-privileged training and education materials, because these materials are relevant to Dr. Marietta's defense that she met the standard of care during Carol's surgery. Moreover, training and educational materials that were created by any source other than Mid Coast's professional competence committee, such as certificates of completion for continuing medical education, are not privileged and are subject to discovery.

ARGUMENT

I. Discovery Orders Are Interlocutory and Not Appealable

Mid Coast waived any arguments it had on the issue of whether discovery orders are appealable by failing to address this issue in its brief. *See Holland v. Sebunya*, 2000 ME 160, ¶ 9, n.6, 759 A.2d 205. Mid Coast is precluded from raising new arguments in its reply brief. *See Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 239-240 (1st Cir. 2013) ("We have repeatedly held, 'with a regularity bordering on the monotonous,' that arguments not raised in an opening brief are waived.").

"It is well settled that appeals, in order to be cognizable, must be from a final judgment." *State v. Black*, 2014 ME 55, ¶ 8, 90 A.3d 448 (quotation marks omitted).

"Generally, discovery orders are interlocutory and not appealable: the aggrieved

party must seek relief in appeal from the final judgment.” *Lewellyn v. Bell*, 635 A.2d 945, 946 (Me. 1993) (quotation marks omitted). Indeed, to our knowledge, this Court has never granted an interlocutory appeal of a discovery order. Despite that, Mid Coast argues that this Court should now consider the merits of **three** different decisions by the Superior Court regarding the production of discovery. Mid Coast’s extraordinary assertion that three unrelated discovery rulings require interlocutory review is instructive, and exemplifies why this Court, like its federal counterparts, has steered clear of interlocutory appeals of discovery orders. If this Court considers these discovery issues at this stage, interlocutory appeals of discovery disputes will surely become a routine part of civil litigation and this Court’s docket. *See Mohawk Indus. v. Carpenter*, 558 U.S. 100, 106 (2009) (stressing that exceptions to the final judgment rule “must ‘never be allowed to swallow the general rule’” (citation omitted)).

This Court has recognized “a few narrowly defined exceptions to the final judgment rule,” including the “collateral order” and “death knell” exceptions. *Pierce v. Grove Mfg. Co.*, 576 A.2d 196, 197 (Me. 1990) (relying on Supreme Court case law in interpreting the death knell exception). Neither is applicable here.

A. The Collateral Order Exception Is Inapplicable

The Law Court “has consistently followed the [collateral order] rule adopted by the United States Supreme Court” in *Cohen v. Benefit Indus. Loan Corp.*, 337

U.S. 541 (1949). *Boyle v. Share*, 377 A.2d 458, 460-61 (Me. 1977); *see also Lord v. Murphy*, 561 A.2d 1013, 1015 (Me. 1989). Under *Cohen* and its progeny, the “collateral order” exception allows for an appeal from an interlocutory order where “(1) that order involves a claim separable from [and] collateral to the gravamen of the lawsuit; (2) it presents a major and unsettled question of law; and (3) there would be irreparable loss of the rights claimed in the absence of immediate review.” *Pierce*, 576 A.2d at 200. In determining whether appeals satisfy the “irreparable loss” factor, appellate courts must “look to categories of cases, not to particular injustices.” *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988). The consistent application of the collateral order exception across a given category of cases creates predictability and discourages futile interlocutory appeals.

Both this Court and the Supreme Court have rejected the argument that the production of ostensibly privileged documents constitutes an “irreparable harm” under *Cohen*. *See Mohawk Indus. v. Carpenter*, 558 U.S. 100, 107 (2009); *see also United States v. Gorski*, 807 F.3d 451, 459 (1st Cir. 2015) (explaining that, under *Mohawk Industries*, “**parties are categorically barred from appealing privilege-related disclosure orders under the collateral order doctrine**” (emphasis added)). *Mohawk Industries* concerned a discovery order requiring the production of documents arguably covered by the attorney-client privilege. While “readily acknowledg[ing] the importance of the attorney-client privilege” to the American

justice system, the *Mohawk Industries* Court explained that the “crucial question . . . is not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders.” *Mohawk Indus.*, 558 U.S. at 108-09. Applying this test to the attorney-client privilege, the Court determined that “collateral order appeals are not necessary to ensure effective review of orders adverse to the attorney-client privilege.” *Id.* at 108. Rather, “[a]ppellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence.” *Id.* at 109. Importantly, the Court acknowledged that the final judgment rule would not prevent attorney-client communications from being erroneously produced in some cases. It concluded, however, that this did not justify interlocutory appeal, because “deferring review until final judgment does not meaningfully reduce the *ex ante* incentives for full and frank conversations between clients and counsel.” *Id.*

Since *Mohawk Industries*, this Court has unambiguously held that the compelled production of purportedly privileged information is not a valid basis for interlocutory appeal. In *In re Motion to Quash Mercy Hosp. Evidence*, 2012 ME 66, 43 A.3d 965 (Saufley, C.J.), a hospital filed an interlocutory appeal on the basis of

statutory privileges protecting sentinel event notifications and reports and professional competence review records; **the latter privilege, which is codified at 24 M.R.S. § 2510-A, is one of the privileges upon which Mid Coast bases this interlocutory appeal.**

In *Mercy*, this Court held that, under *Mohawk Industries*, “*Mercy’s* appeal must be dismissed as an interlocutory appeal to which no exception to the final judgment rule applies.” *Mercy*, 2012 ME 66, ¶ 3, 43 A.3d 965; *see also Black*, 2014 ME 55, ¶ 11, 90 A.3d 448 (dismissing appeal as interlocutory where Defendant claimed evidentiary privilege and that State illegally obtained his medical records because Defendant “would lose no substantial rights by awaiting final judgment”); *accord Harris v. State*, 420 Md. 300, 323 n.22 (Md. 2011) (“*Mohawk Industries* is instructive, if not binding, because it explores the meaning of the *Cohen* test, which we have obviously incorporated into our case law” in interpreting the common law collateral order doctrine); *Kan. Med. Mut. Ins. Co. v. Svaty*, 244 P.3d 642, 656 (Kan. 2010) (citing *Mohawk Industries* for the proposition that the **patient-physician privilege** did not justify an interlocutory appeal).

It is well established, in this Court and elsewhere, that *Mohawk Industries* applies where a non-party may be injured by a lower court ordering the production of privileged material, as long as a litigant has standing and incentive to appeal the final order. *See, e.g., Mercy, supra; Kan. Med. Mut. Ins. Co.*, 244 P.3d at 656. While

this remedy is imperfect, courts have consistently refused to consider how the application of a remedy available at final judgment might create “particular injustices” in a specific case. *Van Cauwenberghe*, 486 U.S. at 529.⁵

B. The Death Knell Exception Is Inapplicable

The death knell exception is “closely related” to the collateral order exception. *Bond v. Bond*, 2011 ME 105, ¶ 11, 30 A.3d 816. It applies “where the issue pressed on appeal would be effectively mooted and substantial rights of a party would be irreparably lost if review were to be delayed until final judgment.” *Lewellyn*, 635 A.2d at 947 (quotation marks omitted). “Put differently, where an interlocutory order has the practical effect of **permanently foreclosing relief on a claim**, that order is appealable.” *Bond*, 2011 ME 105, ¶ 8, 30 A.3d 816 (quoting *Fiber Materials*, 2009 ME 71, ¶ 14, 974 A.2d 918 (emphasis added)); *see also Share v. Air Props. G., Inc.*, 538 F.2d 279, 282 (9th Cir. 1976) (“The death knell doctrine . . . **is concerned with survival of the basic cause of action**, not merely a right collateral thereto, and is

⁵ In its brief on the merits, Mid Coast argues that the production of de-identified medical records could erode patients’ confidence in the physician-patient privilege. MCH Br. at 19. Mid Coast might argue that this supposed change in “*ex ante* incentives” distinguishes this case (where the physician patient privilege is at issue) from *Mohawk Industries* (where the attorney client privilege is at issue). *Mohawk Indus.*, 558 U.S. at 109. In reality, however, there is no basis for the assertion that violation of the patient-physician privilege is any more corrosive than violation of the attorney-client privilege. On the contrary, the production of de-identified operative notes could undermine patient confidence in the privilege is belied by the fact that Mid Coast **informs its patients that their medical information may be shared during judicial proceedings in which they are not parties**. *See* Mid Coast – Parkview Health, *Assuring your privacy*, available at <http://www.midcoasthealth.com/Connections/pdfs/2013-Privacy-Practices.pdf>, at 3.

grounded on the notion that a sentence of death should not be passed on a cause of action by only one judge.” (emphasis added)).

The death knell exception is inapplicable here. First, the Court’s order has not “**permanently foreclos[ed] relief on a claim.**” *Bond*, 2011 ME 105, ¶ 8, 30 A.3d 816 (emphasis added); *cf. Irving Oil, Ltd. v. ACE INA Ins.*, 2014 ME 62, ¶ 10, 91 A.3d 594 (Me. 2014) (explaining that the “death knell exception ordinarily allows an immediate appeal from an order declaring that an insurer has no duty to defend its insured”). Second, for the reasons set forth above, the issues raised in this appeal would not be “effectively mooted . . . if review were to be delayed until final judgment.” *Lewellyn*, 635 A.2d at 947. Rather, Mid Coast has the ability to appeal any, or all, of these discovery orders at the end of trial.

II. The Superior Court Did Not Abuse Its Discretion by Ordering the Production of De-Identified Medical Records

Mid Coast argues that the production of 50 de-identified, third party operative notes is prohibited by state and federal law, and that the Superior Court erred in determining that the production of a small number of de-identified records was reasonably calculated to lead to admissible evidence. MCH Br. at 10-11, 22-23. Mid Coast misses the mark on all fronts. Federal and state law authorize the production of medical records, and the Superior Court carefully crafted an Order that balances both the privacy of third parties and Plaintiff’s right to discover materials relevant to her claim. Accordingly, it should not be disturbed.

A. Federal And State Law Authorize a Court to Order the Production of Medical Records

HIPAA outlines several situations in which a health care provider can disclose protected health information without a patient's consent. 45 C.F.R. § 164.512. Section 164.512 governs "Uses and disclosures for which an authorization or opportunity to agree or object is not required." Pursuant to § 164.512(e)(1)(i), a health care provider is authorized to disclose health information, including unredacted health information, in the course or any judicial or administrative proceeding "[i]n response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order." (emphasis added). See e.g., *McGee v. Poverello House*, 2018 U.S. Dist. LEXIS 189174, at *11 (E.D. Cal. Nov. 5, 2018) (ordering production of patient's medical records pursuant to § 164.512(e)(1)(i)); *Black*, 2014 ME 55, ¶ 10, 90 A.3d 448 ("HIPAA does not protect a patient's interest in the confidentiality of her or his medical records if those records have been obtained pursuant to a court-ordered warrant.").

Similar to federal law and other states, Maine has its own health care information confidentiality statute, 22 M.R.S. § 1711-C. The statute's general confidentiality provision provides in relevant part that "[a]n individual's health care information is confidential and may not be disclosed other than to the individual by the health care practitioner or facility except as provided" in certain specified

circumstances. *Id.* § 1711-C(2). Section 1711-C(6) authorizes a health care provider or facility to disclose health information, including unredacted health information, without a patient's authorization. Specifically, section 1711-C(6)(F-1) authorizes a health care provider to disclose health information “[a]s directed by order of a court.” (emphasis added) *Black*, 2014 ME 55, ¶ 10, n.2, 90 A.3d 448. Although a court may choose to place certain limits and restrictions on the health information that it orders disclosed, neither § 1711-C(6)(F-1) nor HIPAA require that a court de-identify health information before it is produced.

In short, federal and state law contemplate and authorize the Superior Court's action in this case. Moreover, Mid Coast cannot be held to have violated federal and state law so long as they disclose “only the protected health information expressly authorized” by the Superior Court's order. *See* 45 C.F.R. § 164.512(e)(1)(i).

B. Federal And State Law Authorize Medical Providers to Use And Disseminate De-Identified Medical Records

While courts are permitted to order the production of medical records containing protected health information, the Superior Court here crafted its order to require the de-identification of Dr. Marietta's operative notes.

Even without judicial intervention and a court order, federal law permits the use of de-identified medical records for any purpose, including business endeavors,

comparative effectiveness studies, policy assessment, and life sciences research.⁶ See 45 C.F.R. § 164.514(a)-(b); see also U.S. Department of Health & Human Services, *Guidance Regarding Methods for De-Identification of Protected Health Information in Accordance with the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule*, <https://www.hhs.gov/hipaa/for-professionals/privacy/special-topics/de-identification/index.html>. In other words, because HIPAA only prohibits the “[w]rongful disclosure of individually identifiable health information,”⁷ 42 U.S.C. § 1320d-6, where there is no reasonable basis to believe that the de-identified record could be used to identify the patient, the record cannot be “wrongfully disclosed” pursuant to HIPAA. See, e.g., *United States ex rel. McDermott v. Genentech, Inc.*, No. 05-147-P-C, 2006 U.S. Dist. LEXIS 90586, at *39 (D. Me. Dec. 14, 2006) (“HIPAA does not preclude a health care provider from disclosing the ‘what, when and where . . .,’ so long as the patient is not identified or identifiable as a result of the disclosure.”); *Caines v. Addiction Research & Treatment Corp.*, No. 06 Civ. 3399, 2007 U.S. Dist. LEXIS 23130, at *1 (S.D.N.Y. Mar. 20, 2007) (observing that “[i]t is a routine matter in litigation for

⁶ HIPAA authorizes a health care provider to disclose individually identifiable health information without a patient’s authorization to carry out treatment, payment, or health care operations. 45 C.F.R. § 164.506. HIPAA also authorizes medical providers to disclose health information without a patient’s authorization for purposes of public health and research. *Id.* at § 164.512.

⁷ HIPAA defines “individually identifiable health information” as information that (1) is created or received by a health care provider, (2) relates to a past, present, or future health condition, and (3) either “(i) identifies the individual; or (ii) with respect to which there is a reasonable basis to believe that the information can be used to identify the individual.” 42 U.S.C § 1320d(6).

courts to require production . . . of records that reflect medical treatment of non-parties, sometimes with the identities of the patients redacted” and that doing so “is fully consistent with the privacy provisions of HIPAA”). Federal regulations provide a list of “identifiers” that must be “removed” for a medical record to be considered “de-identified,” including, among others, “[n]ames,” “[a]ll elements of dates,” “telephone numbers,” “electronic mail addresses,” “social security numbers,” “biometric identifiers,” and “[f]ull face photographic images and any comparable images.” 45 C.F.R. § 164.514(b)(1).

Likewise, Maine law defines “health care information” as:

information that **directly identifies the individual** and that relates to an individual’s physical, mental or behavioral condition, personal or family medical history or medical treatment or the health care provided to that individual. **“Health care information” does not include information that protects the anonymity of the individual** by means of encryption or encoding of individual identifiers or information pertaining to or derived from federally sponsored, authorized or regulated research governed . . . to the extent that such information is used in a manner that protects the identification of individuals. The Board of Directors of the Maine Health Data Organization shall adopt rules to define health care information that directly identifies an individual

22 M.R.S. § 1711-C(1)(E). Thus, records that contain no “information that directly identifies [an] individual” do not constitute “health care information,” and are not protected by § 1711-C’s confidentiality provision.

Section 1711-C(1)(E) instructs the Maine Health Data Organization (“MHDO”) to “adopt rules to define health care information that directly identifies an individual.” The MDHO has in turn issued regulations regarding “Release of Data to the Public.” That document defines protected health information as:

any **individually identifiable health information** (including any combination of data elements) that relates to the past, present, or future physical or mental health or condition of an individual; or the past, present or future payment for the provision of health care to an individual; and **(a) identifies an individual, or (b) with respect to which there is a reasonable basis to believe that the information can be used to identify an individual patient.**

9-590 C.M.R. ch. 120, 2(34). In addition, MDHO creates a list of “direct patient identifiers,” “such as name, social security number, and date of birth, that uniquely identifies an individual or that can be combined with other readily available information to uniquely identify an individual.” 9-590 C.M.R. ch. 120, 2(27).⁸

The Superior Court ordered that Mid Coast produce “only” the following from each of the 50 non-party operative notes: (1) “the year of the surgery,” (2) “the name of the surgeon (Dr. Marietta),” (3) “the name of the procedure,” and (4) “a portion of the section labeled ‘operative procedure,’” but only up to the point the gallbladder was removed A. 16. The Order goes on to note that, “[t]o the extent there is any identifying information (*e.g.* name, date of birth, age, sex, race) in the ‘operative procedure’ section, such information shall be redacted.” A. 16.

Mid Coast does not appear to dispute that HIPAA authorizes it to produce de-identified medical records. Nor is Mid Coast able to identify any specific infirmity in the Superior Court’s Order, which specifically contemplates elimination of “**any**

⁸ Mid Coast notes that the final category of “direct patient identifiers” listed in the MDHO is a catchall, which defines “identifying information” to include “other unique number, characteristic, code or information that is a direct identifier.” Mid Coast’s brief italicizes “*characteristic*” as if to suggest that the Superior Court’s Order allows for the production of operative notes with patients’ unique characteristics. As is explained below, this assertion is entirely without merit.

1 **identifying information**” in the small portion of the records ordered produced. Instead, Mid Coast suggests that certain unredacted information—“for example, an anatomical anomaly noticed in an operative note or the timeframe of a procedure”—could make individual patients identifiable. MCH Br. at 25.

The argument that the Court’s narrowly tailored Order allows for the production of identifying information is baffling. The Order allows for the description of little more than a description of how the gallbladder was removed. Unless a non-party patient has a particularly identifiable biliary system, the Court’s Order leaves no room for identification. It is hard to fathom, for example, how there could be a “reasonable basis to believe that” the shape of a patient’s gall bladder could “be used to identify the individual.” 42 U.S.C. § 1320d(6).⁹

In any event, even if Mid Coast’s concerns were justified (they are not), its argument demonstrates precisely why appellate courts are reluctant to intervene in discovery disputes in the middle of cases. Without the benefit of any record—much less a single redacted operative note—Mid Coast’s assertion that an operative note from Mid Coast Hospital cannot be “truly de-identif[ied]” is, at best, unsupported

⁹ The assertion that the “timeframe” of the operative note could make a patient identifiable is an even bigger stretch. The Superior Court’s Order requires the redaction of everything except the year of the procedure. The subject of an operative note could not realistically be identified based upon the fact that the surgery occurred in a given year. In any event, suppose that a member of the public knew that a non-party patient had his gallbladder removed by Dr. Marietta in a particular year, and therefore surmised that one of the de-identified operative notes produced in this case belongs to the non-party patient. In that circumstance, it is hard to fathom what the production of the notes would reveal to the member of the public that she did not already know. Again, if there is an unforeseen identifier that would further allow the public to pinpoint a given individual, that identifier may be redacted under the Superior Court’s Order. A. 16.

conjecture. MCH Br. at 25. Mid Coast fails to point to a single “direct identifier” that the Order failed to contemplate, or to provide even a scintilla of evidence that the Court’s Order will result the disclosure of protected health care information. Rather, Mid Coast argues—without citation to any authority whatsoever—that an operative note “does not become ‘not health care information’ simply because the description of the procedure is separated from the information identifying the patient.” MCH Br. at 24.¹⁰ The plain language of § 1711-C(1)(E) and the applicable regulations plainly suggest otherwise: uncoupled from information that “directly identifies” the patient, an operative note is simply not “health care information” under state law, just as it is not “individually identifiable health information” under HIPAA.¹¹

To the extent that one or more records subject to the Order pose a reasonable risk of identifying its subject, Mid Coast may bring these concerns, **along with supporting evidence**, to the Superior Court, which is in the best position to take any necessary remedial action. At this stage, however, there is simply no basis to believe

¹⁰ The notion that privileged information can be redacted from an otherwise non-privileged document is not a novel concept. Attorneys frequently redact communications that are attorney-client privileged from documents that are otherwise discoverable.

¹¹ Similarly, Mid Coast argues that “removing a patient’s name or other such information from an operative note does not mean that it is no longer her operative note.” MCH Br. at 24. But again, neither Maine nor federal law protects a patient’s medical information when extracted from identifying information. Indeed, construing state or federal law otherwise leads to absurd results. Suppose, for example, there were a case in which a physician’s location at a certain time was relevant. Under Mid Coast’s theory, an operative note in which everything is redacted except for the time of surgery would be privileged since, even in the absence of identifying information, it metaphysically remains “the patient’s operative note.”

that the Superior Court's Order is insufficient to ensure that the compelled records do not balance the interests of all the parties.

C. De-identified Medical Records Are Not Privileged Under State Law

Mid Coast next argues that redacted medical records are protected by M.R. Evid. 503(b), which provides that “[a] patient has a privilege to refuse to disclose, and to prevent others from disclosing, confidential communications made for the purpose of diagnosing or treating the patient’s physical, mental, or emotional condition.” Because they are “in derogation of the search for the truth,” evidentiary privileges must be construed narrowly. *United States v. Nixon*, 418 U.S. 683, 710 (1974).

i. Mid Coast’s Interpretation of M.R. Evid. 503 Is Inconsistent with Federal and State Statutes and Regulations

Mid Coast argues that, under a “common-sense reading of Rule 503,” de-identified surgical notes are confidential physician-patient communications. In fact, Mid Coast’s gloss of M.R. Evid. 503 creates an absurd result. As explained above, both federal and state privacy law categorically reject the notion that there is a privilege in de-identified medical records. Thus, were this Court to accept Mid Coast’s interpretation of M.R. Evid 503, the disclosure of de-identified medical records would be permissible under state and federal law **except** in the context of litigation. Such a reading neither narrowly construes the statute, nor sensibly advances the truth-seeking purpose of litigation.

ii. With Near Unanimity, Relevant Case Law from Maine And Other Jurisdictions Support the Superior Court’s Order

The physician-patient privilege in Maine protects **only** “confidential communications” between patients and physicians. “**With almost unanimity**, the courts . . . protecting physician-patient ‘confidential communications’ hold that when adequate safeguards ensure the anonymity of the patient, relevant, nonidentifying information is not privileged.” *Wipf v. Altstiel*, 888 N.W.2d 790, 792 (S.D. 2016) (emphasis added) (collecting cases); *see also In Re Rezulin Prods. Liab. Litig.*, 178 F. Supp. 2d 412, 414 (SDNY 2001) (ordering discovery of redacted non-party medical records, and noting that “[a]lmost all have ruled in favor of discovery in such circumstances”); *Bennett v. Fieser*, 152 F.R.D. 641 (D. Kan. 1994) (“**The vast majority of states** that have addressed this issue have held that non-party patient medical records are discoverable and do not violate the physician-patient privilege where there are adequate safeguards to protect the identity of the non-party patient.” (emphasis added)). As the Supreme Court of Utah recently explained, the near universal rule is premised on the recognition that any concern about the disclosure of privileged communication ceases when the parties are de-identified:

[The physician-patient privilege] shields from disclosure certain information communicated between a physician or a mental health therapist and a patient, so long as the information ‘is communicated in confidence’ and for the purpose of diagnosis and treatment of the patient. . . . [C]ommunicating information contemplates an exchange of information between a physician and a patient. In short, to be operative, [the privilege] requires two actors—a patient and a physician, and an exchange of confidential information concerning a particular subject matter—diagnosis and treatment. All of these elements must be present for the privilege to be activated; mere descriptions of diagnoses and treatments that make no reference to a patient are ineligible for protection under [the

privilege]. Indeed, the presence of identifying information and the orders of the court are what make the information privileged. Without an identified individual connected to a diagnosis, the diagnosis contains nothing more than medical terminology.

Staley v. Jolles, 230 P.3d 1007, 1011 (Utah 2010); *see also Rezulin Prods. Liab. Litig.*, 178 F. Supp. 2d at 414 (noting that, under the same theory propounded by Mid Coast here, “[a] scrap of paper upon which a physician . . . wrote only the word ‘indigestion’ (a diagnosis) or ‘aspirin’ (a treatment) or ‘malingering’ (an evaluation) would . . . be privileged. The . . . rulemakers could not possibly have so intended”).

Likewise, all three Maine Superior Court Justices that have considered the issue have determined that de-identified medical records do not constitute “confidential communications” under M.R. 503. *See Balian v. Kamm*, 1987 Me. Super. LEXIS 376, at *3-4 (Me. Super. Ct., Penobscot Cty., Dec. 22, 1987) (Chandler, J.); *McCain v. Vanadia*, CV-16-117 (Me. Super. Ct., Penobscot Cty, Aug. 7, 2017), at *10 (Murray, J.); *Kennelly v. Mid Coast Hospital*, CV-16-471 (Me. Super Ct., Cumberland Cty., Oct. 15, 2018) (Walker, J.).

Mid Coast cites several cases in support of its argument that “redacted records retain their privileged status.” MCH Br. at 19-20. They are inapposite or unsupportive of their position. For example, Mid Coast relies on cases interpreting the patient-physician privileges in Pennsylvania (*Buckman v. Verazin*, 54 A.3d 956 (Pa. Super. Ct. 2012)), Michigan (*Baker v. Oakwood Hosp. Corp.*, 608 N.W.2d 823 (Mich. App. Ct. 2000)), Texas (*In re Columbia Valley Reg’l Med. Ctr.*, 41 S.W. 3d

797, 800 (Tex. App. 2001)), and Illinois (*Glassman v. St. Joseph Hosp.*, 631 N.E.2d 1186 (Ill. App. Ct. 1st Dist. 1994) and *Parkson v. Cent. Du Page Hosp.*, 435 N.E.2d 140 (Ill. 1982)), but those states have physician-patient privileges that, unlike Maine's, explicitly protect most or all of the content of the medical record, rather than simply physician-patient communications.¹²

Mid Coast also cites to *Roe v. Planned Parenthood*, 912 N.E.2d 61 (Ohio 2009), a politically charged case concerning the discoverability of medical records of non-party patients who had received abortions. In *Roe*, a majority of the Ohio Supreme Court reversed existing precedent, and held that non-party medical records, even when redacted, were protected confidential communications. The Court did so, however, over a concurrence and two dissents, all of which admonished the majority for concluding that an evidentiary privilege precluded the discovery of de-identified medical records. In his dissent, Justice O'Donnell observed that the *Roe* decision was at odds with "decisions of numerous other states, which have . . . recognized the right to compel discovery of medical records from physicians and hospitals." *Id.* at 75 (collecting cases); *see also id.* at 83 (Donovan, J., dissenting) ("The privilege

¹² **Pennsylvania** (28 Pa. Code § 115.27): "All [medical] records shall be treated as confidential;" **Michigan** (MCL § 600.2157): providing that "a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon;" **Texas** (Tex. Evid. R. 509) (protecting, *inter alia*, "record of the patient's identity, diagnosis, evaluation, or treatment created or maintained by a physician"); **Illinois** (735 Ill. Comp. Stat. Ann. 5/8-802) (protecting "any information [the physician] may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient).

asserted by Planned Parenthood is in derogation of the common law, which must be strictly construed against it. The Roes have set forth claims that constitute special circumstances necessitating disclosure. The third-party/nonparty's privacy rights are not invaded or imperiled with the proper redactions. Redactions can be achieved using the proper HIPAA . . . standards to ensure patient confidentiality. The trial court ordered and can continue to take every reasonable and practical measure to ensure that the patients' records will not be disclosed beyond the requirement of discovery. An additional safeguard is the sealing of the records and a confidentiality order imposed upon the parties.”).¹³

D. The Superior Court Did Not Abuse Its Discretion by Ordering the Production of 50 De-Identified Operative Notes

Though Mid Coast claims that this interlocutory appeal centers on the a “major and unsettled question of law,” its brief focuses substantially on the Superior Court's balancing of the parties' interests pursuant to M.R. Civ. P. 26. Even if interlocutory appeal were appropriate here to review the scope of the physician-patient privilege (it is not), Mid Coast should not be afforded interlocutory review of the Superior Court's balancing under Rule 26(b)(1). To do otherwise would

¹³ Mid Coast also cites an unpublished opinion from the Delaware Superior Court, *Ortiz v. Ikeda*, No. C.A. 99C-10-032-JTV, 2001 Del. Super. LEXIS 193 (Del. Super. Ct. Mar. 26, 2001). As Mid Coast notes, in *Ortiz*, the trial court denied the production of redacted third-party medical records in a malpractice case. However, that court's holding on whether such documents are privileged under Delaware law is equivocal. While the court does suggest early on in its opinion that the privilege applies, it refuses to rule out that “there might be circumstances where the Court would order production of the contents of privileged medical records of non-party patients in a malpractice action in redacted form.” *Id.* at *6.

encourage parties to raise meritless “collateral” issues with the hope of receiving premature appellate review of discovery issues that are unquestionably reviewable only after a final judgment.

Because “the trial court has wide discretion over discovery matters,” discovery orders are “generally reviewed for abuse of discretion.” *Picher v. Roman Catholic Bishop of Portland*, 2013 ME 99, ¶ 6, 82 A.3d 101 (internal quotation marks omitted). “An abuse of discretion may be found where an appellant demonstrates that the decisionmaker exceeded the bounds of the reasonable choices available to it, considering the facts and circumstances of the particular case and the governing law. It is not sufficient to demonstrate that, on the facts of the case, the decisionmaker could have made choices more acceptable to the appellant or even to a reviewing court.” *Sager v. Town of Bowdoinham*, 2004 ME 40, ¶ 11, 845 A.2d 567.

To the extent this Court deems it appropriate to review the Order requiring the production of 50 redacted, nonparty operative notes, it should reject Mid Coast’s contention that the Superior Court abused its discretion.

i. The 50 De-Identified Operative Notes Are Relevant to Whether Dr. Marietta Breached the Standard of Care in Carol’s Surgery

Pursuant to M.R. Civ. P. 26(b)(1), 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 It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” “[A] party is not limited to discovery related to its adversary’s framing of the issues or even to the merits of the case, as long as the discovery properly relates to the subject matter involved in the action. Thus, a party may pursue discovery based on its own theory of the case” 2 Harvey, *Maine Civil Practice* § 26:3 at 629 (3d ed. 2011).

Mid Coast argues that “[w]hether Dr. Marietta has used the same or different techniques in *other* cases is irrelevant to *this* case.” MCH Br. at 14 (emphasis in original). According to Mid Coast, any evidence regarding how Dr. Marietta has previously performed laparoscopic cholecystectomy is classic character evidence, prohibited by M.R. Evid. 404(b)(1). *See* MCH Br. at 12 (“The legal tenet that prior acts” are inadmissible “is not new, nor is it novel.”).

As the Superior Court recognized below, irrespective of whether the third-party patient operative notes are relevant to Carol’s claim, **they are relevant to Mid Coast’s defense that Dr. Marietta met the standard of care in Carol’s surgery.** A.12. Mid Coast’s expert on standard of care, Steven Schwaitzberg, M.D., uses and teaches the CVS technique because he recognizes that it is the safest way to perform this surgery. His opinion that Dr. Marietta met the standard of care in Carol’s surgery

even though Dr. Marietta failed to use the CVS technique is predicated on his belief that many doctors, including Dr. Marietta have not been trained in the CVS.

Because Mid Coast's standard of care defense hinges on Dr. Marietta's ignorance regarding the CVS, the non-party operative notes are relevant to the question of Dr. Marietta's knowledge and experience using the CVS. *United States v. Colon Ledee*, 772 F.3d 21, 36 (1st Cir. 2014) (stating evidence of prior acts is admissible to prove a party's knowledge). If Dr. Marietta did not use the CVS in the non-party operations, that would tend to support the premise underlying Dr. Schwaitzberg's opinion, that Dr. Marietta simply was not trained in the CVS. Alternatively, if Dr. Marietta did use the CVS in some or all of the non-party operations, that would tend to undermine Mid Coast's standard of care defense.

Mid Coast argues that "any probative value that the notes may have would be gutted and their prejudicial effect heightened because Dr. Marietta could not testify to any differences in her treatment of the nonparty patients as compared to her treatment of the plaintiff," because of the redaction of "information that would make the subject patient of the note identifiable." MCH Br. at 14-15. It is worth noting the peculiarity of this argument, given Mid Coast's contention elsewhere that the identities of non-party patients can never truly be excised from their operative notes. In any event, Mid Coast is free to argue at trial, or in pre-trial motions, that the prejudicial effects of the redactions substantially outweigh the probative value of the

operative notes. That determination should be made by the trial judge, at a time when he has the benefit of considering concrete evidence, rather than dealing solely in hypothetical arguments. The record before this Court provides **no evidence** for the assertion that the ordered redactions would “gut” the probative value of the third-party operative notes.

ii. There Is No Evidence in the Record That the Production of 50 De-Identified Operative Notes Is Unduly Burdensome

Mid Coast argues that the Superior Court abused its discretion by failing to protect Mid Coast from the “undue burden” of Carol’s discovery request. MCH Br. At 28. Mid Coast asserts, without **any** supporting evidence, that “[t]he time investment for this project alone is a matter of days.” MCH Br. at 29. The notion that it will take Mid Coast “days” to retrieve and redact 50 fifty operative notes strains credulity, as does its **unsupported** argument that the production of 50 operative notes constitutes an “undue burden” on a hospital with a revenue of over \$200 million dollars annually.¹⁴ *Cf. Bailey v. Sears, Roebuck & Co.*, 651 A.2d 840, 844 (Me. 1994) (“In the instant case, in support of their request [for a protective order] the defendants submitted an affidavit of the Director of Product Safety for Emerson . . .”).

¹⁴ Mid Coast-Parkview Health, 2018 Annual Report, available at <http://www.midcoasthealth.com/mid-coast-parkview-health/pdf/Mid-Coast-Parkview-Health-Annual-Report.pdf>, at 5.

In any event, it is one thing to argue to the Superior Court that the request for 50 operative notes is unduly burdensome. It is quite another to assert, without any authority, that the Superior Court's determination to the contrary was an abuse of discretion. *Accord Poliquin v. Garden Way*, 989 F.2d 527, 532 (1st Cir. 1993) (noting that "the district court has 'broad discretion' to decide 'when a protective order is appropriate and what degree of protection is required'" (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984))).

Likely recognizing that there is no appreciable burden on Mid Coast here, Mid Coast invites this Court to speculate about the possible burden of future requests by other hypothetical plaintiffs; Mid Coast warns that, "if such requests become routine for plaintiffs, which they surely will, other requests could include more than 50 records, further enhancing the time and labor burden (and healthcare administration costs) in the future." MCH Br. at 29.

This line of argument, if credited, would undermine the entirety of the discovery process contemplated by the Maine Rules of Civil Procedure. It is tantamount to arguing that this Court should create a bright line rule prohibiting lower courts from compelling the production of emails, since even a narrowly tailored order requiring the production a few emails might "open[] the floodgates" to requests for every email on a server. MCH Br. at 9. This argument fails to appreciate the role of the trial court, which is to fashion discovery rulings

proportionate to the needs of a given case. Mid Coast has no basis for suggesting that, should this Court “open the door” to the production of a limited number of de-identified operative notes, lower courts will become unable to fulfill their supervisory role in the discovery process. *Accord* A. 12 (“caution[ing] that third-party patients’ medical records will not always be relevant to a medical negligence case”).

III. The Superior Court Did Not Abuse Its Discretion by Ordering the Production of Dr. Marietta’s Personnel File, Because These Documents Are Not Privileged

Mid Coast next argues that the Superior Court abused its discretion “when it ordered Mid Coast to produce all nonprivileged materials in Dr. Marietta’s personnel file.” MCH Br. at 31. Notably, Mid Coast does not argue that the production of such materials is burdensome or that the documents are unlikely to lead to admissible evidence. Instead, Mid Coast argues that the production of non-party personnel files is inappropriate “because such material is confidential by statute.”¹⁵ MCH Br. at 31.

As Mid Coast notes, 26 M.R.S. § 631 provides former employees with the right to review their personnel files. The statute also requires employers to “take adequate steps to ensure the integrity and confidentiality of [an employee’s]

¹⁵ The fact that Dr. Marietta is not a named party in this litigation has no bearing on the issue of whether Mid Coast must produce the personnel records of its employee and agent, Dr. Marietta. A principal (Mid Coast) is subject to liability to a third party harmed by an agent’s (Dr. Marietta) conduct. Restat 3d of Agency § 7.04 (3rd 2006). Mid Coast admitted that Dr. Marietta was an agent and/or employee who was acting within the course and scope of her employment at the time she performed Carol’s surgery. A. 18, 43.

records.” *Id.* Mid Coast interprets the requirement that an employer “take adequate steps” to protect personnel files as a bar against employers producing non-party personnel files in litigation. MCH Br. at 31. This argument conflates **confidentiality** and **privilege**. Discovery of “confidential” records is commonplace and is contemplated by the Maine Rules of Civil Procedure. Section 631 does not shield the production of Dr. Marietta’s personnel file.

As the Superior Court noted, this Court’s decision in *Pinkham v. DOT*, 2016 ME 74, 139 A.3d 904, is directly on point. In *Pinkham*, the Maine Department of Transportation (“MDOT”) argued that certain records were not discoverable. In support of this argument, MDOT relied on a Maine statute, which provided that relevant MDOT records “are confidential and may not be disclosed.” *Id.* at ¶ 8 (quoting 23 M.R.S. § 63). The *Pinkham* Court held that the statutory language did not bar production of records in litigation. *Id.* at ¶ 16. First, the Court explained that while M.R. Civ. P. 26(b)(1) excludes the production of **privileged** materials, it does not bar the production of information that is **confidential**. *See id.* at ¶ 12. (explaining that “discovery regards the disclosure of information—**which may be confidential**—within the closed universe of litigation”). Second, in the absence of plain language creating a privilege, the *Pinkham* Court declined to infer a privilege based on the statutory requirement that confidential MDOT documents “may not be disclosed.” *Id.* at ¶ 14; *see also* ¶ 15 (noting that, “unlike the numerous statutes for

which the Legislature has expressly granted privilege . . . **[the statute at issue] is entirely devoid of any language suggesting that it provides for privilege.**” (emphasis added)).

As in *Pinkham*, the statute at issue here provides for confidentiality, but not for privilege. Indeed, there was a stronger argument in *Pinkham* that the relevant statute created a privilege: there, the argument for privilege was premised not simply on the fact that the documents were designated confidential, but also on the statutory instruction that the confidential documents “may not be disclosed”—language that has no analog in § 631. *Cf.* 32 M.R.S. § 3296 (providing that professional competence reviews “are confidential and exempt from discovery”).

Mid Coast argues that *Pinkham* is distinguishable because the MDOT records at issue there were subject to the Maine’s Freedom of Access Act (“FOAA”), while “many records falling under section 631 do not qualify as public records” under FOAA. MCH Br. at 32. Ostensibly, Mid Coast means to suggest that the distinction between confidentiality and privilege in *Pinkham* is limited to the specific nature of that statute. In reality, it is well established, in Maine and elsewhere, that statutory grants of confidentiality do not create an evidentiary privilege. *See, e.g., Emrik v. Chemung Cnty. Dep’t of Soc. Servs.*, 121 F.R.D. 22, 25 (W.D.N.Y. 1988) (“A non-disclosure or ‘confidentiality’ provision in a statute may not always create an evidentiary privilege, especially if the legislature did not ‘explicitly create an

evidentiary privilege.” (quoting *Am. Civil Liberties Union of Mississippi, Inc. v. Finch*, 638 F.2d 1336, 1339 (5th Cir. 1981)).

Mid Coast relies on *Burnett v. Ocean Props., Ltd.*, 2017 U.S. Dist. Lexis 119408 (D. Me. July 31, 2017) for the proposition that “the plaintiff should be required to seek [Dr. Marietta’s personnel file] from Dr. Marietta through a subpoena,” rather than seeking it from Mid Coast through the discovery process. MCH Br. at 33. But *Burnett* concerns the subpoena of a litigant’s personnel file from a **current employer that was not a party to the case**, a fact that undergirds the decision to quash the subpoena. *Burnett*, 2017 U.S. Dist. Lexis 119408, at *5 (explaining that courts have “recognized that subpoenas **directed at litigants’ employers . . .** should be used only as a last resort,” because subpoenas sent to non-party employers could “be a tool for harassment and result in difficulties for her in her new job.” (emphasis added)). More to the point, the *Burnett* court’s decision to quash the subpoena was based not on a rule that personnel records should not be produced by an employer, but on a determination, based on its authority under Rule 26, that the subpoena was unnecessary. *Id.* at *5. Indeed, *Burnett* contravenes Mid Coast’s position that Rule 26 absolutely prohibits the discovery of third-party personnel files that Mid Coast is “statutorily required to keep confidential.” MCH Br. at 9. The *Burnett* Court specifically held that § 636 does not create a privilege, and that “[i]f the information sought is confidential but not privileged, FRCP 26

does not limit the disclosure of otherwise discoverable information.” *Id.* at *3 (emphasis added) (quotation marks and citation omitted).

Finally, Mid Coast argues that “[c]ommon sense demonstrates” that a “nonparty’s personnel file should . . . be protected from disclosure in litigation by the former employer.” MCH Br. at 31. The notion that Maine law prohibits the production of relevant employee personnel files is far from “common sense.” According to Mid Coast’s theory, a “nonparty’s personnel file should . . . be protected from disclosure” where, for example, a plaintiff alleged that negligent hiring of the nonparty employee. This cannot be, and is not, the law.

In sum, neither § 631, nor any case law, suggests that a *privilege* applies to personnel records. The fact that an employee **can** access her personnel file under § 631 does not indicate that others are categorically barred from doing so through the discovery process. Accordingly, the Superior Court did not abuse its discretion in ordering the production of Dr. Marietta’s personnel file.

IV. The Superior Court Appropriately Ordered the Production of Dr. Marietta’s Continuing Medical Education and Training Records

A. Training And Continuing Medical Education Records Are Relevant to Whether Dr. Marietta Was Trained in the CVS Technique

Mid Coast next argues in its interlocutory appeal that the Superior Court “clearly erred” when it determined that materials related to Dr. Marietta’s training

and continuing medical education were relevant to Mid Coast's malpractice claim.¹⁶ MCH Br. at 33. This is so, claims Mid Coast, because "[t]he plaintiff has not alleged that Dr. Marietta was not a properly trained physician." MCH Br. at 34.

Again, Rule 26(b)(1) permits a plaintiff to seek discovery "whether it relates to the claim or defense of the party seeking discovery **or** to the claim **or defense of any other party.**" (emphasis added). Here, Dr. Marietta's training and education is relevant to Dr. Marietta's defense to negligence. As is explained above, Dr. Marietta's knowledge, training, and experience with the CVS is relevant to the opinions of Mid Coast's standard of care expert, Dr. Schweitzberg. Thus, whether or not Dr. Marietta has been trained on the CVS is relevant to the validity of Mid Coast's standard of care defense.

B. The Superior Court's Order Explicitly Carved Out Privileged Professional Competence Review Records

Pursuant to 24 M.R.S. § 2510-A, "all professional competence review records are privileged and confidential." "Professional competence review records" are defined as documents

prepared at the request of or generated by a professional competence review committee relating to professional competence review activity. Records received or considered by a professional competence committee during professional competence review activity are **not** 'professional competence review records' if the records are individual medical or clinical records or any other record that was created for purposes other than professional competence review activity and is available from a source other than a professional competence committee.

¹⁶ As is noted above, to the extent this Court decides to consider the merits of one or more of the discovery issues raised in this appeal, it should nonetheless decline to reach the questions of relevance and burden pursuant to Rule 26(b)(1).

24 M.R.S. § 2502(8). Thus, where a record is (1) “created for purposes other than professional competence review activity” and is (2) “available from a source other than a professional competence committee,” that record is not protected by the privilege set forth in § 2510-A.

Mid Coast represents to this Court that, to the extent documents concerning training or continuing education are in its possession, they are privileged by § 2510-A. MCH Br. at 36-37. As Justice Walker noted, this assertion is dubious. A. 15. For example, to the extent Mid Coast is in possession of any certificates demonstrating that Dr. Marietta completed continuing medical education courses, such certificates would plainly be “created for purposes other than professional competence review activity,” and would likely be available from sources aside from the professional competence committee.

In any event, if Mid Coast is correct that all responsive documents are protected by § 2510-A, it is difficult to comprehend the nature of its objection to the Superior Court’s Order, which specifically provides that Mid Coast “**may claim privilege pursuant to M.R. Civ. P. 26(b)(5)(A)**” of all records protected by § 2510-A. A. 15 (emphasis added). Pursuant to M.R. Civ. P. 26(b)(5)(A), a party that withholds documents on the basis of a privilege must create a privilege log that “describe[s] the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing the information itself privileged or

protected, will enable other parties to assess the applicability of the privilege or protection.”

Mid Coast criticizes Justice Walker for “assum[ing]” that Mid Coast is in possession of responsive, non-privileged documents concerning training and continuing medical education. MCH Br. at 37. But Justice Walker “assumed” no such thing. He simply ordered Mid Coast to produce non-privileged records, to the extent they exist, and to create a privilege log for any documents withheld pursuant to § 2510-A. Needless to say, the Superior Court’s refusal to accept a blanket assertion of privilege and to require a party to follow the applicable Rule of Civil Procedure is not erroneous. *See Tex. Brine Co., LLC v. Occidental Chem. Corp.*, 879 F.3d 1224, 1229-31 (10th Cir. 2018) (denying as unripe an appeal from an order requiring the production of a privilege log that included any privileged communications, and noting that “[w]hy [Defendant] believes it can assert a blanket claim of privilege . . . without complying with Fed. R. Civ. P. 45(e)(2)(A) or Fed. R. Civ. P. 26(b)(5)(A) is beyond us”).

CONCLUSION

Well settled federal and Maine case law and policy considerations regarding the legal process in Maine courts compel the conclusion that Mid Coast’s appeal must be dismissed as an interlocutory appeal to which no exception to the final judgment rule applies.

If, however, this Court considers the merits of Mid Coast's appeal, this Court should affirm the Superior Court's Order. The Superior Court acted within its discretion and consistent with federal and state law in ordering the production of redacted operative reports, Dr. Marietta's personnel file, and Dr. Marietta's training and continuing education materials. The Superior Court appropriately concluded that these documents are relevant to the issue of whether Dr. Marietta breached the standard of care during Carol's surgery.

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CERTIFICATE OF SERVICE

I certify that I have served two copies of the Brief of Plaintiff/Appellee Carol A. Kennelly on counsel of record for the other party by depositing the same, this date, in the United States mail, postage prepaid, to:

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