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New Jersey Appellate Division Confirms Parties May Review for Relevance Documents That Hit on ESI Search Terms

The New Jersey Appellate Division recently issued a rare opinion concerning review and production of Electronically Stored Information (ESI). In [*Atlantic ER Physicians Team Pediatric Associates, PA v. UnitedHealth Group*](#), the Appellate Division held that the trial court erred in holding that all documents that hit on ESI search terms must be produced, regardless of their relevance.

The plaintiffs (emergency medical service providers) alleged that the defendants (insurers and third-party administrators of health benefits plans) underpaid claims by leveraging the plaintiffs' obligation to provide emergency care. The order that the trial court entered to "'govern the discovery of [ESI] and any electronically stored or maintained information' ... require[d] the parties to collaborate to identify 'custodians whose email[s] [were] reasonably believed to contain relevant ESI for collection' and develop 'search parameters, i.e., search terms' to search the agreed-upon custodians' records." During a discovery hearing at which both sides raised relevance objections, the trial court stated that "'relevance is not a reason to withhold documents.'" Thereafter, the parties negotiated search terms in a way that sought to minimize the number of irrelevant documents they would generate. Nevertheless, during a subsequent conference, the trial court directed the parties to produce all documents returned by the agreed-upon ESI search terms, regardless of whether they were responsive or relevant, and permitted only privileged documents to be withheld, stating that "'[a] party may not withhold or redact non-privileged ESI documents, even if the producing party believes the document is wholly non-responsive or that it contains only irrelevant information.'" Those directives were issued even though no party had requested them and despite the defendants' relevance, burden, and privacy concerns.

The Appellate Division reversed, holding that the trial court erroneously ordered the parties to produce irrelevant documents in violation of New Jersey Rule 4:10-2(a). The court rejected the trial court's reasoning that: (1) "ESI is 'fundamentally different' than other forms of discovery and, therefore, that Rule 4:10-2(a)'s relevancy standard should not apply"; and (2) "'relevancy shouldn't be decided by the people who are producing the documents.'" The Appellate Division reasoned instead that ESI is subject to the same relevancy standard embodied in Rule 4:10-2(a) as non-ESI and that "it has always been the producing party's obligation to conduct a relevancy review prior to production." The court emphasized the producing party's "gatekeeping role in deciding whether evidence is relevant and, therefore, subject to discovery."

This opinion confirms that ESI discovery should be analyzed under the same relevance rules as more traditional discovery forms. Further, unless otherwise agreed to in an ESI protocol, documents that hit on search terms need not be automatically produced unless they are relevant to the case.

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