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CLIENT ALERT

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NEW JERSEY APPELLATE DIVISION CLARIFIES APPLICATION OF PRIVILEGE UNDER PATIENT SAFETY ACT

On May 4, 2016 in the matter of Conn v. Rebustillo, et. al., the New Jersey Appellate Division held that, pursuant to the Patient Safety Act(PSA), the privilege afforded to documents, materials or information received by the Department of Health is absolute and not contingent upon review to determine whether the health care facility complied with the process requirements of the PSA.

In this medical malpractice matter, plaintiff alleged that the decedent died as a result of a fall from his hospital bed. Pursuant to the PSA, the hospital conducted a Root Cause Analysis(RCA) and submitted its findings to the Department of Health. The appellate court discussed the privilege afforded to the two categories of documents under the PSA, N.J.S.A. 26:2H-12.23 to 12.25. Subsection (f) of N.J.S.A. 26:2H-25 provides a privilege to documents received by the Department of Health pursuant to the mandatory or voluntary disclosure provisions under subsections (c)(serious preventable adverse events) and (e)(near misses, preventable events and adverse events). Subsection (g) provides a similar privilege to documents that are created as part of the "self critical analysis." The court clarified the distinction between the thresholds for application of the privilege under subsections (f) and (g).

The subsection (f) absolute privilege applies to all documents, materials or information received by the Department of Health pursuant to the mandatory and voluntary disclosures under subsections (c) and (e). The court stated that "the plain language of the [PSA] does not condition the privilege upon the satisfaction of any other criteria." The subsection (f) privilege is not subject to review to determine whether the health care facility complied with the process requirements of the PSA.

In contrast, the appellate court noted that the privilege afforded to internal documents developed as part of self-critical analysis only attaches if the documents are "developed . . . as part of a safety plan" that complies with the requirements set forth in N.J.S.A. 26:2H-12.25(b). Also discussing and distinguishing C.A. ex re. Applegrad v. Bentolila, 219 N.J. 449 (2014).

The appellate court concluded that the analysis conducted by the New Jersey Supreme Court in Applegrad as to whether the hospital's procedure substantially complied with the PSA procedures is unnecessary and inapplicable to the subsection (f) privilege.

Comments

This decision confirms that there is a privilege for two categories of documents developed under the PSA if the requirements of the Act are satisfied. For those documents that are submitted to the Department of Health, there is no requirement that the health care facility establish compliance with the PSA. Health care facilities are still required to prove compliance with the procedural requirements of the PSA for those documents that are prepared as part of the self- critical analysis.

For more information on this matter or related issues, please contact Peter A. Marra, Esq., ptm@spsk.com, a partner in the SPSK Health Care Law practice group for further discussion.

Peter A. Marra, Esq.
William J. Buckley, Esq.
James B. Sharp, Esq.
Olga Kats-Chalfant, Esq.
Julie E. Gendel, Esq.
Scott A. Leaman, Esq.
Benjamin A. Hooper, Esq.