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NEW JERSEY HOSPITALS BEWARE: NJ SUPREME COURT HOLDS THAT SELF-CRITICAL ANALYSIS PRIVILEGE CAN BE WAIVED FOR SLIGHTEST DEVIATION FROM NEW JERSEY PATIENT SAFETY ACT

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Health care facilities around the nation are besieged by plaintiffs’ counsel seeking to intrude on every potential area of discovery, often in a way that impedes health care providers from collaboratively reflecting on instances where there are negative patient outcomes. Over the past several decades, some states have recognized a self-critical analysis privilege to protect that deliberative space. New Jersey is one such state which has done so through the New Jersey Patient Safety Act (“PSA”). In Keyworth v. CareOne at Madison Avenue, hospitals in New Jersey were afforded further clarity as to procedural requirements which must be adhered to in order to benefit from the PSA’s self-critical analysis.

In Keyworth, the New Jersey Supreme Court considered two consolidated appeals arising from adverse events at health care facilities. In both appeals, plaintiffs sought internal reports and associated documents relating to the alleged incidents. The central issue raised in these appeals was whether the subject facilities complied with the PSA such that the requested documents were subject to the self-critical analysis’s absolute privilege.

Upon review, New Jersey Supreme Court held that the sought after internal reports were discoverable because the defendant facilities did not comply with the requirements of the PSA. The Court found, based on its review of the defendant facilities’ own certifications, that defendant facilities’ quality assurance and improvement committees, which were designed to comply with federal Quality Assurance and Performance Improvement (“QAPI”) regulations, also operated as the facilities’ patient safety committees under the PSA. In order to invoke the self-critical analysis privilege under the PSA, a facility’s patient safety committee must operate independently from any other committee. Thus, a healthcare facility cannot conflate quality assurance and improvement committees organized in compliance with QAPI as a patient safety program complying with the PSA.

Additionally, the Court found that the self-critical analysis privilege did not apply because the investigations which produced the disputed materials were undertaken pursuant to federal laws governing QAPI as well as the PSA. Thus, the investigations were not undertaken *exclusively* during the process of self-critical analysis as required by the PSA.

In reaching its holding in Keyworth, the Court underscored that procedural compliance with the PSA's requirements is the single metric for evaluating a health care facility's invocation of the PSA privilege. Given the rise of nuclear verdicts against healthcare facilities, ensuring that internal critiques of an organization's own procedures and responses to an adverse event are not subject to discovery is critical. To guard against this risk, facilities must involve counsel not only in assisting them in setting up their internal compliance but also in carrying out their internal investigations.

For further information or to discuss, please contact Matthew Parker, Esq. at mrp@spsk.com.

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