

NJ Appellate Court Rules Investigative Documents Created in Compliance With the Patient Safety Act Are Protected

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Healthcare Alert

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Under the Patient Safety Act (PSA), a health care facility's incident and investigative reports are "absolutely privileged", says the New Jersey Appellate Division. Earlier this month, the court held in *Keyworth v. Careone at Madison Ave.*, No. A-3751-21, A-0722-22, 2023 N.J. Super. LEXIS 64 (App. Div. June 15, 2023) that internal documents created during a process of self-critical evaluation following a potentially adverse event as part of a facility's patient safety plan, are not subject to disclosure or discovery or admissible at trial if the facility's process was conducted in compliance with *N.J.S.A. 26:2H-12.25(b)* of the PSA. This is true even when the facility does not make a report to the New Jersey Department of Health (DOH).

In *Keyworth*, the appellate division considered consolidated appeals relating to interlocutory orders requiring defendants to disclose incident and investigative reports. The cases were similar in that the defendant health care facilities objected to interrogatories requesting statements regarding the respective negligence actions. Defendants objected based on the self-critical analysis privilege. Both defendants submitted privilege logs for their incident and investigative reports and both plaintiffs moved to compel production of the documents. In the first case, the defendant did not submit the documents to the DOH, but in the second case, the defendant did. However, after conducting *in camera* reviews, the trial courts yielded the same result, finding that the contents of the documents were not privileged, and, therefore, the reports ought to be disclosed. Both defendants appealed.

The appellate division found that the incident and investigative reports had been created during the facilities' self-critical analysis processes as part of the facilities' patient safety plans in compliance with *N.J.S.A. 26:2H-12.25(b)* of the PSA. Therefore, the trial courts' orders requiring disclosure were improper.

According to the appellate court, the purpose of the PSA is to reduce adverse events caused by patient-safety system failures by promoting internal self-reporting and evaluations by health care facilities. To promote reporting and evaluation efforts, the PSA attaches an absolute privilege to reports of adverse events made to the DOH (regardless of whether they were mandatory or voluntary) under *N.J.S.A. 26:2H-12.25(f)*; and also to documents, materials, and information that derive from self-critical investigations under *N.J.S.A. 26:2H-12.25(g)*.

But to be granted such a privilege, facilities must comply with *N.J.S.A. 26:2H-12.25(b)*. This means their patient safety plans must include a patient safety committee consisting of staff representing various disciplines at the facility and processes for the committee to conduct analyses of safety practices and near-misses and for the provision of ongoing patient safety training for facility personnel to reduce the frequency of adverse events.

Additionally, the appellate division stated that its ruling did not prevent plaintiffs from engaging in discovery of facts from other, non-privileged sources. It cited to a Supreme Court case, *Brugaletta v. Garcia*, 234 N.J. 225 (2018), where the Court held that the health care facility's incident report was subject to the self-critical analysis privilege, but because discovery was incomplete due to the absence of the report, the defendant was required to submit a factual narrative of the incident to the plaintiff. Likewise, the *Keyworth* court found that if either defendant were to produce thousands of records in response to a discovery request, the plaintiffs were permitted to request that the defendants provide a narrative to guide them through the voluminous records.

Thus, the PSA permits a health care facility defendant to object to discovery requests regarding information contained in internal incident and investigative documents even when they have not been disclosed to the DOH. However, to assert the self-critical analysis privilege, the documents must have been developed as part of the facility's self-critical analysis process as part of a patient safety plan defined in the PSA.

In sum, in evaluating the self-critical analysis privilege, failing to take steps to comply with the patient safety plan requirements set forth in *N.J.S.A. 26:2H-12.25(b)(1)-(4)* may expose a facility's internal investigative documents to disclosure. Further, keep in mind that asserting the privilege will not exempt your facility from submitting a narrative of the alleged incident if the court so orders.

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