RECORD IMPOUNDED

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3751-21
A-0722-22

MADELINE KEYWORTH,

Plaintiff-Respondent,

v.

CAREONE AT MADISON AVENUE, ANN DURAN, RN, and DONALD GELIN, LPN,

Defendants-Appellants,

and

DALIA TADROS, MD,

Defendant.

SUZANNE BENDER and JONATHAN BENDER, Co-Executors for the Estate of DIANE BENDER, and on behalf of the heirs of DIANE BENDER,

Plaintiffs-Respondents,

v.

HARMONY VILLAGE AT CAREONE PARAMUS, OLGA ROMAINE, RN, RISA KORY, RN,

APPROVED FOR PUBLICATION
June 15, 2023
APPELLATE DIVISION

GELACIO RAMIREZ, RN, and
CECELIA UGWU, RN,

Defendants-Appellants.

Argued May 16, 2023 – Decided June 15, 2023

Before Judges Sumners, Geiger and Berdote Byrne.[1]

On appeal from interlocutory orders of the Superior Court of New Jersey, Law Division, Morris County, Docket No. L-2267-18, and Bergen County, Docket No. L-0948-21.

Anthony Cocca argued the cause for appellants (Cocca & Cutinello, LLP, attorneys; Anthony Cocca and Katelyn E. Cutinello, of counsel and on the briefs).

E. Drew Britcher argued the cause for respondents (Britcher, Leone & Sergio, LLC, attorneys; E. Drew Britcher, of counsel; Jessica E. Choper, on the briefs).

The opinion of the court was rendered by

GEIGER, J.A.D.

In these consolidated appeals, defendants argue the trial court erred by ruling that incident/investigation reports concerning separate incidents resulting in injuries at two facilities, one involving plaintiff Madeline Keyworth and another involving decedent Diane Bender, are not privileged under the Patient Safety Act (PSA), N.J.S.A. 26:2H-12.23 to -12.25, and

[1] Judge Sumners did not participate in oral argument but joins the opinion with the consent of the parties. See R. 2:13-2(b).

therefore discoverable. These appeals center upon the tension between discovery of the underlying facts in each incident, and the legislatively protected need for healthcare facilities to engage in self-critical analysis of incidents without disclosure of any resulting investigation reports or other documents containing confidential deliberative material that is privileged pursuant to the PSA and the regulations promulgated thereunder.

Because we are not considering the merits of plaintiffs' allegations in either case, and because these matters involve confidential records and come before us on interlocutory appeal from discovery rulings, we summarize the alleged facts and relevant procedural history in each case.

Keyworth v. CareOne at Madison Avenue

Plaintiff Madeline Keyworth alleges that she fell twice during her two-day admission at defendant CareOne at Madison Avenue (CareOne) and sustained serious, permanent injuries, including a fractured femur. On November 16, 2018, plaintiff filed her complaint against CareOne, a registered nurse, a licensed practical nurse, and a physician.

The eight-count complaint asserted causes of action for general negligence, violation of the New Jersey Nursing Home Responsibilities and Rights of Residents Act, N.J.S.A. 30:13-1 to -17, respondeat superior, negligent hiring, negligent supervision, breach of contract, violation of the

Omnibus Budget Reconciliation Act, and violation of the rules and regulations promulgated by the Joint Commission on Accreditation of Healthcare Organizations rules and regulations.

Discovery ensued. Plaintiff propounded Form C Uniform Interrogatories.[2] The fifth interrogatory requested defendants provide:

> (a) the name and address of [] any person . . . who has made a statement regarding this lawsuit;
>
> (b) whether the statement was oral or in writing;
>
> (c) the date the statement was made;
>
> (d) the name and address of the person to whom the statement was made;
>
> (e) the name and address of each person present when the statement was made; and
>
> (f) the name and address of each person who has knowledge of the statement.

The interrogatory provided the following instructions if defendants asserted a claim of privilege.

> Unless subject to a claim of privilege, which must be specified: (g) attach a copy of the statement, if it is in writing; (h) if the statement was oral, state whether a recording was made and, if so, set forth the nature of the recording and the name and address of

[2] See Pressler & Verniero, Current N.J. Court Rules, Appendix II, www.gannlaw.com (2023).

> the person who has custody of it; and (i) if the statement was oral and no recording was made, provide a detailed summary of its contents.

On April 16, 2020, defendants provided the following response:

> Upon the advice of counsel, objection to the form of the question. This request is overly broad, burdensome and intended to harass and seeks information that is not reasonably calculated to lead to the discovery of admissible evidence pursuant to R. 4:10-2 and is otherwise irrelevant under N.J.R.E. 401. Further, this request seeks information that is protected by the work-product doctrine, the peer review privilege, the privilege of self-critical analysis, the attorney client privilege and is otherwise evidence of subsequent remedial measures under N.J.R.E. 407.
>
> Additionally, the information contained in those documents is protected by the privilege of self-critical analysis and the Peer Review and Improvement Act of 1982 42 U.S.C. § 1320c-3 et seq., the Health Care Quality Improvement Act 42 U.S.C. § 11101, et seq., N.J.S.A. 2A:84A-22.8, New Jersey Patient Safety Act N.J.S.A. 26:2H-12.23 et seq., C.A. [ex rel. Applegrad] v. Bentolila, 428 N.J. Super. 115 (App. Div. 2012), rev'd, 219 N.J. 449 (2014), C.A. [ex rel. Applegrad] v. Bentolila, 219 N.J. 449 (2014), Brugaletta v. Garcia, 234 N.J. 225 (2018), Christy v. Salem, 366 N.J. Super. 535 (App. Div. 2004) and Facility Policy. Those documents, and the information contained therein, are strictly confidential, and may not be disclosed or distributed to any person or entity outside of the review process, except as otherwise provided by law.
>
> Without waving said objections, and without limitation, there exist two (2) Incident and Investigation Reports dated November 18, 2016 . . . . The reports are not being produced herein pursuant to

> the above objections. A Privilege Log for the Incident and Investigation Reports is attached hereto.

The Incident/Accident Reports were not submitted to the New Jersey Department of Health (DOH).

The first report is titled Incident/Accident Report and contains information related to the first fall, which occurred on November 18, 2016, at 1:00 a.m. It includes a section titled "fall investigation." The second incident report is similar in form to the first Incident/Accident Report, and contains information related to the second fall, which occurred later that morning at 8:00 a.m. It includes a section titled "fall investigation."

On March 31, 2022, after taking the fact depositions of defendant nurses Gelin, Duran, Wojnicz and defendant certified nursing assistant Smythe-King, but before the discovery end date, plaintiff moved to compel production of the two incident reports that defendants earlier claimed were privileged. Defendants opposed the motion to compel and cross-moved for a protective order of the Incident/Accident reports.

In support of their cross-motion, defendants provided a certification of Michael Shipley, a licensed nursing home administrator and chair of CareOne's Quality Assessment and Assurance Committee. Shipley certified the incident reports "were prepared pursuant to" CareOne's Quality Assurance and Performance Improvement (QAPI) plan and "were generated for the sole

purpose of compliance with the requirements of 42 C.F.R. § 483.75 and the PSA."

On May 6, 2022, the trial court denied plaintiff's motion to compel and ordered defendants to submit the reports to the court for in camera review. Defendants submitted the reports to the court as directed. While the in camera review was pending, plaintiff's counsel advised the court that defendants refused to depose plaintiff's expert or produce defendants' experts for depositions until the court conducted its review. On June 22, 2022, the court issued a "sua sponte" order that stated the incident/investigation reports and associated investigative documents were not privileged. In an accompanying statement of reasons, the court stated:

> Having conducted an in camera review of documents submitted to the [c]ourt by Defendant Care One on May 18, 2022, the [c]ourt finds that the documents contained therein were directly related and relevant to the matter at issue and that there is no basis for the documents to be deemed privileged. All issues of privilege as it pertains to Bates stamped Care One 0117-0132 are deemed resolved by the Court.

Defendants moved for leave to appeal and to seal portions of the record pending appeal. We granted both motions. The Keyworth appeal followed.

Bender v. Harmony Village at Care One at Paramus

On June 8, 2019, while a resident at defendant Care One at Harmony Village (Harmony Village), decedent Diane Bender was attacked and seriously

injured by another resident. Plaintiffs allege decedent was not transported to the hospital until five hours after the attack. Decedent, who was eighty-three years old, allegedly suffered multiple rib fractures, head trauma, a spinal contusion, and pneumothorax, which resulted in hospitalization. Plaintiffs claim staff members did not help decedent, and when decedent called 911 herself, staff members improperly turned away responding police and ambulance assistance. Decedent died five weeks after the attack.

The records include progress notes written on June 8 by a registered nurse at 1:31 p.m. and an LPN at 2:44 p.m. Plaintiffs contend decedent's medical chart at Harmony Village did not contain relevant facts to her negligence claims against defendants. The only references to the resident who assaulted plaintiff and the circumstances surrounding the attack are found in the nursing/clinical entries indicating that in response to a call for help, a nurse found decedent sitting on the floor leaning by the head side of the bed and another resident was sitting by the foot of her bed. Decedent was noted as being anxious and complaining of right upper back pain. The entries do not identify the attacker. Nor does the chart have any entries about the attacker's propensity for aggression or his tendency to wander and attempt entry into other residents' rooms.

On February 11, 2021, plaintiffs filed their complaint against defendants Harmony Village and four registered nurses. The nine-count complaint asserted causes of action for general negligence, violation of the New Jersey Nursing Home Responsibilities and Rights of Residents Act, respondeat superior, negligent hiring, negligent supervision, breach of contract, violation of the Omnibus Budget Reconciliation Act regulations, and violation of the rules and regulations promulgated by the Joint Commission on Accreditation of Healthcare Organizations.

Discovery ensued. Similar to the plaintiff in Keyworth, plaintiffs propounded Form C Uniform Interrogatories. In their response to the fifth interrogatory, defendants identified but did not disclose a June 8, 2019 incident report regarding Bender's care, stating it was privileged under the PSA, other federal and State statutes, and case law. More specifically, regarding privilege, defendants stated:

> Further, this request seeks information that is protected by the work-product doctrine, the peer review privilege, the privilege of self-critical analysis, the attorney client privilege and is otherwise evidence of subsequent remedial measures under N.J.R.E. 407.
>
> Additionally, the information contained in those documents is protected by the privilege of self-critical analysis and the Peer Review and Improvement Act of 1982 42 U.S.C. § 1320c-3 et seq., the Health Care Quality Improvement Act 42 U.S.C. § 11101, et seq., N.J.S.A. 2A:84A-22.8, Federal Quality Assurance

> privilege, 42 U.S.C. § 1396r; 42 U.S.C. § 1395i-3; 42 C.F.R. § 483.75, New Jersey Patient Safety Act N.J.S.A. 26:2H-12.23 et seq., C.A. [ex rel. Applegrad] v. Bentolila, 428 N.J. Super. 115 (App. Div. 2012), rev'd, 219 N.J. 449 (2014), C.A. [ex rel. Applegrad] v. Bentolila, 219 N.J. 449 (2014), Brugaletta v. Garcia, 234 N.J. 225 (2018), Christy v. Salem, 366 N.J. Super. 535 (App. Div. 2004) and Facility Policy. Those documents, and the information contained therein, are strictly confidential, and may not be disclosed or distributed to any person or entity outside of the review process, except as otherwise provided by law. Without waving said objections, and without limitation, there exists an Incident/Investigation Report dated [June 8, 2019] . . . . The reports are not being produced herein pursuant to the above objections.

A later served privilege log identified the documents withheld and set forth defendants' objections. Defendants produced Bender's medical records and identified the staff that participated in her care at issue. The June 8 incident report was reported to the DOH.

On April 25, 2022, plaintiffs filed a motion to compel defendants to produce the incident report and other information, including the full name and last known address of the patient who purportedly attacked Bender in her room, the identity of a Care One staff member, and the name of the company that transported Bender from Care One to Valley Hospital on June 8, 2019. Defendants opposed the motion and cross-moved for a protective order prohibiting the release of the incident report pursuant to the PSA and other

authority. Despite defendants' request for oral argument if opposition was filed, the trial court did not permit oral argument.

In support of their claim of privilege, defendants submitted the certification of defendant Kory, who is a certified assisted living administrator (CALA) and the chair of Care One's QAPI Committee. The certification noted that Care One is a health care facility as defined in the PSA and has a N.J.S.A. 26:2H-12.25(b) compliant QAPI plan in place. It further stated that Care One has a process for teams of facility staff to conduct ongoing analysis and application of evidence-based resident safety practices to reduce the probability of adverse events, and to conduct analyses of near-misses and adverse events, particularly Serious Preventable Adverse Events (SPAE).

The certification also represented that the incident report in question was created by Care One as "part of [a] process of self-critical analysis conducted pursuant to the PSA, N.J.S.A. 26:2H-12.25 and N.J.A.C. 8:43E-10.9, as well as N.J.A.C. 8:36-21" and contended the report was confidential, privileged and not subject to disclosure under the PSA.

On May 13, 2022, the trial court directed defendants to provide the documents to the court for in camera review and to produce other requested information to plaintiffs, including the full name of the resident who assaulted

Bender. On May 23, 2022, defendants provided that information, noting that the other resident involved in the incident was deceased.

In a supplemental submission to the court, including a second certification from Kory, defendants indicated that the incident was reported to the police on June 8, and to the New Jersey Department of Health (DOH) and the New Jersey Long-Term Care Ombudsman by telephone call on June 9, and in writing on June 10, 2019. Defendants provided additional documents for in camera review, consisting of a report to the DOH that included the June 8 incident report and portions of the non-party's medical records.

On September 21, 2022, plaintiffs filed a motion to compel the deposition of a subpoenaed fact witness, Dr. Raymond Eskow. Included in the moving papers were an excerpt from the documents that defense counsel previously sent to the Court for in camera review, and a letter from the court dated August 10, 2022, letter addressed to plaintiffs' counsel, which stated:

> The Court has reviewed the records and reports concerning the June 8, 2019 incident. While the records include an Investigation Report, the Report is only a narrative that includes witness statements of a purported altercation between two patients. Nothing concerning deviations of protocols or self-critical statements are included.
>
> Thus, the information is freely discoverable. See Brugaletta v. Garcia, 234 N.J. 225 (2018). These reports are therefore not privileged pursuant to N.J.S.A. 26:2H-12.24(e) and are discoverable.

The letter indicates it was copied to defense counsel. Defense counsel contends she did not receive a copy of the letter from the court and that the letter was not entered on eCourts. Defendants claim the documents claimed to be privileged were released by the court to plaintiff's counsel before defendants were advised of the court's ruling and before defendants could seek reconsideration, a stay of the ruling, or leave to appeal.

On October 7, 2022, the trial court granted plaintiffs' motion to compel Dr. Eskow's deposition. On October 11, the trial court denied defendants' motion to delete the claimed privileged documents from eCourts and associated relief. The court explained that the physician-patient privilege may be waived under certain circumstances, that the HIPAA claims raised by defendants were moot, as the assailant is deceased and the needs of the plaintiffs require disclosure, and that the court's August 10, 2022 order ruled that no other privilege applied.

We granted defendants' motion for leave to appeal the August 10, 2022 order as within time, to seal portions of the record, to stay proceedings in the trial court, and to consolidate the appeal with Keyworth.

In Keyworth, defendants argue:

> I. THE INCIDENT REPORTS ARE PRIVILEGED UNDER THE PATIENT SAFETY

ACT AND FEDERAL QUALITY ASSURANCE PRIVILEGE.

II. THE INCIDENT REPORTS ARE SHIELDED BY THE SELF-CRITICAL ANALYSIS PRIVILEGE.

III. THE TRIAL COURT, BY WAY OF ITS "SUA SPONTE" ORDER, FAILED TO MAKE SPECIFIC PRIVILEGE DETERMINATIONS IN ACCORDANCE WITH [RULE] 4:10-2 AND THE PATIENT SAFETY ACT.

In Bender, defendants argue:

I. THE INCIDENT REPORT AND REPORTING DOCUMENTS ARE PRIVILEGED UNDER THE PATIENT SAFETY ACT.

II. THE INCIDENT REPORT AND REPORTING DOCUMENTS ARE SHIELDED BY THE SELF-CRITICAL ANALYSIS PRIVILEGE.

III. HIPAA AND THE ASSOCIATED "PRIVACY RULE" PROHIBIT THE PUBLIC RELEASE OF THE NONPARTY PATIENT'S PROTECTED HEALTH INFORMATION.

IV. THE AUGUST 10, 2022 ORDER FAILED TO SET FORTH SPECIFIC PRIVILEGE DETERMINATIONS IN ACCORDANCE WITH [RULE] 4:10-2 AND THE PATIENT SAFETY ACT, FAILED TO NOTIFY DEFENSE COUNSEL OF THE COURT'S DECISION, FAILED TO PRESERVE THE CONFIDENTIALITY OF THE DOCUMENTS PENDING APPEAL, LED TO THEIR PUBLIC POSTING ON ECOURTS AND HAS COMPLICATED THE LITIGATION OF THIS MATTER.

Generally, appellate courts "accord substantial deference to a trial court's disposition of a discovery dispute." Brugaletta, 234 N.J. at 240. Appellate courts "will not ordinarily reverse a trial court's disposition of a discovery dispute 'absent an abuse of discretion or a judge's misunderstanding or misapplication of the law.'" Ibid. (quoting Capital Health Sys., Inc. v. Horizon Healthcare Servs., Inc., 230 N.J. 73, 79-80 (2017)). However, "[w]hen the question presented is a legal issue, such as the construction of a statute, our review is de novo." Conn v. Rebustillo, 445 N.J. Super. 349, 353 (App. Div. 2016) (citing Kaye v. Rosefielde, 223 N.J. 218, 229 (2015)). This is such a case.

These consolidated cases require us to consider the scope of the statutory self-critical analysis privilege and determine whether materials developed as part of self-critical analysis conducted pursuant to a facility's patient safety plan are subject to discovery, disclosure, and admissible at trial. This analysis hinges upon whether the facilities involved in these cases met the requirements imposed by the PSA, rendering the materials sought by plaintiffs privileged and protected from disclosure. These are legal issues. Therefore, our review is de novo.

In Christy v. Salem, we addressed the standards that govern disclosure of peer review reports and held that plaintiffs in medical malpractice actions

were entitled to obtain the factual portions of a hospital's peer review committee report. 366 N.J. Super. 535, 543-45 (App. Div. 2004). Christy went even further, holding that in some cases, even deliberative materials which could lead to discovery of relevant evidence of a critical element should be disclosed. Id. at 543-44. We recognized that plaintiffs were "unable to determine, without reviewing the factual material contained in a peer review report, whether or not that material has been otherwise available in discovery." Id. at 543. However, "opinions, analysis and findings of fact concerning the events that are the subject matter of plaintiff's case" were protected from disclosure. Id. at 544-45.

Christy was decided two months before the enactment of the PSA. See Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 3 on N.J.R.E. 500 (2022-2023). Our analysis focuses on the self-critical analysis privilege codified in the PSA and the regulations promulgated thereunder, as interpreted by subsequent caselaw.

"In interpreting a statute, 'our essential task is to understand and give effect to the intent of the Legislature.'" Conn, 445 N.J. Super. at 354 (quoting Pizzullo v. N.J. Mfrs. Ins. Co., 196 N.J. 251, 263-64 (2008)). We first examine "the plain language of the statute," In re Young, 202 N.J. 50, 63 (2010), which is the "clearest indication of a statute's meaning." G.S. v. Dep't

of Hum. Servs., 157 N.J. 161, 172 (1999). "We seek further guidance only when 'the Legislature's intent cannot be derived from the words that it has chosen.'" Conn, 445 N.J. Super. at 354 (quoting Pizzullo, 196 N.J. at 264).

"In enacting the PSA, the Legislature sought to reduce medical errors by promoting internal self-reporting and evaluation by health care facilities." Brugaletta, 234 N.J. at 230. "The PSA was legislatively designed to minimize adverse events caused by patient-safety system failures in a hospital or other health care facility." Id. at 241 (citing N.J.S.A. 26:2H-12.24(b) and (c)). "[T]hrough that multi-faceted statutory scheme, the Legislature sought to encourage self-critical analysis related to adverse events and near misses by fostering a non-punitive, confidential environment in which health care facilities can review internal practices and policies and report problems without fear of recrimination while simultaneously being held accountable." Ibid. (citing C.A., 219 N.J. at 464). "The language and structure of the PSA leave no reasonable doubt about the legislative intent regarding the self-critical-analysis privilege it authorizes." Id. at 247. "At the same time, the Legislature expressly left untouched a plaintiff's ability to secure discovery of underlying information available through other means." Id. at 230.

"The pertinent provisions of N.J.S.A. 26:2H-12.25 evidence an intent to encase the entire self-critical-analysis process in a privilege, shielding a health

care facility's deliberations and determinations from discovery or admission into evidence." Id. at 247. "N.J.S.A. 26:2H-12.25(g), which creates the privilege, does not condition the privilege on the finding of a [Serious Preventable Adverse Event (SPAE)]." Brugaletta, 234 N.J. at 247. "[T]he finding that an event is not reportable does not abrogate the self-critical-analysis privilege." Id. at 248. "[T]he only precondition to application of the PSA's privilege is whether the hospital performed its self-critical analysis in procedural compliance with N.J.S.A. 26:2H-12.25(b) and its implementing regulations." Id. at 247.

"Thus, the Legislature's protective privilege around the process of performing a self-critical analysis is broad, provided procedural compliance is present. The privilege otherwise unconditionally protects the process of self-critical analysis, the analysis's results, and the resulting reports developed by a facility in its compliance with the PSA." Ibid. "A court may not order the release of documents prepared during the process of self-critical analysis." Id. at 249.

The PSA attaches a privilege to specific information generated by health care facilities in two distinct processes: the reporting of adverse events to regulators, and the investigative process that may or may not lead to such

reporting. C.A., 219 N.J. at 467; see N.J.S.A. 26:2H-12.25(f) and (g)(1). In turn, the regulations promulgated by the DOH clarify that

> the statutory privilege applies only to documents, materials and information developed exclusively during self-critical analysis conducted during one of three specific processes: the operations of the patient or resident safety committee pursuant to N.J.A.C. 8:43E-10.4, the components of a patient or resident safety plan as prescribed by N.J.A.C. 8:43E-10.5, or reporting to regulators under N.J.A.C. 8:43E-10.6.
>
> [C.A., 219 N.J. at 468 (citing N.J.A.C. 8:43E-10.9(b)).]

In Conn, we described the purpose of the PSA:

> The explicit goal of the PSA was to improve the safety of patients by obtaining and analyzing information that will lead to the dissemination of effective practices and reduce systems failures. N.J.S.A. 26:2H-12.24(f). The Legislature recognized it was "critical" to encourage disclosure by "creat[ing] a non-punitive culture that focuses on improving processes rather than assigning blame." N.J.S.A. 26:2H-12.24(e). It sought to accomplish this goal "[b]y establishing an environment that both mandates the confidential disclosure of the most serious, preventable adverse events, and also encourages the voluntary, anonymous and confidential disclosure of less serious adverse events, as well as preventable events and near misses." N.J.S.A. 26:2H-12.24(f). To ensure the confidentiality of both the mandatory disclosures made pursuant to N.J.S.A. 26:2H-12.25(c) and the voluntary disclosures that are "encouraged" by N.J.S.A. 26:2H-12.25(e), those disclosures are protected by an absolute privilege. N.J.S.A. 26:2H-12.25(f).

> [Conn, 445 N.J. Super. at 354-55 (alterations in original) (footnotes omitted).]

The information obtained through self-critical analysis "is also used 'to exercise oversight,' with 'primary emphasis on assuring effective corrective action by the facility or health care professional.'" Id. at 354 n.4 (quoting N.J.S.A. 26:2H-12.25(f)). To achieve these goals, N.J.S.A. 26:2H-12.25(e)(1) provides:

> A health care professional or other employee of a health care facility is encouraged to make anonymous reports to the department . . . in a form and manner established by the commissioner, regarding near-misses, preventable events, and adverse events that are otherwise not subject to mandatory reporting pursuant to subsection c. of this section.

To that end, N.J.S.A. 26:2H-12.25(c) requires health care facilities to report "every [SPAE] that occurs in that facility" to the DOH. The documents, materials and information submitted to the DOH pursuant to this requirement are absolutely privileged and shall not be "subject to discovery or admissible as evidence or otherwise disclosed in any civil, criminal, or administrative action or proceeding." N.J.S.A. 26:2H-12.25(f).

To be sure, the documents received by the DOH pursuant to N.J.S.A. 26:2H-12.25(a) and (e)

> trigger the absolute privilege as to all documents so received. The plain language of the statute does not condition the privilege upon the satisfaction of any

> other criteria. Further, the statute provides no rationale or standard for parsing the contents of the documents, allowing for some portions to be privileged and others not privileged.
>
> [Conn, 445 N.J. Super. at 355 (emphasis in original).]

However, when information sought to be protected from disclosure is not submitted to the DOH, "the path to a privilege is different." Id. at 356. "N.J.S.A. 26:2H-12.25(g) establishes the 'self-critical analysis' privilege for internal documents that are the product of an 'investigative process that may or may not lead to . . . reporting' to the Department.'" Ibid. (omission in original) (quoting C.A., 219 N.J. at 467). This alternative basis for protection from disclosure applies when the following requirements are met:

> Any documents, materials, or information developed by a health care facility as part of a process of self-critical analysis conducted pursuant to subsection b. of this section concerning preventable events, near-misses, and adverse events, including [SPAEs], and any document or oral statement that constitutes the disclosure provided to a patient or the patient's family member or guardian pursuant to subsection d. of this section, shall not be:
>
> (1) subject to discovery or admissible as evidence or otherwise disclosed in any civil, criminal, or administrative action or proceeding . . . .
>
> [N.J.S.A. 26:2H-12.25(g).]

Similarly, pursuant to N.J.A.C. 8:43E-10.9(b), the statutory privilege under N.J.S.A. 26:2H–12.25(g)(1) applies only to documents, materials and

information developed exclusively during self-critical analysis conducted during three specified processes: operations of the patient or resident safety committee pursuant to N.J.A.C. 8:43E-10.4, the components of a patient or resident safety plan as prescribed by N.J.A.C. 8:43E-10.5, or reporting to regulators under N.J.A.C. 8:43E-10.6. C.A., 219 N.J. at 468.

Accordingly, while subsection (f) protects all documents "received by the department" from discovery, the privilege afforded by subsection (g) to internal documents "only attaches if the contents are 'developed . . . as part of a patient safety plan' that complies with the requirements set forth in N.J.S.A. 26:2H-12.25(b)." Conn, 445 N.J. Super. at 356 (quoting C.A., 219 N.J. at 469). To qualify as a patient safety plan, the plan must include:

> (1) a patient safety committee, as prescribed by regulation;
>
> (2) a process for teams of facility staff, which teams are comprised of personnel who are representative of the facility's various disciplines and have appropriate competencies, to conduct ongoing analysis and application of evidence-based patient safety practices in order to reduce the probability of adverse events resulting from exposure to the health care system across a range of diseases and procedures;
>
> (3) a process for teams of facility staff, which teams are comprised of personnel who are representative of the facility's various disciplines and have appropriate competencies, to conduct analyses of near-misses, with particular attention to serious preventable adverse events and adverse events; and

> (4) a process for the provision of ongoing patient safety training for facility personnel.
>
> [N.J.S.A. 26:2H-12.25(b)(1)-(4).]

If documents are submitted to the DOH pursuant to N.J.S.A. 26:2H-12.25(f) or meet the requirements of N.J.S.A. 26:2H-12.25(g), they are absolutely privileged and not subject to discovery. C.A., 219 N.J. at 473; Conn, 445 N.J. Super. at 358. Under either of those circumstances, a trial court does not engage in a redaction process and release the redacted document. See Brugaletta, 234 N.J. at 249. The entire document is statutorily protected from disclosure.

Nevertheless, the PSA expressly preserves plaintiffs' right to discover facts through conventional means of discovery "if obtained from any source or context other than those specified in [the PSA]." N.J.S.A. 26:2H-12.25(h), (k). To that end, the PSA shall not "be construed to increase or decrease the discoverability, in accordance with Christy v. Salem, . . . of any documents, materials or information if obtained from any other source or context other than those specified in this [A]ct." N.J.S.A. 26:2H-12.25(k). This right to discovery and admissibility of facts from other sources and contexts is not decreased "[n]otwithstanding the fact that documents, materials, or information may have been considered in the process of self-critical analysis conducted

pursuant to subsection b. of this section, or received by the [DOH] or the Department of Human Services pursuant to the provisions of subsection c. or e. of this section." N.J.S.A. 26:2H-12.25(h).

"Importantly, the privileges in the PSA do not bar the discovery or admission into evidence of information that would otherwise be discoverable or admissible . . . if it is obtainable from any other source or in 'any . . . context other than those specified' in the PSA." Brugaletta, 234 N.J. at 244 (second omission in original) (quoting N.J.S.A. 26:2H-12.25(h)); see also Conn, 445 N.J. Super. at 358 (explaining that plaintiffs retain the right to discover pertinent factual information from non-privileged sources "through conventional means of discovery"). Thus, documents created outside the self-critical analysis process are subject to discovery. Brugaletta, 234 N.J. at 250-51.

This does not necessarily end the trial court's role in resolving the discovery dispute, however. In Brugaletta, the Court held plaintiffs in medical malpractice actions against hospitals are entitled, as a response to discovery requests, to have the hospital provide a narrative to steer them to information contained in thousands of pages of medical records that would lead them to the discrete yet interconnected notations of an apparent adverse incident, even though the hospital's self-critical analysis of a possible SPAE is privileged

under the PSA. 234 N.J. at 252. However, the trial court should not use a self-critical analysis document to achieve that goal. Ibid. Instead, the court should use "its common law power" to order defendants to provide plaintiffs with a concise, understandable narrative containing references to the relevant excerpts of the patient's records. Ibid. The Court noted, however, that it did not mean to suggest that such a narrative should routinely be provided in discovery. Id. at 256. Additionally, plaintiffs are "unquestionably entitled to the raw data contained in [their] patient records." Id. at 252. Some of that "raw factual information" may have been "documented in [the] plaintiff's patient records well before the process of self-critical analysis was commenced . . . ." Id. at 251.

Applying these principles to the facts in Keyworth, the incident report and associated documents were developed during a process of a self-critical analysis as part of a patient safety plan that complied with the requirements of N.J.S.A. 26:2H-12.25(b) but were not reported to the DOH. Pursuant to N.J.S.A. 26:2H–12.25(g), they are protected by the "'self-critical analysis' privilege for internal documents that are the product of an 'investigative process'" even though not submitted to the DOH. Conn, 445 N.J. Super. at 356 (quoting C.A., 219 N.J. at 467). Therefore, the two incident/investigation reports and related documents are absolutely privileged, not subject to

disclosure or discovery, and are inadmissible at trial. N.J.S.A. 26:2H-12.25(g). The balancing process described in Christy, 366 N.J. Super. at 539, 541, does not apply. We therefore reverse the granting of plaintiffs' motion to compel disclosure of the privileged documents and denial of defendants' motion for a protective order. The trial court shall enter a protective order protecting the confidentially of the documents and seal that aspect of the record.

Turning next to Bender, the record demonstrates that the incident report relating to decedent's injuries was created as part of self-critical analysis conducted pursuant to the PSA, N.J.A.C. 8:43E-10.9, and N.J.A.C. 8:36-21.1. The incident report and associated documents were prepared pursuant to Harmony Village's QAPI plan and to comply with the requirements of the PSA and N.J.A.C. 8:36-21.1. The contents of the documents were developed as part of the facility's patient safety plan that met the requirements of N.J.S.A. 26:2H-12.25(b). The incident report was reported to the DOH. Therefore, they are privileged and protected from disclosure pursuant to the PSA. N.J.S.A. 26:2H-12.25(f). Accordingly, they are not subject to disclosure or discovery and are inadmissible at trial. We therefore reverse the granting of plaintiffs' motion to compel disclosure of the privileged documents and denial of defendants' motion for a protective order. The trial court shall enter a

protective order protecting the confidentially of the documents and seal that aspect of the record.

We add that the trial court in Bender should have heard oral argument before deciding the motions, see R. 1:6-2(d) (providing that, except for pretrial discovery and calendar motions, a request for oral argument "shall be granted as of right"), entered a formal order setting forth its ruling, see R. 1:6-2(f), and effected prompt service of the order by uploading it to eCourts, see Pressler & Verniero, cmt. on R. 1:5-2 (noting R. 1:5-2 was relaxed by order to permit service "by electronic filing using an approved electronic filing system pursuant to R. 1:32-2A"). Doing so would have ensured that defense counsel received the court's decision in a timely fashion, thereby affording defendants the opportunity to seek reconsideration, to request a stay of the order pending appeal, and to apply to this court for leave to appeal before the documents were released to plaintiff. Confidentiality of the documents would have been maintained pending appeal.

Lastly, in each case, plaintiffs are free to engage in discovery of facts from non-privileged sources. See Conn, 445 N.J. Super. at 358. Additionally, if defendants produced voluminous medical records in response to a discovery request in either case, plaintiff may request, and the court may order, that defendants provide a "narrative to steer them to information contained in

thousands of pages of medical records" in accordance with Brugaletta, 234 N.J. at 252 .

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION