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Eroding Privileges: Pennsylvania Superior Court Narrowly Construes Scope of MCARE Patient Safety Reporting Privilege

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On Tuesday September 12, 2023, the Superior Court of Pennsylvania issued a published opinion interpreting, for the first time, the scope of the statutory privilege applicable to patient safety reports prepared under the dictates of the Medical Care Availability & Reduction of Error (MCARE) Act, 40 P.S. § 1303.101, *et seq*. In *Wakeem Ford-Bey v. Physician's Care*, the Superior Court interpreted the privilege narrowly and held that interview notes taken by a hospital administrator for purposes of conducting a Root Cause Analysis of an adverse event were not protected by disclosure under MCARE because the hospital failed to prove that (1) the interviewer qualified as a "Patient Safety Officer" under MCARE; (2) the reviewing committee at the hospital qualified as a "Patient Safety Committee" under MCARE; and (3) the documents at issue were actually transmitted to the reviewing committee.

The court held that MCARE protects from disclosure in civil litigation any documents, materials, or information "solely prepared" for the purpose of compliance with the Act. Protected materials are those that "arise out of" matters reviewed by a MCARE-defined Patient Safety Committee. Accordingly, the Superior Court held that a hospital seeking application of the privilege must have: (1) a Patient Safety Plan; (2) a Patient Safety Officer; and (3) a Patient Safety Committee. The MCARE Act outlines several technical requirements that must be met for a person to be considered a "Patient Safety Officer" or for a hospital committee to be considered a "Patient Safety Committee."

In *Ford-Bey*, the hospital argued its Root Cause Analysis report prepared in accordance with its safety policy warranted MCARE protection. The hospital's safety policy established a notification and assessment system for adverse events that informed whether a Root Cause Analysis was required. Based on that assessment, the policy called for additional review by a to-be identified hospital committee to inform a response. Despite the apparent consistency between the goals of the hospital's policy and MCARE—to ensure internal systems for report and review of serious events—the court held that the hospital's policy was inadequate to establish the privilege under MCARE because it did not expressly identify a "Patient Safety Officer" or "Patient Safety Committee." Instead, according to the court, the interviewer and the committee to whom she reported were operating under a "general" hospital policy with respect to the investigation of adverse events. This "general policy" was insufficient to trigger the MCARE Patient Safety privilege. Finally, the court deemed it noteworthy that the hospital could not produce evidence that all of the documents at issue were actually provided to the reviewing committee. In the court's view, this constituted yet another basis to find the MCARE privilege inapplicable.

The *Ford-Bey* decision underscores the need for strict compliance with all of the procedural requirements of the MCARE Act for any related privilege to apply. Moreover, this decision is in line with the continued, and problematic, trend of narrowing the scope of privileges applicable to self-critical analyses in medical malpractice litigation in Pennsylvania. In this way, the *Ford-Bey* case is consistent with the narrow approach Pennsylvania appellate courts have taken in evaluating the related, but distinguishable, Pennsylvania Peer Review Protection Act in recent cases.

Unlike the Peer Review Protection Act, investigation and reporting of adverse events are required by MCARE. Accordingly, Pennsylvania hospitals must familiarize themselves with the dictates of the MCARE Act and the Superior Court's decision in *Ford-Bey*. Now is the time to revisit old patient safety plans and ensure strict compliance with the dictates of the MCARE Act.

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