

Superior Court of Pennsylvania to Address Requirements for Application of the MCARE Patient Safety Privilege

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Since the passage of the Medical Care Availability and Reduction of Error ("MCARE") Act nearly two decades ago, healthcare providers in Pennsylvania have been required to establish procedures and protocols for investigating and reporting adverse events. The purpose of these requirements is to encourage continual improvement with respect to patient safety. In order to provide the necessary conditions for an honest self-critical analysis, Section 311 of MCARE provides that documents generated in connection with the requirements of the MCARE patient safety investigation and reporting provisions are confidential and privileged from discovery in medical malpractice actions. In the almost 20 years since the passage of MCARE, the Superior Court has never squarely addressed the contours of Section 311 or the pre-requisites for establishing the related privilege. The Superior Court is now poised to do so in connection with an interlocutory appeal in *Ford-Bey ex rel Ford-Bey vs. Professional Anesthesia Services of North America, LLC et al.*

In that case, Judge Jeffrey Saltz of the Montgomery County Court of Common Pleas ordered the production of documents claimed to be protected by Section 311 based on his conclusion that the defendant failed to prove technical compliance with the procedural requirements of the MCARE Act.

Judge Saltz relied heavily on *Venosh v. Henzes*, a 2013 Lackawanna County trial court opinion authored by Judge Thomas Nealon, in reaching his conclusion. According to Judge Saltz, documents are only immune from discovery pursuant to Section 311 of MCARE if the materials: (1) were solely prepared or created for the purpose of complying with the MCARE Act; (2) arise out of matters reviewed by either the patient safety committee or the facility's governing board; and (3) were prepared or created pursuant to the responsibilities of the patient safety committee or the facility's governing board.

Additionally, according to Judge Saltz, the healthcare defendant must prove that the patient safety committee at issue strictly conformed to the criteria set forth in MCARE. Specifically, for the privilege to apply, the patient safety committee must include, at a minimum: (1) a patient safety officer; (2) at least three healthcare workers employed by the facility; (3) at least two non-employee residents of the community served by the facility; and (4) an unspecified number of members of the facility's medical and nursing staff.

In *Ford-Bey*, the trial court compelled production of patient safety documents because the healthcare provider failed to produce sufficient evidence that (1) the documents at issue were produced for the *sole* purpose of complying with MCARE's patient safety reporting requirements; (2) the documents at issue were actually reviewed by the patient safety committee; and (3) the composition of the patient safety committee at issue complied with MCARE's requirements.

The trial court's decision in *Ford-Bey* is consistent with a general trend in Pennsylvania trial and appellate courts to construe evidentiary privileges narrowly. However, many trial courts have taken an overly mechanistic approach to the application of privileges in the healthcare context – including the MCARE patient safety provisions. This approach threatens to undermine the ability of healthcare providers to engage in open and honest self-critical analysis for the purpose of improving the quality of patient care. A Superior Court decision in this case will hopefully restore the proper balance between a patient's right to discover information relevant to his or her care against the need for healthcare institutions to continue to improve the quality of care for the benefit of all Pennsylvanians.

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