

The Devil is in the Details: PA Superior Court Continues to Narrowly Construe Scope of the MCARE Patient Safety Privilege

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Last Friday, in *Lahr v. Lehigh Valley Hosp.*, the Superior Court of Pennsylvania issued an unpublished opinion once again narrowly interpreting the scope of the statutory privilege applicable to patient safety reports prepared under the dictates of the Medical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. *Lahr* is the second case in just the last few months in which the Superior Court has strictly applied the MCARE Act's procedural requirements and held that, unless a hospital can affirmatively prove that it complied with those requirements, patient safety reports would not be considered privileged.

The Superior Court's prior published decision in *Ford-Bey* took issue with the structure of the defendant hospital's patient safety plan (finding no privilege because the patient safety plan itself did not strictly comply with the MCARE Act). In *Lahr*, although the patient safety plan was procedurally adequate, the Superior Court nevertheless held that three patient safety reports concerning the incident at issue were discoverable and not protected by the MCARE privilege because the hospital failed to prove that the patient safety reports at issue actually "arose out of 'matters reviewed' by a patient safety committee or a governing board." The Superior Court provided little guidance as to what kind of proof was needed in this regard and injected further ambiguity by suggesting that a patient safety report need not actually be reviewed by the patient safety committee to satisfy the "arising out of matters reviewed" standard.

Although as an unpublished opinion, *Lahr* is not binding on Pennsylvania trial or appellate courts, it serves as a stark reminder that the Superior Court appears to strongly disfavor evidentiary privileges – particularly in the patient safety context – and that hospitals and other qualified health care providers in Pennsylvania undertaking patient safety reviews must be extremely diligent in their processes and record keeping to preserve applicable privileges in subsequent litigation.

If you have any questions or need more information, contact Joshua Gajer, Partner (gajerj@whiteandwilliams.com; 215.864.6837) or Margaret MacDonald, Associate, (macdonaldm@whiteandwilliams.com; 215.864.7050) or a member of our Healthcare Practice.

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