SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2073-17T3

ARIANNA PRUETT THOMSON and
PAUL THOMSON,

Plaintiffs-Respondents,

v.

CRAIG WIENER, M.D., and
COMPREHENSIVE WOMEN'S CARE
OF PARAMUS,

Defendants,

and

HACKENSACK UNIVERSITY MEDICAL
CENTER,

Defendant-Appellant.

Argued May 17, 2018 – Decided May 30, 2018

Before Judges Simonelli, Haas and Gooden Brown.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-4284-16.

Richard J. Mirra argued the cause for appellant (Hoagland, Longo, Moran, Dunst & Doukas, LLP, attorneys; Richard J. Mirra, of counsel and on the brief).

Brian E. Mahoney argued the cause for respondents (Blume, Forte, Fried, Zerres & Molinari, PC, attorneys; Carol L. Forte, of counsel; Brian E. Mahoney, on the brief).

PER CURIAM

By leave granted, defendant Hackensack University Medical Center (HUMC) appeals from the November 16, 2017 Law Division order directing it to provide three patient records to plaintiffs in this medical malpractice case, despite HUMC's claim that the records were confidential and protected from disclosure under the Patient Safety Act (the PSA), N.J.S.A. 26:2H-12.23 to -12.25. For the reasons that follow, we reverse and remand for further proceedings.

Plaintiffs Arianna Pruett Thomson and her husband, Paul Thomson, allege that Arianna's physician, defendant Craig Wiener, M.D., negligently treated her while she was a patient at HUMC and, as a result, the parties' baby died shortly after birth. In discovery, plaintiffs asked HUMC for Arianna's medical records. In the course of responding to that request, HUMC produced a "Privilege Log" identifying ten documents which it asserted were confidential under the PSA because they were prepared as part of the hospital's self-critical analysis of Arianna's case.

By way of background, the Legislature enacted the PSA in 2004 "to reduce the incidence of medical errors that may endanger

patients in health care facilities." C.A. ex rel. Applegrad v. Bentolila, 219 N.J. 449, 451 (2014). The PSA "imposed new requirements for evaluating and reporting of adverse events, and created a statutory privilege shielding specific communications from discovery in litigation." Id. at 451-52.

Specifically, the PSA

> establishe[d] an absolute privilege for two categories of documents. N.J.S.A. 26:2H-12.25(f) (subsection (f) privilege) applies to the first category, which consists of documents received by the Department of Health (the Department) pursuant to the mandatory reporting requirement, N.J.S.A. 26:2H-12.25(c) (subsection (c)) or the voluntary disclosure provision, N.J.S.A. 26:2H-12.25(e) (subsection (e)). N.J.S.A. 26:2H-12.25(g) provides a similar privilege (subsection (g) privilege) to a second category of documents, developed as part of a "self-critical analysis" that might never be provided to the Department.
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> [Conn v. Rebustillo, 445 N.J. Super. 349, 350 (App. Div. 2016).]

Pursuant to the subsection (f) privilege, "[a]ny documents, materials or information received by" the Department from a health care facility pursuant to the PSA's two reporting provisions, subsection (c) and subsection (e), "that are otherwise not subject to mandatory reporting pursuant to [subsection (c)] 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)(1). Thus, the subsection (f) privilege applies to documents that the medical facility submits to the Department.

However, the subsection (g) privilege does not condition confidentiality on whether the facility submits the record to the Department. Instead, the subsection (g) privilege "protects communications generated in the setting of self-critical analysis[,]" and provides:

> Any documents, materials or information developed by a health care facility as part of a process of self-critical analysis conducted pursuant to [N.J.S.A. 26:2H-12.25(b)] concerning preventable events, near-misses and adverse events, including serious preventable adverse events . . . shall not be
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> (1) subject to discovery or admissible as evidence or otherwise disclosed in any civil, criminal or administrative action or proceeding.
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> [Applegrad, 219 N.J. at 467 (quoting N.J.S.A. 26:2H-12.25(g)(1)).]

Thus, subsection (g) "shields certain documents, materials and information developed by a health care facility as it investigates and evaluates adverse events." Ibid. In order to qualify for this privilege, however, the "documents, materials and information" must have been "developed by [the] health care

facility exclusively during the process of self-critical analysis[.]" N.J.A.C. 8:43E-10.9(b)(1) (emphasis added).

If neither the subsection (f) or subsection (g) statutory privileges apply, the health care facility may still attempt to shield its documents from discovery under the common law self-critical analysis privilege recognized in Christy v. Salem, 366 N.J. Super. 535 (App. Div. 2004). Under the common law privilege, disclosure of factual statements in self-critical analysis records is generally permitted, but disclosure of subjective or "evaluative" communications is not. Id. at 543-44; see also Applegrad, 219 N.J. at 465-66 (reiterating the Christy standard).

Here, HUMC claimed that all ten documents listed in its Privilege Log were protected by either the subsection (f) privilege, the subsection (g) privilege, or the common law self-critical analysis privilege discussed in Christy. Plaintiffs responded by filing a motion to compel HUMC to provide the ten records to the trial judge for his in camera review. The judge granted the motion and examined each of the documents.

In his written decision accompanying the November 16, 2017 order, the judge ruled that three of the documents (Nos. 2, 9, and 10 in the Privilege Log) were protected from disclosure by the subsection (f) privilege because HUMC had submitted them to the Department. The judge then performed a Christy analysis of the

remaining seven documents. The judge concluded that four of the documents (Nos. 5, 6, 7, and 8 in the Privilege Log) contained "a privileged analysis and discussion performed by" HUMC and, therefore, were "not subject to disclosure." However, the judge found that the entirety of Document No. 1, and portions of Document Nos. 3 and 4 in the Privilege Log contained "purely factual information" that had to be disclosed under Christy.

Critically absent from the judge's written decision was any discussion, or even a mention, of the subsection (g) privilege, which HUMC contended applied to all of the documents, including Nos. 1, 3, and 4. On appeal, HUMC contends the judge erred by failing to consider the subsection (g) privilege. We agree.

"We review the trial court's discovery decision for an abuse of discretion, but we shall not defer to the trial court's decision if 'based on a mistaken understanding of the applicable law.'" Brugaletta v. Garcia, 448 N.J. Super. 404, 411 (App. Div. 2017) (quoting Applegrad, 219 N.J. at 459). Applying this standard, we are unable to defer to the judge's decision concerning the three documents at issue in this appeal because he mistakenly failed to consider the subsection (g) privilege. Instead, he only examined the subsection (f) privilege and the common law self-critical analysis privilege.

HUMC has not provided the three disputed documents to us on appeal. Therefore, we are unable to conduct an independent review of these records to determine whether the subsection (g) privilege shields them from discovery. See R. 2:6-1(a)(1)(I) (requiring the appellant to provide an appendix that contains "such . . . parts of the record . . . as are essential to the proper consideration of the issues").[1] While we could simply decline to address the issue presented in this appeal on this basis, Soc'y Hill Condo. Ass'n, Inc. v. Soc'y Hill Assocs., 347 N.J. Super. 163, 177-78 (App. Div. 2002), plaintiffs have not sought such relief, and we trust the trial court can promptly correct its mistake if we simply remand the matter to permit it to review the documents to determine whether they are protected from disclosure under the subsection (g) privilege.

Therefore, we reverse the portions of the November 16, 2017 order that directed HUMC to disclose Document No. 1 in its entirety, and parts of Document Nos. 3 and 4 to plaintiffs. We remand to the trial court with the direction that it re-examine these documents to determine whether they are shielded from disclosure by the subsection (g) privilege.

[1] Plaintiff could have moved to seal the record on appeal to protect the confidentiality of the records pending our review.

Reversed in part, and remanded. We do not retain jurisdiction.