

September 4, 2024

## **Trial Court Judge Rejects Plaintiff's "Sole Purpose" and "Ordinary Course of Business" Arguments in Upholding Hospital's Assertion that Safety Occurrence Report Was Privileged Under the Patient Safety Act**

### **I. Factual Background**

The plaintiff in this malpractice action was a 76-year-old patient who was admitted to the inpatient rehab unit at Ingalls Memorial Hospital after a three-week hospital stay for cancer treatment. He was identified as a fall risk, and relevant precautions were taken. He later had an unwitnessed fall in his room and was taken to the ICU after sustaining a head injury. That same day, a nurse created an occurrence report in the Ingalls Healthcare SafetyZone portal. This was the event reporting system used by Ingalls to report privileged patient safety work product (PSWP) to Clarity PSO. The report triggered a patient safety investigation which resulted in a nursing peer review process. All of the materials generated by this review were also reported to the PSO.

During the discovery process, the Hospital provided an updated privilege log which identified the 13 pages at issue as privileged PSWP under the Patient Safety and Quality Improvement Act of 2005 (PSQIA), along with a citation to the Illinois Appellate Court decision in Daley v. Teruel/Ingalls Memorial Hospital, 2018 IL App (1st) 17091, as further support of its privilege argument. The Hospital also submitted two affidavits, one from its Vice President, Clinical Performance Excellence for U of Chicago Medicine, the parent organization of Ingalls, who was the person responsible for Risk and Patient Safety Quality Performance Improvement. The second one was from the Executive Director of Clarity PSO. Together the Court observed that they "set forth a plethora of information as to the workings of the defendant hospital, its agreement with Clarity as its PSO, as well as the purposes and compliance with the requirements of the PSQIA".

Plaintiff, in its motion to compel, argued that the Hospital had not met the privilege requirements under Daley or the PSQIA because it had not established that the disputed documents had not been prepared for the "sole purpose" of reporting to a PSO. Moreover,

they should be treated as documents prepared in the Hospital's "ordinary course of business" and therefore did not qualify as PSWP.

## II. Court's Analysis and Decision

### A. Rejection of Plaintiff's "Sole Purpose" Argument

In response to this argument, Ingalls pointed out the PSQIA contains no such language or requirement. This so-called standard had been relied on by plaintiff's attorneys and a number of courts as a basis to reject the PSWP privilege. As additional support for the Hospital's argument, it cited to the recent decision by the 11<sup>th</sup> Circuit Court of Appeals (In re Baycare Medical Group, 101 F.4<sup>th</sup> 1287(11<sup>th</sup> Cir. 2024) In a detailed analysis, the Court of Appeals rejected a lower district court decision which had held that documents collected in the hospital's patient safety evaluation system and reported to its PSO were not privileged because they also were used for internal patient safety analysis and peer review. Thus, because of this "dual purpose" the privilege did not apply. In addition to pointing out that the term "sole purpose" does not appear in the PSQIA, it stated:"

Contrary to the district court's order, nowhere does the statute require that privileged information be "kept some for the provision to a Patient Safety Organization". Instead, the Act privileges work product as long as it "identifies or constitute[s] the deliberations or analysis of or identifies the fact of reporting pursuant to "a patient safety evaluation system, regardless of whether it is reported to a patient safety organization. The relevant administrative rule confirms as much. BayCare "may use patient safety work product for any purpose within [its] legal entity". Nothing "prohibit[s] the disclosure of patient safety work product among physicians and other health care professionals, particularly for education purposes or for preventing or ameliorating harm".

The trial court accepted Ingall's position and the BayCare analysis in rejecting the plaintiff's "sole purpose" argument.

### B. Rejection of Plaintiff's "Ordinary Course of Business" Argument

Some courts have ruled that if the documents which a hospital defendant argues are PSWP were created "in the ordinary course of business" then they were not created for the purpose of reporting to a PSO and therefore are not privileged. The plaintiff in this case made this additional argument. In response, the trial court accepted Ingalls' contention "that if having a falls reduction policy, specifically for the occurrences related to falls, which are consistent with standards of care and applicable laws, and documents generated in connection therewith are not treated as privileged, and merely to be "ordinary business documents", the protections afforded under the PSQIA would be nullified.

Having found that Ingalls had "satisfactorily established the elements of the privilege from disclosure, contained in the PSQIA" and that the plaintiff's "sole purpose" and "ordinary course of business arguments "are beyond those required by the statute", the trial court denied the plaintiff's motion to compel.

[Burke v. The Ingalls Memorial Hospital, NO: 2023-L-006063 , Cir. Ct. Cook County \(September 4, 2024\)](#)

### III. Lessons Learned

For hospitals and other licensed health care providers which have created or have joined as members of an accredited PSO, list below are some critical take aways and lessons learned from the Burke and other reported court decision involving the scope of privilege protections and requirements under the PSQIA.

1. It is critical to have a detailed and fully developed patient safety evaluation system policy which explains the process by which PSWP is collected and/or generated and how it used for the purpose throughout the facility and health care system for the purpose of improving patient health care outcomes, safety and for reducing risk. Most providers are not taking advantage of the realizing the broad scope of information, data, analyses, reports, minutes, etc., relating to all of the patient safety activities which can be treated as privileged PSWP.

2. Providers should include within the PSES umbrella of policies, at a minimum, its event reporting policy and QAPI/Quality Plan which can be cross-referenced in the PSES policy and introduced together in response to a PSWP discovery or governmental demand. Policies should be updated annually.
3. The Policies should clearly delineate what information is being reported to a PSO and what information is being treated as deliberations or analysis which are the two principal pathways for creating PSWP.
4. It also is essentially mandatory that the provider submit detailed supporting affidavits which cite to the PSES and other policies and strong legal briefs in establishing compliance with the PSQIA but also as a means of educating the judge who may have very little familiarity with the Act and are pre-disposed to reject PSWP privilege arguments.
5. Educate, educate, educate. It is amazing to see many quality and risk personnel, senior executives, in-house counsel and especially defense attorneys have little knowledge about the PSQIA and applicable policies or even what the provider is treating as PSWP.



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- Review, revision and redesign of PSES, and related policies, to maximize privilege protections under the PSQIA
- Provide educational programs for relevant hospital personnel, such as risk, quality, in-house counsel, and defense attorneys regarding all aspects of the PSQIA using practical advice and guidance developed over the years with other health systems and PSOs
- Assist provider's legal counsel when responding to litigation and government demands to disclose PSWP

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