3-7-2024

Sunrise Hosp. v. Eighth Jud. Dist. Ct., 140 Nev. Adv. Op. 12 (Mar. 07, 2024)

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Sunrise Hosp. v. Eighth Jud. Dist. Ct., 140 Nev. Adv. Op. 12 (Mar. 07, 2024)[1]

UNDER THE PATIENT SAFETY AND QUALITY IMPROVEMENT ACT OF 2005 (PSQIA), THE PRIVILEGE OVER IDENTIFIABLE PATIENT SAFETY WORK PRODUCT IS ABSOLUTE AND CANNOT BE WAIVED.

Summary

The Supreme Court of Nevada considered whether the district court exceeded its jurisdiction by compelling testimony concerning alleged privileged information under the Patient Safety and Quality Improvement Act of 2005 (PSQIA). The Court answered this question by considering: (1) whether the PSQIA patient safety work product privilege can be waived and (2) whether the information that Grace seeks to discover constitutes privileged patient safety work product. The Court looked at the plain language of the regulation and found that the regulation describes when patient safety work product shall continue to remain privileged. The regulation does not describe when patient safety work product shall be excepted from privilege–the exceptions are covered in a different section. The district court erred when it found that Sunrise could waive the privilege over patient safety work product under the PSQIA.

The Court ultimately rejected the district court's interpretation and found that the privilege over identifiable patient safety work product is absolute and cannot be waived. The district court was further ordered to vacate its order to compel testimony of Dr. Murawsky and to determine whether Grace seeks to compel identifiable or nonidentifiable patient safety work product, and then rule on the motion to compel accordingly.

Background

Sunrise Hospital and Nurse Olsen were sued by Tiffiny Grace for professional negligence after her child, E.G., suffered permanent developmental damage while in the Neonatal Intensive Care Unit (NICU) at Sunrise Hospital. On January 8, 2018, E.G. was placed in the NICU at Sunrise Hospital due to complications after his premature birth. On February 27, 2018, Cord Olsen was E.G.'s assigned nurse and changed his fluid lines. Shortly thereafter, E.G.'s health rapidly declined. E.G. entered cardiac arrest and suffered a hypoxic event leading to permanent developmental damage.

During the deposition of Dr. Jeffrey Murawsky, the Chief Medical Officer of Sunrise and chairman of the Sunrise Patient Safety Committee, his testimony revealed Sunrise's use of a patient safety evaluation system. This internal evaluation system collected, managed, and analyzed information that it reported to the patient safety organization to improve future healthcare outcomes. This deposition was ultimately halted when Sunrise objected to answering certain questions and asserted privileges under both Nevada law and the Patient Safety and Quality Improvement Act of 2005 (PSQIA). Grace then moved to compel further testimony from Dr. Murawsky to discover what information the Patient Safety Committee examined in its investigation of E.G.'s cardiac arrest.

On October 24, 2022, the district court rejected Sunrise's PSQIA arguments and concluded that any privilege was waived by its disclosure and ordered the parties to determine whether Sunrise waived its privilege under Nevada law. On December 6, 2022, the district court issued a second order granting Grace's motion to compel, and Sunrise filed a writ petition challenging both orders. In November 2023, the district court sua sponte filed a third order

[1] By Toree Robinson.

relating to the motion to compel and neither party was informed or invited to brief any of the issues.

Discussion

Under the PSQIA, patient safety work product is privileged, and that privilege cannot be waived

The Supreme Court of Nevada granted certiorari to clarify the privileges under the Patient Safety and Quality Improvement Act of 2005 (PSQIA)[2] and to "serve public policy" by educating medical providers and attorneys on the extent of the patient safety work product privilege. The PSQIA states that "patient safety work product shall be privileged and shall not be…subject to discovery…[or] admitted as evidence in any Federal State, or local governmental civil proceeding."[3] There are two categories of patient safety work product: identifiable and nonidentifiable. Identifiable patient safety work product contains the identities of the providers, patients, or reporters involved.[4] Nonidentifiable patient safety work product encompasses all other patient safety work product that is without identifying information.[5] Nonidentifiable patient safety work product may be voluntarily disclosed, and when it is, it is exempted from privilege.[6] There are a few exceptions to the PSQIA privilege for identifiable patient safety work product such as in certain criminal proceedings, in civil actions brought by a good faith reporter, or when every medical provider identified in the work product authorizes disclosure; however, none of those exceptions apply here.[7]

The Court considered two questions to determine if the district court erred: (1) whether the PSQIA patient safety work product privilege can be waived and (2) whether the information that Grace seeks to discover constitutes privileged patient safety work product. Under the regulation, 42 C.F.R. § 3.208, "patient work safety work product disclosed in accordance with 42 C.F.R. § 3.204(b)(1) or disclosed *impermissibly* shall remain privileged."[8] The district court incorrectly interpreted this regulation to mean that patient safety work product disclosed *permissibly* shall *not* remain privileged.

The Court first looked at the plain language of the regulation and found that the regulation describes when patient safety work product shall continue to remain privileged.[9] The regulation does not describe when patient safety work product shall be excepted from privilege– the exceptions are covered in a different section.[10] The Court rejected the application of the negative-implication canon to 42 C.F.R. § 3.208 because it would create an exception to privilege far broader than the exceptions to privilege explicitly carved out elsewhere in the PSQIA and its implementing regulations. The Court further held that the district court's interpretation failed to consider that the PSQIA's implementing regulations already contemplate when voluntary disclosure could defeat privilege, specifically, for nonidentifiable patient safety

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[2] Patient Safety and Quality Improvement Act of 2005 (PSQIA), 42 U.S.C. §§ 299b-21–299b-26.
[3] *Id.* at §§ 299b-22(a)(2), (4).
[4] *Id.* at § 299b-21(2).
[5] *Id.* at § 299b-21(3).
[6] *Id.* at § 299b-21(c)(3).
[7] *Id.* at §§ 299b-22(c)(1)(A)–(C).
[8] 42 C.F.R. § 3.208.
[9] *Id.*
[10] *See* 42 C.F.R. § 3.204(b) (titled "[e]xceptions to privilege" and describing when privilege shall not apply to the enumerated disclosures).

work product.[11] Thus, the Court rejected the district court's interpretation and determined that the PSQIA privilege is absolute.

The State of Nevada adopts the same test as federal courts for determining whether PSQIA privilege extends over alleged patient safety work product: (1) whether the materials were "created for the purpose of reporting to a patient safety organization" and (2) whether they were "so reported."[12] If they are so privileged, then courts must consider whether one of the exceptions made explicit by 42 C.F.R. § 3.204(b) applies.[13] The Court concluded that the privilege over identifiable patient safety work product cannot be waived because the PSQIA does not contemplate waiver over such information. This conclusion accords with the PSQIA's stated goals to "strike[] the appropriate balance between plaintiff rights and creat[e] a new culture in the healthcare industry that provides incentives to identify and learn from errors."[14] The Court also noted that the privilege over identifiable patient safety work product under PSQIA flows in both directions. The privilege can be asserted by a plaintiff on the same grounds if a medical provider attempts to introduce evidence including identifiable patient safety work product.

The Court further found that the district court erred by failing to determine whether the testimony that Grace sought to compel from Dr. Murawsky was identifiable or nonidentifiable patient safety work product but declined to make that determination.

Conclusion

The district court erred by rejecting Sunrise's assertion of privilege over identifiable patient safety work product under the Patient Safety and Quality Improvement Act of 2005 (PSQIA). The Court found that under the PSQIA, identifiable patient safety work product is privileged. The privilege is absolute and cannot be waived. Thus, the Court granted the petition for a writ of prohibition, and the district court was ordered to vacate its order to compel the testimony of Dr. Murawsky. Considering this opinion, the district court was further ordered to determine whether the testimony that Grace sought to compel was identifiable or nonidentifiable patient safety work product, and then rule on the motion to compel accordingly.

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[11] 42 C.F.R. § 3.204(b)(4).

[12] Nelms v. Wellpath, LLC, No. 21-10917, 2023 WL 2733379, at *2 (E.D. Mich. Mar. 31, 2023) (quoting Penman v. Correct Care Sols., LLC, No. 5:18-CV-00058-TBR-LLK, 2020 WL 4253214, at *3 (W.D. Ky. July 24, 2020), and citing Tinal v. Norton Healthcare, Inc., No. 3:11-CV-596-S, 2014 WL 12581760, at *11 (W.D. Ky. July 15, 2014).

[13] 42 C.F.R. § 3.204(b)(4).

[14] S. Rep. No. 108-196, at 4 (2003).