NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4202-13T4

DAVID A. JABLOW, EXECUTOR
OF THE ESTATE OF ANNE S.
JABLOW, DECEASED, and DAVID
A. JABLOW, INDIVIDUALLY,

Plaintiff-Appellant,

v.

WENDY J. WAGNER, M.D., and
LIFETIME OB/GYN,

Defendants,

and

SOMERSET MEDICAL CENTER,

Defendant-Respondent.

Argued February 3, 2015 – Decided April 8, 2015

Before Judges Yannotti and Fasciale.

On appeal from Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-1182-13.

Brian J. Levine argued the cause for appellant (Brenner & Levine, P.A., attorneys; Mr. Levine, on the briefs).

Peter L. Korn argued the cause for respondent (McElroy, Deutsch, Mulvaney & Carpenter, L.L.P., attorneys; Mr. Korn, of

counsel; Mr. Korn and Jennifer Schneider, on the brief).

PER CURIAM

Plaintiff David A. Jablow, individually and as executor of the Estate of Anne S. Jablow ("Ms. Jablow"), appeals on leave granted from an order entered by the Law Division on April 11, 2014, disqualifying Brian J. Levine, Esq. ("Levine") of the law firm Brenner & Levine ("B&L") from representing him in this litigation. We affirm.

I.

This appeal arises from the following facts. On March 26, 2013, Dr. Wendy J. Wagner ("Dr. Wagner") performed a surgical procedure upon Ms. Jablow at Somerset Medical Center ("SMC"). Thereafter, Ms. Jablow developed certain complications, which resulted in her re-admission to SMC. She died on March 29, 2013. On September 5, 2013, B&L filed a complaint on behalf of plaintiff in the Law Division asserting medical malpractice and wrongful death claims against Dr. Wagner and SMC.

In October 2013, SMC filed an answer and served discovery requests upon plaintiff, including a notice to produce documents. In response to the notice to produce, plaintiff provided SMC with various documents, including nine pages that SMC had created as part of a Root Cause Analysis ("RCA") concerning the care provided to Ms. Jablow at SMC.

SMC's counsel informed Levine that SMC had created the RCA in accordance with the New Jersey Patient Safety Act ("PSA"), N.J.S.A. 26:2H-12.23 to -12.25. SMC's counsel maintained that the RCA was privileged and confidential pursuant to the PSA. SMC requested that Levine return all hard copies of the documents in his possession, destroy immediately all electronic copies of the documents, and provide an accounting of the persons or entities that had received copies of the documents. Levine refused the requests.

SMC filed a motion in the trial court seeking an order compelling return of the documents and additional relief. In a certification submitted to the trial court, Levine stated that in May 2013, as he was beginning his investigation of the case, his office received the "alleged" privileged documents in an envelope addressed to him. Levine stated that he did not know who sent the documents to him, and that he did not "in any way solicit their production."

Levine noted that each page of the documents had a "footer" which stated that they had been created pursuant to the PSA. He said, however, that merely marking the documents in this manner did not make them privileged. Levine asserted that, in order to determine whether the documents were privileged, he had served demands for the production of documents upon SMC.

The trial court heard oral argument on the motion on December 3, 2013. On December 20, 2013, the court filed a letter opinion stating that the documents had been created in accordance with the PSA and were absolutely privileged from disclosure. The court wrote that the statutory privilege was not lost because there was no indication that "an authorized source" had forwarded the documents to plaintiff's counsel. The court determined that SMC was entitled to a protective order requiring the return of any hard copies and the destruction of any electronic copies. The court memorialized its opinion in an order dated December 20, 2013.

Plaintiff thereafter filed a motion for reconsideration. On January 17, 2014, the court heard oral argument on the motion. The court reserved decision and later informed the parties that a plenary hearing was necessary to determine whether SMC had complied with the PSA in creating and disseminating the documents. The hearing was held on March 5, 2014.

The court filed a lengthy letter opinion dated March 12, 2014, in which it stated that the testimony presented at the hearing established that the documents were created as part of a RCA undertaken in compliance with the provisions of the PSA. The documents were prepared exclusively for PSA purposes and not for

any other reason. The court therefore concluded that the documents were privileged under the PSA.

Furthermore, the evidence showed that the person who provided the documents to plaintiff's counsel was not authorized to do so, and the court stated that such an unauthorized disclosure did not operate as a waiver of the privilege under the PSA. Accordingly, the court entered an order dated March 12, 2014, denying plaintiff's motion for reconsideration.

SMC then filed a motion to disqualify Levine from serving as plaintiff's counsel on the ground that Levine's review of the documents violated RPC 4.4(b). SMC further argued that it would be prejudiced if Levine continued to act as plaintiff's counsel. B&L opposed the motion. The court considered SMC's motion on April 11, 2014, and after hearing counsel's arguments, placed its decision on the record.

The court determined that Levine did not intend to do anything "underhanded or wrong." The court nevertheless concluded that he must be disqualified. The court entered an order dated April 11, 2014, disqualifying Levine from serving as plaintiff's attorney, and stayed the order so that plaintiff could seek interlocutory review by the Appellate Division. By order entered on May 20, 2014, we granted plaintiff's motion for leave to appeal.

II.

Plaintiff does not dispute the trial court's determination that the subject documents are absolutely privileged under the PSA. Plaintiff argues, however, that the privileges under the PSA are limited to non-admissibility of the documents. Plaintiff further argues that, once the documents were disclosed, SMC lost or waived any privileges related thereto. We reject both arguments.

We note initially that a trial court's decision regarding discovery is reviewed for abuse of discretion. Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011). We undertake de novo review of the trial court's "interpretation of the law and the legal consequences that flow from established facts[.]" Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

A. The PSA

The PSA was enacted "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 Act 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 (citing N.J.S.A. 26:2H-12.25.b, c, e, g). "The Act sought

to encourage health care workers to candidly disclose their observations and concerns, and promote self-critical evaluation by professional and administrative staff." Id. at 452.

Under the PSA, an "[a]dverse event" is defined as "an event that is a negative consequence of care that results in unintended injury or illness, which may or may not have been preventable." N.J.S.A. 26:2H-12.25a. A "[p]reventable event" is defined as "an event that could have been anticipated and prepared against, but occurs because of an error or other system failure." Ibid. In addition, the PSA defines "[s]erious preventable adverse event" as a preventable adverse event that "results in death or loss of a body part, or disability or loss of bodily function lasting more than seven days or still present at the time of discharge from a health care facility." Ibid.

The PSA requires health care facilities "to develop and implement a patient safety plan for the purpose of improving the health and safety of patients at the facility." N.J.S.A. 26:2H-12.25b. Among other things, the plan must provide for the establishment of "a patient safety committee." N.J.S.A. 26:2H-12.25b(1). The plan also must "implement a procedure for the collaborative review of adverse events." Bentolila, supra, 219 N.J. at 463.

In addition, the PSA states that every health care facility must "report to the [Department of Health (the "DOH")] or, in the case of a State psychiatric hospital, to the Department of Human Services [(the "DHS")]," any "serious preventable adverse event that occurs in th[e] facility" in the form and manner determined by the Commissioner of the DOH. N.J.S.A. 26:2H-12.25a, c.

Furthermore, the PSA "attaches a privilege to specific information generated by health care facilities in two distinct processes: the reporting of adverse events to regulators, and the investigative process that may or may not lead to such reporting." Bentolila, supra, 219 N.J. at 467. The PSA states that "documents, materials, or information" that the DOH or DHS receives from a health care facility pursuant to the statutory reporting provisions shall not be:

> (1) subject to discovery or admissible as evidence or otherwise disclosed in any civil, criminal, or administrative action or proceeding;
>
> (2) considered a public record under [N.J.S.A. 47:1A-1 to –3] or [N.J.S.A. 47:1A-5 to -10]; or
>
> (3) used in an adverse employment action or in the evaluation of decisions made in relation to accreditation, certification, credentialing, or licensing of an individual, which is based on the individual's participation in the development, collection, reporting or

> storage of information in accordance with this section.
>
> [N.J.S.A. 26:2H-12.25f.]

Furthermore, the PSA states that

> Any documents, materials, or information developed by a health care facility as part of a process of self-critical analysis conducted pursuant to subsection b. of this section concerning preventable events, near-misses, and adverse events, including serious preventable adverse events, . . . shall not be:
>
> (1) subject to discovery or admissible as evidence or otherwise disclosed in any civil, criminal, or administrative action or proceeding; or
>
> (2) used in an adverse employment action or in the evaluation of decisions made in relation to accreditation, certification, credentialing, or licensing of an individual, which is based on the individual's participation in the development, collection, reporting, or storage of information in accordance with subsection b. of this section.
>
> [N.J.S.A. 26:2H-12.25g.]

In 2008, regulations adopted pursuant to the PSA were applied to general, special, psychiatric and rehabilitation hospitals. N.J.A.C. 8:43E-10.2(a)9 and 10 (providing that N.J.A.C. 8:43E-10.1 to -10.11 shall apply to general, special, psychiatric and rehabilitation hospitals effective March 3, 2008). Among other things, the regulations provide that that the statutory privilege only applies "to documents, materials and

information developed exclusively during self-critical analysis" undertaken by the health care facility. Bentolila, supra, 219 N.J. at 468 (citing N.J.A.C. 8:43E-10.9). Moreover, the regulations indicate that the statutory privilege only attaches when the self-critical analysis is undertaken in accordance with the regulations that apply to the operation of a patient safety committee, a patient safety plan, or a report to regulators. Ibid. (citing N.J.A.C. 8:43E-10.9(b)).

B. Scope of Statutory Privilege

As noted, plaintiff does not challenge the trial court's finding that the subject documents are privileged under N.J.S.A. 26:2H-12.25g. Plaintiff argues, however, that the documents were not obtained in discovery and that the statutory privilege only precludes the admission of the records as evidence in this case. The contention is entirely without merit.

As stated in N.J.S.A. 26:2H-12.25g(1), documents that are covered by the privilege shall not be "subject to discovery or admissible as evidence or otherwise disclosed in any civil, criminal, or administrative action or proceeding[.]" (Emphasis added). The record indicates that, while plaintiff's counsel did not obtain the documents through discovery, the documents were disclosed to plaintiff's attorney apparently because he was involved in the civil action to which those documents relate.

This disclosure comes within the broad reach of the plain language of N.J.S.A. 26:2H-12.25g(1). The trial court correctly found that the disclosure here violated the statute.

Plaintiff also argues that ordering the return of the documents and the disqualification of his attorney does not foster the stated purposes of the PSA. We disagree.

As the Supreme Court explained in Bentolila, the PSA "sought to encourage health care workers to candidly disclose their observations and concerns, and promote self-critical evaluation by professional and administrative staff." Bentolila, supra, 219 N.J. at 452. Moreover, the Legislature "reasoned that health care professionals and other facility staff are more likely to effectively assess adverse events in a confidential setting, in which an employee need not fear recrimination for disclosing his or her own medical error, or that of a colleague." Id. at 464.

A determination that the PSA's statutory privilege does not apply to the disclosure of confidential records to an attorney in civil litigation so long as the documents are not admitted as evidence in the litigation would completely undermine the privilege. Application of the privilege here is consistent with the statutory language and the purpose for which it was enacted.

C. Waiver of the privilege

Plaintiff further argues that the privilege was waived when the documents were sent to his attorney. Plaintiff cites N.J.S.A. 2A:84A-29 and N.J.R.E. 530, which provide in pertinent part that a person waives a right or privilege if, with knowledge of the right or privilege, the person makes "disclosure of any part of the privileged matter or consented to such a disclosure made by anyone." Plaintiff says that SMC disseminated the subject documents to all hospital personnel who were involved in review of Ms. Jablow's care and treatment, including Dr. Wagner.

Plaintiff asserts that Dr. Wagner revealed the contents of the documents in an action she brought against SMC, and that SMC did not take any action against her or her attorney in that case for doing so. According to plaintiff, SMC may not be permitted to "pick and choose" when it may assert its privilege under the PSA. Again, we disagree.

Here, the PSA provides an absolute privilege which precludes disclosure of the documents for use in civil, criminal and administrative actions. Under the statute, SMC has the right to assert that privilege. Moreover, as the trial court determined, SMC never authorized anyone to disclose the privileged documents to plaintiff's attorney.

We conclude that the trial court correctly determined that, under the circumstances, SMC did not waive the statutory privilege. See Hedden v. Kean Univ., 434 N.J. Super. 1, 15 (App. Div. 2013) (noting that generally a privilege is not waived by the unauthorized disclosure of privileged information by one who is not the holder of the privilege).

III.

Plaintiff also argues that Levine did not violate RPC 4.4(b) by reviewing the documents and that, therefore, Levine cannot be disqualified from serving as his counsel. RPC 4.4(b) provides that

> [a] lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, properly notify the sender, and return the document to the sender.

According to plaintiff, Levine did not receive the documents "inadvertently[.]" Plaintiff claims that the documents were addressed and mailed to him by someone who was apparently authorized to have possession of them. He states that, at the time the documents were received, B&L had not filed a complaint on his behalf, and that B&L knew that one of the surgeons at SMC had criticized the care that Dr. Wagner had provided to Ms. Jablow.

Plaintiff also says that B&L knew that SMC had taken disciplinary action against Dr. Wagner, in part due to the care that she provided to Ms. Jablow. Plaintiff asserts that it was reasonable for Levine to believe that the documents had not been "inadvertently" sent to him.

We find no merit in these assertions. As the trial court pointed out in its oral decision of April 11, 2014, B&L received the documents in the mail from an anonymous source. Each page had a footer stating that the documents had been prepared exclusively in compliance with the PSA. The court correctly determined that counsel knew or should have known that the documents were "at the very least, arguably privileged[,]" thereby triggering counsel's obligations under RPC 4.4(b). The court properly reasoned that counsel had an obligation under the rule to stop reading the documents, and to return them immediately.

The Supreme Court's decision in Stengart v. Loving Care Agency, Inc., 201 N.J. 300 (2010), supports the trial court's determination. There, the plaintiff brought suit against her former employer, alleging violations of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -49. Id. at 308. The defendant retained a forensic computer expert to access the plaintiff's e-mail messages on her work-issued laptop computer.

Id. at 309. In doing so, the expert retrieved several e-mail messages that the plaintiff had exchanged with her lawyer. Ibid.

Two attorneys from the firm representing the defendant reviewed the e-mails, but did not inform the plaintiff's counsel about them until several months later. Id. at 310. The plaintiff's attorney demanded that the defendant's attorneys identify and return all privileged communications in their possession. Ibid. The employer's attorneys claimed that the communications were not privileged because the plaintiff did not have a reasonable expectation of privacy concerning the communications. Ibid.

The Court held that the plaintiff had a reasonable expectation of privacy in the e-mails she exchanged with her attorney. Id. at 321. The Court rejected the firm's contention that RPC 4.4(b) did not apply because the plaintiff left the e-mails behind on her laptop when she left the company, and did not send them inadvertently. Id. at 325-26. The Court held that the attorneys' review of the e-mails, and their use of the contents of one of the e-mails in responding to interrogatories, fell within the ambit and violated the rule. Id. at 326.

The Court noted that counsel for the defendant had not obtained the privileged documents in a malicious or clandestine manner, but it found that counsel had erred by failing to "set[]

aside the arguably privileged messages once [counsel] realized they were attorney-client communications[.]" Ibid. The attorneys "should have promptly notified opposing counsel when [they] discovered the nature of the e-mails." Ibid.

The circumstances presented here are substantially similar. Plaintiff's attorney received documents that he knew or should have known were privileged. Counsel could not reasonably assume that the privilege was inapplicable. As in Stengart, counsel had an obligation to cease reading the documents and promptly notify opposing counsel that he had received them when he realized the nature of the documents. Therefore, we reject plaintiff's contention that Levine did not violate RPC 4.4(b).

Plaintiff further argues that the court erred by disqualifying Levine from serving as his attorney. He contends that SMC would not be prejudiced if Levine continues as his attorney. Again, we disagree.

In Stengart, the Court remanded the matter to the trial court to determine the appropriate remedy for the RPC 4.4(b) violation. Id. at 326-27. The Court said that in considering disqualification, the trial court should consider "the seriousness of the breach in light of the specific nature of the [material], the manner in which [the information] [was]

identified, reviewed, disseminated, and used," and other relevant factors. Id. at 327.

The court should also balance "the need to maintain the highest standards of the [legal] profession against a client's right freely to choose his counsel." Id. at 327 (citations and internal quotation marks omitted); see also Maldonado v. New Jersey ex rel. Admin. Office of the Courts-Prob. Div., 225 F.R.D. 120, 139 (D.N.J. 2004) (noting factors to consider in determining whether an attorney's violation of RPC 4.4(b) warrants disqualification).

Here, the trial court noted that Levine "knew or should have known that the [documents] w[ere] privileged," and that he waited several months before informing opposing counsel that he had received them. In addition, the court stated that Levine had acknowledged that he "reviewed the documents in depth" and "disseminate[d] the information to an expert." Further, the court found that the information had a significant bearing on the medical malpractice claim against Dr. Wagner and SMC. The court also incorporated findings from its March 12, 2014 opinion, where the court determined that SMC had never authorized the disclosure. The court also found that the prejudice to SMC from the disclosure "is immeasurable[.]"

We are convinced that trial court's findings are entitled to our deference because they are based on sufficient credible evidence in the record. Rova Farms Resort, Inc. v. Investors Ins. Co. of America, 65 N.J. 474, 484 (1974). We conclude that the record fully supports the court's determination that, under the circumstances presented here, Levine must be precluded from continuing to serve as counsel for plaintiff.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION