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## Search for Truth vs. the Public Good: The Effect of the Patient Safety Act on Common-Law Discovery Rules

Erik E. Sardiña

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## SEARCH FOR TRUTH VS. THE PUBLIC GOOD: THE EFFECT OF THE PATIENT SAFETY ACT ON COMMON-LAW DISCOVERY RULES

**Erik E. Sardiña<sup>†</sup>**

“I know no method to secure the repeal of bad or obnoxious laws so effective as their stringent execution.”<sup>1</sup>

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“Hard cases, it has been frequently observed, are apt to introduce bad law.”<sup>2</sup>

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<sup>1</sup> Ulysses S. Grant in his first inaugural address (Mar. 4, 1869), available at [http://avalon.law.yale.edu/19th\\_century/grant1.asp](http://avalon.law.yale.edu/19th_century/grant1.asp).

<sup>2</sup> Winterbottom v. Wright, (1842) 152 Eng. Rep. 402 (Court of Exchequer) 402 (Robert Rolfe, 1st Baron Cranworth).

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## I. INTRODUCTION

In 1999, the Institute of Medicine reported that as many as 98,000 deaths were attributed to medical error nationally each year.<sup>3</sup> In 2000, the health care industry in New Jersey ranked forty-eighth in patient care and safety.<sup>4</sup> Considering these findings, the New Jersey Legislature enacted the Patient Safety Act (hereinafter the “Act”) in 2004 in order to improve patient care.<sup>5</sup> With the central objective to assure that hospitals and health care facilities report certain serious preventable adverse events to government agencies,<sup>6</sup> the statute provides a mechanism for hospitals to engage in a process of self-critical analysis through

<sup>3</sup> COMM. ON QUALITY OF HEALTH CARE IN AM., INST. OF MED., TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM 1 (Linda T. Kohn et al. eds., 2000) [hereinafter IOM REPORT]. See also S. 2015, 210th Leg., at 5 (N.J. 2002) (statement to New Jersey Senate for S. 2105 as pre-filed for introduction in the 2002 session).

<sup>4</sup> S. 2015, 210th Leg., at 5 (N.J. 2002) (statement to New Jersey Senate for S. 2105 as pre-filed for introduction in the 2002 session). While New Jersey ranked as the third-worst state with respect to patient safety in 2000, the cross-state ranking continued to drop. In 2006, Health Grades ranked New Jersey last for hospital patient safety. See HEALTH GRADES, INC. THIRD ANNUAL PATIENT SAFETY IN AMERICAN HOSPITALS STUDY 3 (2006), available at <http://www.allhealth.org/briefingmaterials/HealthGradesQualityStudy-75.pdf>. In 2011, Health Grades determined that New Jersey ranked forty-ninth in risk adjusted bloodstream infection rates. See HEALTH GRADES, INC. EIGHTH ANNUAL PATIENT SAFETY IN AMERICAN HOSPITALS STUDY 3 (2011), available at <https://www.cpmhealthgrades.com/CPM/assets/File/HealthGradesPatientSafetyInAmericanHospitalsStudy2011.pdf>.

<sup>5</sup> N.J. STAT. ANN. § 26:2H-12.24(c) (West 2004).

<sup>6</sup> § 26:2H-12.25(a)-(e).

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confidential, cross-disciplinary communication.<sup>7</sup> The Act, which attempts to create a non-punitive approach to patient safety,<sup>8</sup> generally protects the confidentiality of documents within its purview.<sup>9</sup> Yet with the passage of the bill and its mandatory application, the degree to which the Act modifies the common-law approach is unclear.<sup>10</sup>

This Note analyzes the evidentiary privilege afforded to self-critical analysis in New Jersey. Specifically, this Note focuses on the degree to which the Patient Safety Act replaces the New Jersey courts' grant of discovery rights to factual portions of materials and documents created as part of a process of self-critical analysis within the medical industry. Given New Jersey's preference for broad discovery,<sup>11</sup> New Jersey's Patient Safety Act does not replace the common-law rule, which allowed discovery of factual portions of documents generated during self-critical analysis of adverse events. Part I of this Note will demonstrate the statute's ambiguity as to the degree of discoverability these documents face and engage in an interpretative examination of the Act applying those factors dictated by the New Jersey judiciary.

Part II of this Note will discuss the history of reporting adverse events in the United States and New Jersey, as well as the status of the self-critical analysis privilege in New Jersey prior to the Legislature's adoption of the Patient Safety Act in 2004. Part III will discuss the enactment of the Patient Safety Act and its relationship to the New Jersey Superior Court Appellate Division's decision in *Christy v. Salem*.<sup>12</sup> Part IV will discuss how New Jersey courts have approached discovery of factual portions of self-critical reports created by health care professionals and institutions following the adoption of the Patient Safety Act. Part V will apply statutory interpretation to determine whether the Patient Safety Act bars discovery of factual portions of documents created as part of a process of self-critical analysis.

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<sup>7</sup> § 26:2H-12.25(f)-(k).

<sup>8</sup> § 26:2H-12.24(c).

<sup>9</sup> See § 26:2H-12.25(f)-(k).

<sup>10</sup> See, e.g., *Applegrad v. Bentolila*, No. L-0908-08, 2011 WL 13700 (N.J. Super. Ct. App. Div. Jan. 11, 2011) [hereinafter "Applegrad I"].

<sup>11</sup> See *Christy v. Salem*, 841 A.2d 937, 942 (N.J. Super. Ct. App. Div. 2004) (citing *Kernan v. One Washington Park Urban Renewal Assocs.*, 713 A.2d 411, 426 (N.J. 1998)).

<sup>12</sup> See *Christy*, 841 A.2d at 937.

## **II. SELF-CRITICAL ANALYSIS PRIVILEGE IN NEW JERSEY: AN OVERVIEW**

### *A. What is Self-Critical Analysis*

New Jersey courts,<sup>13</sup> along with other jurisdictions,<sup>14</sup> recognize a privilege of analysis contained in evaluative reports. The self-critical analysis privilege generally requires the following: (1) that the information sought resulted from self-critical analysis conducted by the party seeking to invoke the privilege; (2) that public policy encourage preservation of an atmosphere that promotes uninhibited flow of the information within the industry; and (3) that disclosure of such information would be detrimental to the free exchange of such information within the industry.<sup>15</sup> New Jersey courts have recognized the privilege within a number of industries, including employment<sup>16</sup> and health care.<sup>17</sup>

### *B. The Rise of Self-Critical Analysis Procedures in New Jersey*

As the health care industry flourished in the mid-twentieth century, national medical associations sought to improve patient care through the application of uniform standards of care.<sup>18</sup> These industry groups formed the Joint Commission on Accreditation of Hospitals (“Joint Commission”) to promote hospital-based reform through an evaluative process of health care institutions.<sup>19</sup> In 1965, hospitals seeking participation in the Medicare system could do so by meeting the Joint Commission’s accreditation criteria, thus solidifying its power as the leader in-patient care auditing.<sup>20</sup> In 1979, the Joint Commission implemented an auditing system among its accredited hospitals requiring participants to organize systems of quality assurance.<sup>21</sup> Under

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<sup>13</sup> See, e.g., *Payton v. New Jersey Turnpike Auth.*, 691 A.2d 321, 332-33 (N.J. 1997).

<sup>14</sup> See, e.g., *In re Crazy Eddie Sec. Litig.*, 792 F. Supp. 197, 205 (E.D.N.Y. 1992).

<sup>15</sup> See, e.g., *Wylie v. Mills*, 478 A.2d 1273, 1277 (N.J. Super. Ct. App. Div. 1984).

<sup>16</sup> See *Payton*, 691 A.2d at 332-33.

<sup>17</sup> See *Christy*, 841 A.2d at 940-41.

<sup>18</sup> See Carl F. Ameringer, *THE HEALTH CARE REVOLUTION: FROM MEDICAL MONOPOLY TO MARKET COMPETITION* 190-95 (Berkeley, CA 2008).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Reyes v. Meadowlands Hosp. Med. Ctr.*, 809 A.2d 875, 876-78 (N.J. Super. Ct. Law. Div. 2001).

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its current criteria for accreditation, hospitals must perform self-critical assessments in the wake of certain events involving potential medical errors or unanticipated negative outcomes.<sup>22</sup>

With the growth of the health care market and the promulgation of peer review policies for Joint Commission accredited hospitals, the New Jersey Legislature sought to mandate such a peer review policy for New Jersey hospitals. In 1999, the New Jersey Legislature enacted hospital licensing standards,<sup>23</sup> which required, among other things, that hospitals conduct medical “peer review programs” as a condition of their licensure.<sup>24</sup> In doing so, the Legislature required these programs to perform self-critical analysis of negative outcomes by evaluating patient care through ongoing monitoring.<sup>25</sup>

*C. Privileged: The New Jersey Courts Approach to Self-Critical Analysis*

In the wake of such accreditation requirements by the Joint Commission and the New Jersey Legislature, litigants began seeking materials associated with those peer review programs for use in medical malpractice suits. In *Christy v. Salem*, decided three months prior to the New Jersey Legislature’s adoption of the Patient Safety Act in April 2004, the New Jersey Superior Court Appellate Division treated facts in medical peer review reports separately from evaluative material.<sup>26</sup>

*Christy* arose out of a medical negligence action brought by a plaintiff, Gilbert Christy, who became paralyzed during his course of treatment at the defendant-hospital. Christy was injured in a car accident and taken to Capital Health System at Fuld.<sup>27</sup> After performing radiological studies on Christy, doctors prematurely removed his breathing tube resulting in his paralysis.<sup>28</sup> Christy filed a complaint alleging malpractice.<sup>29</sup> In the aftermath of his paralysis, the hospital’s internal “peer review committee” investigated the matter and generated

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<sup>22</sup> *Id.*

<sup>23</sup> N.J. ADMIN. CODE § 8:43G-2.12(a) (2012).

<sup>24</sup> § 8:43G-27.1(d).

<sup>25</sup> § 8:43G-27.5.

<sup>26</sup> *Christy*, 841 A.2d at 941-42.

<sup>27</sup> *Id.* at 938.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

a written report.<sup>30</sup> During discovery, depositions of treating physicians resulted in conflicting testimony regarding the factual account of his care.<sup>31</sup> In light of such discrepancies, the plaintiff sought a copy of that report.<sup>32</sup> The hospital resisted, claiming that the report was privileged from disclosure as confidential, self-critical analysis.<sup>33</sup> The trial court, after examining the report *in camera*, determined that it was not privileged, and that the report was discoverable in its entirety.<sup>34</sup>

In a unanimous decision by the Appellate Division, the three-judge panel affirmed the trial court's determination in part and reversed in part.<sup>35</sup> Rather than granting blanket permission to discover all information contained within the report, the Appellate Division allowed facts to be discoverable while barring discovery of evaluative and opinionated portions of the report.<sup>36</sup> The court further stipulated that those facts contained in documents falling within the rubric of self-critical analysis were not barred from discovery when they were also contained in other non-privileged sources.<sup>37</sup>

In his analysis, Judge Jack L. Lintner relied on precedent regarding the discoverability of documents created as part of a process of self-critical analysis in other non-medical related industries.<sup>38</sup> He pointed to the existence of the privilege under New Jersey common-law but noted that New Jersey courts are generally guarded in granting the privilege.<sup>39</sup>

In *Payton v. New Jersey Turnpike*, the New Jersey Supreme Court refused to "adopt the privilege of self-critical analysis as a full privilege."<sup>40</sup> Rather, the court viewed self-critical analysis as part of general confidentiality, the discoverability of which should be determined through the application of a balancing test.<sup>41</sup> Thus, New

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Christy*, 841 A.2d at 938-39.

<sup>33</sup> *Id.* at 939.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 940.

<sup>37</sup> *Id.* at 939-40.

<sup>38</sup> *See Christy*, 841 A.2d at 939-40.

<sup>39</sup> *See id.* at 939-41 (The court looked to the application of the self-critical analysis privilege in *Payton*, 691 A.2d 321 and *McClain v. College Hosp.*, 492 A.2d 991 (N.J.1985).).

<sup>40</sup> *Payton*, 691 A.2d at 331.

<sup>41</sup> *Id.*

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Jersey courts have established the privilege as a subclass of general confidentiality rather than making it grounds for categorical exclusion.<sup>42</sup> This approach was consistent with the character of New Jersey discovery rules, which prefer broad discovery to facilitate full disclosure of fact in order to promote settlement.<sup>43</sup>

Since New Jersey courts recognized the importance of confidentiality with regards to self-critical analysis, the *Payton* court considered the value of confidentiality through a balancing test.<sup>44</sup> The court found that “case-by-case” balancing of the party’s right to the information against the public interest in confidentiality would provide enough weight to self-critical analysis as to preclude disclosure.<sup>45</sup> However, the *Payton* court opined that most controversies should result in disclosure, as public policy arguments of the self-critical analysis privilege will not outweigh the benefits of discovery.

Relying on precedent set forth in *Payton*, the *Christy* court found “competing interests” impressing upon the prospective disclosure of the confidential peer review report:

On one hand, a patient has a legitimate interest in discovering “information concerning his care and treatment” which potentially could aid him “in prosecuting a personal injury malpractice suit.” On the other hand, a hospital’s “right to maintain the confidentiality of its peer review committee report embraces a public interest to improve the quality of care and help to ensure that inappropriate [medical] procedures, if found, are not used on future patients.”<sup>46</sup>

To account for the countervailing interests, the court treated factual portions of the committee report differently than the evaluative portions.<sup>47</sup> Specifically, the court held that the purely factual material

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<sup>42</sup> *Id.*

<sup>43</sup> *CPC Int’l, Inc. v. Hartford Accident & Indem. Co.*, 620 A.2d 462, 468 (N.J. Super Ct. App. Div. 1992) (citing *Werkheiser v. T.E. Warren, Inc.* 361 A.2d 603, 604 (N.J. Super. Ct. Law Div. 1976)).

<sup>44</sup> *Payton*, 691 A.2d at 331. *See also McClain* which applied a balancing test to determine the applicability of the privilege rather than recognizing the privilege in full. The court balanced the following criteria:

the extent to which the information may be available from another source;  
the degree of harm that the litigant will suffer from its unavailability;  
the possible prejudice to the agency investigation.

492 A.2d at 998-999.

<sup>45</sup> *Payton*, 691 A.2d at 331.

<sup>46</sup> *Applegrad*, 2011WL13700, at \*5 (quoting *Christy*, 841 A.2d at 940).

<sup>47</sup> *See Christy*, 841 A.2d at 941.

outlined in the relevant section of the report was discoverable while opinions, analyses, and findings of fact concerning the events that are the subject of the plaintiff's case were protected from disclosure.<sup>48</sup> In distinguishing between factual and evaluative aspects of a hospital's self-assessment materials, the court observed that the availability of factual information from other sources does not necessarily preclude disclosure of facts contained in the materials in question.<sup>49</sup>

The court further required that the plaintiff seeking discovery of such deliberative materials show a compelling need for disclosure.<sup>50</sup> The resulting decision ultimately valued a patient's right to know to a greater extent than the societal benefits of hospitals conducting fully confidential self-critical evaluations.

As a result, *Christy* established three important holdings regarding the discoverability of materials claimed to be protected under the self-critical analysis theory: (1) courts are to conduct a balancing test of the competing policy interests when determining the discovery of information contained within self-evaluative reports;<sup>51</sup> (2) when balancing the countervailing implications, discovery of factual information appears appropriate in the context of medical malpractice litigations;<sup>52</sup> (3) the mere result that factual information contained within these reports is also found in other sources does not bar discovery of those facts from the "privileged" materials.<sup>53</sup>

### III. THE PATIENT SAFETY ACT

#### A. *Why A Bill Was Introduced: Mandatory Reporting*

While New Jersey common-law separates fact from opinion, the balancing test only applies to material that was prepared for mandatory government reports or reports created as part of self-critical analysis.<sup>54</sup> The New Jersey Legislature codified this privilege for the health care

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<sup>48</sup> *Id.* at 941-43.

<sup>49</sup> *Id.* at 941-42.

<sup>50</sup> *Id.* at 942.

<sup>51</sup> *Id.* at 940 (citing *Payton*, 691 A.2d at 333).

<sup>52</sup> *Id.* at 942.

<sup>53</sup> *Christy*, 841 A.2d at 941-42.

<sup>54</sup> *Kopacz v. Del. River and Bay Auth.*, 225 F.R.D. 494, 497 (D.N.J. 2004) (citing *Melhorn v. N.J. Transit Rail Operations, Inc.*, No. CIV.A. 98-CV-6687, 2001 WL 516108, at \*1 (E.D. Pa. May 15, 2001)).

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industry with adoption of the Patient Safety Act.<sup>55</sup>

Prior to its enactment, however, the New Jersey Legislature gradually regulated the health care industry's approach to patient care. In 1970, the Legislature limited the disclosure of information secured by utilization review committees of certified hospitals except to physicians, hospital administrators, insurance carriers, or representatives of related government agencies.<sup>56</sup> In another statute predating the Patient Safety Act, the Legislature protected hospital peer-review committees responsible for reviewing a physician's credentials from civil liability.<sup>57</sup> However, the statute did not codify any privilege pertaining to information created during that process.<sup>58</sup>

In 1999, the New Jersey Department of Health and Human Services ("Department"), which the Legislature vested authority to license hospitals within the state,<sup>59</sup> codified its most significant provision affecting the management of patient care by hospitals. As part of the state's current licensing process, the Department requires hospitals to implement a "hospital-wide continuous quality improvement program" in order to "monitor[] patient care."<sup>60</sup> These programs command hospitals to appoint a quality improvement committee with the purpose of reviewing and assessing "risk management activities" in order to improve overall patient care.<sup>61</sup> Yet despite these inroads in patient care, New Jersey was the only state that did not statutorily protect the discovery of materials created by peer review committees by 1999.<sup>62</sup>

### *B. The Patient Safety Act's March through the Legislature*

Since the implementation of N.J.A.C. § 8:43G-27.1, the Legislature has sought to create mandatory reporting of adverse events by hospitals to state agencies while limiting the discoverability of

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<sup>55</sup> See N.J. Stat. Ann. §§ 26:2H-12.23 – 12.25 (West 2004).

<sup>56</sup> § 2A: 84A-22.8. For an explanation of utilization review committees see *Todd v. So. Jersey Hosp. Sys.*, 152 F.R.D. 676, 682 (D.N.J. 1993), which describes such committees as hospital entities responsible for implementation of utilization review plans required for participation under the Social Security Act.

<sup>57</sup> § 2A:84A-22.10.

<sup>58</sup> See § 2A:84A-22.10.

<sup>59</sup> See § 26:2H-1 *et seq.*

<sup>60</sup> N.J. ADMIN. CODE § 8:43G-27.1(b) (20012).

<sup>61</sup> § 8:43G-27.1(d)-(e).

<sup>62</sup> IOM REPORT, *supra* note 3, at 1999.

documents created in connection with hospital's compliance.<sup>63</sup> In 2002, Democratic Senator John Girgenti<sup>64</sup> first introduced a version of the Patient Safety Act in order to "allow health care facilities to continue to engage in open and frank discussion without fear of self-incrimination."<sup>65</sup> This version sought to codify the self-critical analysis privilege by barring discovery or admissibility of any "self-critical analysis."<sup>66</sup> The bill specifically pronounced "all facts related to the adverse event would continue to be available through the normal discovery process."<sup>67</sup> The bill remained stagnant after being referred to the Senate Health, Human Services and Senior Citizens Committee.<sup>68</sup>

On January 13, 2004, a redrafted version of the Patient Safety Act was introduced to the Senate.<sup>69</sup> Comparable to the 2002 bill, the 2004 version (hereafter "S. 557") embodied the basic principle of limiting discovery of materials produced in connection with health care quality control committees. However, the primary role of the bill was the creation of a mandatory reporting requirement for hospitals that

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<sup>63</sup> See, e.g., S. 2105, 210th Leg. (N.J. 2002).

<sup>64</sup> Senator Girgenti served twelve years in the New Jersey General Assembly before entering the Senate in 1990. From 1990 until 2012, he represented the 35th Legislative District comprising townships in southeastern Passaic County, New Jersey. See Senator John A. Girgenti's New Jersey Senate Democrats biography available at <http://njsendems.com/senator.asp?sid=35>.

<sup>65</sup> S. 2105, 210th Leg. (N.J. 2002). Note that an identical version of S. 2105, numbered A. 2658, was introduced in the Assembly. See S. 2105, 210th Leg. (N.J. 2002) (Main bill information available at <http://www.njleg.state.nj.us/bills/BillView.asp> (follow "Bills 2002-2003" hyperlink; then follow "Bill Number" hyperlink; then search "Bill Number" for "S2105").).

<sup>66</sup> The bill defined self-critical analysis as "confidential, critical, evaluative or deliberative reports, opinions or materials prepared by a healthcare facility and its staff in connection with a medical error." Additionally, S. 2105 proposed the following materials to be not considered privileged: "information obtained by observation, sampling, examining, auditory or monitoring by any regulatory agency; information obtained from a source independent of the self-critical analysis review; and information exchanged by and among the department and other appropriate regulatory agencies pursuant to an agreement between or among those agencies." S. 2105, 210th Leg. (N.J. 2002).

<sup>67</sup> S. 2105, 210th Leg. (N.J. 2002).

<sup>68</sup> The bill was reintroduced to the Senate in January 2004 as S. 527, however the bill again did not move beyond the committee phase. See S.2105, 210th Leg. (N.J. 2002) (Main bill information available at <http://www.njleg.state.nj.us/bills/BillView.asp> (follow "Bills 2002-2003" hyperlink; then follow "Bill Number" hyperlink; then search "Bill Number" for "S2105").) and S. 527, 211th Leg. (N.J. 2004) (Main bill information available at <http://www.njleg.state.nj.us/bills/BillView.asp> (follow "Bills 2004-2005" hyperlink; then follow "Bill Number" hyperlink; then search "Bill Number" for "S527").).

<sup>69</sup> S. 557, 211th Leg. (N.J. 2004) (as introduced on Jan. 13, 2004).

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experienced an “adverse event.”<sup>70</sup> In so doing, the bill’s sponsors proposed the bill to “encourage disclosure of these events so that they can be analyzed and used for improvement.”<sup>71</sup> The bill required health care facilities to report adverse events to the Department.<sup>72</sup> Additionally, the bill barred discovery of any document, material or information created for the Department pursuant to reporting requirements.<sup>73</sup> Subsection (g) of the bill provided that “any documents, materials or information developed by a health care facility [in connection with reporting adverse events to the Department] shall not be subject to discovery or admissible as evidence or otherwise disclosed in any civil, criminal or administrative action.”<sup>74</sup> Subsection (h) ensured that information present in these documents would not bar “availability, admissibility, or use. . . if obtained from any source or context other than those specified.”<sup>75</sup> Thus, the mere fact that a statement was present in a document created pursuant to this proposed Act would not bar its discoverability if contained in a document that was otherwise discoverable.

S. 557 was referred to the Senate Health, Human Services and Senior Citizens Committee, which approved the bill without change.<sup>76</sup> In a statement to the Senate, the Senate Committee noted that limitations on discovery “shall not be construed to affect, in any way, the availability, admissibility or use of any such documents, materials or information if obtained from any source or context other than those specified.”<sup>77</sup> On February 23, 2004, the Senate passed the bill by

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<sup>70</sup> As introduced, the bill defined an “adverse event” 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.” S. 557, 211th Leg. (N.J. 2004).

<sup>71</sup> S. 557, 211th Leg. (N.J. 2004) (as introduced on Jan. 13, 2004).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* Additionally, Subsection (g) disallowed the “documents, material or information” from being used in “an adverse employment action or in evaluation of decisions made in relation to accreditation, certification, credentialing or licensing of an individual” or “considered a public record” under the state’s sunshine laws. *Id.*

<sup>75</sup> S. 557, 211th Leg. (N.J. 2004) (as introduced on Jan. 13, 2004).

<sup>76</sup> See S. 527, 211th Leg. (N.J. 2004) (Main bill information available at <http://www.njleg.state.nj.us/bills/BillView.asp> (follow “Bills 2004-2005” hyperlink; then follow “Bill Number” hyperlink; then search “Bill Number” for “S557”).) and S. 557, 211th Leg. (N.J. 2004) (as Senate Committee Substitute on Jan. 26, 2004).

<sup>77</sup> S. 2015, 210th Leg. (N.J. 2002) (statement to New Jersey Senate for S. 2105 as pre-filed for introduction in the 2002 session).

unanimous vote and the Assembly subsequently received the bill.<sup>78</sup> In the Assembly Health and Human Services Committee (“Assembly Committee”), legislators attempted to address the Appellate Division’s holding in *Christy v. Salem* decided on February 17, 2004. The Assembly Committee amended the bill by including the word “discoverability” to Subsection (h).<sup>79</sup> Additionally, the Assembly Committee added the following language to the bill: “Nothing in the substitute is to be construed to increase or decrease the discoverability, in accordance with *Christy v. Salem* of any documents, materials or information if obtained from any source or context other than those specified in this substitute.”<sup>80</sup> The Assembly unanimously passed the bill.<sup>81</sup> On March 29, 2004, S. 557 passed the Senate by a unanimous vote and was subsequently entered as public law upon approval by then-Governor Jim McGreevey.<sup>82</sup>

### C. The Legislative Findings of the Patient Safety Act

As enacted, the Patient Safety Act seeks to improve patient safety through a goal of “craft[ing] a health care delivery system that minimizes. . . the harm to patients that result from the delivery system itself.”<sup>83</sup> To encourage compliance, the Legislature codified in its findings the importance of open dialogue even at the expense of limited liability:

[I]t is critical to create a non-punitive culture that focuses on improving processes rather than assigning blame. Health care facilities and professionals must be held accountable for serious preventable adverse events; however, punitive environments are not particularly effective in promoting accountability and increasing

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<sup>78</sup> See S. 557, 211th Leg. (N.J. 2004) (Main bill information available at <http://www.njleg.state.nj.us/bills/BillView.asp> (follow “Bills 2004-2005” hyperlink; then follow “Bill Number” hyperlink; then search “Bill Number” for “S557”).).

<sup>79</sup> ASSEMBLY HEALTH & HUMAN SERVS. COMM., STATEMENT TO SENATE COMM. SUBSTITUTE FOR S. 557, S. 557, 211th Leg. (N.J. 2004).

<sup>80</sup> *Id.* Furthermore, the Statement accompanying the Assembly Committee’s amended version of the bill merely quotes the amended language from the bill regarding *Christy* without providing any additional insight into the meaning or intent of the included language. *See id.*

<sup>81</sup> See S. 557, 211th Leg. (N.J. 2004) (Main bill information available at <http://www.njleg.state.nj.us/bills/BillView.asp> (follow “Bills 2004-2005” hyperlink; then follow “Bill Number” hyperlink; then search “Bill Number” for “S557”).).

<sup>82</sup> *Id.*

<sup>83</sup> N.J. Stat. Ann. § 26:2H-12.24(c) (West 2004).

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patient safety, and may be a deterrent to the exchange of information required to reduce the opportunity for errors to occur in the complex system of care delivery. Fear of sanctions induces health care professionals and organizations to be silent about adverse events, resulting in serious under-reporting[.]<sup>84</sup>

Thus, the Legislature believed that in order to ensure compliance and truthful reporting to the government agency, hospitals had to be protected from such materials resulting in self-incriminating consequences.

#### ***IV. NEW JERSEY COURTS' CURRENT APPROACH TO SELF-CRITICAL ANALYSIS PRIVILEGE***

While the Patient Safety Act took effect on October 24, 2004,<sup>85</sup> litigants in medical malpractice suits continued to rely on the bifurcated standard set forth in *Christy*.<sup>86</sup> Despite the Patient Safety Act's effect on discoverability of peer review documents, New Jersey courts tended to gloss over the issue in subsequent years.

##### *A. Kowalski v. Palav*<sup>87</sup>

In a 2010 decision, the Appellate Division briefly addressed the trial court's management of a "Criterion Report"<sup>88</sup> prepared by the Hospital's Quality Assurance Committee during the discovery process and trial.<sup>89</sup> The trial court granted the plaintiff access to the report during discovery but ultimately disallowed its introduction as evidence during trial.<sup>90</sup> Regarding the trial court's decision requiring the hospital to

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<sup>84</sup> § 26:2H-12.24(e).

<sup>85</sup> § 26:2H-12.23 (West 2004). *See also* Patient Safety Act, ch. 9, 2004 N.J. Laws (approved April 27, 2004).

<sup>86</sup> *See, e.g.*, Brief for Defendants, *Manalio v. Summit Hosp.*, No. UNN-L-3300-04, 2005 WL 5921141 (N.J. Super. Ct. Law Div. Dec. 14, 2005).

<sup>87</sup> *Kowalski v. Palav*, No. L-4433-99, 2010 WL 4107751 (N.J. Super. Ct. App. Div. Aug. 25, 2010).

<sup>88</sup> According to the court, the report was a one-paragraph document that briefly stated the events surrounding the distressed birth of the plaintiff. *Id.* at \*16.

<sup>89</sup> *Id.* at \*15-20.

<sup>90</sup> *Id.* at \*15-17. During interrogatories, defendant physician was asked whether the hospital or any staff prepared any notes concerning the adverse event. The defendant responded "No." During trial Plaintiff's counsel served a notice to produce any such documents. The defendant hospital produced the report in question. Subsequently, the trial court allowed plaintiffs to use the document to challenge defendant physician's credibility. However, the judge denied defendant's request to "read the content of the report for the

produce the report, the appellate court upheld the ruling:

Unlike the internal investigative report we considered in *Christy*. . . the Criterion Report does not contain the results of any deliberative process undertaken by the quality assurance committee. Rather, it briefly states the facts of the case and then notes that the attending physician recommended it for discussion from an educational perspective. This report is not the type warranting privilege under N.J.S.A. 26:2H-12.25(k).<sup>91</sup>

The court's decision regarding the discoverability of the Criterion Report in *Kowalski* appears to contradict the statutory language and the Legislature's codified intent for enacting the statute. As previously noted, subsection (3)(k) of the Patient Safety Act arguably intends for the statute not to disturb the *Christy* court's holding regarding the discoverability of parallel information if it is contained in both the documents created in connection with the mandatory reporting system as well as other sources not listed in the statute.<sup>92</sup> Furthermore, the statute was specifically enacted to shift the punitive approach to improving patient care to a non-punitive focus.<sup>93</sup>

#### B. *Applegrad v. Bentolila I*:<sup>94</sup> *The Dilemma*

The extent to which the Act affected the *Christy* holding did not appear before the Appellate Division until *Applegrad v. Bentolila I*.<sup>95</sup> In this medical malpractice action arising out of injuries sustained during the minor plaintiff's birth,<sup>96</sup> the plaintiffs challenged the trial court's interlocutory rulings sustaining the assertion of privilege as to thirteen pages of internal hospital records that were withheld during discovery. The records were withheld on the basis that they were fully protected from disclosure under the Patient Safety Act as well as under other statutes, regulations, and case law.<sup>97</sup> During discovery, plaintiffs sought defendant hospital's production of documents surrounding the adverse

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record. . . [because] 'the results of these meetings are not admissible under the law.'" *Id.* at \*15-16.

<sup>91</sup> *Id.* at \*20.

<sup>92</sup> See *Applegrad I*, 2011 WL 13700, at \*8.

<sup>93</sup> N.J. STAT. ANN. § 26:2H-12.24(a)-(e) (West 2004).

<sup>94</sup> See *Applegrad I*, 2011 WL 13700.

<sup>95</sup> *Id.* at \*1.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at \*1-2.

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event in question.<sup>98</sup> The hospital withheld certain quality assurance reports, claiming its discovery was barred under the self-critical analysis theory.<sup>99</sup>

The panel remanded the matter to the trial court, finding the record to be inadequate concerning the specific genesis of each document.<sup>100</sup> After the plaintiffs moved to compel the production of the documents, the motion judge performed an *in camera* review of the reports.<sup>101</sup> As part of its review, the trial court applied the *Christy* standard and subsequently redacted certain opinionated portions.<sup>102</sup> However, prior to releasing the documents to the plaintiff, the defendant's counsel submitted an *ex parte* brief claiming, for the first time, that the Patient Safety Act protected the reports in total.<sup>103</sup> Subsequent to this *ex parte* communication, the motion judge denied the plaintiffs' motion.<sup>104</sup> In so doing, the judge relied on the following reasoning:

(1) the legislative policies underlying the [Patient Safety Act] encourage hospitals to perform confidential internal self-critical analyses after adverse events occur; (2) the one document that [the judge] otherwise would have released in redacted form to plaintiff's counsel under *Christy*. . . constituted 'a quality assurance report' fully protected from disclosure by the [Patient Safety Act]; (3) plaintiffs had not sufficiently proven a need for disclosure, as reflected by their ability to settle with [one defendant] without seeing the documents at issue; and (4) the judge's perception that the factual information on the quality assurance report otherwise could have been obtained by plaintiffs through discovery.<sup>105</sup>

The Appellate Division ultimately left the issue of discoverability undecided, instead holding that when a trial court reviews documents *in camera* it must "make specific determinations regarding [the] plaintiff's access to them."<sup>106</sup> Furthermore, the court, in remanding the action, required the trial judge to examine each document and iterate, as to each

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<sup>98</sup> *Id.* at \*2.

<sup>99</sup> *Id.*

<sup>100</sup> *Applegrad I*, 2011 WL 13700, at \*1. Plaintiffs allege that the employees of defendant hospital failed to sufficiently monitor the labor and delivery process resulting in their daughter experiencing oxygen deprivation culminating in brain damage.

<sup>101</sup> *Id.* at \*2.

<sup>102</sup> *Id.* at \*2-3.

<sup>103</sup> *Id.* at \*3.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* (footnote omitted)

<sup>106</sup> *Applegrad I*, 2011 WL 13700, at \*10.

document, whether the privilege was applicable and explain its rationale for ruling so.<sup>107</sup>

Despite the court's holding, it chose to "present an overview" of the divergent views of interpreting the meaning of the Patient Safety Act in light of its legal significance.<sup>108</sup> Following a comprehensive dissertation of the *Christy* decision and the applicable contents of the Patient Safety Act, the court detailed two interpretations of the Patient Safety Act particularly in light of the inclusion of subsection (3)(k).<sup>109</sup> The first, as advocated by the hospital defendant, advocates a narrow construction of subsection (k), "arguing that the factual/evaluative distinction adopted in *Christy* is not applicable to documents that are not generated within a hospital pursuant to the [Patient Safety Act]."<sup>110</sup> The opposing viewpoint promotes an interpretation as to the statute's reference to *Christy*, preserving its applicability and other legal authority "predating the [Patient Safety Act] to the extent they permitted full or partial disclosure of certain internal hospital self-assessments."<sup>111</sup> Such a reading contends that the "factual/evaluative distinction still applies to documents generated under the [Patient Safety Act] if the information is also contained in other discoverable sources that preexisted the PSA."<sup>112</sup> While the court chose not to resolve the interpretive issues, its holding imposed a procedural hurdle upon providers seeking a privilege under the Patient Safety Act.<sup>113</sup> By requiring providers to certify as to the origins of documents and their relation to the Patient Safety Act, hospitals must explain why materials are privileged; this forces trial judges to dictate detailed findings.<sup>114</sup>

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<sup>107</sup> To expedite the remand process, the court directed the hospital to furnish the trial court within thirty days with detailed certification, to address each document's origin, purpose, generation process, and relation to patient care. *Id.* at \*11.

<sup>108</sup> *Id.* at \*4.

<sup>109</sup> *Id.* at \*8.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Abbot S. Brown, *Hospital Malpractice: Finding the Needle in the Haystack*, 204 N.J.Law Journal 545 (May 30, 2011).

<sup>114</sup> *Id.*

*C. Muenken v. Toner*<sup>115</sup>

While the judiciary refused to resolve the issue in *Applegrad I*, the Appellate Division continued its trend to shorten the Patient Safety Act's limitations on discovery. In *Muenken v. Toner*, the court concluded that factual portions of a peer review committee's report were discoverable.<sup>116</sup> In doing so, the court applied the balancing test dictated in *Christy*,<sup>117</sup> reaffirming the underlying rationale for treating factual portions differently than evaluative portions with respect to the self-critical analysis privilege:

The privilege is not all-encompassing. It applies to limited portions of self-critical evaluations and reports, specifically those evaluative, deliberative non-factual portions that would have a chilling effect on doctors taking steps to improve their procedures. Furthermore, as in *Christy* [], the balancing approach has not resulted in a systematic barring of deliberative and evaluative material that unfairly prevents parties from obtaining truthful information.<sup>118</sup>

While a trial court is obligated to follow the precedent dictated in *Toner* and consequently apply the *Christy* balancing test, the underlying issue remains unresolved. In its *per curiam* opinion, the *Toner* court did not refer to the Patient Safety Act.<sup>119</sup> By failing to address the statute, the decision fails to definitively resolve the issue addressed by the *Applegrad I* court.

*D. Applegrad v. Bentolila (II):*<sup>120</sup> *A New Standard*

Although New Jersey courts continued to recognize the *Christy* standard, no court had engaged in any statutory analysis to resolve the question until the issue in the *Applegrad I* matter reemerged ripe for review.<sup>121</sup> The court examined the interplay between the qualified privilege enumerated in *Christy* and the dimensions of confidentiality proscribed by the Patient Safety Act through the lens of statutory

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<sup>115</sup> *Muenken v. Toner*, No. L-591-06, 2011 WL 2694431 (N.J. Super. Ct. App. Div. July 13, 2011).

<sup>116</sup> *Id.* at \*9.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *See id.* at \*1-9.

<sup>120</sup> *Applegrad v. Bentolila*, 51 A.3d 119 (N.J. Sup. Ct., App. Div., 2012) [hereinafter "*Applegrad II*"].

<sup>121</sup> *Id.* at 123.

interpretation.<sup>122</sup> The court held “that post-event investigatory and analytic documents exclusively created in compliance with the [Patient Safety Act] and its associated regulations, and not created for some statutory or licensure purpose, are absolutely privileged from disclosure under the [Patient Safety Act].”<sup>123</sup> In so doing, the court iterated a new standard that grants an absolute privilege to documents falling within the purview of the Patient Safety Act unless the procedural requirements of the Act were not observed or if the documents were generated for non-Act purposes. In such instances, the common-law standards – such as those developed in *Christy* – govern.<sup>124</sup>

The court reasoned that the Act’s purpose – “to create a non-punitive culture that focuses on improving processes rather than assigning blame” – could not be furthered if the Legislature intended plaintiffs to access factual portions of documents created for the sole purpose of the new reporting requirement.<sup>125</sup> Furthermore, the court deferred to the Department’s position that the Act protected information exclusively developed during the process of self-critical analysis.<sup>126</sup>

Despite its ultimate holding, the court branded the statute’s reference to *Christy* as “an eleventh-hour attempt by legislators to deal with brand-new case law.”<sup>127</sup> Furthermore, the court forewarned health-law professionals:

Another important caveat to bear in mind is that our construction of the PSA is not an invitation to health care providers to shield information that was previously accessible under *Christy* or under other law by indiscriminately labeling such formerly accessible items as “PSA material.” Nor does the law allow a health care facility to evade the limitations of N.J.S.A. 26:2H–12.25(h) and (k) by giving job titles to hospital personnel such as “PSA officers” when, in fact, they are performing functions that are not truly covered by the PSA.<sup>128</sup>

Through this caveat, the court cautions health care facilities against pretextual posturing.

While the *Applegrad II* court appears to resolve the ambiguity of

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 124 (quoting § 26:2H-12.25(g)).

<sup>126</sup> *Applegrad II*, 51 A.3d at 139-40.

<sup>127</sup> *Id.* at 138.

<sup>128</sup> *Id.* at 140-41.

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the Patient Safety Act, the court notes that the issue is still unresolved despite its holding.<sup>129</sup> On remand from *Applegrad I*, proponents for a continuance of the *Christy* standard contended that the provision at issue was unconstitutional under the laws of New Jersey.<sup>130</sup> The New Jersey Constitution affords the New Jersey Supreme Court absolute dominion over the judiciary's procedural rules, while evidentiary rules are adopted only through the participation of all three branches of government.<sup>131</sup> The court in *Applegrad II* left the constitutional issue unresolved:

Given this backdrop of constitutional and legal history, we decline to pronounce the confidentiality provisions in the PSA an invalid exercise of legislative power. Moreover, we agree with the trial judge that the ultimate assessment of this constitutional question is best reserved to the Supreme Court, as the final arbiter of the boundaries among our three branches of State government.<sup>132</sup>

#### V. APPLICATION OF NEW JERSEY COMMON-LAW ANALYSIS

Understandably, the reference to *Christy* in subsection (3)(k) has caused considerable consternation for courts, as evinced by the divergent holdings in *Muenken* and *Applegrad II*.<sup>133</sup> Discovery of factual information contained within reports created for the Department or documents generated to fashion such reports has considerable policy implications. Currently, the Appellate Division's application of the Patient Safety Act in light of the first two parts of *Christy* remains discordant.<sup>134</sup> While some appellate courts recognize the *Christy* standard in full, the court in *Applegrad II* resolved the question in favor of granting a broader privilege, with limited exceptions, rather than continued application of the *Christy* standard.

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<sup>129</sup> See *id.* at 145-46.

<sup>130</sup> *Id.* at 129.

<sup>131</sup> *Id.* at 145.

<sup>132</sup> *Applegrad II*, 51 A.3d at 146 (internal citation omitted).

<sup>133</sup> See, e.g., *Applegrad I*, 2011 WL 13700.

<sup>134</sup> See *supra* Part II.C. for a discussion of the three holdings dictated in *Christy v. Salem*.

A. *Process of Statutory Interpretation as Dictated by the New Jersey Supreme Court*

New Jersey's general rules of statutory construction require "words and phrases [to] be read and construed with their context, and [requires that they] shall, unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language."<sup>135</sup> The New Jersey Supreme Court recently dictated the appropriate method for engaging in textual interpretation of a statute.<sup>136</sup> The primary duty of the interpreting court is to "construe and apply the statute as enacted," and in doing so recognize that "[t]he Legislature's intent is the paramount goal."<sup>137</sup> First, it is necessary to determine whether the statute is "'clear and unambiguous, and susceptible to only one interpretation' . . . [or] if there is ambiguity that leads to more than one plausible interpretation."<sup>138</sup> It is clear, given judicial recognition in *Applegrad I*, that competing readings of the Patient Safety Act's reference to *Christy* are at least plausible.<sup>139</sup>

Second, any reading of the statute should presume words bear their ordinary meaning and have the same meaning throughout a document.<sup>140</sup> Any ambiguous statutory language requires an examination of the "extrinsic evidence, 'including legislative history, committee reports, and contemporaneous construction.'"<sup>141</sup>

B. *Does the Act Codify an Absolute Bar on Discovery of Materials Created under the Statute?*

As recognized in *Applegrad I*, one reading of the Patient Safety Act bars the factual/evaluative distinction adopted by *Christy* as to documents generated by a hospital pursuant to the statute.<sup>142</sup> Any

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<sup>135</sup> N.J. STAT. ANN. § 1:1-1. (West 2004).

<sup>136</sup> See *DiProspero v. Penn.*, 874 A.2d 1039, 1048-57 (N.J. 2005).

<sup>137</sup> *Id.* at 1048. (citing *In re Closing of Jamesburg High Sch.*, 416 A.2d 896, 900 (N.J. 1980) and *Frugis v. Bracigliano*, 827 A.2d 1040, 1057-58 (N.J. 2003)).

<sup>138</sup> *Id.* (quoting *Lazano v. Frank DeLuca Const.*, 842 A.2d 156, 161 (N.J. 2004)).

<sup>139</sup> See *Applegrad I*, 2011 WL 13700, at \*8.

<sup>140</sup> *DiProspero*, 874 A.2d at 1048 (citing *Lane v. Holderman*, 129 A.2d 8, 13 (N.J. 1954)).

<sup>141</sup> *Id.* at 1048-49 (quoting *Cherry Hill Manor Assocs. v. Faugno*, 861 A.2d 123, 129 (N.J. 2004)).

<sup>142</sup> See *Applegrad I*, 2011 WL 13700, at \*8.

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argument that the Patient Safety Act codifies a complete bar of discoverability of documents created within the purview of the statute would rely heavily on the language of the statute. The Act dictates that “documents, materials or information” received by the Department required by a process of reporting,<sup>143</sup> or otherwise developed as part of a process of self-critical analysis, “shall not be subject to discovery admissible as evidence or otherwise disclosed in any civil, criminal or administrative proceeding.”<sup>144</sup> Subsection (h) places an exception to the general rule: “the provisions of this [A]ct shall not be construed to increase or decrease, in any way, the availability, discoverability, admissibility or use of any such documents, materials or information if obtained from any source or context other than those specified in the [A]ct.”<sup>145</sup>

An analysis of the language in the statute could support the contention that the statute places an absolute bar on discovery of documents and other materials within its scope. The statute as written appears to begin with the premise that the self-critical analysis reports are fully protected from discovery and that the statute itself merely adds two important caveats.<sup>146</sup> The first, as stated in subsection (h), seeks to limit the statute from affecting sources independent from those specifically enumerated in the Act.<sup>147</sup> The second, as stated in subsection (k), provides that nothing in the Act shall be construed to affect the discoverability of such sources “in accordance with *Christy*[,] if obtained from any source or context other than those specified.”<sup>148</sup> The canon of statutory construction, “*expressio unius est exclusio alterius* –

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<sup>143</sup> N.J. STAT. ANN. § 26:2H-12.25(f) (West 2004).

<sup>144</sup> § 26:2H-12.25(g). Note that the enumerated materials of this subsection and subsection (f) are barred from use in adverse employment actions or “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.” § 26:2H-12.25(f)(2), (g)(2).

<sup>145</sup> § 26:2H-12.25(h).

<sup>146</sup> See §§ 26:2H-12.24(e), 12.25(f)-(k).

<sup>147</sup> § 26:2H-12.25(h). For any party seeking production of facts contained within evaluative reports, an important argument would be that the documents are not those specifically listed. Thus, not only is the information outside the scope of the Act, but also subsection (h) ensures that the Act in no way affects their discoverability. For example, if the document was not developed by a healthcare facility as part of a process of self-critical analysis or for a patient or patient’s family, then the Act would not affect its discoverability.

<sup>148</sup> § 26:2H-12.25(k).

expression of one thing suggests the exclusion of another left unmentioned – sheds some light on the interpretative analysis.”<sup>149</sup> Such an interpretation would dictate that the Legislature’s specific inclusion of the third part of the *Christy* holding, without mention of the other parts, implies that the factual/evaluative standard is excluded.

Not only does a reading of the statute support such an interpretation, but an examination of the pertinent legislative history also promotes a narrow reading of the statute. In 2002, S. 2015 sought to codify the self-critical analysis privilege with respect to the health care industry, but in so doing clearly allowed “all facts related to the adverse event . . . to be available through the normal discovery process.”<sup>150</sup> Arguably, by not including this language in the 2004 version of the bill, the Legislature intentionally sought to remove such a caveat to the privilege. In fact, the Legislature made no mention of the factual/evaluative distinction in any draft after 2002 or in any statement accompanying such drafts.<sup>151</sup> Furthermore, S. 2105 was reintroduced to the Senate Committee, as S. 527, on the same day that S. 557 was introduced to the same committee. While “an affirmative expression ordinarily implies a negation of any other,”<sup>152</sup> there was no implied exclusion, but rather an explicit acceptance of S. 557 at the expense of S. 527, which had codified the factual/evaluative distinction.<sup>153</sup> Such a reading would ensure that the *Christy* caveat would not act as a long arm able to reach into these specific documents and reports simply because the information may be found elsewhere.

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<sup>149</sup> *Brodsky v. Grinnell Haulers, Inc.*, 853 A.2d 940, 946 (N.J. 2004) (citing *Chevron U.S.A. Inc. v. Echazabel*, 536 U.S. 73, 80 (2002) and *Allstate Ins. Co. v. Malec*, 514 A.2d 832, 835 (N.J. 1986). *See also*, *In re Vince*, 67 A.2d 141, 147 (N.J. 1949) (“Where the policy and purpose of the statute indicate that the common-law was intended to be superseded, and the working of the statute is so complete that it reasonably appears to be exclusive, the maxim *expressio unius est exclusio alterius* may be said to be applicable.”). Alternatively, the canon is referred to as *inclusio unius est exclusio alterius*).

<sup>150</sup> S. 2015, 210th Leg., at 6 (N.J. 2002) (statement to New Jersey Senate for S. 2105 as pre-filed for introduction in the 2002 session).

<sup>151</sup> *See* S. 527, 211th Leg. (N.J. 2004) (Main bill information available at <http://www.njleg.state.nj.us/bills/BillView.asp> (follow “Bills 2004-2005” hyperlink; then follow “Bill Number” hyperlink; then search “Bill Number” for “S557”).) and S. 527, 211th Leg. (N.J. 2004) (Main bill information available at <http://www.njleg.state.nj.us/bills/BillView.asp> (follow “Bills 2004-2005” hyperlink; then follow “Bill Number” hyperlink; then search “Bill Number” for “S527”).).

<sup>152</sup> *Moses v. Moses*, 53 A.2d 805, 810 (N.J. 1947).

<sup>153</sup> *See* sources cited *supra* note 76.

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In support of this reading, it should be noted that a shift has occurred since New Jersey courts first examined the self-critical analysis privilege. In refusing to support an absolute privilege, the *Payton* court dictated that recognized privileges “are rooted in our jurisprudential traditions and reflect a firm societal commitment to preserving particular confidences even at the expense of truth.”<sup>154</sup> However, the *Payton* court further iterated the importance of the self-critical analysis privilege in theory:

Valuable criticism can neither be sought nor obtained nor generated in the shadow of potential or even possible public disclosure. It is not realistic to expect candid expressions of opinion or suggestions as to future policy or procedures in an air of apprehension that such statements may well be used against one’s colleague or employer in a subsequent litigated matter. The purpose of an investigation intended to seek criticism. . .of then existing policy or procedure is self-improvement. The value of the investigation is questionable if the input is not reliable. It is clear that the reliability of the input in this situation varies inversely with the risk of disclosure of the input or resulting criticisms.<sup>155</sup>

Such language mirrors the Legislature’s concerns codified in the Patient Safety Act.<sup>156</sup>

Additionally, the court performed its analysis of the privilege within the context of a wrongful termination lawsuit.<sup>157</sup> As the Legislature noted in its findings, the implication of recognizing the privilege is to create an open forum for the health care industry to improve patient care by reducing “the harm to patients that results from the delivery” of care.<sup>158</sup>

*C. Reasons Why the Patient Safety Act Should be Read to Uphold Christy v. Salem*

The implication of an absolute bar of factual information contained within those sources specifically referenced by the Patient Safety Act would be drastic, and as such, New Jersey courts should continue to

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<sup>154</sup> *Payton*, 691 A.2d at 331.

<sup>155</sup> *Id.* (quoting *Wylie*, 478 A.2d at 1277).

<sup>156</sup> See N.J. STAT. ANN. § 26:2H-12.24(e) (West 2004).

<sup>157</sup> See *Payton*, 691 A.2d at 324.

<sup>158</sup> ASSEMBLY HEALTH & HUMAN SERVS. COMM., STATEMENT TO SENATE COMM. SUBSTITUTE FOR S. 557, S. 557, 211th Leg. (N.J. 2004).

follow *Christy* in light of significant public policy considerations.

Although courts are barred from “writ[ing] an additional qualification which the Legislature pointedly omitted in drafting its own enactment,”<sup>159</sup> lower courts have continued to apply the holding in *Christy* notwithstanding the statutory language with some success.<sup>160</sup> While such a construction may appear at odds with the legislative intent, a more critical examination of the statute supports these courts’ application of *Christy*.

New Jersey courts recognize that “the Legislature is presumed to be aware of judicial construction of its enactments,”<sup>161</sup> and that “a change of language in a statute ordinarily implies a purposeful alteration in [the] substance of the law.”<sup>162</sup> By those canons of statutory construction, courts will presume that the Legislature was aware of the *Christy* decision and that the Legislature consciously included subsection (k) in addition to subsection (h) as another condition to the limitation on discoverability of self-critical analysis. As the New Jersey Supreme Court bluntly stated, “we hardly need state that the Legislature knows how to incorporate into a new statute a standard articulated in a prior opinion of this Court.”<sup>163</sup> Consequently, “statutory language ‘must not, if reasonably avoidable, be found to be inoperative, superfluous or meaningless.’”<sup>164</sup>

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<sup>159</sup> Craster v. Bd. of Comm’rs of Newark, 87 A.2d 721, 723 (N.J. 1952).

<sup>160</sup> See *Kowalski*, 2010 WL 4107751, at \*19 and *Muenken*, 2011 WL 2694431, at \*5, \*9.

<sup>161</sup> N.J. Democratic Party, Inc. v. Samson, 814 A.2d 1028, 1039 n. 6 (N.J. 2002) (citing *Brewer v. Porch*, 249 A.2d 388, 391 (N.J. 1969)).

<sup>162</sup> *Nagy v. Ford Motor Co.*, 78 A.2d 709, 712 (N.J. 1951) (internal quotations omitted).

<sup>163</sup> *DiProspero*, 874 A.2d at 1050.

<sup>164</sup> *V.C. v. M.J.B.*, 748 A.2d 539, 548 (N.J. 2000) (quoting *In re Sussex Mun. Util. Auth.*, 486 A.2d 932, 934 (N.J. Super. Ct. App. Div. 1985), *cert. denied*, 531 U.S. 926. See also *Houman v. Mayor & Council of Borough of Pompton Lakes*, 382 A.2d 413, 434 (N.J. Super. Ch. Div. 1977) (“Courts must adopt that construction of a statute which reconciles and gives reasonable meaning to all its provisions. Statutes must, if reasonably possible, be accorded a construction which is sensible and consonant with reason and good discretion, rather than one which, though liberal, leads to absurd consequences.”) (internal citations omitted); *White v. Hunt*, 6 N.J.L. 415, 419 (1798) (adopting a contraction “not because it is clear of difficulties, but because it seems to be the freest of embarrassment”) (Kirkpatrick, J.); *Wallace v. Wallace*, 3 N.J. Eq. 616, 621 (Prerog. Ct. 1832) (“Where the construction of a statute is doubtful, it is proper in expounding it to take into consideration the consequences that may result from it; for it will never be presumed that the legislature intended to pass an act that would lead to mischievous results, or unsettle the general principles of the law.”).

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This principle of statutory interpretation requires two separate provisions, which serve as caveats to the general limitation of discoverability, be included and given unique applications. Under such a standard, the Legislature's specific reference to *Christy* in subsection (k) could therefore not merely be a reaffirmation of subsection (h). The alternative reading would render subsection (k) a redundant addition that serves as nothing but a superfluous footnote. As such, subsection (k) must preserve the applicability of *Christy* to the extent that courts permit the application of the factual/evaluative distinction to documents generated under the Patient Safety Act if the information is also contained in other discoverable sources.<sup>165</sup>

Beyond the redundancy that would result in reading subsection (k) merely to reaffirm subsection (h), such a result would have contemporaneous adverse consequences. This interpretation would limit litigants in medical malpractice suits from confirming factual information purported by opposing parties.<sup>166</sup>

Ultimately, "the search for truth is paramount in the litigation process."<sup>167</sup> The importance of full disclosure of all relevant facts is "designed to insure that the outcome of litigation in [New Jersey] shall depend on its merits in light of all of the available facts, rather than on the craftiness of the parties or the guile of their counsel."<sup>168</sup> Furthermore, the court in *Christy* recognized the essential role that granting litigants access to these reports would play with respect to the search for truth:

Oftentimes the comparison of different sources reveals inconsistencies that aid in the search for truth. This is especially true here, where plaintiff asserts discrepancies in the factual deposition testimony of various doctors. It is not unusual to find subtle

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<sup>165</sup> See *Applegrad I*, 2011 WL 13700, at \*8. If such interpretation were applied, litigants seeking production of documents falling within the purview of subsection (f) or (g) would merely have to show that the purely factual information is contained in other sources but need not have those sources to demonstrate such a connection. For example, if a litigant sought specific factual information pertaining to the position of a fetus prior to the performance of a caesarean section, the litigant could simply ask the performing physician in an interrogatory and/or subsequently request the production of factual portions of the physician's letter to the quality assurance board.

<sup>166</sup> See *Christy*, 841 A.2d at 941-42.

<sup>167</sup> *Id.* at 942 (citing *Kernan*, 713 A.2d at 426). See also *Hipp v. Prudential Cas. & Sur. Co. of St. Louis*, 244 N.W. 346, 348 (S.D. 1932) (citing *Curtis v. Michaelson* 219 N.W. 49, 52 (Iowa 1928) ("A statute intended for public benefit is to be taken most strongly against those who claim rights or powers under it and most favorably to the public.")).

<sup>168</sup> *Lang v. Morgan's Home Equip. Corp.*, 78 A.2d 705, 707 (N.J. 1951).

differences in both testimony and documented facts, which support an argument bearing on credibility.<sup>169</sup>

A narrow reading of the Patient Safety Act would constructively bar significant procedural opportunities typically afforded to litigants. By barring discovery of factual portions of these documents, litigants would be forced to rely on hospitals' strict record keeping and the testimony of physicians, who typically serve as defendants in the context of medical malpractice suits. Typically, statutes with procedural implications are "given a construction, if possible, which will preserve the essentials of harmony in the judicial system, and the established practice should not be changed except by the clearly expressed will of the lawmakers."<sup>170</sup> Undoubtedly, absent such a protection, a significant possibility arises: defendant physicians could perjure themselves with full knowledge that the only record of their indiscretion is contained within their privileged reports.

Furthermore, the *Christy* court previously addressed any argument that such a decision would not undercut compliance with reporting:

We are not convinced that hospital peer review committees will intentionally leave out purely factual information, which otherwise would provide the basis for their deliberative findings and opinions, simply because it is discoverable. The purely factual material outlined in the first paragraph of Fuld's report is discoverable.<sup>171</sup>

Additionally, it is likely that committees will continue to engage in a process of self-critical analysis of adverse events since other statutes already limit liability against such actors.<sup>172</sup> Furthermore, while failure to report does not impose specific sanctions under the statute, failure to do so could result in some form of administrative sanction.<sup>173</sup> Thus, not only does statutory construction support continued application of the *Christy* holding, but public policy considerations strongly encourage disclosure of factual information in malpractice litigations irrespective of the sources in which the fact is contained.

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<sup>169</sup> *Christy*, 841 A.2d at 941-42.

<sup>170</sup> *In re Kuser's Estate*, 26 A.2d 688, 698 (N.J. Prerog. Ct. 1942) (internal citation and quotation marks omitted).

<sup>171</sup> *Christy*, 841 A.2d at 942.

<sup>172</sup> See N.J. ADMIN. CODE § 8:43G-27.1 – 27.6 (2012). See also *Payton*, 691 A.2d at 332.

<sup>173</sup> James G. Sheehan and Michael A. Morse, 2007 Health L. Handbook § 6:31.

## **VI. CONCLUSION**

With the enactment of the Patient Safety Act in 2004, the effect upon the discovery of facts contained within self-evaluative reports created by health care institutions in connection with a medical error remains in flux. While proponents of continued disclosure argue that the Act merely codified such a right to litigants as dictated by the judicial system in *Christy v. Salem*, opponents of such a construction contend that the Act bars discovery of any information contained within self-critical reports created as an effort to comply with reporting requirements. A narrow interpretation of the statute supports such a contention in light of the Legislature's purposes for enacting the statute. However, given the ambiguous actions of the Legislature, as well as countervailing public policy considerations, New Jersey Courts should continue to grant access to purely factual information contained within these reports. Alternatively, the New Jersey Legislature should amend the statute (following the proper procedural requirements for imposing new evidentiary rules) to articulate its intended effect.