



**PSQIA Case Law Alert:  
Penman v. Correct Care Solutions**

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In July 2020, the U.S. District Court for the Western District of Kentucky issued a decision in the case of *Penman v. Correct Care Solutions, LLC*, No. 5:18-CV-00058-TBR-LLK, 2020 WL 4253214 (W.D. Ky. July 24, 2020).

**Background**

Plaintiff alleged that decedent Marcus Penman (“Penman”), who was an inmate at Kentucky Penitentiary, was mistreated and improperly cared for, ultimately leading to his death in 2017. Plaintiff sued multiple defendants, including Correct Care Solutions, LLC (“Correct Care”), which was responsible, in part, for Penman’s medical and mental healthcare while in the Kentucky Penitentiary. Plaintiff alleged multiple claims against Correct Care for excessive use of force, deliberate indifference to serious medical and mental health needs, failure to intervene and protect, and negligence.<sup>1</sup>

**Mortality and Morbidity Report and Review**

In response to plaintiff’s subpoena, in July 2019, the Kentucky Department of Corrections (“KDOC”) produced a three page document entitled Mortality and Morbidity Report and Review (“Report”). This Report had a heading with the words “Patient Safety Work Product – PSWP – this document is protected from further disclosure pursuant to 42 USC Section 299b-22” which appeared on all three pages.<sup>2</sup> A two months later, Correct Care’s counsel asserted the Report was privileged PSWP and asked counsel to destroy copies of the Report. Plaintiff’s counsel never responded to that request or the privilege assertion. In March 2020, the parties deposed an Officer Sargent. During the deposition, Correct Care’s counsel learned that the plaintiff still had a copy of the Report and again asserted the PSQIA privilege. Despite the assertion, plaintiff used the document when questioning Officer Sargent, presented the Report to him, and read portions of the Report into the record.<sup>3</sup> Correct Care subsequently sought a protective order to prevent further disclosure, to require the copies of the Report be returned or destroyed, and exclude any evidence derived from it.<sup>4</sup>

**Protective Order**

In analyzing whether it was appropriate to enter a protective order for the Report, the court first looked at the threshold matter of whether the Report constituted PSWP. If it did, the court recognized that PSWP remains privileged and confidential even after disclosure such that a protective order would be appropriate.<sup>5</sup> To be PSWP, the court stated that the report must be prepared for reporting to a PSO and actually reported to a PSO. In reviewing the facts, the court found that it was unclear whether the report was prepared for purposes other than reporting to a PSO.<sup>6</sup>

To support its privilege claim, Correct Care submitted an affidavit from the Program Manager for Continuous Quality Improvement at Wellpath (Correct Care’s successor) stating that these types of reports

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<sup>1</sup> *Penman v. Correct Care Solutions, LLC*, No. 5:18-CV-00058-TBR-LLK, 2020 WL 4253214, \*1 (W.D. Ky. July 24, 2020).

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

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at \*2.

<sup>6</sup> *Id.* at \*4.

are assembled and developed for reporting to a PSO.<sup>7</sup> The court pointed out, however, that the Program Manager did not state that the specific Report at issue was assembled and developed for the sole purpose of reporting to a PSO.<sup>8</sup> Because the affidavit does not address whether the Report was developed for reporting to a PSO, it was unclear if the Report was in fact reported or if it was in the PSES for reporting.

The court also took issue with the fact that the Report was produced by the KDOC. To the court, this raised questions about the Report's purpose<sup>9</sup> and whether it was created for reporting to the KDOC rather than for reporting to a PSO.<sup>10</sup> In the end, the court found that Correct Care failed to meet its burden of establishing the privilege applied.<sup>11</sup> Too many questions were left open: When was the Report created? Why was this specific Report created? When and why was it provided to the KDOC? Because Correct Care failed to establish the Report privileged PSWP, the court accordingly denied the motion for a protective order.<sup>12</sup>

### Key Takeaways

- The provider asserting the PSQIA privilege has the burden of establishing it applies. This means sufficient evidence needs to be submitted, which could include a PSO contract, PSES policies, and affidavits. Any affidavits submitted need to be drafted carefully and allege all facts relevant to establish compliance with the PSQIA such that the documents or information at issue are protected by the PSQIA privilege.<sup>13</sup>
- This case is a good reminder that entities and individuals to whom a provider discloses PSWP may be requested to disclose it. Those individuals and entities are "responsible persons" under the PSQIA and are subject to the confidentiality provisions. Providers should be proactive in reminding responsible persons that PSWP is privileged and confidential and should not be disclosed – even in response to a subpoena – except when certain exceptions apply. Providers may also consider requiring responsible persons to contact the provider when they receive disclosure requests so that the provider may handle and evaluate the validity and permissibility of the request.

For information about how to join a patient safety organization, contact the Midwest Alliance for Patient Safety ("MAPS") at [MAPSHelp@team-iha.org](mailto:MAPSHelp@team-iha.org) or 630-276-5657. MAPS is a federally certified patient safety organization and an IHA company.

*This document is for informational purposes only and does not constitute legal advice. For questions about this document, please contact the IHA Legal Affairs Department at [legal@team-iha.org](mailto:legal@team-iha.org) or 630-276-5506.*

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<sup>7</sup> *Id.*

<sup>8</sup> *Penman*, No. 5:18-CV-00058-TBR-LLK, \*4.

<sup>9</sup> Note that the PSQIA does not regulate how a provider uses PSWP, but it does regulate disclosures. *See* 42 C.F.R. Subpart C; Patient Safety and Quality Improvement, 73 Fed. Reg. 70,732, 70,778 (Nov. 21, 2008).

<sup>10</sup> *Penman*, No. 5:18-CV-00058-TBR-LLK, \*4. If the Report was created for reporting to the KDOC, the report would have been prepared for purposes other than reporting to a PSO and would not constitute PSWP. On the other hand, if the Report was produced for reporting to a PSO and then subsequently disclosed to the KDOC – even impermissibly – the Report would constitute PSWP and would remain confidential and privileged.

<sup>11</sup> *Id.* at \*5.

<sup>12</sup> *Id.*

<sup>13</sup> *See Ungurian v. Wilkes Barre Hospital*, 298 MDA 2019, \*17 (Pa. Super. Ct. Apr. 28, 2020)(finding the affidavit insufficient because it did not allege that the hospital developed the report at issue for the purpose of reporting to a PSO). *See also Thompson v. Southern Illinois Hospital Services*, No. 18-CV01520-NJR, 2020 WL 3962270, \*4 (S.D. Ill. July 13, 2020)(finding the affidavit sufficient to show the defendant developed the report at issue for reporting to a PSO).