

STATE OF MICHIGAN
IN THE SUPREME COURT

THE ESTATE OF DOROTHY KRUSAC,
Deceased, by her Personal Representative John
Krusac,

Plaintiff-Appellee,

v.

COVENANT HEALTHCARE, assumed name for
COVENANT MEDICAL CENTER, INC.;
COVENANT MEDICAL CENTER-HARRISON,
assumed name for COVENANT MEDICAL
CENTER, INC; COVENANT MEDICAL
CENTER, Michigan corporations, jointly and
severally

Defendant-Appellant,

Supreme Court Case No. 149270

Court of Appeals Case No. 321719

Saginaw County Circuit Court
No. 12-15433-NH-4

AMICI CURIAE BRIEF OF
THE AMERICAN MEDICAL ASSOCIATION AND
THE MICHIGAN STATE MEDICAL SOCIETY



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STATEMENT OF QUESTIONS PRESENTED

(1) Whether *Harrison v Munson Healthcare, Inc*, 304 Mich App 1; 851 NW2d 549 (2014, erred in its analysis of the scope of the peer review privilege, MCL 333.21515.

Plaintiff-Appellee says “no.”

Defendant-Appellant says “yes.”

Amici AMA and MSMS say “yes.”

(2) Whether the Saginaw Circuit Court erred when it ordered the defendant to produce the first page of its improvement report based on its conclusion that “objective facts gathered contemporaneously with an event do not fall within the definition of peer review privilege.”

Plaintiff-Appellee says “no.”

Defendant-Appellant says “yes.”

Amici AMA and MSMS say “yes.”

STATEMENT OF INTEREST

Amicus Curiae Michigan State Medical Society (“MSMS”) is a professional association which represents the interests of over 14,000 physicians in the State of Michigan. Organized to promote and protect the public health and to preserve the interests of its members, MSMS is frequently called upon to express its views with respect to legal issues of significance to the medical profession.

Amicus Curiae American Medical Association (“AMA”) is the largest professional association of physicians, residents and medical students in the United States. Through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all physicians, residents and medical students in the United States are represented in the AMA's policy-making process. AMA members practice and reside in all states, including Michigan. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. The AMA joins this brief on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts.

In the pending appeal, this Court will decide whether the Court of Appeals erred when it held that Michigan’s statutory peer review privilege did not protect the factual portion of an incident report from disclosure in *Harrison v Munson Healthcare, Inc*, 203 Mich App 1; 85 NW2d 549 (2014), and whether the Saginaw County Circuit Court erred when, in reliance upon *Harrison*, it ordered Defendant-Appellant Covenant Health Center to produce the first page of an “improvement report” on the basis that “objective facts gathered contemporaneously with an event do not fall within the definition of peer review privilege.”

The hospital peer review process, mandated by Article 17 of the Michigan Public Health Code, MCL 333.20101 et seq., is an important component of the delivery of health care in this state. As credentialed members of hospital medical staffs, members of MSMS and the AMA are actively involved in efforts to improve the quality of care provided in Michigan hospitals. Many MSMS and AMA members serve on peer review committees, which seek to ensure the quality of medical care provided in the hospital, and to review the qualifications and practices of physicians providing that care, for the purpose of reducing morbidity and mortality. MSMS and AMA members are also the subject of peer review activities.

Thus, MSMS and AMA have an active interest in the issues before this Court and, in accordance with MCR 7.306(D), greatly appreciate this opportunity to share their views.

STATEMENT OF FACTS

In this wrongful death action, Plaintiff John Krusac, Personal Representative of the Estate of Dorothy Krusac, alleges that Ms. Krusac fell off the procedure table in the cath lab when the nurses at Defendant Covenant Healthcare left her unattended and/or without close monitoring following a cardiac catheterization. The nurses' testimony contradicted this allegation. They maintained that Ms. Krusac's instability was noticed and two of the nurses reached her in time to cradle her and gently lower her to the floor without substantial trauma or impact. Nurse Deb Colvin testified that following the event she prepared an incident report, referred to as an "Improvement Report," describing what occurred. The discoverability of the Improvement Report is the central issue in this appeal.

Covenant asserts that the Improvement Report was given to Ms. Colvin's nursing supervisor and routed through the appropriate channels to the hospital's peer review committee, and is therefore statutorily protected from disclosure by Michigan's peer review privilege, particularly MCL 333.21515 and MCL 333.20175(8). Nonetheless, in light of the Michigan

Court of Appeals opinion in *Harrison v Munson Healthcare, Inc*, 304 Mich App 1; 851 NW2d 549 (2014), Saginaw County Circuit Court Judge Fred Borchard held that the first page of the Improvement Report is not privileged and must be disclosed while “[t]he second page and balance of the report reflect a review process and ... is confidential.” The Circuit Court explained:

This Court agrees with the [*Harrison v*] *Munson* case that objective facts gathered contemporaneously with an event do not fall within the definition of peer review privilege. Having reviewed the report in question, this Court concludes that the first page of the report, that is the front page, is not immune from disclosure as material collected pursuant to MCL 333.21515. As noted in the *Munson* case to hold otherwise would unilaterally insulate from discovery first-hand observations. In the case before this Court, Nurse Colvin was present and reported the “facts” under that section of the report on the same date and within 10 minutes of the occurrence.

Opinion and Order Re: Discovery at 2 (Exhibit A). The Court added that even assuming that the Report is “a peer review” document, “it is not the facts themselves that fall under the peer review privilege but rather what is done with those facts.” *Id.*

In *Harrison*, the parties were in the midst of a medical malpractice trial when, in response to questioning by the trial judge, an employee of Munson disclosed that a member of the surgical staff had prepared a peer review privileged incident report concerning a burn injury the plaintiff sustained during surgery. The trial judge ordered that it be produced for an in camera inspection. After completing his review of the report, Grand Traverse County Circuit Court Judge Philip E. Rodgers sua sponte declared a mistrial on the ostensible basis that the facts stated in the incident report were inconsistent with the defense being presented by the hospital. Judge Rodgers subsequently conducted an evidentiary hearing to determine whether the documents were protected by the peer review privilege and whether Munson and its counsel committed a breach of ethics by presenting a “habit and practice” defense while failing to disclose the contents of the incident report.

Judge Rodgers ultimately concluded that the report was protected by the peer review privilege provided in MCL 333.20175(8) and MCL 333.21515, but went on to hold that the hospital and its counsel nonetheless had a duty to review those privileged documents and disclose the facts and conclusions to plaintiff's counsel in response to plaintiff's discovery requests. Judge Rodgers further concluded that presenting a "habit and practice" defense without disclosing this information to plaintiff's counsel was cause for sanctions.

On appeal in *Harrison*, the Court of Appeals concluded that the initial page of the incident report did not fall within the peer review privilege but the balance of the report, which reflected a review process, was protected. The Court remanded for a redetermination of sanctions. Munson sought leave to appeal to this Court in *Harrison*, while Covenant filed an application in the Michigan Court of Appeals for leave to appeal from the *Krusac* ruling. Leave was denied in *Krusac*. See *Krusac v Covenant Medical Center Inc*, Order dated May 12, 2014 (Docket No. 321719). Covenant then sought leave to appeal to this Court. On June 20, 2014, this Court granted leave in *Krusac* and directed the parties to include among the issues to be briefed:

(1) whether *Harrison v Munson Healthcare, Inc*, 203 Mich App 1 (2014), erred in its analysis of the scope of the peer review privilege, MCL 333.21515; and (2) whether the Saginaw Circuit Court erred when it ordered the defendant to produce the first page of the improvement report based on its conclusion that "objective facts gathered contemporaneously with an event do not fall within the definition of peer review privilege."

See Order dated June 20, 2014 (Case No. 149270) (Exhibit B). The *Harrison* application was simultaneously held in abeyance pending resolution of this appeal in *Krusac*. On November 4, 2014, this Court granted the motion of MSMS and the AMA to file an amici brief. See Order dated November 4, 2014, Exhibit C. This brief is now being submitted pursuant to that order.

STANDARD OF REVIEW

A de novo standard of review governs the issues on appeal. While an order regarding discovery is reviewed for an abuse of discretion, whether the production of documents is barred by statute is a question of law subject to de novo review. *Ligouri v Wyandotte Hosp*, 253 Mich App 372, 375; 655 NW2d 592 (2002). Questions of statutory construction are also reviewed de novo. *Feyz v Mercy Mem Hosp*, 475 Mich at 663, 672; 719 NW2d (2006) . The Court’s role “is to give effect to the intent of the Legislature, as expressed by the language of the statute” and to “apply clear and unambiguous statutes as written, under the assumption that the Legislature intended the meaning of the words it has used ...” *Id.* (footnotes omitted).

ARGUMENT

I. *Harrison* Should Be Reversed Because It Erroneously Limits the Scope of Michigan’s Peer Review Privilege to the Deliberative Process and Wrongfully Excludes From the Privilege Contemporaneous Facts and Information Collected By or For a Peer Review Committee.

The orders and opinions in *Harrison* and *Krusac* evidence a dangerous departure from the peer review protocol that is elevating the quality of health care provided to Michigan citizens. The patient safety/quality care mandate now emanates from nearly every sector of hospital-based health care governance, including federal, state, regulatory, accrediting and voluntarily-imposed authorities. Michigan has heeded that call and is poised to become a leader in a health care revolution that is escalating efforts to improve the quality, safety, accessibility and cost-effectiveness of patient care throughout the country. As the Michigan Health & Hospital Association (“MHA”) explained in its *2011 Patient Safety and Quality Annual Report*, “Michigan hospitals and health systems are committed to leading our state toward becoming the national benchmark for health care quality and patient safety in this decade.” Michigan Health & Hospital Association, *Patient Safety and Quality Annual Report 2011*, at 2

<<http://www.mhakeystonecenter.org/documents/2011psqreport.pdf>> (accessed November 5, 2014) (“2011 MHA Report”).

Michigan’s statutorily-mandated peer review process, with the protections it provides for frank discussion, has been an important part of that effort. “Speaking out about errors is the single most important action a health care worker can take as an individual to impact culture,” the MHA’S 2011 Report emphasizes, but “unfortunately, fear can often lead to silence.” *Id.* at 16. Countermanding the “fear” disincentive is a *sine qua non* of Michigan’s peer review privilege.

The importance of confidentiality in the peer review process is well-recognized. It is an important component of federal safety initiatives as well. For example, the federal imperative to improve patient care, safety and quality is articulated in the federal Patient Safety and Quality Improvement Act (“PSQIA”), which was enacted in 2005 “to provide for the improvement of patient safety and to reduce the incidence of events that adversely affect patient safety.” 42 USC § 299b-21 et seq. According to the Agency for Healthcare Research and Quality, the PSQIA focuses on “creating a voluntary program through which health care providers can share information relating to patient safety events with PSOs [Patient Safety Organizations], with the aim of improving patient safety and the quality of care nationwide.” 73 FR 70732, 70796 (2008). Privilege and confidentiality protections are provided to encourage the sharing of information without fear of liability. *Id.*¹

¹ The Agency explains:

While the Patient Safety Act does establish new Federal confidentiality and privilege protections for certain information, these protections only apply when health care providers work with PSOs and new processes, such as patient safety evaluation systems [] that do not currently exist. *These Federal data protections provide a mechanism for protection of sensitive information that could improve the quality, safety, and outcomes of health care by fostering a non-threatening*

(footnote continued . . .)

MHA created a PSO in 2007 (“MHA Patient Safety Organization”). In its 2011 Report, the MHA notes that nearly every Michigan hospital is an active member. One of the MHA PSO’s functions is to permit providers to “seek expert help in understanding patient safety events and preventing their recurrence in a protected legal environment.” 2011 MHA Report at 13. “By coming together in the MHA PSO’s protected forum to discuss a culture of safety, adverse event management and patient engagement, Michigan hospitals have taken another step in leading the nation in seeking to make health care free from harm.” *Id.* at 16.²

environment in which information about adverse medical events and near misses can be discussed. It is hoped that confidential analysis of patient safety events will reduce the occurrence of adverse medical events and, thereby, reduce the costs arising from such events, including costs incurred by state and local governments attributable to such events.

Id. at 70795-70796 (emphasis added).

² The Patient Protection and Affordable Care Act also seeks to improve patient access to high-quality, affordable health care for all Americans and to that end, directed the Secretary of the Department of Health and Human Services (“HHS”) to establish a National Strategy for Quality Improvement in Health Care (“National Quality Strategy”). See National Strategy for Quality Improvement in Health Care, *2014 Annual Progress Report to Congress* <<http://www.ahrq.gov/workingforquality/reports/annual-reports/nqs2014annlrpt.pdf>> (accessed November 5, 2014). The aims of the National Quality Strategy are to (1) “[i]mprove the overall quality, by making health care more patient-centered, reliable, accessible, and safe;” (2) “[i]mprove the health of the U.S. population by supporting proven interventions to address behavioral, social and, environmental determinants of health in addition to delivering higher-quality care;” and (3) “[r]educe the cost of quality health care for individuals, families, employers, and government.” *Id.* at 3. The principles for the National Quality Strategy state in part that “[t]he best way to improve health care quality is to help professionals evaluate their own performance and their colleagues’ performance, quickly learn how interventions fare in the ‘real world,’ and see the benefits of innovation firsthand-and then widely share the lessons they learn.” National Strategy for Quality Improvement in Health Care <<http://www.ahrq.gov/workingforquality/nqs/principles/htm>> (accessed November 5, 2014). The March 2011 Report to Congress: National Strategy for Quality Improvement in Health Care highlights patient safety organizations as a means by which clinicians and other providers can obtain timely and actionable feedback to improve patient safety and quality of care. National Strategy for Quality Improvement in Health Care, *2011 Annual Progress Report to Congress* <<http://www.ahrq.gov/workingforquality/reports/annual-reports/nqs2011annlrpt.pdf>> (accessed November 5, 2014).

On all of these fronts, confidentiality has become an essential component of the health care community's efforts to improve the quality of hospital-based medical care. Michigan's peer review privilege, as envisioned by the Legislature, is essential to that effort. But its effectiveness has been undermined by *Harrison*. With a focus on litigation rather than improved patient care, *Harrison* has parsed the privilege into untenable segments that are at odds with the statutory language and far removed from its intended moorings.

The privilege began with, and is tethered to, a mandate. To reduce morbidity and mortality and to improve patient care, the Michigan Legislature commanded hospitals to establish peer review committees to review "professional practices in the hospital for the purpose of reducing morbidity and mortality," including "the quality and necessity of the care provided and the preventability of complications and deaths occurring in the hospital." MCL 333.21513.³ To enable Michigan hospitals to perform this function, and to encourage a "[c]andid and conscientious evaluation of clinical practices," the Legislature enacted "two primary measures" which "protect peer review activities from intrusive public involvement *and from litigation.*" *Feyz v Mercy Mem Hosp*, 475 Mich 663, 680-681; 719 NW2d 1 (2006) (footnotes omitted) (emphasis added). The first grants immunity to persons, organizations and entities that provide information to peer review groups or that perform a protected peer review function. See MCL

³ MCL 333.21513 provides in pertinent part:

The owner, operator, and governing body of a hospital licensed under this article:
...

(d) Shall assure that physicians and dentists admitted to practice in the hospital are organized into a medical staff to enable an effective review of the professional practices in the hospital for the purpose of reducing morbidity and mortality and improving the care provided in the hospital for patients. The review shall include the quality and necessity of the care provided and the preventability of complications and deaths occurring in the hospital.

331.531.⁴ The second measure, which underlies the issue presently before this Court, renders *records, data, and knowledge collected for or by peer review entities* confidential and protects them from discovery.

For decades, persons called upon to participate in the peer review and credentialing process have relied upon these protections as an incentive to disclose the untoward events that impede the attainment of quality health care goals. Our appellate courts have encouraged this reliance by consistently upholding the peer review privilege against encroachment, in keeping with its plain meaning and intended scope. That has now changed. With the orders in *Harrison* and *Krusac*, the privilege has been spliced into segments that derive not from the actual language of the statute, but from a judicially-imposed policy preference. *Harrison* and *Krusac* will do a great disservice to the Legislature's health care improvement agenda – and to the quality of care in Michigan - if not reversed.

⁴ MCL 331.531 provides in pertinent part:

- (1) A person, organization, or entity may provide to a review entity information or data relating to the physical or psychological condition of a person, the necessity, appropriateness, or quality of health care rendered to a person, or the qualifications, competence, or performance of a health care provider.
- (2) As used in this section, "review entity" means 1 of the following:
 - (A) A duly appointed peer review committee . . .
- (3) A person, organization, or entity is not civilly or criminally liable:
 - (a) For providing information or data pursuant to subsection (1).
 - (b) For an act or communication within its scope as a review entity.
 - (c) For releasing or publishing a record of the proceedings, or of the reports, findings, or conclusions of a review entity, subject to sections 2 and 3.
- (4) The immunity from liability provided under subsection (3) does not apply to a person, organization, or entity that acts with malice.

A. *Harrison* Was Wrongly Decided.

The limited scope of the peer review privilege under *Harrison* is seriously flawed. The plain meaning of the statute does not bifurcate the privilege between “contemporaneous facts” and “deliberative processes.” The protection afforded by the privilege is expressly broad in keeping with its plain meaning and intended effect. MCL 333.21515 provides:

The records, data, and knowledge collected for or by individuals or committees assigned a review function described in this article are confidential and shall be used only for the purposes provided in this article, shall not be public records, and shall not be available for court subpoena.

In nearly identical language, MCL 333.20175(8) provides:

The records, data, and knowledge collected for or by individuals or committees assigned a professional review function in a health facility or agency, or an institution of higher education in this state that has colleges of osteopathic and human medicine, are confidential, shall be used only for the purposes provided in this article, are not public records, and are not subject to court subpoena

Similar language exists in MCL 331.533 (relating to the release of information for medical research and education):

The identity of a person whose condition or treatment has been studied under this act is confidential and a review entity shall remove the person’s name and address from the record before the review entity releases or publishes a record of its proceedings, or its reports, findings, and conclusions. Except as otherwise provided in section 2, the record of a proceeding and the reports, findings, and conclusions of a review entity and data collected by or for a review entity under this act are confidential, are not public records, and are not discoverable and shall not be used as evidence in a civil action or administrative proceeding.⁵

⁵ The exceptions in Section 2, MCL 331.532, are:

- (a) To advance health care research or health care education.
- (b) To maintain the standards of the health care professions.
- (c) To protect the financial integrity of any governmentally funded program.
- (d) To provide evidence relating to the ethics or discipline of a health care provider, entity, or practitioner.

(footnote continued . . .)

Exceedingly out of sync with the rules of statutory construction, *Harrison* disregarded the plain language of these clear and unambiguous statutes, imposing upon them a meaning they do not express.⁶ *Harrison* determined that “contemporaneous, handwritten operating-room observations were not subject to a peer-review privilege” but that “[th]e balance of the report ... reflected a review process and was confidential.” This interpretation reflects a policy choice made by the judiciary, not the Legislature; most particularly, the *Harrison* panel’s desire to limit the power of risk managers to insulate information from discovery. *Harrison* explains:

Given this evidence, we conclude that the factual information recorded on the first page of the incident report was not immune from disclosure as material collected pursuant to MCL 333.21515. ***To hold otherwise would grant risk managers the power to unilaterally insulate from discovery firsthand observations that the risk managers would prefer remain concealed. The peer-review statutes do not sweep so broadly.***

Harrison at 34 (emphasis added).

That *Harrison* has overstepped its bounds could not be clearer. Its multiple errors turn traditional legal analysis on its head. Those errors include: (1) disregard of binding Michigan precedent regarding the scope of *Michigan*’s peer review privilege and its application to incident reports and contemporaneous facts; (2) selective reliance upon out-of-state decisions that either do not address a statutory peer review privilege or that have a statute bearing no resemblance to the statute here; (3) failure to apply the statutory language as written, opting to instead read

(e) To review the qualifications, competence, and performance of a health care professional with respect to the selection and appointment of the health care professional to the medical staff of a health facility.

(f) To comply with section 20175 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.20175 of the Michigan Compiled Laws.

⁶ The *Harrison* court did not find that the peer review statute was ambiguous but nonetheless construed the statute as if its plain meaning was unclear. *Harrison v Munson Healthcare*, 304 Mich App at 24-35.

unexpressed limitations into the statute; and (4) interpreting the statute to effectuate the Court's policy preferences, rather than to accomplish the Legislature's intent.

1. The Rule Announced in *Harrison* Conflicts With the Binding Precedent of This Court and Other Court of Appeals' Decisions.

Michigan jurisprudence does not support *Harrison*'s dichotomous view of the peer review privilege. In several decades of law on the subject, the appellate courts of this state have never limited the privilege to retrospective deliberative processes in the manner suggested by *Harrison*. To the contrary, Michigan's peer review privilege has historically spanned the bounds of the peer review process. As this Court remarked in *Feyz*, "[p]eer review is a communicative process, designed to foster an environment where participating physicians can freely exchange and evaluate information without fear of liability ..." 475 Mich at 685.

The unmistakable breadth of the peer review process was explicitly described in *Feyz*. This Court explained that "[i]t is obvious that peer review immunity is designed to promote free communications about patient care practices, *as both the furnishing of information to the peer review entity* and the proper publication of peer review materials are acts which are granted immunity." *Id.* "*All the protected activities relate to the exchange and evaluation of such information,*" this Court emphasized, and "*[a]ll the peer review communications are protected from discovery and use in any form of legal proceeding.*" 475 Mich at 685 (emphasis added).

This important privilege is clearly an incentive to open and frank disclosure. Nearly 30 years ago, this Court observed that "[t]o encourage and implement productive peer review procedures, the Legislature has provided that the information and records developed and compiled by peer review committees be confidential and not subject to court subpoena." *Attorney General v Bruce*, 422 Mich 157, 161; 369 NW2d 826 (1985). Emphasizing the need to preserve the integrity of the peer review process in *Bruce*, this Court rejected the Attorney General's attempt to subpoena, on behalf of the Department of Licensing and Regulation and the

Michigan Board of Medicine, a hospital's peer review committee proceedings. Likewise, in *Dorris v Detroit Osteopathic Hosp*, 460 Mich 26, 42-43; 594 NW2d 455 (1999), this Court remarked that without "the assurance of confidentiality as provided by §§ 21515 and 20175(8), the willingness of hospital staff to provide their candid assessment will be greatly diminished" which "will have a direct effect on the hospital's ability to monitor, investigate, and respond to trends and incidents that affect patient care, morbidity, and mortality."

In contrast to *Harrison's* compelled disclosure of contemporaneous factual information within an incident report, this Court made no such distinction when it held in *Gregory v Heritage Hosp* that the trial court erred in compelling the disclosure of *incident and investigative reports* of an assault and battery occurring while the plaintiff was a patient at the hospital. This Court relied upon the affidavit of the hospital's manager of quality and utilization management, which established that the materials were used "for the purpose of maintaining health care standards at the hospital, improving the quality of care provided to patients, and reducing morbidity and mortality within the hospital." 460 Mich at 42.⁷ The sought-after materials included investigative reports, statements, notes, memoranda, records and reports. The Court remanded to permit plaintiff to challenge "the veracity of defendant hospital's procedures." *Id.* at 48-49.

The Court of Appeals has similarly applied the privilege to incident/investigation reports without parsing between contemporaneous facts and deliberative processes. In *Gallagher v Detroit-Macomb Hosp Ass'n*, 171 Mich App 761, 769; 431 NW2d 90 (1988), the Court of Appeals afforded complete protection to an incident report, the purpose of which was to assist the hospital in monitoring its own activities to reduce accidents, injuries, morbidity and mortality

⁷ *Gregory* was decided in conjunction with *Dorris*.

at the hospital. The Court's description of that report – and its similarity to the reports in *Harrison and Krusac* – is instructive:

Thompson explained that an incident report is completed for all unusual occurrences at the hospital and that its purpose was to assist the hospital in monitoring its own activities to reduce accidents, injuries, morbidity and mortality at the hospital. The report is routed to the unit supervisor and the department head for further review and investigation and then to the hospital's legal affairs department. It is tabulated with other reports to identify trends, patterns or problems at South Macomb Hospital. The information is then routed to either the hospital's Safety Committee or Quality Assurance Committee. Both committees are assigned the responsibility of identifying trends or problems at the hospital. Based on Thompson's testimony, the quality and safety committees appear to fulfill the protected review functions.

Id. at 769.

Noting that MCL 333.20175 and MCL 333.21515 “evidence the Legislature’s intent to fully protect quality assurance/peer review records from discovery” and, without distinguishing between facts and deliberations, the Court of Appeals in *Ligouri v Wyandotte Hosp*, 253 Mich App at 377, concluded that reports regarding a patient’s fall at the hospital were protected. *See also, Raslan v Providence Hosp*, unpublished opinion per curiam of the Court of Appeals dated September 11, 2001 (Docket No. 220159), 2001 Mich App LEXIS 2576, at *7 (applying the privilege to investigation reports, peer review reports, and employee records relating to review of professional practices and the quality of care provided in the hospital); *Maviglia v West Bloomfield Nursing & Convalescent Center, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 9, 2004 (Docket No. 248796), 2004 Mich App LEXIS 3048, at *2 (holding that because incident reports are data collected for the purpose of professional review, they must not be subject to discovery in a malpractice case)(emphasis added); *Beaumont Hosp v Medtronic, Inc*, 2010 US Dist LEXIS 39093 (ED Mich, Apr 21, 2010) (variance and sentinel event reports protected by privilege); *Loyd v Oakland/Trinity Health*, 2013 US Dist LEXIS 37039 at *6 (ED Mich, Mar 18, 2013) (“Michigan courts have repeatedly held that the peer

review privilege encompasses hospital incident reports where such reports are ‘compiled in furtherance of improving health care and reducing morbidity and mortality’”); *Lindsey v St John Health Sys*, unpublished opinion per curiam of the Court of Appeals, issued February 6, 2007 (Docket Nos. 268296, 270042), 2007 Mich App LEXIS 268, at *18 (occurrence report is not discoverable as it “necessarily related to a document that concerned the review of professional practices and the quality of care provided by the hospital”).⁸

Rejecting disclosure pursuant to a search warrant in *In Re Lieberman*, 250 Mich App 381, 387; 646 NW2d 199 (2002), the Court of Appeals observed that § 21515 demonstrates that the Legislature has imposed a **comprehensive ban** on the disclosure of any information collected by, or records of the proceedings of, committees assigned a professional review function in hospitals and health facilities” (emphasis added). The comprehensive nature of the privilege was also acknowledged in *Johnson v Detroit Medical Ctr*, 291 Mich App 165, 169 n1; 804 NW2d 754 (2010), which reversed a trial court order requiring defendants to disclose the contents of a physician’s credentials and privileges file, explaining “[b]ecause **everything** within the file is protected, there is no merit to plaintiff’s argument that defendants should be required to prepare a list of the file’s contents so that items can be evaluated individually.” *Id.* (emphasis added).⁹

This long history of enforcing the privilege against encroachment is not undone by the Court of Appeals’ decision in *Centennial Healthcare Mgmt Corp v Dep’t of Consumer & Indus*

⁸ Unpublished cases are attached as Exhibit D.

⁹ See also, *Dye v St John Hosp*, 230 Mich App 661; 584 NW2d 747 (1998) (vacating trial court order compelling the production of information from defendant physician’s credentials file); *Jeung v Allen*, unpublished opinion per curiam of the Court of Appeals, issued April 20, 2004 (Docket No. 245997), 2004 Mich App LEXIS 989, at *3 (“[P]laintiffs seek information obtained by a peer review committee pursuant to its peer review function. The privilege therefore applies”).

Servs, 254 Mich App 275; 657 NW2d 746 (2002). *Harrison* relied upon *Centennial* to “buttress” its distinction between *facts* and *deliberation*, quoting *Centennial* as follows:

Certainly, in the abstract, a peer review committee cannot properly review performance in a facility without hard facts at its disposal. However, it is not the facts themselves that are at the heart of the peer review process. Rather, it is what is done with those facts that is essential to the internal review process, i.e., a candid assessment of what those facts indicate, and the best way to improve the situation represented by those facts. *Simply put, the logic of the principle of confidentiality in the peer review context does not require construing the limits of the privilege to cover any and all factual material that is assembled at the direction of a peer review committee.*

Harrison, 304 Mich App at 32 (emphasis in original).

Harrison’s reliance upon *Centennial* is misplaced. Like *Harrison*, *Centennial* did not apply the plain language of the statute as written but instead considered the “logic” of confidentiality in the peer review context, and found that protection should only be afforded when necessary to “effectuate other purposes outlined in the Public Health Code.” 254 Mich App at 290-291. While that may have been the *Centennial* court’s view, it is not the Legislature’s view. In fact, it is dramatically opposed to the meaning expressed in the words of the statute, which limit the “use” of the information, not the “protection” of the information, to purposes “provided in this article.” The reports in *Centennial* were prepared to comply with certain administrative rules governing nursing homes. Wisely, in *Maviglia, supra*, the Court of Appeals concluded that *Centennial*’s reasoning should be limited to the state agency context, explaining:

The *Centennial* Court’s decision and reasoning is not applicable where, as here, the party seeking disclosure of the information is a private litigant. MCL 333.20175(8) clearly bars release of the “records, data, and knowledge collected for or by individuals or committees assigned a professional review function in a health facility.” The accompanying regulations, 1979 AACRS, R 325.21101, also relied on by plaintiff, provides that accident records and incident reports shall be kept in the home and shall be available to the director or his or her authorized representative for review and copying if necessary. But the rule only authorizes copying of the reports by the director or an authorized representative. It does not indicate that the reports should be available for copying by anyone else.

2004 Mich App LEXIS 3048, at *5-6. *Centennial* does not excuse *Harrison's* disregard of binding Michigan precedent.¹⁰

2. *Harrison's Purported Reliance Upon Monty to Elevate the Sway of Inapposite Out-of-State Cases Is Misplaced.*

In its analysis, *Harrison* did not examine the cases decided by this Court and prior Court of Appeals' panels regarding the scope of the privilege and its applicability to incident reports. *Harrison* ignored those cases, purporting to instead use as guideposts three out-of-state decisions cited by this Court in *Monty v Warren Hosp Corp*, 422 Mich 138; 366 NW2d 198 (1985). The cases are: *Bredice v Doctors Hosp, Inc*, 50 FRD 249 (DC 1970); *Davidson v Light*, 79 FRD 137 (D Colo 1978); and *Coburn v Seda*, 101 Wn2d 270; 677 P2d 173 (1984).

The weight *Harrison* affords to *Bredice*, *Davidson* and *Coburn* and the rule it derives from those cases is not warranted by the mere mention they receive in *Monty*. Quite the contrary, *Harrison* misconstrued *Monty's* reference to those cases and reached a decision that is sharply at odds with *Monty* and the other precedential pronouncements of this Court and the Court of Appeals.

The issue in *Monty* was the propriety of a trial court order which directed defendant hospital to appear *in open court* with the personnel records of defendant doctors and to provide the information necessary for the court to determine if the documents were subject to the peer review privilege. This Court reversed that order insofar as it mandated that the hearing be conducted in *open court*, stating that this could conceivably result in the disclosure of

¹⁰ Further, contrary to *Harrison's* insistence that under the general rule, statutory privileges are to be narrowly construed, 304 Mich App at 25, prior courts have held that the peer review privilege is broad, *In re Lieberman*, 250 Mich App 381, 389-390; 646 NW2d 199 (2002), evidencing "the Legislature's intent to fully protect quality assurance and peer review records from discovery." *Ligouri*, 253 Mich App at 376.

confidential information, thereby defeating the privilege. 422 Mich at 146. This Court mentioned *Davidson*, *Bredice* and *Coburn* but only in passing, stating:

In determining whether any of the information requested is protected by the statutory privilege, the trial court should bear in mind that mere submission of information to a peer review committee does not satisfy the collection requirement so as to bring the information within the protection of the statute. *Marchand, supra*, 168. Also, in deciding whether a particular committee was assigned a review function so that information it collected is protected, the court may wish to consider the hospital's bylaws and internal regulations, and whether the committee's function is one of current patient care or retrospective review. Compare *Davidson v Light*, 79 FRD 137 (D Colo, 1978), with *Bredice v Doctors Hospital, Inc*, 50 FRD 249 (D DC, 1970), *aff'd without opinion* 156 U.S. App DC 199; 479 F2d 920 (1973). See *Coburn v Seda*, 101 Wash2d 270, 277; 677 P2d 173 (1984).

Id. at 146-147.

This mere mention of *Bredice*, *Davidson* and *Coburn*, without reference to their contexts, analyses or holdings hardly constitutes a ringing endorsement of, let alone encouragement for, the dichotomous *Harrison* rule. *Monty* does not use these cases to distinguish between facts and deliberation. The distinction *Monty* makes in *upholding* the privilege is between "current patient care" and "retrospective review." In *Harrison* and *Krusac*, the incident reports were not created for the purpose of rendering current patient care, but were instead designed to enable the hospital's peer review entities to conduct a retrospective review of hospital practices for the purpose of reducing morbidity and mortality. *Monty* does not support the aberrant *Harrison* rule.

3. The Out-of-State Cases Are Not Instructive Because They Do Not Address a Peer Review Statute Similar to the Statute Here.

To the extent reference to case law is required or even desired to determine the scope of Michigan's statutory peer review privilege, traditional legal analysis would first consider Michigan's own jurisprudence. Absent that, instructive authority construing similarly worded statutes from other jurisdictions might be considered. However, one would never expect reliance

to be placed upon out-of-state cases that address dissimilar peer review statutes or no statute at all. Inexplicably, that was the framework of the *Harrison* analysis.

Harrison first considered *Bredice v Doctors Hosp, Inc*, 50 FRD 249 (DC 1970), which *rejected* a request for the minutes and reports of any board or committee of defendant hospital relating to the death of plaintiff's decedent. *Harrison*, 304 Mich App at 28. *Harrison* also relied upon *Davidson v Light*, 79 FRD 137 (D Colo 1978), finding it to have distinguished *Bredice* on the basis that the infection-control records sought in *Davidson* contained factual data relating to the plaintiff's infection as well as the review committee's opinions/evaluations of the care provided to plaintiff, which indicated that the review committee functioned "as a part of current patient care, investigating the source of infections and attempting to control their proliferation." *Harrison* viewed the third case, *Coburn v Seda*, 101 Wash2d 270; 677 P2d 173 (1984), as "particularly instructive." 304 Mich App at 29. The demand in *Coburn* was for the hospital review committee's report regarding the death of plaintiff during a heart catheterization procedure. *Coburn* remanded the case for a determination as to whether Washington's peer view privilege statute applied. *Harrison* quoted *Coburn* as instructing that the statute "may not be used as a shield to obstruct proper discovery of information generated outside review committee meetings" and "does not grant an immunity to information otherwise available from original sources." 304 Mich App at 29-30.

From these decisions, *Harrison* derived "a distinction between factual information objectively reporting contemporaneous observations or findings and 'records, data, and knowledge' gathered to permit an effective review of professional practices." *Id.* at 30. But *Harrison's* reliance upon *Bredice*, *Davidson*, and *Coburn* is misplaced. Peer review statutes were not at issue in *Bredice*. In denying disclosure of committee minutes and reports in *Bredice*, the Court relied upon the public interest in having "staff meetings held on a confidential basis so

that the flow of ideas and advice can continue unimpeded.” 50 FRD at 250-251. While this rationale is consistent with the purpose underlying Michigan’s peer review statute, *Bredice* is otherwise inapposite to this statutory interpretation question.

Davidson is also dissimilar. The Colorado statute addressed (in part) in *Davidson* did not embrace the sought-after report of the hospital’s infection control committee. “Admittedly, this statute does afford certain immunities to members of the committees with which it is concerned, but infection control committees and their members are obviously not included.” 79 FRD at 140. Further, “the committee report ... preceded the effective date of the statute.” *Id.* Thus, the purported distinction between facts and deliberations which *Harrison* gleans from *Davidson* did not derive from a peer review statute analogous to the statute here.¹¹

A peer review statute was at issue in *Coburn* but it bears no similarity to the statute here. It did not protect records, data or knowledge collected by or for individuals and committees assigned a review function. It applied only to “proceedings, reports, and written records” of certain committees and boards. That is why the *Coburn* court concluded that documents “generated outside review committee meetings” must be disclosed. Rev. Code Wash 4.24.250 provides in pertinent part:

(1) . . . The proceedings, reports, and written records of such committees or boards, or of a member, employee, staff person, or investigator of such a committee or board, are not subject to review or disclosure, or subpoena or discovery proceedings in any civil action, except actions arising out of the recommendations of such committees or boards involving the restriction or revocation of the clinical or staff privileges of a health care provider as defined in RCW 7.70.020 (1) and (2).

¹¹ *Harrison* also relied in part on *Bernardi v Community Hosp Ass'n*, 166 Colo 280; 443 P2d 708 (1968), a case briefly addressed in *Davidson*. *Bernardi* is inapposite. In *Bernardi*, an incident report completed by the nurse following the event was included in the patient's hospital chart. *Id.* at 709. The asserted privilege related to the attorney-client privilege, not the peer review privilege. The *Bernardi* court ordered production on the basis that the incident report was not prepared for counsel. *Id.*

Id. (emphasis added). This language is not expansive. It is expressly limited to “proceedings, reports and written records” of boards and their members and agents. *Coburn*’s analysis of this statute has no bearing on the proper scope of Michigan’s peer review statute.

Equally misplaced is *Harrison*’s reliance upon other out-of-state cases for the proposition that “facts concerning a patient’s care, and in particular facts incorporated within an incident report, are not entitled to confidentiality.” 304 Mich App at 32-33. As with the above cases, *Harrison* makes no attempt to correlate the language of the peer review statutes in those cases to the language of MCL 333.20175(8) or MCL 333.21515, rendering the entire discussion meaningless. A comparison of the statutes reinforces this conclusion; they are too dissimilar to be instructive.

For example, *Harrison* quotes *Columbia/HCA Healthcare Corp v District Court*, 113 Nev 521, 531; 936 P2d 844 (1997), for the proposition that “[o]ccurrence reports ... are nothing more than factual narratives’ which contain information usually unearthed in discovery.” 304 Mich App at 32-33 (brackets and ellipses in original). However, the Nevada statute at issue in *Columbia* is far more narrowly drawn than the Michigan statute. Only proceedings and records of organized committees are protected. NRS 49.265 states in relevant part that “1. Except as otherwise provided in subsection 2: (a) *The proceedings and records of:* (1) Organized committees of hospitals... having the responsibility of evaluation and improvement of the quality of care rendered by those hospitals or organizations; and (2) Review committees of medical or dental societies, are not subject to discovery proceedings...” (emphasis added).

Further, the *Columbia* court noted that “the narrow issue” before it was “one of statutory interpretation: whether occurrence reports were intended to be included in the phrase of NRS 49.265 ‘proceedings and records of’ and, therefore, exempted from discovery.” 936 P.2d at 849. *Columbia* relied upon *Trinity Medical Ctr v Holum*, 544 NW2d 148, 157 (ND 1996), which had

construed the phrase “proceedings and records of” the committee as limited to the formal proceedings before the committee and internal records of the committee. *Id.* *Trinity* explained that the phrase includes testimony given to the committee, committee deliberations, discussions among committee members, and minutes of committee meetings but “*[i]t does not include other information or data provided to the committee or collected for the committee’s review by hospital departments or employees.*” *Id.* (emphasis added). In other words, *Trinity* expressly excluded from “proceedings and records of” the committee that which is expressly included in the Michigan statute, i.e., records, data, and knowledge collected for or by the committee. This case certainly has no relevance to Michigan’s peer review statute.

Harrison also relies upon *State ex rel AMISUB, Inc v Buckley*, 260 Neb 596, 614; 618 NW2d 684 (2000). But that reliance is tied to the statutory language which merely protects documents “requested by a hospital medical staff committee or a utilization review committee” and the reports, records and communications of a medical staff committee or a utilization review committee. Expressly excluded are facts or information contained in hospital medical records, and nothing in the statute is to preclude or affect discovery relating to the treatment of a patient in the ordinary course. The statute provides:

The proceedings, minutes, records, and reports of any medical staff committee or utilization review committee as defined in section 71-2046, together with all communications originating in such committees are privileged communications which may not be disclosed or obtained by legal discovery proceedings unless (1) the privilege is waived by the patient and (2) a court of record, after a hearing and for good cause arising from extraordinary circumstances being shown, orders the disclosure of such proceedings, minutes, records, reports, or communications. Nothing in sections 71-2046 to 71-2048 shall be construed as providing any privilege to hospital medical records kept with respect to any patient in the ordinary course of business of operating a hospital nor to any facts or information contained in such records nor shall sections 71-2046 to 71-2048 preclude or affect discovery of or production of evidence relating to hospitalization or treatment of any patient in the ordinary course of hospitalization of such patient.

Neb. Rev. Stat. § 71-2048 (1996) (emphasis added). It was this express statutory language – that does not appear in the Michigan statute – that caused *Buckley* to differentiate between facts and deliberations. The Court explained:

[E]ven if the incident report and fall lists had been specifically requested by a hospital-wide committee, such documents would not have been privileged under §71-2047, because reading §§ 71-2047 and 71-2048 together, these documents consist of merely “facts and information” which is not privileged from discovery under §71-2048 ...

618 NW2d at 696. Thus, the statement quoted by *Harrison* about “percipient witnesses” and “bare facts” was expressly tied to the statutory language. The Court made no universal pronouncement beyond what the statute required.

Harrison also relies upon *John C Lincoln Hosp & Health Ctr v Superior Court*, 159 Ariz 456, 459; 768 P2d 188 (1989). However the Arizona statute, which protects proceedings, records and materials prepared in connection with peer review, is not as broad and inclusive as the Michigan statute. A.R.S. 36-445.01 provides:

A. All *proceedings, records and materials prepared in connection with the reviews* provided for in section 36-445, including all peer reviews of individual health care providers practicing in and applying to practice in hospitals or outpatient surgical centers *and the records of such reviews, are confidential and are not subject to discovery* except ...

Id. (emphasis added).

Harrison’s reliance upon *Babcock v Bridgeport Hosp*, 251 Conn 790, 838; 742 A2d 322 (1999), is also misplaced. The Connecticut statute bears no resemblance to Michigan’s peer review statute. Conn. Gen. Stat. § 19a-17b(d) protects the “proceedings of a medical review committee conducting a peer review” and has a much narrower scope than the Michigan statute:

The *proceedings of a medical review committee conducting a peer review* shall not be subject to discovery or introduction into evidence in any civil action for or against a health care provider . . . ; *provided the provisions of this subsection shall not preclude (1) in any civil action, the use of any writing which was recorded independently of such proceedings; (2) in any civil action, the testimony of any person concerning the facts which formed the basis for the*

institution of such proceedings of which he had personal knowledge acquired independently of such proceedings; (3) in any health care provider proceedings concerning the termination or restriction of staff privileges, other than peer review, *the use of data discussed or developed during peer review proceedings*; or (4) in any civil action, disclosure of the fact that staff privileges were terminated or restricted, including the specific restriction imposed, if any.

Id. (emphasis added). The *Babcock* court held that “by using the word ‘proceedings,’ the legislature intended to restrict the privilege to the substantive discourse that takes place at the actual meetings during which ‘matters which are subject to evaluation and review by such committee,’ are discussed and deliberated.” 742 A2d at 343. This includes the “dialogues, debates and discussions that transpire at a peer review meeting” and the “opinions and conclusions reached by committee members.” *Id.*¹² The same restriction does not appear in the Michigan statute.

These elemental differences in the out-of-state cases – ignored in *Harrison* – render them analytically valueless. But their preeminence in *Harrison* is even more surprising when one considers that Michigan does not lack specific authority on this issue. It was completely unnecessary for the *Harrison* court to reach for instructional analysis beyond Michigan’s jurisdictional boundaries because binding Michigan precedent exists. *Harrison* simply ignores and fails to follow it.

4. *Harrison* Changes the Meaning of the Statute to Effectuate the Court’s Policy Preference Rather Than the Legislature’s Intent.

The plain language of the statute does not support *Harrison*’s conclusion that “factual information,” even if collected by or for a committee performing a review function, is not protected by the peer review privilege, only the deliberative process is protected. Rather, this

¹² Conn. Gen. Stat. § 19a-25 was also addressed. That too was construed to protect only the committee’s work, based upon a concluding sentence which states “This section shall not be deemed to affect disclosure of regular hospital and medical records made in the course of the regular notation of the care and treatment of any patient, *but only records or notations by such staff committees pursuant to their work*” (emphasis added).

distinction between factual information and the deliberative process reflects a policy preference that emanates from the *Harrison* court's concern that risk managers might otherwise have the power to "insulate from discovery firsthand observations that the risk managers would prefer remain concealed." 304 Mich App at 34. This concern is misplaced. Risk managers do not dictate what is or is not placed in the medical record, and facts and observations reported in the medical record are discoverable. But including that same information -- or even a different version of the information, in an incident report does not make the incident report or any part of it, discoverable.

If the report was created pursuant to peer review protocol the privilege applies, irrespective of whether the report might have benefited a claimant or a defendant in subsequent litigation. The Legislature has determined that the importance of fostering a candid evaluation of the practices within the hospital outweighs all other competing considerations. The peer review statute is the balance struck by the Legislature and it expressly embraces "records, data, and knowledge," each of which, by definition, includes "facts."

For example, the *Merriam-Webster Online Dictionary* defines "data" as a "collection of factual knowledge about something." See <http://www.merriam-webster.com/thesaurus/data> (accessed November 10, 2014). Similarly, a "record" is "a body of known or recorded facts about something or someone especially with reference to a particular sphere of activity ..." <http://www.merriam-webster.com/dictionary/records> (accessed November 10, 2014). The definition of "knowledge" includes "the fact or condition of being aware of something" or "the range of one's information or understanding." <http://www.merriam-webster.com/dictionary/knowledge?show=0&t=1415602228> (accessed November 10, 2014). *Harrison* could not have excluded contemporaneous facts from the peer review privilege if it had applied the plain meanings of these words.

Harrison was not authorized to disturb the balance reached by the Legislature. As this Court has often expressed, a court is not empowered to contort the meaning of a statute to satisfy its own policy preferences. In *Ligouri*, the Court noted that “[w]hile production of the records may appear under these circumstances to be the equitable result, equity may not be invoked to avoid application of a statute.” 253 Mich App at 377 n 4. Even *Feyz* recognized that the broad sweep of peer review might “insulate from review and sanction the participants’ liability for some adverse outcomes ...” 475 Mich at 687. But reaching the proper balance is for the Legislature, not the Court. The Court of Appeals explained in *Johnson*:

§333.21515 clearly and unambiguously prohibits discovery of Dr. Nunn’s credentials and privileges file. *Attorney General*, 422 Mich at 173. “To hold otherwise *would require us to create an exception* to the [evidentiary] privilege granted such information by the Legislature; *that is not for us to do*.

291 Mich App at 169 (emphasis added)(brackets in original).

Rejecting the assertion that “compelling policy considerations” militate in favor of holding the privilege inapplicable to criminal investigations, the *Lieberman* court said that “[a] proper, objective reading of the statute ... must be considered the Legislature’s statement of public policy. Because the Legislature protected peer review documents in broad terms, the public policy argument must be resolved in favor of confidentiality.” *In Re Lieberman*, 250 Mich App at 389. Similarly, affirming a motion to quash a subpoena for information subject to the psychologist-patient privilege amidst allegations that the decision would lead to “unfair treatment” and “absurd or illogical results,” the Court of Appeals explained in part:

As Michigan courts have long recognized and often stated, a party having complaints about the wisdom of plain statutory language should direct his arguments to the Legislature. *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 752; 641 NW2d 567 (2002) (“[O]ur judicial role precludes imposing different policy choices than those selected by the Legislature”)(citations omitted); *Gilliam v Hi-Temp Products, Inc*, 260 Mich App 98, 109; 677 NW2d 856 (2003)(“The fact that a statute appears to be impolitic, unwise, or unfair is not sufficient to permit judicial construction. The wisdom of a statute is for the

determination of the Legislature and the law must be enforced as written.”)
(footnote omitted).

In Re Petition of Attorney General for Investigative Subpoenas, 282 Mich App 585; 766 NW2d 675 (2009) (the panel of which included two of the *Harrison* jurists).

This same judicial restraint should have been exercised here. Instead, *Harrison* has fashioned a rule that violates the Legislature’s intent and is unworkable. Both the Trial Court and the Court of Appeals concluded that the incident report was a peer review document. *See* 304 Mich App at 34. At that point, under the plain meaning of the statute, the peer review privilege should have attached. But now it will be necessary for a Court, despite a peer review finding, to splice peer review documents to determine whether certain aspects should be disclosed. This gives little comfort to participants in the peer review process who can no longer be assured that confidentiality will attach to their peer review activities. The uncertainty further undermines the ability of a statutorily protected peer review committee to undertake a review of the professional practices in the hospital for the purpose of reducing morbidity and mortality. *Harrison* should be reversed.

II. The Trial Court Erred in Ordering Covenant to Produce the First Page of the Improvement Report On the Basis That “Objective Facts Gathered Contemporaneously With An Event Do Not Fall Within the Definition of Peer Review Privilege.”

In *Krusac*, the privilege was not applied to the Improvement Report prepared by Nurse Colvin on the ostensible basis that the information contained within the report was merely an account of the factual occurrence. Relying upon *Harrison*, the Trial Court concluded that “objective facts gathered contemporaneously with an event do not fall within the definition of peer review privilege” and “to hold otherwise would unilaterally insulate from discovery first-hand observations.” *Krusac* Opinion and Order Re: Discovery, Exhibit A. For the reasons expressed above, *Harrison* was erroneously decided and does not accurately state the law

governing Michigan's peer review statute. But even beyond the Trial Court's misplaced reliance on *Harrison*, enforcing the peer review privilege does not insulate "first-hand observations" from discovery. Discoverable medical records are filled with first-hand observations, which are also subject to re-telling during depositions and other modes of discovery. Placing a fact in an incident report does not immunize the fact from discovery through other means.

Mr. Krusac argues that the information in the Improvement Report was collected by Nurse Colvin, not the peer review entity and that under this Court's decision in *Marchand v Henry Ford Hosp*, 398 Mich 163; 247 NW2d 280 (1976), protected material must be collected at the direction of a peer review committee; the privilege cannot attach to material which is merely in the possession of a peer review committee. Respectfully, Mr. Krusac is mistaken. In preparing the Improvement Report, Ms. Colvin was doing what was required by the hospital's peer review protocol pursuant to the hospital's mandate to reduce morbidity and mortality. Unlike the Improvement Report, the information requested in *Marchand* was collected by a physician on his own initiative to see how hyperalimentation feeding worked and whether it was effective. *Id.* at 167-168. This Court therefore concluded that it was not "collected pursuant to a directive from a [committee] assigned this review function" and while this information "was subsequently presented at a general staff meeting, the ex post facto submission does not satisfy the 'collection' criteria bringing the data within the ambit of the evidentiary privilege." *Id.* at 168. Here, the Improvement Report was created pursuant to established hospital procedures, as in *Dye v St. John Hosp*, *supra*, where the Court of Appeals explained that materials the credential committee wanted to review before granting staff privileges, even if "submitted" by others as part of the application process, were "collected for or by" the committee and are thus subject to the privilege. 230 Mich App at 667.

Also erroneous are Mr. Krusac's twin assertions that because Nurse Colvin did not make an entry in the medical record (1) the Improvement Report is subject to discovery pursuant to MCL 333.20175(1) which, Mr. Krusac argues, requires hospitals to maintain medical records which would include Ms. Colvin's observations, and (2) requiring disclosure of the facts contained in the Improvement Report fulfills a purpose "provided in this article."

With respect to the first assertion, this Court cannot credit the premise that Ms. Colvin was required to record her observations regarding Ms. Krusac's fall in the medical records. As Covenant explains, Ms. Colvin was the circulating nurse during the catheterization procedure and her notation in the record was limited to the medications she administered to Ms. Krusac. Colvin Dep at 48. Another nurse, Heather Gengler, was charged with documenting events during the catheterization procedure. *Id.* at 36-37; Gengler Dep at 10. But beyond that, the Improvement Report was not created to further Ms. Krusac's care and treatment; it was created and maintained as a confidential document in accordance with the hospital's peer review protocol to reduce morbidity and mortality.¹³ Irrespective of whether Ms. Colvin was or was not obligated to record her observations in the medical record, peer review materials are not a back-up. The statutory procedure does not require or even allow a court overseeing a medical malpractice case to determine whether the hospital's obligation to record observations has been satisfied and, if not, to order that the medical record be supplemented with peer review materials. The confidentiality incentive fostered by the privilege would be eviscerated in the face of such uncertainty.

¹³ The Administrative Manual provides in part under the section titled INCIDENT AND IMPROVEMENT REPORTING, Policy 6.06, that "[t]hese reports will be tracked and trended for the purposes of developing safety prevention, loss control and peer review programs which will benefit all patients and users of Covenant Health Care System's facilities and services." Plaintiff's Appendix at 50b.

As to the second assertion, enhancing the discovery posture of claimants in litigation is clearly not the purpose of any provision of Article 17 of the Public Health Code. Quite the contrary, MCL 333.21515 and MCL 333.20715 expressly protect against court compelled disclosure. The very suggestion that disclosing the facts contained in the Improvement Report would be for a “purpose[] provided in ... article [17]” turns the purpose of the statute on its head.

Finally, this Court would have to reverse decades of law governing the peer review statute if it were to hold that the statute does not create a privilege. To make this argument, Mr. Krusac focuses on language that describes “records, data, and knowledge collected for or by individuals or committees assigned a review function” as “confidential.” But in addition to deeming this material “confidential,” the statute goes on to say that the materials “shall be used only for the purposes provided in this article, shall not be public records, and shall not be available for court subpoena.” Those commands can only be given effect if peer review materials are protected from disclosure. That is certainly the effect this Court has consistently given to the statute over the past several decades. For example, in *Marchand, supra*, this Court explained that MCL 331.422(2) [the predecessor to MCL 333.21515], “creates an evidentiary privilege regarding certain information gathered pursuant to the review function mandated in subsection 1 of the statute.” 398 Mich at 167. In *Monty*, this Court explained that “[t]o require production of the documents in open court in order to establish applicability of the *privilege* could conceivably result in disclosure of confidential information, thereby defeating the *privilege*.” 422 Mich at 146 (emphasis added). There is no basis to depart from this well-established precedent.

RELIEF REQUESTED

For these reasons, Amici Curiae Michigan State Medical Society and the American Medical Association respectfully urge this Court to hold (1) that *Harrison* was wrongly decided

and (2) that the Trial Court in *Krusac* erred when it ordered the defendant to produce the first page of its Improvement Report on the basis that “objective facts gathered contemporaneously with an event do not fall with the definition of peer review privilege.”

KERR, RUSSELL AND WEBER, PLC

By:


Daniel J. Schulte (P46929)

Joanne Geha Swanson (P33594)

Attorneys for Amici Curiae Michigan State Medical
Society and American Medical Association

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Detroit, MI 48226-3427

(313) 961-0200

Dated: November 13, 2014

STATE OF MICHIGAN
IN THE SUPREME COURT

THE ESTATE OF DOROTHY KRUSAC,
Deceased, by her Personal Representative John
Krusac,

Plaintiff-Appellee,

v.

COVENANT HEALTHCARE, assumed name for
COVENANT MEDICAL CENTER, INC.;
COVENANT MEDICAL CENTER-HARRISON,
assumed name for COVENANT MEDICAL
CENTER, INC; COVENANT MEDICAL
CENTER, Michigan corporations, jointly and
severally

Defendant-Appellant,

Supreme Court Case No. 149270

Court of Appeals Case No. 321719

Saginaw County Circuit Court
No. 12-15433-NH-4

INDEX OF EXHIBITS

- A. *Krusac* Opinion and Order Re: Discovery
- B. Supreme Court Order dated June 20, 2014 (Case No. 149270)
- C. Supreme Court Order dated November 4, 2014
- D. Unpublished Cases

A

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

THE ESTATE OF DOROTHY KRUSAC,
Deceased by her representative John Krusac,

Plaintiff,

v

File No. 12-015433-NH-1
HON. FRED L. BORCHARD

COVENANT HEALTHCARE,

Defendant:

CARLENE REYNOLDS (P55561)
3000 Town Center, Suite 1800
Southfield, MI 48075-1311
(248) 351-2200

THOMAS HALL (P42350)
1400 Abbot Road, Suite 380
East Lansing, MI 48823-1221
(517) 853-2929

BY DEPUTY CLERK

SUSAN KALTENBACH
COUNTY CLERK

2014 MAY - 8 P 4:33

SAGINAW COUNTY, MICH.

OPINION AND ORDER
RE: DISCOVERY

This matter is presently before the Court on Plaintiff's request for discovery of a document entitled "Improvement Report". After a careful review of the pleadings and the law, as well as having considered the arguments for and against and having had an opportunity to review in-camera the report in question, the Plaintiff's request is granted as set forth below.

FACTS

This litigation arises as a result of a patient's alleged fall following a catheterization procedure done at Covenant Hospital in Saginaw, Michigan.

Following a lab catheterization procedure, the patient, Dorothy Krusac, allegedly fell from the procedure table to the floor of the cath lab resulting in injury and the demise of the patient. The incident about which Plaintiff complains occurred in the cath lab on September 12, 2008. Following the incident, Nurse Debbie Colvin completed an "Improvement Report" on that same date wherein she described the facts of the incident.

The defense complains evidentiary pursuant to the Public Health Code as to its practices and procedures to improve the quality of patient care and reduce morbidity and mortality (MCL 333.21515). Plaintiff claims that the fact section of the report is not privileged. Plaintiff argues that the patient fell from the table hitting the floor. The defense contends that the patient was caught before she struck the floor. This Court having reviewed the applicable case law and, most recently, the case of *Munson Health Care, Inc., Defendant-Appellee and Surgical Associates of*

Traverse City, P.L.L.C., William P. Potthoff, M.D., and Cindy Gilliland, R.N., Defendants-Appellants and Thomas R. Hall, Appellant, CAP #304539, Grand Traverse Circuit Court No. 2009-027611-NH concludes that the first page of the "Improvement Report" does not fall within the peer review privilege. The second page and balance of the report reflect a review process and this Court concludes is confidential.

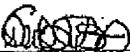
This Court agrees with the *Munson* case that objective facts gathered contemporaneously with an event do not fall within the definition of peer review privilege. Having reviewed the report in question, this Court concludes that the first page of the report, that is the front page, is not immune from disclosure as material collected pursuant to MCL 333.21515. As noted in the *Munson* case to hold otherwise would unilaterally insulate from discovery first-hand observations. In the case before this Court, Nurse Colvin was present and reported the "facts" under that section of the report on the same date and within 10 minutes of the occurrence.

Even assuming, for argument purposes, that the "Improvement Report" is a peer review report, it is not the facts themselves that fall under the peer review privilege but rather what is done with those facts. The back side of the report covers what was done with the facts and this Court concludes that the second page (back page) is, in fact, covered by peer review.

CONCLUSION AND ORDER

The defense is ordered to immediately turn over to Plaintiff the first page of the report entitled "Improvement Report" which is signed by Nurse Debbie Colvin. The back side or second page of the report is not to be turned over.

Dated: May 8, 2014


FRED L. BORCHARD
Circuit Judge

B

Order

Michigan Supreme Court
Lansing, Michigan

June 20, 2014

Robert P. Young, Jr.,
Chief Justice

149270

Michael F. Cavanagh
Stephen J. Markman
Mary Beth Kelly
Brian K. Zahra
Bridget M. McCormack
David F. Viviano,
Justices

JOHN KRUSAC, Personal Representative of the
ESTATE OF DOROTHY KRUSAC,
Plaintiff-Appellee,

v

SC: 149270
COA: 321719
Saginaw CC: 12-015433-NH

COVENANT MEDICAL CENTER, INC., d/b/a
COVENANT MEDICAL CENTER-HARRISON,
d/b/a COVENANT HEALTHCARE,
Defendant-Appellant.

On order of the Court, the application for leave to appeal the May 12, 2014 order of the Court of Appeals is considered, and it is GRANTED. The parties shall include among the issues to be briefed: (1) whether *Harrison v Munson Healthcare, Inc.*, 304 Mich App 1 (2014), erred in its analysis of the scope of the peer review privilege, MCL 333.21515; and (2) whether the Saginaw Circuit Court erred when it ordered the defendant to produce the first page of the improvement report based on its conclusion that "objective facts gathered contemporaneously with an event do not fall within the definition of peer review privilege."

We further ORDER that the stay entered by this Court on May 14, 2014 shall remain in effect until completion of this appeal.



10617

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 20, 2014

Clerk

C

Order

Michigan Supreme Court
Lansing, Michigan

November 4, 2014

Robert P. Young, Jr.,
Chief Justice

149270(28)(30)(31)(33)(35)(37)(38)

Michael F. Cavanagh
Stephen J. Markman
Mary Beth Kelly
Brian K. Zahra
Bridget M. McCormack
David F. Viviano,
Justices

JOHN KRUSAC, Personal Representative of the
ESTATE OF DOROTHY KRUSAC,
Plaintiff-Appellee,

SC: 149270
COA: 321719
Saginaw CC: 12-015433-NH

v

COVENANT MEDICAL CENTER, INC., d/b/a
COVENANT MEDICAL CENTER-HARRISON,
d/b/a COVENANT HEALTHCARE,
Defendant-Appellant.

On order of the Chief Justice, the separate motions of the Michigan Defense Trial Counsel, the Michigan Protection & Advocacy Services, Inc., and the Regents of the University of Michigan to file amicus curiae briefs are GRANTED. The briefs submitted by those amici are accepted for filing. It is further ordered that the separate motions of the Michigan State Medical Society and American Medical Association, the Munson Healthcare, Inc., and the Michigan Health and Hospital Association to file amicus curiae briefs and to extend the time for filing the briefs are GRANTED. The briefs of those amici will be accepted for filing if received on or before November 19, 2014.



I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 4, 2014

①

Caution

As of: November 10, 2014 1:27 PM EST

William Beaumont Hosp. & S. Oakland Anesthesia Assocs., P.C. v. Medtronic, Inc.

United States District Court for the Eastern District of Michigan, Southern Division

April 21, 2010, Decided; April 21, 2010, Filed

Case No. 09-CV-11941

Reporter

2010 U.S. Dist. LEXIS 39093; 2010 WL 1626408

WILLIAM BEAUMONT HOSPITAL and SOUTH OAKLAND ANESTHESIA ASSOCIATES, P.C., Plaintiffs, v. MEDTRONIC, INC., Defendant.

Subsequent History: Motion granted by, in part, Motion denied by, in part *William Beaumont Hosp. v. Medtronic, Inc., 2010 U.S. Dist. LEXIS* 48201 (E.D. *Mich.*, May 17, 2010)

Prior History: *William Beaumont Hosp. v. Medtronic, Inc., 2009 U.S. Dist. LEXIS* 77860 (E.D. *Mich.*, Aug. 31, 2009)

Core Terms

peer review, variance, waive, privilege log, discovery, confidentiality, patient, morbidity, mortality, peer review committee, quality assurance, incident report, occurrence, peer review process, patient care, refill, staff, disclosure, withheld

Counsel: [*1] For William Beaumont Hospital, South Oakland Anesthesia Associates, PC, Plaintiffs: James M. McAskin, Keefe A. Brooks, Brooks Wilkins Sharkey & Turco PLLC, Birmingham, MI.

For Medtronic, Incorporated, Defendant: Abraham Singer, Pepper Hamilton (Detroit), Detroit, MI; John P. Lavelle - NOT SWORN, Jr., Morgan, Lewis, Philadelphia, PA.

Judges: ROBERT H. CLELAND, UNITED STATES DISTRICT JUDGE.

Opinion by: ROBERT H. CLELAND

Opinion

OPINION AND ORDER DENYING IN PART DEFENDANT'S "MOTION TO COMPEL PRODUCTION OF DOCUMENTS" AND DIRECTING PLAINTIFFS TO UPDATE THEIR PRIVILEGE LOG AND FILE ADDITIONAL DOCUMENTATION

Before the court is Defendant Medtronic, Inc.'s "Motion to Compel Production of Documents," filed on February 23, 2010. A hearing on this motion is unnecessary. See *E.D. Mich.* LR 7.1(e)(2). For the reasons stated below, the court will deny in part Defendant's motion.

I. BACKGROUND

On April 15, 2005, an anesthesiologist from Defendant South Oakland Anesthesia Associates, P.C. ("SOAA") attempted to perform a procedure to refill Kathy Cober's Medtronic pain pump at Defendant William Beaumont Hospital ("Beaumont"). (Pls.' Am. Compl. P 12.) The procedure required the use of a "refill kit;" however, a Beaumont nurse retrieved [*2] a "catheter access kit" instead. (*Id.* PP 11, 13.) As a result of the use of the "catheter access kit," the medication was delivered directly into Ms. Cober's intrathecal space causing an overdose ("Cober Incident"). (*Id.* P 12.)

The family of Ms. Cober ("Cober Plaintiffs") sued Beaumont, SOAA, and others in Oakland County Circuit Court claiming damages arising out of the incident ("Cober Litigation"). (*Id.* P 14.) Medtronic was made aware of the incident and the lawsuit and participated in discovery. (*Id.* PP 15, 17.) Counsel for Beaumont and SOAA invited Medtronic to participate in discussions to settle the Cober Litigation, but Medtronic refused. (*Id.* P 22.) On May 29, 2008, Beaumont and SOAA settled the case with the Cober Plaintiffs. (*Id.* P 23.) The settlement included a release of the Cober Plaintiffs' rights against Medtronic. (*Id.*)

On May 21, 2009, Plaintiffs initiated the present action seeking contribution from Medtronic for "Medtronic's allocable share of fault in causing the injury to Ms. Cober." (*Id.* P 28.) Plaintiffs allege that approximately two to three weeks before the Cober Incident, a representative of Medtronic offered to provide free samples of "pain pump refill kits" [*3] for use in refilling Medtronic's implanted pain pumps. (*Id.* P 8.) Medtronic then delivered three free samples to Beaumont. (*Id.*) Only two, however, were "refill kits," while one was a "catheter access kit." (*Id.* P 10.) A representative of Medtronic, Provvidenza Cucchiara, later admitted that a "catheter access kit" should not have been delivered to the Beaumont Department of Anesthesia because "such kits were used primarily for diagnostic procedures, not for pain management." (*Id.* P 13.) Plaintiffs allege that Medtronic was negligent in delivering a diagnostic kit to the anesthesiology department and also for stating that the kit could be used for refill procedures. (*Id.* P 24.)

During discovery, Medtronic served Plaintiffs with requests for admissions, interrogatories, and document requests. (Def.'s Mot. at 8.) In response to certain

document requests, Plaintiffs "objected on the grounds of statutory privileges protecting peer review and other similar matters from disclosure." (*Id.*) On January 22, 2010, Plaintiffs produced a peer review privilege log comprising: (1) Variance Reports and accompanying investigative notes and communications, (2) a Sentinel Event Report and accompanying [*4] materials, (3) an Anestheisa Department Quality Assurance Review and accompanying materials, (4) a Summary FDA Site Visit, (5) a Beaumont Services Company Report of a Variance Report and accompanying investigative notes and communications, and (6) Physician Credential Files. (*Id.*, Ex. B.) On February 23, 2010, Defendant filed a motion to compel the documents withheld by Plaintiffs on the basis of a peer review privilege.

Defendant argues that the peer review privilege does not apply to the documents withheld by Plaintiffs, and even if it did, Plaintiffs have waived the privilege by placing the Cober Incident at issue in this litigation and by involving Defendant in the peer review process. Plaintiffs argue that the withheld documents are privileged because they are "inextricably linked" to the peer review process and that their contribution claim does not waive their right to assert the peer review privilege.

II. STANDARD

A. Peer Review Privilege

Under the Rules of Civil Procedure, a party "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." *Fed. R. Civ. P. 26(b)(1)*. The Federal Rules of Evidence govern the discoverability of privileged [*5] materials. *Fed. R. Evid. 1101; Fed. R. Civ. P. 26(b)*. Pursuant to *Federal Rule of Evidence 501*, the state law of privileges applies to evidence relevant to establishing an element of any claim or defense based in state law. *Fed. R. Evid. 501*. The present case is a contribution action under Michigan law. Accordingly, Michigan law governs the determination of a privilege.

Michigan's Public Health Code requires hospitals "to review their professional practices and procedures to improve the quality of patient care and reduce morbidity and mortality." *Gallagher v. Detroit-Macomb Hosp. Ass'n*, 171 *Mich. App.* 761, 431 N.W.2d 90, 94 (*Mich. Ct. App.* 1988). To facilitate this review, hospitals must establish peer review committees. *Dorris v. Detroit Osteopathic Hosp. Corp.*, 460 *Mich.* 26, 594 N.W.2d 455, 463 (*Mich.* 1999). Specifically, hospitals must:

assure that physicians and dentists admitted to practice in the hospital are organized into a medical staff to enable an effective review of the professional practices in the hospital for the purpose of reducing morbidity and mortality

and improving the care provided in the hospital for patients. The review shall include the quality and necessity of the care provided and the preventability [*6] of complications and deaths occurring in the hospital.

Mich. Comp. Laws § 333.21513(d).

To maximize the effectiveness of this review, Michigan has enacted two statutes that create a peer review privilege for records collected at the direction of a peer review committee. Under *Mich.* Comp. Laws § 333.20175(8),

[t]he records, data, and knowledge collected for or by individuals or committees assigned a professional review function in a health facility or agency, or an institution of higher education in this state that has colleges of osteopathic and human medicine, are confidential, shall be used only for the purposes provided in this article, are not public records, and are not subject to court subpoena.

Mich. Comp. Laws § 333.20175(8). Similarly, *Mich.* Comp. Laws § 333.21515 provides that "[t]he records, data, and knowledge collected for or by individuals or committees assigned a review function described in this article are confidential and shall be used only for the purposes provided in this article, shall not be public records, and shall not be available for court subpoena." *Mich.* Comp. Laws § 333.21515.

To determine whether a record is privileged, "the court should consider the hospital's [*7] bylaws, internal rules and regulations and whether the committee's function is that of retrospective review for purposes of improvement and self-analysis and thereby protected, or part of current patient care." *Gallagher*, 431 N.W.2d at 94. However, the records must have been collected for or by the peer review committee. *Marchand v. Henry Ford Hosp.*, 398 *Mich.* 163, 247 N.W.2d 280, 282 (*Mich.* 1976). The fact that information is submitted to a peer review committee does not mean that it satisfies the collection requirement so as to make it privileged. *Monty v. Warren Hosp. Corp.*, 422 *Mich.* 138, 366 N.W.2d 198, 202 (*Mich.* 1985). Also, the protection afforded quality assurance and peer review reports does not depend on the type of claim asserted by the proponent of the subpoena. *Ligouri v. Wyandotte Hosp. & Med. Ctr.*, 253 *Mich. App.* 372, 655 N.W.2d 592, 595 (*Mich. Ct. App.* 2003).

Although privileges are to be narrowly construed, *Centennial Healthcare Mgmt. Corp. v. Mich.* Dep't of Consumer & Indus. Servs., 254 *Mich. App.* 275, 657 N.W.2d 746, 754 (*Mich. Ct. App.* 2003), the "Legislature protected peer review documents in broad terms." *In re Lieberman*, 250 *Mich. App.* 381, 646 N.W.2d 199,

202-03 (*Mich. Ct. App.* 2002) (stating that the peer review privilege statute "demonstrates that [*8] the Legislature has imposed a comprehensive ban on the disclosure" of peer review material). Indeed, peer review documents

are not subject to disclosure in a criminal investigation pursuant to a search warrant, *In re Investigation of Lieberman*, 250 *Mich. App.* 381, 646 N.W.2d 199 (2002), a civil suit concerning an assault on a hospital patient, *Dorris, supra*, a medical malpractice claim, *Gallagher v. Detroit-Macomb Hosp. Ass'n*, 171 *Mich. App.* 761, 431 N.W.2d 90 (1988), or an investigation by the Board of Medicine, *Attorney General v. Bruce*, 422 *Mich.* 157, 369 N.W.2d 826 (1985).

Manzo v. Petrella, 261 *Mich. App.* 705, 683 N.W.2d 699, 705 (*Mich. Ct. App.* 2004). The Michigan Legislature intended to "fully protect quality assurance/peer review records from discovery." *Ligouri*, 655 N.W.2d at 594 (emphasis in original).

The rationale for this strong protection of peer review material is that:

"[c]onfidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practices is a *sine qua non* of adequate hospital care. To subject the discussions and deliberations [*9] to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations."

Attorney General v. Bruce, 422 *Mich.* 157, 369 N.W.2d 826 (*Mich.* 1985) (quoting *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249, 250 (D.D.C. 1970)). Without confidentiality, "the willingness of hospital staff to provide their candid assessment will be greatly diminished," which "will have a direct effect on the hospital's ability to monitor, investigate, and respond to trends and incidents that affect patient care, morbidity, and mortality." *Dorris*, 594 N.W.2d at 463. "By insuring that the proceedings remain confidential, the Legislature has provided strong incentive for hospitals to carry out their statutory duties in a meaningful fashion." *Attorney General v. Bruce*, 335 N.W.2d 697, 701, 124 *Mich. App.* 796 (*Mich. Ct. App.* 1983).

III. DISCUSSION

A. Variance Reports and Sentinel Event Report

Plaintiffs assert that Variance Report # 232655, a Beaumont Services Company Report of Variance Report # 232655, and Variance Report # 332782, as well as associated investigative notes and communications are protected by the peer review

privilege. (Pls.' Privilege Log, Def.'s Mot., Ex. B.) The two variance reports were [*10] prepared by staff nurses on April 15, 2005, and were given to Nursing Administration, Anesthesia Process Owner, and Medical Quality Program Management. (*Id.*) The Beaumont Services Company Report of Variance Report # 2322655 was issued on November 3, 2005, by Beaumont Services Company and the Clinical Engineering Manager and staff. It was provided to the Patient Safety Officer, the Director of Medical Quality Program Management, the Director of Anesthesia Quality Assurance, and others. (*Id.*) Plaintiffs also assert that the root cause analysis, progress reports, notes, minutes, memos, and communications concerning Sentinel Event 05-03 are protected by the peer review privilege. (*Id.*)

Plaintiffs have attached policies from a Management Manual prepared by Beaumont's Medical Quality Program Management and Quality Management describing the process for preparation and review of Variance Reports.¹ (Pls.' Resp., Ex. B.) Policy Number 153 defines a Variance as "any process/occurrence inconsistent with the routine operation of the hospital or the routine care of patients" and states that "Variances shall be reported, analyzed, trended, and utilized through Intensive Assessment or other review [*11] processes to continually improve systems, processes, education and training to reduce/avoid their occurrence." (*Id.*)

Pursuant to Policy Number 153-1, the first person (including a nurse) who discovers a Variance is required to initiate a Variance Report. (*Id.*) The Report is then given to the department manager or supervisor of the department, who is required to review the Variance Report for completeness and accuracy based on the impact on the patient's care/outcome and actions taken regarding correction and prevention. (*Id.*) The Report is then sent to Management Quality Program Management or Quality Management and the Process Owner. (*Id.*) The Process Owner documents additional findings and follow-up actions, inputs the information [*12] into a database, and determines the extent of necessary review. (*Id.*) The necessary review may entail Sentinel Event review (discussed *infra*), organizational review, departmental review, track and trend only, or Intensive Assessment, defined as "a complete, thorough, in-depth analysis which focuses primarily on processes and systems to discover causal factors leading up to a Variance and to develop and implement risk reduction action plans to prevent recurrences of the Variance." (*Id.*) The Process Owner is directed to "[a]nalyze, track and trend, and make process improvement recommendations on a on-going basis." (*Id.*) The Medical Quality Program Management and Quality Management receive all of the Variance Reports, collect

¹ Defendant notes that "Plaintiffs have not submitted any sworn witness affidavit or testimony to support their assertion of privilege." (Def.'s Reply at 2.) Because the court is to consider "the hospital's bylaws, internal rules and regulations," the Management Manual provides a sufficient basis for the court to determine the existence of the peer review privilege with respect to the Variance Reports and Sentinel Event Reports. *Gallagher*, 431 N.W.2d at 94.

aggregate data, and distribute quarterly reports to the hospital administration as appropriate. (*Id.*)

Regarding Confidentiality, Policy Statement 153 provides that "[a]ny records, data, and information collected for or by individuals involved with a Variance and the subsequent review and analysis are part of a professional, peer review function, performance improvement effort or other quality initiative and are confidential and protected from discovery." (*Id.*) Similarly, [*13] at the bottom of the Variance Report, it states, "This report is CONFIDENTIAL and protected from discovery Its primary use is for professional review purposes in the interest of reducing morbidity and mortality, and improving the care provided patients." (*Id.*, Ex. C.)

A Variance that involves "death or serious physical or psychological injury" is deemed a Sentinel Event. (*Id.*, Ex. D.) For all Sentinel Events, a root cause analysis must be performed, pursuant to Policy Number 174. (*Id.*) The root cause analysis "is a process for identifying the basic reason or causal factor(s) for the Variance, which, if eliminated or corrected, would have prevented the Sentinel Event from occurring." (*Id.*) The analysis is performed by a task force, consisting of "the organization's leadership and appropriate individuals involved in the processes and systems under review." (*Id.*) Policy Number 174 states that "[a]ny records, data, and information collected for or by individuals involved with a Sentinel Event and the subsequent review and analysis are part of a professional, peer review function, performance improvement effort or other quality initiative and are confidential and protected from discovery." [*14] (*Id.*)

Michigan courts have addressed the applicability of the peer review privilege to "incident reports" or "occurrence reports" similar to the reports at issue in this case. *See, e.g., Lindsey v. St. John Health System, Inc., Nos. 268296, 270042, 2007 Mich. App. LEXIS 268, 2007 WL 397075 (Mich. Ct. App. Feb. 6, 2007)* (upholding the trial court's denial of plaintiff's motion to compel production of an "occurrence report" because it "necessarily related to a document that concerned the review of professional practices and the quality of care provided by the hospital"). For instance, in *Gregory v. Heritage Hospital* (a companion case to *Dorris*), a patient alleged that she was assaulted while staying at a hospital. *Dorris, 594 N.W.2d at 458*. The trial court ordered the hospital to produce an incident report, "any investigative reports relative to the incident report," and "any notes, memoranda, records, and reports related to the incident." *Id. at 458-59*. The Michigan Supreme Court held that this was error because the hospital offered an affidavit stating that the information "was collected for the purpose of retrospective peer review by the peer review committee." *Id. at 463-64*. The court then remanded the case [*15] to

the trial court to allow the plaintiff "to test the veracity of the hospital's procedures," i.e. whether the information "was actually collected for the purpose of retrospective review by the peer committee." *Id.*

The *Gregory* court relied on the Michigan Court of Appeals' decision in *Gallagher*, in which the Michigan Court of Appeals affirmed the trial court's decision to not admit a hospital incident report at trial, *431 N.W.2d at 94*. The court determined that the hospital incident report was prepared for purposes consistent with *Mich.* Comp. Laws § 333.20175(5) and *Mich.* Comp. Laws § 333.21515 based on a hospital employee's testimony concerning the hospital's practices regarding incident reports. *Id.* The employee testified that the hospital incident reports were "completed for all unusual occurrences at the hospital" and that their purpose "was to assist the hospital in monitoring its own activities to reduce accidents, injuries, morbidity and mortality at the hospital." *Id.* The report was routed to the unit supervisor, department head, legal affairs department, and then to the hospital's Safety Committee or Quality Assurance Committee. *Id.* These committees were "assigned the responsibility [*16] of identifying trends or problems at the hospital," and the court found that "the quality and safety committees appear to fulfill the protected review functions." *Id.*

In this case, Plaintiffs have demonstrated that the Variance Reports, Sentinel Event Report, and accompanying materials are "records, data, and knowledge collected for or by individuals or committees assigned a professional review function in a health facility or agency." *Mich.* Comp. Laws § 333.20175(8). The primary use of the Reports was for "professional review purposes in the interest of reducing morbidity and mortality, and improving the care provided patients." (Pls.' Resp., Ex. C.) Similar to the report in *Gallagher* which was "completed for all unusual occurrences at the hospital," a Variance Report is completed for occurrences that are "inconsistent with the routine operation of the hospital or the routine care of patients." (*Id.*, Ex. B.) Like the report in *Gallagher* that was routed to various levels of hospital management, the Variance Report is sent to the department supervisor, Management Quality Program or Quality Management and the Process Owner. (*Id.*) Similar to the *Gallagher* committee that was "assigned the [*17] responsibility of identifying trends or problems at the hospital," the Process Owner is directed to "[a]nalyze, track and trend, and make process improvement recommendations on a on-going basis." (*Id.*) In addition, for all Sentinel Events, a task force is formed to conduct a root cause analysis to identify the cause of the Variance, which if corrected would have prevented it from occurring. (*Id.*, Ex. D.) These procedures demonstrate that the data

and reports were collected for a professional review committee.² The purpose of this review was to reduce morbidity and mortality and improve patient care, consistent with the statutory directives of the State of Michigan. See *Mich. Comp. Laws* § 333.21513(d). Accordingly, these materials are protected from discovery by the peer review privilege.

B. Anesthesia Department Quality Assurance Review, Summary FDA Site Visit, Physician Credential Files

Plaintiffs assert that documents entitled "Summary FDA site visit," "Anesthesia Department Quality Assurance Review," and "Physician Credential Files" are protected by the peer review privilege. (Pls.' Privilege Log, Def.'s Mot., Ex. B.) Unlike the Variance Reports and Sentinel Event Report, Plaintiffs have not provided any documentation showing why these documents were prepared and whether they were collected for or by a peer review committee. Nor do Plaintiffs provide any argument in their brief regarding these documents. With the exception of the Summary FDA Site Visit document, the other documents appear, at least nominally, to be privileged. See *Dye v. St. John Hosp. & Medical Center*, 230 *Mich. App.* 661, 584 N.W.2d 747, 749-51 (*Mich. Ct. App.* 1998) (rejecting "plaintiff's conclusion that materials relating to the provision of staff [*19] privileges are outside the purview of the statutes" and holding that the "confidentiality provisions of the statutes apply"). The court will therefore direct Plaintiffs to file documentation sufficient for the court to determine whether these documents are protected by the peer review privilege.

C. The Privilege Log

Defendant argues that the claim of privilege must be rejected because Plaintiffs have failed to provide an adequate privilege log. (Def.'s Mot. Br. at 18.) Under *Federal Rule of Civil Procedure 26(b)(5)*, when parties assert a privilege, they must describe the nature of the withheld documents in a manner that permits the other parties to assess the validity of the privilege claim. *Fed. R. Civ. P. 26(b)(5)*. In addition, this court's standing order regarding discovery practices and expectations states that "[d]ocuments withheld on the basis of privilege must be listed on a privilege log with sufficient information to enable the requesting party to understand the nature of the documents and the basis of the privilege claim." The court concludes that Plaintiffs' privilege log sufficiently meets these standards. It would not be

² Defendant argues that the reports were created pursuant to the Safe Medical Devices Act and not for peer review purposes. (Def.'s Reply at 2.) Policy Number 153-2 sets out Beaumont's policies regarding the preparation and processing of Variance Reports effected by the Safe Medical Devices Act. (Pls.' Resp., Ex. B.) It requires the creation of two reports: a Medical Device Adverse Event Report and [*18] an Annual Summary. (*Id.*) These documents would arguably not be protected by the peer review privilege. However, there is no evidence that they were withheld by Plaintiffs on the basis of the peer review privilege as they are not included on their peer review privilege log.

practicable for a privilege log to contain a detailed [*20] description of the hospital's rules, regulations, and policies concerning peer review records. Nonetheless, when a claim of privilege is challenged, as in this case, the party withholding the records must come forward with sufficient evidence to enable the court to conclusively determine that the privilege applies. Plaintiffs have provided sufficient evidence regarding the Variance Reports and Sentinel Event Report but have not done so with respect to the other documents.

The court has identified one deficiency in the privilege log. Plaintiffs have not identified the names of the authors of the documents. Information concerning the date and author of peer review documents is not protected by the peer review privilege.³ See *Monty*, 366 N.W.2d at 201. Plaintiffs will therefore be directed to supplement their peer review privilege log with this information and provide an updated version of their peer review privilege log to Defendant.

D. Waiver

According to Defendant, the "central [*21] issue" in its motion to compel is its claim that Plaintiffs have waived the peer review privilege. (Def.'s Reply at 3.) Defendant argues that Plaintiffs waived the peer review privilege by affirmatively bringing a contribution action and by involving Defendant in the peer review process. (Def.'s Mot. Br. at 11-18.) Plaintiffs argue that Beaumont has not waived the peer review privilege and that Defendant "fails to cite any Michigan case law in support of its argument that a claim for contribution somehow puts protected peer review material 'at issue' such that one could find a waiver of the peer review privilege." (Pls.' Resp. at 8.)

Whether the peer review privilege can be waived is a matter of first impression in Michigan. In some states, there is a statutory provision for waiver of the peer review privilege. See Susan O. Scheutzow & Sylvia Lynn Gillis, *Confidentiality and Privilege of Peer Review Information: More Imagined Than Real*, 7 J.L. & Health 169, 190-92 (1993) (noting that "[m]ost of the states that provide a privilege for peer review information do not provide any way in which the privilege may be waived," but that six states do have a statutory waiver provision). In states [*22] without a statutory waiver provision, courts are split on whether the peer review privilege can be waived. Compare *Ayash v. Dana-Farber Cancer Inst.*, 443 Mass. 367, 822 N.E.2d 667, 692 n.28 (Mass., 2005) ("In our view, applying waiver principles to peer review communications would significantly undermine the effectiveness of the statute."), and *Emory Clinic v. Houston Emory Univ.*, 258 Ga. 434, 369 S.E.2d 913 (Ga. 1988)

³ Thus, it was improper for Plaintiffs' counsel to direct Dr. Michael Sikorsky at his deposition to not answer the question about the names of the persons involved in the quality-assurance process. (Def.'s Reply, Ex. A.)

("[T]he General Assembly has placed an absolute embargo upon the discovery and use of all proceedings, records, findings and recommendations of peer review groups and medical review committees in civil litigation."), with *In re Missouri ex rel. St. John's Reg'l Med. Ctr. v. Dally*, 90 S.W.3d 209, 217 (Mo. Ct. App. 2002) (per curiam) ("[D]espite the public and other interests that underlie the peer review privilege, it is not an absolute privilege and can be waived . . .").

A strong argument can be made that the peer review privilege is not waivable in Michigan. The statute specifically lists permissible reasons for the release of peer review material, but use in private civil litigation is not one of them. See *Mich. Comp. Laws* § 331.532 (allowing release of peer review material to, among other things, [*23] advance health care research and education, maintain health care profession standards, and protect the financial integrity of governmentally funded programs); *In re Lieberman*, 646 N.W.2d at 202 ("Underscoring the high level of confidentiality attendant to peer review documents is the statutory admonishment that such information is to be used only for the reasons set forth in the legislative article including that privilege." (emphasis in original)). Moreover, with respect to other statutorily-created privileges, like the physician-patient privilege, the Michigan Legislature explicitly included a waiver provision in the statute; however, no waiver provision was included in the peer review privilege statute. See *id.* § 600.2157 ("If the patient brings an action against any defendant to recover for any personal injuries, or for any malpractice, and the patient produces a [treating] physician as a witness . . ., the patient shall be considered to have waived the [physician-patient] privilege . . ."). Nonetheless, the court need not decide whether the peer review privilege is absolute, because even if it could be waived, Plaintiffs have not waived it in this case.

In support of its argument [*24] that Plaintiffs waived the peer review privilege by bringing a contribution claim, Defendant relies on the test set forth in *Howe v. Detroit Free Press, Inc.*, 440 Mich. 203, 487 N.W.2d 374 (Mich. 1992). In *Howe*, the Michigan Supreme Court held that the plaintiffs, who brought a defamation claim, waived the statutory probation report privilege when the defendant's truth defense was seriously undermined without the report. 487 N.W.2d at 384. The *Howe* court adopted the First Circuit's balancing test, articulated in *Greater Newburyport Clamshell Alliance v. Pub. Serv. Co. of N.H.*, 838 F.2d 13 (1st Cir. 1988), which provides that:

a court should begin its analysis with a presumption in favor of preserving the privilege. In a civil damages action, however, fairness requires that the privilege holder surrender the privilege to the extent that it will weaken, in a meaningful way, the defendant's ability to defend. That is, the privilege ends

at the point where the defendant can show that the plaintiff's civil claim, and the probable defenses thereto, are enmeshed in important evidence that will be unavailable to the defendant if the privilege prevails. The burden on the defendant is proportional to the importance [*25] of the privilege. The court should develop the parameters of its discovery order by carefully weighing the interests involved, balancing the importance of the privilege asserted against the defending party's need for the information to construct its most effective defense.

Howe, 487 N.W.2d at 380 (quoting *Clamshell*, 838 F.2d at 20). The *Howe* court then quoted the First Circuit's guidelines:

First, defendants should demonstrate that the material to be discovered is relevant to their case. This showing should include an articulation of how the material could assist the preparation of their defense in a meaningful way. . . . Secondly, defendants should demonstrate why it would be unreasonably difficult for them to obtain the information elsewhere or that redundant evidence will be helpful to their case. They do not have to prove that it is absolutely unavailable from other sources. Of course, the more the requested discovery would intrude into the privilege, the greater should be the showing of need and lack of reasonable alternative sources.

Id. at 382-83 (quoting *Clamshell*, 838 F.2d at 22).

Applying the *Howe* balancing test,⁴ the court concludes that Defendant has not overcome the presumption [*26] in favor of preserving the privilege. Defendant has not demonstrated that its ability to defend will be meaningfully weakened or that it would be unreasonably difficult to obtain the evidence elsewhere. (See Pls.' Resp. at 4 ("Defendant Medtronic has been provided 100% of the medical records pertaining to the care and treatment of Ms. Cober; 100% of the discovery materials, depositions, etc. generated in the underlying Cober litigation; and 100% access to depose each and every person involved in the underlying incident."). To the extent the peer review protected information is relevant, it is the facts concerning the Cober Incident contained in those reports that are relevant. The facts themselves are not

⁴ Plaintiffs question the applicability of the *Howe* test to this case, noting that the *Howe* court underscored the "special standing of truth as a defense in a defamation action" and that *Howe* involved the probation officer-probationer privilege, which the court stated "bears little or no relationship to its protective purpose." (Pls.' Resp. at 8-9 (quoting *Howe*, 487 N.W.2d at 384).) In its reply, Defendant points out that "Plaintiffs' own counsel has recognized in his treatise on Michigan civil practice, the *Howe* at issue waiver standard applies to other evidentiary privileges, not just the probation officer privilege." (Def.'s Reply at 3 (citing Corrigan, et al., *Mich. Prac. Guides: Civil Proc. Before Trial* § 6.49 (2006).) Even though *Howe* is not controlling on the issue of waiver in the context of the peer review privilege, the Michigan Supreme Court would likely apply the *Howe* test if it were to find that the peer review [*28] privilege could be waived by placing the material "at issue."

privileged, even if they were gathered and evaluated by a peer review committee. Defendant is free to depose the persons involved in the incident to ascertain those facts. Indeed, a written record of Beaumont's investigation and assessment of the causes and factors leading to the Cober Incident may not even exist if it were not for the statutory directive for hospitals to review its practices and the concomitant protection afforded to this review. Defendant can mount a full defense [*27] without the peer review material--its defense does not hinge on Plaintiffs' investigation of the Cober Incident, and there is no evidence that Plaintiffs are using the peer review material as "a shield and a dagger at one and the same time." Dally, 90 S.W.3d at 217.

In addition, the policy reasons behind the peer review privilege support not finding a waiver. A hospital will be reluctant to make effective records of its internal investigations with the knowledge that its confidentiality could be easily waived and then used against it as evidence in a later civil action. A ready waiver could have a chilling effect on the "candid assessment" that is necessary for a hospital to effectively "monitor, investigate, and respond to trends and incidents that affect patient care, morbidity, and mortality." Dorris, 594 N.W.2d at 463. This could undermine the "strong incentive for hospitals to carry out their statutory duties in a meaningful fashion." Bruce, 335 N.W.2d at 701.

Michigan's strong protection of peer review material demonstrates the importance of this privilege. The Michigan Legislature "has imposed a *comprehensive ban* on the disclosure of any information collected by, or records of the proceedings of, committees assigned a professional review function in hospitals and health facilities." In re Lieberman, 646 N.W.2d at 202 (emphasis added). Indeed, the peer review privilege trumps a [*29] search warrant in a criminal investigation, id. at 203, and it trumps an investigative subpoena from the Michigan Board of Medicine, Bruce, 369 N.W.2d at 832. These cases militate against finding a ready waiver.

Moreover, a contribution action is not a typical affirmative claim brought by a plaintiff. As the Michigan Court of Appeals has explained, "The *sine qua non* of the contribution statute is that the defendant from whom contribution is sought is a tortfeasor. The contribution act affords a defendant a procedure to gain contribution from a fellow tortfeasor. It does not establish liability in the first instance." Zoll v. Brinkerhoff, 170 Mich. App. 210, 427 N.W.2d 610, 612 (Mich. Ct. App. 1988). The theory is that the injured party could have sued both the plaintiff now seeking contribution and the defendant, and liability would have been apportioned between these two in the underlying suit brought by the injured party. Because only the plaintiff was sued, however, the plaintiff is now seeking this apportionment in a

contribution action. In the underlying Cober Litigation, the peer review material would not have been discoverable and had Defendant been a party, it would have had to defend the suit [*30] without this material. It would be a strange result to require the disclosure of this material when Plaintiffs are now seeking the same apportionment that would have occurred in the Cober Litigation had Defendant been a party. Thus, the "at issue" waiver argument is particularly weak in the context of a contribution claim.

Defendant also argues that Plaintiffs waived the peer review privilege by involving Defendant in the peer review process. (Def.'s Mot. Br. at 17.) In support, Defendant has attached emails from Beaumont's Clinical Engineering Manager seeking to speak with Defendant's engineers about performing a "human factors analysis." (Def.'s Mot., Ex. D.) Defendant's legal counsel sought information from Beaumont regarding the proposed testing protocol, but Beaumont never provided the requested information. (Def.'s Mot. Br. at 17 n.6.) Defendant does not assert that it was involved in producing the Variance Reports or Sentinel Event Report. Defendant provides no authority for the proposition that potential involvement in one aspect of the peer review process necessarily means that a person has access to the complete peer review process. Accordingly, the court concludes that Plaintiffs [*31] have not waived the peer review privilege.

IV. CONCLUSION

IT IS ORDERED that Defendant's "Motion to Compel Production of Documents" [Dkt. # 24] is DENIED IN PART. It is denied as to the first, second, and fifth entries on Plaintiff's peer review privilege log, i.e. the Variance Reports, Sentinel Reports, and accompanying investigative materials.

Plaintiffs are DIRECTED to file by **April 29, 2010**, documentation sufficient for the court to determine whether the third, fourth, and sixth entries on their privilege log are protected by the peer review privilege. Failure to file additional information by this date will result in Defendant's motion being granted as to these documents.

Plaintiffs are FURTHER DIRECTED to supplement their peer review privilege log with the authors of the documents and provide the updated privilege log to Defendant by **April 29, 2010**.

/s/ Robert H. Cleland

ROBERT H. CLELAND

UNITED STATES DISTRICT JUDGE

Dated: April 21, 2010

HOON JEUNG

Court of Appeals of Michigan

April 20, 2004, Decided

No. 245997

Reporter

2004 Mich. App. LEXIS 989; 2004 WL 842511

HOON K. JEUNG, M.D. and YUN HEE JEUNG, Plaintiffs-Appellants, MICHAEL H. ALLEN, CAROLYN POLLOCK CARY, and CURRIE KENDALL POLASKY MEISEL PLC, Defendants-Appellees.

Notice: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: Saginaw Circuit Court. LC No. 02-043856-NM.

Disposition: Affirmed.

Core Terms

discovery, peer review, summary disposition, trial court, attorney-client, defendants'

Judges: Before: Bandstra, P.J., and Sawyer and Fitzgerald, JJ.

Opinion

PER CURIAM.

Plaintiffs appeal as of right an order granting summary disposition to defendants pursuant to MCR 2.116(C)(8) and (C)(10). We affirm.

This case arises out of plaintiff Hoon K. Jeung, M.D.'s suspension from the staff of a hospital and the hospital's refusal to purchase from plaintiff his medical practice and the building that housed the practice. Defendants provided legal representation to the hospital. Plaintiffs' claims were premised upon defendant Allen's providing of legal services to plaintiffs in the past. The trial court held that plaintiffs had failed to state a claim for legal malpractice and that there was no genuine issue of material fact because all evidence necessary to support the claims was barred from discovery by the peer review privilege and by the attorney-client privilege.

A trial court's grant of summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich. 109, 118; [*2] 597 N.W.2d 817 (1999). Under *MCR 2.116(C)(8)*, a court examines the pleadings to determine if the allegations in the complaint could be sufficiently developed to justify recovery. *Id.* at 119-120. Under *MCR 2.116(C)(10)*, a court examines all submitted evidence to determine if it establishes a genuine issue of material fact. *Id.* at 120. Under either *MCR 2.116(C)(8)* or *MCR 2.116(C)(10)*, the materials considered should be viewed in the light most favorable to the non-moving party. *Id.* at 119-120. Although a trial court's order regarding discovery is ordinarily reviewed for an abuse of discretion, whether production of evidence is barred by a statute is a question of law and is therefore reviewed de novo. *Ligouri v Wyandotte Hospital and Medical Center*, 253 Mich. App. 372, 375; 655 N.W.2d 592 (2002). Application of the peer review privilege is an issue of law reviewed de novo. *Dye v St John Hospital and Medical Center*, 230 Mich. App. 661, 665-666; 584 N.W.2d 747 (1998). Whether the attorney-client privilege applies is reviewed de novo. *Leibel v General Motors Corp.*, 250 Mich. App. 229, 236; [*3] 646 N.W.2d 179 (2002).

The peer review privilege is based on *MCL 333.20175(8)*, *MCL 333.21515*, and *MCL 331.533*. The peer review privilege is broad, *In re Lieberman*, 250 Mich. App. 381, 390; 646 N.W.2d 199 (2002), and this Court has held that these statutes "evidence the Legislature's intent to fully protect quality assurance/peer review records from discovery." *Ligouri, supra* at 376 (emphasis original). Although the mere fact that information was submitted to a peer review committee does not automatically trigger the peer review privilege, *Monty v Warren Hospital Corp.*, 422 Mich. 138, 146-147; 366 N.W.2d 198 (1985), plaintiffs seek information obtained by a peer review committee pursuant to its peer review function. The privilege therefore applies. Although a protective order might induce a party to waive a privilege, the hospital here has explicitly not done so, and the privilege itself is absolute. The trial court properly applied the peer review privilege.

The attorney-client privilege is narrowly applicable to confidential [*4] communications between a client and the client's attorney for the purpose of obtaining legal advice, but where the client is an organization, the privilege covers any of that organization's agents or employees authorized to speak for it on that subject. *Leibel, supra* at 236. The privilege further extends to opinions, conclusions, and recommendations based on facts. *Id.* at 239. Only the client may waive the privilege, and it may not be waived by accident. *Id.* at 240. If a document is privileged, it retains the status of being privileged even if it is publicly disclosed or obtained by a party from an independent source. *Id.* at 241. Defendants' client, the hospital, expressly declined to waive any privileges. Therefore, the trial court correctly found that any confidential communications between defendants and the

hospital pertaining to defendants' representation of the hospital is immune from discovery.

Plaintiffs argue that the trial court erred by dismissing their claim of tortious interference with a business relationship. However, to prevail on that claim, plaintiffs must show a valid business expectancy, that defendants [*5] were aware of that expectancy, that defendants intentionally interfered with it, and resulting damage. *Mino v Clio School Dist.*, 255 Mich. App. 60, 78; 661 N.W.2d 586 (2003). Plaintiffs must show that defendants engaged in an act that was wrongful per se or an act that was lawful but malicious and not legally justified for the purpose of invading plaintiffs' rights. *CMI International, Inc v Internet International Corp.*, 251 Mich. App. 125, 131; 649 N.W.2d 808 (2002). Plaintiffs are further required to "demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference," and plaintiffs are required to do so in response to the motion. *Id.* at 131-132. Here, plaintiffs merely stated that the facts would demonstrate defendants' involvement in a scheme to interfere with the purchase. Plaintiffs failed to produce any evidence to show that defendants involvement in the hospital's decision not to purchase Dr. Jeung's building and practice was wrongful. Because defendants were involved in their capacity as the hospital's attorneys, any further discovery of communications between defendants and the hospital [*6] on the matter would be barred by the attorney-client privilege. Because there is no evidence showing the wrongfulness element of this claim and no reasonable likelihood of discovering any, there is no genuine issue of material fact regarding this claim.

Plaintiffs next contend that the trial court erred by granting summary disposition of the legal malpractice claim. To support this claim, plaintiffs had to show an attorney-client relationship, negligence in that legal representation, injury proximately caused by that negligence, and the fact and extent of the injury. *Coleman v Gurwin*, 443 Mich. 59, 63; 503 N.W.2d 435 (1993). Plaintiffs are required to show that, but for defendants' actions, the claimed injury would not have occurred. *Charles Reinhart Co v Winienko*, 444 Mich. 579, 586-587; 513 N.W.2d 773 (1994). Here, those injuries are apparently Dr. Jeung's suspension from the hospital and the hospital's decision not to purchase Dr. Jeung's building or practice. Plaintiffs did not provide any evidence that either event would not have taken place if different attorneys with no knowledge of plaintiffs had been employed by [*7] the hospital as legal counsel, and any communications between the hospital and defendants regarding legal advice or the peer review is privileged. Because there is no evidence showing that the hospital would have acted differently but for defendants' alleged actions and no reasonable likelihood of discovering any, there is no genuine issue of material fact regarding this claim.

Plaintiffs next allege that the trial court should not have dismissed the case before discovery was completed. Although a motion for summary disposition is generally premature if granted before completing discovery regarding a disputed issue, "if a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence." *Bellows v Delaware McDonald's Corp.*, 206 Mich. App. 555, 561; 522 N.W.2d 707 (1994). Mere conjecture does not entitle a party to discovery, because that discovery would be no more than a fishing expedition. *Pauley v Hall*, 124 Mich. App. 255, 263; 335 N.W.2d 197 (1983). Summary disposition may be [*8] appropriate before the completion of discovery where further discovery stands no reasonable chance of resulting in factual support for the nonmoving party. *Colista v Thomas*, 241 Mich. App. 529, 537-538; 616 N.W.2d 249 (2000). Here, the evidence in the record does not show the possibility that any non-privileged evidence might be discoverable, and an unsupported statement that certain facts can be proven is insufficient. *Bellows, supra at 561*. Therefore, summary disposition was not premature.

Finally, plaintiffs argue that their claim of legal malpractice should not have been dismissed because violations of the Michigan Rules of Professional Conduct constitute evidence of negligence. Although violations of the former Code of Professional Responsibility gave rise to a cause of action, *Hooper v Lewis*, 191 Mich. App. 312, 316; 477 N.W.2d 114 (1991), *Rule 1.0(b) of the MRPC* explicitly states that the current rules do not. Further, even if the MRPS's gave rise to a cause of action, as noted above, plaintiffs failed to establish the element of proximate cause. Plaintiffs failed to state a cause of action for legal malpractice. [*9]

Affirmed.

/s/ Richard A. Bandstra

/s/ David H. Sawyer

/s/ E. Thomas Fitzgerald

As of: November 10, 2014 1:29 PM EST

Lindsey v. St. John Health Sys.

Court of Appeals of Michigan

February 6, 2007, Decided

Nos. 268296; 270042

Reporter

2007 Mich. App. LEXIS 268; 2007 WL 397075

CYNTHIA M. LINDSEY, Plaintiff-Appellant, v ST. JOHN HEALTH SYSTEM, INC. - DETROIT MACOMB CAMPUS, d/b/a ST. JOHN DETROIT RIVERVIEW HOSPITAL, ST. JOHN HEALTH SYSTEM, INC., ST. JOHN HOSPITAL & MEDICAL CENTER, and ST. JOHN RIVERVIEW HOSPITAL, Defendants-Appellees.

Notice: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: Wayne Circuit Court. LC No. 03-314865-NO.

Disposition: Affirmed.

Core Terms

trial court, costs, intentional infliction of emotional distress, summary disposition, defendants', discovery, plaintiff's claim, records, attorney's fees, asserts, party's, requirements, psychiatric, outrageous, contends, entities, provides, prevailing party, malpractice, occurrence, pertaining, argues

Judges: Before: Donofrio, P.J., and Bandstra and Zahra, JJ.

Opinion

PER CURIAM.

Plaintiff appeals as of right, challenging the trial court's orders granting defendants summary disposition on plaintiff's claim of intentional infliction of emotional distress, and awarding defendants attorney fees and costs. Because the trial court did not err: in granting summary disposition in favor of defendants on plaintiff's claim of intentional infliction of emotional distress, in refusing to consider various expert affidavits submitted by plaintiff, in dismissing the additional defendants and refusing

to add additional defendants, in granting defendant's request for discovery of plaintiff's psychiatric records, in denying disclosure of the occurrence report to plaintiff, and in awarding costs and attorney fees to defendants as the prevailing party based on plaintiff's rejection of the case evaluation, we affirm.

I

This action arises from plaintiff's hospitalization at [*2] St. John Riverview Hospital. Plaintiff alleged that during her post-surgical recovery at the hospital, unidentified members of defendants' nursing staff treated her in a rude, disrespectful, and unprofessional manner. Plaintiff alleged that members of defendants' nursing staff made derogatory references to her, were rough on one occasion when taking plaintiff's vital signs, threatened to hurt plaintiff, injected an unknown substance into plaintiff's intravenous medications resulting in severe gastrointestinal distress, and failed to respond to plaintiff's requests for assistance, resulting in her falling and incurring injuries. The trial court originally dismissed plaintiff's complaint after determining that her causes of action sounded in medical malpractice and the action was barred by the applicable two-year statute of limitations, *MCL 600.5805(6)*. In the prior appeal, this Court affirmed the trial court's dismissal of plaintiff's negligence and breach of warranty claims because the substance of those claims sounded in malpractice, but determined that plaintiff's claim of intentional infliction of emotional distress was not a malpractice claim and reversed [*3] the dismissal of that claim. *Lindsey v St John Health Sys, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 22, 2005 (Docket No. 251898). On remand and after completion of discovery, the trial court granted defendants' motion for summary disposition and dismissed plaintiff's remaining claim of intentional infliction of emotional distress. This appeal followed.

II

Plaintiff first asserts that the trial court erred in granting summary disposition in favor of defendants. Plaintiff contends that she established a prima facie case of intentional infliction of emotional distress, and argues that both collateral estoppel and the law of the case doctrine precluded the trial court from dismissing her claim. She further asserts the trial court erred in failing to consider evidence she provided in opposition to defendants' motion for summary disposition. We review de novo a trial court's decision regarding a motion for summary disposition. *Sotelo v Grant Twp*, 470 Mich. 95, 101; 680 N.W.2d 381 (2004). Whether the law of the case doctrine applies is a question of law for this Court. *Ashker v Ford Motor Co*, 245 Mich. App. 9, 13; [*4] 627 N.W.2d 1 (2001).

Intentional infliction of emotional distress is recognized as a separate theory of recovery. Heckmann v Detroit Chief of Police, 267 Mich. App. 480, 498; 705 N.W.2d 689 (2005). The elements of this tort include:

(1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. [Lewis v LeGrow, 258 Mich. App. 175, 196; 670 N.W.2d 675 (2003).]

For a plaintiff to establish a prima facie case of intentional infliction of emotional distress, "[i]t has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort." Rosenberg v Rosenberg Bros Special Account, 134 Mich. App. 342, 350; 351 N.W.2d 563 (1984)(citation omitted). Rather, a defendant can be determined to be liable "only where the [defendant's] conduct has been so outrageous in character, and so [*5] extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" Roberts v Auto-Owners Ins Co, 422 Mich 594, 603; 374 N.W.2d 905 (1985)(citation omitted). "[M]ere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" are insufficient to impose liability. *Id.*

As a matter of law, the trial court must initially determine if a defendant's conduct could be reasonably regarded as so outrageous and extreme as to permit recovery. Teadt v Lutheran Church Missouri Synod, 237 Mich. App. 567, 582; 603 N.W.2d 816 (2000). The trial court noted that many of plaintiff's complaints pertaining to the behavior of defendants' staff toward her may be characterized as facial expressions of displeasure or disgust. Plaintiff also identified two derogatory comments or epithets used in reference to her. While the alleged conduct may be properly [*6] considered rude and unprofessional, such conduct amounts to mere "insults" and "indignities" and do not rise to the level necessary to sustain plaintiff's claim.

Plaintiff's final two fact assertions pertain to her intervenous therapy. The first is a statement overheard by plaintiff suggesting that an inappropriate substance could be placed into her IV tube. Again, while the alleged conduct would be considered unprofessional and inappropriate, the comment standing alone is insufficient to meet the minimum threshold to be deemed extreme and outrageous conduct of such severity that it could be construed as "utterly intolerable in a civilized community." Roberts, supra, p 603. The second assertion concerns plaintiff's subsequently altered

allegation that defendants' staff had placed poison in her IV tube to an assertion that a physician-ordered medication had been improperly administered, resulting in a negative physical reaction. Rather than extreme and outrageous conduct, the revised allegation suggests nothing more than malpractice.

Plaintiff alternatively argues that this Court's prior decision in *Lindsey, supra*, slip op p 4, precludes the trial court's [*7] grant of summary disposition. Under the law of the case doctrine, "if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *City of Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich. App. 132, 135; 580 N.W.2d 475 (1998), quoting *CAF Investment Co v Saginaw Twp*, 410 Mich. 428, 454; 302 N.W.2d 164 (1981). "Likewise, a trial court may not take any action on remand that is inconsistent with the judgment of the appellate court." *City of Kalamazoo, supra*, p 135. Hence, "a ruling on a legal question in the first appeal is binding on all lower tribunals and in subsequent appeals." *Id.* "The primary purpose of the rule is to maintain consistency and avoid reconsideration of matters once decided during the course of a single lawsuit." *Id.*

Plaintiff's interpretation of this Court's prior decision regarding her claim for intentional infliction of emotional distress is overly broad. This [*8] Court determined that plaintiff had alleged a claim for intentional infliction of emotional distress that did not sound in medical malpractice but did not make any determination whether plaintiff could factually support her claim. On remand, after conducting additional discovery, defendants filed a second motion for summary disposition, asserting that plaintiff could not establish a genuine issue of material fact regarding her claim. The trial court was required to determine whether plaintiff had demonstrated a prima facie case of intentional infliction of emotional distress. The trial court found, and we agree, that the evidence submitted by plaintiff fell short of the threshold requirements. Plaintiff's argument ignores the distinction between the sufficiency of a pleading to proceed with a claim and the ability to factually substantiate a claim. Plaintiff failed to demonstrate the latter and the trial court's dismissal was not inconsistent with this Court's prior decision.

Plaintiff's reliance on collateral estoppel is also misplaced. "Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding [*9] culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *McMichael v McMichael*, 217 Mich. App. 723, 727; 552 N.W.2d 688 (1996). Plaintiff misinterprets this Court's prior decision as "a valid final judgment,"

with the issue of intentional infliction of emotional distress as having been "actually and necessarily determined." *Id.* Because neither of these requirements was satisfied in this case, the trial court was not precluded from granting summary disposition in favor of defendants.

Finally, plaintiff argues that the trial court erred in failing to consider various affidavits of experts and treating professionals that she provided in opposition to defendants' motion for summary disposition. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Elezovic v Ford Motor Co.*, 472 Mich. 408, 419; 697 N.W.2d 851 (2005).

Plaintiff submitted four affidavits in response to defendants' motion for summary disposition, one authored by her treating psychiatrist; another authored [*10] by her treating physician; and two others pertaining to breaches of nursing standards. The psychiatric affiant merely confirms his treatment history with plaintiff and opines that his treatment record sought to be redacted and precluded from discovery on matters not directly involving plaintiff's experiences with defendants. The affidavit does not provide any factual assertions pertaining to the events alleged by plaintiff in support of her legal claim. Similarly, the physician affiant provides standard of care averments and opinions regarding the events alleged by plaintiff. He additionally provides that upon plaintiff's complaint, he requested an internal investigation by the hospital. At the hearing on defendants' motion, plaintiff acknowledged that none of these individuals witnessed the events that comprised the substance of plaintiff's claim and that plaintiff had been the source of the information attained by the affiants regarding the alleged events.

The trial court correctly noted its role was to determine "whether. . . there's a prima facie case of the intentional infliction of emotional distress." The trial court observed that the affidavits provided little more than a [*11] "repeating, regurgitating what the plaintiff said that the defendants did," and "do nothing more than give their opinion about the ultimate facts of this case, without having any personal knowledge about the behavior of the defendants with regard to the plaintiff

MCR 2.119(B) governs the requirements for an affidavit submitted in support or opposition to a motion, and the requirements are reiterated in *SSC Assoc Ltd Partnership v Gen Retirement Sys.*, 192 Mich. App. 360, 364; 480 N.W.2d 275 (1992). In addition, "[o]pinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact (or the lack of it) must be established by admissible evidence." *Id.* As the trial court recognized, the purpose or use of the affidavits submitted by plaintiff were "not to be used to resolve

a question of fact," but rather only "considered to determine whether an issue of fact exists." *Id.*, p 366. Because the affidavits did not meet the "personal knowledge" criteria delineated in *MCR 2.119(B)*, their content being factually deficient and primarily comprised of [*12] hearsay, the trial court properly discounted the affidavits.

III

Plaintiff also argues that the trial court erred in dismissing all defendants, with the exception of St. John Health System - Detroit Macomb Campus, d/b/a St. John Detroit Riverview Hospital, as a defendant and in denying her request to amend her complaint to add Ascension Health as a defendant. This Court reviews a trial court's decision regarding the amendment of pleadings for an abuse of discretion. *Doyle v Hutzel Hosp.*, 241 Mich. App. 206, 211-212; 615 N.W.2d 759 (2000). "[A] grant or denial of a motion to add a party . . . is governed by the same standard applicable to a motion to amend pleadings." *Waldorf v Zinberg*, 106 Mich. App. 159, 166; 307 N.W.2d 749 (1981).

Plaintiff asserts that Ascension Health and the various other defendants are integrally intertwined corporate entities, all of which sent her billings on their individual mastheads, following her hospitalization at St. John Detroit Riverview Hospital. Although plaintiff only contends a right to amend her complaint to add or retain the various referenced defendants pursuant to *MCR 2.118* [*13], she fails to specify or elucidate the basis for this claim. It appears from plaintiff's motion in the trial court that plaintiff views Ascension Health and the other named defendants as necessary parties, requiring joinder under *MCR 2.205*. Defendants acknowledge that the various entities are related, but insist that only St. John Health System - Detroit Macomb Campus, d/b/a St. John Detroit Riverview Hospital, is the only appropriate defendant because it is the only entity that provided care to plaintiff. Defendants submitted an affidavit explaining the relationships between the corporate entities and asserting that none of the disputed entities provided care to plaintiff and did not have any additional insurance coverage available to address plaintiff's claims should she recover damages.

Generally, a court should freely grant leave to amend when justice so requires. *Knauff v Oscoda Co Drain Comm'r*, 240 Mich. App. 485, 493; 618 N.W.2d 1 (2000). However, amendment is not justified if it would be futile. *Ormsby v Capital Welding, Inc.*, 471 Mich. 45, 53; 684 N.W.2d 320 (2004). *MCR 2.205(A)* [*14] requires the joinder of all parties "having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief." When a party's presence in an action is not found to be essential to

the court rendering complete relief, factors such as avoidance of multiple litigation and judicial economy are insufficient to compel joinder. *Troutman v Ollis*, 134 Mich. App. 332, 339-340; 351 NW2d 301 (1984). In this case, the rights and legal obligations that plaintiff seeks to determine are solely related to, and arise from, her relationship with the direct medical care provider and its actual, governing corporate entity - St. John Health System - Detroit Macomb Campus, d/b/a St. John Detroit Riverview Hospital. Notwithstanding any common interest the precluded defendants may have in the subject matter of this action, their joinder is not essential to a determination of the rights and obligations existent between plaintiff and the remaining defendant, nor are they necessary to permit the trial court to render complete relief. We conclude that the additional defendants are extraneous to the litigation [*15] and plaintiff has not demonstrated that they are essential to her attainment of relief. The trial court did not err in denying plaintiff's request to add Ascension Health and in dismissing the other named defendants in this action.

IV

Next, plaintiff contends that the trial court erred in permitting defendants to obtain discovery of plaintiff's entire psychiatric records and denying her request for discovery of an "occurrence report" completed by defendants. This Court reviews de novo questions of law, including whether a statute precludes production of documents and statutory interpretation. *Dye v St John Hosp & Medical Ctr*, 230 Mich. App. 661, 665; 584 N.W.2d 747 (1998); *Rose Hill Ctr, Inc v Holly Twp*, 224 Mich. App. 28, 32; 568 N.W.2d 332 (1997). A trial court's order is reviewed for an abuse of discretion if it is determined that a privilege is applicable. *Baker v Oakwood Hosp Corp*, 239 Mich. App. 461, 468; 608 N.W.2d 823 (2000). Further, whether a party voluntarily disclosed a document and thereby waived the document's privileged status is a mixed question of fact and law. *Leibel v Gen Motors Corp*, 250 Mich App 229, 232; [*16] 646 N.W.2d 179 (2002).

Plaintiff argues that the trial court erred in requiring her to disclose the entirety of her psychiatric records, rather than only those records that pertained directly to her claims involving St. John Riverview Hospital. After plaintiff asserted the physician-patient privilege to bar disclosure of a portion of her psychiatric records, the trial court indicated that it would be required to dismiss plaintiff's claims for mental distress damages. Plaintiff thereafter agreed to release her treating psychiatrist's "complete file."

Plaintiff cannot assert error on appeal, having waived the physician-patient privilege. The privilege belongs to the patient and, once asserted, can be waived only by the patient. *Herald Co, Inc v Ann Arbor Pub Schools*, 224 Mich. App. 266, 276; 568

N.W.2d 411 (1997). A true waiver is an intentional, voluntary act, which has been defined as the "voluntary relinquishment of a known right." Kelly v Allegan Circuit Judge, 382 Mich. 425, 427; 169 NW2d 916 (1969).

Rather than risk dismissal of her claim for mental distress damages by the trial court, plaintiff agreed [*17] to release the disputed records. Error requiring reversal must be that of the trial court, and not error to which an aggrieved party contributed by plan or negligence. Phinney v Perlmutter, 222 Mich. App. 513, 537; 564 N.W.2d 532 (1997). "A party waives an issue by affirmatively approving of a trial court's action." Muci v State Farm Mut Auto Ins Co, 267 Mich. App. 431, 443; 705 N.W.2d 151 (2005), lv pending 475 Mich. 877 (2006). Given plaintiff's waiver of the physician-patient privilege, she is precluded from now alleging error before this Court.

Plaintiff also contends that the trial court erred in denying disclosure of defendants' occurrence report. "It is well settled that Michigan follows an open, broad discovery policy that permits liberal discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case." Reed Dairy Farm v Consumers Power Co, 227 Mich. App. 614, 616; 576 N.W.2d 709 (1998); MCR 2.302(B)(1). The issue in this case is whether the requested document was privileged.

MCL 333.21515 [*18] provides:

The records, data, and knowledge collected for or by individuals or committees assigned a review function described in this article are confidential and shall be used only for purposes provided in this article, shall not be public records, and shall not be available for court subpoena.

This statutory language clearly and unambiguously indicates that "records, data, and knowledge collected by the peer review committee 'shall be used only for the purposes provided in this article.'" Attorney Gen v Bruce, 422 Mich. 157, 165; 369 N.W.2d 826 (1985).

Plaintiff sought discovery of an occurrence report developed by defendants. This request for discovery necessarily related to a document that concerned the review of professional practices and the quality of care provided by the hospital. MCL 333.21513(d). Defendants established the purpose of the document and verified its use for peer review through an affidavit. As such, the trial court did not err in denying plaintiff's motion to compel production of the document.

V

Plaintiff asserts that the trial court erred in awarding defendants attorney fees and costs. [*19] "Taxation of costs under MCR 2.625(A) is within the discretion of the

trial court." *Blue Cross & Blue Shield of Michigan v Eaton Rapids Community Hosp.*, 221 Mich. App. 301, 308; 561 N.W.2d 488 (1997). Questions regarding the interpretation of the court rules, including "[t]he determination whether a party is a 'prevailing party' under *MCR 2.625* is a question of law," which is reviewed de novo. *Klinke v Mitsubishi Motors Corp.*, 219 Mich. App. 500, 521; 556 N.W.2d 528 (1996). A trial court's decision to grant or deny case evaluation sanctions is subject to review de novo on appeal. *Elia v Hazen*, 242 Mich. App. 374, 376-377; 619 N.W.2d 1 (2000).

While plaintiff contends that the trial court erred in awarding defendants costs and attorney fees based on a determination that her claim was frivolous, she misconstrues the basis for the trial court's award. Although the trial court opined that plaintiff's claim was deserving of sanctions, it awarded costs and attorney fees under *MCR 2.403(O)*, based on plaintiff's rejection of the case evaluation, [*20] and *MCR 2.625(A)(1)*, based on defendants' status as prevailing parties. Contrary to plaintiff's argument, defendants never asserted entitlement to costs and attorney fees based on plaintiff's claim being frivolous.

MCR 2.403(O)(1) provides, in relevant part:

If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation.

For purposes of this court rule, a "verdict" includes "a judgment entered as a result of a ruling on a motion after rejection of the case evaluation." *MCR 2.403(O)(2)(c)*. Plaintiff does not dispute that the case evaluation resulted in the assignment of a value of zero in favor of plaintiff against defendants. Plaintiff rejected the valuation and defendants accepted the award. Based on this rejection, the trial court was required to award defendants "actual costs" in accordance with the mandatory language of the court rule. *MCR 2.403(O)(1)*. A determination of frivolousness by the case evaluation panel is not a requirement [*21] for an award of costs under the rule.

Taxation of costs is also permitted by *MCR 2.625(A)(1)*, which states:

In General. Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action.

While plaintiff correctly observes that this language is permissive, the trial court justified its decision, remarking "that everybody should have known from the

beginning, including the Plaintiff, that she didn't have anything approaching a viable cause of action." We agree with plaintiff that the trial court could not award costs for depositions that were not filed with the clerk's office. MCL 600.2549. But plaintiff fails to acknowledge that the trial court specifically excluded those costs in its determination of an appropriate award. Although plaintiff asserts that she should not be responsible for those discovery costs incurred by defendants after the case evaluation, but which could have been conducted prior to the case evaluation, she provides no authority in support of her position. Because [*22] this Court will not search for authority to support a party's position, Schadewald v Brule, 225 Mich. App. 26, 34; 570 N.W.2d 788 (1997), we deem this claim abandoned. Etefia v Credit Technologies, Inc, 245 Mich. App. 466, 471; 628 N.W.2d 577 (2001).

Plaintiff also takes issue with the award of \$ 1,875 in "expert" witness fees paid by defendants to her treating psychiatrist in post case evaluation defense. Expert witness fees are fees incurred by defendants as part of their "actual costs" under MCR 2.403(O). Hence, the trial court is without discretion to refuse expert witness fees. Because plaintiff fails to cite any legal authority that would serve to preclude an award of this cost to defendants, this claim is deemed abandoned. Etefia, supra, p 471. Plaintiff contends that the trial court erred in determining the "reasonableness" of the attorney fees sought. Notably, the trial court did specifically rule on the reasonableness of the hourly fee charged by defendants' counsel, but, indicated that it would conduct an evidentiary hearing on plaintiff's request. Plaintiff failed [*23] to request such a hearing. A party's failure to request an evidentiary hearing on the issue of attorney fees constitutes a forfeiture of the issue, Kernen v Homestead Dev Co, 252 Mich. App. 689, 692; 653 N.W.2d 634 (2002).

VI

In conclusion, the trial court did not err in granting summary disposition in favor of defendants on plaintiff's claim of intentional infliction of emotional distress. The trial court did not err in refusing to consider various expert affidavits submitted by plaintiff. The trial court did not abuse its discretion when it dismissed the additional defendants and refused to add additional defendants. The trial court did not err in granting defendant's request for discovery of plaintiff's psychiatric records and in denying disclosure of the occurrence report to plaintiff. Finally, the trial court did not err in awarding costs and attorney fees to defendants as the prevailing party and based on plaintiff's rejection of the case evaluation.

Affirmed.

/s/ Pat M. Donofrio

/s/ Richard A. Bandstra

/s/ Brian K. Zahra

◆ Positive

As of: November 10, 2014 1:29 PM EST

Loyd v. St. Joseph Mercy Oakland

United States District Court for the Eastern District of Michigan, Southern Division

March 18, 2013, Decided; March 18, 2013, Filed

Case No. 12-cv-12567

Reporter

2013 U.S. Dist. LEXIS 37039; 2013 WL 1120040

ANITA LOYD, Plaintiff v. ST. JOSEPH MERCY OAKLAND/TRINITY HEALTH, et al., Defendants.

Subsequent History: Summary judgment granted by, Dismissed by *Loyd v. St. Joseph Mercy Oakland/Trinity Health SJMO Pub. Safety Dep't, 2013 U.S. Dist. LEXIS 130967 (E.D. Mich., Sept. 9, 2013)*

Core Terms

patient, peer review, peer, discovery, video surveillance, staff, confidential

Counsel: [*1] For Anita Loyd, Plaintiff: Joseph T. Ozormoor, Grosse Pointe Farms, MI.

For Saint Joseph Mercy Oakland Hospital/Trinity Health, SJMO Public Safety Department, Ryan Hernandez, SJMO HR Officer, Individually and in his official capacity, Stephen Kazimer, Security Supervisor, Individually and in official capacity, Greg Williams, Security Supervisor, Individually and in official capacity, Dave Sikorski, SJMO Safety Officer, Individually and in official capacity, Defendants: Daniel J. Bretz, Clark Hill, Detroit, MI; Ellen E. Hoepfner, Clark Hill PLC, Detroit, MI.

Judges: Hon. GERSHWIN A. DRAIN, UNITED STATES DISTRICT JUDGE.

Opinion by: GERSHWIN A. DRAIN

Opinion

ORDER DENYING PLAINTIFF'S MOTION TO COMPEL DISCOVERY OF DOCUMENTS SOUGHT FROM DEFENDANT SJMO [#18]

I. INTRODUCTION

On June 13, 2012, Plaintiff, Anita Loyd, filed the instant discrimination in employment action pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., the Civil Rights Act of 1991, 42 U.S.C. § 1981a, and Michigan's Elliott-Larsen Civil Rights Act, MICH. COMP. LAWS § 37.2101 et seq. Plaintiff also brings claims of intentional infliction of [*2] emotional distress and interference with contractual employment relationship.

Presently before the Court is Plaintiff's Motion to Compel Discovery of Documents sought from Defendant, St. Joseph Mercy Oakland/Trinity Health ("SJMO"), filed on February 1, 2013. Plaintiff seeks to compel the production of the Potential Error Event Reporting System ("PEERS") report prepared by a nurse regarding Plaintiff's conduct on June 16, 2011, conduct which allegedly led to Plaintiff's discharge. Plaintiff also seeks to compel video surveillance of the Emergency Room from June 16, 2011. This matter is fully briefed and a hearing was held on March 13, 2013. For the reasons that follow, the Court denies Plaintiff's Motion to Compel.

II. FACTUAL BACKGROUND

Plaintiff is a fifty-two year old, African American female who was employed by SJMO for twenty-five years as a security officer in its Public Safety Department from June 10, 1986 until her termination on July 1, 2011. On June 16, 2011, Plaintiff was dispatched for security assistance to restrain a patient at SJMO's Emergency Room, #19. Defendant maintains that Plaintiff assumed the patient had been admitted for drug addiction only and gave this patient [*3] inaccurate advice that she could leave the hospital premises. These comments allegedly escalated the situation and placed the nursing staff and patient in a potentially harmful and dangerous situation because the patient became agitated and tried to rip the I.V. out of her arm. Plaintiff disputes Defendant's assertions that Plaintiff's conduct put the patient and nursing staff at risk.

Sonya Moak, a nurse who was present during the incident on June 16, 2011, drafted a report utilizing SJMO's PEERS system. Moak testified that she did so to improve and provide a safer environment for staff and patients.

A. Let me finish. In my mind the PEERS Reporting is done that when you see a staff member performing or doing something that is --- their behavior is not ---

Q. Appropriate?

A. ---appropriate, then we write the PEERS Report so that they can get some education or some information to make---to make it a better work

environment, a better safe —that's why I use the PEERS.

See Def.'s Resp., Ex. 1 at 124. Plaintiff's supervisors learned of the incident and conducted an investigation, ultimately concluding that Plaintiff's behavior put both the patient and staff at risk of serious harm. Plaintiff was on a [*4] Final Written Warning, thus the incident on June 16, 2011 resulted in her discharge. Plaintiff's discharge paperwork stated that Plaintiff "acted outside the scope of her duties and advised a patient incorrectly about her ability to leave the premises," and that "this behavior exacerbated the patient's behavior in a negative manner that resulted in the patient attempting to pull the IV out and required SJMO staff to place the patient in restraint." See Def.'s Resp., Ex. 2.

III. LAW & ANALYSIS

Plaintiff seeks the production of the PEERS report prepared by Moak in order to determine the veracity of the allegations set forth in Plaintiff's discharge paperwork. Defendant has objected to production of the PEERS report on the basis that the document is confidential and protected from discovery by the peer review confidentiality privilege set forth in the Michigan Public Health Code.

The scope of discovery under the Federal Rules of Civil Procedure is traditionally quite broad. *Lewis v. ACB Bus. Servs.*, 135 F.3d 389, 402 (6th Cir. 1998). *Federal Rule of Civil Procedure 26(b)(1)* permits parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense [*5] . . . if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Fed. R. Civ. P. 26(b)(1)*.

"[T]he peer review statutory regime protects peer review from intrusive general public scrutiny. All the peer review communications are protected from discovery and use in any form of legal proceedings." *Armstead v. Diederich*, No. 296512, 2011 Mich. App. LEXIS 1367, *4-5 (Mich. Ct. App. July 21, 2011). The privilege for peer review data is set forth in three separate statutes. *Armstead*, 2011 Mich. App. LEXIS 1367, at *4. Specifically, *Michigan Compiled Laws § 333.20175(8)* states:

[t]he records, data, and knowledge collected for or by individuals or committees assigned a professional review function in a health facility . . . are confidential, shall be used only for the purposes provided in this article, are not public records, and are not subject to court subpoena.

MICH. COMP. LAWS § 333.20175(8). Next, *Michigan Compiled Laws § 333.21515* provides that "[t]he records, data, and knowledge collected for or by individuals or committees assigned a review function described in this article are confidential and

shall be used only for the purposes provided in this article, [*6] shall not be public records, and shall not be available for court subpoena." MICH. COMP. LAWS § 333.21515. Finally, Michigan Compiled Laws § 331.533 states "[e]xcept as otherwise provided in [this statute], the record of a proceeding and the reports, findings, and conclusions of a review entity under this act are confidential, are not public records, and are not discoverable and shall not be used as evidence in a civil action or administrative proceeding." MICH. COMP. LAWS § 331.533.

Plaintiff argues that the PEERS report is not subject to the peer review privilege because Plaintiff, as a security officer, is not a physician or other health care professional subject to peer review procedures imposed on hospitals. This argument lacks merit. Michigan courts have repeatedly held that the peer review privilege encompasses hospital incident reports where such reports are "compiled in furtherance of improving health care and reducing morbidity and mortality." Gallagher v. Detroit-Macomb Hosp. Ass'n, 171 Mich. App. 761, 768, 431 N.W.2d 90; 171 Mich. App. 761, 431 N.W.2d 90 (1988); see also Ligouri v. Wyandotte Hospital and Med. Center, 253 Mich. App. 372, 375-77, 655 N.W.2d 592; 253 Mich. App. 372, 655 N.W.2d 592 (2002). In Gallagher, the Michigan Court of Appeals [*7] concluded that an incident report prepared at the time of the plaintiff's decedent's injury was appropriately excluded under the peer review privilege because it was prepared for a committee assigned a review function. Gallagher, 171 Mich. App. at 768. Thus, the PEERS report is subject to the peer review privilege if it was "collected for or by an individual or committee assigned a review function." *Id.*

Here, Defendant has offered evidence that the PEERS program is used for the improvement of patient care and to reduce morbidity and mortality rates. See Def.'s Resp., Ex. 4. Rita Stockman, Chief Accreditation, Regulatory & Risk Officer at SJMO, states that:

3. Staff members at SJMO are trained to utilize the Incident Reporting System to report incidents that caused near miss, potential or actual patient injury, death, or potential legal liability.

4. I review all reports made through the Incident Reporting System. As appropriate, I investigate the events or incidents reported for the purpose of improvement of the quality of patient care and the reduction of morbidity and mortality rates.

Id. at 2. Thus, the Court concludes that the PEERS report is subject to privilege because its purpose [*8] is for the improvement of patient care.

Next, Plaintiff argues that Defendant waived the peer review privilege by including information from the report in the Human Resources Department's Investigation Summary, as well as by providing excerpts from the report to the Equal Employment Opportunity Commission and the Michigan Department of Civil Rights. Plaintiff offers no authority for the proposition that the peer review privilege can be waived. While the Michigan courts have yet to rule on this precise issue, it would seem that the Michigan courts would ultimately conclude that the peer review privilege cannot be waived based on the clear statutory language that peer review information may be used "only for the purposes" provided in the statute. MICH. COMP. LAWS § 333.21515. Further, unlike other statutorily-created privileges which contain an explicit waiver provision, the peer review statutes contain no waiver provision. See MICH. COMP. LAWS § 600.2157 (patient-physician privilege waived if patient brings an action to recover for personal injuries); see also MICH. COMP. LAWS § 333.16911 (providing a waiver for communications between a marriage counselor and his or her clients, unless [*9] the counselor is a party defendant to a civil, criminal or disciplinary action arising from that counseling).

As to Plaintiff's request for an order compelling the production of video surveillance from June 16, 2011, Defendant maintains that the only video surveillance is of the hallways in the hospital and not in any of the patient rooms. Further, Defendant contends that the recordings from June 16, 2011 have already been erased and overwritten pursuant to policy. Defendant provides the declaration of Greg Williams, Supervisor in the Public Safety Department, who states that the video recordings are automatically overwritten and erased every thirty days. See Def.'s Resp., Ex. 5.

Plaintiff contends that Defendant's destruction of this evidence amounts to spoliation of evidence subject to sanction. Plaintiff argues that Defendant should have known that Plaintiff's termination on July 1, 2011 would lead to litigation. Thus, Defendant should have preserved the video surveillance from June 16, 2011. Defendant argues that it was put on notice of the possibility of litigation when it received a copy of Plaintiff's EEOC complaint, which was filed three months after June 16, 2011, or on September [*10] 9, 2011.

Plaintiff counters that Defendant's assertion that it did not learn of the potential for litigation until September 9, 2011 is disingenuous. Plaintiff relies on the fact that she filed a grievance with her representative union on July 5, 2011, four days after her termination, to demand reinstatement to her job. Thus, SJMO was on notice of the potential lawsuit before the expiration of the thirty day retention period for video surveillance. Plaintiff argues that the video surveillance is essential to proving her claims. Plaintiff will be unable to challenge the testimony of Defendant's witnesses

concerning the events on June 16, 2011 without the video surveillance. For this reason, Plaintiff requests that the Court sanction Defendant for destroying this evidence when Defendant knew or reasonably should have known that it was relevant to potential litigation. See Bloemendaal v. Town & Country Sports, Inc., 255 Mich. App. 207, 659 N.W.2d 684; 255 Mich. App. 207, 659 N.W.2d 684 (2002); Brenner v. Kolk, 226 Mich. App. 149, 161-62, 573 N.W.2d 65; 226 Mich. App. 149, 573 N.W.2d 65 (1997). Specifically, Plaintiff requests an order excluding the testimony of Defendant's witnesses. The Court finds that Plaintiff's requested sanction is unwarranted. Rather, [*11] Plaintiff may be entitled to a jury instruction that the jury may draw an inference adverse to the culpable party from the absence of the evidence. Brenner, 226 Mich. App. at 161-62. However, the Court will revisit the propriety of a spoliation instruction at the time of trial.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Compel [#18] is DENIED.

Dated: March 18, 2013

/s/ Gershwin A Drain

GERSHWIN A. DRAIN

UNITED STATES DISTRICT JUDGE

1 Cited

As of: November 10, 2014 1:29 PM EST

GERMAINE J. MAVIGLIA, Plaintiff-Appellee, v WEST BLOOMFIELD NURSING & CONVALESCENT CENTER, INC., BEAUMONT NURSING HOME SERVICES, INC., and WEST BLOOMFIELD NURSING & CONVALESCENT CENTER JOINT VENTURE, Defendants-Appellants.

Court of Appeals of Michigan

November 9, 2004, Decided

No. 248796

Reporter

2004 Mich. App. LEXIS 3048; 2004 WL 2533550

GERMAINE J. MAVIGLIA, Plaintiff-Appellee, v WEST BLOOMFIELD NURSING & CONVALESCENT CENTER, INC., BEAUMONT NURSING HOME SERVICES, INC., and WEST BLOOMFIELD NURSING & CONVALESCENT CENTER JOINT VENTURE, Defendants-Appellants.

Notice: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: Oakland Circuit Court. LC No. 2002-041739-NH.

Disposition: Reversed.

Core Terms

peer review, records, confidential, collected, incident report, purposes, subpoena, peer review committee, nursing home

Judges: Before: Murray, P.J., and Sawyer and Smolenski, JJ.

Opinion

PER CURIAM.

Defendants appeal by leave granted the order granting plaintiff's motion to compel discovery of incident reports at defendants' nursing home. In the course of this negligence action, the trial court granted plaintiff's request for discovery of incident reports related to her residency at the nursing home. We hold that because the incident reports are data collected for the purposes of professional review, they

should not be subject to discovery in a negligence/malpractice case. Accordingly, we reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The primary purpose of statutory interpretation is to ascertain and give effect to the intent of the Legislature as expressed in the language of the statute. *In re Lieberman*, 250 Mich. App. 381, 386; 646 N.W.2d 199 (2002). MCL 333.20175(8) provides:

The records, data, and [*2] knowledge collected for or by individuals or committees assigned a professional review function in a health facility or agency, or an institution of higher education in this state that has colleges of osteopathic and human medicine, are confidential, shall be used only for the purposes provided in this article, are not public records, and are not subject to court subpoena.

And MCL 333.21515, which is applicable to hospitals, similarly provides:

The records, data, and knowledge collected for or by individuals or committees assigned a review function described in this article are confidential and shall be used only for the purposes provided in this article, shall not be public records, and shall not be available for court subpoena.

In *Lieberman, supra at 387*, this Court explained the purpose and intent of § 21515 as follows:

The clear language of § 21515 provides: (1) peer review information is confidential, (2) peer review information is to be used "only for the purposes provided in this article," (3) peer review information is not to be a public record, and (4) peer review information is not subject to subpoena. Section 21515 demonstrates that the [*3] Legislature has imposed a comprehensive ban on the disclosure of any information collected by, or records of the proceedings of, committees assigned a professional review function in hospitals and health facilities. If the specific mention of a court subpoena meant that the privilege existed only as a defense against a subpoena, the statute's general language stating that peer review materials are confidential would become nearly meaningless. Although the statute does not refer to search warrants, it would be inconsistent with the stated purposes of the privilege to find that peer review information could be obtained pursuant to an investigatory search warrant. The protection against discovery through subpoena would effectively evaporate if an investigator needed only to obtain a search warrant instead.

Underscoring the high level of confidentiality attendant to peer review documents is the statutory admonishment that such information is to be *used only for the reasons set forth in the legislative article including that privilege.* [Emphasis in original.]

Plaintiff's reliance on *Centennial Healthcare Mgt Corp v Dep't of Consumer & Industry Services*, 254 Mich. App. 275, 290; [*4] 657 N.W.2d 746 (2002), is misplaced. In that case, this Court found that the incident reports, accident reports, and other records prepared in compliance with the administrative rules, which contained only factual information rather than the assessments of the peer review committee, were not within the scope of the privilege. The *Centennial* Court explained:

Certainly, in the abstract, a peer review committee cannot properly review performance in a facility without hard facts at its disposal. However, it is not the facts themselves that are at the heart of the peer review process. Rather, it is what is done with those facts that is essential to the internal review process, i.e., a candid assessment of what those facts indicate, and the best way to improve the situation represented by those facts. Simply put, the logic of the principle of confidentiality in the peer review context does not require construing the limits of the privilege to cover any and all factual material that is assembled at the direction of a peer review committee. [*Id.* at 290.]

We agree with defendants that this reasoning should be limited to the context of where the state agency [*5] responsible for regulating nursing homes requires the collection of incident and accident information:

In the context of the circumstances in the case at bar, it is true that Westgate's peer review committee could not effectively do its work without collecting basic information about the various incidents and accidents that occur at a nursing home. However, it is not the existence of the facts of an incident or accident that must be kept confidential in order for the committee to effectuate its purpose; it is how the committee discusses, deliberates, evaluates, and judges those facts that the privilege is designed to protect. We conclude that in order to effectuate other purposes outlined in the Public Health Code--especially those involving licensing--the statutory peer review privilege outlined in subsection 21075(8) is not undermined by administrative rules requiring a nursing home to keep and make available for review and copying incident reports and accident records that contain basic factual material but do not require the reporting of the internal deliberative process of a peer review committee. [*Id.* at 291].

The *Centennial* Court's decision and reasoning is [*6] not applicable where, as here, the party seeking disclosure of the information is a private litigant. *MCL 333.20175(8)* clearly bars release of the "records, data, and knowledge collected for or by individuals or committees assigned a professional review function in a health facility." The accompanying regulation, 1979 AACS, R 325.21101, also relied on by plaintiff, provides that accident records and incident reports shall be kept in the home and shall be available to the director or his or her authorized representative for review and copying if necessary. But the rule only authorizes copying of the reports by the director or an authorized representative. It does not indicate that the reports should be available for copying by anyone else.

Reversed.

/s/ Christopher M. Murray

/s/ David H. Sawyer

/s/ Michael R. Smolenski

ABDULHASSIB v. PROVIDENCE HOSP.

Court of Appeals of Michigan

September 11, 2001, Decided

No. 220159

Reporter

2001 Mich. App. LEXIS 2576; 2001 WL 1044806

ABDULHASSIB RASLAN, M.D., Plaintiff-Appellant, v PROVIDENCE HOSPITAL,
Defendant-Appellee.

Notice: [*1] IN ACCORDANCE WITH THE MICHIGAN COURT OF APPEALS
RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING
UNDER THE RULES OF STARE DECISIS.

Prior History: Oakland Circuit Court. LC No. 97-545097-NZ.

Disposition: Affirmed.

Core Terms

trial court, terminate, summary disposition, evidentiary ruling, ethnic, limine,
documents, plaintiff's claim, defense motion, records, individuals, excluding,
religious discrimination, peer review, discriminatory, discovery

Judges: Before: Doctoroff, P.J., and Holbrook, Jr., and Hoekstra, JJ.

Opinion

PER CURIAM.

In this employment discrimination case, plaintiff, a licensed physician, appeals as of
right the trial court's dismissal of his action alleging religious and ethnic (national
origin) discrimination by his employer, defendant hospital. We affirm.

In his appellate brief, plaintiff presents only one question in his "statement of
question presented," that being "whether the trial court eviscerated plaintiff's case
through a series of erroneous evidentiary rulings, such that its ultimate decision to
grant summary disposition constitutes reversible error?" In the context of the
statement of the issue presented, it is important to understand the chronology of
events in the trial court leading to the dismissal of plaintiff's claims.

On May 30, 1997, plaintiff filed a complaint against defendant alleging (1) ethnic and religious discrimination in violation of the Civil Rights Act, MCL 37.2201 [*2] *et seq.*, which created a hostile and offensive work environment; (2) breach of contract; and (3) defamation. In March 1998, plaintiff filed a motion to compel production of documents, seeking an order requiring defendant to answer plaintiff's second set of interrogatories and requests for production of documents. In that document, plaintiff had sought records of all disciplinary actions taken against two other doctors, including all investigation reports, peer review reports, and employee records. The trial court denied plaintiff's motion to compel. Thereafter, in July 1998, defendant filed a motion for summary disposition, arguing that it was entitled to summary disposition on each of plaintiff's claims. Having heard arguments, the trial court granted summary disposition on plaintiff's religious discrimination claim and indicated that plaintiff's ethnic discrimination claim survived only with regard to plaintiff's termination. The trial court also granted summary disposition in defendant's favor on plaintiff's contract and defamation claims.¹ Later, in November 1998, defendant filed a motion in limine requesting, among other things, an order excluding evidence at trial of statements [*3] made by employees of defendant hospital who were not involved in the decision to terminate plaintiff's employment pursuant to MRE 401 and 403 and also excluding the testimony at trial of plaintiff's proposed expert witness. After a December 16, 1998 hearing, the trial court excluded the testimony of plaintiff's proposed expert witness and reserved a ruling on the other matter. In March 1999, defendant again filed motions in limine to exclude various evidence at trial, including evidence of statements made by individuals who were not involved in the decision to terminate plaintiff's employment. On March 31, 1999, the trial court signed an order granting defendant's motion in limine, which provided that statements by Carol Fletcher and Drs. Mariona, Maicki and Pike were inadmissible because plaintiff failed to show the requisite connection between the decision-maker, i.e., defendant's CEO, and the above-named individuals. Thereafter, the trial court entered an order of dismissal.²

¹ Plaintiff does not appeal the dismissal of the contract and defamation claims.

² The order of dismissal states:

Plaintiff's motion for adjournment of trial is denied. Plaintiff's motion for entry of an order dismissing the case under MCR 2.116(C)(10) is granted, in light of the agreement of counsel that this court's order granting defendant's motion in limine dated March 24, 1999 results in there being no genuine issue of material fact and defendant is entitled to judgment as a matter of law.

It appears that the order of dismissal refers to the March 24, 1999, motion in limine renewing defendant's motion in limine regarding certain statements and the trial court's oral ruling during the hearing on the motion in limine that granted defendant's motion without prejudice. In other words, the trial court indicated that it would reconsider its decision if plaintiff provided evidentiary support that there is a direct connection between the individual who decided to terminate plaintiff's employment and

[*4] We first address plaintiff's challenge to the trial court's evidentiary ruling regarding plaintiff's motion to compel production of documents, in which plaintiff sought production of peer review documents. This is the only challenged evidentiary ruling that the trial court issued before it granted defendant's motion for summary disposition on plaintiff's claims of religious discrimination and on plaintiff's claims of ethnic discrimination other than the claim related to his termination. Plaintiff argues that the trial court erred in denying his motion to compel production of peer review documents where plaintiff's discovery request fits an exception to the peer review privilege under MCL 333.21515. Plaintiff claims that that statute was created and intended to protect information from being used in malpractice cases and not a discrimination case brought by a hospital's own employee.

This Court reviews de novo questions of law, including whether a statute bars production of documents and statutory interpretation. Dye v St John Hospital & Medical Center, 230 Mich App 661, 665; 584 NW2d 747 (1998); Rose Hill Center, Inc v Holly Twp, 224 Mich App 28, 32; [*5] 568 NW2d 332 (1997). "It is well established that this Court reviews a trial court's evidentiary rulings for an abuse of discretion and, in making that determination, we consider the facts on which the trial court acted to determine whether an unprejudiced person 'would say that there is no justification or excuse for the ruling made.'" Krohn v Sedgwick James of Michigan, Inc, 244 Mich App 289, 295; 624 NW2d 212 (2001) (citation omitted); Grow v W A Thomas Co, 236 Mich App 696, 711; 601 NW2d 426 (1999). Once it is determined whether a privilege is applicable, the trial court's order is reviewed for an abuse of discretion. Baker v Oakwood Hospital Corp, 239 Mich App 461, 468; 608 NW2d 823 (2000).

"It is well settled that Michigan follows an open, broad discovery policy that permits liberal discovery of any matter, *not privileged*, that is relevant to the subject matter involved in the pending case." Reed Dairy Farm v Consumers Power Co, 227 Mich App 614, 616; 576 NW2d 709 (1998) (emphasis supplied); MCR 2.302(B)(1). Thus, the question becomes whether [*6] the requested documents were privileged. The statute at issue in the present case, MCL 333.21515, provides:

The records, data, and knowledge collected for or by individuals or committees assigned a review function described in this article are confidential and shall be used only for the purposes provided in this article, shall not be public records, and shall not be available for court subpoena.

This language clearly and unambiguously states that "the records, data, and

the individuals who made the alleged discriminatory statements. Apparently, the March 31, 1999, order granting defendant's motion in limine excluding evidence at trial of certain statements is the written order manifesting the March 24, 1999, oral ruling.

knowledge collected by the peer review committee 'shall be used only for the purposes provided in this article,'" *Attorney General v Bruce*, 422 Mich 157, 165; 369 NW2d 826 (1985), and thus the statute must be applied as written, *Rose Hill, supra*.

Here, plaintiff sought investigation reports, peer review reports, and employee records. These discovery requests necessarily related to records concerning review of professional practices and the quality of care provided in the hospital. See *MCL 333.21513(d)*. Because there is no exception to *MCL 333.21513(d)* for discrimination cases [*7] brought by a hospital's own employee,³ the trial court did not abuse its discretion in denying plaintiff's motion to compel production of documents.

Because this is the only evidentiary ruling that plaintiff challenges that took place before the trial court's grant of summary disposition on the religious discrimination claim and the [*8] aspects of the ethnic discrimination claim other than plaintiff's termination, we cannot say that the trial court "eviscerated" plaintiff's case on those claims with an erroneous evidentiary ruling. To the extent that plaintiff challenges the grant of summary disposition with regard to religious discrimination and to any aspects of the ethnic discrimination claim besides his termination on substantive grounds, we note that plaintiff failed to raise that as an issue in his statement of question presented, and therefore we need not address this unreserved challenge. *MCR 7.212(C)(5)*; *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999); *Fletcher v Fletcher*, 229 Mich App 19, 25; 581 NW2d 11 (1998). Thus, the grant of summary disposition on those claims stands undisturbed.

Plaintiff also argues that the trial court erred in granting defendant's motion in limine regarding alleged discriminatory statements that resulted in the dismissal by summary disposition of his ethnic discrimination claim. The only adverse employment action that plaintiff claims was made on the basis of ethnic [*9] discrimination and that survived summary disposition was plaintiff's termination. Although plaintiff claims that he was terminated for discriminatory purposes, defendant asserts that plaintiff was terminated for leaving in the middle of surgery on a seventy-nine-year-old woman under general anesthesia to perform a routine delivery of a baby. In deciding whether the statements that doctors in positions superior to plaintiff's position made should be excluded from trial, the trial court

³ Although arguably there may be an exception to *MCL 333.21515* related to the investigation and remediation of a specific and immediate health care crisis, see *Dye, supra* at 668-669, plaintiff's discovery requests do not fall into that category. Further, although plaintiff relies on *Dorsten v Lapeer Co General Hospital*, 88 FRD 583 (ED Mich. 1980), we are not bound by a federal court decision construing Michigan law. *Radtke v Everett*, 442 Mich 368, 381-382; 501 NW2d 155 (1993); *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 402; 571 NW2d 530 (1997).

focused on whether there was a sufficient connection between those individuals and the individual who made the ultimate decision to terminate plaintiff's employment. ⁴

[*10] With regard to the admissibility of evidence, in *Zeeland Farm Services, Inc. v JBL Enterprises, Inc.*, 219 Mich App 190, 200-201; 555 NW2d 733 (1996), this Court explained:

MRE 401 defines relevant evidence as evidence that tends to make the existence of a material fact more probable or less probable than it would be without that evidence. All relevant evidence is admissible except when the federal or state constitutions, the court rules, or the rules of evidence provide otherwise. *MRE 402*. Relevant evidence may be excluded if its probative value is substantially outweighed by the risk of unfair prejudice, confusion of the issues, waste of time, or risk of misleading the jury. *MRE 403*.

Here, the trial court gave plaintiff multiple opportunities to provide it with evidence of the connection between the decision-maker and the individuals who made the allegedly discriminatory statements. Having concluded that plaintiff failed to show the requisite connection, the trial court excluded the following statements:

- (a) Carol Fletcher's alleged statement to the effect that she was "glad [Providence] finally [had] an all black group" ... and [*11] Fletcher's alleged statements inquiring about plaintiff's beard;
- (b) The comment allegedly made by Dr. Mariona in December 1994 concerning plaintiff's appeal of his suspension for failing to attend his rotation at a clinic where Dr. Mariona allegedly stated to plaintiff "Suck it up. You Syrians don't know how to suck it up";
- (c) The statement allegedly made by Dr. Maicki in January 1996 while talking on the telephone where plaintiff allegedly overheard Dr. Maicki say "no Arabs, no blacks in my group"; and
- (d) Dr. Maicki's deposition testimony about having Arabs in his call group; and
- (e) Statements made by Dr. Pike in connection with plaintiff's staff privileges in an e-mail message dated July 21, 1993. [Citations omitted.]

Because there was no evidence presented connecting Carol Fletcher's statements to the decision to terminate plaintiff's employment, the trial court did not abuse its

⁴ See *McDonald v Union Camp Corp.*, 898 F2d 1155, 1161 (CA 6, 1990) ("This circuit has held that a statement by an intermediate level management official is not indicative of discrimination when the ultimate decision to discharge is made by an upper level official."); cf. *Schrand v Federal Pacific Electric Co.*, 851 F2d 152, 156 (CA 6, 1988).

discretion in excluding her statements. The record reveals that defendant's CEO decided to terminate plaintiff and that he relied on the investigation and report of Dr. Welch. Plaintiff does not allege that Dr. Welch made discriminatory statements. With regard to the doctors' [*12] statements that the trial court excluded, we agree with the trial court that plaintiff failed to present sufficient evidence that these doctors had any substantive involvement in the decision to terminate plaintiff's employment. Moreover, the statements that were excluded were either remote in time from plaintiff's March 12, 1997 termination, made by someone who had left the hospital over a year before plaintiff's termination, or devoid of ethnic reference. Thus, even if arguably relevant, the statements had virtually no probative value. See MRE 403. Under these circumstances, we cannot say that the trial court abused its discretion in excluding these statements.

Plaintiff conceded to dismissal of the remaining claim after the trial court's evidentiary ruling. Because we find that such evidentiary ruling was not an abuse of discretion, plaintiff is entitled to no relief.⁵

[*13] Affirmed.

/s/ Martin M. Doctoroff

/s/ Donald E. Holbrook, Jr.

/s/ Joel P. Hoekstra

⁵ Having determined that plaintiff is entitled to no relief from the dismissal of his claims, we need not reach the plaintiff's challenge to the trial court's evidentiary ruling excluding plaintiff's expert.