STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

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.;** and **COVENANT MEDICAL CENTER, INC.;** Michigan Corporations, jointly and severally.

Defendants –Appellants.

Supreme Court
No. 149270

Court of Appeals
No. 321719

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

AMICUS CURIAE BRIEF OF
AMICUS CURIAE MUNSON HEALTHCARE, INC.

Submitted by:

Graham K. Crabtree (P-31590)
Fraser Trebilcock Davis & Dunlap, P.C.
Attorneys for Amicus Curiae
Munson Healthcare, Inc.
124 W. Allegan Street, Suite 1000
Lansing, Michigan 48933
(517) 377-0895

Fraser Trebilcock

TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

THE INTEREST OF AMICUS CURIAE MUNSON HEALTHCARE, INC iv

STATEMENT OF QUESTIONS PRESENTED vii

STATEMENT OF FACTS 1

LEGAL ARGUMENTS 2

I. THE DECISION OF THE COURT OF APPEALS IN *HARRISON v MUNSON HEALTHCARE, INC.*, 304 MICH APP 1; 851 NW2d 549 (2014), ERRONEOUSLY ANALYZED AND INTERPRETED THE SCOPE OF MICHIGAN'S STATUTORY PEER REVIEW PRIVILEGE. THE TRIAL COURT'S DECISION IN THIS CASE, BASED UPON THE ERRONEOUS DECISION IN *HARRISON,* WAS ALSO ERRONEOUS, AND SHOULD THEREFORE BE REVERSED. 2

   A. THE BROAD PROTECTION AFFORDED BY THE STATUTORY PEER REVIEW PRIVILEGE. 4

   B. THE *HARRISON* PANEL'S IMPERMISSIBLE EROSION OF THE PRIVILEGE. 10

   C. THE CONFUSION AND DIFFICULTIES THREATENED BY APPLICATION OF *HARRISON'S* HOLDING. 21

RELIEF 28

INDEX OF AUTHORITIES

Cases

Attorney General v Bruce, 124 Mich App 796; 335 NW2d 697 (1983)...................... 5, 7, 8, 18

Centennial Healthcare Management Corporation v Department of Consumer and Industry Service, 254 Mich App 275; 657 NW2d 746 (2002)........................... 11, 12, 13, 15

Dorris v Detroit Osteopathic Hospital, 460 Mich 26; 594 NW2d 455 (1999)................ 5, 8, 10

Dye v St. John Hospital and Medical Center, 230 Mich App 661; 584 NW2d 747 (1998).. 26

Feyz v Mercy Memorial Hospital, 475 Mich 663, 680; 719 NW2d 1 (2006)............................ 5

Gallagher v Detroit-Macomb Hospital Association, 171 Mich App 761; 431 NW2d 90 (1988) 8, 10

Harrison v Munson Healthcare, Inc., 304 Mich App 1; 851 NW2d 549 (2014) .... passim

In re Investigation of Lieberman, 250 Mich App 381; 646 NW2d 199 (2002).................... 8, 9

Ligouri v Wyandotte Hospital and Medical Center, 253 Mich App 372; 655 NW2d 592 (2003) 8, 10, 19

Manzo v Petrella, 261 Mich App 705; 683 NW2d 699 (2004) 8, 19

Marchand v Henry Ford Hospital, 398 Mich 163; 247 NW2d 280 (1976)................ 13, 17, 19

Maviglia v West Bloomfield Nursing & Convalescent Center, (Unpublished, Court of Appeals No. 248796, *rel'd* 11-9-04).. 15

Monty v Warren Hospital Corporation, 422 Mich 138; 366 NW2d 198 (1955).............. 13, 19

Trinity Medical Center, Inc., v Holum, 544 NW2d 148 (ND 1996)...................................... 20

Statutes

MCL 330.1143a 14

MCL 330.1748(9) 14

MCL 331.531 .... 6, 14

MCL 331.531(1) 6

MCL 331.531(2) 6

MCL 331.532 .... 7, 14

MCL 331.533 .... 6, 14

MCL 333.16244 19

MCL 333.20101 through MCL 333.22260 .... 6, 9

MCL 333.20175 13

MCL 333.20175(1) 17, 18, 19, 21

MCL 333.20175(4) 18

MCL 333.20175(5) 18

MCL 333.20175(8) .... passim

MCL 333.21513 .... iv, 4, 7, 13

MCL 333.21513(a) 4

MCL 333.21513(d) 4

MCL 333.21515 .... passim

MCL 333.21741 15

MCL 333.21743(1)(b) 15

THE INTEREST OF AMICUS CURIAE MUNSON HEALTHCARE, INC.

Amicus Curiae Munson Healthcare, Inc. ("Munson Healthcare") has been granted leave to participate as an amicus curiae by this Court's Order of November 4, 2014, and now submits this Amicus Curiae Brief in accordance with that Order.

Munson Healthcare operates the Munson Medical Center in Traverse City and a network of affiliated hospitals in northern Michigan. Munson Healthcare is the Defendant – Appellant in the case of *Harrison v Munson Healthcare, Inc.*, *et al.*, (Supreme Court Docket No. 148898),[1] which has been held in abeyance pending disposition of the appeal on leave granted in this case pursuant to this Court's Order of June 20, 2014.

Munson Healthcare provides state-of-the-art healthcare to residents of northern Michigan at the Munson Medical Center in Traverse City and its affiliated hospitals throughout northern Michigan. To comply with the mandate of MCL 333.21513, Munson Healthcare has implemented a peer review / quality review process for "the purpose of reducing morbidity and mortality and improving the care provided in the hospital for patients" in accordance with policies adopted for that purpose. To facilitate the effective performance of this important function, Munson Medical Center and its affiliated hospitals collect data and information to be used by individuals and committees involved in the peer review / quality review process. In the collection and use of that data and information, Munson Healthcare and its staff have always relied upon the peer review provisions of MCL 333.20175(8) and MCL 333.21515 establishing the confidentiality, and limiting the use of, the "records, data

[1] *Harrison v Munson Healthcare, Inc.,* 304 Mich App 1; 851 NW2d 549 (2014)

and knowledge collected for or by individuals or committees" assigned a professional review function under Article 17 of the Public Health Code.

By its Order of June 20, 2014, granting leave to appeal in this case, this Court has directed the parties to brief two issues addressing the validity of the Court of Appeals decision in *Harrison*: 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 the peer review privilege.'" Thus, the Court has made it known that it intends to utilize the interlocutory appeal in this case to review the validity of *Harrison's* holdings, determine the proper scope of Michigan's peer review privilege, and evaluate the application of the privilege to facts or purported facts recorded in an "Improvement Report" similar to the "Incident Report" involved in *Harrison.* Accordingly, the Court's decision in this case will serve as the governing authority regarding the scope of the peer review privilege to be applied in future cases.

Munson Healthcare has a strong interest in helping to ensure that these questions are correctly decided in this case. As Munson Healthcare has respectfully asserted in its pending Application for Leave to Appeal in *Harrison,* the Court of Appeals' decision in that case has misconstrued and misapplied the statutory provisions defining the scope of the peer review privilege in Michigan. In doing so, it has overlooked or disregarded binding case law, the clear language of the statutes in question, and the well-known purposes underlying the Legislature's establishment of the peer review privilege. Munson Healthcare is concerned that the erroneous published decision in *Harrison* has seriously eroded the protections which

have been afforded by the peer review privilege to promote the accomplishment of those important purposes and created uncertainty regarding the proper scope and application of the privilege. Munson Healthcare anticipates that this uncertainty will hamper the collection of data and information required for the performance of its peer review / quality review functions if the Court of Appeals' decision in *Harrison* is left to stand as controlling authority for future cases, and that this would ultimately have a substantial adverse impact upon the effective performance of those important functions at Munson Healthcare's hospitals and other hospitals and health facilities throughout the State of Michigan.

STATEMENT OF QUESTIONS PRESENTED

I. **DID THE DECISION OF THE COURT OF APPEALS IN *HARRISON v MUNSON HEALTHCARE, INC.*, 304 MICH APP 1; 851 NW2D 549 (2014), ERR IN ITS ANALYSIS OF THE SCOPE OF MICHIGAN'S STATUTORY PEER REVIEW PRIVILEGE?**

The Defendants – Appellants contend the answer is "Yes."

The Plaintiff – Appellee contends the answer should be "No."

Amicus Curiae Munson Healthcare, Inc. contends the answer is "Yes."

II. **DID THE TRIAL COURT ERR 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 THE PEER REVIEW PRIVILEGE?"**

The Defendants – Appellants contend the answer is "Yes."

The Plaintiff – Appellee contends the answer should be "No."

Amicus Curiae Munson Healthcare, Inc. contends the answer is "Yes."

STATEMENT OF FACTS

Munson Healthcare shall rely upon the discussion of the facts provided in the Appellants' Brief. To the extent that the facts of the *Harrison* case are pertinent, Munson Healthcare will rely upon the discussion of the facts set forth in its Application for Leave to Appeal currently pending in that matter.

FRASER
TREBILCOCK
DAVIS &
DUNLAP,
P.C.
LAWYERS
LANSING,
MICHIGAN
48933

LEGAL ARGUMENTS

I. THE DECISION OF THE COURT OF APPEALS IN *HARRISON v MUNSON HEALTHCARE, INC.*, 304 MICH APP 1; 851 NW2d 549 (2014), ERRONEOUSLY ANALYZED AND INTERPRETED THE SCOPE OF MICHIGAN'S STATUTORY PEER REVIEW PRIVILEGE. THE TRIAL COURT'S DECISION IN THIS CASE, BASED UPON THE ERRONEOUS DECISION IN *HARRISON,* WAS ALSO ERRONEOUS, AND SHOULD THEREFORE BE REVERSED.

In the medical malpractice action giving rise to this appeal, the trial court has ordered the Defendants to produce the first page of a peer review protected "Improvement Report" prepared by hospital staff following the incident at issue, based upon the Court of Appeals' decision in *Harrison v Munson Healthcare, Inc.*, 304 Mich App 1; 851 NW2d 549 (2014), and its pronouncement that "objective facts gathered contemporaneously with an event" do not fall within the definition of the peer review privilege. 304 Mich at 32.

In *Harrison*, the Court of Appeals affirmed the trial court's award of sanctions against Munson Healthcare and its trial counsel, based upon its conclusion that certain "facts" reported on the first page of an Incident Report similar to the Improvement Report involved in this case did not fall within the coverage of the peer review privilege, and should therefore have been disclosed to the plaintiff's counsel. Munson Healthcare contends that the *Harrison* panel's interpretation of the pertinent statutory provisions was manifestly erroneous, and thus, its decision affirming the unwarranted award of sanctions in that matter should be reversed. The trial court's decision requiring disclosure of the first page of the Improvement Report at issue in this case, based upon the erroneous decision in *Harrison,* should be reversed as well.

As Munson Healthcare has asserted in its pending Application for Leave to Appeal in *Harrison,* the Court of Appeals' decision in that case was erroneous because all inquiry and discussion concerning the content of the privileged documents and their use outside of the peer review process should have been ended by the trial court's proper conclusion that the documents were protected by the peer review privilege. The clear and unambiguous statutory provisions defining the scope of the peer review privilege impose a strict limitation upon the use of records, data and knowledge collected, as they were in both of these cases, for purposes of peer review. Such records, data, and knowledge can be used only for the purposes provided in Article 17 of the Public Health Code, are not public records, and are not subject to court subpoena. MCL 333.21515; 333.20175(8).

Our Legislature has defined the scope of the privilege in broad terms to properly serve the laudable purpose of improving patient care by promoting effective peer review. The statutory language provides no basis for suggestions that the existence of the privilege is dependent upon actual use of the collected material by a peer review committee in peer review committee proceedings; as the *Harrison* panel correctly acknowledged, [w]hether a particular document qualifies as privileged under the peer-review statute depends on the circumstances surrounding its creation." 304 Mich App at 26. Nor does the clear and unambiguous statutory language support the exception that the *Harrison* panel has inappropriately added by interpretation – that "objective facts gathered contemporaneously with an event" do not fall within the coverage of the peer review privilege because they do not qualify as records, data, and knowledge collected by or for individuals or committees assigned a professional review function.

As the reported *Michigan* decisions have frequently emphasized, review, disclosure and use of these materials in relation to medical malpractice litigation are not among the purposes addressed or provided for in Article 17 of the Public Health Code. Thus, having properly determined that the Incident Report and related documents at issue were protected by the peer review privilege, the trial judge in *Harrison* should have concluded that Munson Healthcare and its counsel had no duty to review or disclose the content of those documents in relation to the medical malpractice litigation in that case, and that the content of those documents and the alleged "failure" to disclose that content in discovery could not serve as a proper basis for a determination of liability or an award of sanctions in that matter.

In *Harrison*, the Court of Appeals clearly erred in upholding the trial court's improper use of the privileged Incident Report, and compounded the trial court's error by its erroneous conclusion that Nurse Gilliand's notation on the first page of that report was not protected by the privilege. Its published decision is contrary to the statutory language and the decisions discussed herein, and if permitted to stand as controlling authority, will present hospitals and their counsel with an untenable choice in future cases – a choice between disclosure of information and documents within the scope of the peer review privilege defined by the clear and unambiguous statutory language, or risking an assessment of sanctions.

A. THE BROAD PROTECTION AFFORDED BY THE STATUTORY PEER REVIEW PRIVILEGE.

Licensed hospitals are subject to the mandate of MCL 333.21513, which requires hospitals to implement a peer review process for "the purpose of reducing morbidity and mortality and improving the care provided in the hospital for patients." MCL 333.21513(a) and (d). To facilitate the effective performance of this important duty, our Legislature has enacted provisions creating a statutory peer review privilege – provisions which impose strict

limitations upon the use of records, data and knowledge which have been collected for purposes of peer review.

By its enactment of these provisions, the Legislature has clearly manifested its belief that confidentiality is essential to successful peer review, and must therefore be preserved. As the Court of Appeals explained in *Attorney General v Bruce*, 124 Mich App 796, 802-803; 335 NW2d 697 (1983):

> "It is readily apparent that the statutory privilege created with respect to peer review committee communications was intended to encourage those committees to conduct their proceedings in a frank and professional manner. 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. In the absence of such protection, associates of those physicians being investigated by the hospital might prove to be much more reluctant to evaluate their colleagues' skills in an objective fashion."

This straightforward rationale for the peer review privilege has also been recognized by the decisions of this Court. *See, e.g., Dorris v Detroit Osteopathic Hospital,* 460 Mich 26, 42-43; 594 NW2d 455 (1999); *Attorney General v Bruce,* 422 Mich 157, 169; 369 NW2d 826 (1985). It was also acknowledged by the Court of Appeals' decision in *Harrison,* which appropriately observed that "[t]o encourage candid, thorough peer-review assessments of hospital practices, the Legislature has shielded peer-review activities from 'intrusive public involvement and from litigation.' " 304 Mich App at 25, quoting *Feyz v Mercy Memorial Hospital,* 475 Mich 663, 680; 719 NW2d 1 (2006).

Pursuant to the clear and unambiguous language of these statutory provisions, records, data, and knowledge collected for purposes of peer review are confidential, and can be used

only for the purposes provided in Article 17 of the Public Health Code.[2] MCL 333.20175(8) is a part of Part 201, containing general provisions applicable to Article 17. It provides that:

> "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."

MCL 333.21515 is included in Part 215, governing hospitals. It similarly states that:

> "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."

The confidentiality and limited use of peer review protected records is also addressed by the provisions of 1967 PA 270, MCL 331.531, *et seq.,* which address the release of information for medical research and education. MCL 331.531(1) allows a person, organization or other entity to provide a "review entity" with information or data relating to the physical or psychological condition of a person; the necessity, appropriateness or quality of health care provided to a person; or the qualifications, competence, or performance of a health care provider. The definition of "review entity" provided in MCL 331.531(2) includes a "duly appointed peer review committee" of several enumerated entities, including health facilities or agencies licensed under Article 17 of the Public Health Code.

MCL 331.533 provides for the confidentiality of records of proceedings, reports, findings and conclusions of a review entity, and of data collected by or for a review entity

---

[2] Article 17, pertaining to health facilities and agencies, includes Parts 201 through 222 – MCL 333.20101 through MCL 333.22260.

under the Act, and states that these materials "are not public records, and are not discoverable and shall not be used as evidence in a civil action or administrative proceeding.":

> "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,[3] 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."

The decisions discussing Michigan's peer review statutes have emphasized that their terms are clear and unambiguous, and provide broad and comprehensive protection against disclosure of records, data and knowledge collected for facilitation of peer review. And as the appellate decisions of this state have often recognized, it is axiomatic that clear and unambiguous statutory language is not subject to interpretation and must be applied as written. This principle was emphasized by this Court in *Attorney General v Bruce*, *supra,* which held that peer review documents were not subject to disclosure pursuant to an investigative subpoena issued in furtherance of an investigation conducted under Article 15:

> "Internal peer review activities are required by article 17. MCL 333.21513; MSA 14.15(21513) expressly provides that the records, data, and knowledge collected by the peer review committee 'shall be used only for the purposes provided in this article.' This language is unambiguous. Where the statutory language is plain and unambiguous, judicial construction or interpretation which would distort the plain meaning is precluded."
>
> 422 Mich at 165

[3] Section 2 of the Act, MCL 331.532, enumerates the permissible uses of records of a review entity's proceedings and its reports, findings and conclusions. That section does not address the use of records, data, or knowledge collected by or for those entities.

In *Manzo v Petrella,* 261 Mich App 705; 683 NW2d 699 (2004), the Court of Appeals similarly emphasized that, under the plain language of these statutes, any data amassed, assembled, or produced by a hospital's PSSC (Peer Standards and Conduct Committee) was privileged, and thus, exempt from disclosure in discovery or other compelled disclosure in all types of litigation:

> "**The plain language of each statute illustrates that the records, reports, and other related documents collected, used, or generated by a hospital's PSCC are privileged from disclosure.** The discoverability of these documents is not contingent upon the type of claim asserted by a subpoena proponent. *Ligouri, supra* at 377. These 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 NW2d 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 NW2d 90 (1988), or an investigation by the Board of Medicine, *Attorney General v Bruce*, 422 Mich 157; 369 NW2d 826 (1985). **Any data amassed, assembled, or produced by a PSCC is statutorily protected from discovery.**"
>
> 261 Mich App at 715 (Emphasis added)

In *Ligouri v Wyandotte Hospital and Medical Center*, 253 Mich App 372; 655 NW2d 592 (2003), the Court of Appeals noted the Legislature's manifest intent to **fully** protect quality assurance / peer review records from discovery by its enactment of these statutory provisions:

> "The statutes at issue here govern the confidentiality of records, reports, and other information collected or used by peer review committees in the furtherance of their duties and evidence the Legislature's intent to *fully* protect quality assurance/peer review records from discovery. *Dorris v Detroit Osteopathic Hosp*, 460 Mich 26, 40; 594 NW2d 455 (1999). The privilege afforded by statute may be invoked for records, data, and knowledge collected for or by an individual or committee assigned a review function."
>
> 253 Mich App at 376 (Emphasis in Opinion)

In *In re Investigation of Lieberman,* 250 Mich App 381; 646 NW2d 199 (2002), the Court of Appeals noted that the Legislature had chosen to protect peer review materials in "broad terms" by imposing "a comprehensive ban" on the disclosure of any information collected by peer review committees, and specially emphasized its "statutory admonishment" limiting the use of such information to purposes within the scope of Article 17:

> "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 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.
>
> * * *
>
> "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.* See article 17 of the Public Health Code, MCL 333.20101 to 333.22260.
>
> * * *
>
> "The Attorney General asserts that compelling policy considerations militate in favor of holding the statutory privilege narrowly to its terms and allowing the material here sought to be discovered pursuant to criminal investigations. A proper, objective reading of the statute, however, 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."
>
> 250 Mich App at 387, 389 (Emphasis in Opinion)

Review of peer review protected records and disclosure or use of facts or other data compiled or reported therein during the course of malpractice litigation are not among the purposes addressed by Article 17 of the Public Health Code. And pursuant to the clear terms of the statutory provisions previously quoted, these records and their content are confidential, and are not subject to court subpoena. Consistent with those provisions and the authoritative holdings previously discussed, the reported decisions have also specified, on a number of

occasions, that the content of incident reports such as the Incident Report at issue in *Harrison* and the Improvement Report involved in the case at bar, is subject to the protections afforded by the peer review privilege. *See, e.g., Dorris v Detroit Osteopathic Hospital, supra; Ligouri v Wyandotte Hospital and Medical Center, supra; Gallagher v Detroit-Macomb Hospital Association,* 171 Mich App 761; 431 NW2d 90 (1988).

Thus, in *Harrison,* upon the trial court's proper determination that the Incident Report and related documents were protected by the peer review privilege, further review and consideration of their content outside of the peer review process should have been foreclosed, and the inquiry brought to an end. The trial court and the Court of Appeals should have concluded that Munson Healthcare and its counsel had no duty to review or disclose the content of those documents in response to Plaintiff's discovery requests; that the content of those documents could not serve as a proper basis for determining the Hospital's liability in that matter; and that the existence of, and alleged "failure" to disclose that content could not serve as a legally permissible basis for imposing an award of sanctions.

B. THE *HARRISON* PANEL'S IMPERMISSIBLE EROSION OF THE PRIVILEGE.

The Court of Appeals decision in *Harrison* has impermissibly eroded the scope of the peer review privilege by reading in limitations that the Legislature could have, but did not, include. Specifically, the *Harrison* panel has inappropriately added by interpretation a qualification that "objective facts gathered contemporaneously with an event" do not fall within the coverage of the peer review privilege because they do not qualify as records, data, and knowledge collected by or for individuals or committees assigned a professional review function. This, however, is not what the statutes say, and as this Court has frequently

cautioned, it is not acceptable for a court to read unstated requirements into a clear and unambiguous statute.

In *Harrison,* the trial court and the Court of Appeals have relied heavily upon *Centennial Healthcare Management Corporation v Department of Consumer and Industry Services,* 254 Mich App 275; 657 NW2d 746 (2002), as a basis for their finding that the Hospital and its counsel had a duty to disclose the "facts" reported in the Incident Report. Munson Healthcare contends that this reliance has been misplaced. The factual scenario presented in *Centennial* is dramatically different from the facts of the *Harrison* case and the facts presented in this matter, and the decision in that case does **not** create an exception to the statutory privilege establishing a duty to disclose the "facts" reported in the privileged documents at issue in these cases.

In *Centennial,* the plaintiff nursing home sought a declaratory ruling that incident and accident reports prepared at its facility were protected by the statutory peer review privilege, and thus, an administrative rule requiring their disclosure to state auditors was invalid and unenforceable. The Court of Appeals concluded that the statutory peer review privilege did not apply to the incident and accident reports at issue in that case, based primarily upon its conclusion that disclosure of their content did not invade the deliberative processes of the nursing home's peer review committee. 254 Mich App at 291.

Again, the Court should recall that in *Harrison,* the trial court appropriately concluded that the privilege **did** apply to the Incident Report, but concluded, nonetheless, that Munson Healthcare and its counsel were required to disclose the "facts" written by Nurse Gilliand on the first page of that report. The Court of Appeals took a slightly different approach, finding that the peer review privilege did not extend to the first page of the Incident Report because

"objective facts" written on that page should have been reported in the Hospital chart. This conclusion suggests a lack of confidence in the trial court's approach of excusing disclosure and use of the content of a document acknowledged to fall within the coverage of the peer review privilege – that the Court of Appeals felt a need to justify its affirmance of the trial court's award of sanctions by a determination that the privilege did not apply to this part of the Incident Report at all – a conclusion which was reached in spite of the circumstances surrounding the recording of the "facts" in question and the plain statement, on the face of the document, providing assurance that its content was confidential under the various statutes cited.

A review of the *Centennial* decision will reveal that its reasoning is inconsistent with the controlling authorities previously discussed for a number of reasons. First, the pertinent statutory language is unambiguous, as this Court has properly noted in *Attorney General v Bruce, supra.* Thus, construction of the statutory language is neither necessary nor appropriate, and the clear and unambiguous statutory language must be applied as written. But in *Centennial,* the panel concluded that the "collection" requirement of the statute was "somewhat ambiguous" and, based upon that conclusion, chose to narrowly construe the statutory privilege in accordance with the "long-established legal maxim that privileges 'ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.'" 254 Mich App at 287-288. The incident and accident reports at issue in that case had been requested by state nursing home auditors pursuant to administrative rules providing for the requested disclosure, and thus, there was an arguable question as to whether the incident and accident reports had been "collected" by the plaintiff nursing home's peer review committee for use in the peer review process.

In *Harrison,* there was no question that the Incident Report and related documents were prepared and collected for use in the peer review process.[4] This was made clear by the testimony presented in that case, and by the warnings conspicuously displayed on each of those documents stating that each of them was "**a confidential document prepared to assist Quality Improvement or Peer Review Committees in fulfilling the responsibility to reduce morbidity/mortality and improve the quality of care**" – a statement which was presumably relied upon as an assurance that the content of the report would be kept confidential pursuant to the listed statutory provisions.[5] But even if some statutory construction might have been required to resolve the *different* question presented in *Centennial*, and assuming as well, that a strict and narrow construction might be appropriate

---

[4] There was no basis, in *Harrison,* for any suggestion that the Incident Report in question was to play any role in providing any continuation of care to the plaintiff, and thus, there was no basis for a conclusion that the report was completed for any purpose other than use in the Hospital's peer review / quality review process. And in the absence of any evidence suggesting that the Incident Report was prepared for another purpose unrelated to that process, the *Harrison* panel's citation of this Court's observation in *Monty v Warren Hospital Corporation,* 422 Mich 138, 146-147; 366 NW2d 198 (1955), based upon its prior decision in *Marchand v Henry Ford Hospital,* 398 Mich 163; 247 NW2d 280 (1976), 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," was entirely superfluous. In *Marchand*, it was clear that the information in question was not collected for use in a peer review process; it had instead been compiled by a physician for his own research and study. Under those circumstances, which bear no resemblance to the circumstances presented in *Harrison* or this case, this Court appropriately held that the subsequent provision of the independently-complied information to a peer review committee did not bring that information within the coverage of the peer review privilege.

[5] In *Harrison,* the Incident Report concerning the burn injury mishap was prepared after the surgery by circulating nurse Cynthia Gilliand. That Incident Report, entitled "Munson Healthcare Quality / Safety Monitoring" has not been maintained by the Hospital as a part of the patient chart. On its face, and on the back, the form used for that report contained conspicuous notations declaring that the document was a confidential peer review privileged report: **"CONFIDENTIAL: This is a confidential document prepared to assist Quality Improvement and/or Peer Review Committees in fulfilling responsibility to reduce morbidity/mortality and improve the quality of care. MCL 333.20175, 333.21513,**

with respect to some *other* privileges, it has been made very clear, by the authorities previously discussed, that the peer review privilege should be liberally construed in accordance with the Legislature's manifest intent to provide broad and comprehensive protection against disclosure of records, data and knowledge collected for use in the peer review process.

Second, as noted previously, the statutory privilege applies broadly, without limitation, to all "**records, data, and knowledge**" collected **for *or* by individuals *or* committees** assigned a peer review function. This language is clear and unambiguous, and the statutory references to "data" and "knowledge" must obviously encompass any discussion of factual circumstances included within a peer review privileged "record." Thus, the statutory language provides no principled basis for reading in an exception requiring disclosure of "facts," objective or otherwise, referred to in reports collected for use in a peer review process. Nor does the statutory language provide a legitimate basis for exclusion of such "facts" based upon an assumption that their disclosure would not impede the deliberative processes or conclusions of a peer review committee. There was no principled basis for drawing that distinction in *Centennial,* and no legitimate basis for doing so can be derived from the decisions of other jurisdictions, addressing dissimilar issues and statutory provisions, discussed in the Court of Appeals' Opinion. The clear and unambiguous provisions of *Michigan's* peer review statutes shield all records, data and knowledge collected for purposes of peer review, and those provisions must therefore be applied as written unless, and until, the Legislature decides that they should be repealed or modified.

333.21515, 331.531, 331.532, 331.533, 330.1143a, 330.1748(9)." (Appendix "D" of Munson Healthcare's pending Application for Leave to Appeal)

Third, as previously noted, the reported decisions have made it very clear that, under the unambiguous language of these provisions, the "records, data, and knowledge" protected by the privilege can be used **only** for purposes provided for under Article 17 of the Public Health Code. Here, review and disclosure of "facts" (data or knowledge) reported in peer review privileged documents during the course of discovery in medical malpractice litigation were not uses contemplated or approved under Article 17, nor is it consistent with this limitation to use any such facts for determination of liability or assessment of sanctions in civil litigation. In *Centennial*, the incident and accident reports in question were requested by Department auditors pursuant to administrative rules which required their disclosure to the Director of the Department or its authorized agents. Those rules – R 325.21101 and R 325.21104 – were promulgated pursuant to authority granted under several provisions of Article 17, and thus, their disclosure to the Department did not violate the provisions of MCL 333.21515 and MCL 333.20175(8) limiting their use to purposes "provided in" that Article.[6] These differences suggest that the *Centennial* decision should be limited to its unique facts, and it is noteworthy that another panel of the Court of Appeals came to that precise conclusion in the subsequent case of *Maviglia v West Bloomfield Nursing & Convalescent Center,* (Unpublished, Court of Appeals No. 248796, *rel'd* 11-9-04).

---

[6] Munson Healthcare would also direct the Court's attention to MCL 333.21743(1)(b), authorizing disclosure of "Records of license and certification inspections, surveys, and evaluations of nursing homes, other reports of inspections, surveys and evaluations of patient care, and reports concerning a nursing home prepared pursuant to titles 18 and 19 of the social security act ..." and MCL 333.21741, requiring promulgation of rules for nursing homes establishing standards relating to several subjects, including medical audit procedures; standards of patient care; and utilization and quality control review procedures.

It is not significant that no formal peer review hearing was conducted in relation to the mishap at issue in *Harrison.*[7] The statutory privilege applies, by its clear terms, to all records, data, and knowledge collected "**<u>for</u>** or **<u>by</u>**" any "**<u>individuals</u>** or **<u>committees</u>**" assigned a "**<u>professional review function</u>**" in a health facility of agency. Thus, the controlling criteria is the purpose for which the information was collected; the existence of the privilege does not depend upon whether the collected information is subsequently used in a peer review proceeding.

In spite of the clear statutory language defining the scope of the peer review privilege, Plaintiff Krusac offers repeated suggestions that the privilege can only be applied to "records, data and knowledge" collected for or by a peer review committee. This suggestion is manifested on pages 14, 15 and 23 of the Appellee's Brief by statements which overlook the statutory references to "individuals" assigned a "review function." On page 23, for example,

---

[7] The Court of Appeals' Opinion in *Harrison* incorrectly stated that, at Munson, Incident Reports "are not provided to peer review committees for study." 304 Mich App at 34. This erroneous statement appears to have been made in reference to the testimony of Mr. Shirilla and Ms. Schreiber that Incident Reports are retained by the Risk Management Department, and may also have been influenced by a misunderstanding of evidentiary hearing testimony that Incident Reports are never made a part of a disciplinary action file. This, of course, is dramatically different from a statement that Incident Reports are never shared with a peer review committee. Mr. Shirilla has explained that the peer review process, which generally does not focus upon disciplinary action, involves the participation of several different committees responsible for quality or peer review functions related to specific areas such as medical staff, nursing and medication. Ms. Schreiber explained that the original Incident Reports are maintained in the Risk Management Department, but are made available for review by the persons or committees responsible for quality review of particular issues or occurrences. And in light if the limitations imposed by the statutory peer review provisions, it should come as no surprise that Incident Reports and other peer review privileged documents are not made a part of disciplinary action files which could ultimately become a subject for administrative or judicial review. For a more detailed understanding of these issues addressed in *Harrison,* Munson Healthcare would direct the Court's attention to the discussion of those issues on page 36 of its pending Application for Leave to Appeal in that case.

Plaintiff Krusac states that, "[s]ince the testimony provided at the evidentiary hearing demonstrated that the incident report never even made its way to a review committee, the claim of privilege in *Harrison* was properly rejected." This argument misses the mark because, as previously discussed, the statutes defining the peer review privilege are broader in scope, as they extend the privilege to "records, data and knowledge collected for or by **individuals <u>or</u> committees** assigned a review function under Article 17.[8] Plaintiff Krusac also seems to suggest, on pages 14 and 15, that this supposed limitation of the privilege to "records, data and knowledge" collected for or by a peer review *committee* was established by this Court's decision in *Marchand v Henry Ford Hospital, supra.* This, also, is unsupported. Although *Marchand* involved a case where the information in question had been provided to a peer review committee, the issue presented was whether that information, collected for private research and study and not professional review, was protected by the peer review privilege.

Plaintiff Krusac has attempted to defend the *Harrison* panel's holding regarding disclosure of "objective facts" by suggesting that hospitals are required, by MCL 333.20175(1), to keep a record for each patient – a record which includes a record of all "observations" – and to make that record available to the patient. Because subsection 20175(1) allows patients access to the record or "chart" compiled and maintained pursuant to that provision, Plaintiff Krusac argues that disclosing the content of an otherwise privileged Incident Report to make disclosure of "objective facts" which might qualify as an

---

[8] This argument also overlooks the fact that in *Harrison,* the trial court found that the records in question were subject to the peer review privilege, but went on the find that the "facts" written on the first page of the Incident Report were subject to disclosure, nonetheless.

"observation" constitutes a permissible disclosure of "observations" in accordance with MCL 333.20175(1), and thus, constitutes a permissible use of that information under Article 17.

This argument lacks merit for two reasons, First, the argument overlooks the fact that it addresses two separate and entirely different kinds of records that the hospital is required to keep for very different purposes. If a hospital discloses the content of records collected by or for an individual or committee assigned a review function, it is not disclosing the hospital chart, which must be made available under MCL 333.20175(1). Accordingly, disclosing the content of records collected by or for an individual or committee assigned a review function made confidential and exempt from disclosure under subsection MCL 333.20175(8) is not a disclosure allowed or required under subsection 20175(1), and thus, it is not a use authorized under Article 17.

Second, as the University of Michigan Regents have correctly noted in their Amicus Curiae Brief, this Court's decision in *Attorney General v Bruce, supra,* stands as persuasive evidence that this Court has viewed MCL 333.20175(8) as an exception to other provisions requiring disclosure of information in other situations, even those arising under Article 17. In that case, the Attorney General contended that disclosure of peer review protected records was authorized by the provisions of MCL 333.20175(4), which required hospitals to report the "relevant circumstances" of disciplinary actions to the appropriate licensing board, and that this requirement defeated the privilege against disclosure of peer review protected material provided under MCL 333.21515. The Court rejected that argument based upon its finding that the language of MCL 333.20175(5) – the substantively identical predecessor of MCL 333.20175(8) – established an exception to the reporting requirement of MCL 333.20175(4), precluding the requested disclosure of peer review protected records. In so ruling, the Court

expressed its opinion that, "[h]ad the Legislature intended that hospital peer review committee information be available for departmental investigations, it would have expressly so provided as it did in MCL 333.16244; MSA 14.15(16244), which provides that the physician-patient privilege does not apply with respect to such investigations." 422 Mich at 168-169.

The same rationale applies with equal force here. In light of Legislature's clearly expressed intent to provide broad-based protection for records, data and knowledge collected for purposes of peer review, it is reasonable to assume that if the Legislature had intended to create an exception for otherwise privileged "facts" that might be considered an "observation" normally included in a patient's chart pursuant to MCL 333.20175(1), it would have signified that intent by the inclusion of appropriate language establishing that exception. The Legislature has not chosen to do so, and Munson Healthcare respectfully suggests that it would be inappropriate for this Court create such an exception by judicial pronouncement in this case.

There is also no basis for Plaintiff Krusac's suggestion that the lower courts have improperly substituted "privileged" for "confidential," and thus, the privilege extends only to disclosure pursuant to a court subpoena. This lacks merit for three reasons. First, Plaintiff Krusac has cited no Michigan authority in support of this novel argument. Second, the reported *Michigan* decisions have uniformly characterized the protection afforded by these statutory provisions as a "privilege," and have applied that privilege to preclude disclosure of peer review material in every manner of judicial and administrative proceedings. *See, e.g., Marchand v Henry Ford Hospital, supra,* 398 Mich at 167; *Monty v Warren Hospital Corporation, supra; Manzo v Petrella*, 261 Mich App at 715; *Ligouri v Wyandotte Hospital and Medical Center, supra,* 253 Mich App 376, Thus, even if it is assumed for the sake of

discussion that there is a significant legal difference between enforcement of confidentiality and application of a privilege, the language of the provisions at issue establish both confidentiality and privilege. By their plain terms, these provisions state that all "records, data, and knowledge collected for or by individuals or committees assigned a professional review function" in a hospital or a health facility or agency are confidential, and then go on to further provide that such "records, data, and knowledge" are privileged by their further language mandating that they "shall be used only for the purposes provided in this article, are not public records, and are not subject to court subpoena."

Finally, the only authority cited in support of Plaintiff Krusac's argument – a decision of the North Dakota Supreme Court in *Trinity Medical Center, Inc., v Holum,* 544 NW2d 148 (ND 1996) – is clearly distinguishable, as its holding is based upon analysis of a dramatically dissimilar statute. The statute at issue in that case contained two separate and distinct sentences – one which established a requirement of confidentiality, and the other establishing a privilege precluding the use of information, data, reports, or records made available to specified peer review committees in civil litigation. The first sentence declared that information, data, reports, or records made available to any of the specified peer review committees were ***confidential*** and limited the permissible uses of such information, data, reports, or records by those committees and their members. The North Dakota Court noted, with respect to that sentence, that:

> "The first sentence merely provides that information made available to the committee is confidential, and 'may be used by such committees and the members thereof only in the exercise of the proper functions of the committees.' That provision is directed to those who acquire information in the course of serving on the committee, and directs that they are not free to disseminate such information to third persons or the public."

544 NW2d at 156.

The second sentence of the North Dakota statute established the privilege by specifying that "[t]he proceedings and records of such a committee are not subject to subpoena or discovery or introduction into evidence in any civil action arising out of any matter which is the subject of consideration by the committee." 544 NW 2d at 152, 156. The scope of this second sentence was narrower than that of the first sentence, being limited to "the proceedings and records" of the specified peer review committees, and thus, the North Dakota court concluded that the statutory privilege applied only to the "proceedings and records" of the covered committees. 544 NW2d at 156. Michigan's statutory provisions are different. They each establish confidentiality and privilege in a single sentence, mandating that all records, data, and knowledge collected for or by individuals or committees assigned a professional review function are confidential, shall be used only for the purposes provided in Article 17, are not public records, and are not subject to court subpoena.

C. THE CONFUSION AND DIFFICULTIES THREATENED BY APPLICATION OF *HARRISON'S* HOLDING.

It is also important for the Court to note that application of *Harrison's* holding in pending and future cases will be fraught with difficulties if it is allowed to stand as binding authority. Those difficulties have been overlooked or disregarded by the *Harrison* panel, and Plaintiff Krusac's presentation to the Court in this matter does not answer the difficult questions which must be asked.

On page 23 of his Appellee's Brief, Plaintiff Krusac has stated that "[t]he facts of the *Harrison* case also serve to underscore how § 20175(1) must be given effect." Munson Healthcare disagrees, and respectfully suggests that, in fact, the contrary is true – that when the facts of the *Harrison* case are viewed in proper perspective, they provide a compelling

example of why the *Harrison* panel's interpretation of the peer review privilege is problematic. Nonetheless, Plaintiff Krusac has invited the Court to examine the facts of *Harrison* to judge the validity of the lower court decisions in that case. Munson Healthcare urges the Court to accept that invitation so that the Court may reach its own conclusions regarding the allegations of misconduct which have been made in this matter concerning the conduct of the Hospital and defense counsel in *Harrison.*[9]

Even if the Court were to assume the correctness of the principle adopted by the *Harrison* panel and espoused by the Plaintiff in this case – that otherwise privileged "facts" and "observations" must be disclosed, despite the clear statutory prohibitions against doing so – application of that principle is problematic in *Harrison,* and the Court should anticipate that the exercise will be problematic in other cases as well. This is due, in large part, to the fact that it may often be difficult or impossible to determine whether a comment written in an Incident Report or other peer review document may reasonably be considered a statement of

[9] Munson Healthcare believes that a thorough and objective evaluation of *Harrison's* facts will lead this Court to conclude that both of the lower courts have provided an unfairly slanted and unsympathetic account of the occurrences in that case. Those facts have been summarized at length on pages 7-29 of Munson Healthcare's pending Application for Leave to Appeal. It may be acknowledged that Plaintiff Krusac's new appellate counsel was not involved as counsel of record in *Harrison,* and thus, it is likely that his harsh assertions on pages 20-22 of the Appellee's Brief – that the conduct of Munson and its counsel in *Harrison* constituted a "fraud" or an "artifice," and that their defense was "patently at odds with the content of the Incident Report" – are the product of incomplete knowledge, unduly influenced by the accounts gleaned from the lower court opinions in that case. Nonetheless, since it is the Court's objective to judge the validity of the *Harrison* panel's legal analysis of the peer review privilege, it is appropriate for the Court to question why it should have been considered necessary to engage in inflammatory characterizations of the factual scenario that brought the issue before the courts in that case. Munson Healthcare is confident that this Court will carefully review the facts of *Harrison* and reach its own conclusions based upon an objective and dispassionate analysis.

"fact" or an account of an actual "observation," as opposed to a conclusion drawn, or assumption made, with or without personal knowledge or factual support.

On Page 24, Plaintiff Krusac's new appellate counsel has blithely stated, in reference to Nurse Gilliand's notation, that: "The note recorded what the nurse had seen." This, however, has been improperly assumed. The briefly written content of the Incident Report at issue in *Harrison* provides no assurance that this was so, and indeed, the testimony presented in the evidentiary hearing suggests that it was not. As Munson Healthcare has noted in the Court of Appeals and its Application for Leave to Appeal currently pending before this Court, Nurse Gilliand testified that she had no recollection of the minor mishap giving rise to the litigation in *Harrison*, and she expressed serious doubt as to whether she would have been in a position where she could have been able to observe the circumstances of the event in question while performing her duties as circulating nurse.[10]

In the absence of any current memory or content demonstrating that the statement in question was made with personal knowledge of the supposed "fact," Nurse Gilliand's brief statement could just as well have been a recording of an assumption which may, or may not, have been supported by actual facts, or a repetition of what some other unidentified individual had said – a comment which may, or may not, have been correctly heard and understood.[11]

---

[10] Munson Healthcare would direct the Court's attention to pages 9-12, and 27-29 of its Pending Application for Leave to Appeal in *Harrison.*

[11] In footnote 8 on page 24 of the Appellee's Brief, Plaintiff's counsel opines that "[t]he significance of [Nurse Gilliand's] observation was not lost on Munson's operating room manager" because she concluded that the plaintiff "was burned because of the failure to follow hospital procedure in that the holster 'was in [*sic*] field for this case, however bovie was not placed in it.'" This pronouncement is also based upon a liberal measure of speculation. As Munson Healthcare has also noted in its pending Application, the conclusion stated by its Operating Room Manager, Nurse Peterson, was also fraught with uncertainty because she had no memory of her investigation, and it is undisputed that she was not present

And as Munson Healthcare has noted in its pending Application, the comment in question is ambiguous, and thus its meaning is not as clear as Judge Rodgers and Judge Gleicher have supposed. It is not necessary or appropriate to repeat all of what has been said before on that subject here,[12] but the Court may find it significant that the ambiguity of the statement was noted and acknowledged by Judges Owens and Borrello during the oral argument in the Court of Appeals.[13]

These circumstances should cause this Court to ask whether the brief statement at issue on the first page of the Incident Report in *Harrison* can properly be characterized as an "observation" or a statement of "fact." If it cannot, or if the answer is unclear, how can it be reasonably concluded that Munson or its attorney had a duty to disclose that statement, as a part of the hospital chart or otherwise? And if the character of the information and the

---

in the operating room when the mishap occurred and therefore had no personal knowledge of the circumstances involved. Thus, it is equally likely that her conclusion was also based upon an assumption, the source of and support for which are unknown.

[12] Munson Healthcare would direct the Court's attention to pages 41 through 47 of its pending Application for Leave to Appeal in *Harrison*.

[13] Judges Owens and Borrello both made comments during the oral arguments expressing their agreement with Munson's argument that Nurse Gilliand's notation was ambiguous, and expressing surprise that this notation could be deemed sufficient to support an award of sanctions. The comments made by Judge Owens included his observation that: "To me, pretty ambiguous for the judge's conclusions that everything else after that was a big lie in an attempt to cover up and deceive the court. I mean to me, that's amazing." Judge Borrello also discussed the ambiguity of Nurse Gilliand's notation, and in doing so, he remarked that "there was an ambiguity here," and asked the plaintiff's counsel how sanctions could be imposed in light of that ambiguity. He later went on to exclaim: " . . . to sanction a lawyer for that? I mean that, to me, that's a real stretch." Munson Healthcare would again direct the Court's attention to the audio recording of the oral arguments in the Court of Appeals. A DVD copy of that recording has been submitted to the Court as Appendix "H" of Munson Healthcare's Application for Leave to Appeal in *Harrison*. The discussions concerning the ambiguity of Nurse Gilliand's notation occurred during minutes 31 and 32, and 41through 46 of the recording.

existence of a duty to disclose are unclear in *Harrison*, this suggests that there may well be a problematic lack of clarity in other cases as well.

The realization of this potential brings other, more specific, questions to mind. Must hospital personnel compare the patient chart with peer review documents in every case to determine whether there is any real or potential discrepancy between them with respect to the facts of a matter? If there is uncertainty as to whether an Incident Report contains discussion of facts, as opposed to unhelpful conclusions or assumptions, how is that uncertainty to be resolved? How can the uncertainty be resolved in cases, like *Harrison,* where the author of the report has no memory of the event when questioned long after the fact? If the uncertainty cannot be resolved, must the hospital and its counsel seek an *in camera* review by the court to determine whether the content of a peer review report contains "objective facts" which must be disclosed or risk an assessment of sanctions? And if it should be found that a peer review report contains facts which must be disclosed, how can the disclosure of those facts be made without also disclosing their privileged source?

There is also a significant potential for abuse, and that potential raises more questions. Will plaintiff's counsel routinely demand copies of peer review documents in every case as a "fishing expedition," or to protect themselves against claims of malpractice? Will overburdened trial courts be required to conduct an *in camera* review and evidentiary hearing whenever this occurs? Will the Court of Appeals be burdened with applications for interlocutory appeal to perform a second review of sealed records whenever one party or the other is dissatisfied with the trial court's decision?

All of this potential for uncertainty can, and should, be avoided by an unqualified recognition that MCL 333.20175(8) and MCL 333.21515 preclude disclosure of "records,

data and knowledge" collected by or for an individual or entity assigned as review function under Article 17. This requires nothing more than a recognition that the peer review statutes mean what they say, and a reaffirmation of the holdings previously discussed. The reported decisions have made it very clear that peer review documents are privileged. Those authorities have made it equally clear that the content of peer review privileged documents is also privileged, and not to be disclosed or used in litigation.

There is good reason for this. The confidentiality protected by the privilege is essential for the effective functioning of the peer review process, as this Court and the Court of Appeals have often noted, and must therefore be preserved. If peer review is to operate effectively and achieve its intended purpose, physicians and other hospital staff and committees assigned a professional review function must be allowed to collect and examine data, facts and information, and to speak freely about events or injuries without fear that their words and communications will be parsed and dissected in future legal proceedings to determine liability, damages or sanctions.[14] If physicians and hospital staff must be mindful of that potential, it is doubtful that they will be willing to engage in the free and frank discussion that effective peer review requires, and it is likely that the quality of patient care will suffer as a result. These very real concerns were expressed by the Hospital administrators who gave testimony in *Harrison,*[15] and Munson Healthcare respectfully suggests that this Court should pay heed to those concerns.

---

[14] As the Court of Appeals aptly noted in *Dye v St. John Hospital and Medical Center,* 230 Mich App 661; 584 NW2d 747 (1998), this important purpose "would be undermined if particular information properly collected for or by a review entity was later subject to disclosure upon a determination that, for some unknown reason, it was deemed not to be 'in the category of peer review material.'" 230 Mich App at 665, fn. 2.

[15] During her testimony in chambers, Ms. Schreiber expressed her opinion that confidentiality is essential to the peer review process and stated that: "One of my biggest fears is that I'm

It may be acknowledged, of course, that application of this and other privileges may operate to shield relevant evidence from disclosure in judicial proceedings. This, however, is the price that our Legislature has found to be a reasonable cost of the benefits secured by effective peer review. If this policy judgment is to be changed, the change should be made by the Legislature. Medical staff should be allowed to safely rely upon assurances that their confidential communications will remain confidential, and hospitals and their counsel should not be sanctioned for actions taken in reliance upon the existing statutory language.

---

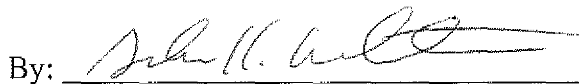
never going to get another incident report from the OR because of this case." And when questioned by Judge Rodgers as to why the "facts" written in the incident report should not have been included in the patient chart, Dr. McGreaham stated that "many of these types of instances are process related. And it takes much more time and energy than one would ever imagine to get to the root cause of even a simple incident like this." Munson Healthcare would direct the Court's attention to page 39 of its pending Application for Leave to Appeal in *Harrison.*

RELIEF

WHEREFORE, Amicus Curiae Munson Healthcare Inc. respectfully requests that this Honorable Court determine that the Court of Appeals' decision in *Harrison v Munson Healthcare, Inc.*, 304 Mich App 1; 851 NW2d 549 (2014) was erroneous with respect to its analysis and application of the statutory peer review privilege, and that the Court reverse the decisions of the lower courts, in this case and in *Harrison,* based upon a proper application of the privilege.

Respectfully submitted,

Fraser Trebilcock Davis & Dunlap, P.C.
Attorney for Amicus Curiae
Munson Healthcare, Inc.

By: 

Graham K. Crabtree (P-31590)
124 W. Allegan, Suite 1000
Lansing, Michigan 48933
(517) 482-5800

Dated: November 18, 2014