STATE OF MICHIGAN

IN THE SUPREME COURT

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

Plaintiff,

Vs.

Sup Ct No. 149270
COA No. 321719
Case No. 12-15433-NH-4
Hon.: Fred L. Borchard

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

Defendant.
_____/

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**AMICUS CURIAE BRIEF OF THE MICHIGAN ASSOCIATION FOR JUSTICE**

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**AMICUS CURIAE BRIEF OF THE MICHIGAN ASSOCIATION FOR JUSTICE**

Respectfully submitted by:
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Attorney for Amicus Michigan
Association for Justice

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## STATEMENT OF ISSUE PRESENTED

WHERE A READING OF THE STATUTES IN QUESTION IN THIS MATTER SHOWS THEY ARE TO BE INTERPRETED *IN PARI MATERIA*, AND WHERE A FOUNDATIONAL SHOWING HAS BEEN MADE THAT CONTEMPORANEOUS OBSERVATIONS REGARDING PATIENT CARE WERE NOT INCLUDED IN THE CHART, BUT APPARENTLY WERE INCLUDED IN AN INCIDENT REPORT, DID A TRIAL COURT PRESIDING OVER A MEDICAL MALPRACTICE ACTION, AFTER PROPERLY REVIEWING THE MATTER *IN CAMERA*, CORRECTLY COMPEL THE FACTUAL CONTEMPORANEOUS MATERIAL TO BE MADE AVAILABLE TO THE PATIENT, DESPITE THE HEALTH CARE PROVIDER'S CLAIM THAT SUCH IS PROTECTED BY THE PEER REVIEW PRIVILEGE?

Plaintiff-Appellee argues "Yes"

Defendant-Appellant argues "No"

Amicus Curiae answers "Yes".

## INTEREST OF AMICUS CURIAE

The Michigan Association for Justice (MAJ) is an organization of Michigan lawyers engaged primarily in litigation and trial work. The MAJ recognizes an obligation to assist this Court on important issues of law that would substantially affect the orderly administration of justice in the trial courts of this state.

## STATEMENT OF FACTS

The MAJ adopts Plaintiff's statement of facts. :

## INTRODUCTION

The instant appeal centers around an incident which befell decedent Dorothy Krusac while a patient at defendant Covenant's facility. The chart available to her (and ultimately, after her passing, to her representatives) was extremely short, merely indicating that there was a fall which had been unwitnessed. It was only after medical malpractice litigation had begun that a more complete factual rendition of the events surrounding her fall emerged, at the depositions of medical personnel attending to, or in the vicinity of, the fall. Not only did these health care providers testify that they had witnessed the fall, in seeming contradiction of the available record, they all offered a similar, detailed story regarding the events surrounding her fall and the aftermath.

Struck by the disparity between the terse wording of the chart, and the richly detailed testimony of the witnesses, plaintiff counsel sought contemporaneous factual descriptions set forth in the "improvement report" which had purportedly been generated for use by a peer review body within Covenant. After an in-camera review of the document, the trial court ordered that plaintiff's counsel be provided with one page of the improvement report.

Defendant Covenant appealed, ultimately to this Court, which granted leave. The sweeping scope of the privilege sought to be affirmed by Covenant would allow medical health providers absolute discretion in determining which records to be made available to the patient, which could lead to the creation of separate records, a scanty one for the patient's eyes, and a more richly detailed one, to be withheld from the patient at all costs.

The Michigan Health Code does not support such a grant of unfettered discretion to health care providers. The same Health Code which provides for the confidentiality of certain records also imposes a duty upon those health care providers to include in a record all significant events occurring in the care and treatment of their patient, and to make such record available to the patient. As such, contemporaneous factual observations about a significant event must be made part of the chart available to the patient. When the chart does not contain any record of such an event, or when the health care providers testify inconsistently with the facts contained in the record, a trial court is authorized to review the material deemed confidential *in camera*, and to determine that which should be made available to the patient.

Dorothy Krusac's fall constitutes such a significant event. The Health Code does not support granting the Hospital herein the unfettered discretion to keep from her factual material that should have been made a part of her chart. The *in camera* review process set forth in *Monty v Warren Hosp Corp*, 422 Mich 138; 366 NW2d 198 (1985) is the appropriate method for maintaining the balance between a patient's right to know what happened to him or her during health care, and a health care provider's right to maintain confidentiality of the inner workings of peer review activities designed to

improve patient care. In the instant matter, the *in camera* procedure was correctly followed by the trial court, which result was properly left to stand by the Court of Appeals. This Court should affirm, to indicate the proper balance between the twin mandates of the health code – transparency to the patient and confidentiality to the hospital review function – was struck by the Trial Court herein.

## ARGUMENT

**A READING OF THE STATUTES IN QUESTION IN THIS MATTER SHOWS THEY ARE TO BE INTERPRETED *IN PARI MATERIA*. AS SUCH, WHERE A FOUNDATIONAL SHOWING HAS BEEN MADE THAT CONTEMPORANEOUS OBSERVATIONS REGARDING PATIENT CARE WERE NOT INCLUDED IN THE CHART, BUT APPARENTLY WERE INCLUDED IN AN INCIDENT REPORT, A TRIAL COURT PRESIDING OVER A MEDICAL MALPRACTICE ACTION IS CORRECT IN REVIEWING THE MATTER *IN CAMERA*, AND COMPELLING THE FACTUAL CONTEMPORANEOUS MATERIAL TO BE MADE AVAILABLE TO THE PATIENT, DESPITE THE HEALTH CARE PROVIDER'S CLAIM THAT SUCH IS PROTECTED BY THE PEER REVIEW PRIVILEGE.**

### A. THE STATUTORY SCHEME

The statute specifically mentioned in the grant of leave by this Court, MCL 333.21515, currently reads as follows:

> 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 statute is found in the Michigan Health Code, under Part 215, Hospitals. A very similar statute is also found in a related section of the Health Code, Part 201, General Provisions, currently codified at MCL 333.20175(8):

> 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.

Another relevant statute relating to patient records is set forth at MCL 333.20175(1), which states:

> A health facility or agency shall keep and maintain a record for each patient, including a full and complete record of tests and examinations performed, observations made, treatments provided, and in the case of a hospital, the purpose of hospitalization.

These statutory directives were all made part of the Health Code, by the same legislation, Pub Acts 1978, No. 368. All of the above statutes were enacted by this legislation, which in its totality was a lengthy rewriting of Michigan's Health Code, which took more than a year to enact.

The language of MCL 333.21515 has not been altered since its enactment. MCL 333.20175 has been amended to include 3 additional subsections, not germane to the issues at hand herein, such that the peer review privilege subsection, which was originally sub (5) is now sub (8). Subsection (1) has not been renumbered, and its language not been altered since its enactment. The only change to the language of MCL 333.20175(8) is the inclusion of the phrase "or an institution of higher education in the state that has colleges of osteopathic and human medicine."

As noted above, the reorganization of the Health Code brought about by 1978 PA 368 was massive – so much so that in 1982, a publication was devoted to an annotation of the changes. Strichmartz, Commentary on the Michigan Public Health Code (ICLE 1982). In the annotation to MCL 333.21515, Mr. Strichmartz merely notes that "A general provision of similar tone is found in §20175(5)." His commentary on MCL 333.20175 is more expansive:

> The tension between public disclosure and confidentiality is demonstrated by this section which starts with a general declaration of records to be kept and then states that the licensing and certification records are public records "unless otherwise provided by law" followed by specific exceptions

for a patient's clinical records and records used in the functioning of a professional review.

Of course, it is well-established that a patient's clinical records are to be made available to the patient (or a representative) upon proper request. The only records to be kept confidential from the patient are those records specifically "used in the functioning of a professional review."

**B. CASE LAW INTERPRETATION**

The first cases interpreting these newly minted statutes split their analysis between the statutory language and the approach taken to a predecessor statute, MCL 331,422, and the cases interpreting that statute. Thus, in *Monty v Warren Hospital Corp*, 422 Mich 138; 366 NW2d 198 (1985), the Court relied in part on *Marchand v Henry Ford Hospital*, 398 Mich 163; 247 NW2d 280 (1976), which interpreted and applied prior 331.422. The *Monty* court made it plain that a trial court, in passing on a claim of privilege, must review the challenged records *in camera*, so as to guard against the disclosure of materials later determined to be confidential. *Monty* at 146. Then, in interpreting the statute, held that:

> 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. *Id* at 146-147.

This holding was buttressed by the ruling in *Attorney General v Bruce*, 422 Mich 157; 369 NW2d 826 (1985), which held that peer review material was protected even as against investigation by the State Attorney General. However, the *Bruce* court took

pains to establish that such protection could not be limitless:

> We do not suggest that a hospital may rely on this language giving it discretion to release peer review committee records to avoid legitimate requests by the board relating to disciplinary actions. Again, we emphasize a hospital's *duty* to cooperate with such investigations by reporting, as was done here, discipline taken and the relevant circumstances. And, the privilege is a narrow one, applying only to "[the] records, data and knowledge collected for or by individuals or committees" assigned a peer review function, MCL 333.20175(5), 333,21515, MSA 14.15(20175)(5), 14.15(21515), *Marchand v Henry Ford Hospital*, 398 Mich 163; 247 NW2d 280 (1976). A claim that certain documents are not privileged may be presented to a circuit court for a hearing. *Monty v Warren Hospital Corp*, 422 Mich 138; 366 NW2d 198 (1985); *Marchand, supra*. That is not the situation in this case, however. Here, the Attorney General concedes that the request was for peer review committee records. *Bruce*, p 172, fn 10. (emphasis in original).

This Court has not altered these holdings since *Monty* and *Bruce*, instead simply applying them in dealing with applications, see, e.g., *Varma v Port Huron Hospital*, 425 Mich 866; 387 NW2d 385 (1986) and *Havey v Warren Hospital Corp*, 423 Mich 855; 376 NW2d 659 (1983); or when confronted by a request to discover records of distinct but similarly situated patients in the hospital where the plaintiff had been treated, *Dorris v Detroit Osteopathic Hospital Corp*, 460 Mich 26, 42; 594 NW2d 455 (1999).

The Court of Appeals has applied the above holdings in two significant cases – *Centennial Healthcare Management v Michigan Department of Consumer Industry Services*, 254 Mich App 275; 657 NW2d 746 (2002) and *Harrison v Munson Healthcare Inc*, 304 Mich App 1; 851 NW2d 549 (2014). The *Centennial* case arose from a dispute between agents of the State and Westgate, a nursing home run by Plaintiff Healthcare group. The State sought accident reports and incident reports relating to patients at the nursing home. At first, Healthcare refused to provide any, claiming that they all were protected by the peer review privilege. Eventually it provided partial material as to three patients. The trial court ordered all factual information in the reports to be provided to

the State, ruling that factual information was to be provided to the State, notwithstanding Healthcare's claim of confidentiality of such information. The Court of Appeals affirmed, holding:

> 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 hard 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 process 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. See *id.* [*Howe v Detroit Free Press*, 440 Mich 203, 226; 487 NW2d 374 (1992)].
>
> 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 or 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 20175(8) is not undermined by administrative rules requiring a nursing home to keep and make available for review and copying medical reports and accident reports that contain basic factual material but do not require the reporting of the internal deliberative process of a peer review committee. *Centennial* at 290-291.

The *Harrison* case, which was directly referenced in the grant of appeal to the instant action, involved a situation where a private party rather than an agent of the State sought factual information about how a burn occurred during an operation. It came to be known that the burn had been caused by a bovie, an electrocautery device, but that the way in which the bovie had caused her injury remained undisclosed. The matter proceeded to trial, at which point the Defendant hospital set out to the jury an explanation of the burn which, upon further in camera review, turned out to be at odds

with contemporaneous factual observations set forth in an incident report. The trial court declared a mistrial and sanctioned the defense counsel. The Court of Appeals affirmed, holding that the first page of the incident report, which consisted of contemporaneous factual observations, should have originally been part of the patient's chart and was not privileged. The remainder of the report was privileged, and its confidentiality was to be preserved. *Id* at 36.

**C. BECAUSE THE STATUTES DO NOT CONFLICT, THIS COURT, IN READING THE STATUTES *IN PARI MATERIA*, MUST NOT CONSTRUE THE PEER REVIEW PRIVILEGE AS SUPERSEDING THE PATIENT'S RIGHT OF ACCESS TO A FULL FACTUAL RECORD. IN FACT, TO DO SO IS CONTRARY TO THE SCOPE OF THE LAW REGARDING PATIENT RIGHTS VS. HOSPITAL NEED TO CONDUCT PEER REVIEW.**

In the above decisions, in interpreting the above statutes, this Court and the Court of Appeals have been unanimous in holding that the confidentiality provisions set forth in MCL 333.20175(8) and 333.21515 do not give a health care provider, such as a hospital, absolute discretion in determining which materials generated during patient care can be shielded by the peer review privilege. First, a showing must be made that the withheld material was indeed "collected for or by individuals or committees assigned a review function." rather than simply containing information which the health care provider would rather not reveal. Second, even assuming that certain contemporaneous factual information and observations were indeed eventually provided to a peer review body, those materials can nevertheless be provided to the extent that they are of the sort which the health care provider was obliged to include in the patient's chart in the first place, or which it was obliged to provide to a reviewing body of the State under appropriate statutory or regulatory provisions.

As noted in the *Centennial* decision, the peer review code sections do not stand

in isolation. Other parts of the Health Code also must be brought to bear on the propriety of withholding factual information as confidential. One of the relevant sections of the Health Code sets forth a duty to provide full charting, and to make this available to the patient. MCL 333.20175(1). In other words, as long as the statutes can be read in a way that avoids conflict, they must be read *in pari materia*.

As noted above, the current Michigan Public health Code was enacted as a comprehensive document. As it relates to the instant litigation, all the statutes involved were enacted within the same Public Act, are all codified in the Health Code, and have a similar subject matter as their purview – the availability of a patient's chart or medical record to the patient. Thus the interpretation of the statutes is to be accomplished pursuant to this Court's holdings on when statutes are to be read *in pari materia,* such as was recently set forth in *IBM Corp v Department of Treasury*, 496 Mich 642, 652-653; 852 NW2d 865 (2014):

> In attempting to find a harmonious construction of the statutes, we "regard all statutes upon the same subject matter as part of one system" [*Rathbun v State of Michigan*, 284 Mich 521, 544; 280 NW 35(1938)]. Further, "[s]tatutes in pari material, although in apparent conflict, should, so far as reasonably possible, be construed in harmony with each other, so as to give force and effect to each." [*Id.*] This Court has stated:
>
> > It is a well-established rule that in the construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although they were enacted at different times, and contain no reference to one another. The endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislature, or to discover how the policy of the legislature with reference to the subject-matter has been changed or modified from time to time. In other words, to determine the meaning of a particular statute, resort may be had to the established policy of the legislature as disclosed by a general course of legislation. [*Id* at 543-

544.]

Thus, the absolute privilege, argued by the hospital to apply to any and all material, in its sole discretion, must be tempered by other duties set forth in the Health Code. As applied to the instant litigation, the hospital is placed under a duty to chart significant matters in a patient's course of treatment. This is especially true when that which should have been contemporaneously charted was in fact recorded, but only under the rubric of an "incident report", in an effort to deny the patient access to it. There is no "medical malpractice" exception to the mandate of MCL 333.20175(1) such as would allow the hospital to keep contemporaneous factual "observations made" or "treatment provided" from the "full and complete record", merely because to do so would provide an advantage to the hospital in any subsequent litigation arising out of the care and treatment of the patient.

The balance to be drawn between providing a patient access to his or her medical records, and allowing the hospital confidentiality in its deliberations regarding incidents or accidents happening at its facility, is not a phenomenon limited to Michigan. Nearly every state has enacted some sort of "peer review privilege". No matter the specific statutory language involved, no state has enacted a scheme which allows the degree of autonomy and discretion sought by the hospital herein. The *Harrison* court pointed out that hospital risk managers are not granted "the power to unilaterally insulate from discovery firsthand observations that the risk manager would prefer remain concealed." *Id* at 46. The court further noted that "we have located no law from any jurisdiction suggesting that a hospital may ethically present a medical malpractice defense directly conflicting with the hospital's knowledge of how an event occurred." *Id* at 48.

Both *Monty* and *Harrison* cited a number of cases from other jurisdictions as to how those other jurisdictions have described the balance between the patient's right to full access to his or her medical charts, and the hospital's right to keep the peer review process confidential. These cases have uniformly held that the privilege is necessarily limited in such a way as to prevent the pitfalls of allowing unfettered discretion to be exercised by a health care provider in determining which portion of the chart the patient is allowed to see, and which he or she isn't. Other more recent cases standing for the same proposition include *Orgavanyi v Henry County Health Center*, 2010 Iowa App LEXIS 1585 (attached as Exhibit A) [a nurse's incident report is not covered by Iowa's statutory peer review privilege]; *Fleming v Mountain States Health Alliance*, 2012 US Dist LEXIS 72795 (WD Va 2012) (Exhibit B) [ordering production of a "variance report" and "incident report followup" regarding a patient's fall, applying Virginia law] and *Stewart v Vivian*, 2012 Ohio App LEXIS 185 (Exhibit C) [merely labeling a document "peer review", "confidential" or "privileged" does not cloak that document with confidentiality].

In Michigan, under our Public Health Code, the duty to preserve the confidentiality of materials generated for peer review must co-exist with the duty to provide a patient access to a complete record regarding the observations made and the treatment provided. When, as in the instant matter, a contemporaneous observation is provided for peer review, but not included in the chart, the balance must be struck in the way the trial court did – by providing the patient with the factual portion of the record, while preserving the remainder of the deliberative process in confidentiality. The Health Code, read *in pari materia,* as constituting a single law, requires such a result. The *in*

*camera* procedure set out in *Monty*, and followed both in *Harrison* and in the instant case, ensures that only that portion of the record which deals with contemporaneous factual observations need be provided.

## CONCLUSION

The trial court herein properly conducted an in camera review of documents to which a legitimate challenge to their privileged nature had been interposed by Plaintiff. After that in camera review, the trial court only ordered the Defendant to make available to the Plaintiff that portion of the challenged documents which should have been charted under MCL 333.20175(1). This appropriate result was left standing by the Court of Appeals. This Court should affirm. By so doing, this Court can reaffirm the necessary balance set forth in the health Code between the patient's right of access and the hospital's right of confidentiality.

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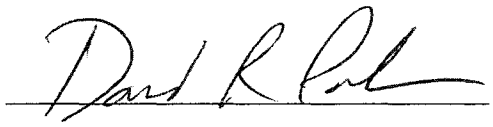
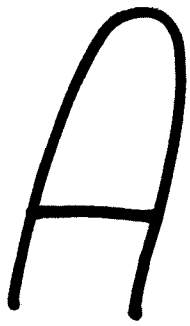
December 1, 2014

## PROOF OF SERVICE

David R. Parker states that, on December 1, 2014, he caused a copy of the instant Motion to Permit Late Filing of the Brief Amicus Curiae, and two (2) copies of the Brief Amicus Curiae, of the Michigan Association for Justice, by first class mail, to all parties of record



David R. Parker



**JANEL ORGAVANYI, Individually and As Next Best Friend of Dorotea Orgavanyi and Gabor Orgavanyi, Plaintiffs-Appellees, vs. HENRY COUNTY HEALTH CENTER, Defendant-Appellant.**

**No. 0-793 / 10-0264**

**COURT OF APPEALS OF IOWA**

*2010 Iowa App. LEXIS 1585*

**December 22, 2010, Filed**

**NOTICE:**

NO DECISION HAS BEEN MADE ON PUBLICATION OF THIS OPINION. THE OPINION IS SUBJECT TO MODIFICATION OR CORRECTION BY THE COURT AND IS NOT FINAL UNTIL THE TIME FOR REHEARING OR FURTHER REVIEW HAS PASSED. AN UNPUBLISHED OPINION MAY BE CITED IN A BRIEF; HOWEVER, UNPUBLISHED OPINIONS SHALL NOT CONSTITUTE CONTROLLING LEGAL AUTHORITY.

**SUBSEQUENT HISTORY:** Reported at *Orgavanyi v. Henry County Health Ctr., 797 N.W.2d 131, 2010 Iowa App. LEXIS 1874 (Iowa Ct. App., 2010)*

**PRIOR HISTORY:** [*1]

Appeal from the Iowa District Court for Henry County, Cynthia H. Danielson, Judge. The defendant hospital appeals a discovery order granting the plaintiffs' motion to compel production of a "patient safety report.".

**DISPOSITION:** AFFIRMED.

**COUNSEL:** James E. Shipman, Christine L. Conover, and Kerry A. Finley of Simmons, Perrine, Moyer, Bergman, P.L.C., Cedar Rapids, and Constance Alt of Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, for appellant.

J. Russell Hixson and Terrence D. Brown of Hixson & Brown, P.C., Clive, for appellees.

**JUDGES:** Heard by Mansfield, P.J., and Danilson and Tabor, JJ.

**OPINION BY:** MANSFIELD

**OPINION**

**MANSFIELD, P.J.**

This appeal presents the question whether a nurse's incident report to a hospital risk manager is covered by Iowa's statutory peer review privilege. *See Iowa Code § 147.135 (2007)*. Because we conclude that it is not, at least where the evidence does not establish the report is in the hands of a peer review committee or an employee thereof, we affirm the decision below.

**I. Factual and Procedural Background.**

On the evening of December 10, 2007, while Iowa was experiencing severe winter weather, Janel Orgavanyi appeared at the emergency room of Henry County Health Center (the Hospital). She was twenty-six weeks [*2] pregnant. She had complaints of pain and bleeding. During the night Janel was attended by Nurse Darla Fisher, who communicated by phone with Dr. Kent Metcalf. A fetal heart monitor was attached. Dr. Metcalf ordered an ultrasound for the morning, and told Nurse Fisher not to do a vaginal exam until then. At approximately 11:30 p.m., Janel voided blood and two quarter-sized pieces of tissue. Dr. Metcalf contends he was not informed of these findings. During the early morning hours of December 11, Janel continued to have pain and cramping, but according to the Hospital, no contractions. Contact was again made with Dr. Metcalf. Dr. Metcalf ordered that Janel be given pain medications. Around 6:00 a.m., Nurse Fisher responded to a call from Janel and noticed she had discharged a large amount of blood and amniotic fluid. Dr. Metcalf was called to the Hospital. Before he

arrived, Janel spontaneously delivered her baby, Dorotea. Efforts were made to resuscitate the baby. Because of the weather, neonatologists from the University of Iowa Hospitals did not arrive until after 9:00 a.m. Dorotea now suffers from serious and permanent brain injuries.

Sometime after the events of December 10-11, Nurse [*3] Fisher completed a "patient safety form." This is a form for staff to report an incident. Three boxes allow the employee to indicate whether he or she is reporting "a medical accident," "a good catch/close call/near miss," or "a hazardous situation or an 'accident waiting to happen.'" There are places on the form for the staff member to identify the patient involved, describe the incident, explain why it happened, and state how it could be avoided in the future.

On September 8, 2008, this medical malpractice action was commenced against the Hospital and Dr. Metcalf. Plaintiffs allege the defendants were negligent in, among other things, failing to perform a vaginal exam or an ultrasound on Janel immediately upon her arrival, failing to diagnose her contractions, failing to administer medication to stop her preterm labor, and failing to transfer her to an obstetrical unit with available neonatal resuscitation before delivery.

In the course of discovery, the Hospital revealed that Nurse Fisher had prepared a "patient safety report." It claimed the report itself was privileged under *Iowa Code section 147.135*, but provided a sample of the form. On June 19, 2009, plaintiffs filed a motion [*4] to compel production of the report. In resistance to the motion, the Hospital submitted an affidavit of Carol A. Adamson, its risk management coordinator. The affidavit states:

> Henry County Health Center is in possession of a 'Patient Safety Report' authored by Darla Fisher, R.N. Henry County Health Center has a formalized risk management plan and peer review system.
>
> At the time Ms. Fisher authored her report, patient safety reports were submitted directly to the Quality/Risk Management Department, who, in turn, submitted analysis of the report to the Performance Improvement Committee of the Board of Trustees and the Medical Staff Quality Improvement Committee.
>
> Paragraph 11.4 of the Medical Staff Bylaws explains the purpose of the Medical Staff Quality Improvement Committee and provides that all functions of the committee are confidential, peer-review functions as described in Article 13 of the Bylaws. Copies of Paragraph 11.4 and Article 13 from the Medical Staff Bylaws in effect at the time of Ms. Orgavanyi's admission to Henry County Health Center are attached to this affidavit.
>
> Consequently, Ms. Fisher's 'Patient Safety Report' is deemed part of Henry County Health Center's formal [*5] peer review process.

Plaintiffs withdrew their motion and took Adamson's deposition. In her deposition, Adamson testified that she is the risk management coordinator for the Hospital. She is the "point person, so to speak, to receive patient safety reports, otherwise known as incident reports, as well as patient complaints." She maintains a file in risk management where all patient safety forms are kept. Fisher's completed form was in that file. Adamson clarified, however, that she was not the risk manager at the time Fisher submitted her "patient safety report."

When plaintiffs' counsel asked if Fisher's actual report was actually forwarded to either of the committees referenced in her affidavit (the Hospital's performance improvement committee or medical staff quality improvement committee), the Hospital's counsel objected and instructed her not to answer. The Hospital's counsel also directed Adamson not to reveal whether an analysis of the report had been provided to either committee. Adamson denied that she was an actual member of those committees.

Plaintiffs then refiled their motion to compel. A hearing on the renewed motion was held December 7, 2009. The district court granted [*6] the motion, ruling as follows:

> Based upon the evidence and argument presented, it is difficult to classify this incident report form as "relating to license discipline or professional competence." It does not necessarily relate to professional competence; rather, it can merely give a heads-up about an accident or close call, such as the example given by Adamson. Even if it does qualify, there is a question of possession. In this case there is no evidence that the Fisher report was actually provided to the peer review committee.
>
> The burden is on HCHC to show the privilege. Defense counsel prevented Adamson from answering questions about the Fisher document. Her affidavit indicated that in general such reports would

> go to the peer review committees, but she stated in her deposition she generally forwards them to Ann Corrigan and the department heads. It is impossible to determine who looked at the Fisher report, only that it is now stored in the risk management office. The question becomes whether risk management is considered an "employee" or "serves" the peer review committees. If so, the document could be privileged as "in [*7] the possession of . . . an employee of a peer review committee." The evidence provided in support of HCHC's position simply does not explain what relation the committees have to the risk management office or what capacity the risk management office serves such committees in regard to incident reports. Absent such a showing Defendant HCHC has failed to meet its burden of proof on its assertion of privilege.

The Hospital applied for interlocutory appeal. The supreme court granted the application and transferred the appeal to our court.

**II. Standard of Review.**

We review a district court's ruling on a motion to compel discovery for an abuse of discretion. *Keefe v. Bernard, 774 N.W.2d 663, 667 (Iowa 2009)*. We afford the district court wide latitude, and will reverse only when the court's discretion is exercised on grounds or for such reasons clearly untenable or to an extent clearly unreasonable. *Hutchinson v. Smith Labs., Inc., 392 N.W.2d 139, 141 (Iowa 1986)*. A ruling based on an erroneous interpretation of a discovery rule can constitute an abuse of discretion. *Keefe, 774 N.W.2d at 667.*

**III. Analysis.**

*Iowa Code section 147.135(2)* provides:

> As used in this subsection, "peer review records" [*8] means all complaint files, investigation files, reports, and other investigative information relating to licensee discipline or professional competence in the possession of a peer review committee or an employee of a peer review committee. As used in this subsection, "peer review committee" does not include licensing boards. Peer review records are privileged and confidential, are not subject to discovery, subpoena, or other means of legal compulsion for release to a person other than an affected licensee or a peer review committee, and are not admissible in evidence in a judicial or administrative proceeding other than a proceeding involving licensee discipline or a proceeding brought by a licensee who is the subject of a peer review record and whose competence is at issue.

In short, for Nurse Fisher's "patient safety report" not to be discoverable, it must be (1) a "complaint file[], investigation file[], report[], and other investigative information," (2) "relating to licensee discipline or professional competence," (3) "in the possession of a peer review committee or an employee of a peer review committee." The district court found the second requirement may not have been met, in [*9] that the report "does not necessarily relate to professional competence . . . ." It also found the third requirement clearly had not been met, because there was "no evidence that the Fisher report was actually provided to the peer review committee."

The supreme court has stated that the privilege conferred by *section 147.135* is "broad," *Carolan v. Hill, 553 N.W.2d 882, 886 (Iowa 1996)*, but in the same case reaffirmed that "[w]hen an asserted privilege is based on a statute, the terms of the statute define the reach of the privilege." *Id.* Thus, we need to decide whether the "patient safety report" in question meets the three criteria of *subsection 147.135(2)*.

On our review of the matter, we agree with the district court that the Hospital failed to establish the third element of the statutory privilege. The record does not demonstrate that the Fisher report was "in the possession of a peer review committee or an employee of a peer review committee." Adamson's affidavit says only that an "analysis" of the report would have been provided by the risk management department to the performance improvement committee and the medical staff quality improvement committee. Moreover, when plaintiffs [*10] asked Adamson in deposition whether the report itself or an analysis thereof had been provided to the committee, she was instructed not to answer. We believe these instructions were improper. *Zander v. Craig Hosp., 743 F.Supp.2d 1225, 2010 U.S. Dist. LEXIS 112244, 2010 WL 4025341 (D. Colo. 2010)* (characterizing as improper instructions not to answer foundational questions that might bear upon the existence or nonexistence of a peer review privilege). Regardless, having told its own witness not to answer, the Hospital is not well situated to argue we should infer the answer would have been favorable to its position.[1]

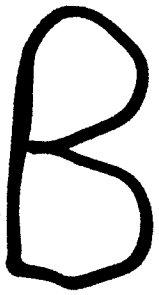
1 At the hearing on the motion to compel, the Hospital's counsel did make a representation "that the analysis was provided and the report was provided in this peer review process, and it was reviewed." The district court's ruling, quoted above, does not mention this representation. We believe the district court properly resolved the motion based on the written record that was before it.

From reading the form itself, the affidavits, and the deposition testimony, we think it logical to conclude that Nurse Fisher's report was not part of a peer review process, but part of the Hospital's regular risk management [*11] system. In an appropriate case, a peer review might have been initiated following such a report, but that does not make the report itself subject to the peer review privilege. Thus, a number of other jurisdictions have found these kinds of incident reports not to be subject to their own states' peer review privileges. *See Powell v. Cmty. Health Sys., Inc. 312 S.W.3d 496, 509 (Tenn. 2010)* ("regularly prepared complaints and incident reports are not privileged even though they might precipitate a peer review proceeding"); *Chicago Trust Co. v. Cook County Hosp., 298 Ill. App. 3d 396, 698 N.E.2d 641, 647-49, 232 Ill. Dec. 550 (Ill. App. Ct. 1998)* ("If, however, a document was created in the ordinary course of the hospital's medical business, or for the purpose of rendering legal opinions, or to weigh potential liability risk, or for later corrective action by the hospital staff, it should not be privileged, even though it later was used by a committee in the peer-review process."); *John C. Lincoln Hosp. & Health Ctr. v. Superior Court for Ariz., 159 Ariz. 456, 768 P.2d 188, 191 (Ariz. Ct. App. 1989)* ("The record indicates that Incident Reports are issued by hospital personnel in the regular course of providing medical care. These reports are [*12] intended for use whenever there is an unusual occurrence of any kind in the day-to-day administration of the hospital. Thus they are very broad in nature and cover situations as diverse as an electrical failure, a patient's loss of personal articles, and an incorrect type of anesthesia. Though Incident Reports sometimes precipitate peer review, they do not always do so, and they are not made solely for that purpose."). *Cf. Ussery v. Children's Healthcare of Atlanta, Inc., 289 Ga. App. 255, 656 S.E.2d 882, 894 (Ga. Ct. App. 2008)* (finding that incident reports were privileged where "the forms on their face indicate that their purpose was for 'Quality Improvement Review' as well as 'Peer Review'"). We believe the same result follows under Iowa law, as to any copy of the report not in the possession of a peer review committee or an employee thereof. *See Iowa Code § 147.135(2).*

The Hospital argues that it is a "Level I, county hospital" and does not "need or have layers and layers of bureaucracy." We agree. Employees can wear more than one hat. But in this case, the record shows only that a risk manager has custody of an incident report. That is not peer review activity in and of itself. Adamson is not a [*13] peer of Nurse Fisher or Dr. Metcalf. Loss prevention, while certainly laudable, is not the same as peer review and a loss prevention report, under Iowa law, cannot be deemed privileged unless at a minimum it is in the hands of a peer review committee. *See Day v. Finley Hosp., 769 N.W.2d 898, 901 (Iowa Ct. App. 2009)* (holding that *section 147.135* protects certain information in the possession of a peer review committee whether generated by the peer review committee or not).

Finally, the Hospital argues that "[t]he genie cannot be put back in the bottle" and if there is a question whether the "patient safety report" met the parameters of the statutory peer review privilege, we should remand for an *in camera* review of the report by the district court. But it was the Hospital's burden below to establish the elements of the privilege. *Hutchinson, 392 N.W.2d at 141* ("One resisting discovery through assertion of a privilege has the burden of showing that a privilege exists and applies."). If it believed an *in camera* review would have been helpful, it should have offered that to the district court. Our normal practice on appeal is not to give a litigant a second opportunity to meet its burden [*14] of proof, after we find it failed to do so the first time. We also do not agree with the closing statement in the Hospital's reply brief that "[t]he chilling effect of an order making such critical analyses public simply cannot be overstated." In the first place, we are not making the report "public." We are simply affirming the district court's order that it be made available to the Janel, her attorneys, and her experts. Second, as we read the form, the individual making the report has the option of remaining anonymous. Thus, the form itself accounts for the possibility that some individuals may be deterred from making a report, and provides the remedy of anonymity. Lastly, we are only finding the report discoverable; we are not ruling on trial admissibility.

**AFFIRMED.**



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**SHARON L. FLEMING, Administrator of the Estate of Paul K. Fleming, deceased, Plaintiff, v. MOUNTAIN STATES HEALTH ALLIANCE d/b/a Russell County Center, Defendant.**

**Civil Action No. 1:11cv00050**

**UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ABINGDON DIVISION**

*2012 U.S. Dist. LEXIS 72795*

**May 25, 2012, Decided**
**May 25, 2012, Filed**

**COUNSEL:** [*1] For Sharon L. Fleming, Administrator of the Estate of Paul K. Fleming, deceased, Plaintiff: Anthony Michael Segura, S. D. Roberts Moore, GENTRY LOCKE RAKES & MOORE, ROANOKE, VA; Clarence Edward Phillips, CLARENCE E. PHILLIPS, P.C., CASTLEWOOD, VA.

For Mountain States Health Alliance, doing business as Russell County Medical Center, Defendant: Nora Beth Dorsey, LEAD ATTORNEY, Neal Howard Lewis, HANCOCK DANIEL JOHNSON & NAGLE PC, GLEN ALLEN, VA.

**JUDGES:** Pamela Meade Sargent, UNITED STATES MAGISTRATE JUDGE.

**OPINION BY:** Pamela Meade Sargent

**OPINION**

**MEMORANDUM OPINION**

This case is before the undersigned on the plaintiff Sharon L. Fleming's Motion To Compel, (Docket Item No. 36) ("Motion"). A hearing was held before the undersigned on May 21, 2012. Based on the arguments and representations of counsel heard before the undersigned on May 21, 2012, and for the reasons set out below, the Motion will be granted.

I.

This case arises from a fall sustained by Paul K. Fleming, the plaintiff's decedent, on January 17, 2010, after being admitted to the hospital for treatment of progressive pneumonia a week earlier. Mr. Fleming's fall risk had been assessed as a 16 on January 16, 2010, and a bed sensor was in use on that day. However, [*2] at the time of Mr. Fleming's fall in the early morning hours of January 17, 2010, the bed sensor was turned off. Mr. Fleming went to the bathroom, where he slipped, fell and hit the back of his head. When Mr. Fleming's treating physician was notified of the fall, "Fall Protocol I" was initiated. Mr. Fleming's fall resulted in a subdural hematoma from which he died later that same day.

The Motion seeks the following documents corresponding to Requests for Production 4, 5, 6 and 7, respectively:

> (4) any and all fall prevention policies that Russell County Medical Center had in place on January 17, 2010;
>
> (5) any and all in-service training manuals and documents given to Robin Jessee, Amanda Hess, Brandon Whited, Audrey Compton, "M. Shelton, RN," Wanda Armes or Jamie Burk prior to January 18, 2010;
>
> (6) any and all policy documents and in-service training on bed alarms, including, but not limited to, policies regarding the installation, deactivation, reactivation and withdrawal of the bed alarm; and
>
> (7) any documents responsive to Interrogatory 7, which asks for the identification of any and all incident reports created

> as a result of Mr. Fleming's January 17, 2010, fall.

The defendant objected [*3] to Request for Production 4, the hospital's fall prevention policies effective on the date of Mr. Fleming's fall, on the ground that any such policies and procedures are privileged under Vriginia Code *§§ 8.01-581.16, 8.01-581.17*, which will hereafter be referred to as the "quality assurance privilege." It further objected on the ground that the request sought to obtain its private rules which it claims are irrelevant and inadmissible under Virginia law pursuant to *Pullen & McCoy v. Nickens, 226 Va. 342, 310 S.E.2d 452 (Va. 1983)*, and also noting that, in Virginia, the applicable standard of care in a medical malpractice case is provided by *Virginia Code § 8.01-581.20* and established through expert testimony. The defendant objected to Request for Production 5, the in-service training manuals and documents given to Mr. Fleming's nursing staff, on the ground that it was overly broad, unduly burdensome, irrelevant to the issues in the case and not reasonably calculated to lead to the discovery of admissible evidence. Likewise, the defendant objected to Request for Production 6, the documents and in-service training manuals on bed alarms, as overly broad, unduly burdensome, irrelevant to the issues [*4] in the case and not reasonably calculated to lead to the discovery of admissible information. It further objected to this request on the ground that such policies and procedures are privileged under the quality assurance privilege and that, to the extent the request sought to obtain its private rules, they were irrelevant and inadmissible. The defendant objected to Request for Production 7, the incident reports relating to Mr. Fleming's fall, to the extent that it seeks to discover materials privileged by the attorney-client privilege, the work-product doctrine and/or the privilege afforded to materials generated and steps taken in anticipation of and in the defense of litigation. The defendant also objected on the ground that such information is privileged under the quality assurance privilege.

*II.*

As an initial matter, I will address the defendant's argument that the Motion should be denied as untimely because it was filed subsequent to the cutoff for discovery. Pursuant to this court's Scheduling Order entered on October 26, 2011, the parties agreed to a discovery plan which required that all discovery be conducted on or before April 27, 2012. The defendant contends that the Motion [*5] is untimely because it was filed on April 30, 2012, three days after the discovery cutoff date. I disagree. By entering this Scheduling Order, the court did not intend to require that any such motion to compel be filed before the cutoff for discovery. As stated in the Scheduling Order, the court intended that written discovery was to be served in sufficient time to allow a response before the discovery cutoff date. Here, the plaintiff sent the Supplemental Interrogatories and Request for Production of Documents and Plaintiff's Request for Admission to Defendant on March 19, 2012. (Exhibit A to Docket Item No. 51). The defendant was able to respond thereto on April 9, 2012, approximately three weeks prior to the discovery cutoff date. (Ex. B to Docket Item No. 51). Also, plaintiff's counsel required some time to review the discovery responses and confer with defense counsel before filing the Motion. It is for these reasons that I find the defendant's untimeliness argument unpersuasive.

Next, this court recognizes that there is a split among the circuit courts in Virginia regarding whether a health care provider's policies, procedures and protocols are privileged materials pursuant to [*6] *Virginia Code §§ 8.01-581.16, 8.01-581-17* (2011 Cum. Supp.). [1] The Virginia Supreme Court has not addressed this issue. *Virginia Code § 8.01-581.17* is entitled "Privileged communications of certain committees and entities." The relevant portions of this statute are as follows:

> *B.* The proceedings, minutes, records, and reports of any (i) medical staff committee, utilization review committee, or other committee, board, group, commission or other entity as specified in *§ 8.01-581.16*; (ii) nonprofit entity that provides a centralized credentialing service; or (iii) quality assurance, quality of care, or peer review committee ... together with all communications, both oral and written, originating in or provided to such committees or entities, are privileged communications which may not be disclosed or obtained by legal discovery proceedings unless a circuit court, 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 this section shall be construed as providing any privilege to any health care provider ... with respect to any factual information regarding [*7] specific patient health care or treatment, including patient health care incidents, whether oral, electronic, or written. However, the analysis, findings, conclusions, recommendations, and the deliberative process of any medical staff committee, utilization review committee, or other committee,

> board, group, commission, or other entity specified in *§ 8.01-581.16*, as well as the proceedings, minutes, records, and reports, including the opinions and reports of experts, of such entities shall be privileged in their entirety under this section.
>
> *C.* Nothing in this section shall be construed as providing any privilege to health care provider, emergency medical services agency, community services board, or behavioral health authority medical records kept with respect to a patient, whose treatment is at issue, in the ordinary course of business of operating a hospital ... nor to any facts or information contained in medical records, nor shall this section preclude or affect discovery of or production of evidence relating to hospitalization or treatment of such patient in the ordinary course of the patient's hospitalization or treatment. ...

1 *Virginia Code § 8.01-581.16* provides that members [*8] of or consultants to certain boards or committees have civil immunity.

The parties agree that there are no written circuit court opinions from the Twenty-Ninth Judicial Circuit [2] addressing this issue. After reviewing several Virginia circuit court cases, some finding that the quality assurance privilege extends to policies, procedures and protocols, and some finding that the privilege does not so extend, I am of the opinion that those cases declining to extend the privilege are the better-reasoned ones. Specifically, I find that the Virginia General Assembly, in enacting this quality assurance privilege, intended to promote open and frank discussion *during* the peer review process among health care providers with the ultimate goal of improving the quality of health care. *See Mejia-Arevalo v. INOVA Health Care Servs., et al., 77 Va. Cir. 43 (Fairfax County 2008)*; *Auer v. Baker, 63 Va. Cir. 596 (Norfolk 2004)*; *Francis v. McEntee, 10 Va. Cir. 126 (Henrico County 1987)*. As the Roanoke City Circuit Court stated in *Johnson v. Roanoke Mem. Hosps., 1987 Va. Cir. LEXIS 86, at *5, 9 Va. Cir. 196 (Roanoke 1987)*, I find that "the ultimate end results of such critiques, which might find their way into depersonalized [*9] manuals of procedure and which have been shorn of individual criticisms, do not merit the same concern for protection from public scrutiny." As the Fairfax County Circuit Court held in *Estate of Curtis v. Fairfax Hosp. Sys., Inc., 21 Va. Cir. 275, 277-78 (Fairfax County 1990)*, the rationale is that discovery of such policies, procedures and protocols does not threaten open discussion and debate within hospitals' review committees and, therefore, the privilege should not apply.

2 The Twenty-Ninth Judicial Circuit encompasses the following counties in Virginia: Buchanan, Dickenson, Russell and Tazewell.

Aside from the quality assurance privilege, some courts also have found that such policies, procedures and protocols should be shielded from discovery under a rationale similar to that which prevents their introduction into evidence. "Virginia has long recognized that admitting internal standards of conduct into evidence allows prudent men to be deemed civilly liable if they violate the higher standards of caution they take upon themselves, independent of the law's requirements." *Mejia-Arevalo, 77 Va. Cir. at 48* (citing *Va. Ry. & Power Co. v. Godsey, 117 Va. 167, 83 S.E. 1072 (Va. 1915))*.

The parties [*10] do not dispute that the standard of care in a medical malpractice case, such as this one, is statutorily prescribed as follows:

> In any proceeding before a medical malpractice review panel or in any action against a physician, clinical psychologist, podiatrist, dentist, nurse, hospital or other health care provider to recover damages alleged to have been caused by medical malpractice where the acts or omissions so complained of are alleged to have occurred in this Commonwealth, the standard of care by which the acts or omissions are to be judged shall be that degree of skill and diligence practiced by *a reasonably prudent practitioner in the field of practice or specialty in this Commonwealth* and the testimony of an expert witness ... as to such standard of care, shall be admitted ....

*VA. CODE ANN. § 8.01-581.20* (2011Cum. Supp.) (emphasis added).

In *Va. Ry. & Power Co. v. Godsey, 117 Va. 167, 83 S.E. 1072 (Va. 1915)*, the Virginia Supreme Court held that the private rules of a defendant street car company were not admissible to establish the standard of care owed the plaintiff by the defendant. The rationale behind the *Godsey* court's holding was that to allow the admission into evidence of a party's [*11] private rules, which might require a much higher degree of care than mandated by the law, would discourage the adoption of such higher standard of care for fear that it would be

used against the party. The *Godsey* court reasoned that if the adoption of such rules was treated as an admission against the party, then the party naturally would find it in its interest not to adopt any rules at all. *See 83 S.E. at 1073*. Several years later, the Virginia Supreme Court reaffirmed the holding in *Godsey in Pullen & McCoy v. Nickens, 226 Va. 342, 310 S.E.2d 452 (Va. 1983)*.

I am unpersuaded by the defendant's argument that its policies, procedures and protocols are not discoverable under the *Godsey* and *Pullen* cases because they are irrelevant and inadmissible. First, I find that the hospital's policies, procedures and protocols regarding fall prevention and the use of bed alarms is relevant to the plaintiff's case. For instance, as plaintiff's counsel argued at the May 21, 2012, hearing, Mr. Fleming's medical record shows that he was assessed as a fall risk of "16" hours before he fell, and it further shows that subsequent to his fall, his treating physician ordered that "Fall Protocol I" be initiated. (Plaintiff's [*12] Exhibit 1). While the standard of care is statutorily prescribed, the hospital's policies, procedures and protocols regarding what measures should have been implemented for a patient with a fall risk of 16 and should be done when "Fall Protocol I" is initiated certainly is relevant to determining whether the defendant acted with the requisite "degree of skill and diligence practiced by a reasonably prudent practitioner. ..." These are only two examples of how such policies, procedures and protocols as sought by the plaintiff could be relevant to this case.

The court wishes to make clear that it is not making a determination as to the admissibility of these policies, procedures and protocols on the topics sought by the plaintiff. That determination is one for the trial judge at a later date. The court is finding only that these policies, procedures and protocols are discoverable.

Next, I find that the in-service training manuals given to Mr. Fleming's nurses prior to January 18, 2010, and the in-service training manuals regarding the use of bed alarms, are relevant to the instant case. For example, while the defendant contends that the real issue, based on the plaintiff's own standard [*13] of care expert's opinion, is whether Mr. Fleming and his family members were educated on the use of a bed alarm, not the nursing staff, it is apparent that such education would be given to the patient and his or her family by the nursing staff. That being the case, I find that the in-service training manuals are relevant to show what education the patient and family members should have received. Of course, whether or not such education was provided is relevant to whether the defendant met the statutorily prescribed standard of care.

I note that the defendant also has argued that requests for production of the in-service training manuals are overly broad and unduly burdensome. The party resisting discovery has the burden of showing that the requested discovery is overly broad or unduly burdensome. Here, the defendant has not offered any explanation as to why such requests are overly broad or unduly burdensome. That being the case, I find that the defendant has failed to meet its burden, and I will overrule these objections. It is for all of the above-stated reasons that I find that the in-service training manuals sought by the plaintiff are relevant and discoverable.

Lastly, the plaintiff [*14] seeks the production of any incident reports of Mr. Fleming's January 17, 2010, fall. While the defendant contends that no such incident reports exist, it has disclosed the existence of two documents that are potentially responsive to this request. First, it has identified a "Variance Report" and second, an "Incident Report Followup." The defendant maintains that these documents contain identical factual information regarding Mr. Fleming's fall as that contained in his medical records, to which the plaintiff has access. However, in addition to the factual information, defense counsel represented to the court that these documents also contain "deliberative information."

*Virginia Code § 8.01-581.17* states as follows: "Nothing in this section shall be construed as providing any privilege to any health care provider ... with respect to any factual information regarding specific patient health care or treatment, including patient care incidents ...." Incident reports have been found discoverable in several circuits in the Commonwealth. *See Hurdle v. Oceana Urgent Care, 49 Va. Cir. 328* (City of Norfolk 1999); *Bradburn v. Rockingham Mem. Hosp, 45 Va. Cir. 356 (Rockingham County 1998)*; *Huffman v. Beverly Cal. Corp., 42 Va. Cir. 205 (Rockingham County 1997)*; [*15] *Messerley v. Avante Group, 42 Va. Cir. 26 (Rockingham County 1996)*; *Benedict v. Community Hosp. of Roanoke Valley, 10 Va. Cir. 430 (Medical Malpractice Review Panel 1988)*; *Atkinson v. Thomas & Va. Beach Gen. Hosp., 9 Va. Cir. 21 (Va. Beach 1986)*. Additionally, *Virginia Code § 8.01-581.17(C)* creates an exception to the privilege set forth in *subsection (B)*, making patient records kept in the ordinary course of business discoverable. In *Witzke v. Martha Jefferson Surgery Ctr., LLC et al., 70 Va. Cir. 217, 220 (Albemarle County 2006)*, the court held that under Virginia law, a factual incident report is not work product and is not protected from discovery by statute. That court further held that because there was no evidence that the incident report at issue was a report specially prepared for quality assurance purposes, it was a medical record kept with respect to the patient in the ordinary course of business of operating a hospital and was, therefore, discoverable. *See Witzke, 70 Va. Cir. at 220*. In *Eppard v. Kelly, 62 Va. Cir. 57, at *63 (Charlottesville 2003)* (quoting *Bradburn,*

*45 Va. Cir. at 360-61*)), the court held that "peer review" should not be used to shield from disclosure [*16] medical records not generated initially for peer review objectives. That court found it to be an "impermissible reading of the statute to extend the privilege to cover all factual reports or incident reports of accidents that happen at a hospital simply because they are sent to a quality assurance committee."

Despite defense counsel's representation that the Variance Report and the Incident Report Followup were created for its quality assurance process, used by the hospital's quality assurance committee and submitted to the hospital's Patient Safety Organization, it has not offered any evidence to persuade the court that such is the case. In the same vein, although the defendant contends that these documents contain deliberative information, it has failed to meet its burden of persuasion. To the extent that the defendant contends that the Variance Report and the Incident Report Followup are privileged pursuant to the attorney-client privilege and the work-product doctrine, the defendant simply has offered no evidence to support such contentions. *See N.L.R.B. v. Interbake Foods, LLC, 637 F.3d 492, 501 (4th Cir. 2011)* (citing *United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982))* [*17] (a party asserting privilege has the burden of demonstrating its applicability). Specifically, the defendant does not allege that these documents contain any communication between counsel and the defendant regarding this case, nor does it allege that the documents contain counsel's mental impressions or were prepared by an attorney in anticipation of litigation.

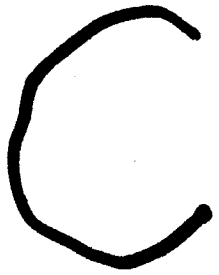
It is for all of the reasons stated herein that I will grant the Motion and order the defendant to produce the requested documents.

An appropriate order will be entered.

ENTER: May 25, 2012.

/s/ Pamela Meade Sargent

UNITED STATES MAGISTRATE JUDGE



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**DENNIS STEWART, Individually and as the Administrator of the Estate of Michelle Stewart, Deceased, Plaintiff-Appellee, - vs - RODNEY VIVIAN, M.D., et al., Defendants-Appellants.**

**CASE NO. CA2011-06-050**

**COURT OF APPEALS OF OHIO, TWELFTH APPELLATE DISTRICT, CLERMONT COUNTY**

*2012-Ohio-228; 2012 Ohio App. LEXIS 185*

**January 23, 2012, Decided**

**SUBSEQUENT HISTORY:** Discretionary appeal allowed by *Stewart v. Vivian, 132 Ohio St. 3d 1461, 2012 Ohio 3054, 969 N.E.2d 1230, 2012 Ohio LEXIS 1742 (2012)*
Cause dismissed by, Application granted by *Stewart v. Vivian, 133 Ohio St. 3d 1418, 2012 Ohio 4838, 976 N.E.2d 910, 2012 Ohio LEXIS 2500 (2012)*

**PRIOR HISTORY:** [**1]
CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS. Case No. 2011 CVA 00318.

**COUNSEL:** Peter A. Saba, Cincinnati, Ohio, for plaintiff-appellee.

Mark A. MacDonald, Cincinnati, Ohio, for defendant, Rodney Vivian, M.D.

Paul W. McCartney, C. Jessica Pratt, Cincinnati, Ohio, for defendant-appellant, Sisters of Mercy of Clermont County, Ohio d.b.a. Mercy Hospital Clermont.

**JUDGES:** PIPER, J. HENDRICKSON, P.J., concurs. RINGLAND, J., dissents.

**OPINION BY:** PIPER

**OPINION**

**PIPER, J.**

[*P1] Defendant-appellant, Sisters of Mercy of Clermont County, Ohio d.b.a. Mercy Hospital Clermont (Mercy Hospital), appeals the decision of the Clermont County Court of Common Pleas denying its motion to quash a subpoena duces tecum served upon Horizon Behavioral Services, LLC d.b.a. Horizon Health EAP - Behavioral Services (Horizon Health), by plaintiff-appellee, Dennis Stewart, individually and as the Administrator of the Estate of Michelle Stewart. [1]

1 Pursuant to *Loc.R. 6(A)*, we sua sponte remove this case from the accelerated calendar and place it on the regular calendar for purposes of issuing this opinion.

**Statement of Facts**

[*P2] Sometime before November 17, 2009, Mercy Hospital's Medical Quality and Patient Safety Counsel conducted a review of matters concerning [**2] the hospital's Behavioral Health Unit. Following this review, and in an attempt to improve the quality of care at Mercy Hospital, the Medical Quality and Patient Safety Counsel requested a follow-up investigation of the Behavioral Health Unit. As part of this follow-up investigation, Mercy Hospital retained the services of Horizon Health, an independent psychiatric consultant. Horizon Health conducted a formal review of Mercy Hospital's Behavioral Health Unit from December 15, 2009 through December 18, 2009.

[*P3] On November 17, 2009, the Ohio Department of Mental Health (ODMH) issued a Private Psychiatric Licensure Survey Report (Survey Report) to Mercy Hospital after the hospital requested a license to treat additional adults. As part of its Survey Report, ODMH recommended "ongoing evaluation of the environment

for any safety risks such as weight bearing devices that include but are not limited to sink faucets, door hinges, etc. and development of a remedial plan for any risks identified." The ODMH also asked Mercy Hospital to submit a "summary of any risks identified in the built environment of care and plans for modification, including [sic] time line for carpet cleaning, on or before [**3] March 1, 2010." The Survey Report also recommended Mercy Hospital to submit its "noted follow-up before or at the time of the program's next application renewal."

[*P4] On February 24, 2010, Michelle Stewart, a patient at the Mercy Hospital Behavioral Health Unit, died after she used a bed sheet to hang herself from her hospital room's bathroom door.

[*P5] On March 5, 2010, ODMH received a "Plan of Correction" from Mercy Hospital indicating, among other things, that Horizon Health had conducted a formal review of its Behavioral Health Unit "to identify and remedy environment care issues." As part of its submitted plan, Mercy Hospital noted that Horizon Health had found "some exposed hinges" and "handles are able to support body weight," thereby making it a priority to replace the Behavioral Health Unit's doors. In total, the Plan of Correction made reference to three issues from the Horizon Health report.

[*P6] Dennis [**4] Stewart, Michelle's husband, subsequently filed suit against Mercy Hospital and its lead psychiatrist, Dr. Rodney Vivian, alleging medical malpractice and wrongful death. Stewart served Horizon Health with a subpoena duces tecum on February 28, 2011, requesting in pertinent part, the following:

[*P7] "Any and all correspondence, communications, agreements, contracts, reports, and documents (including but not necessarily limited to: letters, memos, notes, photos or drawings, audio or visual recordings, transcripts of conversations, statements, emails, and faxes) relating to any review, inspection, recommendations, consultation, or similar inspection of any psychiatric facilities at [Mercy Hospital] * * * conducted prior to January 1, 2011."

[*P8] Mercy Hospital then moved to quash the subpoena issued to Horizon Health claiming the subpoena sought "the production of privileged information regarding an audit performed by [Horizon Health] of [Mercy Hospital] for purposes of Quality Assurance." In support of its motion, Mercy Hospital filed affidavits from Deborah Spradlin, its Director of Behavioral Health, and Bradley Bertke, its Chief Operating Officer. According to the submitted affidavits, Mercy [**5] Hospital retained Horizon Health in order to conduct an audit of the Behavioral Health Unit after its Medical Quality and Patient Safety Council "reviewed matters relevant to the Behavioral Unit * * * for the purpose and quality improvement on the Behavioral Unit." The affidavits also indicated that the decision to retain Horizon Health was initiated prior to the issuance of the November 17, 2009 Survey Report.

[*P9] After holding a hearing on the matter, the trial court issued a decision denying Mercy Hospital's motion to quash. In so holding, the trial court found Mercy Hospital had "destroyed the confidentiality of the findings of Horizon Health by utilizing them for purposes beyond the scope of the peer review committee and referencing some of the findings of Horizon Health in documents which are required to be disclosed to any requesting party pursuant to the Freedom of Information Act."

[*P10] Mercy Hospital now appeals the trial court's decision denying its motion to quash, raising the following assignment of error.

[*P11] "THE TRIAL COURT ERRED BY DENYING THE DEFENDANT-APPELLANT'S MOTION TO QUASH THE SUBPOENA DUCES TECUM SERVED UPON HORIZON HEALTH CARE FOR PRODUCTION OF DOCUMENTS PROTECTED BY [**6] THE PEER REVIEW PRIVILEGE."

[*P12] In Mercy Hospital's single assignment of error, it argues that the trial court erred by denying its motion to quash and challenges the trial court's finding that it destroyed the confidentiality of the peer review report.

[*P13] Generally, an appellate court reviews a claimed error relating to a discovery dispute under an abuse-of-discretion standard. *Selby v. Ft. Hamilton Hosp., Butler App. No. CA2007-05-126, 2008 Ohio 2413, ¶ 9*; *Tracy v. Merrell Dow Pharmaceuticals, Inc. (1991), 58 Ohio St.3d 147, 151-152, 569 N.E.2d 875.* However, as recently stated by the Ohio Supreme Court, if the discovery dispute involves an alleged privilege, such as the case at bar, "it is a question of law that must be reviewed de novo." *Ward v. Summa Health Sys., 128 Ohio St.3d 212, 2010 Ohio 6275, ¶ 10, 943 N.E.2d 514*, citing *Med. Mut. of Ohio v. Schlotterer, 122 Ohio St.3d 181, 2009 Ohio 2496, ¶ 13, 909 N.E.2d 1237.* Therefore, we will employ a de novo review because this appeal raises the issue of whether the peer review privilege found in *R.C. 2305.252* applies to the Horizon Health report. See *Ward v. Summa Health Sys., 184 Ohio App.3d 254, 2009 Ohio 4859, ¶ 11, 920 N.E.2d 421*; *Giusti v. Akron Gen. Med. Ctr., 178 Ohio App. 53, 2008 Ohio 4333, ¶ 12, 896 N.E.2d 769.*

**Horizon** [**7] **Health's Report is Peer Review Protected**

[*P14] As this court has previously stated, merely labeling a document "peer review," "confidential," or "privileged" does not cloak that document with a statutory peer review privilege. *Selby, 2008 Ohio 2413 at ¶ 14.* Instead, peer review protection only applies when the documents in question "were created by and/or exclusively for a peer review committee." *Bansal v. Mt. Carmel Health Sys. Inc., Franklin App. No. 09AP-351, 2009 Ohio 6845, ¶ 17.*

[*P15] "A health care entity asserting the *R.C. 2305.252* privilege bears the burden of establishing the applicability of the privilege." *Bansal at ¶ 14*, citing *Lowery v. Fairfield Med. Ctr., Fairfield App. No. 08 CA 85, 2009 Ohio 4470, ¶ 35.* In an attempt to meet this burden, the health care entity may: (1) submit the disputed documents to the trial court for an in camera inspection, or (2) present affidavit or deposition testimony "containing the information necessary for the trial court to adjudge whether the privilege attaches." *Bansal at ¶ 14.*

[*P16] This court in *Selby* was asked to determine whether EKG discrepancy reports created as a matter of hospital policy and routinely used in patient care were discoverable under [**8] the peer review statute. We held that the reports were not privileged because everyday records cannot be used in peer review and hidden through a shell game, shuffled into a peer review process to be subsequently hidden.

[*P17] Here, however, the Horizon Health report was not created as a matter of policy or the result of routine patient care. Instead, the affidavit of Deborah Spradlin, the RN Director of the Behavioral Health Unit of Mercy Hospital, specifically articulates the process by which the hospital chose to retain Horizon Health to perform its quality assurance audit. Spradlin also averred that Mercy retained Horizon Health specifically to address matters of quality improvement. Nothing in the record disputes this affidavit or tends to establish that Horizon Health was not retained for peer review purposes.

[*P18] Similarly, Bradley Bertke, the Chief Operating Officer of the hospital, also averred that the decision to retain Horizon Health was initiated prior to the date the hospital had received the Ohio Department of Mental Health Licensing Survey Report, and that such efforts to retain Horizon Health for quality assurance purposes was not undertaken to use in the subsequently received [**9] Survey Report. Nor was Horizon Health retained to compile a report or information specific to Michelle Stewart's death, as Horizon Health was clearly commissioned before the date of her death.

[*P19] While the trial court properly determined that the Horizon Health report was peer review protected, the trial court improperly determined that Mercy Hospital's use of the Horizon Health report destroyed the confidentiality of that report, and therefore eliminated the protection of the peer review privilege. While the trial court did not use the word "waiver," its decision to deny the motion to quash for all intents and purposes employed a notion of waiver that is wholly absent from the statute.

**Ohio's Peer Review Statute**

[*P20] *R.C. 2305.252*, Ohio's peer review statute, states:

> [P]roceedings and records within the scope of a peer review committee of a healthcare entity ***shall be held in confidence and shall not be subject to discovery*** or introduction in evidence in any civil action against a health care entity or health care provider, including both individuals who provide health care and entities that provide health care, ***arising out of matters*** that are the ***subject of evaluation and review*** by the peer [**10] review committee. No individual who attends a meeting of a peer review committee, serves as a member of a peer review committee, ***works for or on behalf*** of a peer review committee, or provides information to a peer review committee shall be permitted or required to testify in any civil action ***as to any evidence or other matters*** produced or presented during the proceedings of the peer review committee or as to any ***finding, recommendation, evaluation, opinion, or other action*** of the committee or a member thereof. Information, documents, or records ***otherwise available from original sources*** are not to be construed as being unavailable for discovery or for use in any civil action merely because they were produced or presented during proceedings of a peer review committee, but the information, documents, or records are available ***only from the original sources and cannot be obtained from the peer review committee's proceedings or records.*** An individual who testifies before the peer review committee, serves as a representative of a peer review committee, serves as a member of a peer review committee, works for or on behalf of a peer review committee, or provides information to a peer review [**11] com-

> mittee shall not be prevented from testifying as to matters within the individual's knowledge, but the individual cannot be asked about the individual's testimony before the peer review committee, ***information the individual provided to the peer review committee, or any opinion the individual formed as a result of the peer review committee's activities.*** An order by court to produce for discovery or for use at trial proceedings or records described in this section is a final order. (Emphasis and bold added.)

[*P21] Prior to 2003, judicial decisions were diluting the legislature's intention to protect the peer review process. Thus the Ohio General Assembly revised its previous version in 2003, making the current statute more resolute: peer review committee meetings and the information "arising out of" the peer review evaluation are confidential. The current version of the statute uses clear language expressing the legislature's intent, such as "shall be held in confidence," and "shall not be subject to discovery," to establish an express mandate that peer review proceedings and records are to remain confidential. See *Manley v. Heather Hill, Inc., 175 Ohio App.3d 155, 2007 Ohio 6944, ¶ 30, 885 N.E.2d 971,* [**12] (noting that the 2003 amendment contained stronger language than previous statutes).

[*P22] The legislature amended the statute to direct peer review committee participants to testify only as to their personal knowledge, and clearly states that the participants cannot discuss their testimony arising out of, or before, a peer review committee. This includes "any finding, recommendation, evaluation, opinion, or other action." In order to be balanced and fair, the statute does not prohibit or prevent the use of documents, records, or information that originates from a source *other than* the peer review process. Thus the statute granting absolute confidentiality to peer review also protects the particular interests of the individual litigant.

[*P23] Nowhere in the statute is there any language that suggests the peer review process can be waived, voided, or otherwise "destroyed." The Ohio Supreme Court has warned against enacting "common-law pronouncement" when the legislature has or could have spoken, to the subject of privileges and how they can be waived emphasizing that "[j]udicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final [**13] arbiter of public policy." [2] *State v. Smorgala (1990), 50 Ohio St.3d 222, 223, 553 N.E.2d 672,* superseded by statute on other grounds.

> 2 While the Ohio statute, as well as other state statutes, do not express a means to have the confidentiality waived, or voided, a few states outside of Ohio have statutes that express the means for waiver. See, e.g., *Tex. Occ. Code 160.007(e).*

[*P24] To find otherwise would allow one person who participated in a peer review process to strip the entire privilege, or destroy the confidentiality, intended to be accorded to *all* participants in the peer review process. Such a result would expose *all* who participated in the peer review process, as well as the *entire process* itself [3] The statute does not warrant such interpretation.

> 3 "Privilege law, then, is anchored in considerations of policy that exist independently of the usual evidentiary concerns * * *. Privileges operate to suppress competent, relevant evidence in order to preserve confidential relationships." 1 Weissenberger, Ohio Evidence (1995) 4, Section 501.03.

**The Importance of Peer Review Protection**

[*P25] The general public has a great interest in the continuing improvement of medical and health care services as delivered on [**14] a daily basis. Kohlberg, The Medical Peer Review Privilege: A Linchpin for Patient Safety Measures (2002), 86 Mass. L.Rev. 4. Thus, through *R.C. 2305.252,* the legislature enacted a privilege giving complete confidentiality to the peer review process. The legislature's enactment determined that the public's interest was to be protected from the particular interest of the individual litigant. Therefore, this statutory privilege is unlike other general privileges arising out of common law. It is designed to protect the overall *process* of peer review, including all the administrators, nurses, doctors, committees, and various entities who participate in the gathering of information, fact-finding, and formation of recommendations, to advance the goal of better services with better results. Bravo & Lovering, The Peer Review Privilege: When and How Is It Subject to Waiver? (2010), 9 MedStaff News 1. Protecting the process is imperative for peer review to meet its paramount goal of improving the quality of healthcare. *Giusti v. Akron Gen. Med. Ctr., 178 Ohio App.3d 53, 2008 Ohio 4333, 896 N.E.2d 769.* The privilege provides those in the medical field the needed promise of confidentiality, the absence of which [**15] would make participants reluctant to engage in an honest criticism for fear of loss of referrals, loss of reputation, retaliation, and vulnerability to tort actions. See, also, *Browning v. Burt (1993), 66 Ohio St.3d 544, 562, 1993 Ohio 178, 613 N.E.2d 993,* (noting that a purpose of the statute is not to hinder lawsuits, but rather to afford protection so as to promote a

process whereby individuals will provide information to review committees or boards and are encouraged to freely, completely, and candidly produce information without fear of reprisal or civil liability). See, also, Bravo & Lovering; and Kohlberg.

[*P26] In order to preserve the integrity of this process with meaningful self-examination and frank recommendations, the peer review process and its resulting information are clearly intended to have a privilege of confidentiality providing a "complete shield to discovery." 55 Ohio Jurisprudence 3d, Hospitals & Health Care Providers, Section 41.

[*P27] Other Ohio courts have declined to broaden the peer review statute such as to permit waiver or destruction of confidentiality. The Eighth District was asked to find that a medical group had waived the peer review privilege by providing a report during discovery and talking [**16] about the matter outside the peer review meetings. *Wall v. Ohio Permanente Medical Group, Inc. (1997), 119 Ohio App.3d 654, 695 N.E.2d 1233.* However, that appellate court properly determined that "such a broad concept of waiver would negate the purpose of the peer review confidentiality statute." *Id. at 665.* See, also, *Atkins v. Walker (1981), 3 Ohio App.3d 427, 3 Ohio B. 506, 445 N.E.2d 1132* (rejecting an argument that a written document given to a doctor concerning matters considered by the peer review committee waived any privilege); and *Lowrey v. Fairfield Med. Ctr., Fairfield App. No. 08 CA 85, 2009 Ohio 4470* (finding that the hospital did not waive privilege where it attached peer review documents to a court filing).

[*P28] We also note that other Ohio courts have recognized that Ohio's peer review statute clearly creates an impenetrable protection of confidentiality. See *Tenan v. Huston, 165 Ohio App.3d 185, 2006 Ohio 131, ¶ 23, 845 N.E.2d 549,* (finding that "current *R.C. 2305.252* manifests the legislature's clear intent to provide a complete shield to the discovery of any information used in the course of a peer review committee's proceedings. The language of the statute demonstrates that a party interested in obtaining information used by a peer [**17] review committee that was generated from another source must seek such information from that source, and not from the records of the committee's proceedings"); and *Bansal v. Mount Carmel Health Systems, Franklin App. No. 09AP-351, 2009 Ohio 6845, ¶ 17* (noting that "*R.C. 2305.252* implicitly extends full and unconditional protection to records generated by the 'non-original source,' i.e., the peer review committee").

[*P29] While the statute makes clear that the peer review process and information arising from that process is privileged, the statute also protects the particular interest of the individual litigant. For example, while documents prepared by or used within the peer review committee process are undiscoverable, a person may be asked to testify or produce evidence regarding patient care that is within the declarant's personal knowledge. *Doe v. Mount Carmel Health Systems, Franklin App. No. 05 AP-435, 2005 Ohio 6966.*

**The Horizon Health Report Remains Protected**

[*P30] During the licensure process, the Ohio Department of Health sent the hospital a report of its survey findings. The hospital responded with its Plan of Correction, which identified risk assessments and what quality assurance measures [**18] had been planned or performed. Mercy Hospital merely referenced a few findings learned from the peer review process performed by Horizon Health, indicating the hospital had given priority to the recommendations. While the trial court found that such use destroyed the peer review report's confidentiality, we do not agree.

[*P31] The very nature of a peer review process is to report findings and make recommendations so that they are in fact used beyond the review process itself. For example, a hospital could decide to streamline its registration process based on peer review recommendations that patient care suffers when the patient is not registered quickly enough. The hospital's use of the peer review findings, and their implementation or integration into hospital procedure, does not in any way void, waive, or destroy the hospital's peer review process because it decided to act upon suggestions and improve the health care for its patients.

[*P32] The Fifth District Court of Appeals specifically refused to destroy the confidentiality of peer review in a situation where a hospital implemented peer review recommendations by releasing a memo regarding peer review findings. *Germanoff v. Aultman Hosp., Stark App. No. 2001CA00306, 2002 Ohio 5054.* [**19] The Fifth District cogently agreed with the trial court, which had denied discovery, because it found "illogical the notion that a hospital would have to risk discovery of confidential proceedings simply by implementing the recommended change." *Id. at ¶ 27.* While the statute does say that the records and information created within a peer review cannot be used in civil suits or discovery, the statute does not designate that same information cannot be used for remedial purposes.

[*P33] In the matter sub judice, the trial court took issue with the hospital's reference to the Horizon Health report in its Plan of Correction during the hospital's licensure process. However, the hospital's reference to the three pieces of information from the Horizon Health report demonstrates that the hospital was making arrangements to improve its health care delivery arising

out of the peer review process. The hospital's Plan of Correction merely made reference to three "items" from the Horizon report regarding unsecured furniture, cords longer than 18 inches, as well as exposed hinges and handles that could support body weight. It is significant that the hospital did not include the entire Horizon Health report [**20] (the hospital has not disseminated all of the information from the peer review process), but rather only made reference in its response to three precise issues, as well as the dates the hospital implemented changes. The hospital had already retained Horizon Health for the quality assurance review prior to the licensure survey, and then merely used tidbits of information garnered from Horizon Health to respond to the licensure process.

[*P34] The hospital's reference to the three "items" listed above was in response to the ODMH's Survey Report, in which the surveyor noted that the hospital needed to evaluate its environment "for any safety risks such as weight bearing devices that include but are not limited to sink faucets, door hinges, etc. and development of a remedial plan for any risks identified." The hospital was free to make reference to information it had learned from the peer review process that had previously been commissioned. The law encourages hospitals such as Mercy Hospital to honestly and candidly respond to licensure requirements, and *R.C. 2305.252* clearly excludes such information from the discovery process to be used in civil suits against the hospital. Part of the peer [**21] review process is intended to identify where there is room for correction and improved results. The privilege is not eliminated, nor is the entire process exposed, simply because the hospital used the information as it should have.

**Conclusion**

[*P35] Regardless of how information is used for improvement purposes or discussed by one party or entity outside of the process, the statute clearly does not intend that the peer review process should be voided, waived, or destroyed. To hold otherwise subverts *R.C. 2305.252* and the purpose of the peer review process. One has only to read the statute to realize the Ohio General Assembly did not create a privilege so frail and delicate as to be shattered by a mere reference to findings arising from the peer review process. If one cannot use the information generated from a peer review, the entire process is nullified and the statutory intent defeated. The peer review privilege statute is clearly applicable to the facts of the case herein. This confidentiality is necessary to protect the needs of society as a whole while also protecting the individual litigant's right to discovery from other sources, and therefore should not be interpreted in a way that [**22] erodes its very purpose.

[*P36] Having found that the peer review privilege applies to the Horizon Health report and that the hospital did not destroy the report's confidentiality, Mercy Hospital's sole assignment of error is sustained.

[*P37] The judgment of the trial court in denying the motion to quash is reversed, the subpoena duces tecum is hereby quashed, and this cause is remanded for further proceedings according to law and consistent with this opinion.

HENDRICKSON, P.J., concurs.

RINGLAND, J., dissents.

**DISSENT BY:** RINGLAND

**DISSENT**

**RINGLAND, J., dissenting.**

[*P38] I respectfully dissent from the majority's decision for I find no error in the trial court's decision denying Mercy Hospital's motion to quash. Initially, I find it appropriate to note that our holding in *Selby* indicates that this matter should be reviewed under an abuse of discretion standard. See id., *2008 Ohio 2413 at ¶ 10.* However, in light of the more recent Ohio Supreme Court decisions, as well as a review of the otherwise applicable case law throughout the state, I agree with the majority finding a de novo standard of review applies.

[*P39] That said, while I agree that the affidavits submitted by Mercy Hospital indicate Horizon Health was initially retained [**23] to conduct an audit of the Behavioral Health Unit for peer review purposes, Mercy Hospital did not, in fact, use the Horizon Health report exclusively for that purpose. Instead, as the record indicates, Mercy Hospital also used the Horizon Health report to respond to ODMH's Survey Report requests and recommendations as part of its license certification process. In turn, regardless of whether the Horizon Health report was initially commissioned solely for peer review purposes, just as the trial court found, and for which I agree, by not utilizing the report exclusively for that purpose, Mercy Hospital cannot now shield itself behind the peer review privilege when it effectively "destroyed [its] confidentiality."

[*P40] The majority effectively establishes principles that allow a health care entity to conceal indefinitely any documents it claims were originally created for peer review purposes regardless of whether that initial purpose was later modified and irrespective of how those documents were then used. Because the peer review privilege is not a generalized cloak of secrecy over the entire peer review process, it simply cannot be said that the legislature intended for such a result here. [**24] See *Giusti, 178 Ohio App. 3d 53, 2008 Ohio 4333*

*at ¶ 14, 896 N.E.2d 769*, citing *Huntsman v. Aultman Hosp., Stark App. No. 2006 CA 00331, 2008 Ohio 2554, ¶ 47.*

[*P41] Furthermore, even if I was to find Mercy Hospital had not destroyed the confidentiality of the Horizon Health report by using it to respond to ODMH's Survey Report, based on the facts of this case, I would also find Mercy Hospital has failed to provide sufficient information to meet its burden of establishing the applicability of the peer review privilege.

[*P42] Here, contrary to the majority's decision, the only evidence supporting Mercy Hospital's claim that the peer review privilege applies came from two generalized affidavits that provide nothing more than a blanket assertion that the Horizon Health report was initially created as part of the peer review process. The submitted affidavits, however, leave many questions unanswered for they do not even set forth when Mercy Hospital's Medical Quality and Patient Safety Counsel conducted its review of the hospital's Behavioral Health Unit. [4] An affidavit providing such limited information regarding the timing and process implemented in creating the disputed document, a document allegedly created solely for peer review [**25] purposes, is insufficient to overcome a health care entity's burden of proof required to establish the applicability of the peer review privilege. This is especially true here considering the trial court did not conduct an in camera review of the disputed documents. See *Legg v. Halle, Franklin App. No. 07AP-170, 2007 Ohio 6595, ¶ 27* (finding in camera review of disputed peer review documents "a necessary preliminary step and is the most appropriate way to weigh the claims of privilege regarding the documents").

4 For example, was Mercy Hospital's decision to retain Horizon Health so close in time to ODMH's request that the audit was ultimately performed for both peer review and license certification purposes? Furthermore, what findings from the Horizon Health report, if any, were not disclosed to ODMH that would still be protected by the peer review privilege?

[*P43] While the majority may disagree, similar to our finding that "[s]imply labeling a document 'peer review,' 'confidential,' or 'privileged,' does not invoke the statutory privilege," merely claiming a document was originally created for peer review purposes is insufficient to overcome one's burden of proof establishing the applicability [**26] of the privilege. *Selby, 2008 Ohio 2413 at ¶ 14*. Therefore, I would also find Mercy Hospital failed to provide sufficient proof to meet its burden establishing the applicability of the privilege.

[*P44] As can be seen from my dissent and that of the majority opinion, the statutory language establishing the peer review privilege found in *R.C. 2305.252* leaves many questions unanswered and creates an unsettled state of the law regarding its application. Until these issues can be resolved by the legislature or the Ohio Supreme Court, the state of the law will remain unsettled in the area of medical malpractice leading to further confusion regarding its proper application to the detriment of all parties involved.

[*P45] In light of the foregoing, I find not only did Mercy Hospital destroy the confidentiality of the Horizon Health report by not using it exclusively for peer review purposes, I also find Mercy Hospital failed to provide sufficient proof to meet its burden establishing the applicability of the privilege. Accordingly, I respectfully dissent from the majority's decision for I would overrule Mercy Hospital's single assignment of error and affirm the trial court's decision denying its motion [**27] to quash.