IN THE SUPREME COURT
APPEAL FROM THE SAGINAW COUNTY COURT

THE ESTATE OF DOROTHY KRUSAC, deceased by her representative JOHN KRUSAC,

Plaintiff-Appellee,

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-Appellant.

Supreme Court No. 149270

COA No. 321719

Saginaw Cir. Ct. No. 12-015433-NH-4

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MICHIGAN DEFENSE TRIAL COUNSEL'S *AMICUS CURIAE* BRIEF

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Statement of Question Presented

Whether Michigan's peer review statutes protect factual records, data, and knowledge collected for or by individuals or committees assigned a professional review function in a health facility or agency.

Defendant-Appellant Covenant Healthcare would answer "YES"

Plaintiff-Appellee would answer "NO"

Amicus curiae Michigan Defense Trial counsel answers "YES"

I. STATEMENT OF INTEREST OF AMICUS CURIAE

This *amicus curiae* brief is submitted by the Michigan Defense Trial Counsel ("MDTC"). The MDTC is a statewide organization of attorneys whose primary focus is the representation of defendants in civil proceedings. Established in 1979 to enhance and promote the civil defense bar, MDTC accomplishes this by facilitating discourse among, and advancing the knowledge and skill of, defense lawyers to improve the adversary system of justice in Michigan. MDTC appear before this court as a representative of defense lawyers and their clients throughout Michigan, a significant number of whom are potentially affected by the issues involved in this case.

The opinion of the Court of Appeals in this case and *Harrison v Munson Healthcare* involve an issue of significant importance to *amicus curiae.*

II. JURISDICTIONAL STATEMENT

MDTC adopts and relies upon the Jurisdictional Statement contained in the brief on appeal of Covenant Healthcare.

III. ORDER APPEALED

MDTC adopts and relies upon the statements contained in the brief on appeal of Covenant Healthcare.

IV. STATEMENT OF FACTS

MDTC adopts and relies upon the statements contained in the brief on appeal of Covenant Healthcare.

V. LEGAL ARGUMENT

A. Standard of Review

The instant case, and *Harrison* v *Munson Healthcare,* 304 Mich App 1 (2014), involve questions of statutory interpretation. Statutory interpretation is a question of law which this Court

considers *de novo* on appeal. *Oakland Co. Bd. of Co. Rd. Comm'rs v. Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610, 575 NW2d 751 (1998).

B. *Harrison v Munson Healthcare Inc* erred in its analysis of the scope of the peer review privilege, MCL 333.21515

1. Introduction

In *Harrison* v *Munson Healthcare,* 304 Mich App 1 (2014), a panel of the Court of Appeals was faced with a question of whether a contemporaneous, hand-written incident report was subject to the confidentiality protection of the Michigan peer review statute, MCL § 333.20175(8). The Court in *Harrison* ruled that is was not. This was clear error. There is nothing in Michigan statute or case law which limits peer review documents as *Harrison* has.

2. The peer review statutes at issue

Per the Michigan Public Health Code, hospitals must establish a structure for the review of patient care for the purpose of reducing injuries and deaths. Specifically, MCL 333.21513 provides that hospitals must:

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

To accomplish this statutory mandate, hospitals must establish peer review committees. *Dorris v. Detroit Osteopathic Hosp. Corp.,* 460 Mich 26, 594 NW2d 455, 463 (1999). *Gallagher v. Detroit-Macomb Hosp. Ass'n,* 171 Mich App 761, 431 NW2d 90, 94 (1988). By statute, these committees are subject to peer review protection. Specifically, MCL § 333.20175(8) states:

> [t]he **records, data, and knowledge** collected for or by individuals or committees assigned a professional review function in a health facility 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.

(Emphasis added)

Similarly, MCL § 333.21515 provides:

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

(Emphasis added)

In order for records to be subject to the privilege, the records must have been collected *for* or *by* individuals or committees assigned a professional review function. See *Marchand v. Henry Ford Hosp.,* 398 Mich 163, 247 NW2d 280, 282 (1976). While, generally, privileges are to be narrowly construed, in the case of the peer review statutes, the "[l]egislature protected peer review documents in broad terms." *In re Lieberman,* 250 Mich App 381, 646 NW2d 199, 202-03 (2002). *Lieberman* explained that the peer review statute:

> "demonstrates that the Legislature has imposed a comprehensive ban on the disclosure of any information collected by, or records of the proceedings of, committees assigned a professional review function in hospitals and health facilities.....Underscoring the high level of confidentiality attendant to peer review documents is the statutory admonishment that such information is to be used only for the reasons set forth in the legislative article including that privilege.

Id.

Similarly, in *Gallagher v. Detroit-Macomb Hosp. Ass'n,* 171 Mich App 761, 768, 431 NW2d 90 (1988), the court noted that the Legislature's intent was to *fully* protect peer review materials:

> The statutes at issue here govern the confidentiality of records, reports, and other information collected or used by peer review committees in the furtherance of their duties, and evidence the Legislature's intent to *fully* protect quality

> assurance/peer review records from discovery. *Dorris v. Detroit Osteopathic Hosp.*, 460 Mich. 26, 40, 594 N.W.2d 455 (1999). The privilege afforded by statute may be invoked for records, data, and knowledge collected for or by an individual or committee assigned a review function.

Gallagher v. Detroit-Macomb Hosp. Ass'n, 171 Mich App 761, 768, 431 NW2d 90 (1988).

Indeed, it is beyond dispute that peer review documents are widely protected. They are not subject to disclosure in a criminal investigation pursuant to a search warrant, (*In re Lieberman,supra*) or in a civil suit concerning an assault on a hospital patient (*Dorris, supra)* a medical malpractice claim, *Gallagher supra*, or an investigation by the Board of Medicine (*Attorney General v. Bruce,* 422 Mich 157, 369 NW2d 826 (1985). *Manzo v. Petrella,* 261 Mich App 705, 683 NW2d 699, 705 (2004)). The long-accepted rationale for this strong protection of peer review material is that:

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

Bruce, supra, *quoting Bredice v. Doctors Hosp., Inc.,* 50 FRD 249, 250 (D DC 1970).

Michigan case law has long recognized that without this confidentiality protection, "the willingness of hospital staff to provide their candid assessment will be greatly diminished," which "will have a direct effect on the hospital's ability to monitor, investigate, and respond to trends and incidents that affect patient care, morbidity, and mortality." *Dorris*, 594 NW2d at 463. "By insuring that the proceedings remain confidential, the Legislature has provided strong incentive for hospitals to carry out their statutory duties in a meaningful fashion." *Bruce, supra.*

3. *Harrison failed to apply proper standard to interpretation of the statutory language*

Harrison sought to interpret the peer review statute and apply it to the facts presented there. However, while the rules for statutory interpretation in such as circumstance are well established, *Harrison* chose to apply a much narrower standard than provided by Michigan law, and relied instead on foreign case law interpreting different statutes.

A court's "goal in interpreting a statute is to give effect to the Legislature's intent." *Malpass v. Dep't. of Treasury,* 494 Mich 237, 248–249; 833 NW2d 272 (2013). "When ascertaining the Legislature's intent, a reviewing court should focus first on the plain language of the statute in question, and when the language of the statute is unambiguous, it must be enforced as written." *Fisher Sand & Gravel Co. v. Neal A. Sweebe, Inc.,* 494 Mich 543, 560, 837 NW2d 244 (2013) (citation omitted). "Every word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory...." *Baker v. General Motors Corp.,* 409 Mich 639, 665, 297 NW2d 387 (1980).

While *Harrison* properly *quoted* this standard, it did not actually *apply* it in its decision, instead stating: "we take heed of the general rule that statutory privileges should be narrowly construed". The *Harrison* decision was therefore based on a very narrow interpretation of the statute, without giving deference to legislative intent or prior case decisions. While "narrow" interpretation may be the general rule for applying privileges, particularly common law privileges, it is not the appropriate standard when the statute itself make the privilege broad. In the case of the peer review statutes, the "[l]egislature protected peer review documents in broad terms." *In re Lieberman,* 250 Mich App 381, 646 NW2d 199, 202-03 (2002).

4. *Harrison applied the wrong test to determine if the document was peer review protected*

The basis of the *Harrison* decision was that the document was not privileged because it contained facts and was written shortly after the event. In *Harrison*, the court wrote:

> "Gilliand's contemporaneous, hand-written operating room observations were not subject to peer review privilege. In other words, the initial page of the incident report did not fall within the protection of MCL 333.2151.

Id.

Harrison wrongly assumed that because an incident report was promptly prepared and because it contained facts, it was not a privileged document. That is not the proper test for whether the peer review privilege applies. The correct question is what the *purpose* of the document was, not when it was prepared or whether it contains facts. The long-accepted test for determining whether something is a protected peer review document is:

1. Was the document prepared by or for a committee or individual assigned a review function;

2. Was the document prepared pursuant to hospital bylaws, or internal rules and regulations;

3. Was the individual or committee's function a form of retrospective review for purposes of improvement and self-analysis and thereby protected, or part of current patient care.

Gallagher, 431 NW2d at 94, and *Marchand v. Henry Ford Hosp.,* 398 Mich 163, 247 NW2d 280, 282 (1976).

5. *Michigan case law has properly applied the established peer review test to incident reports in controlling authority*

Harrison made no attempt to apply the established test to the document in question. It also did not refer to the prior Michigan court decisions which have applied the test to incident reports and occurrence reports. Oddly, *Harrison* fails to even cite any of these controlling cases.

Indeed, no court before *Harrison* ever made a determination of whether a document was subject to that privilege based on *when* the report was prepared or because it contained facts.

Gallagher v. Detroit-Macomb Hosp. Ass'n, 171 Mich App 761, 768, 431 NW2d 90 (1988) the Court of Appeals affirmed the trial court's decision to not admit a hospital incident report at trial. The court determined that the hospital incident report was prepared subject to privilege because it was prepared "to assist the hospital in monitoring its own activities to reduce accidents, injuries, morbidity and mortality at the hospital." *Id.*

Similarly, in Lindsey v. St. John Health System, Inc., Nos. 268296, 270042, 2007 WL 397075 (Mich App Feb 6, 2007) the Court of Appeals upheld the trial court's denial of plaintiff's motion to compel production of an "occurrence report" because it "necessarily related to a document that concerned the review of professional practices and the quality of care provided by the hospital". Further, in *Gregory v. Heritage Hospital (*a companion case to *Dorris v Detroit Osteopathic Hospital* 460 Mich 26 (1999), 594 NW2d 455 (1999)), a patient alleged that she was assaulted while staying at a hospital. 594 NW2d at 458. The trial court ordered the hospital to produce an incident report, "any investigative reports relative to the incident report," and "any notes, memoranda, records, and reports related to the incident." *Id.* at 458-59. This Court held that this was error because the hospital offered an affidavit stating that the information "was collected for the purpose of retrospective peer review by the peer review committee." *Id.* at 463-64. This Court then remanded the case to the trial court to allow the plaintiff "to test the veracity of the hospital's procedures," i.e. whether the information "was actually collected for the purpose of retrospective review by the peer committee." *Id.*

There was no mention in any of these cases of the question of *when* the documents were prepared, or if they contained facts. Those considerations have been simply irrelevant to any discussion regarding whether a document is protected by the peer review privilege.

Harrison did not cite any specific authority for its conclusion that the document there was not privileged because it contained facts, however, it discussed three cases cited in *Monty v Warren Hosp Corp,* 422 Mich 138, 144; 366 NW2d 198 (1985) commenting: "We find the cases cited in *Monty* enlightening and utilize them as guideposts." *Id.* *Harrison* further commented: "We derive from these three cases a distinction between factual information objectively reporting contemporaneous observations or findings, and "records, data and knowledge" gathered to permit an effective review of professional practices." Unfortunately, *Harrison* failed to appreciate the facts and holdings in each case. When reviewed, it is clear that none of the cases cited in *Monty* stand for the proposition that only after-the-fact information or non-fact data is subject to the peer-review privilege.

The first case cited, in *Monty, Coburn v Seda,* 101 Wn270; 677 P2d 173 (1984) was decided based strictly on the language of the statute involved, RCW 7.70.020 (1) and (2). That statute did not protect records, data or knowledge gathered. The applicable statute provided, in pertinent part:

> "The proceedings, reports, and written records of [a committee reviewing medical competency of staff]... shall not be subject to subpoena or discovery proceedings in any civil action, except actions arising out of the recommendations of such committees or boards involving the restriction or revocation of the clinical or staff privileges of a health care provider as defined above."

Id. (emphasis added)

That statute clearly did not protect "the records, data and knowledge collected" as the Michigan statute does. Thus, to rely on a case which interpreted a statute from another state that

did not purport to protect records, data or knowledge gathered by a peer-review committee or individuals or committees assigned a professional review function is not only incorrect, it is baffling.

The second case relied upon as guiding authority in *Harrison* is *Davidson v Light*, 79 FRD 137 (D Col 1978). *Davidson* did *not* involve the applicability of *any* statute providing for privilege and was based purely on common law and the Rules of Evidence. While there was some discussion in that case involving the distinction between facts and committee discussions, since there was no statute protecting records, data or knowledge gathered by the committee the discussion is irrelevant to interpretation of the Michigan statute.

The third case cited in *Harrison*, *Bredice v Doctors Hosp. Inc,* 50 FRD 249 (D DC 1970) *aff'd* 479 F2d 920 (1973), *motion for reconsideration denied by,* 51 FRD 187, D DC, Oct. 13, 1970, *aff'd,* 479 F2d 920 (D DC 1973) found that there was a common law privilege in the minutes and reports of a peer review committee. Again, no statutory language was involved and no issue about incident reports was raised. *See William Beaumont Hosp. v. Medtronic, Inc.,* 09-CV-11941, 2010 WL 1626408 (ED Mich Apr. 21, 2010)(variance reports prepared by nurses subject to peer review privilege).

Harrison also relied on *Columbia/ HCA Healthcare Corp v District Court*, 113 Nev 521; 936 P2D 844 (1997), stating "the Nevada Supreme Court observed that "[o]ccurrence reports … are nothing more than factual narratives" which contain information usually unearthed in discovery." *Harrison* at p 19. However, the court failed to appreciate, again, that *Colombia* was a case involving statutory interpretation. The Nevada statute did not include records, data and knowledge in its definition of "peer review", but rather only protected *the proceedings and records* of hospital committees with the responsibility of evaluation and improvement of the

quality of care rendered by those hospitals.[1] Since this case, and *Harrison* depend purely on the interpretation of a Michigan statute, reliance on the interpretation of a totally different statute is clear error.

Similarly, *Harrison* relies on an Arizona case, *John C. Lincoln Hosp v Superior Court*, 159 Ariz 456, 459; 768 P2d 188 (1989). That case, again, involved statutory interpretation. Interestingly, *John C. Lincoln* relied on an earlier Arizona case, *Humana Hosp. Desert Valley v. Superior Court of Arizona In & For Maricopa Cnty.*, 154 Ariz. 396, 402, 742 P.2d 1382, 1388 (Ariz Ct App 1987) which held that a claim that peer review refers only to retrospective review of care provided by physicians already practicing in hospitals was simply wrong. Thus, *John C. Lincoln* only stands for the non-controversial proposition that otherwise non-privileged documents do not become privileged just because they are submitted to a peer review committee.

Since the only "authority" cited by *Harrison* does not support the proposition for which they were cited, the opinion is in error. There is no legal basis to make a distinction between facts submitted to a peer review committee (or individuals or committees assigned a professional review function) and opinion. There is no reason to put some arbitrary time constraint on when the report was written. None of that is mentioned in the Michigan statute, there is no legislative history to support such an interpretation, and no case interpreting it has made such a distinction before *Harrison*.

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[1] NRS 49.265 provides, in pertinent part: 1. Except as otherwise provided in subsection 2:
(a) *The proceedings and records of:*(1) Organized committees of hospitals ... having the responsibility of evaluation and improvement of the quality of care rendered by those hospitals or organizations; and (2) Review committees of medical or dental societies, are not subject to discovery proceedings....
(Emphasis added.)

6. Reliance on Centennial Healthcare Mgt Corp v Dept of Consumer and Industry, is misplaced

Harrison relies on *Centennial Healthcare Mgt Corp v Dep't of Consumer & Industry Services,* 254 Mich App 275, 290; 657 NW2d 746 (2002), to "buttress" its holding (*Harrison* at 18.) However, *Centennial,* is inapplicable. That case held that the incident reports, accident reports, and other records prepared in compliance with the *administrative* rule (which contained only factual information rather than the assessments of the peer review committee) were not within the scope of the privilege. There, a separate regulation compelled maintenance of incident reports and allowed review by the State.[2] Further, as noted in *Maviglia v. West Bloomfield Nursing & Convalescent Center, Inc.* L 2533550, 2 -3 (Mich App 2004) the *Centennial* decision and reasoning is not applicable where the party seeking disclosure of the information is a private litigant, noting: "the rule only authorizes copying of the reports by the director or an authorized representative. It does not indicate that the reports should be available for copying by anyone else." *Maviglia v. West Bloomfield Nursing & Convalescent Center, Inc.* 2533550, 2 -3 (Mich App 2004) 2004 WL 2533550.

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

In the instant case, the trial court issued its Order requiring Covenant to provide Krusac with the first page of Covenant's Improvement Report stating "even assuming...the 'Improvement Report' is a peer review report, it is not the facts themselves that fall under the

[2] 1979 AC, R 325.21101 states in pertinent part: "All of the following records shall be kept in the home and shall be available to the director or his or her authorized representative for review and copying if necessary (d) Accident records and incident reports."

peer review privilege but rather what is done with those facts". The trial court based its opinion on the belief that it was compelled to follow *Harrison*. As set forth above, *Harrison* was wrongly decided, and there are a plethora of other cases which are controlling.

D. Krusac cannot base its claim of "right" to peer review records on a statute that does not create a private cause of action

Plaintiff-Appellee Krusac argues in Section I. B. of its brief on appeal that even if the incident report passed directly to a person or committee assigned a review function for the purposes of reducing morbidity and mortality and to ensure quality control, and that the material was only used for purposes provided in the Public Health Code, what is written on the first page of the incident report must be disclosed because pursuant to MCL 333.20175(1), because, they argue, a hospital is required to maintain a patient record which includes "observations made". Plaintiff-Appellant argues that because a patient's chart must contain observations, therefore, "requiring disclosure of the facts contained in Colvin's incident report represents a use of the material 'for the purposed provided in this article'". This logic is convoluted, to say the least. There are no cases interpreting what is meant by "observations" under 333.20175(1). Plaintiff-Appellee would have this court interpret this section to require that medical records include *all* observations made by *anyone* at *any* time. If that were the standard, medical records would be so unwieldy as to be useless. Any healthcare person who "observed" the patient would have to record what he saw in the medical record, making the medical record essentially a medical equivalent of a newspaper's "live blog". It would have to include everything from everyone who walked by (including orderlies and techs, who do not generally write in charts). That is not, and cannot be, the standard. Certainty, there is no authority to support such an allegation.

Finally, a patient does not have standing to attack an alleged violation of MCL 333.20175. The Michigan Public Health Code does not create a private right of action. *Fisher v.*

W.A. Foote Mem'l Hosp., 261 Mich App. 727, 683 NW2d 248, 249–50 (2004), *review denied*, 473 Mich 888, 703 NW2d 434 (2005); *Ravikant v. William Beaumont Hosp.*, 2003 WL 22244698, at 5 (2003) *Feyz v. Mercy Memorial Hospital* 475 Mich. 663, 719 NW2d 1, 11 n. 45 (2006). Thus, MCL 333.20175 is inapplicable and irrelevant to the peer review issue.

VI. CONCLUSION

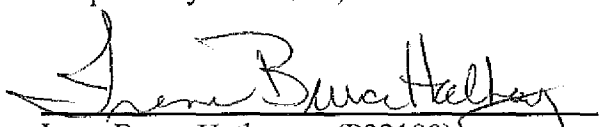
Harrison held that a document prepared for an individual or committee assigned a peer review function was not subject to the peer review privilege if it contained facts and/or was prepared at, or close to, the time of the incident. This finding is contrary to thirty years of case precedent and was based on an artificially narrow reading of the statute contrary to case law precedent, the clear language of the statute and legislative intent. It was based purely on inapplicable foreign case law interpreting foreign statutes with completely different language.

The MDTC submits that *Harrison* used the wrong test to determine whether a document is subject to the peer review privilege. The proper test is the one set forth in the statute itself: was the document prepared by or for an individual or committee assigned a peer review function. Here in Krusac, as in *Harrison*, the document met the statutory criteria. *Harrison* should be reversed and the trial judge's opinion in Krusac overruled.

VII. RELIEF REQUESTED

The MDTC requests that his Court reverse the ruling in *Harrison* and rule that the materials requested here, and in *Harrison*, are subject to the peer review privilege and are not discoverable.

Respectfully submitted,



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