

STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE MICHIGAN COURT OF APPEALS

THE ESTATE OF DOROTHY KRUSAC,
deceased, by her Personal Representative,
JOHN KRUSAC,

Plaintiff-Appellee

-vs-

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,

Defendants-Appellants.

Supreme Court No. 149270

Court of Appeals No. 321719

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



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MICHIGAN PROTECTION & ADVOCACY SERVICE, INC.'S
BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE AMICUS BRIEF

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QUESTIONS PRESENTED

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

Plaintiff's Answer: No

Defendant's Answer: Yes

Amicus Curiae Answer: No

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

Plaintiff's Answer: No

Defendant's Answer: Yes

Amicus Curiae Answer: No

STATEMENT OF FACTS

The *Amicus Curiae* agrees and accepts the facts as set forth in the *Plaintiff-Appellee's Brief on Appeal*.

ARGUMENT

I. FEDERAL LAW REQUIRES MPAS TO CONDUCT ABUSE AND NEGLECT INVESTIGATIONS AND IT THEREFORE HAS A SIGNIFICANT INTEREST IN ACCESS TO PEER REVIEW RECORDS.

Michigan Protection and Advocacy Service, Inc. (MPAS) is a non-profit Michigan corporation with offices located in Lansing and Marquette. The State of Michigan has designated MPAS as the state's protection and advocacy system, pursuant to MCL 330.1931(1), with the responsibility to enforce and carry out the federal mandates of the Federal Protection and Advocacy Acts (P&A Acts).¹ *Michigan Prot & Advocacy Serv, Inc v Miller*, 849 F Supp 1202, 1205-6 (WD Mich 1994). As the state's protection and advocacy system, MPAS is required, among other things, to investigate allegations of abuse and neglect of persons with disabilities. MCL 330.1931(2). MPAS reviews peer review documents in the course of these investigations and is required to maintain the confidentiality of these records. 42 USC § 10806(a).

Congress enacted the Developmental Disabilities Assistance and Bill of Rights Act of 1975 (DD) to protect the human and civil rights of persons with developmental disabilities. 42 USC § 6000 *et seq.* As an integral component of this Act, the Protection and Advocacy (P&A) System was established to ensure that these protections became a reality.² Following congressional hearings and investigations, which substantiated

¹ The federal acts regarding the P&A system have been reviewed in a number of legal publications. See e.g., *Validity, Construction, and Operation of Protection and Advocacy for Mentally Ill Individuals Act*, 42 USC § 10801 *et seq.*, 191 ALR Fed 205 (originally published in 2004); *Validity, Construction, and Operation of Developmental Disabilities Assistance and Bill of Rights Act*, 193 ALR Fed 513 (originally published in 2003).

² In 2000, Congress passed the Developmental Disabilities Assistance and Bill of Rights Act of 2000, Pub L No 106-402, Title IV, § 401(a), 114 Stat 1737 (2000), which repealed and replaced in its entirety the 1975 Act. This version of the DD Act enhanced the access authorities of P&As in a number of respects and can be found at 42 USC §15001 *et seq.*

numerous reports of abuse and neglect in state psychiatric facilities, Congress passed the Protection and Advocacy for Individuals with Mental Illness (PAIMI) Act of 1986. 42 USC § 10801 *et seq.*³ The PAIMI Act, modeled after the 1975 DD Act, provided parallel protections for individuals with mental illness using the same mechanisms as the DD Act (and provided parallel P&A access authority).⁴

The Federal P&A Acts grant a state's P&A System, such as MPAS, access to peer review records regardless of a state statute to the contrary. This has been litigated numerous times. Every United States Circuit Court of Appeals that has reviewed the issue has agreed that a state's P&A system has access to peer review records. See *Prot & Advocacy for Persons with Disabilities, Conn v Mental Health & Addiction Servs*, 448 F3d 119 (CA 2, 2006); *Pennsylvania Prot and Advocacy, Inc v Houstoun*, 228 F3d 423 (CA 3, 2000); *Missouri Prot & Advocacy Servs v Missouri Dept of Mental Health*, 447 F3d 1021 (CA 8, 2006); *Center for Legal Advocacy v Hammons*, 323 F3d 1262 (CA 10, 2003); and *Indiana Prot and Advocacy Servs v Indiana Family and Social Servs Admin*, 603 Fd 365 (CA 7, 2010, en banc).

While the Sixth Circuit has not addressed the issue of access to peer review records, the Michigan Department of Community Health has stipulated in federal

³ Congress found that individuals "with mental illness are vulnerable to abuse and serious injury" and that "[s]tate systems for monitoring compliance with respect to the rights of individuals with mental illness vary widely and are frequently inadequate." 42 USC § 10801(a)(1); 42 USC § 10801(a)(4). See also *Examining the Issues Related to the Care and Treatment of the Nation's Institutionalized Mentally Disabled Persons: Joint Hearings Before the Comm. On Labor and Human Resources and the Subcomm On Labor, Health and Human Services, Education and Related Agencies of the Senate Comm. On Appropriations*, S Hrg No 99-50, Pt II (1985) (Staff Report).

⁴ Under an additional statutory program (established under the Rehabilitation Act), the Protection and Advocacy for Individual Rights (PAIR) Program, P&As are given the same authorities – including access to records as provided under the DD Act – to serve persons with disabilities who are not eligible under either the DD or PAIMI Acts. 29 USC § 794e(f)(2).

litigation that MPAS does have a right to peer review records. See *Michigan Prot and Advocacy Serv, Inc v Dazzo*, Case No. 2:11-cv-14503, Stip. DKT # 14 at 1 (ED, MI, Jan. 6, 2012).

MPAS frequently requests and receives peer review records in the course of its abuse and neglect investigations. Because the United States Sixth Circuit has not ruled on the issue of access to peer review records, MPAS is concerned that a broad interpretation of Michigan's peer review privilege by the Michigan Supreme Court could have a negative impact on MPAS' ability to access peer review records. This would impede MPAS' ability to conduct a full and complete investigation as required by federal law. Because MPAS has a substantial interest in this issue on appeal, it has requested this Court to allow it to file this *Amicus Curie* Brief in support of the Plaintiff-Appellee.

II. MICHIGAN LAW FURTHERS TWO IMPORTANT PUBLIC POLICY PRINCIPLES: ACCURATE & COMPREHENSIVE MEDICAL RECORDS AND CONFIDENTIALITY OF THE PEER REVIEW PROCESS.

Every state has enacted peer review statutes protecting medical review committee proceedings and its members from disclosure of those proceedings records. The Michigan's peer-review privilege at issue on appeal is contained in MCL 333.21515 and MCL 333.20175(8). The statutes were enacted to encourage open and honest evaluations and the sharing of information in regard to incidents and the abilities of medical personnel. The ultimate goal was to improve health care for all patients. 69 ALR 5th 559 (originally published in 1999). As one legal commentator noted:

The purpose of legislation relating to peer review privilege is to encourage candid and voluntary studies and programs used to improve hospital conditions and patient care and to reduce the rates of death and disease. The legislation promotes the belief that, absent the statutory peer review privilege, physicians would be reluctant to sit on peer review committees

and engage in frank evaluations of their colleagues. In line with this purpose, these statutes generally protect against disclosure of the mechanisms of the peer review process, including information gathering and deliberations leading to the ultimate decision rendered by a hospital peer review committee, or, in other words, the statutory privilege covers documents generated specifically for the use of a peer review committee. 69 ALR 5th 559 §2[a](citations omitted) (originally published in 1999).

The peer review privilege is intended to encourage frank evaluations of medical staff by their peers. It was not intended to shield from discovery the contemporaneous observations made by medical staff, especially when those full observations are required to be part of the patient's medical file, accessible to the patient or the patient's representative.

While the peer review privilege is supported by important public policy principles, one must be sure to balance those principles with the principle behind a patient's right to complete and accurate medical records and the right of patients to access their medical records. Michigan law requires each patient's medical record to contain accurate and comprehensive documentation. MCL 333.20175(1). It further requires that this information be available to the patient. *Id.* The contemporaneous observations of medical staff are therefore required to be part of a patient's medical record.

The right to have a complete medical record accessible to patients under Michigan law is similar to a patient's rights under the *Health Insurance and Portability Accountability Act of 1996*, 42 USC 1320d *et seq.* (HIPAA). Complete and accurate medical records, as well as a patient's ability to access the information in their records, is critical in order for patients to make informed choices regarding their medical care, correct inaccurate information in medical reports, and to obtain second opinions.

Ultimately, completeness, accuracy, and access are essential to an individual patient's medical care as well as the quality of medical care in general.

Amicus Curiae agrees with Appellee's argument that MCL 333.20175(1) requires Health Facilities and Agencies to maintain a record for each patient and that these records be full and complete. *Plaintiff Appellee's Brief*, pp 16-21. The statute is a clear statement by Michigan's Legislature that it is critical to patients' future and present medical care that their medical records contain a full and complete record of all information required under the statute.

Defendant-Appellant's argue that if certain factual observations are not privileged then the peer review process will be damaged and that persons will be fearful of participating or providing their observations. Defendant-Appellant's Brief, pp 21-23. But Defendant ignores that these witness-factual observations are already required to be in the medical record under MCL 333.20175(1). The argument also ignores the fact that the privilege has numerous exceptions already, which have not created any such "chilling" effect. One example given is MPAS' access to peer review records to conduct investigations of suspected abuse and neglect of individuals with disabilities. Additionally, under the Health Care Quality Improvement Act of 1986 (HCQIA), 42 USC §§ 11101–11152, the peer review privilege is not recognized by federal courts in regard to cases involving federal civil rights claims. 42 USC § 11111(a)(1).

Michigan law balances the principles behind peer review protection and full and complete medical records accessible to patients. In the current case, the Circuit Court and the Michigan Court of Appeals properly applied the plain meaning of the relevant statutes and properly concluded that the contemporaneous observations contained in

the Improvement Report were facts and not material collected for purposes pursuant to MCL 333.21515.

III. HARRISON V MUNSON HEALTHCARE, INC, WAS DECIDED CORRECTLY AND SHOULD BE UPHELD.

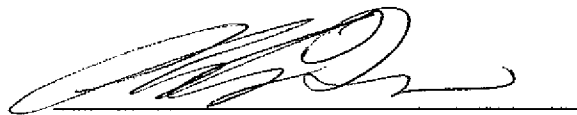
Amicus Curiae agrees with Appellee's argument that *Munson Healthcare, Inc*, was correctly decided. *Harrison v Munson Healthcare, Inc*, 304 Mich App 1; 851 NW2d 549 (2014). *Plaintiff Appellee's Brief*, pp 22-25.

CONCLUSION

MPAS requests that the Court find that the statements of contemporaneous observations are facts that are not covered by the peer-review privilege; such statements are information that is required to be in the patient's file; that *Harrison v Munson Healthcare, Inc*, was correctly decided; and that the Saginaw Circuit Court was correct, in the present case, when it ordered the Defendant to produce the first page of the Improvement Report.

Respectfully submitted,

Date: October 29, 2014



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