IN THE SUPREME COURT

On Appeal from the Michigan Court of Appeals
Meter, PJ, and Kelly and Krause, JJ

THE ESTATE OF DOROTHY KRUSAC, deceased by her representative John Krusac,	Supreme Court Docket No. 149270
Plaintiff-Appellee,	Court of Appeals Docket No. 321719
v	
COVENANT HEALTHCARE, assumed name for COVENANT MEDICAL CENTER, INC.; COVENANT MEDICAL CENTER - HARRISON, assumed name for COVENANT MEDICAL CENTER, INC., Michigan Corporations, Jointly and Severally,	Saginaw County Circuit Court Case No. 12-015433-NH-4
Defendants-Appellants.	

Carlene J. Reynolds (P55561)
LAW OFFICE OF CY WEINER, PLC
Attorneys for Plaintiff-Appellee
4000 Town Center, Ste. 550
Southfield, MI 48075
(248) 351-2200

Mark Granzotto (P31492)
Attorney for Plaintiff-Appellee
2684 Eleven Mile Rd. – Suite 100
Berkley, MI 48072
(248) 546-4649

Thomas R. Hall (P42350)
HALL MATSON, PLC
Attorneys for Defendants-Appellants
1400 Abbot Road, Ste. 380
East Lansing, MI 48823
(517) 853-2929

Stephanie C. Hoffer (P71536)
Jon D. Vander Ploeg (P24727)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Amicus Curiae Michigan Society of Healthcare Risk Management
100 Monroe Center NW
Grand Rapids, MI 49503-2802
616-774-8000

BRIEF OF THE MICHIGAN SOCIETY OF HEALTHCARE RISK MANAGEMENT AS AMICUS CURIAE

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST AND STATEMENT OF POSITION OF AMICUS CURIAE

The Michigan Society of Healthcare Risk Management (MSHRM) is comprised of members for many different areas of healthcare. Membership in the society is open to "employees of a hospital or other healthcare provider whose responsibility is in, or actively participates in, the risk management, loss control, and/or patient safety function of that organization, or individuals who are actively involved in risk management activities on behalf of hospitals or other healthcare providers...."[1]

In other words, MSHRM is a group of individuals whose job it is to improve patient safety. One tool used frequently to improve patient safety is peer review of incidents. The first step of that peer review is generally through creation of an incident report.

Through the current case, this Court is considering whether the Court of Appeals properly decided *Harrison v Munson*, 304 Mich App 1, 851 NW2d 549 (2014). The Court of Appeals did not correctly decide that case. Instead, it significantly undermined the statutory protections granted to committees and individuals assigned a review function. Peer review can no longer be completed under a cloak of confidentiality. Now, risk managers and others assigned a review function must balance their obligation to improve patient safety with the need to minimize potential risk to the hospitals in future litigation.

As such, MSHRM (and its members) have a significant interest in the outcome of this appeal.

[1] See www.mshrm.org/join.php, accessed November 4, 2014

STATEMENT OF APPELLATE JURISDICTION

MSHRM concurs with the statement of jurisdiction set forth in Defendants-Appellants' Brief.

STATEMENT OF QUESTIONS PRESENTED

The Court in the Order granting Defendants-Appellants' Application for Leave to Appeal, requested briefing on the following two issues:

I. **WHETHER *HARRISON v MUNSON HEALTH CARE, INC.*, 304 MICH APP 1 (2014), ERRED IN ITS ANALYSIS OF THE SCOPE OF THE PEER REVIEW PRIVILEGE, MCL 333.21515.**

Plaintiff-Appellee answers: No

Defendants-Appellants answer: Yes

Amicus MSHRM answers: Yes

II. **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-Appellee answers: No

Defendants-Appellants answer: Yes

Amicus MSHRM answers: Yes

INTRODUCTION

"Peer review is '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." *Feyz v Mercy Memorial Hosp*, 475 Mich 663, 719 NW2d 1 (2006). To promote that "candid and conscientious evaluation", the Legislature has set forth confidentiality provisions and privileges in no less than three separate statutes:

MCL 333.21515:

> *"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**."*

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...**are confidential, shall only be used for the purposes provided in this article**, are not public records, and **are not subject to court subpoena**."*

MCL 331.533:

> *"[T]he **record** of a proceeding and the **reports, findings, and conclusions** of a review entity and data collected by or for a review entity under this act **are confidential**, are not public records, and **are not discoverable** and **shall not be used as evidence** in a civil action or administrative proceeding."*

Reinforcing the confidential nature of peer review is crucial to achieving the purpose and goal of improving patient safety. Not only do individuals performing a review function need the cloak of confidentiality to effectively evaluate staff, policies and procedures, but the individuals providing information to review entities also need that guarantee and security of confidentiality. They need to be comfortable being honest and forthcoming in disclosing information about their co-workers – individuals with whom they work and interact on a regular basis.

The Court of Appeals' recent decision in *Harrison v Munson Health Care, Inc.*, 304 Mich App 1 (2014), effectively abrogates that cloak of confidentiality by permitting in camera review into the

substance of peer review protected documents and requiring all "facts" contained within peer review material to be disclosed during litigation. This substantial invasion into the peer review privilege significantly undermines the purpose for that privilege.

It is also contrary to the peer review statutes. Unlike other privileges, the peer review privileges contained within the public health code must be "liberally construed" to effectuate their purpose. See MCL 333.1111(2). The public health code only allows disclosure of peer review material for narrow and specific purposes – checking the credibility of witnesses or disclosure of factual information in the course of litigation are not enumerated exceptions.

The Court's opinion is also contrary to established Supreme Court precedent, which is described in detail below. That precedent can be summarized as establishing two rules:

1. The purpose, not the content, of a document determines whether the peer review privilege applies.

2. While factual information is not necessarily covered by a blanket of privilege, that information can only be obtained from the "original source", not from peer review documents.

Applying those two rules to this case, and to the *Harrison* case, demonstrates that a court need not – and should not – delve into the substance of peer review documents for any reason. Rather, when peer review is asserted, the trial court should require only evidence that the documents were collected by or for an individual or entity assigned a review function. If the document is determined to be protected by the peer review privilege, that is the end of the inquiry.

STATEMENT OF FACTS

As a non-party to the underlying medical malpractice litigation, MSHRM defers to the detailed statements of fact set forth in the Briefs of the parties.

Generally, however, the only truly relevant facts are these:

- After a potential patient safety event, health care providers gave information via incident report[2] and interview to an individual assigned a review function (i.e., involved in the peer review process) at a hospital.
- The purpose of the committee is to improve patient safety.
- During subsequent litigation, a portion of the incident report was required to be disclosed.

There are, of course, other detailed facts relevant to this case, but the above three facts are central to almost every case where *Harrison v Munson* will be used as a basis to require disclosure of material in incident reports.

The effect of *Harrison* is to have trial courts routinely peruse peer review privileged documents "just in case" an inconsistent defense is presented. In fact, that is the same request made by Plaintiff in this case. Plaintiff did not find the deposition testimony credible, so it wanted the trial court to go on a fishing expedition:

> Not one of the three individuals that were present for [the patient's] fall wrote a note in her medical record.
>
> At the time of the deposition [sic], over four years later, all three of them had an independent recollection of this fall and all recalled that not one, not two, but all three, including the one behind the glass, got to her in time, caught her, and gently cradled her to the floor.
>
> Now, the way that they describe the fall and their catching in their depositions is not exactly consistent. One of them says, you know, the other two were there. The other one says, oh, I can't remember if anybody else saw the fall. They – it doesn't jive. It doesn't make sense.
>
> * * *

[2] The hospital refers to the incident report as an "Improvement Report", and while labeling varies across hospitals, the reports serve the same function.

> ...It is my thought that this incident report very well spells out a completely different occurrence of events. [Transcript, March 5, 2014, pp 43-44.]
>
> So they should be precluded ethically from offering explanation of the fall that's inconsistent with known facts. They have them and so, Your Honor, if – I would encourage you to conduct an in camera inspection, and if the facts contained in the incident report mirror what they have stated in their depositions, that they all three got to her in time, and all three gently cradled her to the floor, fine.

In other words, pursuant to *Harrison*, trial courts will now be called upon to routinely review peer review privileged documents whenever a plaintiff does not believe testimony, and to release any factual information in those documents.

ARGUMENT

I. STANDARD OF REVIEW

In this Appeal, the Court will be interpreting and applying several statutory provisions related to the peer review privilege. Questions of statutory interpretation and application are legal questions that are reviewed de novo. *Madugula v Taub*, 496 Mich 685, 853 NW2d 75 (2014) citing *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006) and *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013). The applicability of a privilege is also a question of law, reviewed de novo. See *Dye v St. John Hosp & Med Ctr*, 230 Mich App 661, 665; 584 NW2d 747 (1998).

II. *HARRISON v MUNSON*, 301 MICH APP 1 (2014) ERRED IN ITS ANALYSIS OF THE SCOPE OF THE PEER REVIEW PRIVILEGE, MCL 333.21515.

In order to reduce morbidity and mortality and improve the quality of patient care, the Public Health Code, MCL 333.1101, *et seq*, requires hospitals to review professional practices and procedures. *Attorney General v Bruce*, 422 Mich 157, 161; 369 NW2d 826 (1985). "To encourage and implement productive peer review procedures, the Legislature has provided that the information and records developed and compiled by peer review committees be confidential and not subject to court subpoena." *Id.*

> Confidentiality 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.

Id. at 169 quoting *Bredice v Doctors Hosp, Inc*, 50 FRD 249, 250 (D DC 1970).

The plain language of the statutes, as well as case law precedent, support that incident reports such as the one in this case, are confidential. It should not be used for any purpose other than that set forth by statute, and the "facts" should not be parsed out and disclosed to a plaintiff in litigation.

A. Statutory Support for Protecting the Confidentiality of Incident Reports

1. Under well-established principles of statutory interpretation, the peer review privilege applies to the facts contained within peer review documents, such as the incident report in *Harrison* and the one in this case.

"A court's primary purpose in interpreting a statute is to ascertain and effectuate legislative intent." *Michigan Educ Ass'n v Secretary of State*, 489 Mich 194, 801 NW2d 35 (2011) quoting *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). That intent is determined from the plain language of the statute. See *United States Fidelity Ins & Guar Co v Michigan Catastrophic Claims Ass'n*, 484 Mich 1, 13; 795 NW2d 101 (2009). "Courts may not speculate regarding legislative intent beyond the words expressed in a statute. Hence, nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself." *Michigan Educ Ass'n, supra* at 217-218. "If the language of a statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *United States Fidelity, supra* quoting *Sun Valley Foods Co. v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

There are several statutory sections containing peer review privileges.[3] Those that derive from the public health code are to be "**liberally construed for the protection of the health, safety, and welfare of the people of this state.**" MCL 333.1111(2).

One of those Public Health Code sections that is to be "liberally construed" is 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...are confidential, shall only be used for the purposes provided in this article, are not public records, and are not subject to court subpoena."

[3] In addition to the statutes analyzed here, see MCL 331.533: "...[T]he record of a proceeding and the reports, findings, and conclusions of a review entity and data collected by or for a review entity under this act are confidential, are not public records, and are not discoverable and shall not be used as evidence in a civil action or administrative proceeding."

The second peer review provision to be "liberally construed" under the Public Health Code, MCL 333.21515, is almost identical to MCL 333.20175(8) and states: "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."

According to the plain language of these statutes, if an incident report (1) is a record, contains data, or is a memorialization of knowledge, and (2) was collected for or by individuals or committees assigned a review function, then the information is confidential and not available for court subpoena. Rather, it can only be used for a purpose permissible under Article 17.[4] Disclosure during the course of litigation for any reason is not a permissible purpose.

"Records", "data" and "knowledge" all contemplate factual information:

Record:

> **"**1. [A]n account in permanent form, esp in writing, preserving knowledge or information **about facts or events**". *Collins English Dictionary, Complete and Unabridged 10th Ed.*

Datum [*pl. data*]:

> "1. [A] single piece of information; **fact**". *Collins English Dictionary, Complete and Unabridged 10th Ed.*

Knowledge:

> "1. **[T]he facts**, feelings or experiences known by a person or group of people". *Collins English Dictionary, Complete and Unabridged 10th Ed.*

Under these definitions, an incident report containing factual statements clearly falls within the privilege. Nothing in the statutory language limits the privilege to the deliberative process, and nothing in

[4] Permissible purposes include reducing morbidity and mortality and improving quality of care and patient safety, § 21513(d), and reporting of disciplinary action, §20175(5) and (6). However, disciplinary disclosure is sharply circumscribed, liming disclosure to (i) the name of the individual disciplined, (ii) a description of the disciplinary action, (iii) the grounds for action, and (iv) the date of the incident. §20175(7).

the statutory language prescribes a period one must wait until reporting an event in order to have the privilege apply. It is to whom the information is disclosed – not when that information is disclosed.

The statutes do not contain exceptions for judicial review for any purpose. In fact, all that is generally needed to determine whether the privilege applies is testimony that it is a record created by or for a peer review entity. The content of the document is irrelevant. See *Johnson v Detroit Med Ctr*, 291 Mich App 165, 169, n 1, 804 NW2d 754 (2010) (holding that a list of the contents of a privileging and credentialing file was not required because everything in the file was protected).

While there may be times when the result of confidentiality is that certain facts may not be discovered during litigation, that is a tradeoff that the Legislature has accepted in order to promote forthcoming and candidness during the peer review process. Once a communication is deemed privileged, it cannot be used for *any* purpose – even impeachment. See *People v Stanaway*, 446 Mich 643, 662; 521 NW2d 557 (1994).

It is also a tradeoff that is accepted in the context of other privileges. For example, if a party does not recall information, the opposing party is not entitled to breach the attorney-client privilege to determine whether the party is lying or whether the party at one time knew and advised his or her attorney. If an individual asserts a Fifth Amendment privilege while testifying, we continue on the best we can without those facts. Privileges "are not designed or intended to facilitate the fact-finding process or to safeguard its integrity. Their effect instead is clearly inhibitive; rather than facilitate the illumination of truth, they shut out the light." *People v Warren*, 462 Mich 415, 428; 615 NW2d 691 (2000) quoting 1 McCormick, Evidence (5th ed.), § 72, pp 298-299. Just as in the attorney-client privilege context, if facts are not obtainable in a non-privileged way, they cannot be obtained.

While an attorney has certain ethical duties to prevent false testimony by his or her client, see MRPC 3.3, there is no authority that allows commonplace fishing expeditions into privileged documents during the litigation to determine compliance with those ethical duties. Rather,

> [u]pon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered, or, if it has already been offered, that its false character should be immediately disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

MRPC 3.3(e). In our self-regulated profession, we trust attorneys to abide by the rules of professional conduct. When they do not, the appropriate remedial action is taken through the Michigan Attorney Discipline Board. Routinely abrogating the privilege and requiring judicial regulation should not be permitted.

2. The statute does not allow waiver of the confidentiality protection for the purposes of litigation.

The Michigan statutory scheme does not include a waiver provision[5] – and one should not be implied. Creating a judicial waiver exception when a defense is asserted in a medical malpractice claim would violate public policy. "Applying waiver principles to peer review communications renders meaningless existing confidentiality protections, since physicians will always fear that one of the participants will voluntarily disclose privileged information." Massachusetts Law Review, 2002, v86 n4, *The Medical Peer Review Privilege: A Linchpin for Patient Safety Measures*.

B. The Case Law Interpreting the Peer Review Privilege Does Not Support the Radical Departure in *Harrison*.

An examination of the case law issued by this Court and the Court of Appeals demonstrates that the *content* of peer review has never been relevant to determining whether the peer review privilege applies. Rather, it is the purpose for which the documents are generated or submitted that governs. As

[5] This is different than other states, such as West Virginia, that specifically allow an individual to waive the privilege. See W. Va. Code §30-3C-3 (providing that an individual "may execute a valid waiver authorizing the release of the contents of his file.")

long as a document is collected or maintained by or for a review entity or individual, the privilege bars disclosure. Similarly, the Court of Appeals in *Harrison* erroneously placed emphasis on *when* the incident report was created. There is no exception for facts and no exception for statements made close in time to an event. Rather, the focus is solely on the purpose of the document.

1. ***Monty v Warren Hosp Corp*, 422 Mich 138, 366 NW2d 198 (1985) – The procedure for determining whether the privilege applies focuses on the purposes of the document, not the content or the time it is created**

1985 was a landmark year in the development of the body of case law seeking to interpret the peer review privilege statutes. In that year, both *Monty v Warren Hosp Corp* and *Attorney General v Bruce*, still considered to be seminal cases, were decided; oral argument was held on the same day, and *Monty* was issued shortly before *Bruce*.

In *Monty*, the Court considered the appropriate means for determining whether documents fell within the peer review privilege. Notably, neither the trial court nor this Court required review of the *content* of the documents. Rather, this Court noted that it would be "proper for the trial court to require identification of the documents by date and author." *Monty v Warren Hosp Corp*, 422 Mich 138, 146; 366 NW2d 198 (1985). Further, in determining whether a particular individual or committee is assigned a peer review function, the Court noted that the trial court *may* consider bylaws and internal regulations. *Id.* at 147.

The Court also indicated all trial courts could (but were not required to) consider was whether the committee's function was one of current patient care or retrospective review. To support its holding, it cited case law from foreign jurisdictions. The Court of Appeals relied on those same foreign cases in *Harrison*, but misapplied them.

One of those cases was *Bredice v Doctors Hosp, Inc*, 50 FRD 249 (D. DC. 1970). The discovery sought in that case included any Board of Committee minutes or reports concerning the patient's death and reports to the hospital's insurance carrier. Significantly, the case was brought in federal court - no

statutory privilege applied. So, there was no statutory language to define the scope of any privilege. Rather, the Court was deciding whether the Joint Commission on Accreditation of Hospitals' ("The Joint Commission") requirement that an accredited hospital hold committee review proceedings was a basis for applying a federal common law privilege.

The Court, in holding a federal privilege applied, noted many of the policy reasons for maintaining confidentiality of review meetings. In the course of that, and considering **only** the type of review meeting required by the Joint Commission (i.e., staff meetings held on a monthly basis to review clinical work done), the Court noted that the meetings "are not part of current patient care but are in the nature of a retrospective review of the effectiveness of certain medical procedures." *Id.* at 250.

Nothing in that opinion requires a certain period of time to pass to render information privileged. Rather, the focus is on the purpose of the disclosure. In *Bredice*, the purpose of the disclosure was educational staff meetings.

The following example demonstrates the distinction between a peer review purpose and a current patient care purpose, even when both reports occur immediately after an incident. If a nurse and a physician are discussing a patient's fall and the reason for that fall in order to assist with diagnosis of an injury and proper treatment, that discussion would not fall within the purview of the privilege. (Discussed below, this report *not* being included in the medical record is not grounds for invading the privilege.) If, however, the nurse is completing an incident report so that a risk manager can then follow up on the incident in an effort to determine how it occurred in order to prevent it from happening in the future, the privilege applies. Even if the nurse fills out the incident report immediately after the event, it is the *purpose* of the disclosure that governs whether the privilege applies – not how soon after the event.

Another case relied on by both the Court in *Monty* and misapplied by the Court of Appeals in *Harrison* was *Davidson v Light*, 79 FRD 137 (D Co, 1978). Again, since this is a federal court case, there

was no statutory language defining the scope or applicability of the privilege. *Davidson* involved a plaintiff's attempt to compel production of an "Infection Control Report" generated by the "Infection Control Committee". The court, while noting that "[t]he strength of the policies supporting both positions place this matter nearly in equipoise", ultimately decided that the type of committee in *Davidson* pushed the balance in favor of disclosure. *Id.* at 139. The function of the infection committee was to investigate the source of an infection of a current patient. In other words, it was for current patient care – to help provide treatment to that particular patient and perhaps other patients that contracted that infection. The purpose of the committee was "not to formulate or review hospital policies generally". *Id.* While there was mention of discovery of factual data not impeding the policy reasons for the privilege, that was not central to the court's holding. Nor was the content of the information sought to be protected. Rather, as in *Bredice*, it was the function and purpose of the committee that controlled.

The final case cited on this point in *Monty* and *Harrison* was *Coburn v Seda*, 101 Wash 2d 270, 677 P2d 173 (1984). There, the court considered whether, based on Washington's statute, the privilege applied to medical malpractice actions or only actions where one health care provider sued another. The Court held it applied to malpractice actions. The court noted that the facts are not within the scope of the privilege **to the extent those same facts were obtained from a different source.** *Id.* at 277. To the extent the source of the facts – i.e., the disclosure – would be though the peer review documents, the privilege would bar their disclosure.

That is the key. When one says that the peer review privilege cannot be used to shield "facts", and that voluntary submission of facts to one assigned a review entity does not cloak those facts in privilege, it is properly understood to mean this: Any of the pieces of paper that a peer review entity requests to be completed or submitted cannot be discovered, regardless of whether those documents contain factual information, nor can a review entity be deposed to determine the facts of which it is aware. Rather, the

patient can depose the witness and the witness must testify as to the facts in his or her memory even if those same facts were relayed to a peer review entity. However, the peer review documents cannot be invaded to learn those facts if they are not available elsewhere, such as cases where a witness's memory has faded.

The Court in *Coburn* ultimately remanded for a determination of whether the particular committee that generated the report fell within the statutory definition, but noted "the Request for Production seeks the report of the hospital review committee and falls squarely within the statutory language protecting 'written reports' from discovery" and was nondiscoverable (assuming the committee was within the statutory definition). In fact, the Court refused to recognize in camera review as a necessary procedure. *Id.* at 278.

In distinguishing information that should be disclosed in an interrogatory answer as opposed to that which was privileged, the court distinguished between information necessary to establish the applicability of the privilege (i.e., the name of the committee) with "substantive information about specific cases and individuals". *Id.* at 278. It held the latter was not discoverable through interrogatories.

2. ***Attorney General v Bruce*, 422 Mich 157, 369 NW2d 826 (1985) – Peer review protection is broadly applied, exceptions narrowly construed; the "Original Source" rule is applied**

Shortly after *Monty*, the Court issued its opinion in *Attorney General v Bruce*, 422 Mich 157, 369 NW2d 826 (1985). The primary issue in that case was whether peer review privilege only pertained to court proceedings or applied generally, allowing hospitals to maintain the confidentiality of peer review documents even when they were requested by the attorney general.

The Court focused on the language in the statutes allowing peer review information to "be used only for the purposes provided in this article." *Id.* at 165, quoting § 21515. "This language is unambiguous. Where the statutory language is plain and unambiguous, judicial construction or

interpretation which would distort the plain meaning is precluded." *Id.* citing *Jones v Grand Ledge Public Schools*, 349 Mich 1, 9-10; 84 NW2d 327 (1957).

The Court narrowly construed the exception to § 20175 requiring disciplinary action to be reported, determining that the subsection requiring hospitals to report the "relevant circumstances" prompting the discipline "contemplates an explanation in general terms, of the reasons for the hospital's actions, which could serve as a basis for the board's own investigation." *Id.* at 168.

While not directly considering the "facts versus deliberations" issue, the Court did note, analyzing the various interests of the parties, that the same information was available to the Attorney General. In other words, the "facts" were not privileged even though they were contained in peer review material, but those facts could only be obtained from a non-peer review source:

> The department may interview hospital employees and staff members who have personal knowledge of the activities under investigation and may obtain patient records. The Attorney General is empowered to obtain a court order requiring such testimony and production of such records. MCL § 333.16235; MSA § 14.15(16235). It is precisely this broad authority given the department to conduct investigations that belies the Attorney General's argument that peer review committee records are essential to departmental investigations. To the contrary, the Legislature has enabled the department to utilize much the same information in its investigation as was available to the hospital's peer review committee.

Id. at 170.

The Court, in essence, adopted an "original source" rule.

3. *Gallagher v Detroit-Macomb Hosp Ass'n*, 171 Mich App 761, 431 NW2d 90 (1988) – Consistent with precedent, focuses on the purpose of an incident report, not the content, to determine whether privilege applies.

In this case, the Court of Appeals upheld the trial court's refusal to allow introduction at trial of an incident report drafted by hospital staff. *Gallagher v Detroit-Macomb Hosp. Ass'n*, 171 Mich App 761, 763; 431 NW2d 90 (1988). The Court relied on the testimony of a hospital administrator that the incident report was prepared for a review purpose, "Thompson explained that an incident report is completed for all unusual occurrences at the hospital and that its purpose was to assist the hospital in monitoring its own

activities and reduce accidents, injuries, morbidity and mortality at the hospital." *Id.* at 769. Once again, the *content* of the incident report was irrelevant to the determination of whether the privilege applied.[6] It was the purpose of its preparation and the function of the committee that used it.

4. *Dye v St. John Hospital and Medical Center*, 230 Mich App 661, 584 NW2d 747 (1998)– the plain language of the statue applied to prohibit disclosure of any information in the peer review file

Dye v St. John Hospital is another example showing that the purpose of the document and committee is the relevant inquiry - not the content of the information. There, the plaintiff sought a privileging and credentialing file. The defendant introduced evidence establishing that the privileging and credentialing committee was established "to review the professional practices in the hospital for the purposes of reducing morbidity and mortality, improving the care provided [to] patients in the hospital, and to insure that physicians are granted privileges consistent with their individual training, experience and other qualifications." *Dye v St. John Hosp & Med Ctr*, 230 Mich App 661, 664; 584 NW2d 747 (1998). The file contained information collected by or for committee members, including letters of recommendation and peer evaluations. *Id.* at 664-665.

On plaintiff's motion to compel, the trial court conducted an in camera review of the file. It decided that 24 documents were not privileged and ordered them disclosed, including the reference letters and evaluations. The Court of Appeals held that the plain language of the statute barred disclosure:

> Defendant contends that the statutory sections quoted above demonstrate 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 within hospitals and health facilities. Therefore, defendant asserts, because the requested materials were collected by or for its credentials committee, which exercises a professional review function, the materials sought by plaintiff are not subject to discovery. The plain meaning of the statutory language would support that conclusion. *McCready v. Hoffius*, 222 Mich. App. 210, 215, 564 NW2d 493 (1997).

[6] The one reference made to the content pertained solely to support the conclusion that even if it was error to exclude the report, the error was harmless. *Gallagher, supra* at 770.

Dye, supra at 666-667.

The Court of Appeals rejected the plaintiff's argument that the privilege only applied to retrospective review, analyzing the foreign cases cited in *Monty*: "The only import of these precedents is that certain 'current patient care' issues are so pressing an immediate that the provision of confidentiality is unnecessary to facilitate open discussion by a reviewing committee." *Id.* at 668.

The Court of Appeals also rejected that the documents were not collected "for or by" the review entity because they were submitted by others:

> ...Dr. Paz submitted these materials, or had them submitted on his behalf by colleagues, references, and so forth, pursuant to expectations or directives of the credentials committees. As in any situation regarding application for professional employment, Dr. Paz was aware of the requirements of the committee with respect to the credentials, endorsements, and other materials it wanted to review before granting staff privileges. In that sense, materials in the file relating to Dr. Paz' application for privileges were "collected for or by" the committee and the confidentiality provisions of the statutes apply.

Id. at 670-671. Finally, the Court explained that the facts – as they were available from *other* sources – could still be discovered:

> Plaintiff is free to pursue discovery of information contained in the credentials file **if it is available from other sources.** Our analysis of the statutes at issue here indicates a legislative intent to prohibit litigants from using the files of a review entity like the credentials committee as a "clearinghouse" of information facilitating easy discovery; however, placement of a document within such a file does not protect against its discovery **if available from another source.**

Id. at 674, n 11.

The same result should apply here. When a hospital has a policy that for any unusual occurrence an incident report is generated, and that report is submitted to risk management, the purpose being to monitor events or otherwise analyze to improve patient care, the entire report is privileged. If a nurse observed a fall, and wrote an entry regarding the fall in the medical record or has an independent recollection, a plaintiff can certainly depose that nurse. However, if that information is not available

from the original source, because the nurse did not make an entry in the record or cannot remember, the plaintiff cannot obtain that same factual information through privileged records.

5. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 584 NW2d 455 (1999) – Evidence that hospital incident reports were completed to improve patient care was sufficient for privilege to apply

In *Gregory v Heritage Hosp*, decided *sub nom*, *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 584 NW2d 455 (1999), the Court held the peer review privilege prevented disclosure of an incident report, again not based on the content of the report, but the purpose. An affidavit established that the purpose of the incident report was to "maintain[] health care standards at the hospital, improv[e] the quality of care provided to patients, and reduc[e] morbidity and mortality within the hospital." *Id.* at 42. The Court explained:

> Hospital personnel are expected to give their honest assessment and reviews of the performance of other hospital staff in incidents such as the one in the present case. Absent the assurance of confidentiality as provided by §§ 21515 and 20175(8), **the willingness of hospital staff to provide their candid assessment will be greatly diminished.** This 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.

Id. Nowhere in the opinion does the Court suggest that the factual statements within the incident reports may be discoverable. On the contrary, without the guarantee of confidentiality, the willingness of staff to set forth a candid rendition of those facts will be diminished, impeding the purpose of peer review.

6. *Centennial Healthcare Mgt Corp v Michigan Dep't of Consumer & Industry Svs*, 254 Mich App 275, 657 NW2d 746 (2002) – Misunderstood and misapplied

Despite the long line of precedent, after the Court of Appeals issued its opinion in *Centennial Healthcare Mgt Corp v Michigan Dep't of Consumer & Industry Svs*, 254 Mich App 275, 657 NW2d 746 (2002), plaintiffs started arguing that factual information in peer review files was not privileged and needed to be disclosed.

Properly understood, *Centennial* is a very narrow, fact-specific holding that does not apply in the typical medical malpractice case where a plaintiff is seeking peer review documents. In that case, the Department conducted an annual survey of a nursing home owned by Centennial. As part of that survey, the Department requested all incident reports and accident reports for the prior six months. Centennial refused to produce them, citing peer review, but ultimately provided three reports.

The nursing home was cited for forty-nine deficiencies, and imposed certain enforcement remedies. As part of a revisit, the Department again requested incident and accident reports. Afraid of retaliation, Centennial provided several reports. It then filed a declaratory judgment action seeking a ruling that the incident reports were encompassed by the peer review privilege.

The difference between *Centennial* and the prior peer review decisions is that nursing homes are required to maintain incident reports that can be made available for review by the State. See *Centennial, supra* at 285-286, quoting 1979 AC, R 325.21101. The incident reports must contain certain information. *Id.*

The Court, in distinguishing facts from the deliberative process, ordered the facts disclosed but not the deliberative process because the facts were required to be in the incident report that would be available to the State. The nursing home was taking incident reports that it created pursuant to the administrative rule, and then giving them to its peer review committee to avoid disclosure to the State. In fact, the State did not argue that factual information submitted for the purpose of peer review was not protected. Rather, it argued:

> The facility is free to keep confidential any other records that are prepared or collected by its peer review committee, but it is not permitted to make confidential **otherwise non-confidential accident records and incident reports** by the simple expedient of giving them to their peer review committee or even having them prepared by that committee during the review process.

Id. at 281.

What the nursing home in Centennial was doing would be the equivalent of a hospital giving medical records[7] to its peer review committee and using that as a basis not to disclose or having a committee member create the medical record. It is **not** the equivalent of a peer review entity having individuals create incident reports for a peer review purposes, and there is no exception that requires those incident reports to be disclosed.

Nevertheless, *Centennial* has been expanded beyond the facts of the case to require any factual information in an incident report prepared for a peer review committee to be disclosed.

7. ***Johnson v Detroit Med Ctr*, 291 Mich App 165, 804 NW2d 754 (2010) – No in camera review of the content of peer review is needed**

After *Centennial*, despite trial courts going astray, the Court of Appeals held in *Johnson v Detroit Med Ctr*, 291 Mich App 165, 804 NW2d 754 (2010), that once a determination was made that the peer review privilege applied, no piecemeal dissection of the content of the documents was required. In *Johnson*, a medical malpractice plaintiff sought a physician's privileging and credentialing file. The Court held that "§ 21515 clearly and unambiguously prohibits the discovery of [the physician's] credentials and privileges file." *Id.* at 168-169. Therefore, the file could not be disclosed. The Court rejected the plaintiff's argument that each item in the file must be individually evaluated. *Id.* at 169, n 1. All of the documents were in the file for the purpose of evaluating the physician's privileges, and therefore, all of the documents were protected from disclosure.

Johnson properly followed case law precedent. A determination that the privilege applied was made based on the purpose of the file – not on the content of the documents.

---

[7] Just as nursing homes are required to create incident reports available for state inspection, hospitals are required to maintain medical records that are available to the patient. MCL 333.20175(1) sets forth what information must be maintained in the patient's medical records: (1) tests, (2) examinations performed, (3) observations made, (4) treatments provided and (5) the purpose of hospitalization. MCL 333.20175. There is not requirement that factual details pertaining to an incident be contained in the medical record.

8. *Harrison v Munson Healthcare, Inc*, 304 Mich App 1, 851 NW2d 549 (2014) – The Court of Appeals obliterates the peer review privilege

In *Harrison v Munson Healthcare, Inc*, 304 Mich App 1, 851 NW2d 549 (2014), the Court sanctioned trial courts delving into peer review protected documents for purposes other than determining whether the privilege applied and held that any facts contained in peer review documents were not subject to the privilege. The Court relied on *Centennial, supra*, despite that fact that there was no authority requiring the hospital to maintain the incident report for State inspection purposes (or more appropriately, medical malpractice plaintiff inspection purposes). *Id.* at 32. The Court held that "[o]bjective facts gathered contemporaneously with an event do not fall within the definition" of "collected". *Id.* The Court held that to be "collected" by a peer review committee, material must be "accumulated for study". *Id.* Thus, the Court held the peer review privilege did not apply to factual data in incident reports.

The Court did hold, however, that the peer review privilege applied to the analysis of the peer review investigator. The Court did not address the contradiction between its holding that the facts in the incident report were not collected for a peer review purpose and its analysis that those same facts were then used for a peer review investigation. See *Id.* at 33-34.

The Court in *Harrison* relied on a series of foreign cases, all of which are distinguishable. In *State ex rel AMISUB, Inc v Buckley*, 260 Neb 596, 614; 618 NW2d 684 (2000), the Court held that the committee to which the incident report was submitted was not within the gamut of committees that enjoyed the statutory peer review privilege. So, the incident report was not privileged on that basis – regardless of whether it contained facts or analysis. Although the Court added in dictum that the facts would not be protected pursuant to a statute stating the statute should not be "construed as providing any privilege....to any facts or information contained in [medical records] or preclude or affect discovery of or production of evidence relating to hospitalization or treatment...", that statute was specifically amended after the case was decided. This amended statute now better explains the applicable rule in Nebraska (and

the one that should apply in this case) – "Nothing in this section shall be construed to prevent discovery or use in any civil action of medical records, documents, or information **otherwise available form original sources**....but the records, documents or information **shall be available only from the original sources and cannot be obtained from the peer review committee's proceedings or records."** See Neb Rev St § 71-7912. For this same reason, *Babcock v Bridgeport Hosp*, 251 Conn 790, 742 A2d 322 (1999) on which the Court in *Harrison* relied is also distinguishable.

The Court of Appeals also erred by relying on *Columbia/HCA Healthcare Corp*, 113 Nev 521, 936 P2d 844 (2010). Unlike Michigan's statute that protects the "records, data and knowledge" collected "for or by" a peer review entity, Nevada's statute only protects the "proceedings and records" of such committees. In Nevada, "Records" is interpreted as the records of the review proceedings. *Id.* Therefore, the case has no applicability because the statutes are too dissimilar.

It is the same with the law of Arizona. The Court of Appeals relied on *John C Lincoln Hosp & Health Ctr v Superior Court In and For County of Maricopa*, 159 Ariz 456, 768 P2d 188 (1989). The Arizona statute specifically protects only "proceedings, records and materials prepared in connection with" specific reviews. This is far narrower than "records, data and knowledge" collected by or for a peer review entity.

Based on the misplaced reliance of these foreign authorities, the Court of Appeals ordered the facts contained in a peer review incident report to be disclosed. "To hold otherwise", it continued, "would grant risk managers the power to unilaterally insulate from discovery firsthand observations they would prefer remain concealed." *Harrison, supra* 304 Mich App 1, 851 NW2d 549 (2014).

This is not true. As is the case in Nebraska, the information can still be obtained from the original sources. The Court of Appeals erred in going beyond reviewing the purpose of the incident report and delving into the content. It also applied the statutory language far too narrowly, imposing requirements

on peer review collection that are not required by the statute (i.e., that the information must be collected for the purposes of retrospective study).

For these reasons, *Harrison* was wrongly decided and the Court *Krusak* erred in relying on that opinion.

C. Public Policy

In addition to statutory and case law support, public policy supports maintaining privilege over both facts and analysis contained in peer review documents.

"The great underlying principle upon which the doctrine of privileged communications stands, is public policy." *Bacon v Michigan Cent R Co*, 66 Mich 166, 169; 33 NW 181 (1887). "[T]he concept of privilege thus supersedes even the liberal discovery principles of this state." *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 594 NW2d 455 (1999). Construing the peer review privilege to include factual statements made at or near the time of an event, may on rare occasion prevent a plaintiff from obtaining evidence to support a medical malpractice case. All privileges "require[] the individual to surrender his personal rights, and to suffer loss for the benefit of the common welfare." *Id.* at 169-170.

"The peer review privilege represents a legislative choice between medical staff candor and the plaintiff's access to evidence." *Young v Saldanha*, 189 W Va 330, 334; 431 SE2d 669 (1993) quoting *Shroades v Henry*, 187 W Va 723, 727; 421 SE2d 264 (1992). The peer review privilege is an essential tool for improving patient safety and the quality of health care. So much so, that nearly every state has some form of statutory peer review privilege. See *Trinity Med Ctr, Inc v Holum*, 544 NW2d 148, 153 (ND 1996).[8]

As explained by courts in West Virginia and Illinois:

> The purpose of this legislation is not to facilitate the prosecution of malpractice cases. Rather, its purpose is to ensure the effectiveness of

[8] "[A]lthough nearly every state has some form of statutory privilege for medical peer review, it appears that no two statutes, or courts' interpretations of them, are alike."

> professional self-evaluation, by members of the medical profession, in the interest of improving the quality of health care. The Act is premised on 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.

Young v Saldanha, 189 W Va 330, 334; 431 SE2d 669 (1993) quoting *Daily Gazette Co v West Virginia Bd of Medicine*, 177 W Va 316, 322; 352 SE2d 66 (1986) quoting *Jenkins v Wu*, 102 Ill 2d 468, 479-480; 468 NE2d 1162 (1984).

The privilege is intended to avoid the chilling effect that would otherwise plague peer review proceedings. See *Young, supra* at 334.

As the dissent in *Bruce, supra* at 186 recognized, "To be sure, there is a legitimate public interest in encouraging participation in peer review." Hospitals need staff and employees to come forward and volunteer information. Those individuals are more likely to be open, honest and complete if they are assured that everything they reveal to a risk manager in an incident report will be confidential. Hospital staff and employees need to work together to provide quality health care to patients. When a member of that team is apprehensive that their disclosure could later be discovered by the other members of the team in subsequent litigation, they will be less likely to be completely forthcoming. See *Coburn v Seda*, 101 Wash 2d 270, 677 P2d 173 (1984) ("Individuals may be hesitant to participate in peer or quality review proceedings if anonymity is not assured.").

D. Practical and Public Policy Problems of *Harrison*

In addition to the statutory language, case law, and public policy support, the practical problems in applying *Harrison* demonstrate that it is not a workable rule.

First, the floodgates are opened. Courts will be required to do in camera reviews in every medical malpractice case in which an incident report exists.

In all of those reviews, the courts will be faced with the tedious and often difficult task of distinguishing "facts" from "non-facts" – i.e., opinion or analysis. The *Harrison* case demonstrates the

difficulty with this distinction. The language of the report was: "during procedure bovie was laid on drape, in a fold." After an intensive analysis of the grammar of the report, the Court of Appeals concluded that this documented the "fact" that the bovie was intentionally placed on the drape (in a fold). (The author, however, testified that she did not see the bovie physically placed in a fold, but meant that when she looked, she saw it lying there.) Even assuming she intended the grammar as it was written, since she did not see it placed, it was her retrospective conclusion – an opinion. This simple demonstration shows that facts are not simply black and white, but often the way they are worded involves interpretation and evaluation.

Another practical problem is that incident reports often focus on one area of inquiry and do not give a comprehensive factual recitation. They are "bare bones", as demonstrated by the *Harrison* incident report, and written quickly by an individual not familiar with potential uses in litigation. Allowing the routine disclosure of factual information in incident reports has two negative consequences in this regard. First, unreliable evidence is being introduced in litigation because "the whole story" is not being told. Second, armed with information that the knowledge that the incident report will be released in litigation, hospitals are in a difficult position of having to reevaluate a system that works very well for peer review purposes, but not well for litigation.

E. <u>The Proper Scope of the Peer Review Privilege and How to Resolve the Issue.</u>

MSHRM requests that this Court issue an opinion that simply reaffirms and clearly articulates already established precedent:

1. The purpose, not the content, of a document determines whether the peer review privilege applies.

2. While factual information is not necessarily covered by a blanket of privilege, that information can only be obtained from the "original source", not from peer review documents.

So, when faced with determining whether a document is subject to the peer review privilege, the trial court should consider only the purpose of the document. If it contains "records, data or knowledge", and it was collected by an individual or entity assigned a peer review function, it is privileged. The content of the document is irrelevant to this determination. Plaintiffs have the option of obtaining that same factual information from the "original source" but cannot obtain it through peer review documents. Courts cannot invade the privilege to "double check" a witness' credibility or testimony.

This result is in line with the plain language of the statute, established case law precedent and promotes the public policy that is the basis of the privilege.

III. 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."

The proper rule and procedure is to determine whether information is protected from disclosure by the peer review privilege by considering the purpose for which the information was obtained -- not the substance of the information. "Records", "data" and "knowledge" all contemplate factual information, and therefore, facts contained in peer review document cannot be disclosed from that document if it was "collected for or by individuals or committees assigned a review function." That is the only inquiry facing trial courts. It is irrelevant *when* the information was obtained. All that matters is that it was obtained by an individual or committee assigned a review function. This is how case law has properly interpreted the privilege for years. And that is how the privilege must continue to be interpreted to promote the public policy basis for the privilege.

For these reasons, and all of the reasons set forth above, the trial court erred in requiring the defendants to produce the first page of the incident report.

RELIEF REQUESTED

Therefore, MSHRM respectfully requests that the trial court's order requiring disclosure of the factual information in a peer review protected incident report be REVERSED.

DATED: November 5, 2014

Stephanie C. Hoffer (P71536)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Amicus Curiae Michigan Society
of Healthcare Risk Management
100 Monroe Center NW
Grand Rapids, MI 49503-2802
616-774-8000