STATE OF MICHIGAN
IN THE SUPREME COURT

JOHN KRUSAC, Personal Representative of the ESTATE OF DOROTHY KRUSAC,

Plaintiff-Appellee,

v.

COVENANT MEDICAL CENTER, INC., d/b/a COVENANT MEDICAL CENTER-HARRISON, d/b/a COVENANT HEALTHCARE,

Defendant-Appellant,

Supreme Court No. 149270

Court of Appeals No. 321719

AMICUS CURIAE BRIEF
OF
THE REGENTS OF
THE UNIVERSITY OF MICHIGAN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Michigan

Other jurisdictions

STATUTES

Michigan

Other jurisdictions

OTHER AUTHORITIES

RELEVANT 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, or an institution of higher education in this state that has colleges of osteopathic and human medicine, are confidential, shall be used only for the purposes provided in this article, are not public records, and are not subject to court subpoena.

MCL 331.533:

> The identity of a person whose condition or treatment has been studied under this act is confidential and a review entity shall remove the person's name and address from the record before the review entity releases or publishes a record of its proceedings, or its reports, findings, and conclusions. Except as otherwise provided in [MCL 331.532], the record of a proceeding and the reports, findings, and conclusions of a review entity and data collected by or for a review entity under this act are confidential, are not public records, and are not discoverable and shall not be used as evidence in a civil action or administrative proceeding.

STATEMENT IDENTIFYING INTEREST AS AMICUS CURIAE

The Regents of the University of Michigan have constitutional authority to generally supervise and control the university. Const 1963, art 8, § 5. The Regents are responsible for establishing the mission, goals and objectives of the University of Michigan Health System and supervising its operation and activities.

The University of Michigan Health System (UMHS) includes:

- The University of Michigan Medical School and its faculty group practice with more than 2,000 physician members in 20 clinical departments;
- The University of Michigan Hospitals and Health Centers comprising three hospitals, five specialty health centers, 40 outpatient health centers and 120 outpatient clinics throughout Michigan;
- The clinical activities of the University of Michigan School of Nursing; and
- The Michigan Health Corporation, the legal entity through which UMHS enters into partnerships, affiliations, joint ventures and other business activities.

As one of the largest health care systems in the state, UMHS has a compelling interest in the state of the law affecting health care providers and institutions, including the proper interpretation of Michigan's peer review statutes.

The University of Michigan has garnered national recognition for its innovative focus on improving the quality of patient care by prompt and transparent responses to unanticipated outcomes and patient concerns. UMHS has adopted a proactive, principle-based approach as an essential and integral component of its overall patient safety, peer review, and quality improvement architecture and review processes.

The central premise of this approach is that patients, providers, caregivers, and the institution will all benefit from a process that investigates and responds quickly and honestly to unanticipated outcomes and incidents. The processes employed to meet these goals include capturing incidents through patient safety reporting systems and aggressive data gathering; expeditiously arranging to meet patients' new, urgent clinical care needs; timely investigating and responding to patient safety and quality concerns; obtaining internal and external clinical expert reviews; engaging in comprehensive assessment; and coordinating longer-term follow-up care and other appropriate responses to identified concerns.

STATEMENT OF POSITION AS AMICUS CURIAE

The order granting leave to appeal directed the parties to address two issues:

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

The University of Michigan believes that *Harrison* failed to properly apply the plain and expansive language of Michigan's peer review statutes. Instead, the Court of Appeals decided, as a matter of policy, that protecting the confidentiality of factual information in an incident report is not necessary for effective peer review. The court erred in its analysis because the Legislature has exclusive authority to resolve the public policy questions regarding the need for peer review confidentiality and the scope of protections against use in litigation.

As amicus, the University of Michigan asks this Court to grant leave in *Harrison* and reverse the Court of Appeals, and vacate the circuit court's order in *Krusac* to the extent it is based on *Harrison*.[1]

INTRODUCTION

The Court of Appeals' interpretation of the peer review statutes is wrong. The Legislature has determined that Michigan's strong public interests in protecting the safety of patients and improving the quality of health care are best served by broadly and comprehensively protecting peer review material. The University believes the court misinterpreted the expansive and unambiguous language used by the Legislature and overlooked the existing precedent holding that incident reports are protected against disclosure, including *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 42-43; 594 NW2d 455 (1999); *Gallagher v Detroit-Macomb Hosp Assoc*, 171 Mich App 761, 778-779; 431 NW2d 90 (1988); and *Ligouri v Wyandotte Hosp & Med Ctr*, 253 Mich App 372, 374; 655 NW2d 592 (2002). The Court of Appeals lacked authority or justification to judicially craft an exclusion from the statutory protections for "factual information objectively reporting contemporaneous observations or findings . . . ." *Harrison*, 301 Mich App at 30.

The decision reflects a misunderstanding of the function and importance of incident or occurrence reports to an effective peer review system. An incident report—or a "patient safety report" at UMHS—is the initial step in the process for identifying an unanticipated outcome, gathering the facts, analyzing the causes, and, when appropriate, correcting the

[1] The University's brief will focus on *Harrison* rather than the circuit court's opinion in *Krusac*, which simply quoted and followed *Harrison*. [Opinion and order re: discovery, p. 2] The University also does not address the fact-specific question whether Covenant submitted adequate evidentiary support for its claim of peer review protection. [Plaintiff-appellee's brief on appeal, Argument I(B)]

deficient practice or procedure. Contrary to the Court of Appeals' characterization, a nurse does not "elect[] to place" information about an incident "on a risk management form rather than within the patient's medical record . . . ." *Id.* at 30-31. A physician or nurse does not submit an incident report to simply state what happened during patient care. The report does not serve to supplement the medical record; it is not just another entry in a patient's chart.

Rather, making a report represents a choice to proactively respond to a patient safety concern. An incident report is a flag, used to alert the institution that there may be a problem. At UMHS, a patient safety report serves to trigger the review process, calling attention to an event so a team of experienced professionals can promptly investigate, review the records, interview caregivers, patients and families, and consult with experienced and knowledgeable clinicians.

Confidentiality is just as critical at the start of the patient safety and quality improvement process as it is during the later reviews and evaluations. As this Court has recognized, "[a]bsent the assurance of confidentiality . . . , the willingness of hospital staff to provide their candid assessment will be greatly diminished." *Dorris*, 460 Mich at 42-43. Moreover, the diminished willingness to fully participate in the process 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.*

A hospital's ability to improve the quality of patient care does not depend solely on the analysis, recommendations, and actions resulting from the deliberative review process. Problems cannot be fixed if problems are not known. Unless the individuals involved in patient care report unanticipated outcomes, the personnel responsible for investigating

and reviewing may not learn about incidents. The opportunity for responding, learning, and improving may be lost.

Understanding and believing in the peer review protections are important when a physician, nurse, or staff member decides whether to make a report. The critical decision should not be influenced by a nagging doubt that the report may lose its confidentiality at some later time. There is no room for defensiveness, for looking over one's shoulder. And just as importantly, it is also not a time for rushing to judgment or jumping to conclusions based on incomplete information or first impressions in a report that reflects a single individual's point of view. The decision to make a prompt report should not be affected by concern that a brief description might be later disclosed and used as evidence—perhaps against the reporter—in civil or criminal litigation or in a licensing action.

The success of UMHS's quality improvement and patient safety program depends on the unwavering commitment of every person involved in patient care at its hospitals, health centers, and clinics. As the Legislature and this Court have recognized, confidentiality plays a vital role in encouraging candid and conscientious participation in the peer review process. But, the incentive is strong only when the individuals who are asked to step forward and report patient safety concerns believe the promise of confidentiality will be honored. The decision in *Harrison* is inconsistent with the Legislature's choice to advance this state's interest in patient safety and improved health care by broadly and comprehensively protecting information collected for peer review.

STATEMENT REGARDING PATIENT SAFETY AND QUALITY IMPROVEMENT AT THE UNIVERSITY OF MICHIGAN HEALTH SYSTEM

The University of Michigan is proud of its innovative approach to improving patient safety and gratified by its recognition as a national leader in advancing the quality of

patient care. The philosophy, approach, operation, and success of UMHS have been discussed at length in numerous publications. The following describes the components relevant to the questions presented in this appeal.

UMHS has implemented a comprehensive patient safety program designed to reduce mortality and morbidity and to improve patient care by the identification, analysis, and reduction of risks, which could cause or have caused preventable patient injury or impairment of patient safety. The organization-wide program is designed to reduce medical errors and hazardous conditions by utilizing a systematic, coordinated, and continuous approach to improving patient safety. This approach centers on mechanisms that support effective responses to actual occurrences and hazardous conditions; ongoing proactive reductions in medical or health care errors; and integration of patient-safety priorities in the design and redesign of all relevant organizational processes, functions, and services.

Each hospital department that provides or affects patient care is required to report identified patient safety risks and correct identified safety concerns. Each department must assure the participation of its members in the hospital-wide patient safety reporting system and in the preparation and implementation of corrective action plans. Patients, families and other individuals are encouraged to raise any questions or concerns.

UMHS policy requires that all incidents involving patients must be reported within 48 hours to the Office of Clinical Safety for quality management purposes. An "incident" is "any event which is not consistent with the desired, normal or usual operation of the hospital, department, or medical center." An injury does not have to occur for an incident to be reportable.

Reports about patient care concerns are brought to the Office of Clinical Safety through UMHS's online patient safety reporting system or by phone and email contacts from clinical staff, patients and families, billing and administrative services, or outside providers and facilities. UMHS policy informs all employees that patient safety reports are confidential and non-discoverable as provided by law. The reporting system, patient safety report forms, and related documents similarly advise UMHS staff that information will be used for quality improvement and maintained as confidential. By policy, patient safety reports are not included in patient medical records.

The written and oral reports submitted through the patient safety reporting system are assigned to the Office of Clinical Safety for investigation and evaluation. The Office of Clinical Safety employs patient safety consultants, who are experienced caregivers with backgrounds in specific clinical services, to investigate and evaluate patient safety concerns. Upon receipt of a patient safety report, patient complaint, or other information about patient care concerns, a consultant is assigned to perform an "event review." Senior leadership then determines what kind of further review will occur. The reports are maintained by the Office of Clinical Safety in a database for aggregate review by quality improvement and assurance committees and relevant clinical departments.

ARGUMENT

I. Factual statements about incidents collected for peer review purposes are confidential and protected against disclosure under Michigan's statutes.

The University submits that the Court of Appeals incorrectly interpreted the peer review statutes and erroneously concluded that reports about adverse events and unanticipated outcomes are not fully protected against disclosure. The distinction drawn

between factual information and deliberative content is inconsistent with the statute's plain language and contrary to prior decisions by this Court and the Court of Appeals.

A. The Legislature used broad and expansive language to describe the information that is protected against disclosure.

Statutory interpretation begins with the language used by the Legislature. *Hamed v Wayne Cty*, 490 Mich 1, 8; 803 NW2d 237 (2011). "An undefined statutory term must be accorded its plain and ordinary meaning." *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008). "A lay dictionary may be consulted to define a common word or phrase that lacks a unique legal meaning." *Id.*

Two peer review statutes, MCL 333.20175(8) and MCL 333.21515, apply to "records, data, and knowledge collected for or by individuals or committees assigned a professional review function . . . ." The third, MCL 331.533, applies to "the record of a proceeding and the reports, findings, and conclusions of a review entity and data collected by or for a review entity." Factual information in an incident report is protected under all three statutes.

1. Factual information in an incident report is protected as "records, data, and knowledge" under MCL 333.20175(8) and MCL 333.21515 and as "data" under MCL 331.533.

An incident report itself is a "record," *i.e.* "an account in writing or print . . . intended to perpetuate a knowledge of acts or events" or "something that serves to record: as . . . a piece of writing that recounts or attests to something." Webster's Third New International Dictionary, p. 1898 (1976). The factual statements in an incident report are part of a "record." Nothing in the statutory language indicates that only selected portions of a "record" are protected. The Legislature could have specified that the evaluations,

assessments, and recommendations in a "record" were protected, but that factual information is not protected. It did not.[2]

The factual description of an incident is also "data." The term is defined as "2. individual *facts*, statistics, or items of information; 3. A body or collection of *facts* or particulars; *information*." Random House Webster's College Dictionary, p. 316 (2001) (emphasis added). "Data" includes "*facts* and statistics collected together for reference or analysis." Oxford Online Dictionary.[3] See also, Webster's Third New International Dictionary, p. 577 (1976) (datum: "1 a : *something that is given either from being experientially encountered* or from being admitted or assumed for specific purposes: *a fact* or principle granted or *presented*; 1 b(1): material serving as a basis for discussion, inference, or determination of policy; 1 b(2): *detailed information of any kind.*"; emphasis added).

Moreover, the factual description in an incident report is also "knowledge." The term is defined as "1. acquaintance with facts . . . ; 4. awareness, as of a fact or circumstance; 5. something that is or may be known; information; 6. the body or truths or facts accumulated in the course of time; 7. the sum of what is known." Random House Webster's College Dictionary, p. 688 (2001). See, *Centennial Healthcare Mgt Corp v Dep't of Consumer & Indus Servs*, 254 Mich App 275, 287 n 9; 657 NW2d 746 (2002) ("Knowledge includes 'the sum or range of what has been perceived, discovered, or learned,' as well as 'specific

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[2] Other states have specifically excluded certain records from the scope of peer review protection. For example, Hawaii Rev Stat 624-25.5(d) provides that "[i]nformation and data protected from discovery shall not include incident reports, occurrence reports, statements, or similar reports that state facts concerning a specific situation . . . ."

[3] http://www.oxforddictionaries.com/us/definition/american_english/data?q=data (accessed October 16, 2014; emphasis added)

information about something.'"; quoting The American Heritage Dictionary of the English Language, p. 998 (3d ed, 1996)).

The Legislature's use of these expansive terms—records, data, and knowledge—must be viewed as a deliberate choice to afford protection to a broad class of information. *Dep't of Agric v Appletree Mktg, LLC*, 485 Mich 1, 10; 779 NW2d 237 (2010). Indeed, it is difficult to imagine terms with a broader scope than those used to define the information protected by the peer review statutes, especially when used as a collective phrase in MCL 333.20175(8) and 333.21515.

2. Factual information in an incident report is "collected for or by" individuals and committees with peer review functions.

To be protected under MCL 333.20175(8) and MCL 333.21515, the records, data or knowledge must be "collected for or by individuals or committees assigned a professional review function described in this article [article 17 of the Public Health Code]...." MCL 331.533 uses almost identical language: "data collected by or for a review entity under this act [1967 PA 270]."[4]

The Court of Appeals interpreted these phrases to mean that "a peer review committee 'collects' material by accumulating it for study." *Harrison, supra,* 304 Mich App at 31-32 (citing *Centennial,* 254 Mich App at 290). While that is the narrower of the possible definitions discussed in *Centennial,*[5] incident reports are "accumulated for study"

[4] "Review entity" includes a "duly constituted peer review committee" of a health facility, agency, network, organization or delivery system licensed under article 17 of the Public Health Code. MCL 331.531(2)(a)(iii) and (v).

[5] See *Centennial,* 254 Mich App at 288 ("To 'collect' means to 'bring together in a group or mass, gather,' or to 'accumulate as a hobby or for study,'" quoting The American Heritage Dictionary of the English Language, (3d ed, 1996), p. 372).

by the individuals and committees with assigned review functions. The narrative description—the "data" or "knowledge"—is "collected" so it can be studied and reviewed along with the remaining portions of the report.

In *Monty v Warren Hosp Corp*, 422 Mich 138; 366 NW2d 198 (1985), this Court stated:

> In determining whether any of the information requested is protected by the statutory privilege, the trial court should bear in mind that mere submission of information to a peer review committee does not satisfy the collection requirement so as to bring the information within the protection of the statute. *Id.* at 146-147 (citing *Marchand v Henry Ford Hosp*, 398 Mich 163, 168; 247 NW2d 280 (1976))

The physician in *Marchand* maintained records about a feeding technique "on [his] own initiative to see how this procedure worked." The hospital did not ask or require him to conduct the study. 398 Mich at 167. The physician presented his study at a general staff meeting. *Id.* at 168. This Court found that "the information sought by [the plaintiff] was not collected pursuant to a directive from" a review entity, and therefore, "the *ex post facto* submission does not satisfy the 'collection' criteria bringing the data within the ambit of the evidentiary privilege." *Id.*

In contrast, patient safety reports at UMHS are not created for another purpose unrelated to peer review and submitted *ex post facto* to a committee. The reports are required by hospital policy. They are generated and submitted expressly for use in investigating and reviewing incidents. The entire report, including factual information about an incident, is "accumulated for study" by individuals and committees with assigned review functions.

B. This Court has already held that incident reports are protected as peer review material.

Harrison did not discuss the existing precedent from this Court and the Court of Appeals holding that incident reports are protected against disclosure for use in litigation.

In *Gregory v Heritage Hosp*, decided sub nom *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26; 594 NW2d 455 (1999), the plaintiff sought discovery of an incident report regarding an assault by another hospital patient. The hospital used the incident reports and investigative documents for peer review purposes, *i.e.*, "maintaining health care standards at the hospital, improving the quality of care provided to patients, and reducing morbidity and mortality within the hospital." *Id.* at 42. This Court held that the trial court erred by ordering disclosure of the incident reports and other investigative documents, but remanded so that the plaintiff could have "the opportunity to challenge this evidence regarding whether it was actually collected for the purpose of retrospective review by the peer committee." *Id.* at 43.

Gregory favorably cited *Gallagher v Detroit-Macomb Hosp Assoc*, 171 Mich App 761; 431 NW2d 90 (1988). *Id.* at 40-41. In *Gallagher*, the hospital's procedure required preparation of incident reports for all unusual occurrences. The reports were forwarded to unit supervisors and department heads for further review and investigation and then to the hospital's legal affairs department. Information about specific incidents was tabulated with other reports to identify trends, patterns or problems and then routed to the hospital's safety or quality assurance committees. *Gallagher*, 171 Mich App at 769. The Court of Appeals held that the incident report prepared at the time of the patient's fall was protected against disclosure under MCL 333.20175(8) and 333.21515. *Id.* at 778-779. See also, *Ligouri v Wyandotte Hosp & Med Ctr*, 253 Mich App 372, 374; 655 NW2d 592 (2002)

(holding that written reports, investigations, and statements made concerning the circumstances of a patient's fall were protected against disclosure; citing *Dorris* and *Gallagher*).[6]

In *Harrison*, the Court of Appeals overlooked this existing precedent holding that incident reports are protected as peer review material. Instead, the court relied on *Centennial, supra,* 254 Mich App 275, another case that also did not mention or consider *Dorris, Gallagher* or *Ligouri*. And like *Harrison, Centennial* reflects a policy-based approach that disregards both the expansive language used by the Legislature and the prior contrary decisions from this Court and the Court of Appeals.

Centennial presented an unusual issue, and before *Harrison*, had been limited to its particular regulatory setting.[7] A state regulation required skilled nursing facilities to prepare incident reports and make them available to state compliance surveyors. The facility asserted that the regulation conflicted with MCL 333.20175(8). The Court of Appeals recognized that the description of items protected under the statute, *i.e.,* "records, data, or knowledge," is expansive. *Centennial,* 254 Mich App at 287 & n 9. The court

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[6] Incident reports have been protected against disclosure in several unpublished cases. See, *Lindsey v St John Health Sys*, unpublished opinion per curiam of the Court of Appeals, issued Feb. 6, 2007 (Docket No. 268296, 270042) (occurrence report protected against disclosure); *Maviglia v West Bloomfield Nursing & Convalescent Ctr, Inc*, unpublished opinion per curiam of the Court of Appeals, issued Nov. 9, 2004 (Docket No. 248796) (incident reports protected); *William Beaumont Hosp v Medtronic, Inc*, 2010 US Dist LEXIS 39093, *14-*16 (ED Mich Apr. 21, 2010).

[7] *Maviglia v West Bloomfield Nursing & Convalescent Ctr, Inc*, unpublished opinion per curiam of the Court of Appeals, issued Nov. 9, 2004)(Docket No. 248796), Opinion, p 2 (*Centennial*'s reasoning that factual information is not protected "should be limited to the context of where the state agency responsible for regulating nursing homes requires the collection of incident and accident information.")

interpreted "collected by or for" to mean "accumulate[d] material for study." *Id.* at 287, 290. Under those definitions, the court acknowledged that incident reports were accumulated for study by the facility's review committee. *Id.* at 290.

The court in *Centennial*, however, was apparently dissatisfied with the outcome that would result from applying the statute as written. Instead, *Centennial* looked to "the logic of the principle of confidentiality in the peer review context." *Id.* In the court's view, the logic did not require protection for "any and all factual material that is assembled at the direction of a peer review committee." *Id.* at 291. Moreover, the court also believed that the statutory protections should be limited when needed to "effectuate other purposes outlined in the Public Health Code." *Id.*

Centennial's policy-based interpretation is directly contrary to this Court's holding in *Atty Gen v Bruce*, 422 Mich 157; 369 NW2d 826 (1985). As recognized in *Bruce*, the language used by the Legislature in the peer review statutes prevails, even though disclosure might advance the "strong public interest" in licensing health professionals. *Id.* at 165, 170. See also, *Atty Gen v Kent Cmty Hosp (In re Lieberman)*, 250 Mich App 381, 388-389; 646 NW2d 199 (2002)(search warrant cannot be used to obtain protected peer review materials for use in criminal proceeding).

In *Harrison*, the Court of Appeals disregarded the statutory language and substituted its judgment about the proper balancing of the valid and competing public interests. The court explained its belief that maintaining confidentiality for factual reports is not necessary for a hospital's quality improvement program. 304 Mich App at 30-32. The court also pointed out the benefit to be gained from disclosing the factual description of an incident in a malpractice action. *Id.* at 34. Based on these policy-based considerations, the

court decided that the peer review statutes should not protect factual statements in incident reports. *Id.* at 32.

Reasonable persons can certainly disagree whether factual statements collected for peer review should be protected against disclosure in litigation. However, only the Legislature has the authority to resolve the public policy questions involved in balancing the confidentiality for quality assurance and improvement in health care facilities against the availability of information for use in litigation. "Courts cannot substitute their opinions for that of the legislative body on questions of policy." *Feyz v Mercy Mem'l Hosp*, 475 Mich 663, 679; 719 NW2d 1 (2006)(interpreting related peer review statutes; citation omitted).

As recognized by this Court and other decisions by the Court of Appeals, the Legislature has declared through unambiguous and expansive language that the records, data, and knowledge collected for quality improvement purposes cannot be discovered or used in litigation. The Legislature did not include the asterisk added by the Court of Appeals, *i.e.* "except when a court determines that the information collected is factual in nature."

C. The statutory text does not support plaintiff's argument that peer review materials can be used as substitute or supplemental patient records.

The plaintiff in *Krusac* makes the same policy-based arguments that the Court of Appeals expressed in *Harrison* and *Centennial*. [Plaintiff's brief on appeal, pp. 19-24] In addition, plaintiff advances as a novel, but textually unsupportable, argument that peer review information can—and should—be disclosed and used as substitute or supplemental patient medical records. According to this argument, MCL 333.20175(1) requires health facilities, including hospitals, to "keep and maintain a record for each patient, including a

full and complete record of tests and examinations performed, observations made, treatments provided, and in the case of a hospital, the purpose of hospitalization." Because this provision is contained in article 17 of the Public Health Code, plaintiff argues that "requiring disclosure of the *facts* contained in [an] incident report represents a use of the material 'for the purposes provided in this article,' as both §20175(8) and §21515 provide." [Plaintiff's brief on appeal, p. 19 (emphasis in original)]

This Court rejected a similar argument in *Atty Gen v Bruce, supra.* The Attorney General sought peer review materials for use in a physician licensing investigation, which was conducted under article 15 of the Public Health Code. Because MCL 333.21515 provides that protected materials could be used "only for the purposes provided in this article," *i.e.* article 17, this Court held peer review committee records were not discoverable. 422 Mich at 165-167.

As an alternative argument, the Attorney General sought to rely on a provision in article 17. A subsection in MCL 333.20175 required hospitals to submit reports to the licensing board and agency about disciplinary action taken against medical staff members, including "the relevant circumstances."[8] The Attorney General argued that the duty to report the relevant circumstances of disciplinary actions was provided in article 17, and therefore, indicated a legislative intent to allow disclosure of peer review materials in licensing investigations and proceedings. 422 Mich at 167-168. This Court disagreed, reasoning that the specific inclusion of the protection against disclosure of peer review

[8] Prior to amendment by 2000 PA 319, MCL 333.20175(4) required hospitals to "report to the appropriate licensing board and to the department not more than 30 days after any disciplinary action has been taken against a member of the medical staff, and the relevant circumstances, for any of the grounds set forth in section 16221." The current reporting requirements are found in MCL 333.20175(5) and (7).

information in the same statute as the requirement for reporting disciplinary action demonstrated just the *opposite, i.e.* that the Legislature intended that peer review information could not be disclosed for use in licensing matters. *Id.* at 168-169.

The reasoning in *Bruce* applies to plaintiff's argument as well. By including a subsection in MCL 333.20175 requiring hospitals to maintain patient records, the Legislature did not intend to undermine the separate subsection protecting peer review materials against disclosure. Nor did the Legislature modify or limit the prohibition in MCL 331.533 against discovering or using data collected for peer review purposes as evidence.

When rejecting another argument advanced by the Attorney General in *Bruce*, this Court noted that the "purposes" for which hospitals establish peer review committees are reducing morbidity and mortality, ensuring quality of care, reviewing professional practices, and granting staff privileges consistent with practitioners' qualifications. 422 Mich at 169 (citing MCL 333.21513). Maintenance of patient records is not a purpose related to the peer review functions mandated by the Public Health Code. "Records, data and knowledge" are not "collected for or by" individuals and committees with peer review functions "for the purpose[]" of maintaining patient records. The Public Health Code imposes numerous duties and requirements on health facilities and agencies. If every statutory obligation in article 17 was a "purpose" for which peer review materials could be disclosed and used, then "the Legislature's intent to *fully protect* quality assurance/peer review records from discovery" would be eviscerated. *Dorris*, 460 Mich at 40 (emphasis added).

Moreover, plaintiff's argument ignores additional plain language in the statutes. The protections for peer review materials in each statute are joined by the conjunctive term

"and." Even if peer review material could be used to supplement patient records as a way to comply with MCL 333.20175(1), the information would still be confidential under all three peer review statutes. It would not be subject to subpoena under MCL 333.20175(8) and MCL 333.21515. And it would not be discoverable and could not be used as evidence under MCL 331.533. Plaintiff's argument would lead to an absurd result: information in incident reports could be used to supplement patient records, but would be protected against discovery or use as evidence. "[S]tatutes must be construed to prevent absurd results . . . ." *Rafferty v Markovitz*, 461 Mich 265, 270, 602 NW2d 367 (1999).

Although plaintiff strains to tether this assertion to the statutory language, the surrounding context discloses that it is the same policy-based argument on which the Court of Appeals based its decision in *Harrison*. Plaintiff maintains that factual information in incident reports should be available to supplement medical records that do not fully describe patient care or to impeach witnesses who testify in malpractice actions. [Plaintiff's brief on appeal, pp. 19-21] Here again, these are debatable positions on which reasonable persons can disagree—and which only the Legislature has the authority to resolve.

D. The Court of Appeals should not have relied on cases from other jurisdictions interpreting statutes with different language.

In addition to disregarding the statutory language and overlooking existing precedent, the Court of Appeals erroneously looked for guidance from cases in other jurisdictions applying statues with very different language. *People v Thompson*, 477 Mich 146, 155; 730 NW2d 708 (2007)(construction placed on statutes in other jurisdictions will not be followed when inconsistent with the words used in Michigan statutes); *Atty Gen v*

MPSC, 412 Mich 385, 404; 316 NW2d 187 (1982)(dissimilar statutes from other jurisdictions are not helpful to illuminate meaning of Michigan statute).[9]

The Court of Appeals began by reviewing three cases cited by this Court in *Monty*. *Harrison*, 304 Mich App at 28-31.[10] Finding those cases "enlightening," the court "utilize[d] them as guideposts" leading to "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." *Id.* at 28, 30. The distinction, however, is not based on the language of Michigan's peer review statutes.

Two of the cases did not interpret peer review statutes. Rather, the courts considered whether there was good cause to deny discovery under the federal rules based on a common law qualified privilege. *Bredice v Doctors Hosp*, 50 FRD 249, 250-251 (D DC

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[9] A case cited by the plaintiff in *Krusac* expresses the same caution when interpreting peer review statutes.

> It has been noted that "there is extremely wide variation in the privilege granted by the states," and that there is little consistency in the entities covered or types of information protected. Susan O. Scheutzow & Sylvia Lynn Gillis, *Confidentiality and Privilege of Peer Review Information: More Imagined Than Real*, 7 J L & Health 169, 186-187 (1992-1993).... As a result, the caselaw interpreting these widely varying statutes has been described as "creating a crazy quilt effect among the states." Scheutzow & Gillis, supra, 7 J.L. & Health at 188.... Thus, although 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.

Trinity Medical Ctr v Holum, 544 NW2d 148, 153 (ND 1996)(additional internal citations omitted)

[10] In *Monty*, this Court did not cite the three cases to interpret the scope of information protected under the statute. Instead, the cases were cited when discussing whether a particular committee was assigned a review function, an issue on which a court "may wish to consider the hospital's bylaws and internal regulations, and whether the committee's function is one of current patient care or retrospective review." *Id.* 422 Mich at 147.

1970); *Davidson v Light*, 79 FRD 137, 139-140 (D Colo 1978). The statute considered in *Coburn v Seda*, 101 Wn2d 270; 677 P2d 173 (1984), is much different than Michigan's. The Washington statute only applied to "proceedings, reports, and written records" of certain committees and boards, Rev Code Wash 4.24.250. As a result, documents "generated *outside* review committee meetings" were not protected. 677 P2d at 277 (emphasis added). Unlike Michigan, the Washington statute did not protect "data" and "knowledge" that is "collected by or for" individuals and committees with assigned review functions.

The other cases relied upon by the Court of Appeals also interpreted much different statutes. See, *e.g. Columbia HCA/Healthcare Corp v Eighth Judic Dist Ct*, 113 Nev 521; 936 P2d 844, 949 (1997)(statute only protected the "proceedings and records" of hospital committees); *John C Lincoln Hosp & Health Ctr v Superior Ct*, 159 Ariz 456; 768 P2d 188, 191 (Ariz App 1989)(statute only applied to "proceedings, records and materials prepared in connection with the reviews" by certain committees; incident reports were not prepared for use by review committee but were "issued by hospital personnel in the regular course of providing medical care"); *Babcock v Bridgeport Hosp*, 251 Conn 790; 742 A2d 322, 353-354 (1999)(hospital failed to demonstrate that documents were outside statutory exclusion for "regular hospital and medical records made in the course of the regular notation of the care and treatment of any patient").

Like the Court of Appeals in *Harrison*, the plaintiff in *Krusac* relies on the interpretation of a North Dakota statute with much different language than Michigan's. [Plaintiff's brief on appeal, pp. 26-28] The peer review protections created by that state's statute are stated in two distinct sentences. First, "[a]ny information, data, reports, or records made available" to certain committees "are confidential and may be used by such

committees and the members thereof only in the exercise of the proper functions of the committees." Second, the "proceedings and records of such a committee are not subject to subpoena or discovery or introduction into evidence in any civil action arising out of any matter which is the subject of consideration by the committee." NDCC 23-01-12.1. The North Dakota Supreme Court noted the differences between the two sentences, both as to the type of materials protected and the nature of statutory protection. The first sentence expansively provided that "*[a]ny information*, data, reports, or records *made available*" to designated committees are confidential and can be used only for proper committee functions. In contrast, the second sentence only protected the "proceedings and records" against subpoena, discovery, or introduction into evidence. *Trinity Medical Ctr v Holum,* 544 NW2d 148, 153 (ND 1996).

Michigan's statutes make no such distinction in the protections available for peer review materials. All of the statutory protections—confidentiality, restricted use for article 17 purposes, protection against subpoena, prohibition against discovery or use as evidence—extend to the same categories of information: "records, data, and knowledge collected for or by individuals or committees assigned a professional review function," MCL 333.20175(8) and MCL 333.21515, and "data collected by or for a review entity." MCL 331.533.

While the importance of the specific statutory language cannot be overstated, it is also helpful to note there are courts in other states that afford peer review protection to factual statements in incident reports. See, *e.g. Carr v Howard,* 426 Mass 514; 689 NE2d 1304, 1310 (1998)("the reports are 'necessary to the work product' of medical peer review committees because they trigger the work of such committees"; "incident reports are a core

component of peer review, they begin the peer review process, and they are necessary to a committee's work product"); *Ussery v Children's Healthcare of Atlanta, Inc*, 289 Ga App 255; 656 SE2d 882 (2008)(statute applied to "proceedings, records, actions, activities, evidence, findings, recommendations, evaluations, opinions, data, or other information"; notification forms to report unusual or unexpected occurrences "are exactly the type of documents protected from discovery by the peer review privilege," citing *Ligouri*, 253 Mich App at 374).[11]

The review of cases from other jurisdictions simply demonstrates that courts and legislatures in other states have reached different conclusions when balancing the competing interests of peer review confidentiality and full disclosure in litigation. In Michigan, the Legislature has decided the question by enacting statutes with broad and expansive language.

CONCLUSION

As amicus, the University believes that the Court of Appeals in *Harrison* erroneously interpreted the peer review statutes.

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[11] See also, *Community Hosp of Indianapolis v Medtronic, Inc*, 594 NE2d 448, 453 (Ind App 1992) (incident reports privileged under statute protecting "all communications to a peer review committee"); *Arlington Mem Hosp Found v Barton*, 952 SW2d 927, 929 (Tex Civ App 1997) (incident reports protected under statute applying to "records or determinations of or communications to a medical peer review committee"); *In re Osteopathic Med Ctr*, 16 SW3d 881, 886 (Tex Civ App 2000) (same); *Cook v Toledo Hosp*, 169 Ohio App 3d 180; 862 NE2d 181, 188-189 (2006) (same).

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