IN THE SUPREME COURT

OF THE STATE OF MICHIGAN

APPEAL FROM THE SAGINAW COUNTY CIRCUIT COURT

PRESIDING JUDGE FRED L. BORCHARD

THE ESTATE OF DOROTHY KRUSAC, deceased by her representative John Krusac,

Plaintiff-Appellee,

Supreme Court No. 149270

COA No. 321719

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

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

Defendant-Appellant.

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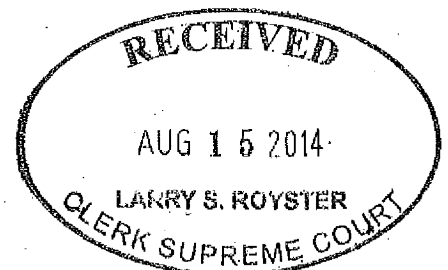
DEFENDANT-APPELLANT COVENANT HEALTHCARE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED



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JURISDICTIONAL STATEMENT

On May 8, 2014, the Saginaw County Circuit Court, Judge Fred L. Borchard presiding, entered an Order requiring Defendant-Appellant Covenant HealthCare to produce a portion of its internal "Improvement Report" to Plaintiff. (A copy of the May 8, 2014 Order from the Saginaw County Circuit Court is attached at Appellant's Appendix ("AA") at 195a-196a). The trial court's decision was based on its conclusion that it was bound to follow the recent, erroneous opinion issued by the Court of Appeals in *Harrison v Munson Healthcare, Inc*, 304 Mich App 1; ___ NW2d ___ (2014). By judicial fiat, *Harrison* effectively eviscerates the long-standing peer review privilege codified at MCL 333.21515.

Following the May 8, 2014 Order of the trial court, Defendant-Appellant timely filed an Application for Leave to Appeal to the Michigan Court of Appeals. The Application was denied for "failure to demonstrate the need for immediate review." (A copy of the May 12, 2014 Order from the Court of Appeals is attached at AA 203a).

Thereafter, Defendant-Appellant timely filed an Application for Leave to Appeal to this Court. That Application was granted by Order dated June 20, 2014. (A copy of the June 20, 2014 Order from the Court of Appeals is attached at AA 207a). This Court's Order instructs the parties to address two issues: (1) whether *Harrison* was wrongly decided; and (2) whether the trial court erred in ordering Covenant HealthCare to turn over its internal, peer review protected document. This Court has jurisdiction over the instant appeal by virtue of MCR 7.301.

ORDER APPEALED

Defendant-Appellant Covenant HealthCare appeals from the May 8, 2014 "Opinion and Order Re: Discovery" issued by the Saginaw Circuit Court, Hon. Fred L. Borchard, requiring it to immediately produce the first page of its "Improvement Report" to Plaintiff. (A copy of the May 8, 2014 Opinion and Order Re: Discovery is attached as AA at 195a-196a). That Opinion and Order, issued the week before trial was set to begin, required Defendant-Appellant to disclose information that is not subject to discovery by way of the oft-described "peer review" statutes. See, e.g. MCL 333.20175(8) and MCL 333.21515.

On May 12, 2014 Defendant-Appellant filed an Application for Leave to Appeal with the Michigan Court of Appeals, as well as a Motion for Stay Pending Appellate Review and a Motion for Immediate Consideration of Defendant-Appellant's Motion for Stay Pending Appellate Review. The Court of Appeals issued an Order granting Defendant-Appellant's Motion for Immediate Consideration, but denied its Motion for Stay and Application for Leave to Appeal. (A copy of the May 12, 2014 Order from the Court of Appeals is attached at AA 203a).

On May 14, 2014 Defendant-Appellant filed an Application for Leave to Appeal with this Court, coupled with a Motion for Stay Pending Appellate Review and a Motion for Immediate Consideration of Defendant-Appellant's Motion for Stay Pending Appellate Review. This Court granted the latter two Motions, by way of an Order also issued on May 14, 2014. (A copy of the May 14, 2014 Order from this Court is attached at AA 206a).

This Court issued its Order Granting Leave to Appeal on June 20, 2014. (A copy of the June 20, 2014 Order from this Court is attached at AA 207a).

As indicated, this appeal emanates from a recent erroneous holding of the Court of Appeals in *Harrison v Munson Healthcare, Inc*, 304 Mich App 1; ___ NW2d ___ (2014). That opinion was issued on January 30, 2014. In short, the Court of Appeals' decision in *Harrison* is squarely at odds with the Legislature's intent in promulgating a comprehensive ban on communications made pursuant to the peer review process. The Court of Appeals erred in failing to apply the plain language of MCL 333.20175(8) and MCL 333.21515. By creating an arbitrary "objectively reported contemporaneous observation" exclusion to the otherwise statutorily protected, peer review privileged classification of "records, data, and knowledge" gathered for a peer review committee, the Court of Appeals improperly usurped the role of the Legislature. In fact, the Court of Appeals readily acknowledged that the distinction it created was based not on the unambiguous language of the statute, but rather its own interpretation of three cases from out-of-state jurisdictions.[1] See *Harrison* at 30.

For the reasons set forth, Defendant-Appellant Covenant HealthCare respectfully requests that this Court: (1) overrule *Harrison* as wrongly decided; and (2) apply the plain language of MCL 333.20175(8) and MCL 333.21515 to the facts of this case, thereby REVERSING the trial court's Order to produce the peer-review protected Improvement Report.

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[1] This form of statutory construction is not only unwarranted, but illogical. In relying upon *Bredice v Doctors Hosp, Inc*, 50 FRD 249 (D DC, 1970); *Davidson v Light*, 79 FRD 137 (D Colorado, 1978); and *Coburn v Seda*, 101 Wn2d 270; 677 P2d 173 (1984); the Court of Appeals failed to give appropriate weight and consideration to Michigan case law or, more importantly, the specific statutory language of MCL 333.21515 which was controlling.

STATEMENT OF QUESTIONS PRESENTED

I. Did the Court of Appeals err in *Harrison v Munson Healthcare, Inc*, 304 Mich App 1 (2014), in its analysis of the scope of the peer review privilege, MCL 333.21515?

The trial court answered: "BOUND TO FOLLOW"

Defendant-Appellant Covenant HealthCare answers: "YES"

Plaintiff-Appellee answers: "NO"

II. Did the Saginaw Circuit Court err in ordering production of the first page of Defendant-Appellant's 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 trial court answered: "NO"

Defendant-Appellant Covenant HealthCare answers: "YES"

Plaintiff-Appellee answers: "NO"

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STATEMENT OF FACTS

In the medical malpractice action giving rise to this appeal, Plaintiff John Krusac claims negligence among the nursing staff at Covenant HealthCare during the course of a cardiac catheterization procedure. The procedure was performed on Plaintiff's decedent (Dorothy Krusac) back on September 12, 2008. Specifically, Plaintiff asserts that the nursing staff failed to appropriately monitor Ms. Krusac in the minutes following completion of the procedure, thereby allowing her to "fall" from the procedure table to the floor.

Plaintiff's theory is that as a result of this fall, Ms. Krusac actually struck her head on the floor. This, in turn allegedly caused her to sustain a "closed head injury and traumatic brain injury that did not immediately manifest clinically or on CT imaging . . . and neurogenic pulmonary edema." (A copy of Plaintiff's Complaint, ¶ 83, is attached at AA 25a). Plaintiff further maintains that this process somehow caused increased fluid to accumulate in her lungs, thereby worsening her cardiac function and ultimately causing her death on October 8, 2008. (A copy of Plaintiff's Complaint, ¶ 85, is attached at AA 26a).[2],[3].

* * *

On October 24, 2012 Plaintiff deposed the members of Defendant's staff who were present in the catheterization lab, both during and immediately following Ms. Krusac's cardiac cath

[2] Throughout this litigation, Defendant has **vehemently denied** Plaintiff's claims and in particular, any notion that Ms. Krusac sustained a "head injury." This theory is completely unsupported by any substantive information from the medical chart. Indeed, it has already resulted in Judge Borchard's decision to strike one of Plaintiff's experts, Dr. Cathy Helgason (a neurologist) who attempted to espouse the theory of "neurogenic pulmonary edema." She is forbidden from testifying at trial pursuant to MRE 702.

[3] While Defendant's causation/damage experts were never deposed, each is adamant that the minor nature of Ms. Krusac's "fall" had nothing whatsoever to do with her eventual descent into cardiorespiratory arrest and ultimately, her death on October 8, 2008. Indeed, Ms. Krusac's medical history was significant for myocardial infarction (heart attack), congestive heart failure (CHF), chronic obstructive pulmonary disease (COPD), arthritis, diabetes, and end stage endocarditits/valvular heart failure. Per the testimony of her cardiologist (Dr. Pramod Sanghi) she was **not** a candidate for surgical valve replacement. Simply put, this woman was in profoundly poor health and had a severely limited life expectancy, at all times during these efforts to provide palliative care.

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procedure. They included Mr. Rogers Gomez (a cardiac technician), Nurse Heather Gengler, and Nurse Deb Colvin. Each one testified to the effect that as Ms. Krusac was rolling off the cath lab table, **Nurse Colvin was able to hook her arms underneath Ms. Krusac and, essentially, assist her to the floor.**

Contrary to the assertions made by Plaintiff's counsel at the March 5, 2014 and May 12, 2014 hearings, **the testimony of these witnesses is not "inconsistent."** Similarly, it is not in "contradiction" with the information contained in Ms. Krusac's medical records—nor with any characterization offered by defense counsel on the record during any motion hearing. In truth, Plaintiff counsel's rather unique interpretation of the words used by Defendant's staff members during their depositions as somehow representing "conflict" does nothing to invalidate or otherwise overcome the peer review privilege. Rather, this is a well-recognized issue for the jury to decide, as the credibility of any witness is an appropriate subject for jury consideration.

* * *

Despite the latest overtures of Plaintiff's counsel, Nurse Deb Colvin **never** testified that she **completely** prevented Ms. Krusac from making contact with the floor, after she rolled off the procedure table. Rather, she testified that she was able to get her arms under the patient's body as she was in the process of rolling off the table. This allowed Nurse Colvin to assist and to otherwise slow Ms. Krusac's descent to the floor. Moreover, Nurse Colvin testified that any contact between Ms. Krusac and the floor was well guarded as Nurse Colvin's arms were underneath the patient, and would have made contact with the floor first. The relevant portions of Nurse Colvin's testimony appear below:

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[By Plaintiff's counsel, Mr. Sanfield]

Q. Okay. Got it. So you see – you see her rolling off the table at this point?

A. Correct.

Q. Is she rolling off the table the side away from you or the side towards you?

A. Towards me.

Q. What do you do?

A. I run over and hook my hands underneath her.

Q. And what happens?

A. I bring her down, because she's going down to the ground and my arms are underneath her.

Q. Both arms? One arm?

A. Both arms.

Q. Is anyone observing this happening?

A. I don't know. I didn't see if anybody – I mean, I'm just concerned with her, and my face is buried in her chest.

(A copy of Deborah Colvin's Deposition Transcript is attached at, p 37, AA 57a).

* * *

Q. And so does Miss Krusac – does her body make contact with the floor?

A. Parts of it, I guess. My arms are completely underneath, so I'm not – I don't know exactly what hit the ground.

(Deborah Colvin's Deposition Transcript at, p 38, AA 57a).

* * *

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Q. So you take the position that you slowed down her fall or had – or just that you had your arms under her at the time that she fell in terms of arms being under the torso?

A. I feel that I definitely softened her fall.

(Deborah Colvin's Deposition Transcript at, p 41, AA 58a).

* * *

Q. And she did not lose [sic] consciousness, as far as you could tell?

A. No, she did not.

Q. You had a discussion with her?

A. Yes. I asked her if she was having any pain anywhere. I asked her if she had hit her head.

Q. She denied that?

A. Correct.

Q. And this was like a discussion that happened moments like within seconds of the fall?

A. Correct.

(Deborah Colvin's Deposition Transcript at, p 43, AA 58a).

Meanwhile, Rogers Gomez is a certified cardiac technician who assisted with the procedure. His testimony largely **supported** Nurse Colvin's description of events. He testified that Nurse Colvin helped Ms. Krusac to the ground as she proceeded to roll off the table. More specifically, he testified that Nurse Colvin was holding the patient in her arms as she was "letting her down" because Nurse Colvin was not strong enough to raise/lift Ms. Krusac back onto the procedure table. To this end, he testified that he too was able to reach Ms. Krusac in time to assist her down to the floor, and that any contact between Ms. Krusac and the floor was well guarded. The pertinent portions of Mr. Gomez's testimony are as follows:

[By Plaintiff's counsel, Mr. Joel Sanfield]

Q. And you actually saw the patient falling from the table before Miss Colvin had gotten to her?

A. No, I seen Debbie holding on to her as she was coming down; then I assisted.

Q. Well, how far away were you from the table when this occurred?

A. Two steps, two to three steps.

Q. And what do you mean when you say that Miss Colvin was holding onto Miss Krusac?

A. Well, she was holding – had her arms underneath her. She was kind of letting her down, because the lady was coming down, and Debbie could not raise her. So she was coming down slowly, and I went to assist.

Q. So was Miss Colvin actually sort of cradling Miss Krusac?

A. At that point in time, yes.

Q. In her arms, in midair?

A. Half on – half on the table, I say she was one – 4/5ths off the table and she was going down. And Debbie was assisting her, bringing her down, because she could not raise her to put her back on the table.

(A copy of Rogers Gomez's Deposition Transcript is attached at, pp 20-21, AA 74a-75a).

Q. So describe for me how that occurred and how she got to the ground.

A. We laid her down. She was falling, and we gently laid her down.

Q. So when you got to – how long did it take you to get to Miss Colvin and Miss Krusac?

A. As I said before, about two seconds, two or three seconds.

Q. All right. And had there been a little bit more movement or little bit more – Miss Krusac and Miss Colvin descend a little bit more towards the floor at that point from where you initially observed them?

A. She was sort of at the edge of the table, and Debbie was cradling her, and she was going down with her, holding her, and I went to assist.

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(Rogers Gomez's Deposition Transcript at, pp 21-22, AA 75a).

* * *

Q. So where did you position yourself and where did you put your hands on Miss Krusac to assist in lowering her to the floor?

A. Cradling her head, neck and shoulders.

(Rogers Gomez's Deposition Transcript at, p 22, AA 75a).

* * *

Q. And do you know approximately where Miss Colvin's hands or arms were on the patient?

A. Probably I would think she was next to me. I was trying to make sure she didn't hit her head on the floor, but laid her on the floor. But Debbie, I would say around her thoracic, lower lumbar spine, around that area, and her other – left arm was towards her pelvis and thigh.

Q. Did any part of Miss Krusac's body make contact with the floor, that was not otherwise supported by either you or Miss Colvin?

A. **That I would say – it had to make contact, but it was well guarded, because she was cradled.**

(Rogers Gomez's Deposition Transcript at, p 23, AA 75a).

Finally, Nurse Heather Gengler testified that she first noticed Ms. Krusac rolling off the cath table as the action was occurring. She heard a reaction from Nurse Colvin and witnessed Nurse Colvin in the process of catching and/or assisting Ms. Krusac to the floor. Nurse Gengler affirmed that Nurse Colvin's arms were under the patient prior to Ms. Krusac making any contact with the floor. Upon witnessing these events unfold, Nurse Gengler rushed into the room, arriving at approximately the same time that Nurse Colvin and Mr. Gomez had finished assisting Ms. Krusac to the floor. The relevant portions of Nurse Gengler's testimony are as follows:

[By Plaintiff's counsel, Mr. Joel Sanfield]

Q. Did you see her fall?

A. Not necessarily, no. I heard Deb; and in that transition, I went to the room and saw them assisting her to the floor.

(A copy of Heather Gengler's Deposition Transcript is attached at, p 5, AA 63a).

Q. Okay. And so what was the first indication to you that you can remember that there was something amiss as it related to Miss Krusac?

A. I can remember Deb saying something, and turning around at the same time, and catching her at the same time I was jumping up to go out in the room.

(Heather Gengler's Deposition Transcript at, p 16, AA 65a).

* * *

Q. And you saw at that point – did Miss Colvin – at that point that you first looked up, did Miss Colvin have her hands on Miss Krusac at this point?

A. I'm not sure.

Q. Okay. Was Miss Krusac still on the table, or off the table, or in the process of rolling off the table?

A. I believe she was in the process.

Q. Okay.

A. She was still physically on the table.

Q. Okay. And at the same time, were you sort of getting up, or did you – before you got up and started moving towards the area, into the room, I guess, which you were kind of doing just by instinct, right?

A. The minute you see that there's any kind of trouble you go up to assist.

Q. Right. So as you're doing that, are you looking through the window at the same time?

A. Yes.

Q. So what are you seeing unfolding before you get into the room?

A. I just recall the patient having difficulty and running in there to help Deb, who was assisting the patient.

Q. Okay. So at some point, did you see Deb get her arms on Miss Krusac?

A. Yes.

Q. Do you know if that was before or after Miss Krusac made contact with the ground?

A. Before.

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(Heather Gengler's Deposition Transcript at, pp 16-17, AA 65a-66a).

* * *

Q. Okay. Did you observe anything else at that point?

A. No, I was in there before – almost before she – Deb had assisted her down and Rogers had assisted her to the ground.

Q. Okay. Was there a point that Miss Colvin actually had Miss Krusac cradled in her arms and Miss Krusac was neither on the ground, or on the table, or in contact with the table?

A. I guess I'm not sure of your question. Deb had her in her arms before she left the table, in the motion of her rolling off the table.

(Heather Gengler's Deposition Transcript at, p 18, AA 66a).

Nurse Colvin testified that she filled out an Improvement Report after this event. Moreover, she testified that the report was given to her nursing supervisor and routed through the appropriate channels to Defendant's peer review committee. (Deborah Colvin Deposition Transcript, pp 47-48, AA 59a). Mr. Gomez testified that he was questioned for purposes of providing information to a peer review committee, but did not fill out an Improvement Report. (Rogers Gomez's Deposition Transcript, p 27, AA 76a). Meanwhile, Nurse Gengler did not fill out an Improvement Report, nor was she questioned. (Heather Gengler's Deposition Transcript, p 24, AA 67a).

Interestingly, Plaintiff's counsel had knowledge of the Improvement Report's existence as early as October 24, 2012. Despite this, she waited until virtually the eve of trial to request its production by way of a motion *in limine*. (A copy of Plaintiff's Motion in Limine Regarding Production of Facts Contained in Incident Report is attached at AA 119a-161a). At the time, Plaintiff argued that the Improvement Report should be **admissible in order to cross examine Defendant's staff members**, and to ensure that a "fraud" was not being committed upon the trial

court by defense counsel. (Plaintiff's Motion in Limine Regarding Production of Facts Contained in Incident Report at, ¶ 4 and ¶8, AA 120a and 122a).

The trial court initially **denied** Plaintiff's motion *in limine* after oral argument was heard. (A copy of the March 5, 2014 Hearing Transcript is attached as AA 162a-180a; A copy of the March 21, 2014 Order Denying Plaintiff's Motion in Limine Regarding Production of Facts Contained in Incident Report is attached as AA 181a-182a). Thereafter, Plaintiff filed a Motion for Reconsideration that was ultimately granted by the trial court on May 2, 2014. (A copy of the May 2, 2014 Order is attached as AA 183a-184a). The court's Order required that Defendant produce a copy of the Improvement Report for *in-camera* review.

A follow-up hearing on was then conducted on Monday, May 5, 2014. (A copy of the May 5, 2014 Hearing Transcript is attached as AA 185a-194a). Significantly, an evidentiary hearing was never conducted relative to this issue.[4]

Thereafter, (on May 8, 2014) the trial court issued its Order requiring Defendant to immediately provide Plaintiff with the first page of its Improvement Report. The Order reads, in part, that "even assuming . . . the 'Improvement Report' is a peer review report, it is not the facts themselves that fall under the peer review privilege but rather what is done with those facts."[5] (May 8, 2014 Opinion and Order Re: Discovery at AA 195a-196a).

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[4] Prior to making any determination as to whether the information contained within the Improvement Report was privileged, the trial court should have conducted more than an *in-camera* review of the Improvement Report. An evidentiary hearing should have been conducted, wherein the trial court considered, at a minimum, the hospital's bylaws, internal rules and regulations and whether the committee's function is for purposes of improvement and self-analysis and thereby protected, or part of current patient care. See *Gallagher v Detroit-Macomb Hosp Ass'n*, 171 Mich App 761, 769; 431 NW2d 90 (1988); *Monty v Warren Hosp Corp*, 422 Mich App 138, 147; 366 NW2d 198 (1985).

[5] Clearly, the trial court's May 8, 2014 Order was based largely, if not exclusively, on the holding in *Harrison*. More specifically, the trial court noted that it "agrees with the *Munson* case that objective facts gathered contemporaneously with an event do not fall within the definition of peer review privilege." In short, it applied the erroneous opinion in *Harrison* to hold that the peer review privilege protects only the deliberative process of a hospital's peer review committee.

Plaintiff subsequently filed an Emergency Motion to Compel Production of the Incident Report and for Sanctions. A hearing regarding same was held on Monday, May 12, 2014. (A copy of the May 12, 2014 Hearing Transcript is attached at AA 197a-202a). Attending the May 12 hearing along with defense counsel was Ms. Rebecca Schultz, Director of Risk Management at Covenant Healthcare. Defense counsel offered to have Ms. Schultz take the stand and provide testimony relative to the hospital's peer review process, as well as the purposes and policies behind the existence of its Improvement Reports. Despite this, Ms. Schultz's input was not requested by the Court.

Because no evidentiary hearing was held to address the Improvement Report, Defendant respectfully submits and asks that this Court review the hearing transcript from an evidentiary hearing held as part of another recent medical malpractice action in Saginaw County (*Doyle vs Covenant;* Saginaw County Circuit Court No. 12-016476-NH).

In that case, Ms. Schultz did testify as to the hospitals' peer review process, including the purposes and policies behind the creation and maintenance of Improvement Reports. The hearing was conducted on December 20, 2013 and involved a similar situation in which plaintiff's counsel was attempting to argue – even prior to publication of the *Harrison* opinion – that plaintiff should be entitled to "facts" contained within peer review documents. (A copy of the *Doyle* December 20, 2013 Hearing Transcript is attached at AA 84a-118a).

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Again, Ms. Schultz's testimony confirms that the hospital's Improvement Reports are used for purposes of peer review. (December 20, 2013 Hearing Transcript at, p 16, AA 99a). If an incident occurs within the hospital: 1) staff are asked/expected to fill out an Improvement Report as soon as possible; 2) the Improvement Report is immediately forwarded to a department/unit manager for assessment; and 3) the Improvement Report and manager assessment are then

forwarded to risk management for review, tracking, and additional assessment.[6] (December 20, 2013 Hearing Transcript at, p 10 and 12, AA 93a and 95a).

Ms. Schultz's sworn testimony at the December 20, 2013 hearing clearly establishes that the Improvement Reports used by the hospital are for peer review purposes. Defendant further maintains that this sworn testimony meets the requirements of MRE 803(23), if necessary, and should be considered in the absence of an evidentiary hearing. Indeed, Ms. Schultz testified as to the very same issues involved here and her testimony was given mere months before this matter arose.

The Improvement Report at issue here was specifically created for purposes of Defendant's peer review process – as explained by Ms. Schultz – in an effort to reduce patient mortality and morbidity. Indeed, this was readily recognized by Judge Kaczmarek of the Saginaw County Circuit Court, who subsequently issued an Order **denying** production of the [sic] Incident Report(s).

Here, Defendant's staff members had varying recollections of this event – and each has provided sworn testimony to same. While the witnesses may have used different verbiage to describe the events that occurred, this does not intrinsically make them "liars" nor does it amount to "a fraud" being perpetrated upon the Court– despite the pleas of Plaintiff's counsel. Rather, this is the nature of witness testimony; it provides different accounts and perspectives of the same event. It is for the jury to decide what weight and authority is to be given to their testimony.

Plaintiff now seeks to obtain information that the Legislature has given broad protection by claiming that witness testimony **may** be contradictory or inconsistent with a document created by

[6] Nurse Colvin previously testified that the report was given to her nursing supervisor and routed through the appropriate channels to Defendant's peer review committee. (Deborah Colvin Deposition Transcript at, pp 47-48, AA 59a).

or for a hospital's peer review entity. Armed with nothing more, plaintiffs and their lawyers appear and claim entitlement to the "facts" for purposes of impeachment and/or demonstrating "fraud."[7] Based upon the *Harrison* opinion, this argument, in the absence of anything further, is conveniently being used to eviscerate the peer review privilege.

In the matter currently before the Court, Plaintiff sought production of the Improvement Report based on nothing more than a purported hunch that it "may" or "might" contain a "different version" of events from those ostensibly presented by the defense. (March 5, 2014 Hearing Transcript at, pp 43-44, AA 172a). It is also significant to note that following the *in-camera* review of the Improvement Report the trial court failed to cite any "inconsistencies" with Covenant's asserted defense.

The clear and unambiguous language of the statutory provisions establishing the peer review privilege imposes a strict limitation upon the use of "records, data, and knowledge" collected "by or for" a peer review entity. MCL 333.21515. Such records, data, and knowledge can be used **only** for the purposes provided in article 17 of the Public Health Code, are not public records, and are not subject to court subpoena. See MCL 333.21515; MCL 333.20175(8).

Plaintiff is entitled to use the medical records and witness testimony for purposes of this action, but not protected peer review documents. See *In re Petition of Attorney General*, 422 Mich 157, 170; 369 NW2d 826 (1985). Plaintiff has already deposed each of the staff members who were present at the time of this incident. Each has testified to his or her recollection of this event. While Plaintiff is entitled to use the medical records in an attempt to impeach their testimony, the peer review privilege cannot be invaded for such a purpose under article 17 of the

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[7] It bears repeating that even impeachment is not one of the enumerated and recognized exceptions under Article 17 of the Public Health Code. Moreover, even if such improvement and/or incident reports are not protected under MCL 333.21515, they are still inadmissible as hearsay. Thus, the argument presented by plaintiffs that "entitles" them to this information, is a farce.

Public Health Code. Review and disclosure in relation to medical malpractice litigation – whether controverting or supporting a theory of defense – is not among the enumerated purposes addressed or provided for under article 17.

Having properly determined that the Improvement Report and related documents at issue were protected by the peer review privilege, the trial court should have concluded that Defendant and its counsel had no duty to disclose the content (including "objective facts contemporaneously gathered") in relation to this medical malpractice litigation. This is particularly true where even the Court of Appeals in *Harrison* indicated "we express no opinion regarding whether [defendant hospital] should have produced the first page of the incident report to [plaintiff] during discovery." *Harrison* at 35.

Harrison did, however narrow the scope and application of the peer review privilege in two distinct, yet very significant ways. First, the Court of Appeals narrowed the scope of the peer review statute by excluding "contemporaneous information" from the peer review protection. This is significant as MCL 333.21515 does not contain any language that limits or excludes "contemporaneous information" from the privilege.

The second distinction created by the Court of Appeals was to limit application of the peer review privilege exclusively to the deliberative process of a peer review committee. This limitation necessarily excludes information gathered "for" a peer review entity from the protection of MCL 333.21515. This is contrary to the clear and unambiguous language of MCL 333.21515, wherein "records, data, and knowledge" collected "for or by" individuals or committees assigned a review function are to be confidential. The statutory language does not reserve the privilege to a peer review committee's deliberative process. To the contrary, the Legislature has given broad protection to peer review materials in an attempt to create a comprehensive ban on materials

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gathered by or for a peer review entity. *In re Investigation of Lieberman,* 250 Mich App 381, 387; 646 NW2d 199 (2002).

Accordingly, Defendant-Appellant Covenant Healthcare respectfully requests that this Court enter an Order reversing the trial court's May 8, 2014 Order requiring production of the first page of the Improvement Report, as the report constitutes privileged peer review material and is not subject to discovery. Defendant further requests that this Honorable Court correct the improper judicial construction and policy making of the Court of Appeals in *Harrison.*

STANDARD OF REVIEW

The trial court's decision to order the production of Defendant's Improvement Report amounts to improper judicial construction and interpretation of MCL 333.21515. This was based, in part, upon the Court of Appeals' improper judicial construction and interpretation of MCL 333.21515 in *Harrison v Munson Healthcare, Inc.* It is well settled that questions of statutory construction and other questions of law are reviewed *de novo*. *Halloran v Bhan*, 470 Mich 572; 683 NW2d 129 (2004); *Bartlett v North Ottawa Cmty Hosp*, 244 Mich App 685; 625 NW2d 470 (2001).

LEGAL ARGUMENT

I. THE SAGINAW COUNTY CIRCUIT COURT ERRED IN ORDERING DEFENDANT TO PRODUCE THE FIRST PAGE OF ITS IMPROVEMENT REPORT, IN RELIANCE ON *HARRISON V MUNSON HEALTHCARE, INC.*

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On May 8, 2014 the trial court issued an Order requiring Defendant to produce the first page of its Improvement Report after concluding that "objective facts gathered contemporaneously with an event do not fall within the definition of peer review privilege." (May 8, 2014 Opinion and Order Re: Discovery attached at AA 195a-196a). The trial court further indicated that "it is

not the facts themselves that fall under the peer review privilege, but rather what is done with those facts." (May 8, 2014 Opinion and Order Re: Discovery attached at AA 196a). Significantly, in reaching its ruling, the trial court relied on the recent decision of *Harrison v Munson Healthcare, Inc*, 304 Mich App 1; __ NW2d __ (2014).

The trial court's reliance on *Harrison* was in error. Namely, in *Harrison*, both the trial court and Court of Appeals found that the incident reports had *not* been created "for or by" the hospital's peer review committees. *Harrison* at 34; see also MCL 333.21515. Rather, the Court of Appeals found that the incident reports were stored within the risk management department, but never provided to peer review committees for study. *Id.* The Court of Appeals in *Harrison* went on to issue a baffling opinion wherein it protected from discovery the vast majority of the incident report, but refused to extend the peer review privilege over "factual information recorded on the first page of the incident report." *Harrison* at 34.

The situation is unfortunately quite clear: In *Harrison*, the Court of Appeals took considerable efforts to circumscribe and create a "contemporaneous observations" exception to MCL 333.21515[8]. Moreover, despite its overreaching efforts, the *Harrison* Court ultimately "express[ed] no opinion regarding whether Munson should have produced the first page of the incident report to Harrison during discovery." *Harrison* at 35. Accordingly, while invalidating decades of Michigan case law that provided a clear understanding of the peer review privilege, the Court of Appeals simultaneously refused to apply or give context to its own ruling. Thus, in the

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[8] As discussed herein, the language of MCL 333.21515 contains no exception for "contemporaneous observations." In "deriving" 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" the Court of Appeals clearly engaged in improper statutory construction. See *Harrison* at 30; see also *Kootz v Ameritech Svcs, Inc*, 466 Mich 304; 645 NW2d 34 (2002).

instant case Judge Borchard should not have relied on *Harrison.* Instead, the trial court should have applied MCL 333.21515 as written.

Where the statutory language is plain and unambiguous, judicial construction or interpretation that would distort the plain meaning is precluded. *Jones v Grand Ledge Pub Sch*, 349 Mich 1, 9-10; 84 NW2d 327 (1957); *In re Petition of Attorney Gen*, 422 Mich 157, 165; 369 NW2d 826 (1985). The trial court never made an initial determination as to whether MCL 333.21515 was ambiguous as written. Accordingly, it was unnecessary for the trial court to look to *Harrison* for any clarification or guidance as to how MCL 333.21515 should be applied. If additional guidance was required, there are numerous appellate rulings (including those from this Court) with more precedential value than *Harrison.*

In *In re Petition of Attorney General*, this Court was asked to consider whether the protections under MCL 333.21515 for "records, data, and knowledge collected for or by" review entities prevented discovery of peer review records from State licensing investigations under article 15 of the Public Health Code. This Court noted that the language of MCL 333.21515 was clear and unambiguous. *In re Petition of Attorney General* at 165. Moreover, this Court was "persuaded that the Legislature's intention that peer review committee records not be discoverable" for any purposes beyond those provided by article 17 of the Public Health Code "is evident on examination of the statute . . . ." See *id.* at 165-166. While holding that peer review records are not discoverable, this Court indicated that the Attorney General was still permitted to obtain patient records, as well as conduct interviews of hospital employees and staff members having personal knowledge of the activities. *Id.* at 170.

As this Court has already found the language of MCL 333.21515 to be unambiguous, the trial court erred by engaging in judicial construction and interpretation. *Id.* at 165; *Jones* at 9-10.

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It is well understood that the Legislature has given broad protection to peer review materials in an attempt to create a comprehensive ban on materials gathered for or by a peer review entity. *In re Investigation of Lieberman,* 250 Mich App 381, 387; 646 NW2d 199 (2002)

The trial court's May 8, 2014 Order ignores the clear Legislative intent behind the peer review statutes. Requiring production of the peer review documents, **even a first page containing "objective facts gathered contemporaneously with an event,"** substantially undermines the Legislature's intent to *fully* protect information gathered for or by a peer review entity. Indeed, without "objective facts" being first provided to a peer review entity, no deliberative process could be taken. Such is the very reason why MCL 333.21515 states that "records, data, and knowledge" collected "for or by" a peer review committee are to be confidential.

This case is largely analogous to *In re Petition of Attorney General,* in that Plaintiff seeks to use peer review records for purposes not permitted under article 17 of the Public Health Code. The language of MCL 333.21515 is plain and unambiguous. The Legislature has made its intent perfectly clear. Peer review records are not subject to discovery for purposes of a civil action such as this medical malpractice suit.

Just as in *In re Petition of Attorney General*, peer review records and quality assurance information are not discoverable. However, Plaintiff is entitled to obtain medical records and to conduct the depositions of hospital employees and staff members having personal knowledge of the events at issue. Plaintiff has done so. Plaintiff's discontent or dissatisfaction with witness testimony or the substance of the medical records, does not overcome the privilege.

Plaintiff's argument that discovery of the peer review records is necessary to impeach the testimony of Defendant's staff members, is baseless. MCR 2.302(B) clearly indicates that

"[p]arties may obtain discovery regarding any matter, *not privileged*, which relates to the subject matter involved in the pending action . . . ." [Emphasis added.] **Not only are the peer review records privileged, but they also constitute inadmissible hearsay. See MRE 801, MRE 802.**

Courts cannot substitute their opinions for that of the legislative body on questions of policy. See *Feyz v Mercy Mem'l Hosp*, 475 Mich 663, 679; 719 NW2d 1 (2006), citing *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999), quoting the dissenting opinion of YOUNG, P.J., in the Court of Appeals in that case quoting *Cady v Detroit*, 289 Mich 499, 509; 286 NW 805 (1939). Unfortunately, this is exactly what was done by the trial court when it relied upon the recent *Harrison* opinion in ordering Defendant to produce the first page of its Improvement Report. It is also for this reason that Defendant now respectfully requests that this Court offer its guidance, and correct the errors of the lower courts.

II. THE DECISION IN *HARRISON V MUNSON HEALTHCARE, INC* WAS THE RESULT OF IMPROPER JUDICIAL CONSTRUCTION AND INTERPRETATION.

As a state licensed hospital, Defendant is subject to the mandate of MCL 333.21513, that statute requires hospitals to implement a peer review process for "the purpose of reducing morbidity and mortality and improving the care provided in the hospital for patients." MCL 333.21513 (a) and (d). To facilitate the effective performance of this important duty, our Legislature has enacted provisions creating a statutory peer review privilege – provisions that impose strict limitations upon the use of records, data and knowledge that have been collected (as in this case), for purposes of peer review.

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MCL 333.21515 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. [Emphasis added.]

Meanwhile MCL 333.20175(8) states:

> 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. [Emphasis added.]

These nondisclosure protections apply regardless of the nature of the claim asserted by the party seeking the records. *Manzo v Petrella & Petrella & Assoc, PC*, 261 Mich App 705, 715; 683 NW2d 699 (2004). Further, the Legislature has granted immunity to persons, organizations, and entities that provide information to peer review groups or perform protected peer review communicative functions. See MCL 331.531.

The *Harrison* opinion is the product of improper judicial construction and interpretation, coupled with a failure to apply MCL 333.21515 as written and intended by the Legislature. Indeed, *Harrison* relied upon three cases from other jurisdictions to "derive a distinction" between "factual information objectively reporting contemporaneous observations or findings" and "records, data, and knowledge." See *Harrison* at 30. The apparent reason for doing so was to deny "risk managers the power to unilaterally insulate from discovery firsthand observations that the risk managers would prefer remain concealed." *Id.* at 34.

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One of the most fundamental rules of statutory construction is that the Legislature must be presumed to have intended the plain meaning of the words used in the statute. *Wackerman v State*, 47 Mich App 228; 209 NW2d 493 (1973); *Arrigo's Fleet Serv, Inc v State, Dep't of State, Bureau of Auto Regulations*, 125 Mich App 790; 337 NW2d 26 (1983). A court's primary role is to give

effect to the intent of the Legislature, as expressed by the language of the statute. *Feyz* at 673, citing *Grimes v Dep't of Transp*, 475 Mich 72, 77; 715 NW2d 275 (2006).

As noted above, courts cannot substitute their opinions for that of the legislative body on questions of policy. See *Feyz* at 679. An appellate court is mandated by MCL 8.3a to construe words that have acquired "peculiar and appropriate meaning in law" according to such meaning and is not free to adopt another construction merely because it would more closely align itself with court's notion of sound policy. *McCann v State, Dep't of Mental Health*, 47 Mich App 326; 209 NW2d 456 (1973), rev'd on other grounds, 398 Mich 65; 247 NW2d 521 (1976).

Clear and unambiguous statutes are not to be judicially construed or interpreted; the terms are simply to be applied to the facts of the case. See *Acer Paradise, Inc v Kalkaska County Rd Comm'n*, 262 Mich App 193; 684 NW2d 903 (2004). Plain, unambiguous language in a statute leaves no room for judicial construction and must be given effect according to the plain meaning of the words. *In re Gay's Estate*, 310 Mich 226, 17 NW2d 163 (1945). A court is to apply clear and unambiguous statutes as written, under the assumption that the Legislature intended the meaning of the words it has used in the statute. *Feyz* at 672, citing *Casco Twp v Secretary of State*, 472 Mich 566, 571; 701 NW2d 102 (2005).

To ascertain legislative intent with respect to a statute, a reviewing court should first review the specific language of the disputed provision, giving all terms their plain and ordinary meaning absent a contrary legislative intent. *Travelers Ins Co v S & H Tire Co*, 134 Mich App 214; 351 NW2d 279 (1984). In defining statutory language, a court must look to a critical word or phrase as well as its placement and purpose in the statutory scheme. *Feyz* at 672-673, citing *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). No phrase, clause, or word of a statute should be ignored in construing the statute, nor should the intent of the Legislature be

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defeated by a technical or forced interpretation of the statutory language. *Johnson v Hartford Ins Co*, 131 Mich App 349, 360; 346 NW2d 549 (1984); *Grand Rapids Motor Coach Co v Pub Serv Comm*, 323 Mich 624; 36 NW2d 299 (1949).

Those words that have acquired a peculiar and appropriate meaning in the law are construed according to that peculiar and appropriate meaning. *Feyz* at 673, citing MCL 8.3a. MCL 8.3a states:

> All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

In construing a statute, dictionary definitions may properly be used to determine common usage of a statutory term. *People v Gilbert*, 88 Mich App 764; 279 NW2d 546 (1979); *Fenton Area Pub Sch v Sorensen-Gross Constr Co*, 124 Mich App 631; 335 NW2d 221(1983); *K Mart Corp v Michigan Dep't of State,* 127 Mich App 390; 339 NW2d 32 (1983); *Harper Safety Ctr, Inc v Dep't of State*, 134 Mich App 404; 350 NW2d 888 (1984); *In re Acquisition of Land by Detroit Edison Co etc*, 137 Mich App 161; 357 NW2d 843 (1984); *In re Estate of Harris*, 151 Mich App 780; 391 NW2d 487 (1986). As provided under MCL 333.21515, the terms "data" and "knowledge" have not acquired any peculiar meaning in the law. Therefore, a court must apply the plain and ordinary meaning to these terms. See *Feyz* at 673, citing MCL 8.3a.

Here, the Merriam-Webster Dictionary defines "data" as "*facts or information* used usually to calculate, analyze, or plan something" or "*factual information*." Meanwhile, the Merriam-Webster Dictionary defines "knowledge" as "*the fact or condition of knowing something* with familiarity gained through experience or association" or "*the fact or condition of having knowledge or of being learned*." It is therefore clear that the terms "data" and "knowledge" are

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synonymous with "facts" or "factual information." To this end, the Merriam-Webster Dictionary defines "fact" as "a piece of information presented as having *objective reality*." Thus, MCL 333.21515 seeks to protect from discovery the "records, data, and knowledge" – or *objective information* – that is gathered "for or by" a review entity.

This interpretation is both logical and entirely consistent with the Legislature's attempts to provide comprehensive protection to hospitals' peer review process. *In re Investigation of Lieberman*, 250 Mich App 381; 646 NW2d 199 (2002). It promotes the willingness of hospital staff *to provide* candid information to a peer review committee for assessment in peer review proceedings. See *Dorris* at 42. To hold otherwise would have a substantial chilling effect on healthcare professionals' willingness to provide candid information for fear that these "objective facts" could later be used against them in a legal setting – much as Plaintiff and his counsel now seek to do.

In *Harrison*, the Court of Appeals ostensibly addressed a problem of its own creation – the concern that "risk managers [would have] the power to unilaterally insulate from discovery firsthand observations that the risk managers would prefer remain concealed." *Id.* at 34. However, when construing a statute, "a court should not abandon the canons of common sense." *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 644; 513 NW2d 799 (1994). A court may not read into the law a requirement that the lawmaking body has seen fit to omit. *In re Hurd-Marvin Drain*, 331 Mich 504, 509; 50 NW2d 143 (1951). When the Legislature fails to address a concern in the statute with a specific provision, a court "cannot insert a provision" of its own. *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 142; 662 NW2d 758 (2003).

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It was the responsibility of the Court of Appeals to refrain from engaging in judicial construction and interpretation where the statutory language of MCL 333.21515 was clear and unambiguous. It was the further responsibility of the Court to give the statutory terms their plain and ordinary meaning. The Court had a duty to avoid inserting its own provision into the statute based upon perceived policy concerns. The Court of Appeals failed in its responsibilities.

The implications of the *Harrison* opinion have been broad, to say the least. If allowed to stand (in conjunction with the instant case) the tenets of that opinion will lead to an out-and-out judicial repeal of the well-known and understood peer review privilege that has been recognized in Michigan for decades. The responsibility now falls upon this Court to reverse the trial court's order requiring production of Defendant's Improvement Report, and by extension, the error that was compounded by the Court of Apeals in *Harrison*. This Court must ensure that due deference is given to the Legislature's intent in creating the peer review privilege(s) found under MCL 333.21515 and MCL 333.20175(8).

III. THE DECISION IN *HARRISON V MUNSON HEALTHCARE, INC.* WRONGLY NARROWED THE PEER REVIEW PRIVILEGE AFFORDED UNDER MCL 333.21515.

As noted by this Court in *In re Petition of Attorney General*, MCL 333.21515 is clear and unambiguous as written. See *In re Petition of Attorney General* at 165. Accordingly, Defendant respectfully maintains that the result in *Harrison* was misguided, as there was no need for the Court of Appeals to engage in judicial construction or interpretation. See *Jones* at 9-10; *In re Petition of Attorney General* at 165.

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The Legislature has given broad protection to peer review materials in an attempt to create a comprehensive ban on materials gathered by or for a peer review entity. *In re Investigation of Lieberman* at 387. Despite being aware of the Legislature's intent, the Court of Appeals "derived

a distinction" by looking to three cases from outside jurisdictions. *Harrison* at 30. Using them, the Court of Appeals narrowed the scope and application of MCL 333.21515 in two distinct, yet very significant ways.

First, the Court of Appeals narrowed the scope of the peer review statute by permitting discovery of "factual information," even if gathered "for" a peer review committee. In doing so, the Court of Appeals construed MCL 333.21515 to protect **only** the deliberative process of a peer review committee. This distinction implicitly narrows the peer review privilege by permitting discovery of information gathered "for" a peer review entity. Such a distinction runs afoul of the clear and unambiguous language of the statute, which reads that "records, data, and knowledge" collected "*for or by*" individuals or committees assigned a review function are to be confidential. If the gathering of objective (i.e. factual) information for a peer review committee is not performed by definition, there can be no deliberative process. Further, what utility is there in gathering "non-objective" information for purposes of peer review? To what end would such information aid in a hospital's attempts to reduce morbidity and mortality, and to improve overall patient care?

The second distinction created by the Court of Appeals was to exclude so-called "contemporaneous information" from peer review protection. The statutory language of MCL 333.21515 does not contain any limitation or exclusion relative to "contemporaneous information." There is absolutely no reference to **when** "records, data, and knowledge" must be collected in order for the protection to apply. Thus, the Court of Appeals narrowed the scope of MCL 333.21515 by creating a temporal or time-based distinction, one the Legislature never intended. Again, this distinction amounts to an improper exercise of judicial construction and

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interpretation. See *Feyz* at 672; *Casco Twp* at 571; *Grimes* at 77; *Johnson* at 360; *Grand Rapids Motor Coach Co* at 624; *Houghton Lake Area Tourism & Convention Bureau* at 142.

A. ***HARRISON V MUNSON HEALTHCARE, INC.*** **IMPROPERLY LIMITED THE PROTECTIONS OF THE PEER REVIEW STATUTE TO THE DELIBERATIVE PROCESS OF A PEER REVIEW COMMITTEE.**

Nothing in the statutory language of MCL 333.21515 portends to limit the peer review privilege as involving only the deliberative processes of a peer review committee. Rather, the statute unambiguously protects from discovery "records, data, and knowledge" collected "for or by" individuals or committees assigned a review function. See MCL 333.21515.

In beginning its analysis of MCL 333.21515, the *Harrison* Court correctly noted the general rule that statutory privileges should be narrowly construed. *Harrison* at 24, citing *People v Warren*, 462 Mich 415, 427; 615 NW2d 691 (2000)(discussing the marital privilege) and *In re Brock*, 442 Mich 101, 119; 499 NW2d 752 (1993)(discussing the physician-patient privilege). The Court further indicated that statutory privileges "should be no greater than necessary to promote the interests sought to be protected in the first place." *Harrison* at 24, citing *People v Wood*, 447 Mich 80, 91-92; 523 NW2d 477 (1994)(discussing a parent's attempt to assert privilege over communications between a minor child and a social worker pursuant to former MCL 339.1610(2)).

While addressing the general rule, none of the cases cited in *Harrison* involved the peer review privilege. Accordingly, *Harrison* failed to consider the broad protections that the Legislature specifically intended to afford a hospital's peer review activities.

Indeed, *In re Investigation of Lieberman*, 250 Mich App 381; 646 NW2d 199 (2002), noted that the Legislature had chosen to protect peer review materials in "broad terms" by imposing "a comprehensive ban" on the disclosure of any information collected by peer review

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committees, and specifically emphasized its "statutory admonishment" limiting the use of such information to purposes within the scope of article 17:

> The clear language of § 21515 provides: (1) peer review information is confidential, (2) peer review information is to be used "only for the purposes provided in this article," (3) peer review information is not to be a public record, and (4) peer review information is not subject to subpoena. Section 21515 demonstrates that the Legislature has imposed a comprehensive ban on the disclosure of any information collected by, or records of the proceedings of, committees assigned a professional review function in hospitals and health facilities.
>
> * * *
>
> Underscoring the high level of confidentiality attendant to peer review documents is the statutory admonishment that such information is to be *used only for the reasons set forth in the legislative article including that privilege.* See article 17 of the Public Health Code, MCL 333.20101 to 333.22260. [Emphasis in Opinion.]
>
> * * *
>
> The Attorney General asserts that compelling policy considerations militate in favor of holding the statutory privilege narrowly to its terms and allowing the material here sought to be discovered pursuant to criminal investigations. A proper, objective reading of the statute, however, must be considered the Legislature's statement of public policy. *Because the Legislature protected peer review documents in broad terms, the public policy argument must be resolved in favor of confidentiality.*

In re Investigation of Lieberman at 387-389. [Emphasis added.]

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." *Dorris v Detroit Osteopathic Hosp Corp,* 460 Mich 26, 42; 594 NW2d 455 (1999), quoting *In re Petition of Attorney General*, 422 Mich 157, 169; 369 NW2d 826 (1985). In order to promote "the willingness of hospital staff to provide their candid assessment" in peer review proceedings, the Legislature enacted measures to protect peer review activities from intrusive public involvement and from litigation. See *Dorris* at 42.

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In *Feyz,* this Court noted that the peer review protection extended to more than just the deliberative process of a peer review committee. Indeed, this Court stated:

> Peer review immunity is designed to promote free communications about patient care practices, *as both the furnishing of information to the peer review entity* and the proper publication of peer review materials are acts which *are granted immunity. All the protected activities relate to the exchange and evaluation of such information.* [Emphasis added.]

Id. at 685.

In *Harrison,* the Court of Appeals noted that to protect objective facts gathered contemporaneously with an event would be to "grant risk managers the power to unilaterally insulate from discovery firsthand observations that the risk managers would prefer remain concealed" and that "[t]he peer-review statutes do not sweep so broadly." *Harrison* at 34. To the contrary, this Court previously noted that "[i]n providing extensive immunity for peer review, the Legislature was obviously aware that [the stringent protections afforded to communicators and communications made in peer review] might insulate from review and sanction the participants' liability for some adverse outcomes . . . ." *Feyz* at 687.

In *Harrison* the Court of Appeals appeared to be more concerned with correcting some perceived wrong, than in applying MCL 333.21515, as written. In adopting this stance, the Court of Appeals went to extraordinary measures to "derive" the distinction it did. It engaged in policy making, rather than applying the clear and unambiguous language of the statute, as well as following the precedent of this Court. Courts cannot substitute their opinions for that of the legislative body on questions of policy. See *Feyz* at 679.

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MCL 333.21515 indicates that the privilege applies to "records, data, and knowledge" collected "for or by" a peer review entity. It is axiomatic that a review committee cannot engage in any deliberative process unless information has first been gathered and/or prepared.

Accordingly, the Legislature clearly intended for the privilege to be applied to information which is collected *before* a review committee begins its deliberative process. This Court has already recognized as much. See *Feyz* at 685-687; *Dorris* at 42.

The Legislature chose to protect peer review materials in the broadest sense by imposing "a comprehensive ban" on the disclosure of any information collected for or by a peer review committee. See *In re Investigation of Lieberman* at 387-389. It is designed to protect from discovery all activities concerning both the furnishing, as well as the receipt, of information to a peer review committee. See *Feyz* at 685, 687. The Court of Appeals had no reason to engage in judicial construction or interpretation. Under no circumstances was it justified in imposing its own policy ideals in lieu of the Legislature.

B. *HARRISON V MUNSON HEALTHCARE, INC.* IMPROPERLY EXCLUDED "CONTEMPORANEOUS INFORMATION" FROM PEER REVIEW PROTECTION

By its enactment of MCL 333.21515 and MCL 333.20175(8), the Legislature clearly manifested its belief that confidentiality is essential to successful peer review, and must therefore be preserved. As a panel of the Court of Appeals explained in *Attorney General v Bruce*, 124 Mich App 796, 802-803; 335 NW2d 697 (1983):

> It is readily apparent that the statutory privilege created with respect to peer review committee communications was intended to encourage those committees to conduct their proceedings in a frank and professional manner. By insuring that the proceedings remain confidential, the Legislature has provided strong incentive for hospitals to carry out their statutory duties in a meaningful fashion. In the absence of such protection, associates of those physicians being investigated by the hospital might prove to be much more reluctant to evaluate their colleagues' skills in an objective fashion.

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The Court of Appeals' decision in *Harrison* created an arbitrary distinction between "factual information objectively reporting contemporaneous observations" and "'records, data, and knowledge' gathered to permit an effective review of professional practices." *Harrison* at 30.

Nothing in the statutory language found under MCL 333.20175(8) and MCL 333.21515 references or attempts to exclude facts "contemporaneously reported" from the peer review privilege. Rather, the statutory language simply states "records, data, and knowledge collected for or by individuals or committees . . . ." See MCL 333.21515 and MCL 333.20175(8). The statutes contain no language whatsoever regarding a time-based limitation on whether information collected by or for a peer review entity is privileged. By creating an arbitrary distinction relative to "contemporaneously reported" facts, the Court of Appeals improperly usurped the role of the Legislature.

This Court apply the Legislature's intent in creating the peer review privilege(s) found under MCL 333.21515 and MCL 333.20175(8). Failure to apply the statutes as intended by the Legislature violates the founding principles defining the separation of powers. Clearly, the Court of Appeals overstepped the power of the Legislature when it attempted to engage in policy making.

CONCLUSION AND RELIEF REQUESTED

Based on the foregoing, Defendant-Appellant Covenant Healthcare respectfully requests that this Court apply MCL 333.20175(8) and MCL 333.21515 as the statutes are written and intended. In doing so, Defendant respectfully requests that this Court hold that: (1) *Harrison* was wrongly decided; and (2) overrule the trial court's May 8, 2014 order requiring production of the first page of Defendant's Improvement Report.

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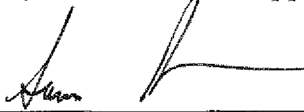
Respectfully submitted,

Hall Matson, PLC
Attorneys for Defendant-Appellant Covenant Healthcare

By: 

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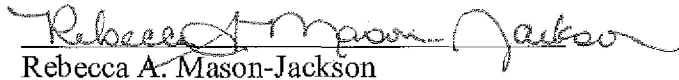
Dated: August 15, 2014

Proof of Service

The undersigned certifies that a copy of the foregoing document was served to all counsel of record on August 15, 2014.



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