STATE OF MICHIGAN

IN THE COURT OF APPEALS

LISA AND MICHAEL DWYER,

Plaintiffs,

v.

ASCENSION CRITTENTON HOSPITAL,

Defendant/Appellant;

and

KIMBERLY COBURN and DOMINICK ZACK, as Co-Personal Representatives of the ESTATE OF MICHAEL FUGLE, D.O., FUGLE AND ASSOCIATES, P.C., JIGNESH PATEL, D.O., JIGNESH PATEL, D.O., PLLC, Jointly and Severally,

Defendants.

Court of Appeals Case No. 347171

Oakland County Circuit
Case No. 17-160599-NH

Hon. Nanci Grant

AMICI CURIAE BRIEF OF MICHIGAN STATE MEDICAL SOCIETY AND THE AMERICAN MEDICAL ASSOCIATION

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STATEMENT OF INTEREST OF AMICI CURIAE MICHIGAN STATE MEDICAL SOCIETY AND THE AMERICAN MEDICAL ASSOCIATION

Amicus Curiae Michigan State Medical Society ("MSMS") is a professional association which represents the interests of over 14,000 physicians in the State of Michigan. Organized to promote and protect the public health and to preserve the interests of its members, MSMS is frequently called upon to express its views with respect to legal issues of significance to the medical profession.

Amicus Curiae American Medical Association ("AMA") is the largest professional association of physicians, residents and medical students in the United States. Through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all physicians, residents and medical students in the United States are represented in the AMA's policy-making process. AMA members practice and reside in all states, including Michigan. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health.

MSMS and the AMA join this brief on their own behalves and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts.

In the pending appeal, this Court is being asked to decide whether a trial court can order that portions of a hospital's physician-credentialing file be produced to the plaintiff in litigation, despite the privileges that attach to such records under three Michigan statutes. See Order and Opinion dated 12/18/18 ("Trial Court Order"), attached as Exhibit 1. The credentialing file is part of the hospital's peer review process, which is mandated by Article 17 of the Michigan Public

Health Code, MCL 333.20101 et seq. Because peer review is integral to the delivery of quality health care in this state, the Legislature has directed that records and information collected for or by individuals or committees with a peer review function are exempted from discovery and court subpoena. See MCL 333.21515, MCL 333.20175(8), and MCL 331.533.

Here, in ordering the production of certain emails directed to Ascension's Chief Medical Officer, a Credentials Committee member, the Trial Court imposed restrictions upon the privilege that do not exist in the statute. The Trial Court restricted the privilege to information generated by, or at the request of, a committee member. The Trial Court also impermissibly limited the privilege to documents that are reflected in the deliberations of the peer review entity, excluding "objective facts" from the privilege; this limitation conflicts with the Supreme Court's holding in *Krusac v Covenant Med Ctr, Inc*, 497 Mich 251; 885 NW2d 908 (2015), that "the peer review statutes do not contain an exception for objective facts contained in an otherwise privileged incident report.

The Trial Court relied upon its own policy rationale to justify this result, stating "if all materials viewed by peer review committees were deemed undiscoverable, a hospital could never be held accountable for any negligent act within the purview of the committee." This reasoning defies the Legislature's determination that the importance of fostering a candid evaluation of the practices within the hospital to reduce morbidity and mortality and improve patient care outweighs competing considerations and requires the confidentiality that the privilege guarantees. It also ignores plaintiff's ability to discover documents from hospitals without invading the investigative files of peer review committees.

The Trial Court Order presents a matter of great concern to MSMS and the AMA. As credentialed members of hospital medical staffs, members of MSMS and the AMA are actively involved in efforts to improve the quality of care provided in Michigan hospitals. Many MSMS

and AMA members serve on peer review committees, which seek to ensure the quality of medical care provided in the hospital. MSMS and AMA members are also the subject of peer review activities and/or confidentially provide information to peer review committees, in reliance upon the privilege. Thus, MSMS and the AMA have an active interest in the issues before this Court and respectfully request the opportunity to share their views.

STATEMENT OF QUESTION PRESENTED

Whether the Trial Court impermissibly ordered the disclosure of portions of the hospital's physician credentialing file in contravention of Michigan's statutory privileges?

The Trial Court said "no."

Plaintiff-Appellee says "no."

Defendant-Appellant Ascension Providence Rochester Hospital says "yes."

Amici Curiae MSMS and the AMA say "yes."

Further, MSMS/AMA disagree with Plaintiff's characterization of the issue as "[w]hen a trial judge conducts in camera review and determines that particular documents are outside the scope of statutory peer review privileges, are those unprivileged e-mails discoverable if relevant to a contested liability claim?" See Dwyers' App Br at 9. This statement of the issue assumes the trial judge correctly determined that the documents are not protected by the peer review privilege, which is the very issue raised by this appeal.

STANDARD OF REVIEW

A de novo standard of review governs the issues on appeal. While an order regarding discovery is reviewed for an abuse of discretion, whether the production of documents is barred by statute is a question of law subject to de novo review. *Ligouri v Wyandotte Hosp,* 253 Mich App 372, 375; 655 NW2d 592 (2002). Questions of statutory construction are also reviewed de novo. *Feyz v Mercy Mem Hosp,* 475 Mich at 663, 672; 719 NW2d (2006). The Court's role "is to give effect to the intent of the Legislature, as expressed by the language of the statute" and to

"apply clear and unambiguous statutes as written, under the assumption that the Legislature intended the meaning of the words it has used …" *Id.* (footnotes omitted).

MSMS/AMA disagree with the Dwyers' characterization of the standard of review as invoking clear error. See Dwyers' App Br at 10. Contrary to the Dwyers' assertion that the Trial Court made findings of fact that three specific e-mail exchanges, judged by their content, were outside the scope of the peer review privilege, whether the privilege applies does not depend upon the actual content of the emails (which are not a matter of factual dispute – the content of the emails say what they say). The issue here involves the application of law to undisputed facts established without contest by Dr. Wissman's affidavits. And in fact, later in their brief, the Dwyers acknowledge that "the trial court either did or did not commit *legal error* in statutory interpretation and in finding that the specific documents she reviewed in camera were not within the statutory protection." Dwyers' App Br at 11 (emphasis added).

ARGUMENT

I. The Trial Court Order Should Be Reversed Because, to Further the Trial Court's Own Policy Preference, the Trial Court Imposed Limitations Upon the Peer Review Privilege That Are Not Expressed in the Statutes and Disregarded Binding Case Law.

The Trial Court's order in *Dwyer* evidences a dangerous departure from the peer review protocol that is elevating the quality of health care provided to Michigan citizens. The patient safety/quality care mandate now emanates from nearly every sector of hospital-based health care governance, including federal, state, regulatory, accrediting and voluntarily-imposed authorities. As the Michigan Health & Hospital Association ("MHA") explained in its 2017-2018 Annual Report, "Healthcare teams must be willing to work together, learn from peers and implement the changes necessary to make patient care safer and more reliable." Michigan Health & Hospital Association, *Improving Care Together, MHA Keystone Center 2017-2018 Annual Report*, <https://www.mha.org/Portals/0/Documents/Reports%20and%20Publications/MHA%20Keystone%20Center%20Annual%20Report/2017-2018-mha-keystone-center-annual-report.pdf> (accessed April 26, 2019) ("2017-2018 MHA Report").

Michigan's statutorily-mandated peer review process, with the protections it provides for frank discussion, has been a significant part of that effort. The importance of confidentiality in the peer review process is well-recognized. It is an integral component of federal safety initiatives as well. For example, the federal imperative to improve patient care, safety and quality is articulated in the federal Patient Safety and Quality Improvement Act ("PSQIA"), which was enacted in 2005. 42 USC § 299b-21 et seq. The PSQIA "establishes a voluntary reporting system designed to enhance the data available to assess and resolve patient safety and health care quality issues." Further, "[t]o encourage the reporting and analysis of medical errors, PSQIA provides Federal privilege and confidentiality protections for patient safety information, called patient safety work product" and "authorizes HHS to impose civil money penalties for violations of patient safety

confidentiality." The PSQIA also authorizes the Agency for Healthcare Research and Quality (AHRQ) to "list" approved patient safety organizations (PSOs) to "collect and review patient safety information." https://www.hhs.gov/hipaa/for-professionals/patient-safety/statute-and-rule/index.html (accessed April 30, 2019).

Privilege and confidentiality protections are provided to encourage the sharing of information without fear of liability. "Enforcement of the confidentiality of patient safety work product is crucial to maintaining an environment for providers to discuss and analyze patient safety events, identify causes and improve future outcomes." https://www.hhs.gov/hipaa/for-professionals/patient-safety/enforcement/index.html (accessed April 30, 2019). As the Agency explained in describing rules adopted by the Secretary of Health and Human Services to implement certain aspects of the PSQIA, including the framework by which hospitals, doctors, and other health care providers may voluntarily report information to PSOs on a privileged and confidential basis for the aggregation and analysis of patient safety events:

> While the Patient Safety Act does establish new Federal confidentiality and privilege protections for certain information, these protections only apply when health care providers work with PSOs and new processes, such as patient safety evaluation systems, that do not currently exist. These Federal data protections provide a mechanism for protection of sensitive information that could improve the quality, safety, and outcomes of health care by fostering a non-threatening environment in which information about adverse medical events and near misses can be discussed. It is hoped that confidential analysis of patient safety events will reduce the occurrence of adverse medical events and, thereby, reduce the costs arising from such events, including costs incurred by state and local governments attributable to such events.

https://www.federalregister.gov/documents/2008/11/21/E8-27475/patient-safety-and-quality-improvement at 70795-70796 (accessed May 3, 2019).

MHA created a PSO in 2007 ("MHA Patient Safety Organization"). The MHA Patient Safety Organization "aims to analyze the types of patient safety events occurring in Michigan and translates that information into actionable patient safety and quality improvement efforts."

Michigan Health & Hospital Association, *Patient Safety and Quality Annual Report 2013*, <https://www.crainsdetroit.com/assets/PDF/CD915491028.PDF> (accessed April 26, 2019) ("2013 MHA Report"), p 16. Since the creation of the MHA Patient Safety Organization, there has been a significant increase in the reporting of adverse events:

> This significant increase is a result of efforts by the MHA PSO, Michigan hospitals and health systems, vendors and ECRI Institute to encourage a culture that supports event reporting, making the reporting process more efficient and maintaining high quality through the automated transfer of adverse event data. It is also a reflection of MHA PSO members' acceptance and comfort with the provisions of the Patient Safety Act that provide a protected environment to encourage voluntary reporting of safety event data. [*Id*.]

The MHA Keystone Center PSO was recently recertified as a federally listed PSO with the Agency for Healthcare Research and Quality (AHRQ) through 2021. 2017-2018 MHA Report, p 14.[1]

On all of these fronts, confidentiality has become an essential component of the health care community's efforts to improve the quality of hospital-based medical care. Michigan's peer review privilege, as envisioned by the Legislature, is essential to that effort. But its effectiveness threatens to be undermined by the Trial Court Order. With a focus on litigation rather than improved patient care, the Trial Court has limited the privilege in a manner that is at odds with the statutory

[1] The Patient Protection and Affordable Care Act also seeks to improve patient access to high-quality, affordable health care for all Americans and to that end, directed the Secretary of the Department of Health and Human Services ("HHS") to establish a National Strategy for Quality Improvement in Health Care ("National Quality Strategy"). *See* National Strategy for Quality Improvement in Health Care, *2015 National Healthcare Quality and Disparities Report and 5th Anniversary Update on the National Quality Strategy* < https://www.ahrq.gov/sites/default/files/wysiwyg/research/findings/nhqrdr/nhqdr15/2015nhqdr.pdf > (accessed April 26, 2019). The aims of the National Quality Strategy are to (1) "[i]mprove overall quality, by making health care more patient-centered, reliable, accessible, safe, and focused on achieving meaningful health outcomes;" (2) "[i]mprove the health of the U.S. population by supporting proven interventions to address behavioral, social and, environmental determinants of health in addition to delivering higher quality care;" and (3) "[r]educe the cost of quality health care for individuals, families, employers, and government." *Id.* at 1.

language, case law, and accepted methods of legal analysis. For the reasons stated below, the Trial Court Order should be reversed.

A. Michigan's Statutory Peer Review Privileges Are Broadly Written to Allow a Candid Evaluation of the Professional Practices Within a Hospital to Reduce Morbidity and Mortality and Improve Patient Care.

The peer review privilege in Michigan began with, and is tethered to, a mandate. To reduce morbidity and mortality and to improve patient care, the Michigan Legislature commanded hospitals to establish peer review committees to review "professional practices in the hospital for the purpose of reducing morbidity and mortality," including "the quality and necessity of the care provided and the preventability of complications and deaths occurring in the hospital." MCL 333.21513.[2] To enable Michigan hospitals to perform this function, and to encourage a "[c]andid and conscientious evaluation of clinical practices," the Legislature enacted "two primary measures" which "protect peer review activities from intrusive public involvement *and from litigation*." *Feyz v Mercy Mem Hosp*, 475 Mich 663, 680-681; 719 NW2d 1 (2006) (footnotes omitted) (emphasis added). The first grants immunity to persons, organizations and entities that provide information to peer review groups or that perform a protected peer review function. *See* MCL 331.531.[3] The second measure renders records, data, and knowledge collected for or by peer

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[2] MCL 333.21513 provides in pertinent part:

> The owner, operator, and governing body of a hospital licensed under this article:
> . . .
>
> (d) Shall assure that physicians and dentists admitted to practice in the hospital are organized into a medical staff to enable an effective review of the professional practices in the hospital for the purpose of reducing morbidity and mortality and improving the care provided in the hospital for patients. The review shall include the quality and necessity of the care provided and the preventability of complications and deaths occurring in the hospital.

[3] MCL 331.531 provides in pertinent part:

> (1) A person, organization, or entity may provide to a review entity information or data relating to the physical or psychological condition of a person, the necessity,

review entities confidential and protects them from discovery. MCL 333.21515, MCL 333.20175(8), MCL 331.533.

For decades, persons called upon to participate in the peer review and credentialing process have relied upon these protections as an incentive to disclose the untoward events that impede the attainment of quality health care goals. Our appellate courts have encouraged this reliance by consistently upholding the peer review privilege against encroachment, in keeping with its plain meaning and intended scope. Courts have held that the peer review privilege is broad, *In Re Lieberman*, 250 Mich App 381, 389-390; 646 NW2d 199 (2002), evidencing "the Legislature's intent to fully protect quality assurance and peer review records from discovery." *Ligouri*, 253 Mich App at 376.

B. The Trial Court Order Impermissibly Limits the Privilege to Documents That Are Reflected in the Deliberations of the Peer Review Entity and to Information Generated By, or at the Request of, a Committee Member.

The protection afforded by the peer review privilege is expressly broad in keeping with its intended purpose and effect. MCL 333.21515 provides:

> appropriateness, or quality of health care rendered to a person, or the qualifications, competence, or performance of a health care provider.
>
> (2) As used in this section, "review entity" means 1 of the following:
>
> (a) A duly appointed peer review committee . . .
>
> (3) A person, organization, or entity is not civilly or criminally liable:
>
> (a) For providing information or data pursuant to subsection (1).
>
> (b) For an act or communication within its scope as a review entity.
>
> (c) For releasing or publishing a record of the proceedings, or of the reports, findings, or conclusions of a review entity, subject to sections 2 and 3.
>
> (4) The immunity from liability provided under subsection (3) does not apply to a person, organization, or entity that acts with malice. . . .

> 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.

In nearly identical language, MCL 333.20175(8) provides:

> 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.

Similar language exists in MCL 331.533 (relating to the release of information for medical research and education):

> 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 section 2, 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.[4]

Exceedingly out of sync with the rules of statutory construction, and to effectuate its own policy preference, the Trial Court Order disregards the plain language of these clear and unambiguous statutes, imposing distinctions, conditions, and requirements upon application of the

[4] The exceptions in Section 2, MCL 331.532, are:

> (a) To advance health care research or health care education.
>
> (b) To maintain the standards of the health care professions.
>
> (c) To protect the financial integrity of any governmentally funded program.
>
> (d) To provide evidence relating to the ethics or discipline of a health care provider, entity, or practitioner.
>
> (e) To review the qualifications, competence, and performance of a health care professional with respect to the selection and appointment of the health care professional to the medical staff of a health facility.
>
> (f) To comply with section 20175 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.20175 of the Michigan Compiled Laws.

privilege that are not expressed in the statutes. The Trial Court also ignored the Supreme Court's decision in *Krusac v Covenant Med Ctr, Inc*, 497 Mich 251; 885 NW2d 908 (2015). Three errors are most prominent.

First, the Trial Court Order explicitly holds that the privilege only attaches to documents that are reflected in the committee's deliberations, discussions, evaluation, and judgment and excludes facts:

> [I]t is not the existence of the facts of an incident or accident that must be kept confidential in order for the committee to effectuate its purpose. See *Centennial Healthcare Management Corp v Mich Department of Consumer & Industry Servs*, 254 Mich App 275, 290 (2002). Rather, "***it is how the committee discusses, deliberates, evaluates, and judges those facts that the privilege is designed to protect***." See *id.* [Trial Court Order at 3 (emphasis added)].
>
> * * *
>
> Further, despite the fact that the entirety of the committee's file is before this Court, ***there is no indication that the committee discussed, deliberated, or evaluated the information contained within the e-mails and that, based on the emails in question, they made specific decisions concerning Dr. Fugle***. [Trial Court Order at 3-4 (emphasis added)].
>
> * * *
>
> Because it appears that the above-referenced e-mails ***have nothing to do with the committee's deliberative process and because they do not reflect the committee members' analysis or deliberations***, the Court finds that they are ***not protected*** from discovery pursuant to MCL 333.20175(8), MCL 333.21515, and MCL 331.533. See *Centennial Healthcare Management Corp*, 254 Mich App at 290. [Trial Court Order at 4].

Second, the Trial Court Order requires that to warrant protection, the emails must have been "generated" by members of the peer review entity, sent directly to a member of the peer review entity, or been prepared at the request of the peer review entity:

> [I]t appears that the e-mails referenced *supra* were exchanged by Dr. Wissman and other medical professionals relating to concerns about Dr. Fugle as a result of Dr. Wissman's position as ACH's Chief Medical Officer. Indeed, the October 10, 2014 email from Ms. Crawforth (who was a Certified Registered Nurse Anesthetist and the Interim Director of Perioperative Services at the time) to Dr. Wissman

> references Dr. Wissman's role as Chief Medical Officer. ACH has ***not provided any evidence to support that Mr. Powell, Ms. Crawforth, Ms. Gentry, Dr. Gonzales, and Ms. Gura were members of the committee or that Dr. Wissman was acting in her role as a committee member at all pertinent times***. ***As a result, there is no indication that the e-mails referenced supra were generated by members of the committee***. ***The Court fails to see how the actions of one committee member can amount to a peer review function***. [Trial Court Order at 3 (emphasis added)].
>
> * * *
>
> Moreover, there is ***no evidence*** before this Court ***that the emails were prepared at the request of the committee***. See *Marchand v Henry Ford Hosp,* 398 Mich 163, 167-168 (1976). [Trial Court Order at 4 (emphasis added)].

And *third*, in imposing this non-statutory criteria upon exercise of the privilege, the Trial Court has rewritten the statutes to accommodate its own policy choice in favor of litigation, stating as its apparent policy rationale:

> Indeed, if all materials viewed by peer review committees were deemed undiscoverable, ***a hospital could never be held accountable for any negligent act within the purview of the committee***. [Trial Court Order at 4 (emphasis added)].

The Trial Court has clearly overstepped its bounds. It is not for the Court to rewrite the statute to reflect its own policy preference. As this Court explained in *Johnson v Detroit Medical Center*, 291 Mich App 165, 168; 804 NW2d 754 (2010), "[t]he use of the word 'shall' in the statute indicates that this provision is mandatory." The Trial Court's multiple errors ignore the plain meaning of the statutes and disregard Michigan case law.

C. The Privilege is not Limited to Information and Documents That Are Reflected in the Peer Review Committee's Deliberations, Discussions, Evaluation, and Judgment or to Documents That are Generated by Committee Members.

Michigan jurisprudence does not support the Trial Court's view of the peer review privilege. The several decades of law on the subject do not limit the privilege to only those documents that reflect the deliberative processes of the peer review committee. To the contrary, Michigan's peer review privilege has historically spanned the bounds of the peer review process.

As the Supreme Court remarked in *Feyz*, "[p]eer review is a communicative process, designed to foster an environment where participating physicians can freely exchange and evaluate information without fear of liability …" 475 Mich at 685.

The unmistakable breadth of the peer review process was explicitly described in *Feyz*. The Supreme Court explained that "[i]t is obvious that 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." *Id.* "*All the protected activities relate to the exchange and evaluation of such information*," the Court emphasized, and "[*a*]*ll the peer review communications are protected from discovery and use in any form of legal proceeding*." 475 Mich at 685 (emphasis added).

This important privilege is clearly an incentive to open and frank disclosure. Over 30 years ago, the Supreme Court observed that "[t]o encourage and implement productive peer review procedures, the Legislature has provided that the information and records developed and compiled by peer review committees be confidential and not subject to court subpoena." *Attorney General v Bruce*, 422 Mich 157, 161; 369 NW2d 826 (1985). Emphasizing the need to preserve the integrity of the peer review process in *Bruce*, the Supreme Court rejected the Attorney General's attempt to subpoena, on behalf of the Department of Licensing and Regulation and the Michigan Board of Medicine, a hospital's peer review committee proceedings. Likewise, in *Dorris v Detroit Osteopathic Hosp*, 460 Mich 26, 42-43; 594 NW2d 455 (1999), the Supreme Court remarked that without "the assurance of confidentiality as provided by §§ 21515 and 20175(8), the willingness of hospital staff to provide their candid assessment will be greatly diminished" and "[t]his 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."

The comprehensive nature of the privilege in the very context presented by Ascension's appeal in this case was acknowledged by this Court in *Johnson v Detroit Medical Ctr*, 291 Mich App 165, 168 and 169 n1; 804 NW2d 754 (2010), which reversed a trial court order requiring defendants to disclose the contents of a physician's credentials and privileges file. This Court explained that "a credentialing committee is a peer review committee" and "[b]ecause *everything* within the file is protected, there is no merit to plaintiff's argument that defendants should be required to prepare a list of the file's contents so that items can be evaluated individually." *Id*. (emphasis added). *See also*, *Dye v St John Hosp*, 230 Mich App 661, 668-669; 584 NW2d 747 (1998) (vacating trial court order compelling the production of information from defendant physician's credentials file, concluding that the "materials in the file relating to [the physician's] application for privileges were 'collected for or by' the committee and the confidentiality provisions of the statutes apply.")

More recently, in an action by a physician contesting the defendant hospital's refusal to renew the physician's medical staff privileges, this Court rejected the assertion that the privilege did not apply to information regarding "alleged misrepresentations on his application concerning whether his privileges at another hospital had been suspended and whether he had allowed one of his board certifications to lapse." *Rasak v Botsford Gen Hosp*, unpublished opinion per curiam of the Court of Appeals issued September 25, 2018 (Docket No. 339614). The plaintiff argued that *Krusac* limited the privilege to records, data, and knowledge acquired for the purpose of reducing morbidity and mortality and improving patient care, and that the information he sought did not relate to patient care. This Court disagreed with plaintiff's attempt to narrow the privilege, stating that "any information pertaining to plaintiff's suspension at the other hospital easily falls within this scope, particularly because it related to plaintiff's alleged misconduct surrounding his patient

care and refusal to abide by imposed limitations at that hospital" and further concluded that "information concerning board certifications, or the lack thereof, is reasonably related to patient care." This Court emphasized that *Feyz* contradicted plaintiff's argument that a physician who is denied privileges is entitled to these materials, stating, "*Feyz* applied the statutory peer-review regime in the context of a lawsuit by a physician who was disciplined by the defendant hospital" and "[t]he Court held that peer-review communications are protected from discovery and use in 'any form of legal proceeding,'" citing *Feyz*, 475 Mich at 685.[5]

In *Gregory v Heritage Hosp,* 460 Mich 26; 594 NW2d 455 (1999),[6] the Michigan Supreme Court held that the trial court erred in compelling the disclosure of incident and investigative reports of an assault and battery occurring while the plaintiff was a patient at the hospital. The Court relied upon the affidavit of the hospital's manager of quality and utilization management, which established that the materials were used "for the purpose of maintaining health care standards at the hospital, improving the quality of care provided to patients, and reducing morbidity and mortality within the hospital." 460 Mich at 42. The sought-after materials included investigative reports, statements, notes, memoranda, records and reports. The Court remanded to permit plaintiff to challenge "the veracity of defendant hospital's procedures." *Id*. at 48-49.

This Court afforded complete protection to an incident report in *Gallagher v Detroit-Macomb Hosp Ass'n*, 171 Mich App 761, 769; 431 NW2d 90 (1988), where the purpose of the report was to assist the hospital in monitoring its own activities to reduce accidents, injuries,

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[5] Although unpublished, *Rasak* is cited because it reflects the broad application of the privilege in a recent case. Unpublished cases are attached as Exhibit 2.

[6] *Gregory* was decided in conjunction with *Dorris.*

morbidity and mortality at the hospital. The Court's description of that report shows the Trial Court's error in refusing to afford protection to the emails sent to Dr. Wissman:

> Thompson explained that an incident report is completed for all unusual occurrences at the hospital and that its purpose was to assist the hospital in monitoring its own activities to reduce accidents, injuries, morbidity and mortality at the hospital. The report is routed to the unit supervisor and the department head for further review and investigation and then to the hospital's legal affairs department. It is tabulated with other reports to identify trends, patterns or problems at South Macomb Hospital. The information is then routed to either the hospital's Safety Committee or Quality Assurance Committee. Both committees are assigned the responsibility of identifying trends or problems at the hospital. Based on Thompson's testimony, the quality and safety committees appear to fulfill the protected review functions.

Id. at 769.

Noting that MCL 333.20175 and MCL 333.21515 "evidence the Legislature's intent to *fully* protect quality assurance/peer review records from discovery," this Court in *Ligouri v Wyandotte Hosp*, 253 Mich App at 377, concluded that reports regarding a patient's fall at the hospital were protected. And rejecting disclosure pursuant to a search warrant in *In Re Lieberman*, 250 Mich App 381, 387; 646 NW2d 199 (2002), the Court of Appeals observed that § 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" (emphasis added). As the Supreme Court explained in *Dorris*, the statutes have been interpreted to fully protect quality assurance/peer review records from discovery. 460 Mich at 40.

The above-cited cases do not require that protected information and documents be directly sent to the peer review committee, that they be generated by committee members, that they reflect the deliberations of committee members, or that they be considered or acted upon in any specific way. Nor is this consistent history of judicial application altered by this Court's decision in *Centennial Healthcare Mgmt Corp v Dep't of Consumer & Indus Servs*, 254 Mich App 275; 657

NW2d 746 (2002). The Trial Court relied upon *Centennial* as support for its conclusion that the documents must reflect the committee's use of the documents in its deliberative process, citing *Centennial* for the proposition that "it is not the existence of the facts of an incident or accident that must be kept confidential in order for the committee to effectuate its purpose," and "'it is how the committee discusses, deliberates, evaluates, and judges those facts that the privilege is designed to protect.'" Trial Court Order at 3.

Centennial does not articulate the current law on this issue. Rather, in *Krusac v Covenant Med Ctr, Inc*, 497 Mich 251; 885 NW2d 908 (2015), the Michigan Supreme Court limited *Centennial*'s holding, stating:

> The *Harrison* panel also found support for its decision in *Centennial Healthcare Mgt. Corp. v. Dep't. of Consumer & Indus. Servs*., 254 Mich.App. 275, 657 N.W.2d 746 (2002). However, *Centennial* is inapposite. *Centennial* does not address whether a private litigant has a right to review objective facts contained in an otherwise privileged incident report, but instead involves whether an administrative rule promulgated by the Michigan Department of Consumer and Industry Services infringed the peer review privilege. But, to the extent *Centennial* may be read as contrary to our opinion today, we limit its reasoning and holding to its specific facts [497 Mich at 263, n 10].

The issue in *Krusac* was whether the peer review privilege applied to objective facts contained in an incident report which a nurse prepared and submitted to her supervisor shortly after a patient rolled off the operating room table following completion of a cardiac catheterization. After reviewing the report *in camera*, the Trial Court ordered defendant to provide plaintiff with the first page of the report, which purportedly contained only objective facts, relying upon this Court's decision in *Harrison v Munson Healthcare, Inc*, 304 Mich App 1; 851 NW2d 249 (2014). In holding that "the peer review statutes do not contain an exception for objective facts contained in an otherwise privileged incident report," the Supreme Court overruled *Harrison*. 497 Mich at 259.

Further, *Centennial* did not apply the plain language of the statute as written but instead considered the "logic" of confidentiality in the peer review context and found that protection

should only be afforded when necessary to "effectuate other purposes outlined in the Public Health Code." 254 Mich App at 290-291. *Centennial's* application of the peer review privilege is dramatically opposed to the meaning expressed in the words of the statute, which limit the "use" of the information, not the "protection" of the information, to purposes "provided in this article." The reports in *Centennial* were prepared to comply with certain administrative rules governing nursing homes. Wisely, even before *Krusac*, this Court concluded that *Centennial's* reasoning should be limited to the state agency context, explaining:

> The *Centennial* Court's decision and reasoning is not applicable where, as here, the party seeking disclosure of the information is a private litigant. MCL 333.20175(8) clearly bars release of the "records, data, and knowledge collected for or by individuals or committees assigned a professional review function in a health facility." The accompanying regulations, 1979 AACS, R 325.21101, also relied on by plaintiff, provides that accident records and incident reports shall be kept in the home and shall be available to the director or his or her authorized representative for review and copying if necessary. But the rule only authorizes copying of the reports by the director or an authorized representative. It does not indicate that the reports should be available for copying by anyone else.

Maviglia v West Bloomfield Nursing & Convalescent Center, Inc, unpublished opinion per curiam of the Court of Appeals, issued November 9, 2004 (Docket No. 248796), p 2 (holding that because incident reports are data collected for the purpose of professional review, they must not be subject to discovery in a malpractice case).[7]

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[7] *Maviglia* is cited because it further analyzes and limits the reach of *Centennial*. *See also*, *Raslan v Providence Hosp*, unpublished opinion per curiam of the Court of Appeals issued September 11, 2001 (Docket No. 220159), p 7 (applying the privilege to investigation reports, peer review reports, and employee records relating to review of professional practices and the quality of care provided in the hospital); *Lloyd v Oakland/Trinity Health*, No. 12-cv-12567, 2013 WL 11113570 (ED Mich, Mar 18, 2013) ("Michigan courts have repeatedly held that the peer review privilege encompasses hospital incident reports where such reports are 'compiled in furtherance of improving health care and reducing morbidity and mortality'"); *Lindsey v St John Health Sys*, unpublished opinion per curiam of the Court of Appeals, issued February 6, 2007 (Docket Nos. 268296, 270042), p 18 (occurrence report is not discoverable as it "necessarily related to a document that concerned the review of professional practices and the quality of care provided by the hospital"). These unpublished decisions are footnoted to show this Court's historic practice of broadly applying the privilege to documents that are not reflective of the peer review entity's

D. The Trial Court's Limitations Contravene the Express Language of the Peer Review Statutes.

The Trial Court's limitations on the protection afforded by the privilege cannot be reconciled with the unambiguous language of the peer review statutes. These statutes represent the balance struck by the Legislature and expressly embrace "records, data, and knowledge," each of which, by definition, includes more than the deliberative processes of the peer review entity. In rejecting the objective facts/deliberation distinction in *Krusac*, the Supreme Court held that "the peer review statutes do not contain an exception for objective facts contained in an otherwise privileged incident report." 497 Mich at 259. The Court looked to the dictionary definitions of the words, finding in each instance that the term embraced objective facts. The Court explained:

> Both §§ 20175(8) and 21515 protect the "records, data, and knowledge" collected for or by a peer review committee . . . "Record" is defined as "an account in writing or the like preserving the memory or knowledge of facts or events." Random House Webster's College Dictionary (2001) (emphasis added). "Data" is defined as "individual facts, statistics, or items of information." *Id*. (emphasis added). "Knowledge" is defined as "acquaintance with facts, truths, or principles" or "familiarity or conversance, as by study or experience." *Id*. (emphasis added). Because the ordinary meaning of these statutory terms plainly encompasses objective facts, we hold that objective facts are subject to the peer review privilege. We therefore disagree with the *Harrison* panel's conclusion that the Legislature intended to exclude from protection objective facts contained in an otherwise peer review privileged incident report [497 Mich 259-260].

If the Trial Court had followed *Krusac* and applied the plain meaning of these words, it could not have excluded the referenced emails from the protection of the peer review privilege.

Further, *Krusac* distinguished *Monty v Warren Hospital Corp*, 422 Mich 138, 146-147; 366 NW2d 198 (1985), which the Trial Court relied upon in fashioning the objective facts exception. *Krusac* found *Monty* to be inapplicable to issues involving the scope of the privilege

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deliberative process, as well as to documents that were not generated by a member of the committee or at a member's request.

as the issue in *Monty* was whether a hospital committee was assigned a peer review function and the statutes at issue were not similar to those before the Court. *Krusac* explained:

> To create the objective-facts exception, the *Harrison* panel relied on several cases from outside our jurisdiction. However, resort to these cases was not permitted because the peer review statutes are unambiguous. See *Madugula*, 496 Mich. at 696, 853 N.W.2d 75. In any event, the cases utilized by the *Harrison* panel do not support the creation of such an exception. The panel relied upon three cases cited by this Court in *Monty v. Warren Hosp. Corp*., 422 Mich. 138, 146–147, 366 N.W.2d 198 (1985): *Davidson v. Light*, 79 F.R.D. 137 (D.Colo., 1978), *Bredice v. Doctors Hosp*., 50 F.R.D. 249 (D.D.C., 1970), and *Coburn v. Seda*, 101 Wash.2d 270, 677 P.2d 173 (Wash., 1984). ***However, the Monty court relied on those cases as guidance for determining whether a hospital committee was assigned a peer review function, not whether the content of an incident report was protected by the peer review privilege. In addition, a reading of these cases indicates that they shed no light on the scope of our peer review statutes*** as they either do not discuss a statutory privilege at all (e.g., *Bredice* and *Davidson*), or pertain to a statutory privilege materially different from ours (e.g., *Coburn*) [*Krusac*, 497 Mich at 260, n 4 (emphasis added)].

The Trial Court likewise refused protection on the ostensible basis that the emails were not sent to Dr. Wissman in her capacity as a Credentials Committee member, and hence, "there is no indication that the e-mails … were generated by members of the committee." Dr. Wissman's affidavits show otherwise. Dr. Wissman's affidavits show that as Chief Medical Officer, she is "the individual designated to receive reports of any issues or incidents involving the medical staff"; that she undertakes a professional review of reports to determine if referral to a peer review committee for further investigation or consideration is warranted; all documents identified by the Court were placed in the Credentials Committee file, which means she determined that further investigation or consideration was warranted; that the initial professional review is part of her assigned duties; the Credentials Committee met monthly and discussed credentials issues, including those contained in the Credentials Committee file; the documents ordered to be disclosed reflect the investigation undertaken during the peer review process involved in credentialing, as well as the "credentialing decision regarding the information received"; and "all of the Documents

were collected as part of my professional review function as Chief Medical Officer and/or as part of the professional review processes involved in credentialing as it relates to the decision to grant, regulate, or modify the privileges which had been extended." Dr. Wissman further stated that all of the documents were maintained to allow the Credentials Committee to carry out its functions. As Ascension argues, Dr. Wissman's affidavits show "that the specific emails ordered to be disclosed by the trial court were part of APRH's credentialing file on Dr. Fugle, and were collected, maintained, and discussed for and by the APRH Credentials Committee as part of the professional peer review processes involved in credentialing …" APCH's Reply at 4.

The Trial Court disregarded this testimony. While acknowledging that "Dr. Wissman's affidavit indicates that the credentials committee has a review function: It reviews recommendations and comments regarding an applicant for staff membership," the Court nonetheless erroneously concluded that the emails ordered to be produced related to concerns "as a result of Dr. Wissman's position as ACH's Chief Medical Officer" and ACH did not provide evidence that Dr. Wissman was acting in her role as a committee member at all pertinent times. *Such evidence directly appears in the Affidavit*.[8]

[8] The Dwyers' analogies do not inform the analysis. The assertion that Defendant's view of the peer review privilege means that the casual mention by a physician in "the ladies' room [that] 'Dr. Fugle doesn't seem to be as spry as he used to be'" or that a conversation overheard by a credentialing committee member that Dr. Fugle "forgot a birthday" would be considered confidential communications makes light of this very serious issue and offends reasoned analysis. See Dwyers App Br at 14-15. The Dwyers acknowledge that "if the communications were directed to Dr. Wissman in her capacity as committee member, this would, deservedly, stand as potent evidence that the communication is within the statute." Dwyers App Br at 17. As her affidavits indicate, Dr. Wissman received the emails as the person designated to receive reports regarding members of the medical staff and to determine whether referral to the peer review committee, of which she is a member, for investigation was warranted. Dr. Wissman was a Credentials Committee member by virtue of her role as chief medical officer and thus received the emails in her capacity as a committee member as well as her capacity as chief medical officer. There is no basis to conclude that the emails, however addressed, were received in her role as chief medical officer but not in her role as a Credentials Committee member.

Further, the privilege statutes do not require that the emails be generated by members of the committee; they protect "[t]he records, data, and knowledge collected *for or by individuals or committees* assigned a professional review function …" MCL 333.21515; MCL 333.20175(8) (emphasis added), and "[t]he record of a proceeding and the reports, findings, and conclusions of a review entity and data collected *by or for* a review entity." MCL 331.533. Here the documents ordered to be disclosed were clearly *collected by an individual* (the hospital's chief medical officer, who is also a Credentials Committee member) assigned a professional review function (receiving and evaluating reports of issues and incidents involving physicians to determine if further consideration or investigation is warranted), and presented to the Credentials Committee for further consideration. See Wissman Affidavits. This scenario is directly embraced by the statutory language.

The Trial Court cites *Marchand v Henry Ford Hosp*, 398 Mich 163; 247 NW2d 280 (1976), for the proposition that protected material must be collected at the direction of a peer review committee and the privilege cannot attach to material which is merely in the possession of a peer review committee. Unlike the emails provided to Dr. Wissman here, the information requested in *Marchand* was collected by a physician on his own initiative to see how hyperalimentation feeding worked and whether it was effective. *Id*. at 167-168. The Supreme Court therefore concluded that it was not "collected pursuant to a directive from a '[committee] assigned this review function'" and while this information "was subsequently presented at a general staff meeting, the ex post facto submission does not satisfy the 'collection' criteria bringing the data within the ambit of the evidentiary privilege." *Id*. at 168.

Here, according to Dr. Wissman's affidavit, the emails were provided to and evaluated by Dr. Wissman as "the individual designated to receive reports of any issues or incidents involving

the medical staff" so she could undertake a professional review to determine if referral to a peer review committee for further investigation or consideration was warranted. Dr. Wissman determined that further investigation was warranted and the Credentials Committee engaged in that review. This is as much a part of the peer review process as were the protected incident reports in *Krusac*, *Gregory*, *Gallagher*, and *Ligouri*. See also, *Dye v St. John Hosp*, *supra*, where this Court explained that materials the credentials committee wanted to review before granting staff privileges, even if "submitted" by others as part of the application process, were "collected for or by" the committee and are thus subject to the privilege. 230 Mich App at 667.[9]

E. The Trial Court Impermissibly Alters the Meaning of the Peer Review Statutes to Effectuate Its Own Policy Preference.

The Trial Court has impermissibly rewritten the peer review statutes to accommodate its policy choice in favor of litigation. That policy rationale is set forth in the Trial Court Order, where the Court reasons that "if all materials viewed by peer review committees were deemed undiscoverable, a hospital could never be held accountable for any negligent act within the purview of the committee." Trial Court Order at 4. The Trial Court's rationale is clearly wrong: the fact that a privilege protects records, data and knowledge collected for and by individuals or committees assigned a review function does not mean that hospitals cannot be held accountable for negligent acts. It just means that, as the Legislature has commanded, these peer review materials are not available to litigants.

[9] The Dwyers argue that if the persons communicating were not committee members, their "communications were not part of any deliberations of the committee and were not of a confidentiality concern too sensitive to share with outsiders." Dwyers App Br at 17-18. This argument is belied by *Dye* and the other cases cited above. Indeed, denying the privilege to information submitted by non-committee members would undermine the purpose of the peer review privilege and conceivably limit to a great degree the information available to the committee when performing its review function, wholly undermining the purpose of the privilege.

Irrespective of whether the records, data, and knowledge might have benefited a claimant or a defendant in subsequent litigation, the Legislature has determined that the importance of fostering a candid evaluation of the practices within the hospital outweighs competing considerations. Nothing in the peer review confidentiality statute inhibits plaintiffs from employing the full range of discovery mechanisms generally available to plaintiffs in other lawsuits – except that the contents of the peer review file and the deliberations of the peer review committee are privileged. Hospitals can be and are regularly held liable for medical malpractice using these discovery techniques. In *Krusac*, the Supreme Court expressed that "while the peer review privilege may make it more difficult for a party to obtain evidence, the burden on a litigant is mitigated by the fact that he or she may still obtain relevant facts through eyewitness testimony, including from the author of a privileged incident report, and from the patient's medical record." 497 Mich at 262. *Krusac* further states that "even though the information may properly be proved from another source – i.e., the medical record or witness testimony – a hospital may still claim an exemption from disclosure materials that are subject to the peer review privilege." 496 Mich at 261, n6.

The Trial Court was not authorized to disturb the balance reached by the Legislature with respect to this issue. As our appellate courts have often expressed, a court is not empowered to contort the meaning of a statute to satisfy its own policy preferences. In *Ligouri*, this Court noted that "[w]hile production of the records may appear under these circumstances to be the equitable result, equity may not be invoked to avoid application of a statute." 253 Mich App at 377 n 4. *Feyz* recognized that the broad sweep of peer review might "insulate from review and sanction the participants' liability for some adverse outcomes …" 475 Mich at 687. And in *Krusac*, the Supreme Court expressed:

> Indeed, by their very nature, privileges "are not designed or intended to facilitate the fact-finding process or to safeguard its integrity," but "[t]heir effect instead is clearly inhibitive; rather than facilitate the illumination of truth, they shut out the light." *People v. Warren*, 462 Mich. 415, 428, 615 N.W.2d 691 (2000), quoting 1 McCormick, Evidence (5th ed.), § 72, pp. 298–299 [497 Mich at 263, n 8].

Reaching the proper balance is for the Legislature, not the Court. This Court explained in *Johnson*:

> §333.21515 clearly and unambiguously prohibits discovery of Dr. Nunn's credentials and privileges file. *Attorney General*, 422 Mich at 173. "To hold otherwise *would require us to create an exception* to the [evidentiary] privilege granted such information by the Legislature; *that is not for us to do*.

291 Mich App at 169 (emphasis added) (brackets in original). Rejecting the assertion that "compelling policy considerations" militate in favor of holding the privilege inapplicable to criminal investigations, the *Lieberman* court said that "[a] proper, objective reading of the statute … 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 Lieberman*, 250 Mich App at 389. Similarly, affirming a motion to quash a subpoena for information subject to the psychologist-patient privilege amidst allegations that the decision would lead to "unfair treatment" and "absurd or illogical results," this Court explained in part:

> As Michigan courts have long recognized and often stated, a party having complaints about the wisdom of plain statutory language should direct his arguments to the Legislature. *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 752; 641 NW2d 567 (2002) ("'[O]ur judicial role precludes imposing different policy choices than those selected by the Legislature ….'") (citations omitted); *Gilliam v Hi-Temp Products, Inc*, 260 Mich App 98, 109; 677 NW2d 856 (2003) ("The fact that a statute appears to be impolitic, unwise, or unfair is not sufficient to permit judicial construction. The wisdom of a statute is for the determination of the Legislature and the law must be enforced as written.") (footnote omitted).

In Re Petition of Attorney General for Investigative Subpoenas, 282 Mich App 585; 766 NW2d 675 (2009).[10]

Here, the Trial Court fashioned a rule that violates the Legislature's intent and undermines the purpose and effectiveness of the peer review privilege, signaling that participants in the peer review process can no longer be assured that confidentiality will attach to the knowledge or documents they provide to enable statutorily protected committees to perform their peer review function. The Trial Court Order should be reversed.

RELIEF REQUESTED

For these reasons, Amici Curiae Michigan State Medical Society and the American Medical Association join Defendant-Appellant Ascension Providence Rochester Hospital in requesting that this Court vacate the Trial Court's December 18, 2018 Order and Opinion.

Respectfully submitted,

KERR, RUSSELL AND WEBER, PLC

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Dated: July 24, 2019

[10] The Dwyers argue that "the 'policy' aspect of [the] privilege is fairly debatable," casting aspersions upon its utility. Dwyers App Br at 10. Such rhetoric is irrelevant. As the above cases show, policy rationales fall within the exclusive domain of the Legislature, not the judiciary.

CERTIFICATE OF SERVICE

Cynthia J. Villeneuve, being first duly sworn deposes and says on July 24, 2019, she filed the foregoing document with the Clerk of the Court using the Court's electronic filing system which will electronically serve all parties of record.

/s/ Cynthia J. Villeneuve
Cynthia J. Villeneuve