STATE OF MICHIGAN
IN THE COURT OF APPEALS

YOLANDA JOHNSON, Successor Personal Representative of the Estate of Vera Jackson, Deceased,

Plaintiff-Appellee,

v

THE DETROIT MEDICAL CENTER, a Michigan non-profit corporation, HARPER-HUTZEL HOSPITAL, a Michigan non-profit corporation, ANDRE R. NUNN, M.D., and DETROIT SURGICAL SPECIALISTS, P.C., d/b/a Detroit Bariatrics, a Michigan professional corporation, jointly and severally,

Defendants-Appellants.

Court of Appeals Case No. 293304

Lower Court Case No. 08-123187-NH
Wayne County Circuit Court

BRIEF OF AMICUS CURIAE MICHIGAN STATE MEDICAL SOCIETY

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STATEMENT OF THE ISSUES

I. Whether files relating to the process of awarding hospital privileges and credentials to a physician constitute peer review materials which are statutorily protected from disclosure?

Plaintiff-Appellee says "no."

Defendants-Appellants say "yes."

The Trial Court said "no."

Amicus Curiae MSMS says "yes."

II. Whether the plaintiff in a medical malpractice action can compel the production of the medical records of patients who are not parties to an action?

Plaintiff-Appellee says "yes."

Defendants-Appellants say "no."

The Trial Court said "yes."

Amicus Curiae MSMS says "no."

STATEMENT OF FACTS AND PROCEEDINGS

Amicus Curiae Michigan State Medical Society refers this Court to the factual statement in Defendants-Appellants' Brief on Appeal.

INTEREST OF AMICUS CURIAE MICHIGAN STATE MEDICAL SOCIETY

Amicus Curiae Michigan State Medical Society (MSMS) is a professional association that represents the interests of over 14,000 physicians in the State of Michigan. MSMS was organized to promote and protect the public health, and to preserve the interests of physicians throughout the state. MSMS has frequently been called upon to express the views of its members regarding matters of importance to the health care community.

The confidentiality issues raised by the present appeal are of immense interest to MSMS' members and the patients they serve. In its July 24, 2009 Order, the Trial Court compelled Defendants to produce protected peer review materials pertaining to the process of awarding hospital privileges and credentials to Defendant Dr. Andre Nunn. The Court also ordered Defendants to produce the operative logs of surgeries Dr. Nunn performed on non-party patients with only the names redacted. In accordance with the statutory privilege granted to foster frank discussion in the peer review process, Michigan courts have consistently held that materials collected by or for a peer review committee cannot be compelled through discovery or subpoena. Likewise, this Court has afforded absolute protection pursuant to the statutory physician-patient privilege against the discovery of records pertaining to non-party patients.

Regrettably, the Trial Court order disregards the prohibitions and privileges contained within these statutory directives and the established precedent which addresses them. For these reasons, which are more fully discussed below, MSMS urges this Court to reverse the Trial Court order compelling discovery.

ARGUMENT

I. PEER REVIEW RECORDS ARE ENTITLED TO ABSOLUTE PROTECTION FROM DISCLOSURE.

A. The Standard of Review is De Novo.

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 Hospital,* 253 Mich App 372, 375; 655 NW2d 592 (2002). Questions of statutory construction are afforded de novo review. *Feyz v Mercy Memorial Hospital,* 475 Mich 663, 672; 719 NW2d 1 (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).

B. To Effectuate the Peer Review Function, Documents Collected by Peer Review Entities Are Statutorily Protected From Disclosure.

To reduce morbidity and mortality and to improve patient care, the Michigan Legislature has commanded hospitals to establish peer review committees to review "professional practices in the hospital," including "the quality and necessity of the care provided and the preventability of complications and deaths occurring in the hospital." MCL 333.21513. The statute provides in pertinent part:

> The owner, operator, and governing body of a hospital licensed under this article:
>
> (a) Are responsible for all phases of the operation of the hospital, selection of the medical staff, and quality of care rendered in the hospital.
>
> (b) Shall cooperate with the department in the enforcement of this part, and require that the physicians, dentists, and other personnel working in the hospital who are required to be licensed or registered are in fact currently licensed or registered.

(c) Shall assure that physicians and dentists admitted to practice in the hospital are granted hospital privileges consistent with their individual training, experience, and other qualifications.

(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.

Granting staff privileges consistent with the qualifications of each licensee is part of the peer review process. *See Attorney General v Bruce,* 422 Mich 157; 369 NW2d 826 (1985). To perform this function, and to encourage the "[c]andid and conscientious evaluation of clinical practices" that is so essential to the continued improvement of patient care and treatment, the Legislature "has enacted two primary measures to protect peer review activities from intrusive public involvement and from litigation." *Feyz*, 475 Mich at 680-681 (footnotes omitted). The first grants immunity to persons, organizations and entities that provide information to peer review groups or perform a protected peer review function. MCL 331.531.[1] The second, which

[1] 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, 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.

underlies the issue presently before this Court, renders records, data, and knowledge collected for or by peer review entities confidential and protects them from discovery. As to this later provision, the Michigan Supreme Court in *Bruce* has explained:

> Hospitals are required to establish peer review committees whose purposes are to reduce morbidity and mortality and to ensure quality of care. MCL 333.21513; MSA 14.15(21513). Included in their duties is the obligation to review the professional practices of licensees, granting staff privileges consistent with each licensee's qualifications. MCL 333.21513(c); MSA 14.15(21513)(c).
>
> The rationale for protecting the confidentiality of the records, data, and knowledge of such committees was set forth in an oft-quoted opinion of the United States District Court for the District of Columbia:
>
> > Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practices is a *sine quo non* of adequate hospital care. To subject the discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations. [Emphasis in original. *Bredice v Doctors Hospital, Inc,* 50 FRD 249, 250 (D DC, 1970), *aff'd without opinion* 156 US App DC 199; 479 F2d 920 (1973).]
>
> In enacting §§ 20175(5) and 21515, the Legislature provided a strong incentive for hospitals to carry out their statutory duties.

Attorney General v Bruce, 422 Mich at 169 (footnote omitted).

This protection applies irrespective of the nature of the claim asserted, *Manzo v Petrella & Petrella & Assoc*, PC, 261 Mich App 705, 715; 683 NW2d 699 (2004), *Ligouri,* 253 Mich App at 376-77, and includes subpoenas obtained by the Attorney General in the course of a criminal investigation, *In re Investigation of Lieberman*, 250 Mich App 381; 646 NW2d 199 (2002), as well as investigations by the Board of Medicine. *Attorney General v Bruce,* 422 Mich

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> (4) The immunity from liability provided under subsection (3) does not apply to a person, organization, or entity that acts with malice.

at 168-170. Indeed, the privilege accorded to peer review materials is reiterated ***three*** times in the Public Health Code. MCL 333.21515 provides:

> 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.[2]

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[2] 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.

Explaining the peer review privilege in *Feyz*, the Supreme Court said:

> Peer review is a communicative process, designed to foster an environment where participating physicians can freely exchange and evaluate information without fear of liability if the hospital ultimately relies on peer review evaluations and adversely affects the reviewed physician's hospital privileges. It 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. All the protected activities relate to the exchange and evaluation of such information. Moreover, ***the peer review statutory regime protects peer review from intrusive general public scrutiny. All the peer review communications are protected from discovery and use in any form of legal proceeding***.

475 Mich at 685 (emphasis added).

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. Thus, in *Dorris v Detroit Osteopathic Hospital*, 460 Mich 26; 594 NW2d 455 (1999), the 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, because the affidavit of the hospital's manager of quality and utilization management 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.[3] Time and again, this Court has likewise enforced the statutory privilege against discovery demands for disclosure. *See e.g., In re Lieberman,* 250 Mich App at 387 (denying enforcement of an investigatory search warrant and stating"[a]lthough the statute does not refer

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> (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.

[3] The Court remanded to the trial court to allow the plaintiff to test the veracity of the hospital's procedures.

to search warrants, it would be inconsistent with the stated purposes of the privilege to find that peer review information could be obtained pursuant to an investigatory search warrant. The protection against discovery through subpoena would effectively evaporate if an investigator needed only to obtain a search warrant instead"); *Dye v St John Hosp*, 230 Mich App 661; 584 NW2d 747 (1998) (vacating trial court order compelling the production of information from defendant physician's credentials file); *Maviglia v West Bloomfield Nursing & Convalescent Center, Inc,* unpublished opinion per curiam of the Court of Appeals dated November 9, 2004 (Docket No. 248796), 2004 Mich App LEXIS 3048, *2 (2004) (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); *Jeung v Allen*, unpublished opinion per curiam of the Court of Appeals dated April 20, 2004 (Docket No. 245997), 2004 Mich App LEXIS 989, *3 ("[P]laintiffs seek information obtained by a peer review committee pursuant to its peer review function. The privilege therefore applies"); *Ligouri*, 253 Mich App at 377 ("Because the trial court found that the reports are of the type protected from subpoena under the statutory provisions at issue, the trial court abused its discretion in ordering disclosure of the reports solely because it believed plaintiff's claim was one of negligence rather than malpractice"); *Raslan v Providence Hosp*, unpublished opinion per curiam of the Court of Appeals dated September 11, 2001 (Docket No. 220159), 2001 Mich App LEXIS 2576 (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); *Gallagher v Detroit-Macomb Hosp Ass'n*, 171 Mich App 761, 769; 431 NW2d 90 (1988) (an incident report, the purpose of which was to assist the hospital in monitoring its own activities to reduce accidents, injuries, morbidity and mortality at the hospital, is protected under the peer review privilege statutes).

The Trial Court order enigmatically disregards the statutory protection of peer review materials and its consistent enforcement in this state, apparently, in part, on the basis that the privilege does not apply to the defendant doctor's privilege and credentialing file. The Michigan Supreme Court's discussion of the privilege in *Attorney General v Bruce* leads to a contrary conclusion. There, the Court emphasized a hospital's duty to establish "peer review committees whose purposes are to reduce morbidity and mortality and to ensure quality of care" and whose duties include "the obligation to review the professional practices of licensees, granting staff privileges consistent with each licensee's qualifications." 422 Mich at 109 (citing MCL 333.21513(c)). In fact, the material subpoenaed in *Bruce* involved the hospital's internal investigation of a staff physician following the death of a patient and the suspension of the physician's privilege for six months. The Court applied the peer review privilege to that material.

The defendant physician's personnel and credentials file was also at issue in *Dye v St. John Hosp*, *supra*. There, the plaintiff argued that the privilege did not apply to the prospective question of whether to extend staff privileges to the defendant doctor, but rather applied "only to documents gathered for 'retrospective' analysis of a past incident or issue raising concerns about medical personnel or hospital procedures." 230 Mich App at 667. This Court rejected that distinction, concluding that the privilege protects against the disclosure of information relating to the doctor's application for staff privileges; further, materials the credential 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 thus subject to the privilege.

The same analysis applies to Dr. Nunn's credentialing and privilege file. The Trial Court's order creates a dangerous breach of the very privilege the Legislature deemed so critical

to the quality of care in Michigan's hospitals. All persons who are called upon to participate in the credentialing process have relied upon the privilege as an incentive to frank discussion and disclosure; indeed, the credentialing process cannot be effective without it. The order compelling production must be reversed.

II. THE PHYSICIAN-PATIENT PRIVILEGE BARS DISCLOSURE OF MEDICAL RECORDS PERTAINING TO NON-PARTY PATIENTS.

A. The Standard of Review is De Novo.

Application of the physician-patient privilege raises a question of law that is reviewed de novo. *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 468; 608 NW2d 823 (2000).

B. The Physician-Patient Privilege Prohibits Disclosure of Surgical Logs Relating to Non-Party Patients.

The physician-patient privilege prohibits a hospital from releasing the medical records of a non-party patient without the patient's consent. MCL 600.2157 states in pertinent part:

> Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to pre scribe for the patient as a physician, or to do any act for the patient as a surgeon. If the patient brings an action against any defendant to recover for any personal injuries, or for any malpractice, and the patient produces a physician as a witness in the patient's own behalf who has treated the patient for the injury or for any disease or condition for which the malpractice is alleged, the patient shall be considered to have waived the privilege provided in this section as to another physician who has treated the patient for the injuries, disease, or condition.

The purpose of the privilege "'is to protect the doctor-patient relationship and ensure that communications between the two are confidential.'" *Baker,* 239 Mich at 470 (quoting *Herald Co Inc v Ann Arbor Public Schools*, 224 Mich App 266, 276; 568 NW2d 411 (1997)). Only the patient can waive the privilege. *Id.*

The scope of the privilege is controlled by statute and broadly protects "any information" acquired in the course of the professional relationship, permitting no exception for records from which patient names have been redacted. *Baker* at 475. In *Baker*, this Court explained:

> Plaintiff has …failed to cite valid authority for her argument that the physician-patient privilege is not violated where patient names have been redacted from the records. The statute does not make an exception for redacted medical records. On the contrary, the statute broadly and clearly forbids physicians from disclosing "any information" acquired under the requisite circumstances. When statutory language is clear and unambiguous, we must honor the legislative intent as clearly indicated in that language. *Western Michigan Univ Bd of Control v Michgian,* 455 Mich 531, 538; 565 NW2d 828 (1997). No further construction is required or permitted. *Id.* ***Read literally, the privilege statute does not allow for an exception when the information is disclosed without the patient's name attached. We therefore conclude that the privilege applies even where the patient names are not disclosed***.

Id. at 475 (emphasis added). The privilege outweighs a plaintiff's need for the evidence to prevail at trial, *Dierickx v Cottage Hosp Corp*, 152 Mich App 162, 169; 393 NW2d 564 (1986), lv den 426 Mich 868 (1986), and is an "absolute bar," protecting "'within the veil of privilege,' whatever in order to enable the physician to prescribe, 'was disclosed to any of his senses, and which in any way was brought to his knowledge for that purpose.'" *Schechet v Kesten,* 372 Mich 346, 351; 126 NW2d 718 (1964), quoting *Briggs v Briggs,* 20 Mich 34, 41. Thus, disclosure of "medical information" – even without names – is prohibited. *Id.*

Michigan courts have consistently denied the production of non-party medical records in reliance upon the privilege. In *Dorris v Detroit Osteopathic Hosp*, 460 Mich 26; 594 NW2d 455 (1999), the Supreme Court held that defendant hospital could not be compelled to disclose the name of the patient with whom plaintiff shared a room, reasoning that "'prescribe' should be interpreted broadly enough to encompass any information acquired to allow the physician to order or recommend any treatment for a patient" and noting that "pursuant to Michigan Administrative Code, it is necessary for a physician to obtain a patient's name before a

prescription can be written for a patient." 460 Mich at 37, n5. *See also, Schechet v Kesten,* 372 Mich 346, 351; 126 NW2d 718 (1964).

In *Baker,* this Court reversed a trial court order compelling the discovery of medical research records of Alzheimer's patients, which plaintiff alleged were relevant to her wrongful discharge claim. This Court concluded that "under Michigan Supreme Court precedent and subsequent decisions by this Court, the physician-patient privilege is an absolute bar that prohibits the unauthorized disclosure of patient medical records," irrespective of whether the names were redacted. 239 Mich App at 463. *See also, Popp v Crittenton Hosp*, 181 Mich App 662, 665; 449 NW2d 678 (1989) ("In this case, the information sought was protected by a physician-patient privilege held by someone not a party to the lawsuit who did not waive his privilege. The trial court correctly denied plaintiff's request."); *Doll v City of Flint*, unpublished decision per curiam of the Court of Appeals dated April 27, 2004 (Docket No. 242308), 2004 Mich App LEXIS 1080, *7-8 (excluding information from a clinic's patients regarding complaints of alleged racially preferential treatment); *In re Petition of Attorney General for Investigative Subpoenas*, 282 Mich App 585; 766 NW2d 675 (2009) (affirming order quashing investigative subpoenas directed to the treatment of ten of respondent's patients because of the psychologist-patient privilege). [4]

[4] Disclosure of the surgical logs relating to non-party patients also implicates disclosure restraints in the Health Insurance Portability and Accountability Act ("HIPPA"), 42 USC §1320d *et seq*. Describing the genesis of HIPPA in *Holman v Rasak*, the Michigan Supreme Court recently explained:

> Congress enacted the Health Insurance Portability and Accountability Act in 1996. HIPPA provided that if Congress did not enact "legislation governing standards with respect to the privacy of individually identifiable health information within 36 months after HIPPA was enacted," the Secretary of Health and Human Services would be required to "promulgate final regulations containing such standards …" PL 104-191, §264(c)1), 110 Stat 2033. Pursuant to

The law is therefore clear. There is no authority under Michigan law for compelling production of the surgical logs. The Trial Court order should be reversed.

> that legislative mandate, 45 CFR 164.502(a) provides that "[a] covered entity may not use or disclose protected health information, except as permitted or required by this subpart …"

486 Mich 429, 434; 785 NW2d 98 (2010). "Covered entity" includes a "health care provider who transmits any health information in electronic form …" "Protected health information" is "individually identifiable health information" that is "recorded in any form or medium" and is:

> information that is a subset of health information, including demographic information collected from an individual, and:
>
> (1) [i]s created or received by a health care provider, health plan, employer, or health care clearinghouse; and
>
> (2) [r]elates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
>
> (i) [t]hat identifies the individual; or
>
> (ii) [w]ith respect to which there is a reasonable basis to believe the information can be used to identify the individual.

Id. at 435, citing 45 CFR 160.103. However, to the extent HIPPA is "contrary" to state law (meaning that "a covered entity would find it impossible to comply with both the [s]tate and federal requirements" or the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of HIPPA), the more stringent provisions of the physician-patient privilege in MCL 600.2157 – which protects all health information whether or not "individually identifiable" – control. *See id.* at 440-441 ("Under HIPPA, "'[a] standard, requirement, or implementation specification' of HIPPA 'that is *contrary* to a provision of State law preempts the provision of State law' unless, among other exceptions, '[t]he provision of State law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification adopted under' HIPPA. 45 CFR 160.203.")

RELIEF REQUESTED

Amicus Curiae Michigan State Medical Society therefore requests that this Court reverse the Trial Court's July 24, 2009 order compelling the production of documents.

Respectfully submitted,

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Dated: October 27, 2010

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2010, I electronically filed the foregoing with the Clerk of the Court using the Court's electronic filing system which will send notification of such filing electronically to Anita L. Comorski, Esq., at appeals@tnmglaw.com and that I served a copy by First Class Mail upon Michelle M. Shaya, Esq., Ishbia & Gagleard PC, 251 E. Merrill Street, Floor 2, Birmingham, MI 48009.

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