# STATE OF MICHIGAN

# COURT OF APPEALS

LISA DWYER and MICHAEL DWYER,

Plaintiffs-Appellees,

v

ASCENSION CRITTENTON HOSPITAL,

Defendant-Appellant,

and

KIMBERLY COBURN and DOMINICK ZACK, Personal Representatives of the ESTATE OF MICHAEL FUGLE, D.O., FUGLE & ASSOCIATES, PC, JIGNESH PATEL, D.O., and JIGNESH PATEL, D.O., PLLC,

Defendants.

UNPUBLISHED
April 2, 2020

No. 347171
Oakland Circuit Court
LC No. 2017-160599-NH

Before: M. J. KELLY, P.J., and FORT HOOD and BORRELLO, JJ.

PER CURIAM.

Defendant, Ascension Crittenton Hospital,[1] appeals by leave granted[2] the trial court's order granting in part and denying in part its motion for a protective order. Because the trial court erred in its application of the statutory peer review privilege, we reverse.

[1] Now called Ascension Providence Rochester Hospital.

[2] *Dwyer v Coburn*, unpublished order of the Court of Appeals, entered January 16, 2019 (Docket No. 347171).

## I. BASIC FACTS

Plaintiffs, Lisa Dwyer and Michael Dwyer, filed a complaint alleging that Dr. Michael Fugle was negligent in performing a total left knee replacement on Lisa in March 2015, which led to pain and discomfort, affected Lisa's ability to walk, and required a second corrective operation. Plaintiffs alleged that Dr. Fugle, who died in September 2015, had dementia, brain cancer, or a brain tumor that resulted in the loss of his privileges at other hospitals. Plaintiffs claimed that defendant hospital was negligent in maintaining Dr. Fugle's surgical privileges.

During discovery, plaintiffs requested production of defendant's credentialing file on Dr. Fugle and sought to depose Dr. Sheryl Wissman, defendant's Chief Medical Officer and a member of defendant's credentialing committee. Plaintiffs intended to ask Dr. Wissman about Dr. Fugle's competence to perform surgeries to determine whether defendant hospital improperly allowed Dr. Fugle to have surgical privileges. Defendant opposed the request for production and sought a protective order, arguing that the file was not subject to disclosure under the statutory peer review privilege, and asserting that plaintiffs could not ask Dr. Wissman about the credentialing file for the same reason. The trial court ordered production of the file for an *in camera* review. Defendant subsequently produced the file, which was accompanied by an affidavit from Dr. Wissman stating that the documents produced for the *in camera* review consisted of the credentialing committee's complete file on Dr. Fugle and that all of the documents in the file were collected for or by the committee to carry out its review function, which included review of hospital staff privileges.

The trial court reviewed the documents and granted in part and denied in part defendant's motion for a protective order regarding the credentialing file. The court agreed that the documents collected by the peer review committee were generally privileged; however, the court ordered the production of three e-mail conversations. The trial court noted that the e-mails were sent to Dr. Wissman in her role as Chief Medical Officer, not in her capacity as a member of the credentialing committee. In addition, the court found it was significant that the record did not establish that the other individuals who participated in the e-mail conversations were members of the credentialing committee. The court concluded that the actions of a single committee member did not reflect a peer review function. The court further noted that the file contained no indication that the committee discussed the e-mails or that the committee used the information in the e-mails to render a decision about Dr. Fugle. Additionally, the court found nothing to suggest that the committee requested the information in the e-mails. Finally, the trial court remarked that a hospital could never be held accountable for negligence if all material submitted to a peer review committee were deemed undiscoverable.

Defendant filed a motion for reconsideration. Attached to the motion was a new affidavit executed by Dr. Wissman in December 2018, stating that in her capacity as Chief Medical Officer, she was responsible for receiving reports about the medical staff and that she reviewed those reports to decide whether to refer a report to a peer review committee. Dr. Wissman stated that the placement of the three e-mail conversations in the credentialing file meant that she determined that further review was warranted. Additionally, the e-mails contained information reflecting an

investigation undertaken during peer review that involved credentialing.[3] The trial court denied the motion for reconsideration for failure to demonstrate palpable error.

## II. STATUTORY PEER REVIEW PRIVILEGE

### A. STANDARD OF REVIEW

Defendant argues that the trial court misapplied the statutory peer review privilege.[4] Whether production of information or documents is barred by statutory privilege presents an issue of law to be reviewed de novo by the courts. *Krusac v Covenant Med Ctr*, 497 Mich 251, 255; 865 NW2d 908 (2015).

### B. ANALYSIS

Hospitals must assess a physician's training, experience, and qualifications before granting hospital staff privileges. MCL 333.21513(c). MCL 333.21513(d) requires hospitals to create peer review committees

> 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. [MCL 333.21513(d).]

To encourage the candor necessary to carry out this policy, "the Legislature has provided that the records, data, and knowledge collected for or by peer review entities are confidential and not discoverable." *Feyz v Mercy Mem Hosp*, 475 Mich 663, 680-681; 719 NW2d 1 (2006). "MCL 333.20175 . . . addresses a hospital's duty to keep and maintain records regarding all treatment given to patients at that facility." *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 40; 594 NW2d 455 (1999). MCL 333.20175(8) states:

---

[3] A trial court has discretion to consider new evidence when hearing a motion for reconsideration. MCR 2.119(F)(3); *Yoost v Caspari*, 295 Mich App 209, 220; 813 NW2d 783 (2012). Here, there is nothing on the record indicating that the court did not consider Dr. Wissman's new affidavit Accordingly, we include it in our review of the court's decision to grant in part and deny in part the protective order sought in this case. See *Yoost*, 295 Mich App at 220 (considering a newly filed affidavit because the court considered it in its ruling).

[4] Amici Detroit Medical Center and the Regents of the University of Michigan argue that the statutory peer review provisions are an absolute ban, not an evidentiary privilege subject to a balancing test or waiver. However, in *Krusac v Covenant Med Ctr*, 497 Mich 251; 865 NW2d 908 (2015), our Supreme Court repeatedly and consistently referenced the "peer review privilege." Additionally, the Court discussed the nature of privileges, *id*. at 262 n 8, and whether the privilege could be waived as a sanction, *id*. at 262 n 9. Thus, we discern no basis to treat the peer review privilege as an absolute ban instead of an evidentiary privilege.

> The records, data, and knowledge collected for or by individuals or committees assigned a professional review function in a health facility or agency, or an institution of higher education in this state that has colleges of osteopathic and human medicine, are confidential, shall be used only for the purposes provided in this article, are not public records, and are not subject to court subpoena.

MCL 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.

MCL 331.533 states in part:

> 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.

"[A] credentialing committee is a peer review committee." *Johnson v Detroit Med Ctr*, 291 Mich App 165, 168; 804 NW2d 754 (2010).

Defendant argues that the trial court relied on outdated and distinguishable caselaw. We agree. The trial court's opinion relies upon our Supreme Court's decision in *Monty v Warren Hosp Corp*, 422 Mich 138; 366 NW2d 198 (1985) and this Court's decision in *Centennial Healthcare Mgt Corp v Michigan Dept of Consumer & Industry Services*, 254 Mich App 275; 657 NW2d 746 (2002) for the proposition that submission of documents to a peer review committee does not render those documents or the facts contained in those documents privileged because "it is how the committee discusses, deliberates, evaluates, and judges those facts that the privilege is designed to protect." However, the principles the court derives from the decisions in *Monty* and *Centennial* were rejected and effectively overruled by our Supreme Court's decision in *Krusac*, which specifically held that "§§ 20175(8) and 21515 do not contain an exception to the peer review privilege for objective facts." *Krusac*, 497 Mich 253. The Court explained:

> [Sections] 20175(8) and 21515 make privileged all records, data, and knowledge collected for or by a peer review committee in furtherance of its statutorily mandated purpose of reducing morbidity and mortality and improving patient care. This includes objective facts gathered contemporaneously with an event contained in an otherwise privileged incident report. [*Id*. at 263.]

The Court noted 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 disclosing materials that are subject to the peer review privilege." *Krusac*, 497 Mich at 261 n 6.

In this case, the trial court's analysis of the statutory peer review privilege conflicted with both the statutory language and our Supreme Court's opinion in *Krusac*. The trial court's reasoning that the e-mails did not include more than one member of the committee is inconsistent with the statutory language, which protects information "collected for or by *individuals* or committees" who have an assigned review function. MCL 333.20175(8) (emphasis added); MCL 333.21515 (emphasis added). The statutory provisions do not require the participation of multiple members of a peer review committee. Dr. Wissman participated in the three e-mail conversations identified for disclosure by the trial court. Dr. Wissman had been a member of the credentialing committee since 2012 and Chief Medical Officer since 2014. As Chief Medical Officer, Dr. Wissman was "the individual designated to receive reports of any issues or incidents involving the medical staff," and she was responsible for determining whether further investigation by a review committee was necessary. Dr. Wissman's receipt of the e-mails meets the statutory language of information collected by an individual with an assigned review function. Accordingly, the trial court's distinction on the basis of the number of individuals involved in the peer review committee was erroneous.

The trial court further reasoned that the record contained no indication that the committee deliberated about the information in the e-mails or that the committee rendered a decision about Dr. Fugle's privileges on the basis of the information in the e-mails. This reasoning is similar to the flawed analysis undertaken in *Harrison* and *Centennial* and rejected in *Krusac*. In *Centennial*, 254 Mich App at 290, this Court distinguished between the submission of objective facts to a review committee and the committee's "candid assessment of what those facts indicate." The *Centennial* Court concluded that the administrative requirement that nursing homes keep incident and accident reports and make them available for review and copying did not conflict with the peer review confidentiality provisions because the reports did "not require the reporting of the internal deliberative process of a peer review committee." *Id*. at 291. Citing this reasoning, the Court in *Harrison* concluded that "[o]bjective facts gathered contemporaneously with an event" were not confidential because they did not meet the statutory requirement of "materials accumulated for study by individuals or committees 'assigned a professional review function.' " *Harrison*, 304 Mich App 1, 32; 851 NW2d 549 (2014), vacated 498 Mich 888 (2015). Yet, our Supreme Court rejected *Harrison*'s reasoning because the peer review statutes refer broadly to " 'records, data, and knowledge' " and do not exclude objective facts in otherwise privileged reports. *Krusac*, 497 Mich at 259-260.

The trial court further erred because its reasoning did not take into account the context of the e-mails or Dr. Wissman's statements. Dr. Wissman's affidavit produced with the documents stated that all of the documents were collected by the committee for the purpose of performing its review function. The e-mails were addressed to Dr. Wissman, and they were contained in the file maintained by the Credentials Committee. Dr. Wissman averred that the documents in the file and any factual information in the documents was collected by the committee for the purpose of carrying out its review function. Dr. Wissman's descriptions of the documents contained in the file contradicts the trial court's rationale. Moreover, it is unclear what evidence would have established that the committee deliberated on the information in the e-mails or what evidence of a decision-making process was required. From the trial court's reasoning that the e-mails did not reflect overt deliberation and considering Dr. Wissman's description of the contents of the file, it appears that the e-mails contained factual information supporting the committee's review function.

The trial court's dissection of the committee's use of the documents is inconsistent with *Krusac*'s broader reading of what material falls under the peer review confidentiality provisions.

The trial court also reasoned that there was no indication that the committee requested the e-mails, citing *Marchand v Henry Ford Hosp*, 398 Mich 163, 167-168; 248 NW2d 280 (1976). *Marchand* is distinguishable, however. In *Marchand*, a doctor had conducted research on a feeding technique of his own volition and for the advancement of scientific knowledge, and he had presented his findings at a general hospital staff meeting, which did not amount to the collection of information by a peer review committee for a review purpose. *Marchand*, 398 Mich at 167-168. In this case, the fact that the committee did not request the information in the e-mails does not address whether the committee *collected* the information in furtherance of its review function. The relevant statutes use the word "collected," not "requested." MCL 331.533; MCL 333.20175(8); MCL 333.21515. The word "collect" means to gather, while the word "requested" means to ask for. *Merriam-Webster's Collegiate Dictionary* (11th ed). A committee can collect information that it did not request. Therefore, the trial court's observation that the committee did not request the information does not address whether the e-mails were received and kept for the purpose of review.

Moreover, the trial court improperly substituted its own policy concerns for the Legislature's stated policy behind protecting the confidentiality of peer review information. The trial court reasoned 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." The Legislature, however, enacted the statute for "the purpose of reducing morbidity and mortality and improving the care provided in the hospital for patients." MCL 333.21513(3). This purpose is served by "the candid and conscientious assessment of hospital practices." *Krusac*, 497 Mich at 256. "Moreover, 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." *Id*. at 262. Similarly, in *In re Investigation of Lieberman*, 250 Mich App 381, 382, 389; 646 NW2d 199 (2002), after concluding that peer review materials could not be obtained through a search warrant in a criminal investigation of a patient who died at a long-term care facility, this Court also rejected the argument "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." Rather, the stated legislative purpose and the statute's protection of peer review documents "in broad terms" counseled "in favor of confidentiality." *Id*. at 389.

Based on the foregoing, we conclude that the trial court erred by concluding that the three e-mails were not protected by the peer review privilege.

Reversed.

/s/ Michael J. Kelly
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello