MEDICAL MALPRACTICE DEFENSE LAW LEGAL ALERT

Michigan Supreme Court Holds Facts Contained in Peer Review Incident Report are Privileged and Protected

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The Michigan Supreme Court has issued its eagerly-awaited written opinion in the Krusac v. Covenant Medical Center matter. In Krusac, the trial court ordered the production of the objective facts contained in a hospital incident report in reliance on the Harrison v. Munson decision, which held in part that the peer review privilege does not protect objective facts gathered contemporaneously with an event as part of a peer review investigation. Harrison v Munson, 304 Mich App 1 (2014). The defendant in Krusac sought leave to appeal and stay the trial proceedings in the Court of Appeals, which the Court of Appeals denied. Defendant then sought review from the Supreme Court, which the Supreme Court granted. The issues before the Supreme Court in Krusac were whether the trial court in Harrison v Munson Healthcare, Inc., 304 Mich App 1 (2014) erred in its analysis of the scope of the peer review privilege and further, whether the trial court in Krusac erred in requiring production of the first page of the incident report containing the facts involved in the peer review investigation. The Michigan Supreme Court answered “yes” to both questions.

The Michigan Supreme Court affirmed the integrity of the peer review privilege in Michigan, holding that the peer review privilege applies to all “records, data and knowledge” – including objective facts – gathered for or by a peer review committee in furtherance of its statutorily mandated purpose of reducing morbidity and mortality and improving patient care.

The Court ultimately based its ruling on the plain meaning of the applicable peer review statutes, MCL 333.20175(8) and 333.21515. These statutes protect all “records, data and knowledge” and, though there is no definition of these terms in the statutes, a common understanding of “records, data and knowledge” clearly encompass “facts.” The Supreme Court further found that the Harrison Court’s restricted interpretation of the peer review privilege which found an “exception” to the peer review privilege for such facts was misplaced, as there is no such exception in the language of the statutes.

The Supreme Court further reasoned that a hospital’s obligation to maintain a complete patient record for each patient under MCL 333.20175(1) did not alter the scope of the peer review privilege by requiring disclosure of facts obtained in the peer review incident report that may not be in the patient record. The Court found that maintaining a medical record and complying with its peer review obligations are two separate and distinct hospital duties.

To the extent concern was presented that risk managers could simply insulate facts from discovery that were unfavorable, the Supreme Court reasoned that the scope of the peer review privilege is not boundless. Only the records, data, and knowledge collected by or for the committee for a proper peer review purpose are protected. Moreover, while it may make discovery more difficult, a litigant can still obtain the relevant facts through appropriate
discovery means such as from the medical records and from eyewitness testimony, including testimony from the author of the incident report. The Court found that this is the balance the legislature has struck between disclosing information to patients and protecting peer review materials, and it is not within the Court’s power to alter this balance.

Overall, the Supreme Court ruled that objective facts gathered contemporaneously with an event contained in an otherwise privileged incident report are protected by the peer review privilege. In so holding, the Supreme Court overruled the Harrison decision to the extent its ruling regarding the peer review privilege was inconsistent. The Supreme Court also vacated the Krusac decision and remanded it back to the trial court for further proceedings.

This decision represents a significant victory in protecting the integrity of the peer review privilege and the important responsibility of hospitals and providers to continually, and more importantly, to candidly improve their processes and protect patient safety. As always, it remains important that hospitals assure that any peer review investigation conducted and any incident report generated is only done by a proper peer review committee and for a proper peer review purpose. To the extent this is done, the concern regarding separating the facts and analysis of the peer review process raised by the Harrison decision has been laid to rest by the Supreme Court.

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