

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

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|--|---|------------------------|
| DENNIS STEWART, Individually and as the Administrator of the Estate of Michelle Stewart, Deceased, | : | |
| | : | CASE NO. CA2011-06-050 |
| Plaintiff-Appellee, | : | <u>OPINION</u> |
| | : | 1/23/2012 |
| - vs - | : | |
| RODNEY VIVIAN, M.D., et al., | : | |
| Defendants-Appellants. | : | |

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2011 CVA 00318

Peter A. Saba, 2623 Erie Avenue, P.O. Box 8804, Cincinnati, Ohio 45208, for plaintiff-appellee

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PIPER, J.

{¶1} Defendant-appellant, Sisters of Mercy of Clermont County, Ohio d.b.a. Mercy Hospital Clermont (Mercy Hospital), appeals the decision of the Clermont County Court of Common Pleas denying its motion to quash a subpoena duces tecum served upon Horizon

Behavioral Services, LLC d.b.a. Horizon Health EAP – Behavioral Services (Horizon Health), by plaintiff-appellee, Dennis Stewart, individually and as the Administrator of the Estate of Michelle Stewart.¹

Statement of Facts

{¶2} Sometime before November 17, 2009, Mercy Hospital's Medical Quality and Patient Safety Counsel conducted a review of matters concerning the hospital's Behavioral Health Unit. Following this review, and in an attempt to improve the quality of care at Mercy Hospital, the Medical Quality and Patient Safety Counsel requested a follow-up investigation of the Behavioral Health Unit. As part of this follow-up investigation, Mercy Hospital retained the services of Horizon Health, an independent psychiatric consultant. Horizon Health conducted a formal review of Mercy Hospital's Behavioral Health Unit from December 15, 2009 through December 18, 2009.

{¶3} On November 17, 2009, the Ohio Department of Mental Health (ODMH) issued a Private Psychiatric Licensure Survey Report (Survey Report) to Mercy Hospital after the hospital requested a license to treat additional adults. As part of its Survey Report, ODMH recommended "ongoing evaluation of the environment for any safety risks such as weight bearing devices that include but are not limited to sink faucets, door hinges, etc. and development of a remedial plan for any risks identified." The ODMH also asked Mercy Hospital to submit a "summary of any risks identified in the built environment of care and plans for modification, including [sic] time line for carpet cleaning, on or before March 1, 2010." The Survey Report also recommended Mercy Hospital to submit its "noted follow-up before or at the time of the program's next application renewal."

{¶4} On February 24, 2010, Michelle Stewart, a patient at the Mercy Hospital

1. Pursuant to Loc.R. 6(A), we sua sponte remove this case from the accelerated calendar and place it on the regular calendar for purposes of issuing this opinion.

Behavioral Health Unit, died after she used a bed sheet to hang herself from her hospital room's bathroom door.

{¶5} On March 5, 2010, ODMH received a "Plan of Correction" from Mercy Hospital indicating, among other things, that Horizon Health had conducted a formal review of its Behavioral Health Unit "to identify and remedy environment care issues." As part of its submitted plan, Mercy Hospital noted that Horizon Health had found "some exposed hinges" and "handles are able to support body weight," thereby making it a priority to replace the Behavioral Health Unit's doors. In total, the Plan of Correction made reference to three issues from the Horizon Health report.

{¶6} Dennis Stewart, Michelle's husband, subsequently filed suit against Mercy Hospital and its lead psychiatrist, Dr. Rodney Vivian, alleging medical malpractice and wrongful death. Stewart served Horizon Health with a subpoena duces tecum on February 28, 2011, requesting in pertinent part, the following:

{¶7} "Any and all correspondence, communications, agreements, contracts, reports, and documents (including but not necessarily limited to: letters, memos, notes, photos or drawings, audio or visual recordings, transcripts of conversations, statements, emails, and faxes) relating to any review, inspection, recommendations, consultation, or similar inspection of any psychiatric facilities at [Mercy Hospital] * * * conducted prior to January 1, 2011."

{¶8} Mercy Hospital then moved to quash the subpoena issued to Horizon Health claiming the subpoena sought "the production of privileged information regarding an audit performed by [Horizon Health] of [Mercy Hospital] for purposes of Quality Assurance." In support of its motion, Mercy Hospital filed affidavits from Deborah Spradlin, its Director of Behavioral Health, and Bradley Bertke, its Chief Operating Officer. According to the submitted affidavits, Mercy Hospital retained Horizon Health in order to conduct an audit of the Behavioral Health Unit after its Medical Quality and Patient Safety Council "reviewed

matters relevant to the Behavioral Unit * * * for the purpose and quality improvement on the Behavioral Unit." The affidavits also indicated that the decision to retain Horizon Health was initiated prior to the issuance of the November 17, 2009 Survey Report.

{¶9} After holding a hearing on the matter, the trial court issued a decision denying Mercy Hospital's motion to quash. In so holding, the trial court found Mercy Hospital had "destroyed the confidentiality of the findings of Horizon Health by utilizing them for purposes beyond the scope of the peer review committee and referencing some of the findings of Horizon Health in documents which are required to be disclosed to any requesting party pursuant to the Freedom of Information Act."

{¶10} Mercy Hospital now appeals the trial court's decision denying its motion to quash, raising the following assignment of error.

{¶11} "THE TRIAL COURT ERRED BY DENYING THE DEFENDANT-APPELLANT'S MOTION TO QUASH THE SUBPOENA DUCES TECUM SERVED UPON HORIZON HEALTH CARE FOR PRODUCTION OF DOCUMENTS PROTECTED BY THE PEER REVIEW PRIVILEGE."

{¶12} In Mercy Hospital's single assignment of error, it argues that the trial court erred by denying its motion to quash and challenges the trial court's finding that it destroyed the confidentiality of the peer review report.

{¶13} Generally, an appellate court reviews a claimed error relating to a discovery dispute under an abuse-of-discretion standard. *Selby v. Ft. Hamilton Hosp.*, Butler App. No. CA2007-05-126, 2008-Ohio-2413, ¶ 9; *Tracy v. Merrell Dow Pharmaceuticals, Inc.* (1991), 58 Ohio St.3d 147, 151-152. However, as recently stated by the Ohio Supreme Court, if the discovery dispute involves an alleged privilege, such as the case at bar, "it is a question of law that must be reviewed de novo." *Ward v. Summa Health Sys.*, 128 Ohio St.3d 212, 2010-Ohio-6275, ¶ 10, citing *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-

Ohio-2496, ¶ 13. Therefore, we will employ a de novo review because this appeal raises the issue of whether the peer review privilege found in R.C. 2305.252 applies to the Horizon Health report. See *Ward v. Summa Health Sys.*, 184 Ohio App.3d 254, 2009-Ohio-4859, ¶ 11; *Giusti v. Akron Gen. Med. Ctr.*, 178 Ohio App. 53, 2008-Ohio-4333, ¶ 12.

Horizon Health's Report is Peer Review Protected

{¶14} As this court has previously stated, merely labeling a document "peer review," "confidential," or "privileged" does not cloak that document with a statutory peer review privilege. *Selby*, 2008-Ohio-2413 at ¶ 14. Instead, peer review protection only applies when the documents in question "were created by and/or exclusively for a peer review committee." *Bansal v. Mt. Carmel Health Sys. Inc.*, Franklin App. No. 09AP-351, 2009-Ohio-6845, ¶ 17.

{¶15} "A health care entity asserting the R.C. 2305.252 privilege bears the burden of establishing the applicability of the privilege." *Bansal* at ¶ 14, citing *Lowery v. Fairfield Med. Ctr.*, Fairfield App. No. 08 CA 85, 2009-Ohio-4470, ¶ 35. In an attempt to meet this burden, the health care entity may: (1) submit the disputed documents to the trial court for an in camera inspection, or (2) present affidavit or deposition testimony "containing the information necessary for the trial court to adjudge whether the privilege attaches." *Bansal* at ¶ 14.

{¶16} This court in *Selby* was asked to determine whether EKG discrepancy reports created as a matter of hospital policy and routinely used in patient care were discoverable under the peer review statute. We held that the reports were not privileged because everyday records cannot be used in peer review and hidden through a shell game, shuffled into a peer review process to be subsequently hidden.

{¶17} Here, however, the Horizon Health report was not created as a matter of policy or the result of routine patient care. Instead, the affidavit of Deborah Spradlin, the RN Director of the Behavioral Health Unit of Mercy Hospital, specifically articulates the process

by which the hospital chose to retain Horizon Health to perform its quality assurance audit. Spradlin also averred that Mercy retained Horizon Health specifically to address matters of quality improvement. Nothing in the record disputes this affidavit or tends to establish that Horizon Health was not retained for peer review purposes.

{¶18} Similarly, Bradley Bertke, the Chief Operating Officer of the hospital, also averred that the decision to retain Horizon Health was initiated prior to the date the hospital had received the Ohio Department of Mental Health Licensing Survey Report, and that such efforts to retain Horizon Health for quality assurance purposes was not undertaken to use in the subsequently received Survey Report. Nor was Horizon Health retained to compile a report or information specific to Michelle Stewart's death, as Horizon Health was clearly commissioned before the date of her death.

{¶19} While the trial court properly determined that the Horizon Health report was peer review protected, the trial court improperly determined that Mercy Hospital's use of the Horizon Health report destroyed the confidentiality of that report, and therefore eliminated the protection of the peer review privilege. While the trial court did not use the word "waiver," its decision to deny the motion to quash for all intents and purposes employed a notion of waiver that is wholly absent from the statute.

Ohio's Peer Review Statute

{¶20} R.C. 2305.252, Ohio's peer review statute, states:

[P]roceedings and records within the scope of a peer review committee of a healthcare entity **shall be held in confidence and shall not be subject to discovery** or introduction in evidence in any civil action against a health care entity or health care provider, including both individuals who provide health care and entities that provide health care, **arising out of matters** that are the **subject of evaluation and review** by the peer review committee. No individual who attends a meeting of a peer review committee, serves as a member of a peer review committee, **works for or on behalf** of a peer review committee,

or provides information to a peer review committee shall be permitted or required to testify in any civil action **as to any evidence or other matters** produced or presented during the proceedings of the peer review committee or as to any **finding, recommendation, evaluation, opinion, or other action** of the committee or a member thereof. Information, documents, or records **otherwise available from original sources** are not to be construed as being unavailable for discovery or for use in any civil action merely because they were produced or presented during proceedings of a peer review committee, but the information, documents, or records are available **only from the original sources and cannot be obtained from the peer review committee's proceedings or records**. An individual who testifies before the peer review committee, serves as a representative of a peer review committee, serves as a member of a peer review committee, works for or on behalf of a peer review committee, or provides information to a peer review committee shall not be prevented from testifying as to matters within the individual's knowledge, but the individual cannot be asked about the individual's testimony before the peer review committee, **information the individual provided to the peer review committee, or any opinion the individual formed as a result of the peer review committee's activities**. An order by court to produce for discovery or for use at trial proceedings or records described in this section is a final order. (Emphasis and bold added.)

{¶21} Prior to 2003, judicial decisions were diluting the legislature's intention to protect the peer review process. Thus the Ohio General Assembly revised its previous version in 2003, making the current statute more resolute: peer review committee meetings and the information "arising out of" the peer review evaluation are confidential. The current version of the statute uses clear language expressing the legislature's intent, such as "shall be held in confidence," and "shall not be subject to discovery," to establish an express mandate that peer review proceedings and records are to remain confidential. See *Manley v. Heather Hill, Inc.*, 175 Ohio App.3d 155, 2007-Ohio-6944, ¶ 30, (noting that the 2003 amendment contained stronger language than previous statutes).

{¶22} The legislature amended the statute to direct peer review committee participants to testify only as to their personal knowledge, and clearly states that the

participants cannot discuss their testimony arising out of, or before, a peer review committee. This includes "any finding, recommendation, evaluation, opinion, or other action." In order to be balanced and fair, the statute does not prohibit or prevent the use of documents, records, or information that originates from a source *other than* the peer review process. Thus the statute granting absolute confidentiality to peer review also protects the particular interests of the individual litigant.

{¶23} Nowhere in the statute is there any language that suggests the peer review process can be waived, voided, or otherwise "destroyed." The Ohio Supreme Court has warned against enacting "common-law pronouncement" when the legislature has or could have spoken, to the subject of privileges and how they can be waived emphasizing that "[j]udicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final arbiter of public policy."² *State v. Smorgala* (1990), 50 Ohio St.3d 222, 223, superseded by statute on other grounds.

{¶24} To find otherwise would allow one person who participated in a peer review process to strip the entire privilege, or destroy the confidentiality, intended to be accorded to *all* participants in the peer review process. Such a result would expose *all* who participated in the peer review process, as well as the *entire process* itself³ The statute does not warrant such interpretation.

The Importance of Peer Review Protection

{¶25} The general public has a great interest in the continuing improvement of medical and health care services as delivered on a daily basis. Kohlberg, *The Medical Peer*

2. While the Ohio statute, as well as other state statutes, do not express a means to have the confidentiality waived, or voided, a few states outside of Ohio have statutes that express the means for waiver. See, e.g., Tex. Occ. Code 160.007(e).

3. "Privilege law, then, is anchored in considerations of policy that exist independently of the usual evidentiary concerns * * *. Privileges operate to suppress competent, relevant evidence in order to preserve confidential relationships." 1 Weissenberger, *Ohio Evidence* (1995) 4, Section 501.03.

Review Privilege: A Linchpin for Patient Safety Measures (2002), 86 Mass. L.Rev. 4. Thus, through R.C. 2305.252, the legislature enacted a privilege giving complete confidentiality to the peer review process. The legislature's enactment determined that the public's interest was to be protected from the particular interest of the individual litigant. Therefore, this statutory privilege is unlike other general privileges arising out of common law. It is designed to protect the overall *process* of peer review, including all the administrators, nurses, doctors, committees, and various entities who participate in the gathering of information, fact-finding, and formation of recommendations, to advance the goal of better services with better results. Bravo & Lovering, *The Peer Review Privilege: When and How Is It Subject to Waiver?* (2010), 9 MedStaff News 1. Protecting the process is imperative for peer review to meet its paramount goal of improving the quality of healthcare. *Giusti v. Akron Gen. Med. Ctr.*, 178 Ohio App.3d 53, 2008-Ohio-4333. The privilege provides those in the medical field the needed promise of confidentiality, the absence of which would make participants reluctant to engage in an honest criticism for fear of loss of referrals, loss of reputation, retaliation, and vulnerability to tort actions. See, also, *Browning v. Burt* (1993), 66 Ohio St.3d 544, 562, (noting that a purpose of the statute is not to hinder lawsuits, but rather to afford protection so as to promote a process whereby individuals will provide information to review committees or boards and are encouraged to freely, completely, and candidly produce information without fear of reprisal or civil liability). See, also, Bravo & Lovering; and Kohlberg.

{¶26} In order to preserve the integrity of this process with meaningful self-examination and frank recommendations, the peer review process and its resulting information are clearly intended to have a privilege of confidentiality providing a "complete shield to discovery." 55 Ohio Jurisprudence 3d, Hospitals & Health Care Providers, Section 41.

{¶27} Other Ohio courts have declined to broaden the peer review statute such as to

permit waiver or destruction of confidentiality. The Eighth District was asked to find that a medical group had waived the peer review privilege by providing a report during discovery and talking about the matter outside the peer review meetings. *Wall v. Ohio Permanente Medical Group, Inc.* (1997), 119 Ohio App.3d 654. However, that appellate court properly determined that "such a broad concept of waiver would negate the purpose of the peer review confidentiality statute." *Id.* at 665. See, also, *Atkins v. Walker* (1981), 3 Ohio App.3d 427 (rejecting an argument that a written document given to a doctor concerning matters considered by the peer review committee waived any privilege); and *Lowery v. Fairfield Med. Ctr.*, Fairfield App. No. 08 CA 85, 2009-Ohio-4470 (finding that the hospital did not waive privilege where it attached peer review documents to a court filing).

{¶28} We also note that other Ohio courts have recognized that Ohio's peer review statute clearly creates an impenetrable protection of confidentiality. See *Tenan v. Huston*, 165 Ohio App.3d 185, 2006-Ohio-131, ¶ 23, (finding that "current R.C. 2305.252 manifests the legislature's clear intent to provide a complete shield to the discovery of any information used in the course of a peer review committee's proceedings. The language of the statute demonstrates that a party interested in obtaining information used by a peer review committee that was generated from another source must seek such information from that source, and not from the records of the committee's proceedings"); and *Bansal v. Mount Carmel Health Systems*, Franklin App. No. 09AP-351, 2009-Ohio-6845, ¶ 17 (noting that "R.C. 2305.252 implicitly extends full and unconditional protection to records generated by the 'non-original source,' i.e., the peer review committee").

{¶29} While the statute makes clear that the peer review process and information arising from that process is privileged, the statute also protects the particular interest of the individual litigant. For example, while documents prepared by or used within the peer review committee process are undiscoverable, a person may be asked to testify or produce

evidence regarding patient care that is within the declarant's personal knowledge. *Doe v. Mount Carmel Health Systems*, Franklin App. No. 05 AP-435, 2005-Ohio-6966.

The Horizon Health Report Remains Protected

{¶30} During the licensure process, the Ohio Department of Health sent the hospital a report of its survey findings. The hospital responded with its Plan of Correction, which identified risk assessments and what quality assurance measures had been planned or performed. Mercy Hospital merely referenced a few findings learned from the peer review process performed by Horizon Health, indicating the hospital had given priority to the recommendations. While the trial court found that such use destroyed the peer review report's confidentiality, we do not agree.

{¶31} The very nature of a peer review process is to report findings and make recommendations so that they are in fact used beyond the review process itself. For example, a hospital could decide to streamline its registration process based on peer review recommendations that patient care suffers when the patient is not registered quickly enough. The hospital's use of the peer review findings, and their implementation or integration into hospital procedure, does not in any way void, waive, or destroy the hospital's peer review process because it decided to act upon suggestions and improve the health care for its patients.

{¶32} The Fifth District Court of Appeals specifically refused to destroy the confidentiality of peer review in a situation where a hospital implemented peer review recommendations by releasing a memo regarding peer review findings. *Germanoff v. Aultman Hosp.*, Stark App. No. 2001CA00306, 2002-Ohio-5054. The Fifth District cogently agreed with the trial court, which had denied discovery, because it found "illogical the notion that a hospital would have to risk discovery of confidential proceedings simply by

implementing the recommended change." Id. at ¶ 27. While the statute does say that the records and information created within a peer review cannot be used in civil suits or discovery, the statute does not designate that same information cannot be used for remedial purposes.

{¶33} In the matter sub judice, the trial court took issue with the hospital's reference to the Horizon Health report in its Plan of Correction during the hospital's licensure process. However, the hospital's reference to the three pieces of information from the Horizon Health report demonstrates that the hospital was making arrangements to improve its health care delivery arising out of the peer review process. The hospital's Plan of Correction merely made reference to three "items" from the Horizon report regarding unsecured furniture, cords longer than 18 inches, as well as exposed hinges and handles that could support body weight. It is significant that the hospital did not include the entire Horizon Health report (the hospital has not disseminated all of the information from the peer review process), but rather only made reference in its response to three precise issues, as well as the dates the hospital implemented changes. The hospital had already retained Horizon Health for the quality assurance review prior to the licensure survey, and then merely used tidbits of information garnered from Horizon Health to respond to the licensure process.

{¶34} The hospital's reference to the three "items" listed above was in response to the ODMH's Survey Report, in which the surveyor noted that the hospital needed to evaluate its environment "for any safety risks such as weight bearing devices that include but are not limited to sink faucets, door hinges, etc. and development of a remedial plan for any risks identified." The hospital was free to make reference to information it had learned from the peer review process that had previously been commissioned. The law encourages hospitals such as Mercy Hospital to honestly and candidly respond to licensure requirements, and R.C. 2305.252 clearly excludes such information from the discovery process to be used in civil

suits against the hospital. Part of the peer review process is intended to identify where there is room for correction and improved results. The privilege is not eliminated, nor is the entire process exposed, simply because the hospital used the information as it should have.

Conclusion

{¶35} Regardless of how information is used for improvement purposes or discussed by one party or entity outside of the process, the statute clearly does not intend that the peer review process should be voided, waived, or destroyed. To hold otherwise subverts R.C. 2305.252 and the purpose of the peer review process. One has only to read the statute to realize the Ohio General Assembly did not create a privilege so frail and delicate as to be shattered by a mere reference to findings arising from the peer review process. If one cannot use the information generated from a peer review, the entire process is nullified and the statutory intent defeated. The peer review privilege statute is clearly applicable to the facts of the case herein. This confidentiality is necessary to protect the needs of society as a whole while also protecting the individual litigant's right to discovery from other sources, and therefore should not be interpreted in a way that erodes its very purpose.

{¶36} Having found that the peer review privilege applies to the Horizon Health report and that the hospital did not destroy the report's confidentiality, Mercy Hospital's sole assignment of error is sustained.

{¶37} The judgment of the trial court in denying the motion to quash is reversed, the subpoena duces tecum is hereby quashed, and this cause is remanded for further proceedings according to law and consistent with this opinion.

HENDRICKSON, P.J., concurs.

RINGLAND, J., dissents.

RINGLAND, J., dissenting.

{¶38} I respectfully dissent from the majority's decision for I find no error in the trial court's decision denying Mercy Hospital's motion to quash. Initially, I find it appropriate to note that our holding in *Selby* indicates that this matter should be reviewed under an abuse of discretion standard. See *id.*, 2008-Ohio-2413 at ¶ 10. However, in light of the more recent Ohio Supreme Court decisions, as well as a review of the otherwise applicable case law throughout the state, I agree with the majority finding a *de novo* standard of review applies.

{¶39} That said, while I agree that the affidavits submitted by Mercy Hospital indicate Horizon Health was initially retained to conduct an audit of the Behavioral Health Unit for peer review purposes, Mercy Hospital did not, in fact, use the Horizon Health report exclusively for that purpose. Instead, as the record indicates, Mercy Hospital also used the Horizon Health report to respond to ODMH's Survey Report requests and recommendations as part of its license certification process. In turn, regardless of whether the Horizon Health report was initially commissioned solely for peer review purposes, just as the trial court found, and for which I agree, by not utilizing the report exclusively for that purpose, Mercy Hospital cannot now shield itself behind the peer review privilege when it effectively "destroyed [its] confidentiality."

{¶40} The majority effectively establishes principles that allow a health care entity to conceal indefinitely any documents it claims were originally created for peer review purposes regardless of whether that initial purpose was later modified and irrespective of how those documents were then used. Because the peer review privilege is not a generalized cloak of secrecy over the entire peer review process, it simply cannot be said that the legislature intended for such a result here. See *Giusti*, 2008-Ohio-4333 at ¶ 14, citing *Huntsman v. Aultman Hosp.*, Stark App. No. 2006 CA 00331, 2008-Ohio-2554, ¶ 47.

{¶41} Furthermore, even if I was to find Mercy Hospital had not destroyed the confidentiality of the Horizon Health report by using it to respond to ODMH's Survey Report, based on the facts of this case, I would also find Mercy Hospital has failed to provide sufficient information to meet its burden of establishing the applicability of the peer review privilege.

{¶42} Here, contrary to the majority's decision, the only evidence supporting Mercy Hospital's claim that the peer review privilege applies came from two generalized affidavits that provide nothing more than a blanket assertion that the Horizon Health report was initially created as part of the peer review process. The submitted affidavits, however, leave many questions unanswered for they do not even set forth when Mercy Hospital's Medical Quality and Patient Safety Counsel conducted its review of the hospital's Behavioral Health Unit.⁴ An affidavit providing such limited information regarding the timing and process implemented in creating the disputed document, a document allegedly created solely for peer review purposes, is insufficient to overcome a health care entity's burden of proof required to establish the applicability of the peer review privilege. This is especially true here considering the trial court did not conduct an in camera review of the disputed documents. See *Legg v. Halle*, Franklin App. No. 07AP-170, 2007-Ohio-6595, ¶ 27 (finding in camera review of disputed peer review documents "a necessary preliminary step and is the most appropriate way to weigh the claims of privilege regarding the documents").

{¶43} While the majority may disagree, similar to our finding that "[s]imply labeling a document 'peer review,' 'confidential,' or 'privileged,' does not invoke the statutory privilege," merely claiming a document was originally created for peer review purposes is insufficient to

4. For example, was Mercy Hospital's decision to retain Horizon Health so close in time to ODMH's request that the audit was ultimately performed for both peer review and license certification purposes? Furthermore, what findings from the Horizon Health report, if any, were not disclosed to ODMH that would still be protected by the peer review privilege?

overcome one's burden of proof establishing the applicability of the privilege. *Selby*, 2008-Ohio-2413 at ¶ 14. Therefore, I would also find Mercy Hospital failed to provide sufficient proof to meet its burden establishing the applicability of the privilege.

{¶44} As can be seen from my dissent and that of the majority opinion, the statutory language establishing the peer review privilege found in R.C. 2305.252 leaves many questions unanswered and creates an unsettled state of the law regarding its application. Until these issues can be resolved by the legislature or the Ohio Supreme Court, the state of the law will remain unsettled in the area of medical malpractice leading to further confusion regarding its proper application to the detriment of all parties involved.

{¶45} In light of the foregoing, I find not only did Mercy Hospital destroy the confidentiality of the Horizon Health report by not using it exclusively for peer review purposes, I also find Mercy Hospital failed to provide sufficient proof to meet its burden establishing the applicability of the privilege. Accordingly, I respectfully dissent from the majority's decision for I would overrule Mercy Hospital's single assignment of error and affirm the trial court's decision denying its motion to quash.