

2004

Kathryn Cannon, as surviving spouse of Gary R. Cannon, deceased, Lane Cannon and Roland Cannon, as surviving children and legal heirs of Gary R. Cannon, deceased v. Salt Lake Regional Medical Center Inc., John and Jane Does 1 Through X and Doe Business Entities 1 Through V : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Kathryn Cannon, as surviving spouse of Gary R. Cannon, deceased, Lane Cannon and Roland Cannon, as surviving children and legal heirs of Gary R. Cannon, deceased v. Salt Lake Regional Medical Center, Inc., John and Jane Does 1 Through X and Doe Business Entities 1 Through V: Brief of the Appellees*, No. 20040486 (Utah Court of Appeals, 2004).

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IN THE UTAH COURT OF APPEALS

KATHRYN CANNON, as surviving
spouse of GARY R. CANNON,
deceased, LANE CANNON and
ROLAND CANNON, as surviving
children and legal heirs of GARY R.
CANNON, deceased,

Case No. 20040486-CA

Plaintiffs/Appellants,

vs.

SALT LAKE REGIONAL MEDICAL
CENTER, INC., JOHN AND JANE
DOES 1 THROUGH X AND DOE
BUSINESS ENTITIES 1 THROUGH
V,

Defendants/Appellees.

UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 20040486-CA

BRIEF OF THE APPELLEES

INTERLOCUTORY APPEAL FROM ORDER DENYING DISCOVERY
THIRD DISTRICT COURT, SALT LAKE COUNTY, UTAH
JUDGE JUDITH S.H. ATHERTON

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JURISDICTION

The Utah Court of Appeals has jurisdiction over this interlocutory appeal pursuant to Utah Code Ann. § 78-2a-3(j) (2002).

STATEMENT OF THE ISSUES

1. Whether any existing incident report created pursuant to Utah's care-review statute, Utah Code Ann. § 26-25-1 (1998), is privileged and not subject to discovery.¹ The trial court denied plaintiffs' motion to compel production of any existing incident report in a Minute Entry dated March 4, 2004. R. at 173-75, attached as Exhibit A to Addendum. The trial court's denial of plaintiffs' motion to compel is reviewed for abuse of discretion. *Pack v. Case*, 2001 UT App 232, ¶ 16, 30 P.3d 436. The trial court's interpretation of Utah's care review statute is a question of law that is reviewed for correctness. *Jeffs v. Stubbs*, 970 P.2d 1234, 1240 (Utah 1998). The trial court's acceptance of the facts set forth in the affidavit supporting application of Utah's care-review statute is reviewed "under a broad grant of discretion." *In re Gen. Determination of Rights to Use of All the Water*, 982 P.2d 65, 72 (Utah 1999).

2. Whether issues regarding further discovery are properly before the Court. The Minute Entry appealed from does not address further discovery regarding any existing incident report. R. at 173-75. Utah's appellate courts serve the "limited function" of reviewing "orders and judgments made by the trial court in the first

¹Utah Code Ann. §§ 26-25-1, -2 and -4 were amended in 2004. Because this suit was commenced in 2002, the 1998 version of the statute applies. *State ex rel. T.M.*, 2003 UT App 191, ¶ 17, 73 P.3d 959. In any event, the 2004 statutory amendments do not affect the issues on appeal.

instance.” *Brumley v. Utah State Tax Comm’n*, 868 P.2d 796, 802 (Utah 1994) (denying petition for rehearing).

DETERMINATIVE LAW

All information, interviews, reports, statements, memoranda, or other data furnished by reason of this chapter, and any findings or conclusions resulting from those studies are privileged communications and are not subject to discovery, use, or receipt in evidence in any legal proceeding of any kind or character.

Utah Code Ann. § 26-25-3 (1998) (attached as Exhibit B to Addendum).

STATEMENT OF THE CASE

On or around December 16, 2002, plaintiffs filed this lawsuit alleging medical malpractice against Salt Lake Regional Medical Center (the “Hospital”). R. at 10. Plaintiffs’ First Set of Requests for Production of Documents includes a request for each incident report that may exist regarding Mr. Cannon’s alleged fall while he was a patient at the Hospital. R. at 13-14. The Hospital objected to plaintiffs’ request for any existing incident report on the grounds of the privilege contained in Utah’s care-review statute, Utah Code Ann. §§ 26-25-1 to - 5. R. at 42-43.

On October 24, 2003, plaintiffs served a motion to compel production of any incident report that may exist with respect to Mr. Cannon’s alleged fall (“First Motion to Compel”). R. at 58-67. On November 17, 2003, the Hospital served its memorandum in opposition to plaintiffs’ First Motion to Compel. R. at 68-92. Attached to the Hospital’s memorandum is the affidavit of Linda Wright, who is the Risk Manager in the Hospital’s Quality Assurance Department. R. at 78-80, attached as Exhibit C to Addendum. Plaintiffs served their reply memorandum in support of their First Motion to Compel on

December 5, 2003. R. at 101-159. The trial court denied plaintiff's First Motion to Compel in a March 4, 2004 Minute Entry. R. at 173-75; Exhibit A. Due to a clerical error, copies of the Minute Entry were sent to the parties signed but undated. R. at 345. To preserve plaintiffs' right to file a timely petition for interlocutory appeal, the trial court entered a new Order denying plaintiffs' First Motion to Compel in a Minute Entry dated May 21, 2004. R. at 345, attached as Exhibit D to Addendum. The trial court's May 21, 2004 Minute Entry did not alter the substance of the March 4, 2004 Minute Entry or otherwise change the trial court's reasoning for denying plaintiffs' First Motion to Compel. R. at 345; Exhibit D.

On June 10, 2004, plaintiffs filed a petition for permission to appeal the trial court's interlocutory Order denying plaintiffs' First Motion to Compel. Brief without exhibits is attached as Exhibit E to Addendum. The sole issue presented by plaintiffs in their petition is whether any existing incident report is discoverable. Exhibit E. On June 16, 2004, the Utah Supreme Court transferred the case to this Court for disposition. R. at 359. This Court granted plaintiffs' petition for interlocutory appeal in an Order dated June 28, 2004. R. at 362.

STATEMENT OF FACTS

1. This is an action for alleged medical malpractice arising from treatment rendered to decedent Gary R. Cannon during his admission at the Hospital from May 16, 2001 through May 21, 2001. (R. at 3-5.)

2. On May 18, 2001, Mr. Cannon was found on the floor in his hospital room. (R. at 5.)

3. Plaintiffs' first set of requests for production of documents includes a request for any incident report that may exist regarding Mr. Cannon's alleged fall while he was a patient at the Hospital. (R. at 13.)

4. On February 24, 2003, the Hospital responded to plaintiffs' first set of interrogatories and requests for production of documents. The Hospital specifically objected to plaintiffs' request for any existing incident report on the grounds of the care-review privilege, which is codified in Utah Code Ann. §§ 26-25-1 to -5. (R. 42-43.)

5. On October 24, 2003, plaintiffs served their First Motion to Compel production of any incident report that may exist with respect to Mr. Cannon's alleged fall at the Hospital. (R. at 58-67.)

6. On November 16, 2003, the Hospital served its memorandum in opposition to plaintiffs' First Motion to Compel. Supporting the Hospital's memorandum is the affidavit of Linda Wright, who is the Risk Manager in the Hospital's Quality Assurance Department. (R. at 68-92; Exhibit C.)

7. In her affidavit, Linda Wright testifies that the Hospital's Quality Assurance Department is charged with the responsibility of collecting and evaluating incident

reports for the purpose of assessing, evaluating and improving the quality of health care rendered to patients at the Hospital. (R. at 79; Exhibit C.)

8. Ms. Wright further testifies that incident reports are not created or used for any purpose other than for evaluating and improving the health care rendered to patients at the Hospital. (R. at 79; Exhibit C.)

9. Ms. Wright also testifies that incident reports are not included in the patient's medical records and do not constitute routine business or medical records of the Hospital. (R. at 79; Exhibit C.)

10. Ms. Wright finally testifies that incident reports are necessary and critical to the care-review work performed by the Hospital's Quality Assurance Department. (R. at 79; Exhibit C.)

11. On December 5, 2003, plaintiffs served a reply memorandum in support of their First Motion to Compel and submitted the motion to the trial court for decision. Plaintiffs did not request additional time to conduct discovery prior to submitting their First Motion to Compel for decision. (R. at 99-159.)

12. The trial court denied plaintiffs' First Motion to Compel in a March 4, 2004 Minute Entry. The trial court relied on *Benson v. IHC Hosp., Inc.*, 866 P.2d 537 (Utah 1993) and the undisputed affidavit testimony of Linda Wright in concluding that any existing incident report is privileged and not discoverable. (R. at 173-175; Exhibit A.)

13. Due to a clerical error, copies of the March 4, 2004 Minute Entry were sent to counsel for the parties signed but not dated. To preserve plaintiffs' right to file a timely petition for interlocutory appeal, the trial court entered a new Order denying

plaintiffs' First Motion to Compel in a Minute Entry dated May 21, 2004. The trial court's May 21, 2004 Minute Entry did not alter the substance of the March 4, 2004 Minute Entry or otherwise change the trial court's reasoning for denying plaintiffs' First Motion to Compel. (R. at 345; Exhibit D.)

14. On June 10, 2004, plaintiffs filed a petition for permission to appeal the trial court's Order denying plaintiffs' First Motion to Compel. (Exhibit E.)

15. Following the trial court's Order denying plaintiffs' First Motion to Compel, plaintiffs sought additional discovery related to any existing incident report. Specifically, plaintiffs served interrogatories and requests for admission related to any existing incident report. Plaintiffs also sought to depose Linda Wright and other Hospital representatives who have knowledge about any existing incident report (the "Rule 30(b)(6) deponents"). Plaintiffs' notices of deposition are not included in the record on appeal. (R. at 203-204, 228.)

16. In a letter dated March 19, 2004, counsel for the Hospital informed plaintiffs' counsel that the Hospital would not produce Linda Wright or the Rule 30(b)(6) deponents for deposition questioning about any existing incident report unless ordered to do so by the trial court. Counsel for the Hospital relied on the trial court's March 4, 2004 Minute Entry in refusing to produce the requested deponents. (R. at 228.)

17. On March 24, 2004, plaintiffs filed a second motion to compel ("Second Motion to Compel") the depositions of Linda Wright and the Rule 30(b)(6) deponents. (R. at 215-230.)

18. In a Minute Entry dated May 21, 2004, the trial court partially granted plaintiffs' Second Motion to Compel. Specifically, the trial court ruled that plaintiffs "are entitled to depose Linda Wright." The Minute Entry is silent with respect to plaintiffs' request for an order compelling the depositions of the Rule 30(b)(6) deponents. (R. at 347-48, attached as Exhibit F to Addendum.)

19. Plaintiffs have not petitioned for interlocutory appeal of the trial court's May 21, 2004 Minute Entry regarding the deposition of Linda Wright and the Rule 30(b)(6) deponents. (Exhibit A.)

20. In April 2004, the Hospital responded to plaintiffs' interrogatories and requests for admission related to any existing incident report. The Hospital objected to the interrogatories and requests for admission on the grounds of attorney client privilege; attorney work product doctrine; the trial court's March 4, 2004 Minute Entry; Utah's care-review statute; and the cases cited in the Hospital's memoranda in opposition to plaintiffs' First Motion to Compel. (R. at 330-335, 393-94.)

21. On July 16, 2004, the Hospital filed a motion for protective order and stay of all discovery relating to any existing incident report pending disposition of the case on appeal. The trial court has not yet ruled on the Hospital's motion. (R. at 375-406.)

22. On August 9, 2004, plaintiffs responded to the Hospital's motion for protective order and stay of all discovery pending appeal by filing a third motion to compel ("Third Motion to Compel") answers to their interrogatories and requests for admission related to any existing incident report. Plaintiffs' Third Motion to Compel also seeks an order compelling the deposition of Linda Wright and the Rule 30(b)(6)

deponents. Plaintiffs' Third Motion to Compel is not part of the appellate record in this case, and the trial court has not yet ruled on the motion.

23. On August 9, 2004, plaintiffs also filed a motion with this Court for an extension of time to file their appellate brief and for an order compelling additional discovery related to any existing incident report. Included in plaintiffs' motion is a request for an order compelling (1) answers to plaintiffs' interrogatories and requests for admission regarding any existing incident report; and (2) the depositions of Linda Wright and the Rule 30(b)(6) deponents. (Pls.' Mot. for Ext. of Time; brief without exhibits attached as Exhibit G to Addendum.)

24. On August 26, 2004, the Hospital filed a memorandum in opposition to plaintiffs' motion for extension of time to file their appellate brief and for an order compelling additional discovery related to any existing incident report. (Hosp.'s Mem. in Opp'n to Mot. for Ext. of Time; brief without exhibits attached as Exhibit H to Addendum.)

25. On September 2, 2004, this Court denied plaintiffs' motion for an extension of time to file their appellate brief and for an order compelling additional discovery related to any existing incident report. (9/2/04 Order, attached as Exhibit I to Addendum.)

26. The Hospital has disclosed the names of all Hospital employees known to have discoverable information regarding the facts of this case, including the facts surrounding Mr. Cannon's alleged fall. (R. at 35-39, 176-178.)

27. Plaintiffs have not taken any depositions in this case.

28. Counsel for the Hospital has deposed the following individuals:

Dr. Ronald Ward	3/24/04	Gary Cannon's treating physician
Dr. Diana Banks	2/27/04	Kathryn Cannon's treating physician
Kathryn Cannon	10/21/03	Plaintiff
Lane Cannon	10/21/03	Plaintiff
Roland Cannon	10/21/03	Plaintiff

(R. at 48-50, 160-162, 166-168.)

SUMMARY OF ARGUMENT

This case involves a straight forward application of Utah's care-review statute. The undisputed affidavit testimony of Linda Wright establishes that any existing incident report is privileged and not discoverable. The undisputed evidence also establishes that all statutory and case law requirements for application of the care-review privilege have been met. Furthermore, protection of any existing incident report is consistent with the Utah State Legislature's intent and with public policy supporting the assessment and improvement of health care.

Additional corroborative evidence or an in-camera review of any existing incident report are not required under Utah law, and the trial court acted within its discretion in denying plaintiffs' motion to compel any existing incident report without conducting an in-camera review or requiring additional evidence to corroborate the testimony of Linda Wright.

Plaintiffs already have access to the facts of this case, including the facts surrounding Mr. Cannon's alleged fall, through non-privileged sources of discovery. Protection of any existing incident report from discovery will neither preclude plaintiffs

from discovering the facts of the case nor abrogate their cause of action against the Hospital.

The sole issue before the Court is whether any existing incident report is discoverable. Issues pertaining to additional discovery related to any existing incident report are not part of this interlocutory appeal and are not included in the record on appeal. Therefore, the Court should refuse to consider arguments pertaining to such issues. Rather, the Court should affirm the trial court's denial of plaintiffs' First Motion to Compel and remand the case to the trial court for further proceedings.

ARGUMENT

I. THE UNDISPUTED EVIDENCE ESTABLISHES THAT ANY EXISTING INCIDENT REPORT IS PRIVILEGED

Utah's care-review statute provides that "any person" may provide "interviews," "reports," "statements" or "memoranda" to "any health facility's in-house staff committee for the uses described in Subsection (3)" of section 26-25-1. Utah Code Ann. § 26-25-1(1), (2) (1998); Exhibit B. Subsection (3) in turn provides that the reports, statements or memoranda may be provided for "the evaluation and improvement of hospital and health care rendered by hospitals, health facilities, or health care providers." Utah Code Ann. § 26-25-1(3); Exhibit B. Finally, the statute provides that "[a]ll information, reports, statements, memoranda, or other data" furnished by reason of the statute is "privileged communications and [is] not subject to discovery, use, or receipt in evidence in any legal proceeding of any kind or character." Utah Code Ann. § 26-25-3 (1998); Exhibit B. The privilege thus extends to all information furnished by reason of the statute and not merely all non-factual information, as argued by plaintiffs. Pls.' Br., p. 11.

The affidavit testimony of Linda Wright establishes that any existing incident report created in this case is privileged under the statute. First, there can be no dispute that any existing incident report would in fact be a report, statement or memorandum. R. at 79, ¶ 2; Exhibit C. Moreover, Ms. Wright's affidavit establishes that the Hospital's Quality Assurance Department is charged with the responsibility of collecting and evaluating incident reports for the purpose of assessing and improving the quality of health care provided to patients. R. at 79, ¶ 2; Exhibit C. In addition, incident reports are created and submitted to the Quality Assurance Department for the sole purpose of evaluating and improving the care provided to patients at the Hospital. R. at 79, ¶¶ 3-5, 7; Exhibit C. Finally, Ms. Wright's affidavit establishes that incident reports are critical to the care-review function of the Quality Assurance Department. R. at 79, ¶ 9; Exhibit C.

In the only case interpreting Utah's care-review statute, the Utah Supreme Court concluded that the care-review privilege attaches only to materials that are prepared specifically to be submitted for care-review purposes. *Benson v. I.H.C. Hosp., Inc.*, 866 P.2d 537, 540 (1993). The affidavit of Linda Wright also establishes compliance with the specifically-prepared requirement of *Benson*. The Quality Assurance Department requires Hospital staff to prepare incident reports for all unusual occurrences. R. at 79, ¶ 3; Exhibit C. The reports are specifically created for submission to the Quality Assurance Department. R. at 79, ¶ 4; Exhibit C. Just as important, the Quality Assurance Department reviews each incident report that is created. R. at 79, ¶ 5; Exhibit C. Incident reports are required, submitted and reviewed because they are critical to the Quality Assurance Department's responsibility for assessing and improving the quality of health

care provided to patients at the Hospital. R. at 79, ¶ 6; Exhibit C. Because incident reports created by Hospital staff satisfy all statutory and common law requirements, any existing incident report created in this case is privileged and not subject to discovery.

II. ADDITIONAL CORROBORATING EVIDENCE IS NOT REQUIRED OR NECESSARY

Plaintiffs argue that Ms. Wright's affidavit is inadequate to establish that the care-review privilege applies to any existing incident report. Pls.' Br. p. 15. Plaintiffs specifically argue that the Hospital was required to submit additional evidence, such as the Hospital's bylaws, rules and regulations, to corroborate the testimony of Ms. Wright. *Id.* at p. 16. Plaintiffs further argue that the trial court was required to conduct an in-camera review of any existing incident report. *Id.* at p. 17.

Despite plaintiffs' arguments to the contrary, Ms. Wright's affidavit testimony sufficiently establishes that the care-review privilege applies. The plain language of the care-review statute does not require a health care facility to provide additional corroborative evidence. Utah Code Ann. § 26-25-1 to -3. In any event, plaintiffs in the present case did not file a motion for an in-camera review or for additional corroborative evidence prior to submitting their First Motion to Compel for decision. More importantly, the trial court did not request or need additional corroborating evidence or an in-camera review before ruling that any existing incident report is privileged.

In Utah, a trial court has discretion to conduct an in-camera review of privileged documents but is not required to do so. *Spratley v. State Farm Mut. Auto. Ins. Co.*, 2003 UT 39, ¶ 22, 78 P.3d 603 (stating that a trial court may conduct in-camera review "where appropriate"); *Thurston v. Workers Comp. Fund of Utah*, 2003 UT App 438, ¶ 25, 83

P.3d 391 (concluding that the trial court did not abuse its broad discretion in discovery matters by denying the plaintiff's motion for an in-camera review). Massachusetts' highest court has recognized that an in-camera review of incident reports "necessarily involves an invasion and dilution of a statutory privilege" and that such a review should be conducted only as a "last resort" when other evidence, such as affidavit testimony, does not establish the privilege. *Carr v. Howard*, 689 N.E.2d 1304, 1312-1315 (Mass. 1998) (holding that affidavit testimony alone was sufficient to establish privilege).

Here, the trial court acted within its discretion in denying plaintiffs' First Motion to Compel without conducting an in-camera review of any existing incident report or requiring additional corroborative evidence. No motion for an in-camera review or additional corroborative evidence was filed by plaintiffs, and other undisputed evidence, namely the affidavit testimony of Linda Wright, establishes the privilege. Under these circumstances, an in-camera review and/or additional corroborative evidence were not warranted.

Because Utah's courts have addressed the issue and given trial courts discretion with respect to in-camera reviews, case law from Texas or any other jurisdiction is not persuasive and should be ignored. In any event, plaintiffs' reliance on Texas case law is misplaced. First, none of the Texas cases cited by plaintiffs require the production of bylaws or other hospital rules in addition to affidavit testimony. *Mem'l Hosp.—The Woodlands v. McGown*, 927 S.W.2d 1, 11 (Tex. 1996); *In re Osteopathic Med. Ctr. of Tex.*, 16 S.W.3d 881, 884 (Tex. App. 2000); *Arlington Mem'l Hosp. Found., Inc. v. Barton*, 952 S.W.2d 927, 930 (Tex. App. 1997); *Northeast Cmty. Hosp. v. Gregg*, 815

S.W.2d 320, 323 (Tex. App. 1991). To the contrary, the Texas Court of Appeals has stated that a party's duty to establish the existence of a privilege is "generally accomplished by affidavit." *In re Osteopathic Med. Ctr. of Tex.*, 16 S.W.3d at 884.

With respect to in-camera reviews, Texas has a specific rule of civil procedure that permits but does not require such review. Tex. R. Civ. P. 193.4; *see also In re Ching*, 32 S.W.3d 306, 311 (Tex. App. 2000) (stating that an in-camera review may be conducted if the trial court determines that it "is necessary"). Moreover, an in-camera review is required in Texas only when the party seeking discovery has introduced evidence which counters the evidence tendered by the opposing party to establish the existence of the privilege. *Osborne v. Johnson*, 954 S.W.2d 180, 185 (Tex. App. 1997).

Here, plaintiffs failed to introduce any evidence in opposition to the affidavit of Linda Wright. While plaintiffs point to a training video allegedly used by the Hospital, that tape was not produced by the Hospital in this case, was not provided to the trial court for review, has not been admitted into evidence by the trial court and is not included in the record on appeal. Accordingly, the tape does not constitute evidence opposing the affidavit of Linda Wright and should be ignored by this Court. *State v. Pliego*, 1999 UT 8, ¶ 7, 974 P.2d 279 (stating that an appellate court's review is "limited to the evidence contained in the record on appeal" (quotations and citations omitted)).

Even if the Court accepted plaintiffs' statements regarding the video tape, those statements do not address the elements of Utah's care-review statute or in any way contradict the affidavit testimony of Linda Wright. Even under Texas law, an in-camera

review would not be required because plaintiffs failed to introduce any evidence to contradict the affidavit testimony of Linda Wright.

Contrary to plaintiffs' assertions otherwise, Utah law does not require additional corroborative evidence or an in-camera review of any existing incident report. The trial court acted within its discretion in relying on the undisputed affidavit testimony of Linda Wright to deny plaintiffs' First Motion to Compel.

III. CASE LAW INTERPRETING CARE-REVIEW STATUTES IN OTHER JURISDICTIONS IS NOT PERSUASIVE OR HELPFUL

The Utah Supreme Court has concluded that information and material prepared specifically for submission for care-review purposes is privileged. *Benson*, 866 P.2d at 540. Plaintiffs' reliance on case law interpreting care-review statutes that are materially different from Utah's care-review statute is not persuasive or helpful. The North Dakota Supreme Court has recognized that while nearly every state has a peer-review and/or a care-review privilege statute, "it appears that no two statutes, or courts' interpretations of them, are alike." *Trinity Med. Ctr., Inc. v. Holum*, 544 N.W.2d 148, 153 (N.D. 1996). Accordingly, the North Dakota Supreme Court concluded "because of the lack of uniformity among the various states' peer review privilege statutes, caselaw [sic] interpreting those statutes is not highly persuasive in our interpretation of [the North Dakota statute]." *Id.*

A review of the cases cited by plaintiffs demonstrate that they are not on point. For instance, plaintiffs rely heavily on unreported cases from Virginia. Pls.' Br., pp. 6-9. The Virginia statute at issue in both *Bradburn v. Rockingham Mem'l Hosp.*, 45 Va. Cir. 356, (Va. Cir. Ct. 1998), copy attached in R. at 133-137 and as Exhibit J to Addendum,

and *Benedict v. Cmty. Hosp. of Roanoke Valley*, 10 Va. Cir. 430, 1988 WL 626030, at *4 (Va. Cir. Ct. 1988), copy attached as Exhibit K to Addendum, is materially different from the statute at issue in this case. In particular, the Virginia statute expressly excludes from the care-review privilege records “kept in the ordinary course of business of operating a hospital [or] any facts or information contained in such records.” *Id.* at *4 (quoting Va. Code Ann. § 8.01-581.17 (1988)).

The court in *Benedict* concluded that the ordinary course of a hospital’s business is to prevent accidents or mishaps. *Id.* at *5. The court then determined that any document, including incident reports, relating to the all-embracing concept of patient welfare and safety falls within the exception to Virginia’s care-review statute. *Id.* The court in *Benedict* therefore based its analysis on the specific language of the Virginia statute. *Benedict* served as the “basis” for the court’s decision in *Bradburn*. 45 Va. Cir. Ct. at 361. Because Utah’s care-review statute does not include an exception similar to the one included in Virginia’s statute, cases interpreting the Virginia statute are not on point. Even the court in *Benedict* acknowledged that the incident report at issue in that case would be privileged but for the specific exception included in the Virginia statute. *Id.* at *3.

Interestingly, Virginia circuit courts have differed in their treatment of incident reports. In a decision that is more recent than *Benedict*, a Virginia Circuit Court held that a hospital’s incident reports should be protected from disclosure. *Mangano v. Kavanaugh*, 30 Va. Cir. 66, 1993 WL 945920, at *3 (Va. Cir. Ct. 1993), copy attached as Exhibit L to Addendum. The court in *Mangano* acknowledged a difference of opinion

with respect to how broadly the Virginia privilege should be read and applied. *Id.* at *1. The court in *Mangano* concluded that the privilege should be read broadly in accordance with the legislature's desire to promote the exposure and frank discussion of mistakes and mishaps. *Id.* at *2. Thus, even when considered against Virginia's broad exception to the care-review privilege, incident reports have still been found to be privileged in that jurisdiction.

In any event, case law interpreting the Virginia statute is not on point. Utah's care-review statute does not contain an exception to the privilege for records created in the ordinary course of business, and such an exception cannot be read into Utah's statute. *State v. Rudolph*, 970 P.2d 1221, 1229 (Utah 1998) (“[C]ourts are not to infer substantive terms into the text [of a statute] that are not already there. Rather, the interpretation [of Utah's care-review statute] must be based on the language used, and the court has no power to rewrite the statute to conform to an intention not expressed.” (Citation omitted.)). Unlike the Virginia statute, Utah's care-review statute does not contain any exceptions to the privilege.

Additional case law cited by plaintiffs is equally unhelpful because the statutes applied in those cases are materially different from Utah's care-review statute. *See, e.g., Cochran v. St. Paul Fire & Marine Ins. Co.*, 909 F. Supp. 641, 644 (W.D. Ark. 1995) (applying Ark. Code Ann. § 16-46-105, which expressly provides that incident reports are not privileged); *Hill v. Sandhu*, 129 F.R.D. 548, 550 (D. Kan. 1990) (applying Kan. Stat. Ann. § 65-4915, which limits the privilege to records generated by the review committee); *Porter v. Snyder*, 115 F.R.D. 77, 78 (D. Kan. 1987) (applying Kan. Stat.

Ann. § 65-2836, which limits the privilege to the records generated by the review committee); *Nat'l Bank of Commerce v. HCA Health Serv. of Midwest, Inc.*, 800 S.W.2d 694, 701 (Ark. 1990) (applying Ark. Code Ann. § 16-46-105); *Columbia/HCA Healthcare Corp. v. Eighth Judicial Dist. Court*, 936 P.2d 844, 849 (Nev. 1997) (applying Nev. Rev. Stat. 49.265, which limits the privilege to the proceedings and records generated by the review committee); *Romero v. Cohen*, 679 N.Y.S.2d 264, 294 (N.Y. Sup. Ct. 1998) (applying N.Y. Educ. Law § 6527, which allows for discovery of statement made by the defendant to a review committee); *Trinity Med. Ctr., Inc. v. Holum*, 544 N.W.2d 148, 152-153 (N.D. 1996) (applying North Dakota statute that limits the privilege to the records and proceedings of the review committee itself).

Plaintiffs' analogy to motor vehicle investigative reports is likewise inapplicable. Pursuant to Utah Code Ann. § 41-6-40 (Supp. 2004), law enforcement agencies are expressly required to disclose investigative reports to a variety of individuals and entities, including those involved in a motor vehicle accident. *Id.* Furthermore, motor vehicle investigative reports do not serve the same internal quality assurance and improvement purposes of incident reports. For these reasons, plaintiffs' comparison between incident reports and motor vehicle investigative reports is not valid.

The protection afforded by Utah's care-review privilege turns on the plain language of section 26-25-3, the legislative intent behind section 26-25-3 and case law interpreting section 26-25-3. As argued above, the undisputed evidence establishes that any existing incident report is privileged under Utah's care-review statute and case law

interpreting that statute. Moreover, as argued below, legislative intent and public policy support protection of any existing incident report from discovery.

To the extent the Court is inclined to look at case law from other jurisdictions, a number of jurisdictions have held that incident reports are privileged and not discoverable. *See, e.g., Romero*, 679 N.Y.S.2d at 264, 266-67 (recognizing that other jurisdictions preclude or limit discovery of peer review records); William D. Bremer, J.D., Annotation, *Scope and Extent of Prot. From Disclosure of Med. Peer Review Proceedings Relating to Claim in Med. Malpractice Action*, 69 A.L.R. 5th 559 (1999).

IV. THE UTAH STATE LEGISLATURE HAS UNEQUIVOCALLY STATED ITS INTENT TO PROTECT INCIDENT REPORTS FROM DISCOVERY

When interpreting statutes, a court's "primary goal is to give effect to the legislature's intent in light of the purpose the statute was meant to achieve." *Evans v. State*, 963 P.2d 177, 184 (Utah 1998). Here, the Utah State Legislature's intent with respect to quality assurance materials such as incident reports is unequivocal.

The care-review privilege was strengthened by the Utah State Legislature in response to the Utah Supreme Court's 1993 decision in *Benson*. The statute reviewed in *Benson* provided that reports "are privileged communications and may not be used or received in evidence in any legal proceeding of any kind or character." *Benson*, 866 P.2d at 539 (quoting Utah Code Ann. § 26-25-3 (1993)). In *Benson*, the Utah Supreme Court concluded that the care-review privilege, as drafted by the legislature, protected care-review information from use at trial but did not protect such materials from discovery requests. *Id.* at 540. The court noted that if the legislature intended to protect

such materials from discovery, it could have expressly done so by using such language in the statute. *Id.*

In response to the *Benson* decision, the Utah State Legislature amended the care-review statute in 1994 to protect incident reports and other care-review materials from discovery. Utah Code Ann. § 26-25-3 (1994). Representative Melvin Brown proposed a quality assurance amendment to section 26-25-3 clarifying that care-review materials “are not subject to discovery, use, or receipt in evidence in any legal proceeding of any kind or character.” Rep. Brown Amend. to Sub. S.B. 158, attached as Exhibit M to Addendum. Immediately below Representative Brown’s proposed amendment was the following handwritten note:

It is and has been the intention of the legislature that the ***broadest scope of privilege, including not being subject to discovery***, has been the intention of the legislature in not permitting the materials described above to be used or received in evidence in any legal proceeding of any kind or character.

Id. (Emphasis added.)

When introducing his proposed amendment on the floor of the House of Representatives, Representative Brown stated that millions of dollars are saved by eliminating unnecessary or inappropriate care through quality assurance activities. Utah State House of Rep., Floor Deb. on Sub. S.B. 158, Remarks of Rep. Brown, 50th Leg., Gen. Sess., Day 45, March 2, 1994, Tape 1, Counter No. 1034. Representative Brown further stated that its was in the “public interest for these [quality assurance] activities to occur to the ***maximum extent possible*** and that they [will not] be if people [are not] protected from discovery.” *Id.* (Emphasis added.) Representative Brown concluded by

reiterating that it was the legislature's intent that quality assurance activities not be subject to discovery. *Id.* No representative spoke against Representative Brown's proposed amendment. *Id.* The amendment was passed by both houses of the legislature and signed into law by the governor. Utah Code Ann. § 26-25-3 (1994).

The 1994 amendment to section 26-25-3 is the determinative law in this case. In passing the 1994 amendment, the legislature could not have been more clear in signaling its intent that quality assurance materials are not subject to discovery. The Court should give effect to the legislature's intent by affirming the trial court's Order denying plaintiffs' First Motion to Compel.

V. PUBLIC POLICY SUPPORTS PROTECTION OF INCIDENT REPORTS

The Utah Supreme Court has echoed the public policy concerns expressed by Representative Brown. In *Benson*, the court recognized that the purpose of the care-review statute is to provide information that may be used to evaluate and improve medical care provided to patients. 866 P.2d at 539. The court also recognized that in the absence of the privilege, "personnel might be reluctant to give such information, and the accuracy of the information and the effectiveness of the studies would diminish greatly." *Id.* Protecting incident reports from discovery is necessary to ensure the candid feedback that is required to accomplish the purposes of the care-review statute.

VI. THE FACTS OF THE CASE ARE AVAILABLE THROUGH NON-PRIVILEGED SOURCES

Plaintiffs would have the Court believe that they do not have access to the facts of this case. Pls.' Br., p. 11. Plaintiffs' argument simply does not hold up under scrutiny.

First, plaintiffs have all of Mr. Cannon's medical records at their disposal. Second, the Hospital has disclosed the identities of all Hospital employees known to have discoverable information regarding the facts of this case, including knowledge about Mr. Cannon's alleged fall. R. at 35-39, 176-178. Significantly, plaintiffs have failed to depose any of these individuals even though nearly two years have passed since the case was commenced.

Plaintiffs cannot be heard to complain about stale evidence and alleged holes in the medical records when they have not bothered to depose Hospital employees who have discoverable knowledge about the facts of the case. Rather than work up their case through permissible avenues of discovery, plaintiffs have instead chosen to spend their time and resources in pursuit of what could aptly be described as a crusade to circumvent the care-review privilege. Plaintiffs' attempt to cast themselves as somehow disadvantaged in the discovery process is not supported by the facts.

VII. THE ALLEGED TRAINING VIDEO SUPPORTS APPLICATION OF THE CARE-REVIEW PRIVILEGE

As already pointed out, the training video allegedly used by the Hospital was not produced in this case, was not provided to the trial court for review, has not been admitted into evidence by the trial court and is not part of the record on appeal. For all of these reasons, the Court should not consider any arguments pertaining to the video. In any event, the video actually supports the privilege that shields any existing incident report from discovery. As alleged by plaintiffs, the video instructs that all circumstances and findings regarding a patient's fall should be documented in both the patient's medical chart and an incident report. Pls.' Br., p. 19.

A patient's medical records are discoverable and have been provided to plaintiffs in this case.² Thus, the facts surrounding a patient's fall are not hidden and suppressed but rather disclosed in the patient's medical records. Likewise, the facts contained in Mr. Cannon's medical records can be supplemented and further understood through depositions of those individuals who were involved in providing care to Mr. Cannon. Because the basic facts surrounding a patient's fall are obtainable through non-privileged sources, incident reports should be fully protected, as intended by the Utah State Legislature.

Incident reports are not part of a patient's medical records and are created for the limited purpose of allowing a hospital to assess and improve the health care provided to patients. R. at 79, ¶¶ 7-8; Exhibit C. Plaintiffs' attempt to read an exception into the care-review statute for factual materials that may be contained in an incident report is not supported by the plain language of the statute, not supported by the legislative intent and public policy behind the statute and not necessary given the availability of factual information from non-privileged sources.

VIII. PLAINTIFFS' NEGLIGENCE CLAIM IS NOT ABROGATED BY THE CARE-REVIEW PRIVILEGE

Plaintiffs cite case law from other jurisdictions in support of their argument that competing interests in this case should be resolved in favor of disclosure. Pls.' Br., pp.

²Mr. Cannon's medical records are not part of the record on appeal. While the Hospital disputes plaintiffs' accusations regarding the completeness of Mr. Cannon's medical records, the Court should ignore any arguments pertaining to the substance of those records. *Pliego*, 1999 UT 8 at ¶ 7 (stating that an appellate court's review is "limited to the evidence contained in the record on appeal" (quotations and citations omitted)).

11-15. The cases cited by plaintiffs are not on point. The plaintiff in *Greenwood v. Wierdsma*, 741 P.2d 1079 (Wyo. 1987), asserted a claim against the hospital alleging that it failed to properly investigate, certify or review a physician's surgical skills and the procedure he performed on the plaintiff. *Id.* at 1081.

The issue in *Greenwood* was whether the plaintiff was entitled to hospital records concerning the physician's privileges and credentialing. *Id.* at 1082. The court in *Greenwood* held that denying the plaintiff access to those records by virtue of the peer-review privilege would be tantamount to denying a cause of action against hospitals for negligence in credentialing physicians and maintaining qualified medical personnel. *Id.* at 1087. The court refused to construe the statute at issue in *Greenwood* so broadly when the legislature had not expressly done so in the language of the statute. *Id.* at 1088. Likewise, *Adams v. St. Francis Reg'l Med. Ctr.*, 955 P.2d 1169 (Kan. 1998), involved a situation in which the plaintiffs had no other way to develop the facts of the case without access to the documents at issue. *Id.* at 1180.

As pointed out previously, plaintiffs in the present case have access to the facts involving the care provided to Mr. Cannon, including the facts surrounding his alleged fall, through non-privileged sources. Plaintiffs' failure to mine discoverable sources of information about the case is no one's fault but their own. This case has been pending for nearly two years. During that time, plaintiffs have chosen not to take any depositions to supplement the evidence contained in the medical records concerning Mr. Cannon's alleged fall or the treatment and care provided to Mr. Cannon in general. Because neither plaintiffs' malpractice claim nor access to the facts surrounding that claim have been

abrogated by the care-review privilege, the concerns addressed in *Greenwood* and *Adams* do not apply.

Likewise, case law cited by plaintiffs that addresses the scope of the presidential privilege is not applicable. Pls.' Br., pp. 13-15. *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090 (1974) is distinguishable from the present case. First, *Nixon* addressed the scope of a privilege in the context of a criminal prosecution and not a civil case involving claims of negligence. *Id.* at 683, 94 S. Ct. at 3095. In a criminal case, constitutional considerations arise that do not apply in a civil case. *See, e.g., State v. One 1980 Cadillac*, 2001 UT 26, ¶ 14, 21 P.3d 212 (stating that Sixth Amendment right to confront accusers and to have assistance of counsel applies in criminal prosecutions but not in civil in rem proceedings). In *Nixon*, the Supreme Court cited concerns about the Sixth Amendment right to confront witnesses in a criminal case and carefully noted that its decision was limited to balancing the competing interests in a criminal matter. *Id.* at 712 n. 19, 94 S. Ct. at 3109.

Second, *Nixon* involved interpretation of a privilege, the presidential privilege, that is implied from the President's Article II powers but not expressly set forth or limited in the text of Constitution. *Id.* at 711, 94 S. Ct. at 3109. In contrast, this case involves the scope of an express statutory privilege in a civil matter. Case law from the Supreme Court addressing the scope of a different and implied privilege in the context of a criminal prosecution is not relevant to the issue before the Court.

IX. THE HOSPITAL'S COMPLIANCE WITH A COURT ORDER IN ANOTHER CASE IS NOT BINDING IN THIS CASE AND DOES NOT BAR THE HOSPITAL FROM ASSERTING THE CARE-REVIEW PRIVILEGE IN THIS CASE

Plaintiffs seem to imply that the Hospital's compliance with an order to compel an incident report in another case forever precludes the Hospital from opposing a request for an incident report in the future. The trial court's decision compelling production of an incident report in the *Adam* case does constitute binding precedent on either the trial court or this Court.

Utah law allows for a second trial court judge to revisit an issue ruled upon by another judge when the issue is presented in a different factual or legal light or when the second judge determines that the first judge's ruling was erroneous. *Red Flame, Inc. v. Martinez*, 2000 UT 22, ¶¶ 4-5, 996 P.2d 540. A second look at the issue of whether any existing incident report is discoverable was warranted by the trial court in this case because additional factual material was presented, namely the affidavit of Linda Wright, that was not presented for review to the court in the *Adam* case. The trial court's ruling in the *Adam* case was based on the absence of an affidavit or other evidence establishing that incident reports are created specifically for submission for review purposes. R. at 127-29; attached as Exhibit N to Addendum.

When the same issue arose in the present case, the Hospital, who is represented by a different lead attorney, submitted the affidavit of Linda Wright in support of its opposition to plaintiffs' First Motion to Compel. R. at 78-80; Exhibit C. The affidavit testimony of Linda Wright establishes that incident reports are in fact prepared specifically for care-review and quality assurance purposes. R. at 79, ¶¶ 4, 7; Exhibit C.

The Hospital has consistently opposed requests for production of incident reports. Just because the Hospital complied with an order compelling production of an incident report in the *Adam* case does not mean that the Hospital picks and chooses when to “hide behind” the care-review privilege. Pls.’ Br., p. 21.

The Hospital has consistently and correctly relied on the care-review statute for protection of incident reports from discovery, regardless of whether the information contained in them is favorable. Because the plain language of the care-review statute, case law interpreting that statute, legislative history and public policy all support the protection of incident reports from discovery, the trial court’s Order denying plaintiffs’ First Motion to Compel should be affirmed.

X. PLAINTIFFS’ MOTIONS FOR ADDITIONAL DISCOVERY AND THE TRIAL COURT’S RULINGS ON THOSE MOTIONS ARE NOT PROPERLY BEFORE THE COURT

This Court granted plaintiffs’ petition for permission to appeal the trial court’s order denying plaintiffs’ First Motion to Compel. The sole issue presented by plaintiffs’ petition is whether any existing incident report is discoverable. Exhibit E. Subsequent to the trial court’s denial of plaintiffs’ First Motion to Compel, plaintiffs filed two additional motions to compel discovery related to any existing incident report, and the Hospital filed a motion to stay all discovery related to any existing incident report pending resolution of this appeal. R. at 215-30, 375-406. The trial court has ruled on one of those three motions. R. at 347-48; Exhibit F. The two remaining motions are fully briefed, submitted and under review by the trial court.

None of the three motions filed subsequent to the trial court's denial of plaintiffs' First Motion to Compel are properly before the Court because (1) the Court granted plaintiffs' petition for interlocutory appeal for the limited purpose of reviewing the trial court's denial of plaintiffs' First Motion to Compel; and (2) the trial court has not yet ruled on two of the three motions pertaining to additional discovery related to any existing incident report. *State v. Redd*, 1999 UT 108, ¶ 9, 992 P.2d 986 (limiting the court's review to issues presented in the petition for interlocutory appeal); *Brumley v. Utah State Tax Comm'n*, 868 P.2d 796, 802 (Utah 1993) (affirming that Utah's appellate courts serve a "limited function" of reviewing "orders and judgments made by the trial court in the first instance").

Furthermore, only a small portion of the briefing completed on the two pending motions is included in the record on appeal. The Court should decline plaintiffs' invitation to address issues and motions that are not included in the record on appeal. *Pliego*, 1999 UT 8, at ¶ 7 (stating that an appellate court's review is "limited to the evidence contained in the record on appeal" (quotations and citations omitted)). Finally, this Court has previously denied plaintiffs' motion for an order compelling additional discovery pertaining to any existing incident report. Exhibit I. There is no need for the Court to revisit the issue. For all of these reasons, the Court should not consider plaintiffs' arguments or requests for relief pertaining to additional discovery related to any existing incident report.

CONCLUSION

The undisputed affidavit testimony of Linda Wright establishes that the care-review privilege applies to any existing incident report and that all statutory and case law requirements pertaining to the care-review privilege have been satisfied. No additional corroborative evidence or an in-camera review of any existing incident report is required under the law, and such additional measures were not requested by the trial court. The trial court acted well within its discretion in denying plaintiffs' First Motion to Compel on the basis of the undisputed testimony of Linda Wright.

Both legislative intent and public policy support and require protection of incident reports from discovery. Plaintiffs have access to the facts of the case, including those surrounding Mr. Cannon's alleged fall, through non-privileged sources of discovery. The protection of any existing incident report from discovery will not prejudice plaintiffs' efforts to discover the facts of the case or abrogate their cause of action for negligence against the Hospital. Because issues pertaining to additional discovery related to any existing incident report are not properly before the Court, arguments pertaining to additional discovery related to any existing incident report should not be considered.

For these reasons, the trial court's Order denying plaintiffs' First Motion to Compel should be affirmed, and the case should be remanded to the trial court for further proceedings.

DATED this 2nd day of November, 2004.

SNOW, CHRISTENSEN & MARTINEAU

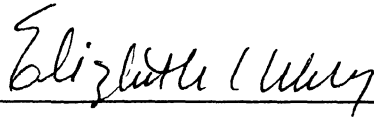
By Elizabeth Willey
David W. Slagle
Elizabeth L. Willey
Bradley R. Blackham
Attorneys for Appellees

020440-0051\brb\Cannon - Appellate Brief-2-latest.wpd

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of November, 2004, I caused a true and correct copy of the foregoing **BRIEF OF THE APPELLEES** to be mailed to the following:

Douglas G. Mortensen
Matheson, Mortensen, Olsen & Jeppson
648 East 100 South
Salt Lake City, UT 84102
Attorneys for Plaintiffs Kathryn Cannon, Lane Cannon and Roland Cannon



020440-0051\brb\Cannon - Appellate Brief-2-latest.wpd

ADDENDUM

Exhibit A	Minute Entry dated March 4, 2004. R. at 173-75
Exhibit B	Utah Code Ann. § 26-25-3 (1998)
Exhibit C	Affidavit of Linda Wright
Exhibit D	May 21, 2004. R. at 345
Exhibit E	Plaintiffs' Petition for Permission to Appeal the Trial Court's Interlocutory Order Denying Plaintiffs' First Motion to Compel
Exhibit F	Minute Entry dated May 21, 2004, R. 347-48
Exhibit G	Plaintiffs' Motion for Extension of Time
Exhibit H	Hospital's Memorandum in Opposition to Motion for Extension of Time
Exhibit I	Order dated 9/2/04
Exhibit J	<i>Bradburn v. Rockingham Mem'l Hosp.</i> , 45 Va. Cir. 356, (Va. Cir. Ct. 1998), in R. at 133-137
Exhibit K	<i>Benedict v. Cmty. Hosp. of Roanoke Valley</i> , 10 Va. Cir. 430, 1988 WL 626030, at *4 (Va. Cir. Ct. 1988)
Exhibit L	<i>Mangano v. Kavanaugh</i> , 30 Va. Cir. 66, 1993 WL 945920, at *3 (Va. Cir. Ct. 1993)
Exhibit M	Rep. Brown Amend. to Sub. S.B. 158
Exhibit N	Minute Entry Decision and Order, <i>Adam v. Salt Lake Regional Medical Center</i> , R. at 127-29

Exhibit A

FILED DISTRICT COURT
Third Judicial District

MAR - 4 2004

SALT LAKE COUNTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

Deputy Clerk

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

KATHERYN CANNON, as surviving	:	MINUTE ENTRY
spouse of GARY R. CANNON,	:	
deceased, LANE CANNON and	:	CASE NO. 020914614
ROLAND CANNON, as surviving	:	
children and legal heirs of	:	
GARY R. CANNON, deceased,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
SALT LAKE REGIONAL MEDICAL	:	
CENTER, INC., JOHN AND JANE	:	
DOES 1 THROUGH X, and DOE	:	
BUSINESS ENTITIES 1 THROUGH V,	:	
	:	
Defendants.	:	

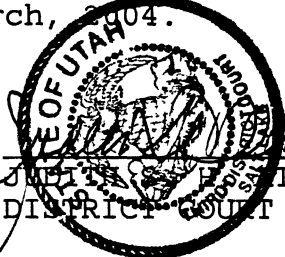
This matter is before the Court on plaintiffs' Motion to Compel, dated October 24, 2003. This Court has reviewed arguments of counsel and hereby denies plaintiffs' Motion.

Pursuant to Benson, ex rel. Benson v. IHC Hospitals, Inc., 866 P.2d 537 (Utah 1993), the Supreme Court equates the peer review privilege with the care review privilege. Accordingly, reports are privileged if they are "prepared specifically to be submitted for review purposes." Id. The only evidence presented in this case is the Affidavit of Linda Wright. Ms. Wright asserts that the "Incident reports are created specifically for submission to the [care review department]," and that "Incident reports are not

created or used for any purpose other than for evaluating and improving the health care rendered to patients at Salt Lake Regional Medical Center.... Incident reports are not included as part of the patient's medical records."

In the absence of any evidence to the contrary, this Court finds that the reports are privileged.

Dated this 4 day of March, 2004.


JULIE S. HERTON
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this_____ day of March, 2004:

Douglas G. Mortensen
Attorney for Plaintiffs
648 East 100 South
Salt Lake City, Utah 84102

David W. Slagle
Elizabeth L. Willey
Bradley R. Blackham
Attorneys for Defendant
Salt Lake Regional Medical Center
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145

Exhibit B

state, shall immediately report to a law enforcement agency the injury.

(b) The report shall state the name and address of the injured person, if known, the person's whereabouts, the character and extent of the person's injuries, and the name, address, and telephone number of the person making the report.

(2) A health care provider may not be discharged, suspended, disciplined, or harassed for making a report pursuant to this section.

(3) A person may not incur any civil or criminal liability as a result of making any report required by this section.

(4) A health care provider who has personal knowledge that the report of a wound or injury has been made in compliance with this section is under no further obligation to make a report regarding that wound or injury under this section.

History: C. 1953, 26-23a-2, enacted by L. 1968, ch. 238, § 2; 1966, ch. 23, § 2.

Amendment Notes. — The 1996 amend-

ment, effective April 29, 1996, subdivided section (1) and rewrote Subsection (1); and made stylistic changes to Subsection (4); and made stylistic changes.

26-23a-3. Penalties.

A health care provider who intentionally or knowingly violates any provision of Section 26-23a-2 is guilty of a class B misdemeanor.

History: C. 1953, 26-23a-3, enacted by L. 1988, ch. 238, § 3.

Cross-References. — Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

CHAPTER 24

LOCAL HEALTH DEPARTMENT ACT [RENUMBERED]

26-24-1 to 26-24-24. Renumbered.

Renumbered. — Laws 1990, ch. 186, §§ 889 to 913 renumbered this chapter as §§ 17A-3-501 to 17A-3-525, effective April 23, 1990. Sections 17A-3-501 to 17A-3-524 were renumbered again as §§ 26A-1-101 et seq. in 1991.

CHAPTER 25

CONFIDENTIAL INFORMATION RELEASE

Section 26-25-1. Authority to provide data on treatment and condition of persons to designated agencies — Immunity from liability.
26-25-2. Restrictions on use of data.
26-25-3. Information considered privileged communications.

Section 26-25-4. Information held in confidence — Protection of identities.
26-25-5. Violation of chapter a misdemeanor — Civil liability.
26-25-6. Repealed.

26-25-1. Authority to provide data on treatment and condition of persons to designated agencies — Immunity from liability.

(1) Any person, health facility, or other organization may, without incurring liability, provide the following information to the persons and entities described in Subsection (2):

- (a) information as determined by the state registrar of vital records appointed under Title 26, Chapter 2;
- (b) interviews;
- (c) reports;
- (d) statements;
- (e) memoranda; and
- (f) other data relating to the condition and treatment of any person.

(2) The information described in Subsection (1) may be provided to:

- (a) the department and local health departments;
- (b) the Division of Mental Health within the Department of Human Services;
- (c) scientific and health care research organizations affiliated with institutions of higher education;
- (d) the Utah Medical Association or any of its allied medical societies;
- (e) peer review committees;
- (f) professional review organizations;
- (g) professional societies and associations; and
- (h) any health facility's in-house staff committee for the uses described in Subsection (3).

(3) The information described in Subsection (1) may be provided for the following purposes:

- (a) study, with the purpose of reducing morbidity or mortality; or
- (b) the evaluation and improvement of hospital and health care rendered by hospitals, health facilities, or health care providers.

(4) Any person may, without incurring liability, provide information, interviews, reports, statements, memoranda, or other information relating to the ethical conduct of any health care provider to peer review committees, professional societies and associations, or any in-hospital staff committee to be used for purposes of intraprofessional society or association discipline.

(5) No liability may arise against any person or organization as a result of:

- (a) providing information or material authorized in this section;
- (b) releasing or publishing findings and conclusions of groups referred to in this section to advance health research and health education; or
- (c) releasing or publishing a summary of these studies in accordance with this chapter.

(6) As used in this chapter:

- (a) "health care provider" has the meaning set forth in Section 78-14-3; and
- (b) "health care facility" has the meaning set forth in Section 26-21-2.

History: C. 1953, 26-25-1, enacted by L. 1981, ch. 126, § 24; 1966, ch. 130, § 1; 1969, ch. 142, § 1; 1990, ch. 83, § 15; 1990, ch. 114, § 21; 1990, ch. 183, § 10; 1992, ch. 240, § 2; 1994, ch. 201, § 13.

Repeals and Reenactments. — Laws 1981, ch. 126, § 1 repealed former §§ 26-25-1 to 26-25-5 (L. 1967, ch. 48, §§ 1 to 5; 1969, ch. 197, §§ 76 to 79), the Radiation Protection Act. Present §§ 26-25-1 to 26-25-5 were enacted by

§ 24 of the act. For present provisions regulating radiation sources, see § 19-3-301 et seq.

Amendment Notes. — The 1996 amendment, effective April 29, 1996, in Subsection (1)(a) deleted former language pertaining to health information required for birth certificates, in Subsection (2)(a) added "and local health departments", and in Subsection (2)(d) substituted "Utah Medical Association" for

"Utah State Medical Association"

Cross-References. — Attorney of patient access to medical records, § 78-25-25. Child abuse reporting requirements, § 62A-4a-401 et seq. Medical examiner's records, § 26-4-17. Physician-patient privilege, § 78-24-8. State hospital mental health records, confidentiality, § 62A-12-247.

NOTES TO DECISIONS

Limitation on privilege.

The purpose of statutes providing the "care review" privilege is to improve medical care by allowing health-care personnel to provide information to evaluate and improve hospital and

health care, and only documents prepared specifically for review purposes are privileged, not documents that might or could be used in the review process. *Benson ex rel Benson v. I.H.C. Hosps.*, 866 P.2d 537 (Utah 1993).

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — Legislative Enactments — Health Law, 1990 Utah L. Rev. 261.

A.L.R. — Patient's right to disclosure of his or her own medical or hospital records, 47 A.L.R.4th 701.

26-25-2. Restrictions on use of data.

The Division of Mental Health within the Department of Human Services, scientific and health care research organizations affiliated with institutions of higher education, the Utah Medical Association or any of its allied medical societies, peer review committees, professional review organizations, professional societies and associations, or any health facility's in-house staff committee may only use or publish the material received or gathered under Section 26-25-1 for the purpose of advancing medical research or medical education in the interest of reducing morbidity or mortality, except that a summary of studies conducted in accordance with Section 26-25-1 may be released by these groups for general publication.

History: C. 1953, 26-25-2, enacted by L. 1981, ch. 126, § 24; 1989, ch. 130, § 2; 1990, ch. 183, § 11; 1996, ch. 201, § 14.

Amendment Notes. — The 1996 amendment,

effective April 29, 1996, substituted "Utah Medical Association" for "Utah State Medical Association" and made a stylistic change.

26-25-3. Information considered privileged communications.

All information, interviews, reports, statements, memoranda, or other data furnished by reason of this chapter, and any findings or conclusions resulting from those studies are privileged communications and are not subject to discovery, use, or receipt in evidence in any legal proceeding of any kind or character.

History: C. 1953, 26-25-3, enacted by L. 1981, ch. 126, § 24; 1989, ch. 142, § 2; 1994, ch. 314, § 3; 1996, ch. 201, § 15.

Amendment Notes. — The 1994 amendment, effective July 1, 1994, substituted "are

not subject to discovery, use, or receipt in evidence" for "may not be used or received in evidence" near the end of the section.

The 1996 amendment, effective April 29, 1996, deleted language pertaining to health

information required on birth certificates as determined by the state registrar of vital records.

NOTES TO DECISIONS

ANALYSIS

Limitation on privilege
Waiver of privilege

Limitation on privilege.

The purpose of statutes providing the "care review" privilege is to improve medical care by allowing health-care personnel to provide information to evaluate and improve hospital and health care, and only documents prepared spe-

cifically for review purposes are privileged, not documents that might or could be used in the review process. *Benson ex rel Benson v. I.H.C. Hosps.*, 866 P.2d 537 (Utah 1993).

Waiver of privilege.

Hospital's inclusion in same documents of both privileged and nonprivileged materials did not waive the privilege as to all of them. *Benson ex rel Benson v. I.H.C. Hosps.*, 866 P.2d 537 (Utah 1993).

COLLATERAL REFERENCES

A.L.R. — Discovery of hospital's internal records or communications as to qualifications

or evaluations of individual physician, 81 A.L.R.3d 944.

26-25-4. Information held in confidence — Protection of identities.

(1) All information, interviews, reports, statements, memoranda, or other data provided to a person or organization under this chapter shall be held in strict confidence by that person or organization, and any use, release, or publication resulting therefrom shall be made so as to preclude identification of any individual or individuals studied.

(2) Notwithstanding Subsection (1), the department's disclosure of information under this chapter is governed by Chapter 3 of this title.

History: C. 1953, 26-25-4, enacted by L. 1981, ch. 126, § 24; 1989, ch. 142, § 3; 1996, ch. 201, § 16.

Amendment Notes. — The 1996 amendment, effective April 29, 1996, added Subsection (2); added the Subsection (1) designation,

in Subsection (1) deleted former language pertaining to health information required for birth certificates as determined by the state registrar of vital records, and made stylistic and related changes.

26-25-5. Violation of chapter a misdemeanor — Civil liability.

(1) Any use, release or publication, negligent or otherwise, contrary to the provisions of this chapter shall be a class B misdemeanor.

(2) Subsection (1) shall not relieve the person or organization responsible for such use, release, or publication from civil liability.

History: C. 1953, 26-25-5, enacted by L. 1981, ch. 126, § 24; 1991, ch. 241, § 19.

Cross-References. — Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

26-25-6. Repealed.

Repeals. — Laws 1996, ch. 201, § 21 repeals § 26-25-6, as enacted by Laws 1989, ch. 25, § 2, concerning confidentiality requirements regarding communicable or reportable diseases effective April 29, 1996.

CHAPTER 25a

**CONFIDENTIAL COMMUNICABLE
DISEASE INFORMATION
[RENUMBERED]**

26-25a-101 to 26-25a-104. Renumbered.

Renumbered. — Laws 1996, ch. 201, §§ 9 to 12 renumbered §§ 26-25a-101 to 26-25a-104, relating to confidential communicable disease information, as §§ 26-6-27 to 26-6-30, as of April 29, 1996.

CHAPTER 26**EXPERIMENTAL ANIMALS**

Section		Section	
26-26-1	"Institution" defined.	26-26-4.	animal to an institution.
26-26-2	Authorization for institutions to obtain impounded animals.		Institution to pay transportation expense — Restrictions on use of animals — Fee.
26-26-3	Period of impoundment and effort to find owner prerequisite to delivery of animals to institution by governing body of county or municipality — Owner's prerogative regarding provision of	26-26-5.	Records of animals required.
		26-26-6.	Revocation of authorization.
		26-26-7.	Adoption of rules by department — Inspection and investigation of institutions.

26-26-1. "Institution" defined.

As used in this chapter, "institution" means any school or college, agriculture, veterinary medicine, medicine, pharmacy, dentistry or other educational, hospital or scientific establishment properly concerned with the investigation of or instruction concerning the structure or functions of living organisms, the cause, prevention, control or cure of diseases or abnormal condition of human beings or animals.

History: C. 1953, 26-26-1, enacted by L. 1981, ch. 126, § 25.

Repeals and Reenactments. — Laws 1981, ch. 126, § 1 repealed former §§ 26-26-1 to 26-26-8 (L. 1969, ch. 64, §§ 1 to 8), the Anatomical Gift Act. Present §§ 26-26-1 to 26-26-7 were enacted by § 25 of the act. For the

Uniform Anatomical Gift Act, see Chapter 26 of this title.

Cross-References. — City pounds, § 10, 64.

Cruelty to animals as misdemeanor, § 301.

COLLATERAL REFERENCES

Journal of Energy Law and Policy. — The Pound Seizure Controversy: A Suggested Compromise in the Use of Impounded Animals for Research and Education, 11 J. Energy L. & Pol'y 241 (1991).

Cages and Codes: The Debate Over the Use of Laboratory Animals, 11 J. Energy L. & Pol'y 319 (1991).

Am. Jur. 2d. — 4 Am. Jur. 2d Animals § 48. C.J.S. — 3A C.J.S. Animals § 342.

26-26-2. Authorization for institutions to obtain impounded animals.

Institutions may apply to the department for authorization to obtain animals from establishments maintained for the impounding, care and disposal of animals seized by lawful authority. If, after investigation, the department finds that the institution meets the requirements of this chapter and its rules and that the public interest will be served thereby, it may authorize the institution to obtain animals under this chapter.

History: C. 1953, 26-26-2, enacted by L. 1981, ch. 126, § 25.

26-26-3. Period of impoundment and effort to find owner prerequisite to delivery of animals to institution by governing body of county or municipality — Owner's prerogative regarding provision of animal to an institution.

The governing body of the county or municipality in which an establishment is located shall make available to an authorized institution as many impounded animals in that establishment as the institution may request; provided, however, that such animals shall have been legally impounded at least five days or for such other minimum period as may be specified by municipal ordinance, and remain unclaimed and unredeemed by their owners or by any other person entitled to do so. The establishment shall first make a reasonable effort to find the rightful owner of such animal, and if the owner is not found, shall make a reasonable effort to make the animal available to others during the impound period. Owners of animals who voluntarily provide their animals to an establishment may, by signature, determine whether or not the animal may be provided to an institution or used for research or educational purposes.

History: C. 1953, 26-26-3, enacted by L. 1981, ch. 126, § 25; 1989, ch. 80, § 1.

26-26-4. Institution to pay transportation expense — Restrictions on use of animals — Fee.

The authorized institution shall provide, at its own expense, for the transportation of such animals from the establishment to the institution and shall use them only in the conduct of scientific and educational activities and for no other purpose. The institution shall reimburse the establishment for animals received. The fee shall be, at a minimum, \$15 for cats and \$20 for dogs.

Exhibit C

DAVID W. SLAGLE - A2975
ELIZABETH L. WILLEY - A5639
BRADLEY R. BLACKHAM A8703
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant
Salt Lake Regional Medical Center
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

KATHERYN CANNON, as surviving spouse
of GARY R. CANNON, deceased, LANE
CANNON and ROLAND CANNON, as
surviving children and legal heirs of GARY R.
CANNON, deceased,

Plaintiffs,

vs.

SALT LAKE REGIONAL MEDICAL
CENTER, INC., JOHN AND JANE DOES 1
THROUGH X AND DOE BUSINESS
ENTITIES 1 THROUGH V,

Defendants.

AFFIDAVIT OF LINDA WRIGHT

Civil No. 020914614

Judge Judith S.H. Atherton

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

Linda Wright, being first duly sworn, deposes and says:

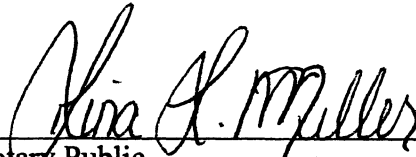
1. I am the Risk Manager in the Quality Assurance Department at Salt Lake Regional Medical Center, and I am personally familiar with the facts and matters herein set forth.
2. The Quality Assurance Department is charged by the Medical Executive Committee at Salt Lake Regional Medical Center with responsibility for collecting and evaluating unusual occurrence reports (also known as incident reports) for the purpose of assessing, evaluating and improving the quality of health care rendered to patients at Salt Lake Regional Medical Center.
3. The Quality Assurance Department requires staff at Salt Lake Regional Medical Center to fill out incident reports for all unusual occurrences.
4. Incident reports are created specifically for submission to the Quality Assurance Department at Salt Lake Regional Medical Center.
5. The Quality Assurance Department reviews all incident reports created for the specific purpose of evaluating and improving the health care rendered to patients at Salt Lake Regional Medical Center.
6. Incident reports are necessary and critical to the care-review work performed by the Quality Assurance Department.
7. Incident reports are not created or used for any purpose other than for evaluating and improving the health care rendered to patients at Salt Lake Regional Medical Center.
8. Incident reports are not included as part of a patient's medical records.

9. Incident reports do not constitute routine business or medical records of Salt Lake Regional Medical Center.

DATED this 17 day of November, 2003.


Linda Wright

SUBSCRIBED AND SWORN to before me this 17 day of November, 2003.


Notary Public
Residing at: 4722 W. Helenic Lane
West Jordan, Utah 84088

My Commission Expires:

2/5/05

O:\20440\51\PLEADING\Affidavit Linda Wright.wpd

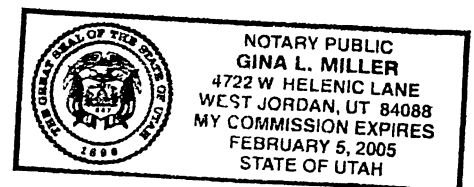



Exhibit D


IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

KATHERYN CANNON, as surviving	:	MINUTE ENTRY
spouse of GARY R. CANNON,	:	
deceased, LANE CANNON and	:	CASE NO. 020914614
ROLAND CANNON, as surviving	:	
children and legal heirs of	:	
GARY R. CANNON, deceased,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
SALT LAKE REGIONAL MEDICAL	:	
CENTER, INC., JOHN AND JANE	:	
DOES 1 THROUGH X, and DOE	:	
BUSINESS ENTITIES 1 THROUGH V,	:	
	:	
Defendants.	:	

The Court is in receipt today of a letter from plaintiffs' counsel, dated March 18, 2004. Due to court error, the copies of the Minute Entry denying plaintiffs' Motion to Compel signed and entered March 4, 2004, were sent to counsel, undated. To preserve plaintiffs' right to file an interlocutory appeal, the Court now enters the Order denying plaintiffs' Motion to Compel on May 21, 2004. Plaintiffs' counsel need not prepare a final Order.

Dated this 21 day of May, 2004.


JUDITH S. H. APPERTSON
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 24th day of May, 2004:

Douglas G. Mortensen
Attorney for Plaintiffs
648 East 100 South
Salt Lake City, Utah 84102

David W. Slagle
Elizabeth L. Willey
Attorneys for Defendant
Salt Lake Regional Medical Center
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145

MA Blain

Exhibit E

RECEIVED
6/14/04

Douglas G. Mortensen, USB #2329
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.
648 East 100 South
Salt Lake City, Utah 84102
(801) 363-2244

Attorneys for Plaintiff

IN THE SUPREME COURT OF THE STATE OF UTAH

KATHERYN CANNON, as surviving
spouse of GARY R. CANNON,
deceased, LANE CANNON and
ROLAND CANNON, as surviving children
and legal heirs of GARY R. CANNON,
deceased,

Plaintiffs,

vs.

SALT LAKE REGIONAL MEDICAL
CENTER, INC., JOHN AND JANE DOES
1 THROUGH X and DOE BUSINESS
ENTITIES 1 THROUGH V,

Defendants.

**PETITION FOR
PERMISSION TO APPEAL
INTERLOCUTORY ORDER
(Subject to Assignment
to the Court of Appeals)**

Case No.: _____

Third Judicial District Court
Civil No.: 020914614
Judge: Judith Atherton

Pursuant to Rule 5, U.R.A.P., Plaintiffs/Petitioners Katheryn, Lane and Roland Cannon hereby petition the Utah Supreme Court to permit an interlocutory appeal from the order of the Honorable Judith S.H. Atherton entered on May 21, 2004. The district

court's Minute Entry was signed on May 21, 2004. A copy of that Minute Entry is attached hereto as **EXHIBIT "A"**. That minute entry finalized a minute entry which had been mailed to plaintiffs' counsel, unsigned and undated in early March, 2004. A copy of the unsigned, undated March Minute Entry is attached hereto as **EXHIBIT "B"**.

I.

CONCISE STATEMENT OF MATERIAL FACTS

1. During the early morning of May 18, 2001, patient Gary Cannon sustained a subdural hematoma from a fall in his hospital room on Unit 4C of Salt Lake Regional Hospital. Three days later, he died from this injury. On the day the incident occurred, incident reports were prepared by members of the nursing staff.

2. On December 17, 2002, plaintiffs submitted in formal discovery a request for "each 'incident report' and other documentation of Mr. Cannon's fall during the early morning hours of May 18, 2001."

3. On February 24, 2003, the Hospital formally refused to honor this request, claiming the information sought to be protected by care review privilege found in UCA §26-25-3.

4. On October 24, 2003, plaintiffs filed a motion to compel production of the incident reports. On November 17, 2003, the Hospital filed a memorandum in opposition to the motion and on December 5, 2003, the plaintiffs filed a reply memorandum supporting their motion. After holding the matter under advisement for several months, the district court issued its ruling denying plaintiffs' motion to compel production of the incident reports.

5. The district court's denial of plaintiffs' motion was based entirely on a conclusory assertion in an affidavit of the hospital's risk manager that the incident reports were "not created or used for any purpose other than for evaluating or improving . . . health care." The district court stated: "in the absence to any evidence to the contrary, this Court finds that the reports are privileged."

6. Immediately following the district court's denial of their motion, plaintiffs undertook additional discovery to test the accuracy of the assertion of the hospital's risk manager. They attempted to depose the risk manager and to depose all persons with knowledge or information as to the identity of persons who have seen the incident reports. (See Exhibits "C" and "D", attached). Plaintiffs also served two requests for admissions and two interrogatories seeking admission that the attorneys defending the hospital in this action have seen the incident reports. The hospital has refused to cooperate in any of these discovery efforts. (See Exhibits "E" and "F", attached). A

motion to compel is pending¹.

II.

ISSUE PRESENTED

The issue sought to be reviewed is whether a hospital's factual incident reports, created contemporaneously with an event causing injury to a patient, are discoverable. Evidence that this issue was preserved in the district court may be found in the district court's May 21, 2004 Minute Entry (Exhibit "A", attached) in which the district court states:

To preserve plaintiffs' right to file an interlocutory appeal, the Court now enters the Order denying plaintiffs' motion to compel on May 21, 2004. Plaintiffs' counsel need not prepare a final Order.

¹This second motion to compel was submitted for decision on April 2, 2004. UCA §78-7-25(1) provides:

A judge of a trial court shall decide all matters submitted for final determination within two months of submission, unless circumstances causing the delay are beyond the judge's personal control.

Despite this statute, no decision has yet been issued. The briefs pertaining to this pending motion to compel discovery are attached hereto as Exhibits "G, H, I, J."

III.

APPLICABLE STANDARD OF REVIEW

The district court's decision that the incident reports are privileged was a conclusion of law (based on the district court's interpretation of UCA §26-25-3) which must be reviewed for correctness, without according any deference to the district court's ruling. See Rushton v. Salt Lake County, 977 P.2d 1201, 1203 (Utah 1999); Taylor EX REL CT v. Johnson, 977 P.2d 479, 480 (Utah 1999); and Trujillo v. Jenkins, 840 P.2d 777, 778-79 (Utah 1992).

IV.

WHY AN IMMEDIATE INTERLOCUTORY APPEAL SHOULD BE PERMITTED.

The incident reports plaintiffs seek were written by persons with first-hand knowledge and clear recollection of the event on the very day it occurred. They are factual in nature. They contemporaneously record important information concerning when the patient fell, when and by whom he was discovered and what observations were made concerning his position, location and condition after his fall. They also may include accurate reporting of when various care providers arrived on the scene to begin assisting in the patient's care.

Due to prelitigation requirements governing health care malpractice claims in Utah, plaintiffs are denied opportunity to obtain statements from key hospital employees until long after an event has occurred. By the time a plaintiff discovers which hospital employees have knowledge or information of what happened, memories have grown dim or become non existent.

In this case, only the hospital and its representatives have possession of the key facts concerning the injury which caused the death of patient Gary Cannon. Over three years have elapsed since the patient's death. It is likely that when care providers on duty at the time of Mr. Cannon's fall are identified and deposed, they will claim they no longer have recollections of what occurred. The only accurate indications of what occurred are contained in the incident reports. Although the patient's hospital chart has been produced, its entries relating to the patient's fall are terse, unclear and, in some respects, inconsistent.

Plaintiffs' counsel is aware of no Utah authority declaring factual incident reports either non discoverable or privileged. Courts in other jurisdictions have found such incident reports to be fully discoverable and not privileged. In a medical negligence suit, all parties should have access to the same factual information. Factual information contained in basic incident reports should not be declared protected by Utah's care-review privilege statute. Hospitals should not be allowed to hide basic factual information behind the cloak of a peer-review statute.

There is an additional, unusual reason why production of the incident reports in this case should be compelled. Just one day before Mr. Cannon's mishap, another patient at this same hospital sustained injuries from an unattended fall. That patient's injuries also proved fatal. In the suit brought by his family, a motion to compel production of the incident reports was granted. (See Third Judicial District Court Case No. 020910871, Adam v. Salt Lake Regional Medical Center). The hospital produced the reports pertaining to the fall of that patient, as ordered. The fact that the hospital produced incident reports in that case renders suspect its risk manager's bald assertion that the incident reports in this case were created and used solely for the purposes set forth in Utah's care review statute. Denying the plaintiffs' motion to compel in this case renders the hospital free to pick and choose when it wishes to hide behind the privilege. It will produce incident reports it deems favorable in one case and keep them suppressed in another case when the facts they reveal harm its case or rebut its defenses. The unfairness produced by inconsistent application of the privilege is palpable.

V.

WHY THE APPEAL MAY MATERIALLY ADVANCE TERMINATION OF THE LITIGATION.

Trial of this action without a revelation of the facts contained in the incident reports will be essentially meaningless. Plaintiffs will be unable to ascertain the extent to which the hospital breached the applicable standard of care without discovery of information contained in the incident reports. Proceeding to trial will be a colossal waste of judicial and litigant resources. On the other hand, production of the incident reports at this juncture could lead to a prompt settlement or, alternatively, could conceivably persuade the plaintiffs and their experts that no deviation from the standard of care occurred and the suit should therefore be dismissed voluntarily. The incident reports hold the key to a just outcome of this case. Determining whether those incident reports are discoverable now will save all of the parties and the district court considerable time and resources.

VI.

WHY THE SUPREME COURT SHOULD DECIDE THIS CASE.

The current version of UCA §26-25-3 owes its existence to the Utah legislature's modification of the care-review statute following this Court's decision in Benson v. IHC Hospitals, Inc. 866 P.2d 537 (Utah 1993). In that case, this Court declared that "only

material and information prepared *specifically* for submission to a peer-review committee” are subject to privilege. (866 P.2d at 540). In Benson, this Court also dealt with another legitimate concern: that documents which should be a part of a patient’s medical record are labeled as privileged documents and removed from the medical record. *Id.* It has been established through discovery in the Adam v. Salt Lake Regional Medical Center case that nurses working at this hospital are shown a training video entitled “Patient Falls: Panic or Prevention?.” That video specifically states, with respect to patient falls:

All circumstances and findings should be documented in the patient’s chart and on the incident report form.

It is precisely because the facts and circumstances surrounding Mr. Cannon’s fall are not documented in the patient’s chart that plaintiffs seek production of the incident reports.

Traditionally, this Court has reserved to itself the task of interpreting statutes enacted in response to prior decisions of this Court. This is such an occasion. This Court should retain jurisdiction and decide the appeal.

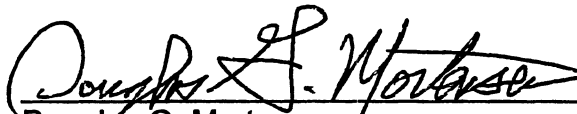
VII.

RELIEF SOUGHT

Petitioners ask this Court to do four things:

1. Permit their interlocutory appeal from the district court's decision denying discovery of the hospital's incident reports concerning the decedent's unattended fall;
2. Retain jurisdiction of this appeal rather than assign it to the Court of Appeals for disposition;
3. *Either* itself decide the pending motion to compel discovery of the facts concerning who has seen and "used" the incident reports the hospital refuses to produce to plaintiffs or order the district court to rule on the motion without further delay;
4. Allow plaintiffs a limited period of time to conduct the discovery they seek to conduct for the purpose of presenting sufficient factual information to enable this Court to determine whether the incident reports truly were prepared solely for care-review purposes as alleged by the hospital's risk manager and whether, even if they were, they should be shown to plaintiffs' counsel.

Respectfully submitted this 10th day of June, 2004.



Douglas G. Mortensen
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 10 day of June, 2004, I caused a true and correct copy of the foregoing to be delivered to the following via the means indicated:

Elizabeth L. Willey
Snow, Christensen & Martineau
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, UT 84145

<input checked="" type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Facsimile
<input type="checkbox"/>	Hand-Delivered
<input type="checkbox"/>	Federal Express

Ann Berumen

Pldg req for permission to appeal. 0608

Exhibit F

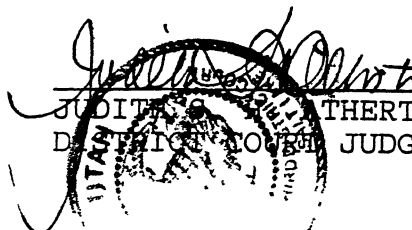
IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

KATHERYN CANNON, as surviving	:	MINUTE ENTRY AND ORDER
spouse of GARY R. CANNON,		
deceased, LANE CANNON and	:	CASE NO. 020914614
ROLAND CANNON, as surviving		
children and legal heirs of	:	
GARY R. CANNON, deceased,		
	:	
Plaintiffs,		
	:	
vs.		
	:	
SALT LAKE REGIONAL MEDICAL		
CENTER, INC., JOHN AND JANE	:	
DOES 1 THROUGH X, and DOE		
BUSINESS ENTITIES 1 THROUGH V,	:	
Defendants.	:	

This matter is before the Court on plaintiff's Motion to Compel Discovery and for Sanctions. This Court has reviewed the Motion and Memoranda of the parties. The Court agrees with plaintiffs' position concerning this Court's prior ruling. Plaintiff is entitled to depose Linda Wright.

Therefore, plaintiffs' Motion to Compel is granted. Plaintiffs' Motion for Sanctions is denied.

Dated this 21 day of May, 2004.



JUDITH S. THERTON
DISTRICT COURT JUDGE

CANNON V. SALT LAKE
REGIONAL MEDICAL CENTER

PAGE 2

MINUTE ENTRY

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry and Order, to the following, this 24th day of May, 2004:

Douglas G. Mortensen
Attorney for Plaintiffs
648 East 100 South
Salt Lake City, Utah 84102

David W. Slagle
Elizabeth L. Willey
Attorneys for Defendant
Salt Lake Regional Medical Center
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145

MHE

Exhibit G

Douglas G. Mortensen, #2329
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.
648 East 100 South
Salt Lake City, Utah 84102
Telephone: (801) 363-2244

FILED 8/10/04

Attorneys for Plaintiffs/Appellants

IN THE UTAH COURT OF APPEALS

KATHERYN CANNON, as surviving
spouse of GARY R. CANNON,
deceased, LANE CANNON and
ROLAND CANNON, as surviving children
and legal heirs of GARY R. CANNON,
deceased,

Plaintiffs/Appellants,

vs.

SALT LAKE REGIONAL MEDICAL
CENTER, INC., JOHN AND JANE DOES
1 THROUGH X and DOE BUSINESS
ENTITIES 1 THROUGH V,

Respondents/Appellees.

**MOTION FOR EXTENSION
OF TIME WITHIN WHICH
TO FILE APPEAL BRIEF
AND
TO ALLOW ADDITIONAL
DISCOVERY
AND
SUPPORTING MEMORANDUM**

Case No. 2:0040486-CA

Third Judicial District Court
Case No.: 020914614
Judge Judith S. Atherton

MOTION

Pursuant to Rules 22 and 23, Utah Rules of Appellate Procedure,

Appellants Kathryn, Gary and Lane Cannon hereby move this Court for an order

allowing them to conclude discovery pertaining to the issue raised on appeal, requiring the respondent to cooperate in such discovery and directing the district court to compel and oversee compliance with such discovery. Appellants also move this Court for an order extending the deadline for them to file their appeal brief to a date thirty days from the completion of the discovery.

These motions are supported by the following memorandum.

MEMORANDUM

GERMANE FACTS

1. The principal issue sought to be reviewed in this case is whether a hospital's factual incident reports, created contemporaneously with an event causing injury to a patient, are discoverable.

2. Appellants filed their petition for permission to appeal interlocutory order on June 10, 2004. Rule 5, URAP, required them to do so at that time. A later filed petition would have been untimely.

3. Unfortunately, discovery germane to the issue on appeal was not completed at the time this Court granted appellant's petition (on June 28, 2004).

4. The district court's denial of Plaintiff's motion to compel production of

the incident reports was based entirely on a conclusory assertion in an affidavit of the hospital's risk manager that the incident reports were "not created or used for any purpose other than for evaluating or improving . . . health care." The district court stated: "in the absence of any evidence to the contrary, this Court finds that the reports are privileged."

5. Immediately following the district court's denial of their motion, Plaintiffs undertook additional discovery to test the accuracy of the assertion of the hospital's risk manager. They attempted to depose the risk manager and to depose all persons with knowledge and information as to the identity of persons who have seen the incident reports. The hospital declined to cooperate in this discovery and Plaintiffs filed a second motion to compel. This motion to compel was granted. However, there was some mixup in mailing the minute entry notifying Plaintiffs of the grant of that motion. Having not received a copy of the minute entry granting their second motion to compel, counsel for the Plaintiffs wrote the district court on June 4, 2004 requesting a ruling on the motion. In response, the Plaintiffs received on July 7, a minute entry dated July 6, 2004 stating:

The Motion to Compel requests that the defense be compelled to produce for deposition Linda Wright and all other representatives who have information responsive to

plaintiffs' Rule 30(b)(6)[sic] deposition notice.

This Court ruled on plaintiffs' Motion by way of Minute Entry and Order on May 21, 2004. At that time, the Court granted plaintiffs' Motion to Compel

(See Exhibit "A", attached).

6. Before the grant of their second motion to compel, Plaintiffs had served on the Hospital two admission requests and two interrogatories. The Hospital declined to answer those discovery requests other than by objecting to them. The admission requests and interrogatories asked the Hospital to admit that its incident reports had been seen by counsel representing the Hospital in this wrongful death action and requested the identity of every person who had seen the incident reports. (See Exhibits "B" and "C", attached).

7. Recently, Plaintiffs filed with the district a third motion to compel asking that the Hospital be compelled to provide responses to the admission requests and interrogatories and to produce their risk manager and other employees for the requested Rule 30(b)(6) deposition. (See Exhibit "D", attached).

8. The Hospital has taken the position that no discovery should be allowed during the pendency of the appeal based on the fact that appellants' relief request in its petition for permission to appeal asks this Court to:

Either itself decide the pending motion to compel discovery of the facts concerning who has seen and “used” the incident reports the Hospital refuses to produce to plaintiffs or order the district court to rule on the motion without further delay.

(See p. 10 of Appellants’ Petition for Permission to Appeal Interlocutory Order, ¶3).

9. Unbeknownst to Plaintiffs/Appellants, the district court had already ruled (favorably) on the motion to compel discovery. That ruling, however, did not address the Hospital’s failure to answer the admission requests and interrogatories because that failure had not occurred at the time the motion had been submitted.

10. In their Petition for Permission Appeal Interlocutory Order, Appellants expressly included the following relief request:

4. Allow plaintiffs a limited period of time to conduct the discovery they seek to conduct for the purpose of presenting sufficient factual information to enable this Court to determine whether the incident reports truly were prepared solely for care-review purposes as alleged by the hospital’s risk manager and whether, even if they were, they should be shown to plaintiffs’ counsel.

(See Petition for Permission to Appeal Interlocutory Order, p. 10, ¶4).

I.

**JUSTICE WOULD BEST BE SERVED BY ALLOWING
APPELLANTS TO CONCLUDE THE DISCOVERY
PERTAINING TO THE ISSUE ON APPEAL AND DIRECTING
THE DISTRICT COURT TO SEE THAT THE DISCOVERY IS
COMPLETED.**

Rule 5(a), URAP requires that an appeal from an interlocutory order be filed within 20 days after entry of the order. Had appellants waited until they had received appropriate responses to the outstanding discovery requests relating to the issue on appeal, their appeal would have been time-barred. The Hospital's refusal to produce its risk manager for deposition and to respond forthrightly to Appellants' admission requests and interrogatories has placed Appellants between the proverbial "rock and a hard place."

Unquestionably, this Court will be better able fairly to decide the issue on appeal if it has before it all the relevant facts. In deciding whether the Hospital should be compelled to produce its incident reports, it is important for this Court to know whether the Hospital's counsel in this suit has seen those incident reports. It is also important for this Court to know who else has seen the incident reports and for what purposes.

II.

APPELLANTS SHOULD BE GRANTED AN ENLARGEMENT OF TIME WITHIN WHICH TO FILE THEIR APPEAL BRIEF.

Appellants have been notified their appeal brief is due on September 3.

They seek an extension solely for the purpose of concluding outstanding discovery relating to the issue on appeal. Appellants have *not* previously sought or been granted an enlargement of time within which to file their appeal brief.


They ask that they be granted until 30 days after they have received the Hospital's responses to their two admission requests and interrogatories and have deposed the Hospital's risk manager and Rule 30(b)(6) designees to file their appeal brief.

CONCLUSION AND RELIEF REQUEST

Appellants ask this Court to direct the district court to compel the Hospital to comply promptly with the district court's order allowing the Plaintiffs to depose the Hospital's risk manager and Rule 30(b)(6) designees and to compel the Hospital to respond to the Plaintiffs' two outstanding admission requests and interrogatories. Appellants ask that a deadline be set for the completion of that discovery. Appellants ask that they be given until 30 days after such discovery

has been completed to file their appeal brief.

Dated this 9 day of August, 2004.

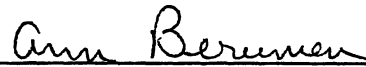

Douglas G. Mortensen
Matheson, Mortensen, Olsen & Jeppson, P.C.
Attorneys for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

On the 9 day of August, 2004 I caused to be delivered via the following method a copy of the foregoing to the following:

Elizabeth L. Willey
Snow, Christensen & Martineau
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, UT 84145

<input checked="" type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Facsimile -363-0400
<input type="checkbox"/>	Hand-Delivered
<input type="checkbox"/>	Federal Express



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Exhibit H

DAVID W. SLAGLE (2975)
ELIZABETH L. WILLEY (5639)
BRADLEY R. BLACKHAM (8703)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Salt Lake Regional Medical Center, Inc.
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE UTAH COURT OF APPEALS

KATHRYN CANNON, as surviving
spouse of GARY R. CANNON, deceased,
LANE CANNON and ROLAND
CANNON, as surviving children and legal
heirs of GARY R. CANNON, deceased,

Plaintiffs,

vs.

SALT LAKE REGIONAL MEDICAL
CENTER, INC., JOHN AND JANE DOES
1 THROUGH X AND DOE BUSINESS
ENTITIES 1 THROUGH V,

Defendants.

**DEFENDANT SALT LAKE
REGIONAL MEDICAL CENTER'S
MEMORANDUM IN OPPOSITION
TO PLAINTIFFS' MOTION FOR
EXTENSION OF TIME TO FILE
APPEAL BRIEF AND TO ALLOW
ADDITIONAL DISCOVERY**

Case No. 20040486-CA

Third Judicial District Court
Civil No. 020914614
Judge Judith S.H. Atherton

Defendant Salt Lake Regional Medical Center ("Salt Lake Regional") submits the following memorandum in opposition to plaintiffs' Motion for Extension of Time to File Appeal Brief and to Allow Additional Discovery.

STATEMENT OF FACTS

1. This is a medical malpractice case arising from treatment and care rendered to decedent Gary Cannon while he was a patient at Salt Lake Regional from May 16, 2001 through May 21, 2001. (Compl.)

2. On January 6, 2003, plaintiffs served their first set of interrogatories and requests for production of documents on Salt Lake Regional. (Pls.' First Set of Interrogs. and Req. for Prod. of Docs.)

3. Plaintiffs' first set of requests for production of documents includes a request for each incident report that may exist regarding Mr. Cannon's fall while he was a patient at Salt Lake Regional. (Id.)

4. On February 24, 2003, Salt Lake Regional responded to plaintiffs' first set of interrogatories and requests for production of documents. Salt Lake Regional specifically objected to plaintiffs' request for each incident report on the grounds of peer review and the provisions of Utah Code Ann. § 26-25-1 et seq. (1953 as amended). (Salt Lake Reg'l Answers to Pls. First Set of Interrogs. and Req. for Produc. of Docs.)

5. On October 24, 2003, plaintiffs served a motion to compel production of any incident report that may exist with respect to Mr. Cannon's fall at Salt Lake Regional. ("First Motion to Compel"). (Pls.' First Mot. to Compel.)

6. On November 16, 2003, Salt Lake Regional served its memorandum in opposition to plaintiffs' First Motion to Compel. Supporting Salt Lake Regional's memorandum is the affidavit of Linda Wright, who is the director of risk management at Salt Lake Regional. (Salt Lake Reg'l Mem. in Opp'n to Pls.' First Mot. to Compel.)

7. On December 5, 2003, plaintiffs served a reply memorandum in support of their First Motion to Compel and submitted the motion to the trial court for decision. Plaintiffs did not request additional time to conduct discovery prior to submitting their First Motion to Compel for decision. (Reply Mem. in Supp. of Pls.' First Mot. to Compel; Pls.' Not. to Submit for Decision.)

8. On March 4, 2004, the trial court issued an unsigned and undated minute entry ("Minute Entry 1") denying plaintiffs' First Motion to Compel. In Minute Entry 1, the trial court acknowledged that the only evidence presented was the affidavit of Linda Wright. The trial court ruled that in the absence of any evidence to the contrary, any existing incident reports are privileged. (Minute Entry 1, attached as Exhibit A.)

9. On March 15, 2004, plaintiffs served requests for admission on Salt Lake Regional. Plaintiffs specifically requested that Salt Lake Regional admit the following: (1) that any existing incident reports have been seen by Salt Lake Regional's counsel; and (2) that any existing incident reports have been seen by individually named attorneys representing Salt Lake Regional. (Pls.' Req. for Admis. and Second Set of Interrogs.)

10. On March 15, 2004, plaintiffs served their second set of interrogatories on Salt Lake Regional. Plaintiffs specifically requested the following information: (1) the basis for any refusal to admit the statements specified in plaintiffs' requests for admission; (2) the names of every person having knowledge of the grounds for Salt Lake Regional's refusal to admit the statements specified in plaintiffs' request for admission; (3) the identity of each document supporting Salt Lake Regional's refusal to admit the statements specified in plaintiffs' request for admissions; and (4) the names of every person who has seen any existing incident report. (Id.)

11. On March 18, 2004, plaintiffs, pursuant to Rule 30(b)(6) of the Utah Rules of Civil Procedure, served a notice of deposition of the following individuals: (1) "[e]ach person who has knowledge or information as to the identity of each person who has seen or may have seen the incident report(s) which Salt Lake Regional Medical Center has refused to produce in this action;" and (2) "[e]ach and every person who has at any time seen the incident reports Salt Lake Regional Medical Center has refused to produce in this action pertaining to the fall on or about May 18, 2001 of patient Gary R. Cannon" ("Rule 30(b)(6) deponents"). (Pls.' Rule 30(b)(6) Notice of Dep.)

12. On March 18, 2004, plaintiffs also served a notice of deposition of Linda Wright. (Pls.' Notice of Dep. of Linda Wright.)

13. On March 19, 2004, counsel for Salt Lake Regional sent plaintiffs' counsel a letter regarding plaintiffs' March 18, 2004 notices of depositions. Based on the trial court's ruling in Minute Entry 1, counsel for Salt Lake Regional refused to produce either Linda Wright or the Rule

30(b)(6) deponents without an order from the trial court. (3/19/04 Willey Letter, attached as Exhibit B.)

14. On March 24, 2004, plaintiffs served a motion to compel the depositions of Linda Wright and the Rule 30(b)(6) deponents ("Second Motion to Compel"). Plaintiffs argued that Minute Entry 1 invites discovery into the accuracy of Linda Wright's affidavit testimony. (Pls.' Second Mot. to Compel.)

15. On March 24, 2004, plaintiffs also served an objection to Minute Entry 1. Plaintiffs specifically objected because Minute Entry 1 was not dated and signed. Plaintiffs requested that the trial court not sign and enter Minute Entry 1 until it had resolved plaintiffs' Second Motion to Compel. (Pls' Objection to Minute Entry 1.)

16. On March 29, 2004, counsel for Salt Lake Regional received a signed copy of Minute Entry 1 ("Minute Entry 2") that is dated March 4, 2004. (Minute Entry 2, attached as Exhibit C.)

17. On March 31, 2004, Salt Lake Regional served its memorandum in opposition to plaintiffs' Second Motion to Compel. Salt Lake Regional argued that it reasonably relied on Minute Entry 1 and applicable statutory and case law in refusing to produce Linda Wright and the Rule 30(b)(6) deponents for depositions. (Salt Lake Reg'l Mem. in Opp'n to Pls.' Second Mot. to Compel.)

18. On April 16, 2004, Salt Lake Regional responded to plaintiffs' requests for admission. Salt Lake Regional objected to both requests for admission on the grounds of attorney

client privilege; work product doctrine; Minute Entry 1; and the statutes and case law cited in Salt Lake Regional's memoranda in opposition to plaintiffs' First Motion to Compel and Second Motion to Compel. (Salt Lake Reg'l Answers to Pls.' First Set of Req. for Admis., attached as Exhibit D.)

19. On April 16, 2004, Salt Lake Regional responded to plaintiffs' second set of interrogatories. In response to plaintiffs' first interrogatory, Salt Lake Regional identified the grounds for its refusal to admit the statements specified in plaintiffs' request for admissions; identified counsel for both parties and Judge Atherton as individuals with knowledge supporting Salt Lake Regional's refusal to admit the statements specified in plaintiffs' request for admissions; and referred plaintiffs to Minute Entry 1 and the statutes and cases cited in Salt Lake Regional's memoranda in opposition to plaintiffs' First Motion to Compel and Second Motion to Compel as documents supporting Salt Lake Regional's refusal to admit the statements specified in plaintiffs' request for admissions. (Salt Lake Reg'l Answers to Pls.' Second Set of Interrogs., attached as Exhibit E.)

20. On May 21, 2004, the trial court issued a minute entry ("Minute Entry 3") granting in part Plaintiffs' Second Motion to Compel. Specifically, the trial court ruled that plaintiffs "are entitled to depose Linda Wright." Minute Entry 3 is silent with respect to plaintiffs' request for an

order compelling the depositions of the Rule 30(b)(6) deponents.¹ (Minute Entry 3, attached as Exhibit F.)

21. On May 21, 2004, the trial court issued a separate minute entry ("Minute Entry 4") clarifying Minute Entry 1. The trial court explained that Minute Entry 1 had been signed and entered on March 4, 2004 but that the copies initially sent to counsel were undated and unsigned. To preserve plaintiffs' right to file an interlocutory appeal, the trial court re-entered an order denying plaintiffs' First Motion to Compel on May 21, 2004. Minute Entry 4 did not alter the substance of Minute Entry 1 or otherwise change the trial court's stated reasons for denying plaintiffs' First Motion to Compel. (Minute Entry 4, attached as Exhibit G.)

22. On June 4, 2004, plaintiffs' counsel sent a letter to the trial court inquiring as to the status of plaintiffs' Second Motion to Compel. The letter reflects plaintiffs' counsel's belief that the trial court had not yet ruled on plaintiffs' Second Motion to Compel. (6/4/04 Mortensen Letter.)

¹It should be noted that on plaintiffs incorrectly represent and imply in their memorandum that the trial court ordered the depositions of the Rule 30(b)(6) deponents. Plaintiffs acknowledged in a recent memorandum filed with the trial court that Minute Entry 3 "does not specifically grant the plaintiffs' [sic] the right to depose other representatives under plaintiffs' Rule 30(b)(6) motion," but they go on to argue that a subsequent minute entry dated July 6, 2004 "implies" that the trial court granted plaintiffs' Second Motion to Compel as it pertains to the Rule 30(b)(6) deponents. In their memorandum filed with this Court, however, plaintiffs have not drawn any distinction between the trial court's actual orders and plaintiffs' interpretation of those orders.

23. On June 10, 2004, plaintiffs filed a petition for interlocutory appeal of the trial court's order denying plaintiffs' First Motion to Compel. (Pls.' Pet. for Permission to Appeal Interlocutory Order.)

24. On June 28, 2004, this Court granted plaintiffs' petition for interlocutory appeal of the trial court's order denying plaintiffs' First Motion to Compel. (Order granting Pls.' Pet. for Interlocutory Appeal.)

25. On July 6, 2004, the trial court issued a minute entry ("Minute Entry 5") in response to the June 4, 2004 letter from plaintiffs' counsel regarding the status of plaintiffs' Second Motion to Compel. In Minute Entry 5, the trial court explained that it had already ruled on plaintiffs' Second Motion to Compel in Minute Entry 3. The Court attached a copy of Minute Entry 3 to Minute Entry 5. Minute Entry 5 did not alter the substance of Minute Entry 3. (Minute Entry 5, attached as Exhibit H.)

26. Plaintiffs' counsel admits that he received Minute Entry 3 by July 7, 2004. (7/9/04 Mortensen Letter, attached as Exhibit I.)

27. On July 9, 2004, plaintiffs, pursuant to Rule 11 of the Utah Rules of Appellate Procedure, served their Certification of Absence of Transcript and Statement of Issues to be Presented on Appeal. (Pls.' Cert. of Absence of Transcript and Statement of Issues to be Presented on Appeal, attached as Exhibit J.)

28. Plaintiffs identified the primary issue on appeal as whether any existing incident report is discoverable. (Id.)

29. Plaintiffs identified a secondary issue on appeal as whether Salt Lake Regional “should be compelled to respond to plaintiffs’ discovery requests (including interrogatories and admission requests) seeking to ascertain the identity and job description of all persons who have seen the incident reports and the purposes for which such reports were disseminated to such persons.” (Id.)

30. On July 16, 2004, Salt Lake Regional served its Motion for Protective Order and Stay of Discovery. Salt Lake Regional moved the trial court for an order staying all discovery relating to the existence, substance, nature or dissemination of any existing incident report until the appeals process is complete. (Salt Lake Reg’l Mot. for Protective Order and Stay of Disc.)

31. The grounds for Salt Lake Regional’s motion to stay discovery is that it would be improper to permit discovery regarding any existing incident reports when the issues of (1) whether incident reports are discoverable; and (2) whether Salt Lake Regional is required to comply with plaintiffs’ discovery requests regarding incident reports are on appeal to this Court. (Id.)

32. On August 9, 2004, plaintiffs responded to Salt Lake Regional’s Motion for Protective Order and Stay of Discovery by filing (1) a motion with the trial court to compel supplemental responses to plaintiffs’ request for admissions and interrogatories and the depositions of Linda Wright and the Rule 30(b)(6) deponents (“Third Motion to Compel”); and (2) the present

motion for extension of time and an order compelling discovery before this Court. (Pls.' Third Motion to Compel; Pls.' Mot. for Extension of Time Within Which to File Appeal Brief and to Allow Additional Discovery and Supp. Mem.)

ARGUMENT

Under the Utah Rules of Appellate Procedure, motions for an enlargement of time for filing an appellate brief "are not favored." Utah R. App. P. 22(b). Furthermore, a motion for extension of time may be granted only upon a showing of good cause. *Id.* Plaintiffs' request for an enlargement so that they can conduct more discovery is not supported by good cause and goes against the well established role of appellate courts.

I. NEW EVIDENCE MAY NOT BE CONSIDERED ON APPEAL

This Court has repeatedly stated that it does not hear or consider new evidence on appeal. *In re L.M.*, 2001 UT App 314, ¶ 16 n. 3, 37 P.3d 1188; *Lyons v. Booker*, 1999 UT App 172, ¶ 2, 982 P.2d 1142; *State v. Vessey*, 967 P.2d 960, 966 (Utah Ct. App. 1998); *Otteson v. Dep't of Human Serv., Office of Soc. Serv.*, 945 P.2d 170, 171 (Utah Ct. App. 1997); *Finlayson v. Finlayson*, 874 P.2d 843, 847 (Utah Ct. App. 1994). The Court has been stringent in applying this rule. For example, the Court refused to consider a rape victim's affidavit testimony in which she recanted trial testimony used to convict the defendant. *Vessey*, 967 P.2d at 966 (striking new testimony and concluding that defendant failed to show that his conviction was not supported by sufficient evidence).

The reasons supporting a strict application of the rule against consideration of new evidence on appeal go to the fundamental difference between trial courts and appellate courts. Trial courts have “an advantaged position to evaluate the evidence and determine the facts.” *Utah Med. Prod., Inc. v. Searcy*, 958 P.2d 228, 232 (Utah 1998). For this reason, trial courts “are given primary responsibility for making determinations of fact.” *Am. Fork City v. Singleton*, 2002 UT App 331, ¶ 5, 57 P.3d 1124. On the other hand, appellate courts are charged with the responsibility of “examining the record for evidence supporting the judgment.” *Shioji v. Shioji*, 712 P.2d 197, 201 (Utah 1986).

The Utah Supreme Court explained the differing roles of trial and appellate courts as follows:

The appellate court is entrusted with ensuring legal accuracy and uniformity and should defer to the trial court on factual matters. It is inappropriate for an appellate court to disregard the trial court’s findings of fact and to assume the role of weighing evidence and making its own findings of fact.

Bailey v. Bayles, 2002 UT 58, ¶ 19, 52 P.3d 1158 (concluding that the court of appeals “exceeded its proper role” by finding facts beyond those found by the trial court) (quotations and citations omitted); *see also Brigham City v. Stuart*, 2002 UT App 317, ¶ 10, 57 P.3d 1111 (refusing appellant’s request to supplement the trial court’s factual findings). In *Bailey*, the Utah Supreme Court quoted with approval the following passage from *Corpus Juris Secundum*:

The reviewing court is confined to the facts specially found by the trial court, and the reviewing court may not make findings of fact for or against appellant, and cannot consider evidence to find facts or

make a decision upon them or supplement the facts found by the trial court with any additional facts

2002 UT 58 at ¶ 19 (quoting 5 C.J.S. *Appeal and Error*, § 710 (1993) (alterations in original) (footnotes omitted)).

Here, plaintiffs have appealed the trial court's denial of plaintiffs' First Motion to Compel production of any existing incident reports. *See* Pls.' Pet. for Permission to Appeal Interlocutory Order; Exhibit A (Minute Entry 1); Exhibit G (Minute Entry 4). In support of their motion for an extension of time to file an appeal brief and for an order compelling additional discovery, plaintiffs argue that "this Court will be better able to fairly decide the issue on appeal if it has before it all the relevant facts." Pls.' Mot. for Extension of Time Within Which to File Appeal Br. and to Allow Additional Discovery and Supp. Mem., p. 6. Thus, plaintiffs' request for an extension of time to file their appeal brief is contingent upon their additional request for an order compelling discovery.

Plaintiffs' underlying request for an order compelling discovery so that they can present supplemental evidence to this Court for consideration should be denied because new evidence may not be considered on appeal. The only evidence presented to the trial court for consideration in connection with plaintiffs' First Motion to Compel is the affidavit testimony of Linda Wright, which was submitted in support of Salt Lake Regional's memorandum in opposition to plaintiffs' First Motion to Compel. *See* Exhibit A. Furthermore, the trial court's Minute Entry 1 clearly indicates that the only facts considered by the court were those contained in Ms. Wright's affidavit. *Id.* It was

not until after the trial court first denied plaintiffs' First Motion to Compel that plaintiffs sought additional discovery.

Under well established rules of appellate court procedure, this Court may not consider evidence other than the affidavit testimony of Linda Wright. While plaintiffs may believe other as-yet undiscovered evidence may be relevant, this Court is not at liberty to supplement Ms. Wright's affidavit testimony with other evidence that was not considered by the trial court; weigh Ms. Wright's affidavit testimony against other evidence not considered by the trial court; or allow further discovery on the appealable issues so that the appellate record may be supplemented. Accordingly, plaintiffs' request for an order compelling discovery should be denied. Because plaintiffs' request for an order compelling discovery is improper and should be denied, there is no good cause for allowing plaintiffs additional time to file their appeal brief. Therefore, plaintiffs' motion should be denied in its entirety.

II. PLAINTIFFS MAY NOT SEEK AN ORDER COMPELLING SUPPLEMENTAL RESPONSES TO WRITTEN DISCOVERY WHEN THE LEGALITY OF THE DISCOVERY REQUESTS IS AN ISSUE TO BE PRESENTED AND ARGUED ON APPEAL

Plaintiffs' motion should be denied for additional reasons. First, plaintiffs' request for an order compelling discovery is improper because the legality of plaintiffs' discovery requests is an issue on appeal. After receiving the trial court's orders denying their First Motion to Compel and partially granting their Second Motion to Compel, plaintiffs filed a statement of issues to be argued on appeal. *See* Exhibit J. Plaintiffs identified the following secondary issue on appeal: Whether

Salt Lake Regional “should be compelled to respond to plaintiffs’ discovery requests (including interrogatories and admission requests) seeking to ascertain the identity and job description of all persons who have seen the incident reports and the purposes for which such reports were disseminated to such persons.” *Id.* Thus, plaintiffs are appealing the very issue that is the subject of this motion—whether Salt Lake Regional should be compelled to provide supplemental responses to plaintiffs’ second set of interrogatories and requests for admission.

Because the relief requested by plaintiffs in their motion is an issue to be decided on appeal, it would be inappropriate for this Court to grant plaintiffs’ motion before the parties have briefed and argued the underlying merits of plaintiffs’ discovery requests in their appellate briefs and during oral argument. Underlying plaintiffs’ motion and the issue on appeal is the issue of whether Salt Lake Regional appropriately and justifiably relied on the attorney-client privilege, attorney work product doctrine, Utah’s care-review privilege and other objections in responding to plaintiffs’ second set of interrogatories and requests for admission. Because these issues are the subject of appeal and have not yet been briefed or argued, plaintiffs’ motion should be denied.

III. PLAINTIFFS’ ARGUMENT IS INADEQUATELY BRIEFED

Plaintiffs’ motion should also be denied because they have failed to adequately brief the merits of the underlying discovery requests. Salt Lake Regional has raised numerous legal objections to plaintiffs’ second set of interrogatories and requests for admission, including the attorney-client privilege, attorney work product doctrine, and the care-review privilege. *See Exhibits*

D & E. Plaintiffs have wholly failed to present any argument as to whether the privileges and objections asserted by Salt Lake Regional apply and preclude discovery of the information requested. In the absence of any argument on the underlying merits of plaintiffs' request for an order to compel discovery, the request should be denied. *See State v. Thomas*, 1999 UT 2, ¶ 11, 974 P.2d 269 (“[A] reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research.” (Quotations and citations omitted)).

IV. THE TRIAL COURT HAS NOT RULED ON THE ISSUE

Plaintiffs' request for an order compelling discovery should also be denied because the trial court has two motions pending before it on the same issue. In particular, Salt Lake Regional has filed a motion for protective order and stay of all discovery relating to incident reports. In addition, plaintiffs have filed a motion to compel discovery related to incident reports. As the court with the primary responsibility for managing this case, the trial court should be permitted to rule on the pending motions without interference from this Court. Only after the trial court has ruled on the issues presented in the pending motions would an interlocutory review by this Court or the Utah Supreme Court be appropriate.

V. PLAINTIFFS CHOSE THE TIMING OF THEIR APPEAL

Plaintiffs' argument that they have been placed between a rock and a hard spot is also without merit. This is an interlocutory appeal. Plaintiffs are the ones who chose to petition for

appellate review of an interlocutory order while discovery remains to be conducted. After making that choice, plaintiffs cannot now be heard to complain that more discovery needs to be completed. Furthermore, it was plaintiffs who chose not to pursue any discovery related to incident reports prior to moving the trial court for an order compelling the production of any existing incident reports. Even after Salt Lake Regional submitted the affidavit of Linda Wright in opposition to plaintiffs' First Motion to Compel, plaintiffs did not request time for additional discovery before submitting their motion to the trial court for decision. Any difficulties that plaintiffs find themselves in with respect to the record on appeal are of their own making and do not warrant an extension of time to file an appeal brief or an order compelling discovery.

CONCLUSION

Plaintiffs' request for an order compelling additional discovery should be denied because new evidence may not be considered on appeal. Plaintiffs' motion should also be denied because the issue presented in plaintiffs' motion is the same issue to be decided on appeal. Plaintiffs' motion is also inadequately briefed. Furthermore, the trial court has not had an opportunity to decide the issue. In the absence of good cause shown, plaintiffs' motion for an extension of time to file their appeal brief and for an order compelling discovery should be denied.

DATED this 26 day of August, 2004.

SNOW, CHRISTENSEN & MARTINEAU

By Bradley R. Blackham
David W. Stagle
Elizabeth L. Willey
Bradley R. Blackham
Attorneys for Salt Lake Regional Medical Center,
Inc.

020440-0051\brb\54833.wpd

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of August, 2004, I caused a true and correct copy of the foregoing **DEFENDANT SALT LAKE REGIONAL MEDICAL CENTER'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR EXTENSION OF TIME TO FILE APPEAL BRIEF AND TO ALLOW ADDITIONAL DISCOVERY** to be mailed to the following:

Douglas G. Mortensen
Matheson, Mortensen, Olsen & Jeppson
648 East 100 South
Salt Lake City, UT 84102
Attorneys for Plaintiffs Kathryn Cannon, Lane Cannon and Roland Cannon


Legal Assistant

020440-0051\brb\54833.wpd

Exhibit I

D & E. Plaintiffs have wholly failed to present any argument as to whether the privileges and objections asserted by Salt Lake Regional apply and preclude discovery of the information requested. In the absence of any argument on the underlying merits of plaintiffs' request for an order to compel discovery, the request should be denied. *See State v. Thomas*, 1999 UT 2, ¶ 11, 974 P.2d 269 (“[A] reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research.” (Quotations and citations omitted)).

IV. THE TRIAL COURT HAS NOT RULED ON THE ISSUE

Plaintiffs' request for an order compelling discovery should also be denied because the trial court has two motions pending before it on the same issue. In particular, Salt Lake Regional has filed a motion for protective order and stay of all discovery relating to incident reports. In addition, plaintiffs have filed a motion to compel discovery related to incident reports. As the court with the primary responsibility for managing this case, the trial court should be permitted to rule on the pending motions without interference from this Court. Only after the trial court has ruled on the issues presented in the pending motions would an interlocutory review by this Court or the Utah Supreme Court be appropriate.

V. PLAINTIFFS CHOSE THE TIMING OF THEIR APPEAL

Plaintiffs' argument that they have been placed between a rock and a hard spot is also without merit. This is an interlocutory appeal. Plaintiffs are the ones who chose to petition for

appellate review of an interlocutory order while discovery remains to be conducted. After making that choice, plaintiffs cannot now be heard to complain that more discovery needs to be completed. Furthermore, it was plaintiffs who chose not to pursue any discovery related to incident reports prior to moving the trial court for an order compelling the production of any existing incident reports. Even after Salt Lake Regional submitted the affidavit of Linda Wright in opposition to plaintiffs' First Motion to Compel, plaintiffs did not request time for additional discovery before submitting their motion to the trial court for decision. Any difficulties that plaintiffs find themselves in with respect to the record on appeal are of their own making and do not warrant an extension of time to file an appeal brief or an order compelling discovery.

CONCLUSION

Plaintiffs' request for an order compelling additional discovery should be denied because new evidence may not be considered on appeal. Plaintiffs' motion should also be denied because the issue presented in plaintiffs' motion is the same issue to be decided on appeal. Plaintiffs' motion is also inadequately briefed. Furthermore, the trial court has not had an opportunity to decide the issue. In the absence of good cause shown, plaintiffs' motion for an extension of time to file their appeal brief and for an order compelling discovery should be denied.

DATED this 26 day of August, 2004.

SNOW, CHRISTENSEN & MARTINEAU

By Bradley R. Blackham
David W. Stagle
Elizabeth L. Willey
Bradley R. Blackham
Attorneys for Salt Lake Regional Medical Center,
Inc.

020440-0051\brb\54833.wpd

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of August, 2004, I caused a true and correct copy of the foregoing **DEFENDANT SALT LAKE REGIONAL MEDICAL CENTER'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR EXTENSION OF TIME TO FILE APPEAL BRIEF AND TO ALLOW ADDITIONAL DISCOVERY** to be mailed to the following:

Douglas G. Mortensen
Matheson, Mortensen, Olsen & Jeppson
648 East 100 South
Salt Lake City, UT 84102
Attorneys for Plaintiffs Kathryn Cannon, Lane Cannon and Roland Cannon


Legal Assistant

020440-0051\brb\54833.wpd

FILED
UTAH APPELLATE COURTS
SEP / 2 2004

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

Kathryn Cannon; Lane Cannon;)
and Roland Cannon,)
)
 Plaintiffs and Appellants,)
)
v.)
)
Salt Lake Regional Medical)
Center, Inc.; John and Jane)
Does I through X and Doe)
Business Entities I through V,)
)
 Defendants and Appellees.)

ORDER

Case No. 20040486-CA

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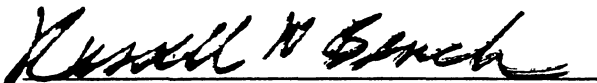
Before Judges Bench, Davis, and Jackson

This is before the court on Appellants' Motion for Extension of Time Within Which to File Appeal Brief and to Allow Additional Discovery.

IT IS HEREBY ORDERED that Appellants' motion is denied. Appellants' brief is due thirty days from the date of this order.

Dated this 2nd day of September, 2004.

FOR THE COURT:



Russell W. Bench,
Associate Presiding Judge

CERTIFICATE OF MAILING

I hereby certify that on September 2, 2004, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

ELIZABETH L. WILLEY
SNOW CHRISTENSEN & MARTINEAU
10 EXCHANGE PL 11TH FLOOR
PO BOX 45000
SALT LAKE CITY UT 84145-5000

DOUGLAS G. MORTENSEN
MATHESON MORTENSEN OLSEN JEPPSON PC
648 E 100 S
SALT LAKE CITY UT 84102

Dated this September 2, 2004.

By Maren Larson
Deputy Clerk

Case No. 20040486

Exhibit J

[Home](#) [Sources](#) [How Do I?](#) [Site Map](#) [What's New](#) [Help](#)Search Terms: **bradburn and rockingham and memorial**

FOCUS™

[Search Within Results](#)[Edit Search](#)[Print](#) [Email](#)[Document List](#) [Expanded List](#) [KWIC](#) [Full](#)[<<previous](#) Document 2 of 2.Norman L. **Bradburn, Sr. v. Rockingham Memorial Hospital**

Case No. (Law) 10636

CIRCUIT COURT OF **ROCKINGHAM** COUNTY, VIRGINIA

45 Va. Cir. 356; 1998 Va. Cir. LEXIS 85

April 17, 1998, Decided

HEADNOTES:

HEADNOTE: Hospital incident reports that are mere recitations of objective facts and hospital policy and procedures manuals that are the final result of hospital staff deliberations are not exempt from discovery under § 8.01-581.17.

JUDGES: [****1**] By Judge John J. McGrath, Jr.

OPINIONBY: McGrath

OPINION: [***356**]

In this medical malpractice action, Plaintiff has brought suit against **Rockingham Memorial Hospital** alleging that the negligence of its employees caused him to suffer a tripartite fracture of his hip on May 9, 1994, as the result of a fall from a hospital bed. It is the Plaintiff's contention that the staff of **Rockingham Memorial Hospital** had improperly provided for his safety and security when he was placed unrestrained in a bed after his physicians had allegedly ordered that bed restraints be used to prevent the Plaintiff from exiting his bed.

Counsel for the parties have completed most of the discovery in the case, and the matter now brought before the Court includes the relatively narrow issues presented by the discoverability of two separate classes of documents. First, the Plaintiff seeks certain Policies, Procedures, and Protocols of the Defendant which specifically relate to fall prevention, vest restraints, nursing rounds, and post-incident care of patients. The Plaintiff seeks a second class of documents which are generically referred to as the Incident Reports or Accident Reports prepared immediately after the [****2**] incident which gave rise to this cause of action.

The Defendant resists production of either of these two types of documents on the grounds that they are privileged under § 8.01-581.17 of the Code of Virginia, 1950, as amended. In addition, Defendant asserts that its Policies, Procedures, and Protocols manuals are not discoverable because they are irrelevant as a matter of law under the holding in Pullen & McCoy v. Nickens, 226 Va. 342, 310 S.E.2d 452 (1983).

[***357**] An evidentiary hearing was held on Plaintiff's Motion to Compel Discovery Responses. At this hearing, the Defendant produced two witnesses and a number of exhibits in support of its contention that both classes of documents should be and are privileged under § 8.01-581.17 of the Code of Virginia. The first witness called by the Defendant was Mrs. Young, who is the Director of Quality Management for **Rockingham Memorial Hospital** and also is a member of the Safety and Risk Management Committee of the Hospital. She gave an overview description of how the quality control assessment process works at the hospital. Her testimony was essentially that all untoward incidents which might give rise to liability which occur within the hospital [****3**] are required to be reported by staff on a form that is variously known as a "Pink Sheet," a QCCR, or a QCR. These are the various names used for Incident Reports which are prepared

by one or more staff members who are witnesses to or are involved in an accident. After these Incident Reports are completed, they are either reviewed on an individual basis or they are aggregated for statistical tracking and analysis by the various inter-disciplinary committees of the hospital which have, as part of their function, the monitoring and promulgation of quality assurance practices.

Mrs. Young further testified that the Policies, Procedures, and Protocols of the hospital are developed by various working committees and work their way through the inter-disciplinary committees and the medical staff peer review committees and are eventually promulgated as Policies and Procedures by the Board of Directors or Directing Manager upon the recommendation of the Quality Assessment and Improvement Committee. According to Mrs. Young, the Procedures of the hospital are more detailed documents generated for use at the department level, which lay out the specific manner in which the generalized Policies are [**4] to be applied in day-to-day activities.

Dr. Danny A. Neal, who is the current Chairman of the Medical Executive Committee of **Rockingham Memorial** Hospital, testified at length on the importance of the quality assessment and review procedures utilized at **Rockingham Memorial** Hospital and more particularly as utilized by the Medical Staff. Dr. Neal's testimony was essentially that the various medical groups operating within the hospital and the hospital Board of Directors and management rely heavily upon the various quality assurance committees that have been established, and these committees, in turn, rely upon the unfettered access to information from employees and medical staff members. It was Dr. Neal's testimony that, in his judgment and experience, the materials which were generated by the staff were of better quality and more usable for quality control purposes when the staff and employees were assured that whatever [*358] information they generated would be free from discovery by legal process and possible use in litigation against them or their employer. Although the record is not exactly clear on this issue, it appears that individual Incident Reports are not always examined [**5] in detail by the Medical Executive Committee, but they are frequently utilized by the lower echelon committees to examine trends and are a basis for statistical analysis to determine what areas require additional attention from a quality assurance perspective.

The statutory provisions involved in this case are set forth in § 8.01-581.16 and 8.01-581.17 of the Code of Virginia.

Section 8.01-581.17 provides that:

The proceedings, minutes, records, and reports of any (i) medical staff committee, utilization review committee, or other committee as specified in § 8.01-581.16... together with all communications, both oral and written, originating in or provided to such committees or entities, are privileged communications which may not be disclosed or obtained by legal discovery proceedings unless a circuit court, after a hearing and for good cause arising from extraordinary circumstances being shown, orders the disclosure of such proceedings, minutes, records, reports, or communications. Nothing in this section shall be construed as providing any privilege to hospital medical records kept with respect to any patient in the ordinary course of business of operating a hospital nor to [**6] any facts or information contained in such records, nor shall this section preclude or affect discovery of or production of evidence relating to hospitalization or treatment of any patient in the ordinary course of hospitalization of such patient.

Section 8.01-581.16 provides that the "Committees" which are covered by the privilege of § 8.01-581.17 are "any committee, board, group, commission or other entity which functions primarily to review, evaluate, make recommendations on... (iv) the adequacy or quality of professional services...."

Since the two classes of documents at issue in this case raise somewhat different legal issues, they will be treated separately.

I. Discoverability of Incident Reports

The QCRs, QCCRs, or "Pink Sheets" (which hereinafter will be referred to simply as "Incident Reports") are prepared by staff personnel whenever there is an untoward incident which occurs at the hospital. These Incident Reports are then forwarded to various quality assurance committees. The [*359] testimony in this case was that such an Incident Report was prepared immediately after Mr. **Bradburn** had suffered his fall by one or more of the nurses who were attending on the [**7] ward when he was injured. No other accident or incident report was prepared by anyone employed by the hospital.

The Defendant's position is that all of these Incident Reports are clearly privileged under the provisions of § 8.01-581.17 because they are "communications... originating in or provided to a committee, board, group,

commission, or other entity which functions primarily to review, evaluate, or make recommendations on... (iv) the adequacy or quality of professional services...." The Defendant contends that these Incident Reports are an integral part of the overall quality assurance or quality assessment process that has been established within the hospital to assure high quality medical care. In essence, the Defendant argues that these Incident Reports are the raw material which is supplied to the various quality assurance committees to be reviewed and to be analyzed for the purposes of maintaining or improving the quality of medical care rendered at the hospital.

The Plaintiff's contention is that these Incident Reports are not part of the deliberative quality control process and are not within the scope of the privilege as intended by the legislature. The Plaintiff's [**8] position is that it was never the intention of the legislature to extend a quality assurance privilege to routine, factual reports which record the time, place, date, witnesses, and observations relating to a particular incident. The Plaintiff's position is that the privilege is meant to protect the give and take of the deliberative process and the self-searching review conducted by quality control committees.

There appear to be no appellate cases in Virginia clearly articulating the metes and bounds of the privilege set forth in § 8.01-581.17 when dealing with incident reports relating to accidents which occur in medical facilities: There has been a substantial number of cases decided at the Circuit Court level, and they are more or less evenly divided on the question of whether such incident reports are privileged within the meaning of § 8.01-581.17. Plaintiff points to a number of decisions which have held that incident reports such as the ones involved in this case, even when they are supplied directly and exclusively to quality assurance or quality control committees, are not covered by the privilege because they do not contain any of the normal deliberative processes which [**9] the legislature intended to protect in the statute. See, e.g., *Huffman v. Beverly Calif. Corp.*, 42 Va. Cir. 205 (**Rockingham** County, 1997) (McGrath, J.); *Messerley v. Avante Group, Inc.*, 42 Va. Cir. 26 (**Rockingham** County, 1996) (McGrath, J.); *Roadcap v. Beverley Enterprises, Inc.* (**Rockingham** County, 1996) (Hupp, J.); *Benedict v. Community Hosp. of [**360] Roanoke Valley*, 10 Va. Cir. 430 (City of Roanoke, 1988) (Coulter, J.); *Johnson v. Roanoke Memorial Hosp.*, 9 Va. Cir. 196 (City of Roanoke, 1987) (Coulter, J.); and *Atkinson v. Thomas*, 9 Va. Cir. 21 (City of Virginia Beach, 1986) (Russo, J.).

The Defendant cites to a number of circuit court opinions which have held that incident reports such as the one involved here are covered by the quality assurance deliberative privilege set forth in § 8.01-581.17. See, e.g., *Jones v. Rezba* (City of Winchester, 1997) (Wetsel, J.); *Stevens v. Lemmie*, 40 Va. Cir. 499 (City of Petersburg, 1996) (Lemons, J.); *Adams v. Patterson* (City of Winchester, 1994) (Wetsel, J.); *Mangano v. Kavanaugh*, 30 Va. Cir. 66 (Loudoun County, 1993) (Horne, J.); *Houchens v. University of Va.*, 23 Va. Cir. 202 (City of Charlottesville, 1991) (Swett, J.); *Hedgepeth v. [**10] Jesudian*, 15 Va. Cir. 352 (City of Richmond, 1989) (Markow, J.); *Riordan v. Fairfax Hosp. System, Inc.*, 28 Va. Cir. 560 (Fairfax County, 1988) (McWeeny, J.); *Francis v. McEntee*, 10 Va. Cir. 126 (Henrico County, 1987) (Kulp, J.); *Peck v. Chippenham Hosp., Inc.* (Medical Malpractice Review Panel, City of Richmond, 1986) (Nance, J.).

After reviewing all of these decisions and the evidentiary record established in the hearing on the instant motion, this Court continues to believe that the position as set forth in *Huffman v. Beverly Calif. Corp.*, 42 Va. Cir. 205 (1997), and *Messerley v. Avante Group*, 42 Va. Cir. 26 (1996), is an accurate statement and interpretation of the applicable law. In the *Huffman* and *Messerly* opinions, this Court indicated that records such as these, which are standard incident reports that are filed for any accident occurring at a medical facility, are not shielded from discovery by the provisions of § 8.01-581.17 because they do not rise to the level as contemplated by the statute of being quality assurance deliberative documents. They are simply recitations of the accident that occurred, the witnesses who were present, and other objective facts that can be ascertained [**11] from the eyewitnesses to the incident. As such, they are much more akin to the ordinary hospital records, which are exempted from the reach of this privilege pursuant to the last sentence of § 8.01-581.17.

It is certainly clear that the legislature has determined as a matter of public policy in Virginia that many of the documents utilized in, by, and with quality assurance organizations within medical facilities are to be exempt from discovery (absent a showing of special need) in order to facilitate the free flow of information between staff personnel and quality assurance committees. Although that is a commendable objective and needs to be adhered to whenever the deliberative process is involved, it appears to be an [**361] impermissible reading of the statute to extend this privilege to cover all factual reports or incident reports of accidents that happen at a hospital simply because they are sent to a quality assurance committee.

The basis of this Court's decision was set forth very well by Judge Coulter in his decision in *Benedict v. Community Hosp.*, 10 Va. Cir. 430 (1988), when he stated:

The argument that all field work, the incident reports, the questions concerning [**12] falls that might proceed a peer review meeting should be free from discovery... must yield to the more compelling mandate of the statute's last sentence. Otherwise, all documents could become privileged simply by the committee requiring their production or attaching them to the minutes. As stated in Johnson: "almost anything could come within such broad and limitless sweep." Id. at page 436.

Therefore, the Defendant, **Rockingham Memorial Hospital**, will be ordered to produce within ten days of this Order copies of all incident reports that have been requested by the Plaintiff.

II. Discoverability of the Defendant's Policies, Procedures, and Protocols

The Plaintiff's position at this the discovery stage of the litigation is that he is entitled to obtain the policies, procedures, and protocols of **Rockingham Memorial Hospital** relating to fall prevention, vest restraints, nursing rounds, and post-incident care of patients involved in such incidents because (1) these policies, procedures, and protocols are not "the proceedings, minutes, records, and reports of a medical staff committee or utilization review committee or other committee specified in § 8.01-581.16" nor are they communications [**13] originating in or provided to such committees; and (2) the fact that such policies, procedures, and protocols may not be introduced into evidence under the Supreme Court's holding in Pullen & McCoy v. Nickens, 226 Va. 342, 310 S.E.2d 452 (1993), does not mean that such documents cannot be obtained in discovery pursuant to Rule 4:1(b)(1). The Plaintiff contends that such information may be "reasonably calculated to lead to the discovery of admissible evidence." In short, the Plaintiff takes the position that it is premature at this point to determine the admissibility into evidence of these documents and that discovery should be permitted.

The Defendant Hospital, on the other hand, argues vigorously that the policies, procedures, and protocols established by the hospital are the result of [*362] the peer review process and thus are privileged as a written communication originating from such a committee under the provisions of § 8.01-581.17 of the Code of Virginia, and, in addition, are exempt from discovery because they are not likely to result in the discovery of admissible evidence because pursuant to § 8.01-581.20 of the Code of Virginia, the standard of care is established by statute, and [**14] under the holding of the Supreme Court in Pullen v. Nickens, supra; the private rules, regulations, and procedures established by a party are not admissible in determining whether or not the party has met the applicable standard of care.

As in the case of the decisional authority relating to incident reports, the circuit courts are fairly evenly split on the issue of whether policies, procedures, and protocols of medical care providers can be obtained in discovery. A number of courts have held that the privilege set forth in § 8.01-581.17 only applies to the deliberative processes by which peer review groups establish procedures and protocols and does not extend to the final product thereof and that the scope of discovery set forth in Rule 4:1(b)(1) is broad enough to permit Plaintiffs to obtain this material in discovery before reaching the issue of whether such materials may be introduced at trial. See, e.g., Houchens v. University of Va., 23 Va. Cir. 202 (City of Charlottesville, 1991) (Swett, J.); Curtis v. Fairfax Hosp. Systems, Inc., 21 Va. Cir. 275 (Fairfax County, 1990) (Annunziata, J.); Hedgepeth v. Jesudian, 12 Va. Cir. 221 (City of Richmond, 1988) (Markow, J.); Johnson v. Roanoke [**15] **Memorial Hosp.**, 9 Va. Cir. 196 (City of Roanoke, 1987) (Coulter, J.).

The courts which have denied discovery of policy, procedures, and protocol manuals of medical care providers have done so on the grounds that either: (1) they are privileged written communications originating from a peer review group covered by the provisions of § 8.01-581.17 of the Code of Virginia and/or (2) that the internal policies, procedures, and protocols established by a medical care provider are irrelevant to determining whether or not the defendant has violated the statutory mandated standard of care for medical care providers. See, e.g., Adams v. Patterson (City of Winchester, 1994) (Wetsel, J.); Mangano v. Kavanaugh, 30 Va. Cir. 66 (Loudoun County, 1993) (Horne, J.); Riordan v. Fairfax Hosp. Systems, Inc., 28 Va. Cir. 560 (Fairfax County, 1988) (McWeeny, J.); Leslie v. Alexander, 14 Va. Cir. 127 (City of Alexandria, 1988) (Swersky, J.); Francis v. McEntee, 10 Va. Cir. 126 (Henrico County, 1987) (Kulp, J.); and Peck v. Chippenham Hosp., Inc. (Medical Malpractice Review Panel, City of Richmond, 1986) (Nance, J.).

On the issue of whether the policies, procedures, and protocol manuals of a medical care [**16] provider are privileged under § 8.01-581.17 of the Code of [**363] Virginia, this Court believes that the rationale set forth by Judge Annunziata in Curtis v. Fairfax Hosp. Systems, Inc., 21 Va. Cir. 275 (1990), and Judge Coulter in Johnson v. Roanoke **Memorial Hosp.**, 9 Va. Cir. 196 (1987), is the better reasoned analysis of the decided cases. Clearly, the internal dialogue and the give and take of the peer review process, which lead up to and are an integral part of developing the policies, procedures, and protocols of medical care providers are

exempted from discovery in the absence of good cause shown. However, the actual product that is generated thereby, which are generally policy and procedure manuals that are intended to be followed by all of the hospital staff and attending physicians are not part of the deliberative process but are the final result thereof and do not share in the privilege conferred by the statute. Therefore, it is this Court's holding that the privilege granted by § 8.01-581.17 does not protect from discovery the final result of the peer review activity, that is the policies, procedures, and practices manuals that are ultimately promulgated by the health care providers and which are used to govern the operations of the hospital.

However, given the clearly-delineated statutory standard of care that is set forth in § 8.01-581.20 of the Code of Virginia and the still viable holding of the Supreme Court in Pullen v. Nickens, supra, it is extremely doubtful that there is any way in which the internal policies, procedures, and protocols of medical care providers could be admitted into evidence in this case. To permit such documents into evidence would clearly destroy any incentive of medical care providers to adopt internal operating procedures which adopted anything but the bare minimum standard. This is exactly the type of chilling effect that the holding in Pullen v. Nickens, supra, was meant to prevent. However, at the discovery stage of the litigation, it cannot be said with a certainty that these materials will not lead to the discovery of admissible evidence within the purview of Rule 4:1(b)(1) of the Rules of the Supreme Court.

Therefore, solely for the purposes of discovery, this Court holds that these materials are to be produced to the Plaintiff pursuant to the various discovery requests that have been filed in this case. The Court cautions that what is covered by this Opinion and Order are the final and operative policies, procedures, and protocols relating to the subject matter at hand and that this ruling does not extend to any internal documentation reflecting the deliberations of the committees or groups which led to the formulation of the final policies and procedures that were in place at the time of the accident. Therefore, the Defendant will be required to produce these materials to Plaintiff within ten days of this Order.

[←previous](#) **Document 2 of 2.**

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Exhibit K

C

Circuit Court of Virginia.

Evelyn G. BENEDICT, Claimant
v.
COMMUNITY HOSPITAL OF ROANOKE
VALLEY, Health Care Provider

Feb. 29, 1988.

OPINION

COULTER, J.

PRELIMINARY STATEMENT: THE ISSUE AND THE BACKGROUND

*1 The discoverability of incident reports, by whatever name called, or their functional equivalents, is the issue of the moment in these proceedings. Evelyn G. Benedict was a patient in the Community Hospital of Roanoke Valley from October to December, 1983, having undergone amputation of the left leg below the knee. While recuperating she claims that she sustained additional injuries to the stump of her leg, apparently as a result of three separate events: a blow to the stump of her leg during physical therapy on November 22, 1983; falling on her stump on November 27, 1983, while trying to move unattended from her chair to her walker; and again striking her abbreviated leg on December 4, 1983, when she was dropped by a nursing assistant. The claimant seeks to hold the hospital responsible for these acts or omissions of alleged negligence, contending that as a result her healing was delayed, additional pain, suffering, and depression experienced, and further medical expenses incurred.

On June 7, 1984, Ms. Benedict's attorney requested access to all medical records relating to her hospitalization and treatment. Fifteen months later on October 10, 1985, formal notice of a malpractice claim was given. The hospital thereupon on December 4, 1985, requested that the claim be referred to a medical review panel. After some discovery efforts, an informal hearing on the defendant's

objections to the claimant's Interrogatory No. 7 was held on August 25, 1986, at which time the incident reports prepared by the hospital were held to be discoverable. This decision was in keeping with several similar rulings that the court had recently made. No order memorializing this decision, however, was ever submitted.

Thereafter the defendant disclosed that though an incident report, which it identified as a Quality Care Control Report, and a "writing" by Charlotte Oliver had been prepared contemporaneously with the incident or incidents, they were now missing and hence could not be produced for discovery purposes. Though counsel for the defendant did not know that the documents were missing at the time he urged their immunity from discovery, and no one is suggesting otherwise, the claimant raises the nasty specter that they could have been conveniently misplaced by hospital personnel after resistance to its production had proved unavailing--- a very uncomfortable and unpleasant suspicion the validity of which will probably never be known. In any event, the defendant in its amended answer to Interrogatory No. 7 and subsequent memorandum has identified eight documents which it concedes could possibly be construed as responsive to the claimant's interrogatory.

THE INTERROGATORY AND THE AMENDED ANSWER

Interrogatory No. 7 read as follows:

(7) Was any Incident Report or similar document prepared following any of the injuries Mrs. Benedict received involving her stump? If so, please describe it and advise who has custody of it now.

The defendant's amended answer and subsequent memorandum have disclosed:

- *2 1. Risk Management Review Report (prepared after claimant's attorney's request to review the medical records on June 7, 1984).
- 2. Routine Questions on Claims Concerning

Falls (prepared by Head Nurse Belinda Williams after claimant's attorney's request to review the medical records).

3. & 4. Statements of Sharon Saferight, R.N. and J. Harper, R.N. (prepared following a visit from a member of the claimant's family to the hospital on February 1, 1984, seeking information about the injuries).

5. Statement of Nurse Williams (prepared at the request of the hospital's in-house attorney on May 6, 1984).

6. Supplemental statement of Nurse Williams (prepared at the request of the insurance carrier for use by its attorney after the claimant's attorney's request to review the claimant's medical records).

7. Statement of Charlotte Oliver, Nursing Assistant (prepared at the request of the insurance carrier on October 18, 1985, after the claimant had filed her formal notice of her claim against the hospital).

8. Transcript of insurance carrier's interview with Diane Osborne, Director of Physical Therapy (transcribed on February 11, 1986, for the use of the attorney for the insurance carrier.)

THE DEFENDANT'S CONTENTION

The defendant contends that none of these eight documents should be discoverable on the following grounds:

1. That these reports, statements or transcripts are privileged within the scope of § 8.01-581.17 of the Code of Virginia of 1950, as amended.

2. That these documents were prepared in anticipation of litigation and hence are entitled to the protection of Rule 4:1(b)(3) of the Rules of the Supreme Court of Virginia.

3. That these documents were also prepared at the request and for the review of an attorney and are accordingly likewise entitled to the protection of the same Rule 4:1(b)(3).

THE PRECEDENTS OF THIS COURT: MALONE & JOHNSON

These points and arguments in their support

have heretofore been thoroughly and painstakingly considered by this court after the submission of excellent briefs and persuasive arguments involving extensive research in two other recent cases: *Malone, Exec. v. Gill Memorial*, City of Roanoke Circuit Court Law Action 86-0307, and *Johnson, Admx. v. Roanoke Memorial Hospitals, Inc.*, City of Roanoke Circuit Court Law Action 87-321.

In *Malone*, an operation on the plaintiff's decedent, Stella Reamey, for cataracts and a lens implant was begun but aborted because of the patient's restlessness under anesthesia. She was sent to the recovery unit and shortly thereafter to her room. Early the next morning Ms. Reamey could not be aroused and became comatose. She died four months later, having never regained consciousness. The incident report, recorded statements taken by the insurance adjuster, and various manuals were held discoverable over vigorous objections of the defendant. There was no formal written opinion rendered in that case but a lengthy oral ruling was delivered from the bench, transcribed and made a part of the record.

*3 In *Johnson* the plaintiff's decedent died at age 33 on his way home after being treated for a sore throat and released from the emergency room of the Roanoke Memorial Hospital. There were no incident reports available, but the plaintiff sought certain formal Job Descriptions for Nurses Aides and Registered Nurses and the Care Manual on Triage and Nursing Assessment. The court held that these documents were discoverable, again over the strong arguments of the defendant that they were privileged under the same statute relied on in this case (§ 8.01-581.17). The 13-page written opinion, in which ten decisions from other jurisdictions upholding the discovery of similar material were cited, noted at the outset:

Because of the importance of the issue, the tenacity of the defendant's resistance, public policy concerns in genuine conflict, and the apparent differing attitudes and rulings of state trial judges, a review of this court's analysis and prior conclusion is justified. The matter thus will be considered afresh and

subjected to more reasoned review.

CONCERN FOR CONSISTENCY, THOUGH
A FACTOR, DOES NOT CREATE
DISABILITY FOR SELF-
CORRECTION.

Consistency from the bench is an essential ingredient of justice; it is a necessary component of a stable jurisprudence. Upon it rests the doctrine of stare decisis. Precedent would be meaningless without it. Continuity of the law and respect for past decisions satisfy the need for some certainty and understanding of what the law is. Treating litigants equally under similar factual situations is simply a trademark of Anglo-American law. And yet, as Emerson has so poignantly put it:

Consistency [FN1] is the hobgoblin of little minds, adored by petty statesmen, philosophers and divines.

FN1. It is, of course, a *foolish* consistency that Emerson condemns.

and

With consistency a great soul has simply nothing to do. He may as well concern himself with his shadow on the wall.

Concern for consistency, therefore, though a significant factor, should never inhibit the reexamination of complex issues; it should not imprison reason nor create disability for self-correction. The problem, therefore, will again be reviewed anew particularly since the thrusts of this defendant's arguments are somewhat different than those advanced in *Malone* and *Johnson*.

THE DEFENDANT'S ARGUMENTS
ANALYZED OXYMORONIA IS NOT THE
KEY. WHAT IS THE
"ORDINARY COURSE OF PATIENT
TREATMENT" IS THE ULTIMATE
QUESTION.

In *Malone* and *Johnson* the documents sought to be discovered, other than the incident report, were for the most part materials developed *after* the meetings of peer review committees. In the case at bar it is suggested that the reports at issue would have preceded

such meetings. Hence the defendant places great emphasis on the provision in § 8.01-581.17 which grants privilege to "... *all* communications, both oral and written, originating in or *provided* to such committees." Since such reports were, in fact, provided to a committee or committees that come within the protective umbrella of the statute, ergo by inescapable logic they are privileged. And so it would seem to be except for the last provision of this statute which, as in *Malone* and *Johnson*, must still be reckoned with.

*4 Nothing in this section shall be construed as providing any privilege to hospital medical records kept with respect to any patient *in the ordinary course of business of operating a hospital* nor to any facts or information contained in such records nor shall this section preclude or affect discovery of or production of evidence relating to hospitalization or treatment of any patient *in the ordinary course of hospitalization of such patients*.

Unlike the arguments presented in *Malone* and *Johnson*, the defendant at bar urges most earnestly and vigorously that the records or evidence sought were not kept in the ordinary course of the business of operating a hospital nor did they relate to the hospitalization or treatment of a patient. The defendant argues, in other words, that before the exclusion of the last provision of the statute can apply the records or evidence sought must have been medical records kept in the ordinary course of the business of operating a hospital, or they must relate to the ordinary course of hospitalization or treatment of the patient. The defendant's argument continues that incident or risk management review reports, routine questions concerning falls, and interviews with nurses who may know something about a patient's fall are not medical records and are not kept in the ordinary course of the business of operating a hospital nor do they include facts or evidence relating to the hospitalization or treatment of a patient in the ordinary course of the hospitalization of a patient. Therefore, the defendant contends, such records should not be granted the immunity from privilege which was intended by the last sentence of this statute.

This argument, however, begs the question. What are, or should be, records kept in the ordinary course of treating a patient or operating a hospital with respect to patients, that is the ultimate question. The ordinary course of a hospital's function surely includes the prevention of accidents or mishaps to those who have been entrusted to its care. Charting the ordinary course of a patient's treatment would or should require description of events out of the ordinary that relate to a patient's health and well-being. As a health care provider, protection from further illness or injury is an inescapable component of treating a patient.

To suggest that negligent acts or omissions are not a part of a patient's usual treatment and that, therefore, they should not be considered as part and parcel of delivering health care may be oxymoronic, as erudite counsel suggests, but such characterization does not thereby make the argument valid. It is false reasoning as the following analysis should demonstrate. The defendant advances this proposition:

Premise: An accident is not part of a patient's usual treatment.

Conclusion: Therefore any record concerning an accident, it not being usual or in the ordinary course of patient treatment, is privileged.

*5 The premise may indeed be oxymoronic, i.e. self-contradictory. Causing additional injury by accident is certainly contradictory to the notion of usual treatment. But the fallacy in this argument exists in the definition of terms; confusion is created in stating the premise. It is not claimed, nor could it be reasonably suggested, that causing an accident is part of a patient's usual treatment; the contention is that the prevention of accident is, or should be, part of his usual treatment.

Thus the smoke screen of oxymoronia beclouds the issue. The only oxymoronic element in this controversy is the statute itself (oxymoronic meaning a self-contradictory expression such as "cruel kindness"; but being oxymoronic does not settle an argument:

which thought prevails "cruelty" or "kindness"?)

What could be more within the ordinary course of the treatment of a patient who has lost her leg than careful supervision that she not fall on her stump, that she not be left negligently unattended, that she be helped with due care when she shifts from chair to bed or from bed to walker, that her physical therapy be conducted with proper attention. Because a hospital may not choose to call a document a "medical record" or may contend that various reports are not maintained in the ordinary course of a hospital's business or a patient's treatment does not make it so. The ordinary course of a hospital's business or a patient's treatment is the welfare and safety of its patients. And *any* document that relates to that all-embracing concept comes, or should come, within the meaning of the last sentence of the statute in question, oxymoronic as it makes the entire section, except, as this court has indicated in its *Johnson* opinion, the precise proceedings and minutes of the true peer review committees where the free exchange of criticisms should not be hindered.

The argument that all the field work, the incident reports, the questions concerning falls that might precede a peer review meeting, should be free from discovery (which admittedly is granted by the statutory language that "all communications ... provided to such committees" are privileged) must yield to the more compelling mandate of the statute's last sentence. Otherwise, all documents could become privileged simply by the committee requiring their production, or attaching them to the minutes. As stated in *Johnson*: "Almost anything could come within such broad and limitless sweep."

**"ANTICIPATION OF LITIGATION" MUST
BE THE PREDOMINANT REASON OF
CREATING A
DOCUMENT; "NEED" FOR DISCOVERY IS
A RELATIVE CONCEPT.**

If not privileged, then, within the meaning of the contradictory provisions of the statute in question, the defendant urges that nonetheless

they should not be discoverable since they were prepared in anticipation of litigation and are protected by the provisions of Rule 4:1(b)(3) of the Rules of the Supreme Court. Here, again, a litigant can always claim that documents sought were made in "anticipation of litigation." In reality, when an untoward event has occurred to a patient in a hospital causing injury, hospital officials, keenly conscious of the litigious nature of the American character, will undertake an investigation to accumulate *facts* so as to be fully informed if claim is ultimately made. But such information is also sought in pursuit of the hospital's noble objectives of remedying procedures or policies that bring about accidents. The investigation is part of the hospital's program of quality control.

*6 The injured patient, on the other hand, is at such an unfair advantage: one single individual, sick and weakly, pitted against a colossal corporate giant with staff and resources unlimited and personnel schooled in the techniques of avoiding or minimizing losses for claimed negligence. Already incapacitated and perhaps further damaged by the incident and at the complete mercy of the personnel from whom she seeks recovery and relief, she is hardly in position to undertake critical investigation of what happened. It is, after all, the search for truth that is the engagement at hand and if, as defendant's counsel volunteers, "The hospital's position is not motivated by a desire to hide the substantive contents of the reports, ..." then, especially since the incident reports are no longer available, their functional equivalents should be produced. It is, of course, the *factual* presentation of what happened that is discoverable; mental impressions, conclusions or opinions are not included. All factual statements and reports, therefore, that were obtained prior to the claimant's attorney's entrance on the scene (June 7, 1984), which include Documents No. 3, 4, and 5, should be discoverable, as the defendant has not sustained its burden of showing that they were *predominantly* made in anticipation of litigation.

As to Document No. 1 (the Risk Management

Review Report) and Document No. 2 (Routine Questions of Claims Concerning Falls) prepared apparently after June 7, 1984, when the claimant's attorney made his first request (although the claimant's attorney in her brief at p. 8 represents that Document No. 2 was prepared on or about February 1, 1984) the court is satisfied that enough substantial need has been shown to require the production of these documents and that obtaining their substantial equivalent could not only not be obtained "without undue hardship" but could probably not be obtained at all.

Document No. 6, the supplemental statement of Head Nurse Williams, even though prepared after the appearance of the claimant's attorney, should be considered and treated as an addendum to her original statement and therefore should be discoverable.

As to Documents Nos. 7 and 8, statements of employees of the defendant that were obtained after the claimant's formal notice of an official claim on October 18, 1985, neither sufficient need nor hardship has been demonstrated to justify their disclosure. They were prepared, one nearly two years and the other more than two years after the events, and subsequent to the equivalent of instituting suit. Furthermore, they were obviously obtained at the behest of trial counsel and hence are more clearly a part of the attorney's work product. The claimant's need to disclose them is far less substantial; and her ability to obtain the recollection and statements of these witnesses are otherwise available without invasion of trial counsel's files.

CONCLUSION: THE COURT'S FUNCTION
IS TO BALANCE CONFLICTING
INTERESTS AS FAIRLY
AND JUSTLY AS SOCIETY'S CONSCIENCE
MIGHT REQUIRE.

*7 In the final analysis the critical test in resolving the dispute at issue is the fair and just balancing of conflicting interests. What are the benefits to be achieved in refusing disclosure against the harm to the claimant that might thereby result. The records sought

are not the pure peer review proceedings that public policy might justify in keeping secret. They are not the minutes of meetings during which self-criticism and fault-finding within the organization are encouraged. At issue basically are factual reports of several incidents that occurred while a patient of a hospital was undergoing treatment. Disclosing the contents of these reports for discovery purposes-- since the hospital has nothing to hide--should not cause undue harm to the hospital. It should not--and will not--discourage nor frustrate their continuing and self-serving efforts to improve the delivery of health care. On the other hand, a woman whose leg had been amputated has allegedly sustained additional injury to the stump of her severed limb while at the mercy of and under the control of the defendant hospital and its personnel.

The issue of the moment is *not* was the hospital negligent; that is reserved for a later day. The present question involves the search for the truth, for the factual, objective development of what took place. And the ultimate presentation of the evidence that these reports might provoke, it must be noted, is *not* to be submitted before a lay jury--- at least not at this time. No lawsuit has yet been started. We are before a medical review panel, at the request of the defendant, composed of doctors and lawyers who unlike the usual trier of facts are commissioned to seek out those facts. One would assume that the panel would want access to *all* records and documents available. Certainly, the climate before a medical review panel is considerably different than the litigation pit of a trial.

As observed by the author of the annotation in 15 A.L.R.3d 1446 "Scope of Defendant's Duty of Pretrial Discovery in Medical Malpractice Action":

A majority of courts that have spoken on the question have allowed the plaintiff in a medical malpractice action quite liberal discovery, many specifically stating that the difficulty in discovering evidence in a malpractice action makes it all the more important that the plaintiff be allowed to examine the defendant, especially as to those

facts that are solely within his knowledge.

When the input by one party to an issue in dispute has been so handicapped at the outset because of the conditions of health and the location and environment in which the incidents occurred and when measured against the relative investigative strengths of the parties, natural notions of fair play lean heavily toward opening rather than closing doors that might balance the contest. The potential harm to the claimant in refusing the discovery sought far outweighs the benefit to the defendant in maintaining their secrecy.

*8 Considering all the factors herein discussed, therefore, it is the judgment of this court, serving as chairman of this panel, that the claimant's request as to the production of Document Nos. 1-6 should be granted, but denied as to Document Nos. 7 and 8. To such extent the defendant's objections are overruled.

10 Va. Cir. 430, 1988 WL 626030 (Va. Cir. Ct.)

END OF DOCUMENT

Exhibit L

Circuit Court of Virginia, Loudoun County.

Betty Mangano

v.

Michael A. Kavanaugh, M.D. and Loudoun
Hospital Center

LAW # 13357.

January 21, 1993.

*1 On , this Court heard counsels' arguments on Plaintiff's Motion to Compel Discovery. At that time, the Court ruled on all of plaintiff's discovery requests with the exception of those relating to the production of information to which a privilege is asserted pursuant to ' 8.01-581.17, Code of Virginia. Because of the differing rulings among the circuit courts in Virginia regarding the scope of the privilege encompassed by ' 8.01-581.17, the Court took these discovery requests under advisement.

Thomas D. Horne, Judge.

On January 13, 1993, counsel informed the Court that the parties had settled all claims and that the matter would not be going to trial. Although this settlement makes plaintiff's discovery requests moot, the Court, having taken the matter under advisement, believes it would be appropriate and beneficial to advise counsel how it would have ruled on the protection to be granted under ' 8.01-581.17 in medical malpractice cases.

Section 8.01-581.17 of the Virginia Code protects from the discovery process:

"The proceedings, minutes, records, and reports of any medical staff committee, utilization review committee, or other committee as specified in ' 8.01-581.16 , together with all communications, both oral and written, originating in or provided to such committees...."

The committees specified by ' 8.01-581.16 include:

"... such committee, board, group, commission or other entity which functions primarily to review, evaluate, or make recommendations on (i) the duration of patient stays in health care facilities, (ii) the professional services furnished with respect to the medical or dental necessity for such services, (iii) the purpose of promoting the most efficient use of available health care facilities and services, (iv) the adequacy or quality of professional services, (v) the competency and qualifications for professional staff privileges, or (vi) the reasonableness or appropriateness of charges made by or on behalf of health care facilities; provided that such entity has been established pursuant to federal or state law or regulation, or pursuant to Joint Commission on Accreditation of Hospitals requirements, or established and duly constituted by one or more public or licensed private hospitals...."

The differing opinions from the circuit courts regarding ' 8.01-581.17 have come in the interpretation of what constitutes "proceedings, minutes, records, and reports" of the covered committees as well as the intent of the legislature is limiting discovery of "all communications, both oral and written, originating in or provided to such committees". Some courts have taken a broad approach to the privilege granted by ' 8.01-581.17 and have held that communications such as a hospital's policy and procedure manual are privileged from disclosure, as well as hospital "Incident Reports" regarding a particular patient's claim of injury resulting from medical treatment. See e.g., Hedgepeth v. Jesudian, 15 Va.Cir. 352 (1989) (discovery permitted as to guidelines but not as to reports); Leslie v. Alexander, 14 Va.Cir. 127 (1988); Francis v. McEntee, 10 Va.Cir. 126 (1987). On the other hand, some courts have taken a more narrow approach and have held that such communications are not privileged from the discovery process. See e.g., Hedgepeth v. Jesudian, 12 Va.Cir. 221 (1988) (see above); Sawyer v. Childress, 12 Va.Cir. 184 (1988); Benedict v. Community Hospital, 10 Va.Cir. 430 (1988) (medical malpractice review panel); Johnson v. Roanoke Memorial

Hospitals, 9 Va.Cir. 196 (1987); Atkinson v. Thomas, 9 Va.Cir. 21 (1986).

*2 This Court is of the opinion that ' 8.01-581.17 should be read broadly and that protection should be accorded all communications originating from or provided to such medical committees. The Court believes this broad approach is consistent with the objective of the statute which is to encourage health care providers "to adopt policies and procedures which will provide the public with the highest degree of care recognized by the medical and scientific communities at any given time." Francis v. McEntee, 10 Va.Cir. 126, 128 (1987). In enacting ' 8.01-581.17, the Virginia General Assembly recognized that in order to achieve this goal there must be open and frank discussions "where criticisms are actually encouraged and mistakes or deficiencies aggressively exposed..." Johnson v. Roanoke Memorial Hospitals, Inc., 9 Va.Cir. 196, 198 (1987). In addition, the legislature recognized the need for privacy in order to promote the type of vigorous debate where such open exchanges could be made without fear of public disclosure. Indeed, without protection from disclosure such discussions would probably be meaningless and without substance. Thus, it is the Court's opinion that the intent of the legislator's in enacting ' 8.01-581.17 was to afford the utmost protection to such communications and thus make them privileged from the discovery process.

The Plaintiff has not at this stage of the proceedings demonstrated "good cause arising from extraordinary circumstances" which would justify a disclosure of those matters to which the privilege is asserted. Similarly, the Court need not at this time address the issue of relevancy of specific discovery requests. Pullen & McCoy v. Nickens, 226 Va. 342 (1983).

Addressing each of plaintiff's discovery requests to which defendants claimed a privilege under ' 8.01-518.17, the Court would have ruled that as to certain matters requested the privilege has been properly asserted ' 8.01-581.17 and thus would have

denied discovery as to such privileged matters. The Court's comments on each request is as follows:

"Interrogatory 9. State completely and in detail your procedure for inquiry, investigation or review of complaints or reports of potential or actual malpractice by either staff physicians or physicians granted privileges in the hospital; and if such procedure has been modified or amended since August, 1986, state precisely the former procedure and the modified or amended procedure, giving the effective date of modification or amendment."

This request essentially calls for the production of the hospital's policy and procedure manual detailing how medical malpractice claims are investigated and handled by the hospital. As noted above, the circuit courts are split on the particular issue of the discovery of such internal manuals. Those courts holding that such manuals are discoverable rationalize that they are merely the end result of confidential committee proceedings and, as such, do not merit the same concern for protection from public scrutiny. See e.g., Johnson v. Roanoke Memorial Hospitals, *supra* at 199 (the "depersonalized manuals of procedure which have been shorn of individualized criticisms" are not protected from discovery).

*3 This Court believes, however, that such policy manuals are encompassed by the privilege under ' 8.01-581.17. Such manuals, while they may be the end-product of confidential proceedings, are still communications originating from a committee whose function it is to review, evaluate, or make recommendations on health care facilities and services. As such, they should be given the protection accorded other confidential communications.

"Interrogatory 10. Identify separately ... all communication, written and oral, from you to either Michael A. Kavanagh, M.D. or Paul L. Weiner, M.D. or to you from either of them relating to or in any way connected with the possibility of a claim or the actual claim by

Plaintiff that is the subject of this litigation; and identify fully all persons who were present when each such communication was made."

The Court believes this request clearly falls within the scope of the privilege encompassed by ' 8.01-581.17 as communications originating from or provided to a committee (formed under ' 8.01-581.16) whose function it is to review "the adequacy or quality of professional services." As such, these communications are protected from discovery.

This request may also be seeking the production of the hospital's "Incident Report" (or its functional equivalent) as it relates to Plaintiff's claim against defendants. The courts which have held that these reports are discoverable have rationalized that they fall within the exception of ' 8.01- 581.17 -- that is, they are "... records kept with respect to any patient in the ordinary course of business of operating a hospital..." See e.g., *Benedict v. Community Hospital*, supra. However, this Court believes that such communications are clearly part of the confidential process envisioned by ' 8.01-581.17 and must be protected from disclosure. Indeed, a hospital's review and evaluation of a malpractice claim is exactly the type of communication most deserving of frank and open discussion without fear of public disclosure. To the extent that plaintiff's request sought such communications, it would have been denied.

"Interrogatory 18. State fully and in detail each and every inquiry, investigation and/or review of either Michael A. Kavanagh, M.D. or Paul L. Weiner, M.D., including without limitation all relevant dates, circumstances, findings, recommendations, reprimands or other actions."

The Court believes that this request also clearly falls within the scope of the privilege encompassed by ' 8.01-581.17 as communications originating from or provided to a committee (formed under ' 8.01-581.16) whose function it is to review "the adequacy or quality of professional services," as well as "the competency and qualifications for

professional staff privileges." As such, these communications are protected from discovery.

*4 "Interrogatory 19. Identify each and every person by name, employer, profession, address and telephone number that was involved in any way with the actual claim or possible claim by Plaintiff ... or any inquiry, investigation or review referred to in Interrogatory 18 above; and for each person, state their role and the relevant events with which they were connected."

"Interrogatory 20. Identify separately ... each and every document produced or generated in connection with any of the events or persons referred to in Interrogatories 17, 18 and 19 above; and for each such document, identify fully the person who has possession, custody or control thereof."

To the extent that these requests seek underlying documentation to interrogatories previously ruled privileged, the Court would rule that these requests would also be denied.

30 Va. Cir. 66, 1993 WL 945920 (Va. Cir. Ct.)

END OF DOCUMENT

Exhibit M

S.B. 153
HEALTH CARE REFORM II
HOUSE
~~Senate Floor Amendments~~

FEBRUARY 3 1994 GS

Neil Brown

proposes the following amendments:

26-25-3. Information considered privileged communications.

All information, including information required for the medical and health section of birth certificates as determined by the state registrar of vital records appointed under Chapter 2, in interviews, reports, statements, memoranda, or other data furnished by reason of this chapter, and any findings or conclusions resulting from those studies are privileged communications and

~~[may not be used or received]~~ ARE NOT SUBJECT TO DISCOVERY, USE, OR RECEIPT IN

evidence in any legal proceeding of any kind or character.

It is, the intention of the legislature that the broadest scope of privilege, ~~not~~ including ~~not~~ being ~~at~~ subject to discovery, has been the intention of the legislature, is not permitting the materials described above to be used or received in evidence in any legal proceeding of any kind or character.

*Final Come
 Brown vs IHC*

Exhibit N

FILED DISTRICT COURT
Third Judicial District

OCT 28 2003

By SALT LAKE COUNTY
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

IONA ADAM, et al.	:	MINUTE ENTRY DECISION AND
		ORDER
Plaintiff,	:	
		CASE NO. 020910871
vs.	:	
SALT LAKE REGIONAL MEDICAL		
CENTER, et al.	:	
Defendant.	:	

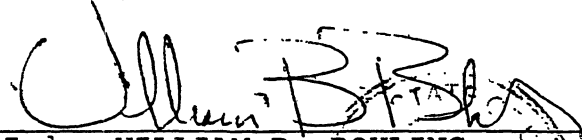
Before the Court is Plaintiff's Second Motion to Compel, pursuant to Rule 4-501. Having considered the Motion and the Memoranda submitted by the parties, the Court enters the following decision:

The present Motion seeks to compel Defendants' production of incident reports requested from the Plaintiffs. In denying the request, the Defendant asserted that "if such documents exist, they are not discoverable and are privileged pursuant to § 26-25-3, Utah Code Ann. (1996)." This statutory provision, otherwise known as the care review privilege, "privileges only documents prepared specifically to be submitted for review purposes" and cannot be read so broadly as extending to all "documents that might or could be used in the review process." Benson ex rel. Benson v. IHC

Hospitals, 866 P.2d 537, 540 (Utah 1993). Utah law is clear that the party invoking the privilege must produce evidence establishing its applicability to the documents in question. See id., at 538.

Accordingly, Plaintiff's Motion to Compel is hereby GRANTED. Defendant is hereby ordered to produce either the incident reports as requested, or evidence that the incident reports were created "specifically to be submitted for review purposes." This constitutes the final order of the Court on the matters referenced herein. No further order is required.

DATED this 28 day of October, 2003.


Judge WILLIAM B. BOHLING
District Court Judge

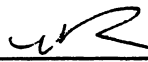
CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 020910871 by the method and on the date specified.

METHOD NAME

Mail	DOUGLAS G MORTENSEN ATTORNEY PLA 648 E 100 S SALT LAKE CITY, UT 84102
Mail	DAVID W. SLAGLE ATTORNEY DEF 10 EXCHANGE PLACE, 11TH FLOOR SLC UT 84145

Dated this 28 day of Oct, 2003.



Deputy Court Clerk