



# Harrison v. Munson Healthcare, Inc., 869 N.W.2d 613 (Mich. 2015)

Topics Covered: Peer Review

## **Outcome: Favorable**

### **Issue**

One of the issues in this case was whether a hospital was required to acknowledge, for purposes of its defense in a medical liability suit, the findings set forth in documents protected by the peer review privilege.

### **AMA Interest**

The AMA believes that all documents submitted for purposes of peer review should be protected from legal discovery.

### **Case Summary**

Jeanne Harrison underwent surgery at Munson Hospital to remove a cancerous thyroid gland. Following the surgery, she discovered a quarter-sized burn on her forearm. She asked a Munson representative to explain the cause of her burn. The representative told her that an electrocautery device called a Bovie had caused the wound, but the representative offered no additional details. She found the Munson explanation unsatisfactory.

Harrison sued Munson Healthcare, the owner of Munson Hospital, for medical malpractice. The complaint included a count based on *res ipsa loquitur*. Munson Hospital denied responsibility for the Bovie and claimed that no one in the operating room could remember the circumstances surrounding the burn.

Following various preliminary motions, Harrison undertook extensive discovery, including interrogatories, requests for admissions, and depositions to establish the underlying facts. The case sent to trial before a jury. On the second day of testimony, it came to light for the first time that Munson had prepared an incident report, which indicated what had happened. Munson stated that it had not produced the incident report in discovery because it was a privileged document. The judge adjourned the trial so he could examine the incident report and ascertain whether it was, in fact, privileged.

On examining the incident report, the judge declared a mistrial. The trial court then conducted an evidentiary hearing on whether the incident report qualified as a peer review protected document. One month after completion of the evidentiary hearing on the peer review privilege, the trial court issued a lengthy ruling that the incident report and related documents were, indeed, privileged. The court further determined that the Munson trial attorney had violated the

rules of professional conduct applicable to attorneys by maintaining a defense that was inconsistent with known but undisclosed facts.

The court assessed Munson and its trial attorney \$53,958.69, jointly and severally, in sanctions. This represented a portion of Harrison's expenses, which would not have been required if the hospital had seasonably disclosed a defense consistent with the incident report.

The parties filed post-hearing motions, including a motion by Munson and its trial attorney that the sanctions were improper and a motion by Harrison that the sanctions were insufficient. Both post-hearing motions were denied and both sides appealed to the Michigan Court of Appeals.

The Court of Appeals found that the first page of the incident report, which consisted of hand-written operating room observations, were not subject to a peer review privilege because they did not reflect a review process. The court also held that Munson and its trial attorney were obligated to consider the information contained in that report when responding to discovery. It then found it within the discretion of the trial court to sanction Munson and its attorney. However, the Court of Appeals found that the trial court had erred by imposing liability against Munson and its trial attorney on a joint and several basis. Finally, the Court of Appeals summarily denied Harrison's cross-appeal for sanctions in an amount greater than the trial court award.

Munson and its attorney filed separate applications to the Michigan Supreme Court, seeking discretionary review of the Court of Appeals decision. Subsequent to the filing of the applications for review, the Michigan Supreme Court held, in *Krusac v. Covenant Medical Center*, that the Harrison holding was incorrect.

On September 30, 2015, the Michigan Supreme Court vacated the Court of Appeals decision and remanded the case to the trial court for reconsideration of the sanctions award.

### **Litigation Center Involvement**

The Litigation Center, along with the Michigan State Medical Society, was to file an *amicus* brief urging the Michigan Supreme Court to grant a petition for leave to appeal. In light of the *Krusac* decision, however, such a brief was unnecessary.