

ARE YOUR INCIDENT REPORTS PROTECTED?

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In November 2004, the Michigan Court of Appeals settled the long-disputed argument over whether incident reports are discoverable in a negligence/malpractice case.

Maviglia v. West Bloomfield Nursing & Convalescent Center, Inc., (No. 248796, rel'd 11/09/04) (unpublished), was a personal injury action in which the plaintiff contended that the defendants were liable for money damages for injuries sustained by the plaintiff for two falls on the premises of the defendants' nursing and convalescent center.

During the course of discovery, the plaintiff filed a request to produce for any incident reports prepared by the defendants with regard to the residency of the plaintiff. Defendants objected on the ground that any such reports were not subject to subpoena pursuant to the Michigan Public Health Code and Michigan Compiled Laws Annotated, based on the idea that such reports are made by committees relative to morbidity, mortality, and resident care, and are thus privileged under Michigan law. Ultimately, the court held that federal law applied, and the records were ordered produced.

On appeal, the court reviewed MCL 333.20175(8) and MCL 333.21515, both of which assert that the records, data, and knowledge collected by committees assigned a review function are ineligible as public records and not available for court subpoena. The court cited to *In re Lieberman*, 250 Mich App 381, 386 (2002), which articulated that the language of § 21515 was clear, and demonstrated a "comprehensive ban on the disclosure of any information collected by, or records of the proceedings of, committees assigned a professional review function in hospitals and health facilities."

The court also analyzed the plaintiff's citation to *Centennial Healthcare Mgt Corp v Dep't of Consumer & Industry Services*, 254 Mich App 275, 290 (2002), for the proposition that incident reports must be produced notwithstanding statutory privileges. In *Centennial Healthcare*, the Michigan Department of Consumer & Industry Services was the entity seeking production of the incident report so that it could conduct an annual survey of the subject health care center. The court found that the state should have access to the incident reports with respect to licensing and the issuance of provider agreements. Specifically, the court held that confidentiality is essential to the functioning of the process and to the improved healthcare and treatment of patients, and that "to subject the discussion and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations."

However, the Maviglia court ultimately determined that the plaintiff's reliance on *Centennial*

Healthcare was misplaced in the realm of *private litigation*. Rather, the conditions propounded by the court in *Centennial Healthcare* were reserved for cases where a *state agency* requires the collection of accident and incident information, and not where the party seeking disclosure is a *private litigant*. In such cases, the state may be in the best position to show the “exceptional necessity” needed for the production of such records, whereas a private litigant could not. The court further determined that MCL 333.20175(8) and MCL 333.21515 clearly bar the release of information collected for committees in their function of professional review.

In doing so, the court of appeals acknowledged the plain meaning of the statutes involving incident reports and effectively limited the scope of the “exception” created in *Centennial Healthcare*. The decision effectively supports the public policy reasoning behind the peer review process and allows facilities to continue such practices without fear of disclosure during suit in the future.

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