IN THE SUPREME COURT OF THE STATE OF UTAH

LISA W. ALLRED and MARLIN P. ALLRED, Plaintiffs/Appellees, v. RONALD J. SAUNDERS, M.D.; RONALD J. SAUNDERS, M.D.; PC, Defendants/Appellants, and IHC HEALTH SERVICES, INC., dba AMERICAN FORK HOSPITAL, Appellant.	Case No. 20120985 Dist. Ct. No. 100103761

BRIEF OF AMICI CURIAE

David C. Gessel (5694)
Utah Hospital Association
2180 South 1300 East, Suite 440
Salt Lake City, UT 84106

Mark A. Brinton (9398)
Utah Medical Association
310 East 4500 South, Suite 500
Salt Lake City, UT 84107-4250

Tawni J. Anderson (8133)
Hall Prangle & Schoonveld
111 E. Broadway, Suite 700
Salt Lake City, UT 84111

Attorneys for Utah Hospital Association, Utah Medical Association, American Medical Association, and Various Utah Hospitals

OTHER COUNSEL

Robert D. Strieper
Strieper Law Firm
2366 Logan Way
Salt Lake City, UT 84108

Attorney for Appellees Lisa Allred and Marlin Allred

Rodney R. Parker
Brian P. Miller
Derek Williams
Snow Christensen & Martineau
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, UT 84145-5000

Attorneys for IHC Health Services, Inc.
dba American Fork Hospital

Curtis Drake
Snell & Wilmer
15 West South Temple, Suite 1200
Salt Lake City, UT 84101

Attorney for Defendant Ronald J. Saunders, MD

Shawn McGarry
Kipp & Christian
10 Exchange Place, Suite 1100
Salt Lake City, UT 84111

Attorney for Defendant Steven B. Cherrington

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST AND IDENTIFICATION OF AMICI CURIAE

On October 8, 2013 this Court granted leave for the Utah Hospital Association, Utah Medical Association, and various Utah hospitals[1] to appear as amici curiae in this important case. After their petition was filed, the American Medical Association joined in this brief as an additional amicus.

Amici curiae represent the interests of the major institutional health care providers in the State of Utah as well as the interests of individual physicians throughout the State of Utah and throughout the United States. They file this brief in support of the positions advanced on appeal by appellants IHC Health Services, Inc. d/b/a American Fork Hospital; Ronald J. Saunders, M.D.; and Ronald J. Saunders, M.D., P.C.

The Utah Hospital Association ("UHA") is the trade association representing virtually all Utah hospitals, urban and rural and acute and specialty. UHA represents Utah's hospitals in all advocacy arenas and its mission is to be Utah's most influential, trusted, and respected leader in hospital and health care policy and advocacy, as well as a trusted source for information and knowledge on health care issues.

[1] These hospitals include St. Mark's Hospital in Salt Lake County, Ogden Regional Medical Center in Weber County, and Timpanogos Regional Medical Center in Utah County.

The Utah Medical Association ("UMA") is the voice of medicine in Utah, representing medical doctors and medical students throughout the state. Concerned with the environment in which medicine is practiced, UMA is actively involved in Utah's healthcare, legislative, regulatory, environmental, educational, and business arenas. UMA is comprised of physicians who care for, and about, the people of Utah.

The American Medical Association ("AMA") is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups, seated in the AMA's House of Delegates, substantially all US physicians, residents, and medical students are represented in the AMA's policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. Its members practice in every state, including Utah, and in every specialty.

The AMA appears herein on its own behalf and as a representative of the Litigation Center of the AMA and the State Medical Societies ("Litigation Center"). The Litigation Center is a coalition of the AMA and the medical societies of all 50 states, plus the District of Columbia. Its purpose is to concentrate legal resources in filing lawsuits or amicus curiae briefs in cases of general interest to physicians, in accordance with the policies of the AMA.

In this case, the trial court ruled that Dr. Saunders' credentialing file is not privileged and is subject to discovery by the Allreds, and also ruled that an affidavit submitted to establish the privileged nature of various incident reports lacked specificity sufficient to establish the privilege and was therefore subject to in camera review. In ruling on Dr. Saunders' credentialing file, the trial court declined to apply the privilege contained in Utah Rule of Civil Procedure 26(1)(b) and instead incorrectly concluded that rule 26 did not apply, and that section 26-25-3 of the Utah Code affords a privilege only to documents relating specifically "to the condition and treatment of [a] person".[2]

The more significant question, as reflected in the recent amendment to rule 26(1)(b), as well as in the statutory peer review and care review privileges and our appellate courts' application of those privileges, is whether the materials sought were *prepared specifically for* the purposes of quality review, whether that be credentialing, peer review, or care review. Although that question is not the sole determinant of whether a privilege applies, it is a critical threshold consideration in the analysis of these privilege issues. And that question makes sense--because not all information necessary to fully evaluate the quality of care given by physicians and hospitals will relate to the care given to specific patients.

[2] R. 891-92.

The trial court's unduly restrictive interpretation of Utah law effectively nullifies the privileged nature and the confidentiality of the physician credentialing process, which is meant to improve the quality of patient care and reduce morbidity and mortality in all Utah hospitals. If allowed to stand, the trial court's ruling will have a chilling effect on the willingness of Utah hospital administrators, Utah physicians, and other Utah healthcare providers to participate in the hospital staff physician credentialing process and will impede every Utah hospital's ability to conduct the full, frank, and candid evaluation of staff physician applicants that is necessary to continually improve patient care for all Utah citizens.

Amici curiae, by virtue of representing nearly all health care providers in Utah as well as physicians throughout the United States, and in accordance with their goal of providing the highest quality of care to its citizens, have a significant interest in having this Court confirm that the trial court's ruling is inconsistent with both Utah law and the numerous policy considerations underlying these longstanding protections that are essential to effective and well-informed quality review and improvement. In addition, Amici have an interest in clarifying, for the benefit of all litigants and the trial courts, what degree of specificity is required for a *Cannon* affidavit to show that incident reports are privileged and not subject to discovery.

JURISDICTION

This Court has jurisdiction pursuant to Utah Code Annotated section 78A-3-102(3).

STATEMENT OF ISSUES PRESENTED, STANDARD OF REVIEW, AND STATEMENT OF FACTS

Amici curiae adopt the statement of issues presented and standards of review, along with the statement of the case and statement of facts, submitted by appellants IHC Health Services, Inc. d/b/a American Fork Hospital; Ronald J. Saunders, M.D.; and Ronald J. Saunders, M.D., P.C.

ARGUMENT

I. THE PORTIONS OF DR. SAUNDERS' CREDENTIALING FILE THAT WERE CREATED SPECIFICALLY FOR THE PURPOSE OF PEER AND CARE REVIEW ARE PRIVILEGED AND PROTECTED FROM DISCOVERY BY RULE 26 AS WELL AS EXISTING STATUTORY AND CASE LAW

Dr. Saunders' credentialing file is protected from discovery by the 2012 amendment to rule 26 of the Utah Rules of Civil Procedure, which recognizes and incorporates the privileges long granted to "all information in any form provided during and created specifically as part of" peer review, care review, and quality review.[3]

[3] Utah R. Civ. P. 26(b)(1).

A. History and Purpose of Amended Rule 26 of the Utah Rules of Civil Procedure

The 2012 amendment to rule 26 was brought about through the joint efforts of amici Utah Hospital Association and Utah Medical Association, after discussion with the plaintiffs' bar as represented by the Utah Justice Association. Those groups, and the legislature in amending rule 26, intended to import both the substance of the statutory privileges as well as all of the law interpreting and applying those statutory privileges, directly into the rule 26 privilege.

This unified effort was meant to preserve the status quo of then-existing privileges; as Senator Valentine noted when the bill to amend rule 26 was debated, the legislature intended "to ensure the confidentiality of peer review, care review, and quality assurance processes", which are "important processes because they help us make our system safer".[4] In doing so, however, the legislature was neither expanding nor contracting the scope of the statutory privileges and the case law interpreting them; instead, the amendment was intended to "maintain[ ] the status quo, with no change either one way or the other."[5]

To ensure that this purpose was plain and clear, the legislature appended a note to the amended rule 26, stating in full:

---

[4] Senate Floor Debates on SJR 15 (2012 General Session), Day 38, at 1:51:31-1:53:00.
[5] *Id.*

(1) The amended language in paragraph (b)(1) is intended to incorporate long-standing protections against discovery and admission into evidence of privileged matters connected to medical care review and peer review into the Utah Rules of Civil Procedure. These privileges, found in both Utah common law and statute, include Sections 26-25-3, 58-13-4, and 58-13-5, UCA, 1953. The language is intended to ensure the confidentiality of peer review, care review, and quality assurance processes and to ensure that the privilege is limited only to documents and information created specifically as part of the processes. It does not extend to knowledge gained or documents created outside or independent of the processes. The language is not intended to limit the court's existing ability, if it chooses, to review contested documents in camera in order to determine whether the documents fall within the privilege. The language is not intended to alter any existing law, rule, or regulation relating to the confidentiality, admissibility, or disclosure of proceedings before the Utah Division of Occupational and Professional Licensing. The Legislature intends that these privileges apply to all pending and future proceedings governed by court rules, including administrative proceedings regarding licensing and reimbursement.

(2) The Legislature does not intend that the amendments to this rule be construed to change or alter a final order concerning discovery matters entered on or before the effective date of this amendment.

(3) The Legislature intends to give the greatest effect to its amendment, as legally permissible, in matters that are pending on or may arise after the effective date of this amendment, without regard to when the case was filed.[6]

---

[6] Utah R. Civ. P. 26, Legislative Note, March 6, 2012.

Notably, this amendment to rule 26 was explicitly intended to be retroactive in order "to give the greatest effect" to the privilege. The legislature, as well as the Amici and other groups involved in the amendment's passage, wanted an expansive application of these already-existing privileges in recognition of the privileges' vital role in protecting health care.

Evaluating physicians' credentials, peer review, and care review are processes that are critical to the operation of many clinics, hospitals, and other medical centers. The goal of these review meetings has always been to improve patient care and to improve quality care processes; these reviews reduce the chance that adverse outcomes will recur, and help all to learn from challenges that others have experienced. Moreover, accrediting and review organizations often *require* institutions such as hospitals to conduct these meetings.

Peer and care review panels, as well as committees that evaluate physicians' credentials, work only because participants are assured that anything they say will be kept confidential. Without that assurance, key participants might be reluctant to participate candidly, fearing their words could be used against them. The organizations that conduct the meetings rely on the candor of those who participated in the events being reviewed.

B. The Privileges As Applied To Dr. Saunders' Credentialing File

The trial court incorrectly declined to afford the protections of rule 26 to Dr. Saunders' credentialing file, and also incorrectly concluded that because at least some of the credentialing file materials related to Dr. Saunders' competence and qualifications instead of directly regarding the care and treatment of a specific patient, the file was not protected from discovery. But as shown by the amended rule 26, which incorporated the statutory peer and care review privileges along with multiple decisions from this Court and the court of appeals applying those statutory privileges, the relevant inquiry is whether the information sought was created for the purpose of peer or care review to improve the quality of health care rendered to patients.

Under the plain language of rule 26(b)(1), determining the applicability of the privileges is a functional inquiry; the privilege applies to "all information in any form" used for review purposes so long as it was "provided during and created specifically as part of" "peer review, care review, or quality assurance processes". Instead of engaging in the analysis called for by rule 26 and the statutory and case law it incorporated, the trial court mistakenly focused on the subject matter of the credentialing materials--but its inquiry should have ended

with a determination that the files were in fact created for and submitted to a review process.[7]

But even assuming the propriety of the trial court's conclusion that the amended rule 26 "does not create an evidentiary privilege, despite wording that could potentially be read to the contrary",[8] Dr. Saunders' credentialing file is also protected from discovery by section 26-25-3 of the Utah Code. As cogently discussed in Appellants' opening brief,[9] over the course of several decades the Utah Legislature has endeavored to develop and refine a comprehensive statutory scheme in the form of care review and peer review privileges and immunities.[10]

---

[7] The trial court's interpretation is also contrary to fundamental rules of statutory interpretation. Only subsection (g) of section 26-25-1, a catch-all provision, includes the qualifier that the information must "relat[e] to the condition and treatment of any person." The other enumerated types of information (interviews, reports, statements, memoranda, etc.) do not contain such a qualifier and yet they still fall under the privilege--regardless of whether they relate to the condition and treatment of a person--so long as they were created specifically for purposes of review. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 156 (2012) ("*Material within an indented subpart relates only to that subpart*" while "material contained in an unindented text relates to all the following or preceding indented subparts" (emphasis added). The phrase "relating to the condition or treatment of any person" applies *only* to subsection (g), not to the other subparts of section 26-25-1, and review information can be privileged under the statute even if its subject matter is not related to any particular patient's care.

[8] R. 893. As Appellants observe in their brief on appeal, the trial court's reasoning on this point is "not entirely clear." (Br. of Appellants at 13.)

[9] Br. of Appellants at 10-12.

[10] *See* Utah Code Ann. §§ 26-25-1 *et seq.*, 58-13-4, 58-13-5.

These statutes are meant to encourage frank, open, and candid peer review of a physician's competence and other matters relating to his or her ability to deliver quality health care and services to patients in hospital and other institutional settings.[11] To carry out and further this laudable purpose, the statutes prohibit the "discovery, use, or receipt in evidence in any legal proceeding of any kind or character" of "all information, interviews, reports, statements, memoranda, or other data furnished" to any hospital peer review committee involved in any physician review process as well as "any findings or conclusions" reached as a result of that process.[12]

As with rule 26, the statutory peer and care review privileges have always been extended to information that was "*prepared specifically* to be submitted for review purposes".[13] In contrast, "documents that *might or could* be used in the review process" are not confidential and protected by statute.[14] For example, in *Wilson* this Court considered whether neonatal mortality statistics were privileged and thereby shielded from discovery. Because the statistics were

---

[11] *Wilson v. IHC Hosps., Inc.*, 2012 UT 43, ¶ 115; *Archuleta v. St. Mark's Hosp.*, 2009 UT 36, ¶¶10, 14; *Benson v. IHC Hosps., Inc.*, 866 P.2d 537, 539 (Utah 1993); *Rees v. Intermountain Health Care, Inc.*, 808 P.2d 1069, 1078 (Utah 1991); *Cannon v. Salt Lake Med. Ctr*, 2005 UT App 352, ¶22.

[12] Utah Code Ann. § 26-25-3.

[13] *Wilson v. IHC Hosps., Inc.*, 2012 UT 43, ¶ 115, 289 P.3d 369 (quoting *Benson*, 866 P.2d at 540 (emphasis in original)).

[14] *Id.* (Emphasis in original).

"prepared specifically for review purposes," this Court held that "they qualify for the care review privilege."[15]

Similarly, in *Archuleta*, this Court addressed the privileged nature and protection from discovery of physician credentialing files under section 26-25-3.[16] While the majority and the two dissenting justices disagreed about whether the "plain language" of section 58-13-5(7) conferred immunity on hospitals against claims for negligent credentialing, the Court was unanimous in its conclusion that under section 26-25-3, all information provided to a peer review committee was "deemed to be a privileged communication" that "is not subject to discovery, use, or receipt in evidence in any legal proceeding of any kind or character."[17] Accordingly, although recognizing a cause of action for negligent credentialing, this Court clarified that a plaintiff would need to look elsewhere and obtain "independently available information" to establish his/her claim for negligent credentialing.[18]

---

[15] *Wilson*, 2012 UT 43, ¶ 119 (quoting *Benson*, 866 P.2d at 540 (internal quotations omitted) and citing *Cannon*, 2005 UT App 352, ¶ 21 n. 7); *see also* Utah Code Ann. § 26-25-3 (stating "all information" furnished for purposes of peer-, care-, and quality review is privileged and "not subject to discovery"); Utah R. Civ. P. 26(b)(1) (protecting from discovery "all information in any form provided during and created specifically as part of . . . peer review, care review, or quality assurance processes").

[16] 2010 UT 36.

[17] *Archuleta*, 2010 UT 36, ¶32; ¶10, n.1.

[18] *Id.* at ¶10, n.1.

Allowing the trial court's restrictive interpretation of the privilege to stand would virtually abolish the protections historically afforded the vital information needed to fully assess physicians' and hospitals' provision of care to Utah's citizens. And as a practical matter, the subject-matter-based inquiry used by the trial court would be ineffective at fulfilling the purpose of the privilege, because only some of the information needed to fully assess and review health care will come from information relating directly to the care and treatment of a patient. Of necessity, some of the information relied on by review committees relates primarily to a *physician's* knowledge, training, experience, evaluations, and outcomes. And yet without those non-patient-specific materials, hospitals would be unable to effectively assess the full measure of a physician's competence and fitness to practice at a given facility and perform specified procedures.

In sum, the trial court's interpretation of what evidence is protected from discovery is contrary to the legislature's unambiguous and repeatedly-expressed intent to protect the confidentiality of *all* evidence that was created specifically for purposes of review, in order to better analyze and improve the quality of health care delivered to Utah's citizens. The trial court should have concluded that rule 26 protected Dr. Saunders' credentialing file from discovery. In the alternative, even accepting the trial court's erroneous interpretation of the effect

of rule 26, it should have concluded that the credentialing file was privileged under section 26-25-3.

II. THE TRIAL COURT'S RULING IS INIMICAL TO THE GOAL OF CONTINUALLY EVALUATING AND IMPROVING PATIENT CARE IN UTAH

Credentialing, peer review, and care review are processes undertaken by every Utah hospital for the purpose of obtaining and evaluating all the information necessary to assess an individual health care provider's competence to deliver quality health care services, with the overall goal of continually working to improve patient care. There are two vital components to these review processes. First, competent hospital staff physicians must be willing to sit on credentialing committees and engage in this peer review process. Second, the participating physicians must be willing to engage in an open exchange of information concerning the qualifications of the physicians seeking credentialing.

The confidentiality granted to the peer review credentialing process by the Legislature serves these dual purposes and encourages credentialing committee members to engage in a frank, open, and candid evaluation of physician applicant's competence without fear of disclosure or reprisal.[19] As this Court expressly recognized in *Benson*, the aim of the peer review privilege is to

---

[19] *See generally Archuleta v. St. Mark's Hosp.*, 2010 UT 36, ¶¶10, 14; *Rees v. Intermountain Health Care, Inc.*, 808 P.2d 1069, 1078 (Utah 1991); *Cannon v. Salt Lake Med. Ctr.*, 121 P.3d 74, 80 (Utah 2005).

> allow a hospital board, committee, department, medical staff, or professional organization of health care providers to freely evaluate their colleagues' professional skills, ethics, and character as part of [a] review. The policy behind the [peer review] privilege is similar that of the care review privilege: to protect health care providers who furnish information regarding the quality of health care rendered by any individual or facility, pursuant to such a review.[20]

Without a guarantee of confidentiality, hospitals would be hard-pressed to find competent physicians willing to serve this important function. Indeed, disincentives are already abound; physicians have often been deterred from participating in review because of "an aversion to criticizing one's peers, loss of pay for time spent participating, or the fear of reprisal in the form of loss of patient referrals".[21] "Most importantly . . . the fear of possible legal repercussions from adverse decisions, particularly the discovery and liability implications associated with lawsuits, tends to chill frank and effective participation in the process."[22]

Perhaps the only tool in the Legislature's arsenal that can effectively remove these disincentives and allay prospective participants' concerns is the shield of confidentiality. The short-term gains realized by parties seeking to weaken or even dismantle altogether these protections are far outweighed by the

---

[20] *Benson*, 866 P.2d at 539-40 (internal quotation marks omitted).

[21] George E. Newton II, Maintaining The Balance: Reconciling The Social And Judicial Costs Of Medical Peer Review Protection, 52 Ala. L. Rev. 723, 727 (2001).

[22] *Id.*

long-term detrimental effects that will plague the healthcare system in their absence. Indeed, it "seems fairly predictable that once hospitals and physicians realize that heretofore privileged communications are now discoverable, meaningful peer review would soon become a thing of the past."[23]

If review proceedings lose their privilege and become subject to discovery by the plaintiffs' bar, the "chilling effect on full, fair, frank, 'on the record' peer review would seem to be obvious."[24] Ultimately, "physicians cannot be expected to participate candidly in peer review or error reporting activities if their identities, comments, records and recommendations are not afforded strict protection."[25] As succinctly stated by the Florida Supreme Court, "The policy of encouraging full candor in peer review proceedings is advanced only if all documents considered" during the review or credentialing process "are protected. . . . Physicians who fear that information provided in an application might someday be used against them by a third party will be reluctant to fully detail matters that the committee should consider."[26]

---

[23] Rodney H. Lawson, Charles Josef Blanchard, The Peer Review and Self-Evaluation Privileges and Immunities – Has The Pendulum Swung Too Far?, 3 Sedona Conf. J. 123, 130 (2002).

[24] *Id.*

[25] Kenneth R. Kohlberg, The Medical Peer Review Privilege: A Linchpin for Patient Safety Measures, 86 Mass. L. Rev. 157, 162 (2002).

[26] *Cruger v. Love*, 599 So.2d 111, 113-14 (Fla. 1992); *see also McGee v. Bruce Hosp. System*, 312 S.C. 58, 61-62 (S.C. 1993) (the overriding policy of confidentiality is to encourage self-evaluation and "promote complete candor and open discussion among

Undeniably, the goal of improved patient care is best served by encouraging participation by qualified physicians and fostering an atmosphere of professional candor during peer review, care review, and credentialing proceedings – something that is far less likely to occur if the confidentiality of the processes is weakened, or under the trial court's ruling, removed altogether.

III. THE *CANNON* STANDARD DOES NOT PROVIDE SUFFICIENT GUIDANCE ON THE LEVEL OF SPECIFICITY REQUIRED TO EFFECTIVELY ASSERT THE CARE-REVIEW PRIVILEGE

The trial court determined that Appellants successfully made a prima facie showing that the incident reports at issue satisfied the criteria of sections 26-25-1 and 26-25-3, but nonetheless held that the hospital's affidavit lacked the specificity required under *Cannon v. Salt Lake Regional Med. Ctr.*, 2005 UT App 352, to invoke the privilege without the necessity of in camera review.[27] That requisite specificity, according to the appellate court, includes "descriptive, detailed, and helpful information about the reports for which the privilege is asserted," including a sufficient "summary" of "the nature of the incident

---

participants"); *Stratienko v. Chattanooga-Hamilton County Hosp. Auth.*, 226 S.W.3d 280, 283 (Tenn. 2007) (confidentiality is "essential to [peer review] process" because it encourages physician participants to "candidly, conscientiously, and objectively evaluate and review their peers' professional conduct, competence and ability to practice medicine"); *In re McClusky v. Krothapalli*, 762 So.2d 836, 839 (Ala. 2000) (same).

[27] R. 890.

reports, i.e., what they are, what information they contain, how they are used, [and] who exactly gets to see them, etc."[28]

While *Cannon* may seem to provide a workable standard that must be met to avoid an in-camera review, the level of specificity required under that standard is proving difficult to define in practice. As illustrated by the affidavit and ruling of the trial court in this case, both litigants and trial courts are struggling to find a common understanding of what level of specificity is required to properly invoke the privilege without the necessity of an in camera review--which, although less violative of the privilege than full disclosure to the plaintiff, is nonetheless an intrusion on the privilege.

As discussed by Appellants, Ms. Minaga-Miya's Affidavit provided a descriptive and detailed summary of what the privileged documents are, what information they contain, how they are used by the hospital, and who exactly gets to see them.[29] The Affidavit gave even more detail about the content of individual documents than the one in *Cannon*. Despite providing this information – the information explicitly listed by the *Cannon* court – the trial court concluded that the Affidavit was not sufficiently specific concerning "exactly what information is contained in the records she identifies."[30] As

---

[28] R. at 890; *Cannon*, 2005 UT App 352, ¶20.
[29] Br. of Appellants at 26-27; R. 738-41.
[30] R. 889.

Appellants noted, "[i]t is difficult to conceive what additional detail might be necessary to comply with the district court's view of *Cannon*, and how such detail might be described without disclosing the content of the file."[31]

Appellants' rhetorical inquiry appropriately describes the quandary faced by litigants. On the one hand, health care providers are acutely aware that failing to provide a sufficient level of specificity regarding the contents of the care review materials could subject those documents to in camera review – as occurred in this case – or an order that the materials must be disclosed to the plaintiff. On the other hand, health care providers can be "specific" only to a certain point without disclosing the actual *contents* of the care review materials and potentially waiving the privilege. As currently presented, the *Cannon* standard fails to provide the requisite guidance to avoid placing health care providers in this untenable position.

In sum, the standard provided by *Cannon* has proved unworkable and further guidance from this Court would enable litigants and the trial courts to have a clear sense of what is required to properly invoke the privilege without the need of in camera review or blanket disclosure to plaintiffs. Otherwise, the current uncertainty surrounding the level of specificity required to invoke the privilege and avoid an in camera review will only serve to discourage willing

[31] Br. of Appellants at 27.

participation in review committees and weaken participants' confidence that their candid statements will truly remain confidential.[32]

Moreover, shifting the focus of the privilege analysis from the subject matter of the documents to a functional inquiry into whether the document was "prepared specifically for review purposes" will be more consistent with the clear language of Rule 26(b)(1) and our courts' past treatment of those statutory privileges. Moreover, litigants, trial courts, and healthcare providers would have a much more workable standard under which to evaluate claims of privilege, and the unnecessary invasion and dilution of the privilege associated with in camera reviews could be minimized if not eliminated altogether.

CONCLUSION

The trial court should have determined that any materials in Dr. Saunders' credentialing file that were created specifically for purposes of evaluating his competence and care are protected from discovery under rule 26(b)(1). Instead, the trial court ignored the plain language of rule 26 and incorrectly ruled that Dr. Saunders' credentialing file is not privileged because it does not relate to the care and treatment of a specific patient.

This ruling is contrary to well-established Utah law and affirming that ruling would severely undercut the function of peer and care review in Utah,

---

[32] *See Benson*, 866 P.2d at 539.

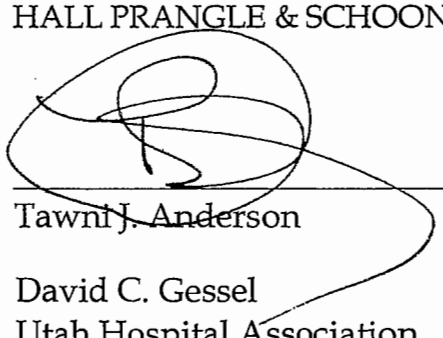
thereby harming our citizens' health by preventing health care providers from engaging in full and frank discussions of physicians' competency, as well as continually reviewing the provision of health care to determine how the various providers can continue improving their quality of patient care.

In addition, the trial court's ruling that Ms. Minaga-Miya's affidavit was insufficiently specific to invoke the care review privilege illustrates chronic problems faced by health care providers who are trying to invoke these longstanding privileges. Further guidance from this Court would greatly benefit litigants and the courts.

For the reasons stated in this brief and the brief of Appellants, amici join Appellants in respectfully requesting this Court to reverse the trial court's ruling.

DATED this 29th day of October, 2013.

HALL PRANGLE & SCHOONVELD, LLC



Tawni J. Anderson

David C. Gessel
Utah Hospital Association

Mark A. Brinton
Utah Medical Association

Attorneys for Utah Hospital Association, Utah Medical Association, American Medical Association, and Various Utah Hospitals

Certificate of Compliance With Rule 24(f)(1)

This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because it contains 4,252 words, excluding the parts of the brief exempted by Utah R. App. P.2d(f)(1)(B), and this brief complies with the typeface requirements of Utah R. App. P.27(b) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 13 point Book Antiqua.

DATED this 28th day of October, 2013.

HALL PRANGLE & SCHOONVELD, LLC

TAWNI J. ANDERSON
Attorneys for Utah Hospital Association, Utah Medical Association, and Various Utah Hospital

4841-4455-5542, v. 1