IN THE SUPREME COURT OF OHIO

KALVYN STULL, AN INCOMPETENT PERSON, BY AND THROUGH HIS GUARDIAN OF THE ESTATE, BRIAN ZIMMERMAN, et al.,	)	**Case No. 2023-0352**
Plaintiffs-Appellees,	)	**On Appeal from the Ninth Appellate District Summit County Case No. CA-29969**
v.	)	
SUMMA HEALTH SYSTEMS, et al.,	)	
Defendants-Appellants.	)	

MERIT BRIEF OF AMICI CURIAE, AMERICAN MEDICAL ASSOCIATION, OHIO HOSPITAL ASSOCIATION, OHIO STATE MEDICAL ASSOCIATION, AND OHIO OSTEOPATHIC ASSOCIATION, IN SUPPORT OF APPELLANTS

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STATEMENT OF INTEREST OF AMICI CURIAE

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 its House of Delegates, substantially all physicians, residents, and medical students in the United States are represented in the AMA's policy-making process. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes. The AMA members practice in every medical specialty and in every state, including Ohio.

The Ohio Hospital Association ("OHA") is a private nonprofit trade association established in 1915 as the first state-level hospital association in the United States. For more than 100 years, the OHA has provided a mechanism for Ohio's hospitals to come together and advocate for health care legislation and policy in the best interest of hospitals and their communities. The OHA is comprised of 252 hospitals and 15 health systems, collectively employing more than 250,000 employees in Ohio.

The Ohio State Medical Association ("OSMA")[1] is a nonprofit professional association established in 1835 and is comprised of physicians, resident physicians, and medical students in Ohio. The OSMA's membership includes most Ohio physicians engaged in the private practice of medicine. The OSMA's purposes are to improve public health through education, encourage interchange of ideas among members, and maintain and advance the standards of practice by requiring members to adhere to the concepts of professional ethics.

[1] The AMA and OSMA submit this brief on their own behalf and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state and the District of Columbia. Its purpose is to represent the viewpoint of organized medicine in the courts.

The Ohio Osteopathic Association ("OOA"), established in 1898, works to advance the distinctive philosophy and practice of osteopathic medicine and promote public health. The OOA, a non-profit professional association and divisional society of the American Osteopathic Association, advocates for the more than 7,500 licensed osteopathic physicians ("DOs") in Ohio as well as approximately 1,000 medical students who attend Ohio University Heritage College of Osteopathic Medicine.

Amici represent the vast majority of hospitals and physicians in Ohio and have a strong interest in legal and legislative developments affecting their members, such as the recent Ninth District's decision in *Stull v. Summa Health Sys.*, 2022-Ohio-457, 185 N.E.3d 141 (9th Dist.) ("*Stull*"), which provided an exception under the statutory peer review privilege set forth in R.C. 2305.252 for the files of resident physicians (i.e., residency files). Residency files are generated for quality assurance and improvement purposes to assess the competence of, professional conduct of, and quality of care provided by resident physicians[2] in Ohio. Amici are deeply concerned that, if this Court does not reverse *Stull* and hold that the statutory peer review privilege protects residency files from discovery in a civil lawsuit, the peer review process for resident physicians in Ohio will be jeopardized, paving the way for less candor and scrutiny of resident physicians.

LAW AND ARGUMENT

A. Introduction

Peer review is a longstanding tradition in health care because it provides a forum for health care providers to have candid discussions about sensitive but necessary topics for quality review and improvement purposes. Physicians and other health care providers need to be able to engage

[2] A resident physician is a medical school graduate with a degree in Doctor of Medicine (M.D.) or Doctor of Osteopathic Medicine (D.O.) enrolled in a post-graduate residency program accredited by the Accreditation Council for Graduate Medical Education ("ACGME").

in honest conversations and provide candid feedback without fear of retaliation, and they must be assured that the information generated during peer review proceedings will not be used against them in the future in any civil action. Thus, confidentiality is the key to facilitate an effective and efficient peer review process. Recognizing the importance of peer review in improving the overall quality of the health care system, all 50 states and the District of Columbia have adopted legislation to provide health care statutory peer review privilege, which protects records provided to or generated by a peer review committee from discovery in civil actions.[3]

The statutory peer review privilege set forth in R.C. 2305.252 was adopted "to protect the integrity and confidentiality of the peer review process so that health care entities have the freedom to meaningfully review and critique, and thereby improve, the overall quality of the healthcare services they provide." *Cousino v. Mercy St. Vincent Med. Ctr.*, 2018-Ohio-1550, 111 N.E.3d 529, ¶ 15 (6th Dist. 2018). Without the protection of peer review privilege, health care providers may be "reluctant to engage in an honest criticism for fear of loss of referrals, loss of reputation, retaliation, and vulnerability to tort actions." *Id.*, citing *Stewart v. Vivian*, 12th Dist. Clermont No. CA2011-06-050, 2012-Ohio-228, ¶ 25. Appellate courts in Ohio have consistently recognized that the confidentiality guaranteed by peer review privilege "'provides an umbrella of protection to information which is collected and maintained by a peer review committee during a peer review process.'" *Meade v. Mercy Health Ctr.*, 2019-Ohio-438, 130 N.E.3d 1058, ¶ 10 (9th Dist.), citing *Lowrey v. Fairfield Med. Ctr.*, 5th Dist. Fairfield No. 08 CA85, 2009-Ohio-4470, ¶ 28.

The Ninth District's decision in *Stull*, which wrongfully excludes residency files from the protection of peer review privilege, significantly undermines the purpose of the peer review

[3] Rachel A. Lindor, M.D., J.D., et al., "State Variability in Peer Review Protections Heightens Liability Risks." *Mayo Clinic Proceedings: Innovations, Quality & Outcomes* 5.2 (2021): 476-479, at 477.

process within a hospital. If the Ninth District's ruling is not reversed and clarification is not provided to Ohio's lower courts, *Stull* will cause irreparable damage to the trust in the peer review process and the willingness to engage in candid conversations to reduce morbidity and mortality among patients and improve the overall quality of health care services.

Indeed, the Ninth District's carve-out for residency files under R.C. 2305.252 serves no valid purpose and appears to be premised on a misunderstanding of a physician's post-graduate training and why it must be protected by the peer review privilege. In the same way that law school prepares future lawyers to think like lawyers by equipping law students with the necessary legal skills and in-depth knowledge of the legal system, medical school prepares future physicians by providing medical students with the scientific knowledge and necessary clinical skills before entering the practice of medicine. In the same way that lawyers only become experts at the practice of law through practice and experience, physicians perfect the practice of medicine through continuous learning and exposure. The purpose of post-graduate residency training is to arm recent medical school graduates with specialized knowledge through real life clinical experience to ensure that they are on track to become competent practitioners. Although resident physicians are considered physicians, they have only limited licenses to practice medicine and, therefore, are considered "doctors in training." Their abilities to learn and improve performance and clinical competency during residency will ultimately shape the future quality of the health care system.

In 2016, there were a total of 33,621 actively licensed physicians in Ohio and a total of 6,104 resident physicians.[4] Those numbers increased in 2020 (the last year for which data is

[4] Association of American Medical Colleges (AAMC) Ohio Physician Workforce Profile 2016 Data.

readily available) to a total of 35,333 actively licensed physicians and 7,270 resident physicians.[5] The COVID-19 pandemic significantly increased the needs for health care professionals, including physicians and resident physicians. Moreover, the COVID-19 pandemic had a significant impact on medical education by forcing many medical students to transition to online learning, especially during the early months of the pandemic. Against the backdrop of the COVID-19 pandemic, clinical training for post-graduate medical students is more crucial than ever. Given their evolving knowledge and clinical experience, resident physicians need the same assurance as fully-licensed physicians — if not more — that confidential information generated during peer review for performance and quality improvement purposes will not be used against them in a future civil action.

To protect the integrity of the peer review process, the practice of medicine, and quality of health care services provided to patients in Ohio, it is imperative that resident physicians are afforded the same peer review privilege that is provided to fully-licensed physicians with years or even decades of medical experience. Indeed, nothing in the plain language of Ohio's peer review statute suggests that resident physician peer review files should be treated any differently than similar files of fully-licensed physicians. And, for good reason, this Court has never made that distinction either. Accordingly, this Court should reverse the Ninth District's decision and conclude that residency files fall within the scope of the peer review privilege set forth in R.C. 2305.252.

[5] Association of American Medical Colleges (AAMC) 2021 State Physician Workforce Data Report.

B. Ohio case law instructs that the peer review privilege set forth in R.C. 2305.252 should apply equally to resident physicians' residency files.

The peer review privilege set forth in R.C. 2305.252 provides, in relevant part, the following:

> Proceedings and records within the scope of a peer review committee of a health care entity shall be held in confidence and shall not be subject to discovery or introduction in evidence in any civil action against a health care entity or health care provider, including both individuals who provide health care and entities that provide health care, arising out of matters that are the subject of evaluation and review by the peer review committee. R.C. 2305.252(A).

Under Ohio law, "[a]ll documents within a peer review committee's[6] own records, regardless of the source, are absolutely immune from discovery in any civil action against a health care entity or health care provider." *Cousino v. Mercy St. Vincent Med. Ctr.*, 2018-Ohio-1550, 111 N.E.3d 529, ¶ 25 (6th Dist.), citing *Cook v. Toledo Hosp.*, 169 Ohio App.3d 180, 2006-Ohio-5278, 862 N.E.2d 181, ¶ 31 (6th Dist.).

A health care entity claiming protection under the peer review statute must establish two elements: (1) the existence of a peer review committee and (2) the requested records are within the scope of that peer review committee. *Id.* at ¶ 16. Upon satisfaction of the two elements, "the requested documents are unconditionally privileged and immune from discovery." *Id.* Indeed, appellate courts in Ohio have consistently recognized that the confidentiality guaranteed by peer review privilege "'provides an umbrella of protection to information which is collected and maintained by a peer review committee during a peer review process.'" *Meade v. Mercy Health Ctr.*, 2019-Ohio-438, 130 N.E.3d 1058, ¶ 10 (9th Dist.), citing *Lowrey v. Fairfield Med. Ctr.*, 5th Dist. Fairfield No. 08 CA85, 2009-Ohio-4470, ¶ 28.

[6] In general, a peer review committee is a committee designated by a hospital to conduct professional review activities. As discussed later, R.C. 2305.25 sets forth definitions of "peer review committee."

Stull appears to be the first case in which an Ohio court has addressed whether Ohio's peer review statute (R.C. 2305.252) applies to residency files generated by a residency peer review committee for quality assurance purposes. Nothing in the text of the statute, however, suggests it should not apply equally to resident physicians. Indeed, it would set a very dangerous precedent if Ohio courts were to rule that residency files are not entitled to the same protections as the credentialing files of fully-licensed physicians. Accordingly, this Court is urged to reverse the Ninth District's decision in *Stull* and instruct the lower courts to apply Ohio's statutory peer review privilege, R.C. 2305.252, to the residency files of health care providers that are used by a hospital's peer review committees to evaluate the competence of, professional conduct of, and quality of care provided by resident physicians.

C. The Ohio General Assembly, by enacting the peer review privilege statute and expanding its scope, intended the statute's broad coverage to ensure that participants are free to engage in candid conversations and meaningful reviews.

As previously discussed, the statutory peer review privilege set forth in R.C. 2305.252 was adopted "to protect the integrity and confidentiality of the peer review process so that health care entities have the freedom to meaningfully review and critique, and thereby improve, the overall quality of the healthcare services they provide." *Cousino*, 2018-Ohio-1550, 111 N.E.3d 529, at ¶ 15. Ohio courts have repeatedly stated that R.C. 2305.252 manifests the Ohio legislature's intent to provide "a complete shield" to peer review privileged materials in order to protect the integrity of the peer review process. *Id.* at ¶ 25, citing *Cook*, 169 Ohio App.3d 180, 2006-Ohio-5278, 862 N.E.2d 181, at ¶ 31, quoting *Tenan v. Huston*, 165 Ohio App.3d 185, 2006-Ohio-131, 845 N.E.2d 549, ¶ 23 (11th Dist.) ("R.C. 2305.252 manifests the legislature's clear intent to provide a complete shield to the discovery of any information used in the course of a peer review committee's proceedings.").

The legislative history of the peer review statute is consistent with this intent. In 2003, the Ohio General Assembly modified the language of R.C. 2305.252 to specify that documents generated by original sources[7] "are available only from the original sources and cannot be obtained from the peer review committee's proceedings or records."[8] This modification inevitably placed a burden on the party seeking peer review privileged materials to obtain the materials from their original sources as opposed to the peer review committee. In 2014, the General Assembly once again modified R.C. 2305.252 to provide that if any record in a peer review privileged file is released (inadvertently or otherwise), such release does not waive the peer review privilege as to any other record in the file that has not been released.[9] This modification is another indicator of the General Assembly's intent to protect the integrity of the peer review process by providing the highest level of confidentiality.

D. The Ninth District misconstrued the peer review process for resident physicians and created an unwarranted distinction between "peer review" and "residency review."

Here, the Ninth District correctly concluded that the committees designated by Summa to review and evaluate the competence of, professional conduct of, and quality of care rendered by resident physicians — i.e., Summa's Graduate Medical Education Committee (GMEC)[10] and/or the Clinical Competency Committees for each residency program (CCCs) — fall within the definition of a "peer review committee" set forth in R.C. 2305.25(E)(1)(a) and R.C. 2305.25(E)(2)(c). Undisputedly, the plain language of the statute does not exclude from peer review privilege the protection of records generated during the review and evaluation of resident

[7] An original source is a source other than the peer review committee itself.
[8] 2002 Ohio Laws File 243 (S.B. 179).
[9] 2014 Ohio Laws File 60 (Am. Sub. H.B. 123).
[10] Major health care systems and teaching hospitals across the United States have established GMECs for the purpose of overseeing the quality of residency education in accordance with standards set forth by the ACGME.

physicians. While the Ninth District correctly concluded that Summa's GMEC and CCCs constituted peer review committees warranting the protection of the peer review privilege, it erroneously concluded that residency files were not covered by the peer review privilege. *Stull v. Summa Health Sys.*, 2022-Ohio-457, 185 N.E.3d 141, ¶ 14-15 (9th Dist.).

The Ninth District's opinion erroneously suggests that there is a distinction between "residency review" and "peer review." *Id*. at ¶ 15. In so doing, the Ninth District suggests that, because residency files are generated during residency reviews, they are not subject to the protection of peer review privilege. This distinction between "residency review" and "peer review" is unwarranted, however, and may be due to the Ninth District's confusion regarding the training and evaluation processes for fully-licensed physicians and resident physicians. Resident physicians have limited licenses to practice medicine under the supervision of fully-licensed physicians; however, resident physicians are also physicians. Because of their limited scope of practice, resident physicians are subject to a different credentialing and evaluation process than fully-licensed physicians. As a result, the peer review processes for resident physicians and physicians differ, and thus Summa created a separate peer review committee — i.e., the GMEC — to review the competence of, professional conduct of, and quality of care provided by resident physicians at Summa. As explained below, this type of peer review committee for resident physicians still falls within the definitions set forth in R.C. 2305.25(E), as recognized by the Ninth District.

Under R.C. 2305.25(E)(1)(a), a "peer review committee" includes a committee that "conducts professional credentialing or quality review activities involving the competence of, professional conduct of, or quality of care provided by *health care providers* …" (Emphasis added.) Additionally, under R.C. 2305.25(E)(2)(c), a "peer review committee" includes "a board

or committee of a hospital … when reviewing professional qualifications or activities of *health care providers* …" (Emphasis added.) Based on the plain language of the definitions set forth in R.C. 2305.25, a peer review process that "conducts professional credentialing or quality review activities involving the competence of, professional conduct of, or quality of care" rendered by resident physicians is exactly the type of peer review committee intended to be protected by peer review privilege. The use of the broad term "health care providers" in the statutory language cannot — and should not — be interpreted to exclude resident physicians from the protection of peer review privilege. Summa's GMEC, established as a committee of a hospital for the purpose of "reviewing professional qualifications or activities of" resident physicians, is precisely the type of "peer review committee" described in R.C. 2305.25. Therefore, the review and evaluation of resident physicians conducted by the GMEC (and the individual CCCs for each residency program) fall within the scope of the definition of a "peer review committee" that is entitled to protection under the peer review statute.

Notwithstanding the plain language of the statute, the Ninth District erroneously created a distinction between "peer review" and "residency review." This erroneous legal distinction wrongfully causes confusion[11], serves no meaningful purpose, and results in disparate and unfair treatment of resident physicians who are no longer subject to R.C. 2305.252 in light of the Ninth District's decision.

[11] The Ninth District's decision causes unnecessary confusion both within hospitals (which are required to engage in peer review activities to ensure the provision of competent, quality health care) and Ohio's courts.

E. Residency files that are generated, maintained, and used by the GMEC and the individual CCCs to evaluate and review the competence of, professional conduct of, and quality of care rendered by resident physicians are protected under R.C. 2305.252.

Because Summa's GMEC and the individual CCCs for each residency program fall squarely within the definition of a "peer review committee" under R.C 2305.25(E), described above, it follows that residency files created, maintained, and used by the GMEC and the CCCs for the purpose of evaluating the competence of, professional conduct of, and quality of care provided by resident physicians are covered by the peer review privilege in R.C. 2305.252(A). As illustrated by the case comparison below, the Ninth District's holding to exclude residency files from the protection of peer review privilege undercuts the very purpose of the peer review privilege and is inconsistent with the plain language of the statute.

Recently, the First District affirmed the lower court's decision to compel a defendant-hospital to produce employee files of several nurses after concluding the following: (1) defendant-hospital failed to meet its burden to prove the existence of a peer review committee for nurses, and (2) nurses' complete employee files were not protected by the peer review privilege. *Spurgeon v. Mercy Health-Anderson Hosp., LLC*, 2020-Ohio-3099, 155 N.E.3d 103 ¶ 26 (1st Dist.). In holding that the defendant-hospital failed to prove the existence of a peer review committee for nurses, *Spurgeon* reasoned that, while the defendant-hospital had a process for evaluating nurses, it had not designated a "peer review committee" for the nurses. *Id.* at ¶ 20. Unlike *Spurgeon*, however, the existence of a peer review committee for resident physicians has been proved and was fully accepted by the Ninth District in *Stull*.

With respect to the nature of the files requested by the plaintiff, the *Spurgeon* court further reasoned that, because the complete employee files "were not generated exclusively for peer-review committee," they were not protected by peer review privilege. *Id.* at ¶ 25. In fact, in

Spurgeon, the nurses' employee files requested by the plaintiff could be traced to the human resources department, not a peer review committee. *Id.* In contrast, residency files are not personnel files kept in the possession of the human resources department; they are "residency quality files" that are generated, maintained, and used exclusively by for the GMEC and CCCs for peer review purposes. Indeed, in this case, evidence was presented to show that each residency file at Summa "contains records of quality assessment by faculty members of the medical care rendered by the resident physicians, and the competence of, professional conduct of, and quality of care provided by the residents." (Affidavit of Erica Laipply, M.D., ¶ 8-9, Supp. 196). Given the purpose of the GMEC and its responsibilities[12], residency files must be protected from discovery because they are used and maintained by Summa's peer review committees to improve the quality of health care services rendered by resident physicians. Accordingly, it is critical that this Court rule that the peer review privilege in R.C. 2305.252 applies fully to residency files.

F. Once it has been established that there is a peer review committee and a residency file is within the scope of the committee, the residency file is absolutely privileged.

In *Cousino v. Mercy St. Vincent Med. Ctr.*, 2018-Ohio-1550, 111 N.E.3d 529, ¶ 21 (6th Dist. 2018), the court found that the defendant-hospital met its burden to prove the credentialing committee at issue fell within the definition of a peer review committee. *Id.*, at ¶ 21. As such, the court in *Cousino* reiterated that the defendant-hospital did not need to identify or submit any documents that were found exclusively within the credentialing file because the entire file was "absolutely privileged and immune from discovery" under the peer review statute. *Id.* at ¶ 26 and

[12] In accordance with ACGME guidelines, responsibilities of the GMEC include the following: (1) review and implement policies for clinical training programs; (2) maintain oversight of clinical training programs; (3) conduct reviews of clinical training programs; (4) provide a forum for exchange of information among the participants; (5) engage in discussions related to adverse actions against resident physicians; and (6) review incident reports and implement correction plans.

¶ 51. In fact, the court made it clear that even an in-camera inspection of any documents within the credentialing file would not be ordered because "no documents can be obtained from a peer review committee's records – period." *Id.* at ¶ 31.

Here, the GMEC's qualification as a peer review committee for resident physicians is not disputed. As discussed above, the GMEC's responsibility to oversee and review the competence of, professional conduct of, or quality of care provided by resident physicians means that records of the GMEC itself are "absolutely privileged and immune from discovery." In accordance with the ruling in *Cousino*, therefore, the identification of specific documents within a residency file is not needed because the entire residency file is privileged. Additionally, because the Appellees requested the residency file in its entirety, the Appellants' burden to prove the application of the peer review privilege should be based upon the general premise of the residency file as opposed to any specific documents within the file.

G. Other jurisdictions have applied peer review privilege statutes to residency files.

Although *Stull* appears to present an issue of first impression in Ohio, other jurisdictions faced with the issue of whether to apply a peer review privilege statute to residency files have done so. Decades ago, a Delaware federal district court addressed this same issue and held that the peer review statute was applicable to a resident physician's file. *See Burnett v. Ghassem Vakili, M.D., P.A.*, 685 F. Supp. 430 (D. Del. 1988), aff'd, 902 F.2d 1559 (3d Cir. 1990). In *Burnett*, the plaintiff-patient brought a medical malpractice action against the defendant-hospital and sought to compel the hospital to produce records and documents pertaining to a resident physician's employment. After reviewing Delaware's peer review statute,[13] the court concluded that "[e]mployment applications and records of resident physicians used by [the] resident selection committee and

[13] Del. Code Ann. tit. 24, § 1768 (West)

resident evaluation committee of medical center and sought through discovery by patient in medical malpractice action fell within scope of [the] Delaware [peer review] statute …" *Id.* at ¶ 3.

After the establishment of the ACGME in the 1980s, post-graduate training for resident physicians became standardized across the country and many hospital systems implemented GMECs to oversee their residency programs. Two decades later, a federal court in Texas was faced with an issue relating to the scope of Texas' peer review statute and its application to residency files generated for and maintained by a hospital's GMEC. *See Garza v. Scott & White Mem'l Hosp.*, 234 F.R.D. 617 (W.D. Tex. 2005). In *Garza*, the plaintiff, on behalf of her deceased husband, brought a negligence action against the resident physician who performed laparoscopic surgery on her husband. Plaintiff sought to compel discovery of the resident's personnel file and employment records, which contained documents that were generated for and maintained by the hospital's GMEC. *Id.* After a review of Texas peer review statute,[14] the court denied the plaintiff's motion to compel production of the resident physician's personnel file and employment records, holding that the peer review statute barred them from discovery. *Id.* at ¶ 10.

Protecting the integrity of the peer review process in health care is not limited to the bounds of one state. A review of cases from other states on the issue of applying state statutory peer review privilege to resident physicians supports the protection of residency files that are generated by a peer review committee within a hospital under Ohio law pursuant to R.C. 2305.252.[15] This Court is urged to follow the precedent set by other states.

[14] Tex. Health & Safety Code Ann. § 161.032 (West).
[15] No cases were found in other jurisdictions where a court drew a distinction between "residency review" and "peer review."

H. The plaintiff is not left without recourse in a civil proceeding in the absence of the production of a resident physician's residency file because peer review privilege only protects the peer review process, not the underlying facts

The statutory peer review privilege is constantly balancing two important interests: the integrity of the peer review process and a plaintiff's ability to adequately present her case through proper discovery requests. Indeed, "[t]he statutory health care peer-review privilege is not a generalized cloak of secrecy over the entire peer-review process." *Hance v. Cleveland Clinic*, 2021-Ohio-1493, 172 N.E.3d 478, ¶ 18 (8th Dist.), citing *Smith v. Cleveland Clinic*, 2011-Ohio-6648, 197 Ohio App. 3d 524, 968 N.E.2d 4, ¶ 11 (8th Dist.). With respect to the issue at hand, the denial of the Appellees' access to a resident physician's entire residency file is not unfair to the Appellees because peer review privilege only protects the process, not the underlying facts.

Regarding records that exist outside of the peer review process, R.C. 2305.252 provides, in relevant part, the following:

> Information, documents, or records otherwise available from original sources are not to be construed as being unavailable for discovery or for use in any civil action merely because they were produced or presented during proceedings of a peer review committee, but the information, documents, or records are available only from the original sources and cannot be obtained from the peer review committee's proceedings or records. R.C. 2305.252(A).

In sum, records that exist outside of the peer review process are still discoverable even if they are used or presented during the peer review process. The statutory peer review privilege merely protects the integrity of the peer review process by holding that the records of a peer review committee itself are subject to an absolute privilege. A plaintiff should bear the burden of conducting the due diligence to assess the specific documents that may be discoverable, rather than requesting the "entire file" of a peer review committee be handed over to her. To hold that the defendant must turn over the requested residency file wrongfully tilts the fairness scale toward the plaintiff. The Ninth District's decision to compel the production of a resident physician's entire

file (including all of the performance evaluations contained therein) fails to balance both parties' interests, and if not reversed, will significantly damage the integrity of the peer review process.

CONCLUSION

The peer review process exists as a forum for health care providers to exchange candid feedback and engage in productive discussions to improve the quality of health care services rendered to patients. To effectively engage in the peer review process, participants must be assured that the sensitive information and records generated during peer review are kept confidential and will not be used against them in a civil action in the future. The Ninth District's decision to exclude resident physicians' residency files — generated during the residency peer review process — from the protection of Ohio's statutory peer review privilege set forth in R.C. 2305.252 undermines the very purpose of the peer review statute and is inconsistent with the statute's plain language and the precedent set in other states. The outcome of the legal issue presented in this case will impact the practice of medicine, the post-graduate training of resident physicians, and the overall quality of health care services delivered to the general public in Ohio. For reasons stated in this brief, the judgment below must be reversed.

Respectfully submitted,

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