2014 WL 9867116 (Mich.App.) (Appellate Brief)
Court of Appeals of Michigan.

Jordan MELICK, as Personal Representative of the Estate of Robert Louis Melick, Deceased, Plaintiff-Appellee,
v.
WILLIAM BEAUMONT HOSPITAL, d/b/a Beaumont Hospital, Grosse Pointe, Defendant-Appellant.

No. 319495.
June 17, 2014.

<< Oral Argument Requested >>
Wayne County Circuit Court
Case No. 13-000193-NH
Hon. Robert L. Ziolkowski

Plaintiff-Appellee's Brief on Appeal

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*II STATEMENT ON JURISDICTION

Plaintiff-Appellee, Jordan Melick, as Personal Representative of the Estate of Robert Melick, deceased, does not take issue with the Defendant-Appellant William Beaumont Hospital, d/b/a Beaumont Hospital, Grosse Pointe's "Statement of Appellate Jurisdiction" in their Brief on Appeal, filed December 11, 2013 (p. v). Specifically, Plaintiff does not dispute that this Court granted interlocutory leave to appeal on March 20, 2014, from a discovery order of Wayne Circuit Judge Robert Ziolkowsi (Def.-

Appellant's Ex. A - Order Granting Plaintiffs Motion to Compel Defendant to Produce Policies and Procedures, 9/26/13), [1] and order denying reconsideration (Def.-Appellant's Ex. B - Order Denying Defendant's Motion for Reconsideration, 11/22/13) being appealed here, and that this Court's jurisdiction is controlled by MCR 7.203(B)(1).

*III COUNTER-STATEMENT OF QUESTION PRESENTED

WHERE THE DEFENDANT HOSPITAL FAILS TO SHOW THAT THE TRIAL COURT **ABUSED** ITS DISCRETION BY ISSUING A DISCOVERY ORDER REQUIRING DEFENDANT TO PRODUCE ITS FALL PREVENTION POLICIES AND PROCEDURES, UNDER MCR 2.302(B)(1), BECAUSE:

● THE POLICIES AND PROCEDURES ARE RELEVANT TO WHETHER PLAINTIFF HAS A VIABLE CLAIM FOR DEFENDANT'S DIRECT NEGLIGENCE IN ADOPTING AND/OR ENFORCING FALL PREVENTION MEASURES FOR ITS PATIENTS;

● THE TRIAL COURT FOUND THE INFORMATION SOUGHT, AT LEAST, IS *"REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE";*

● DEFENDANT FAILS TO SHOW THAT THE REQUESTED POLICIES AND PROCEDURES ARE PRIVILEGED;

● DEFENDANT HAS NOT DEMONSTRATED THAT IT WOULD BE PREJUDICED BY PRODUCING ITS POLICIES AND PROCEDURES,

● INSTEAD, THE TRIAL COURT GRANTED A STRINGENT PROTECTIVE ORDER LIMITING DISSEMINATION OF THE DOCUMENTS WHICH DEFENDANT CLAIMS TO BE "CONFIDENTIAL";

● DEFENDANT MISCHARACTERIZES THIS DISCOVERY ORDER AS IF IT WERE AN EVIDENTIARY RULING, WHICH IT IS NOT,

● DEFENDANT MAINTAINS THAT THE TRIAL COURT'S DISCOVERY ORDER ERRONEOUSLY DECIDED THAT THE POLICIES AND PROCEDURES WOULD ESTABLISH THEIR "LEGAL DUTY", WHICH THE ORDER DOES NOT ADDRESS, AND

● DEFENDANT SIGNED THE ORDER "APPROVED AS TO FORM",

SHOULD THIS COURT AFFIRM THE TRIAL COURT'S ORDER OR DECIDE THAT DEFENDANT'S INTERLOCUTORY APPLICATION FOR LEAVE TO APPEAL WAS IMPROVIDENTLY GRANTED?

The Trial Court would answer "Yes".

Plaintiff-Appellee answers "Yes.

Defendant-Appellant Beaumont Hospital would answer "No".

*1 COUNTER-STATEMENT OF FACTS

A "fall" is defined in medical terminology as: "1. To drop accidentally to the floor or ground. 2. An accidental drop, usually caused by slipping or losing one's balance. In the **elderly**, falls are the leading cause of death. ***. Taber's Cyclopedic Medical Dictionary (18th Edition), p. 704; Centers for Disease Control & Prevention, Web-based Injury Statistics Query and

Reporting System "WISQARS" (online), *http://www.cdc.gov/inijury/wisqars/index.html,* and National Safety Council, NSC Joins U.S. Consumer Product Safety Commission to reduce **elderly** falls and injuries (press release on line), 2005 Feb 14, *http:// www.nsc.org/Pages/NationalSafetyCouncilJoinsUSConsumerProd missiontoReduceElderlyFallsandlnjuries.a.* In fact, in response to the preventable nature of this recurring problem, the Centers for Medicare & Medicaid Services (CMS) issued a clear mandate regarding these types of injuries. As of 2008, CMS no longer reimburses hospitals to treat injuries from falls sustained in the hospital if the fall could have been prevented during the Medicare beneficiary's stay. In fact, CMS said, in response to comments on the proposed regulations, "We believe that injuries that occur in the hospital due to falls are preventable." See, 72 Federal Register (No. 162) 47130 at 47214 (August 22, 2007). CMS identified five external causes of injury codes that would identify falls in a hospital., including "E884.4 Fall from bed" and concluded, "These codes clearly identify certain types of falls. If coded for an inpatient, they could identify that the fall occurred in the hospital." Id.

This action for medical negligence arises from a preventable fall of a patient in Defendant's Hospital who had been initially assessed by Defendant as being at risk for ***2** falling and for whom some inadequate fall-prevention precautions had been undertaken by Defendant's staff to prevent foreseeable injuries.

1. Allegations of Defendant's Vicarious Liability for the Decedent's Foreseeable Fall and Consequent Death and the Plaintiff's Discovery Requests for the Hospital's Fall Prevention Policies and Procedures

The Complaint in this case alleges that the Defendant Hospital is vicariously liable for serious injuries and consequent death of Plaintiffs decedent, Robert Melick while he was a patient at the Defendant Hospital. (Def.-Appellant's Ex. D - Complaint.) Defendant had assessed Mr. Melick as a person who was at risk for foreseeable falls and orders were written to address fall prevention for his safety, based on the Defendant's initial assessment and his changing condition while he was an in-patient. In spite of the foreseeability of his risk for falling, the day after he was admitted to the Defendant Hospital, Mr. Melick fell from a hospital bed, hit his head, suffered a catastrophic closed-head injury, and ultimately died as a result of that injury. (*Id.*) Plaintiff believes that the hospital is required to adopt policies and procedures for "sitters" [2] to stay with a patient. (*Id.;* Def.-Appellant's Ex. I - Transcript Motion to Compel, 8/23/13, p. 3.)

Plaintiff, as the personal representative of Mr. Melick's estate, brought an action for wrongful death and served a Request for Production of Documents on Defendant with his Complaint on January 4, 2013. (Def.-Appellant Ex. E.) Defendant responded to the Request, but refused to produce certain hospital policies and procedures requested in Paragraph 2 of Plaintiff's Request for Production dated February 21. 2013. ***3** (Def.-Appellant's Ex. G[1], p. 5.) Plaintiff also requested additional policies and procedures from the Defendant Hospital on April 26, 2013. (Def.-Appellant's Ex. F.) Defendant's stated reason for refusing to produce the policies and procedures is that they are "irrelevant". (Def.-Appellant's Ex. G[2].)

On May 28, 2013, Defendant also objected to Plaintiff's Amended Notices of Taking Deposition of Dr. Michael Pieh and Colin Moe, R.N., Duces Tecum. (Def.-Appellant's Ex. G[3].). Plaintiffs notice had requested that the deponent bring any and all documents as they related to patient, Robert Melick. Despite court orders and motions, wherein the Defendant has been required to produce committee review materials, Defendant continued to object to the production by witnesses of notes in their possession pertaining to Robert Melick. The deposition notices sent to witnesses have requested that they produce any notes in their possession.

2. The Trial Court's Ruling That Defendant Must Product Its Policies and Procedures Under Protective Order

At the hearing on Plaintiffs Motion to Compel, the Trial Judge summed up his ruling on the record and explained the exercise of his discretion in this discovery dispute as follows:

THE COURT: ***This is a serious matter. The allegation is a death here. And **whether or not there is a claim that can be brought is certainly something that should be discoverable. It's just a question of how to do it in such a way as it protects**

the interest of both sides. And, so, if it's necessary to have a protective order, you [Mr. Tamm, defense counsel] can prepare a protective order. But you're going to allow him [Mr. Meyers, plaintiff's counsel] to discover whether or not there are policies and procedures and provide them to plaintiff's Counsel, and then he can go from there. If he can present a proper claim under the Court Rules, he can do it. If not, it's over. You've got a protective order, and you get your policies and procedures returned.

***4** (Def.-Appellant's Ex. H -Transcript, p. 9, emphasis added.)

The discovery order described by the Trial Court in fact was entered. (Def.-Appellant's Ex. A.) Defendant has been granted interlocutory leave to appeal in this Court from that discovery order and from the Trial Court's order denying reconsideration. (Def.-Appellant's Exs. A -C.)

DISCUSSION

The Defendant objected to a request by the Plaintiff to produce its hospital policies and procedures. Plaintiff moved to compel production and Defendant answered with a claim of unspecified "privilege"[3] and argued that the policies and procedures were "irrelevant". Exercising its discretion in this discovery dispute, the Trial Court granted plaintiffs motion to compel with a protective order and Defendant's attorneys signed that order "approved as to form".

Although the order they are appealing from is clearly a discovery order compelling the production of documents, Defendant frames the issues in terms of a "decision to admit or exclude evidence", which it clearly is not. Defendant also refers to "establishing" the standard of care and/or a "legal duty" in a negligence action, although clearly this case is one for medical malpractice and special evidentiary rules and requirements for expert opinion testimony on Defendant's liability would apply at the trial stage.

Defendant Beaumont Hospital has argued that the discovery question of whether it should be compelled to produce fall-prevention policies and procedures should be resolved on interlocutory appeal, which is not a favored remedy, because otherwise "the ***5** error will not be subject to review and correction because the information sought will have been produced *** ". (Def.-Appellant's Application, p. vii.) In making that conclusory statement, Defendant totally overlooked mentioning the fact that the discovery order (Def. Appellant's Ex. A), from which it has now been permitted an interlocutory appeal, includes a protective order to prevent additional dissemination of the policies and procedures which Defendant would designate as "confidential".

Plaintiff-Appellee respectfully submits, therefore, that only the Defendant's "irrelevance" objection should be considered in this matter. Defendant-Appellant Beaumont Hospital essentially makes the same unpersuasive arguments on that issue in their brief on appeal as they did in the trial court and in their application for interlocutory leave to appeal.

A. Standard of Review

This Court reviews for an **abuse** of discretion a trial court's ruling on a motion to compel discovery. *Bronson Methodist Hosp v Auto-Owners Ins Co,* 295 Mich App 431, 440; 814 NW2d 670 (2012). "An **abuse** of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.* at 442; *Barnett v Hidalgo,* 478 Mich 151, 158; 732 NW2d 472 (2007).

Additionally, this Court reviews a trial court's decision to grant or deny a motion for reconsideration for an **abuse** of discretion. Churchman v Rickerson, 240 Mich App 223, 233; 611 NW2d 333 (2000).

In civil cases, an **abuse** of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dep't of Transp*

v ***6** *Randolph,* 461 Mich 757, 768; 610 NW2d 893 (2000); *Churchman v Rickerson, supra.* Under either test, the Trial Court did not **abuse** its discretion in this case.

Although the ruling appealed from is reviewed for an **abuse** of discretion, the Defendant argues this appeal also involves "interpretation of a court rule, which, like matters of statutory interpretation, is a question of law that we review de novo." *Marketos v American Employers Ins Co,* 465 Mich 407, 412; 633 NW2d 371 (2001). In Marketos, the Supreme Court set forth its method for interpreting court rules:

> "When called on to construe a court rule, this Court applies the legal principles that govern the construction and application of statutes. Accordingly, we begin with the plain language of the court rule. When that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation. Similarly, common words must be understood to have their everyday, plain meaning."

(*Id.* at 413, quoting *Grievance Administrator v Underwood,* 462 Mich 188, 193-194; 612 NW2d 116 (2000).)

Court rules are subject to the same rules of construction as statutes. *Vyletel-Rivard v Rivard,* 286 Mich App 13, 21; 777 NW2d 722 (2009). The Court's goal in interpreting the meaning of a court rule is to give effect to the intent of the drafters. *Id.* This Court first examine the language used. *Kloian v Domino's Pizza, LLC,* 273 Mich App 449, 458; 733 NW2d 766 (2006). The drafters are assumed to have intended the effect of the language plainly expressed, and Court's must give every word its plain and ordinary meaning. Brausch v Brausch, 283 Mich App 339, 348; 770 NW2d 77 (2009). If the language is plain and unambiguous, then the Court must apply the language as written. *Vyletel-Rivard,* 286 Mich App at 22. In such instances, judicial construction is neither necessary nor permitted. *Kloian,* 273 Mich App at 458.

***7 B. The Trial Court Did Not Abuse Its Discretion By Granting Plaintiff's Motion to Compel Production of Defendant's Relevant Policies and Procedures**

For purposes of discovery, the definition of relevancy is itself broadly interpreted and the criteria used to determine relevancy of material less restrictive at pretrial than at trial stage. *Marchand v Henry Ford Hosp,* 398 Mich 163; 247 NW2d 280 (1976) (discovery requests concerning the extent of the defendant hospital's use of a feeding technique known as "hyperalimentation" and how many of of its patients had died before the plaintiffs decedent). In an opinion written by Justice Coleman, the Supreme Court clearly and unequivocally held, 398 Mich at 169-170:

Determining matters of the relevancy of interrogatories is within the trial judge's discretion and we will not interfere absent an **abuse** of that discretion.[3] We make no comment upon the relevancy of the disputed question at the trial of the instant case. Michigan allows liberal discovery and the criteria utilized as to the relevancy of material differs at the trial and pretrial levels.[4]

[3] *Walker Metallurgical Corp v Ledoux & Co,* 16 Mich App 588; 168 NW2d 474 (1969). This line of reasoning is in keeping with the general rule that the determination of the relevancy and materiality of evidence is a matter of discretion with the trial judge. *Carreras v Honeggers & Co,* 68 Mich App 716, 724; 244 NW2d 10 (1976); *People v Howard,* 391 Mich 597, 603; 218 NW2d 20 (1974).

See also MCLA 769.26; MSA 28.1096 and GCR 1963, 529.1.

[4] GCR 1963, 309.4 states that "Interrogatories may relate to any matters which can be inquired into under sub-rule 302.2" which deals with depositions and their scope of examination.

In the authors' comments to GCR 1963, 302.2 found at 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 42, they state:

"The third limitation, relevancy, should be liberally construed. Subrule 302.2(1) specifically provides that relevancy to the subject matter includes relevancy to the claim or defense of the examining party or any other party. Since an important role of discovery is to obtain information which will lead to further investigation, an inquiry should be permitted even ***8** though it is not strictly relevant to the precise issues formulated by the pleadings. In this regard, the rule makes it clear that information concerning the existence of books and other objects, and the identity and location of persons having knowledge of relevant facts may be sought upon a deposition."

The fact that *Marchand* was decided before the adoption of the current Michigan Court Rules on discovery does not diminish the clarity of the Supreme Court's reasoning. In that context, the Defendant's arguments about its potential evidentiary admissibility and "duty", provided that Plaintiff decides to amend the complaint, should be not considered as dispositive of this discovery dispute.

Determinations concerning relevancy are within the trial court's discretion. This discretion is particularly great given the broad definition of relevancy under Michigan law. *Maerz v United States Steel Corp,* 116 Mich App 710; 323 NW2d 524 (1982) (discovery request for prior similar incidents).

Defendant Beaumont would have this Court gloss over the distinction between relevancy for purposes of discovery and for purposes of evidentiary admissibility at trial. The decision on the discovery question in *Maerz, supra*, 116 Mich App 722-723, therefore, is worth repeating as being illustrative on that point and showing how well-established the distinction has been:
Under Michigan case law, discovery rules are to be liberally construed. *Hallett v Michigan Consolidated Gas Co,* 298 Mich 582, 592; 299 NW 723 (1941), *Vincent v Van Blooys,* 263 Mich 312, 314; 248 NW 633 (1933), *Dowood Co v Michigan Tool Co,* 14 Mich App 158, 161; 165 NW2d 450 (1968). This is reflected in decisions which have made it clear that **the admissibility requirement is satisfied so long as the matter sought to be discovered could be admitted for any purpose, including impeachment, upon the offer of any party, including the party resisting discovery.** *Kalamazoo Yellow Cab v Kalamazoo Circuit Judge,* 363 Mich 384; 109 NW2d 821 (1961). In *Banaszkiewicz v Baun,* 359 Mich 109, 116; 101 NW2d 306 (1960), the Michigan Supreme Court stated that ***9** the purpose of the admissibility limitation was the prevention of "fishing expeditions into areas unrelated to the cause of action, not to impede a party in discovering from any person, whether competent as a witness or not, all facts and information, not privileged, which are relevant to that cause of action. **Indeed, it is the gaining of such information, from whatever source, that the rule was designed to facilitate."** In *Baun* the Court held that the admissibility requirement did not prohibit the taking of plaintiffs' deposition by an administrator, when such testimony would have been incompetent without a waiver of the protection of the "dead man's statute". The *Baun* case had been viewed as "indicative of judicial resistance to a strict application of [the admissibility] requirement, when it might seriously impede useful discovery efforts". 2 Honigman & Hawkins, Michigan Court Rules Annotated, Rule 306, Author's Comments 3a, 1981 pocket part, p 35.

In light of these authorities, we hold that the protective order should not have been granted because there was a possibility that the information sought would be admissible evidence. Defendant acknowledges that evidence of damage to property of other individuals might have probative value on the issue of proximate cause, provided a proper foundation could be laid. Such information could also have probative value on the issue of defendant's knowledge, which would be material to plaintiffs' claim of negligence. ***

(Emphasis added.)

Review of the record in this case reveals that the Trial Judge did not **abuse** his discretion such that an unprejudiced person, considering the facts upon which the Trial Court acted, would say there is no justification or excuse for the ruling, or the result is so violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias. *Auto Club Ins Ass'n v State Farm Ins Cos,* 221 Mich App 154, 167; 561 NW2d 445 (1997) (order awarding attorney fees); *Schoensee v Bennett,* 228 Mich App 305, 314-315; 577 NW2d 915 (1998) (order awarding attorney fees).

As the Supreme Court declared, "This state has a strong historical commitment to a far-reaching, open, and effective discovery practice." *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 36; 594 NW2d 455 (1999). To that end, the parties "may ***10** obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action *** including the existence, description, nature, custody, condition, and location of books, documents, other tangible things, or electronically stored information and the identity and location of persons having knowledge of a discoverable matter." MCR 2.302(B)(1). Indeed, all information is subject to discovery, including information that will be inadmissible at trial, as long as "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Id.; Harrison v Olde Financial Corp*, 225 Mich App 601, 614; 572 NW2d 679 (1997).

Because the purpose of discovery is to simplify and clarify issues, the rules should be construed in an effort to facilitate trial preparation and to further the ends of justice. *Eyde v Eyde*, 172 Mich App 49, 54; 431 NW2d 459 (1988).

Importantly, Michigan law no longer requires a plaintiff to show "good cause" in order to obtain production of documents or things under MCR 2.310. See *Davis v O'Brien*, 152 Mich App 495; 393 NW2d 914 (1986).

Beaumont Hospital does not have grounds to object that the information sought will be inadmissible at trial, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Defendant has objected to the production of the documentation requested. Any non-privileged, relevant information will be discoverable. Importantly, under the Michigan Rules of Evidence, "relevant evidence" is defined by MRE 401 as follows:

> Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

***11** Generally, "company rules" are admissible "to show that the company perceived a risk and what precautions it deemed appropriate to be taken." 1 Lee & Lindahl, Modern Tort Law (Rev ed), §3.29, p 98. In other words, "the regulations adopted by an employer for the conduct of a factory or a transportation system, may be some evidence of his belief as to the standard of care required, and thus of the nature of an act violating those rules ***." 2 Wigmore on Evidence (Chadbourn rev 1979), §282, p 146; (emphasis in the original). See, for example, *Welch v Jackson & Battle Creek Traction Co*, 154 Mich 399, 404-405, 407; 117 NW 898 (1908).

Michigan case law has long recognized that hospital rules and regulations are discoverable (as in the present case). See, e.g., *Davis v O'Brien, supra*, 152 Mich App 495. In particular, the Davis Court stated:
Hence, those requests for documents relating to the rules, regulations and guidelines on the selection of hospital medical staff, the nature and quality of patient care rendered, the operation of the Department of Radiology, the method of review of the Department of Radiology staff, and procedure followed by any entity assuring quality care if rendered in the Department of Radiology are all relevant with regard to the quality of care rendered by the hospital.

Similarly, documents relating to the hiring, training, supervision and review of radiology technicians, and documents relating to the maintenance of the apparatus used in the administration of the examination performed on plaintiff's decedent are relevant on the issue of the quality of care rendered by the hospital and its staff. Documents listing the pattern of staff organization or management, and listing the people associated with the Department of Radiology are relevant as they will lead to evidence concerning all personnel who rendered treatment to the plaintiff.

Davis, supra, at 505-506.

***12** Finally, the information sought is certainly not privileged. In Davis v O'Brien, supra, this Court reasoned that hospital rules and regulations were not privileged within the meaning of the Court Rules. More specifically, the Court ruled as follows: *We are skeptical that privilege applies to the hospital's rules and* regulations or to documents related to the hospital's accreditation.

156 Mich App at 505, n 5 (emphasis added).

As such, it is clear that rules and regulations regarding fall-prevention measures are not privileged and are clearly relevant to the outcome of this case.

C. Defendant's Liability for Its Own Direct Negligence Is Well-Established in Michigan Common Law

Defendant has now acknowledged the fact that a claim for direct negligence against the hospital is viable in the State of Michigan (Def.-Appellant's Brief on Appeal, pp. 24-25) and, in fact, the failure to adopt or implement policies and procedures has been recognized as a direct cause of action against hospitals. The case law cited by Defendant in its response to the motion to compel (Def.-Appellant's Ex. H) speaks to the question of the standard of care of nurses. The discovery materials being sought in this case are not being sought to establish the standard of care, but to determine whether or not the hospital failed to adopt or implement policies and procedures. As recognized in the medical malpractice accrual statute, MCL 600.5838a, a health care malpractice claim may be brought against a "licensed health facility or agency" licensed under MCL 333.20101 et seq. Specifically, MCL 333.20102 provides in relevant part:
(1) "Health facility or agency", except as provided in section 20115, means:

(g) A hospital.

***13** (5) "Hospital" means a facility offering inpatient, overnight care, and services for observation, diagnosis, and active treatment of an individual with a medical, surgical, obstetric, chronic, or rehabilitative condition requiring the daily direction or supervision of a physician. Hospital does not include a mental health hospital licensed or operated by the department of community health or a hospital operated by the department of corrections.

This definition includes hospitals, such as Defendant Beaumont. A hospital organization's failure to adopt policies and procedures is a claim sounding in negligence. It is well settled that hospitals and medical corporations may be held directly liable for their failure to promulgate appropriate rules and regulations governing the quality of care rendered to their patients and for their failure to develop adequate procedures to ensure that their medical personnel have the qualifications and skills needed to render quality medical care. *Ferguson v Gonyaw,* 64 Mich App 685, 697, 236 NW2d 543 (1975).

In the present case, the requested hospital policies and procedures are relevant to the issues of Beaumont Hospital's negligence and the negligence of Beaumont Hospital regarding the monitoring of a particular patient for fall prevention. Among other things, a hospital's policies and procedures may be relevant to show what the hospital's own staff actually knew, or should have known, about fall prevention. If these policies exist they should be produced and if no policies and procedures exist, Defendant Beaumont Hospital should inform Plaintiff as such.

Numerous Michigan decisions have recognized that hospital administrators have independent duties owed to patients. Those kinds of decisions include *Bronson v Sisters of Mercy Health Corp,* 175 Mich App 647; 428 NW2d 276 (1989) (a hospital standard of care with regard to staffing); ***14** *Penner v Seaway Hospital,* 102 Mich App 697; 302 NW2d 285 (1981) (dealing with a hospital administration's standard of care in reviewing the conduct of staff physicians); *Ferguson v Gonyaw,* 64 Mich App 685; 236 NW2d 543 (1975) (dealing with a hospital administration standard of care for negligent credentialing); *Ravenis v Detroit General Hospital,* 63 Mich App 79; 234 NW2d 411 (1979) (dealing with a hospital administration's failure to maintain

procedures regarding coronial transplants); *Bivins v Detroit Osteopathic Hospital*, 77 Mich App 478; 258 NW2d 527 (1977) (holding hospitals are liable for want of ordinary care toward their patients and upholding a jury's finding of direct negligence on the part of the hospital regardless of the jury's finding that the staff physician was not negligent.)

The responsibility of a hospital for the quality of care provided to patients is also required pursuant to Michigan statute. The liability of hospitals is set forth clearly and definitively. MCL 333.21513 provides:
The owner, operator, and governing body of a hospital licensed under this article:

(a) **Are responsible for** all phases of the operation of the hospital, selection of the medical staff, and **quality of care rendered in the hospital.**

The language of this statute is clear and unambiguous. The statute simply and clearly states hospitals are responsible for the quality of care provided therein. *Id.* Beaumont's failure to adopt polices and procedures clearly involves a question of institutional duty. The Court in *Bronson v Sisters of Mercy Health Corp, supra,* 175 Mich App 647, held that the plaintiff's claim against defendant hospital sounded in malpractice and therefore summary disposition was proper where plaintiff failed to comply with the filing requirements pertaining to medical malpractice cases. The plaintiff in *Bronson* alleged that defendant hospital did not comply with the standard of ***15** care and skill of hospitals in similar localities. The plaintiff alleged that defendant hospital breached its duty to meet this standard of care in its selection and supervision of staff, in providing a safe environment for post-surgical care, and that in sum, plaintiff claimed defendant hospital was negligent in performing those professional services rendered by a hospital. Plaintiff argued that her lawsuit against defendant was founded on ordinary negligence, not medical malpractice, and accordingly was governed by a three-year period of limitation. There the Court recognized that a hospital could be sued for independent acts of negligence.

> "malpractice" actions against hospitals would be limited to cases where plaintiffs seek to impose vicarious liability on hospitals for the malpractice of their agents; all actions charging independent acts of negligence by hospitals would be classified as "ordinary negligence" cases. *We do not find any indication that such a distinction was intended by the Legislature nor do we find such a distinction warranted.* We believe that, in amending § 5838, the Legislature intended that all claims against a hospital for negligent performance of professional medical services would be governed by the statutory period of limitation for medical malpractice actions.

Id., at 653-654.

The *Bronson Court cited Penner v Seaway Hospital,* 102 Mich App 697 (1981), where the panel similarly opined that plaintiff's complaint sounded in medical malpractice where the allegations in plaintiff's complaint included breaches by defendant hospital of its duties to review the conduct of staff physicians and require staff physicians to comply with hospital rules, state law, and the standards of the hospital community.

Here, as in *Bronson* and *Penner*, Plaintiff's claims against the hospital involve breaches in Beaumont's institutional duty and involve claims of direct negligence, which are clearly claims sounding outside vicarious liability.

***16** The Michigan Supreme Court addressed claims asserted directly against a hospital in *Dorris v Detroit Osteopathic Hosp Corp,* 460 Mich 26 (1999). In Dorris, the plaintiff alleged that the hospital owed a duty to maintain a staff that was able to protect patients from other violent patients, that the hospital owed a duty to maintain a staff that could adequately control the behavior of psychiatric patients, and that the defendant hospital breached those duties. *Id.* at 46. The court permitted these claims, and ultimately held that the claim for negligent "supervision and monitoring involves question of professional medical management. Thus, plaintiff's claim was one of medical malpractice." *Id.* at 49.

Michigan Courts have also recognized a variety of other claims asserted directly against a hospital. Negligent credentialing, failure to supervise and maintain staff, and failure to maintain adequate policies and procedures have all been permitted.

A hospital has an obligation to develop certain protocols, procedures, rules and regulations pursuant to its business activities as a hospital. In *Ravenis v Detroit General Hospital, supra,* 63 Mich App 79, the Court of Appeals held that the hospital could be successfully sued for **failing to adopt a procedure** which would assure that a party responsible for determining the suitability of a cornea for transplant would have access to all relevant medical records of the proposed donor. *Id.* at 84. In *Call v Chambers,* unpublished opinion per curiam issued by the Court of Appeals on February 16, 2001 (Docket No. 218865), 2001 WL 740588 (Appendix 1),[4] the Court of Appeals indirectly addressed the issue in finding that a hospital's internal rules and regulations may not establish the standard of care applicable to a hospital in credentialing ***17** physicians, but where an institution is required by law to promulgate certain rules and regulations, those rules and regulations are admissible as evidence of negligence. *Id.* at *2, citing *Beals v Walker,* 416 Mich 469, 481: 331 NW2d 700 (1982). The *Call* panel, however, did not decide that hospital bylaws, rules regulations and procedures for credentialing physicians for hospital staff "privileges" could not be obtained through discovery. Instead, they concluded that they would be inadmissible as evidence at trial.

Defendant Beaumont argues that a hospital's internal policies and procedures are not admissible to establish the standard of care generally in a medical malpractice action. The Defendant relies upon cases speaking to the standard of care applicable to a nurse. In support of this argument Defendant cites *Gallagher v Detroit-Macomb Hospital Association,* 171 Mich App 761; 431 NW2d 90 (1988). That case has never been cited in support of a proposition that a hospital does not have a requirement to establish policies and procedures. Instead, Gallagher declares that hospital protocols are relevant and admissible to provide the standard of care "where they were adopted by the relevant medical staff and where there is a causal connection between the violation of the rule and the injury," 171 Mich App at 767. Furthermore, protocols are admissible to show that a nurse or physician exercised poor judgment. At a minimum, with the appropriate foundation being laid, hospital policies and procedures would be relevant as evidence of what the hospital employees knew or should have known about reasonable care on the topic.

Plaintiff does not claim, however, that a hospital's policies and procedures would actually set the level of care that would be reasonable under the circumstances.

***18** The essential reason for the general rule that hospital policies and procedures do not necessarily "set" the standard of reasonable care, is that the common law recognizes that sometimes an entire organization or even an industry may be negligent in its activities. As Justice Holmes stated in *Texas & P Ry v Behymer,* 189 US 468 470; 47 L Ed 905; 23 S Ct 622 (1903):

> What usually is done may be evidence of what ought to be done, but *what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.* (Emphasis added.)

Similarly, in The *TJ Hooper,* 60 F2d 737, 740 (CA 2, 1932) (where the District Court Judge concluded that vessels were unseaworthy because they did not carry radio receivers by which they could have seasonably gotten warnings of a change in the weather), Justice Hand stated:

> [I]n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. *Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.* (Emphasis added.)

In *Zdrojewski v Murphy,* 254 Mich App 50; 657 NW2d 721 (2002), this Court specifically rejected defendant's argument in deciding where plaintiff alleged, not only a violation of internal policy, but also a violation of Joint Commission on Accreditation of Healthcare Organizations[5] standards. The Zdrojewski Court noted:

***19** Defendants have not cited any authority holding that the rules of an external regulatory agency such as JCAHO could not be used to establish defendants' duty to plaintiff. Therefore, we reject defendants' argument that the trial court should have granted its motion for a directed verdict on that basis.

Id. at 62-63.

In *Gallagher, supra,* plaintiff alleged nursing negligence in failing to properly secure the plaintiff to his bed, resulting in a fall. Plaintiff Gallagher sought to offer internal rules and regulations which spoke to issues concerning the utilization of restraining devices to establish a nursing standard of care. It was never plaintiffs claim in that action that the hospital was negligent for failing to adopt or implement written policies and procedures. As this Court explained in *Gallagher:*

> Plaintiff sought to introduce internal rules concerning restraint of patients, charting of observations and monitoring changes in behavior. *But the question at trial was whether Gallagher had received adequate nursing care or, in other words, whether the nurses had exercised appropriate medical judgment.* The rules plaintiff sought to use were not standards for exercising judgment but were more in the nature of the hospital's administrative guidelines. As such, they were not indicative of community standards nor do they appear to be causally connected to the injury."

Id. at 767-768 (emphasis added).

It could be argued that the Gallagher court made its decision finding that the rules were not admissible in evidence because they were not relevant to the claimed negligence present in that particular case. The other problem with Defendant's analysis is that the adoption of the rule or regulation may have been mandated by statute. The court noted in *Gallagher*, a violation of a regulation promulgated pursuant to a statutory authority, is admissible in a medical malpractice action. *Id.* at 766-777, citing *Kakligian v Henry Ford Hospital*, 48 Mich App 325, 332; 210 NW2d 463 (1973) (violations of regulation promulgated pursuant to statutory authority are evidence of negligence).

***20** When Congress passed the Social Security Amendments of 1965 (Public Law 89-97), it permitted hospitals accredited by the JCAHO to be "deemed" in compliance with the Medicare Conditions of Participation for Hospitals. The Act provided hospitals with an alternate path that many consider preferable to a survey done by the individual state survey agencies on behalf of the Centers for Medicaid and Medicare Services (CMS) to qualify for Medicare and Medicaid reimbursement. The Conditions of Participation for hospitals are contained in 42 CFR, Part 482. *See, e.g.*, 42 CFR §482.13(c)(2), and (e)-(f), "Patient's rights" (Appendix 3). CMS regulations carry the force of federal law under various aspects of the Social Security Act, Title XVIII and XIV. Defendant Beaumont Hospital chose that path and holds itself out as JCAHO certified.

The Rules of the JCAHO are required to be followed by hospitals accepting Medicare and Medicaid funding. Applicable JCAHO standards which may have relevance to the present action will be the subject the matter of future depositions of Beaumont Hospital administrators and need not be gone into here.

Whether Beaumont has adopted and implemented policies and procedures with regard to the utilization of bedside rails, the utilization of bed alarms, fall precautions, and the utilization of sitters are extremely relevant to this case and they should be produced. See Def.-Appellant's Ex. G(1) - Defendant's Answer to Plaintiffs First Interrogatories and Request for Production of Documents, p. 5, paragraph 2. In the event the Defendant failed to adopt and implement policies and procedures relative to the questions involved, Plaintiff may move to amend his Complaint to allege acts of corporate negligence against the hospital. The Statute of Limitations has not run as to those claims.

***21** Although Defendant has cited several appellate opinions for the proposition that an organization's rules and procedures do not establish the standard of reasonable care, those cases do not dispose of the discovery question raised by this appeal, which does not even reach the standard of care question. The unpublished opinions, in particular, are not dispositive of this

case for several reasons: a) They are distinguishable on their facts. b) They are limited to its own factual record. c) They are an unpublished Court of Appeals opinion and therefore not precedential binding, MCR 7.215(C)(1). Therefore, the Defendant's case law does not determine the discovery issue which they have raised themselves.

D. Defendant Has Not Shown It Is Aggrieved by the Trial Court's Discovery Order; Therefore, Defendant Lacks Standing to Appeal

Contrary to Defendant-Appellant's framing of the questions presented (Def.-Appellant's Brief on Appeal, p. vi), the Trial Court appropriately exercised its discretion and ordered Defendant to produce its fall-prevention policies and procedures as a matter of pretrial discovery procedure. MCR 2.302(B)(1). Further, "[t]he question of jurisdiction is always within the scope of this Court's review ***." *Walsh v Taylor*, 263 Mich App 618, 622; 689 NW2d 506 (2004).

Rulings on the Defendant's "standard of care" and "legal duty" and "to admit or exclude evidence" have actually not yet been reached by the Trial Court in this case. (Def.-Appellant's Brief, p. vi.) Plaintiffs motion to compel (Def.-Appellant's Ex. G) merely placed specific discovery disputes at issue in the instant case. Therefore, the trial court's discretionary order compelling production of the disputed documents (Def.-Appellant's Exhibit A) simply did not decide whether those documents would be ***22** admissible or establish the standard of care or Defendant's "legal duty", if any. See *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003) ("It is settled that error requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence."). *Id.*

To put it another way, to have standing to bring an appeal, a party must be **aggrieved** by the lower court's decision. *Rymal v Baergen*, 262 Mich App 274, 318; 686 NW2d 241 (2004). The concepts of standing and whether an individual is an aggrieved party are closely related. *See Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 290-291; 715 NW2d 846 (2006), construing MCR 7.203(A). "In order to have appellate standing, the party filing an appeal must be 'aggrieved."' *Manuel v Gill*, 481 Mich 637, 643; 753 NW2d 48 (2008). The term "aggrieved party" is defined as one who is not merely disappointed over a certain result, but one who has "suffered a concrete and particularized injury ***. [A] litigant on appeal must demonstrate an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case." *Federated Ins Co, supra*, 475 Mich at 291-292.

In order to appeal, "It is a cardinal principle, which applies alike to every person desiring to appeal, that he must have an interest in the subject-matter of the litigation. Otherwise he can have no standing to appeal." *Allen v Soule*, 191 Mich 194, 197; 157 NW 383 (1916). On appeal, the litigant must demonstrate that he or she is affected by the decision of the trial court. *George Realty Co v Paragon Refining Co of Mich*, 282 Mich 297, 300; 276 NW 455 (1937); *see also Ford Motor Co v Jackson (On Rehearing)*, 399 Mich 213, 226 n 9; 249 NW2d 29 (1976) (a party is entitled to appeal when it is ***23** interested in the subject matter of the controversy and is injuriously affected or aggrieved by the lower court's judgment or order) (citation omitted). Whether a party has standing is a question of law, which the appellate courts review de novo. *Lee v Macomb County Board of Comm'rs*, 464 Mich 726, 734; 629 NW2d 900 (2001).

In this case, the Defendant Hospital appeals from a discretionary discovery order of the Trial Court compelling production of certain documents, which Defendant considers "confidential". Simultaneously, the Trial Court also granted a protective order, severely limiting further dissemination of the "confidential" documents (Def.-Appellant's Ex. A, pp. 2-5). Interestingly, Defendant maintains that the ruling is erroneous on evidentiary or "legal duty" grounds which were simply not reached by the Trial Court's order. Further, Defendant signed the discovery order "approved as to form", which waives any claim that other rulings may have been made by the Trial Court which are not contained in the order from which Defendant is appealing. (Def.-Appellant's Ex. A.) To be clear, Plaintiff is not suggesting that Defendant waived its appellate rights as to the **content** of the Wayne Circuit Court's discovery order, or stipulated to its substance, merely by signing "approved as to form", which is one of the permissible methods for entering an order, "if, in the court's determination, it comports with the court's decision." MCR 2.602(B)(2). Instead, Plaintiff is saying that Defendant has waived any right to argue that the Trial Court's order (Def.-Appellant's Ex. A) does not comport with the court's decision or that it does not mean what it plainly says.

In *Roberts v Farmers Ins Exch*, 275 Mich App 58, 71-73; 737 NW2d 332 (2007), this Court considered an argument that, by signing proposed orders indicating "approved as to form and content", the defendant insurance company had waived the ***24** right to appeal orders by the trial court awarding attorneys fees. The Roberts panel quoted extensively, with approval, from *Ahrenberg Mechanical Contracting, Inc v Howlette*, 451 Mich 74, 77-79; 545 NW2d 4 (1996), and concluded:

> Here, there is no indication that the parties stipulated to the outcome; therefore, the analysis in *Kim [v loor*, 266 Mich 335, 336-338, 253 NW 318 (1934),] is applicable. Farmers vigorously litigated its position in the trial court, and then acted promptly to perfect an appeal. *Ahrenberg Mechanical Contracting, Inc, supra* at 79. Farmers was merely indicating that it approved of the content of the orders as being *reflective of the trial court's rulings.*

Similarly, in this case, Defendant Beaumont Hospital should not be permitted to argue that the order compelling production of its policies and procedures (Def.-Appellant's Ex. A) has a "hidden meaning", for example, as a ruling on an evidentiary question or summary disposition of Defendant's "legal duty" as a matter of law.

Plaintiff respectfully submits, therefore, that Defendant has not shown that it has "standing" to appeal from that order on the grounds argued in its Brief on Appeal. Defendant-Appellant's argument and rhetorical comments are further addressed elsewhere in this Brief in Opposition.

E. Any Potential Claim of Peer Review or Other Privilege Has Been Waived

Defendant fails to raise the "peer review" privilege, MCL 333.21515, in its Questions Presented. (Def.-Appellant's Application for Leave to Appeal, 12/11/13, p. vi; Def. Appellant's Brief, 5/13/14, p. vi.) Therefore, although it certainly has the power to do so, this Court should not address the peer review privilege, or any other potential privilege, as being waived by Defendant's failure to include it in the statement of questions presented on appeal. ***25** *Joerger v Gordon Food Serv*, 224 Mich App 167, 172, 568 NW2d 365 (1997); *Maryland Cas Co v Allen*, 221 Mich App 26, 32-33, 561 NW2d 103 (1997); *Marx v DOC*, 220 Mich App 66, 81, 558 NW2d 460 (1996).

In the event this Court does consider the peer review privilege, briefly, the information must have been collected for or by an individual or committee assigned to specifically review "the professional practices in the hospital for the purpose of reducing morbidity and mortality and improving the care provided in the hospital for patients." MCL 333.21513(d); *see also Marchand v Henry Ford Hosp*, 398 Mich 163, 167-168, 247 NW2d 280 (1976). Therefore, the mere submission of information to a peer review committee, let alone any other type of hospital meeting, does not bring the information within the protection of the statute. *Monty v Warren Hosp Corp*, 422 Mich 138, 146-147, 366 NW2d 198 (1985).

In any event, Michigan courts recognize a hearing *in camera* as the appropriate proceeding to determine whether the statutory privilege protects the requested documents and information. *Monty*, 422 Mich at 146; *Marchand*, 398 Mich at 166-168; *Porter v Michigan Osteopathic Hosp Ass'n, Inc*, 170 Mich App 619, 624, 428 NW2d 719 (1988).

In *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26; 594 NW2d 455 (1999), the trial court was ordered to give plaintiff an opportunity on remand to test the veracity of an affidavit from the defendant's Manager of Quality and Utilization Management stating that the records plaintiff sought were kept for the purpose of maintaining health care standards at the hospital, improving the quality of care provided to patients, and reducing morbidity and mortality within the hospital. The affidavit also stated that the information was collected for purposes of retrospective review by the peer committee.

***26** More recently, this Court has acknowledged that a trial court erred by determining that factual and objective information in a hospital's incident report about a patient being seriously burned in the operating room during a surgical procedure, including a

nurse's contemporaneous handwritten operating room observations, would be privileged from disclosure under MCL 333.21515 ("peer review") or "confidential". *Harrison v Munson Healthcare, Inc,* 304 Mich App 1;___NW2d___ (2014). This Court distinguished such factual matters from records, data and knowledge gathered to permit an effective review of professional practices by the hospital's "peer review" committee which is assigned to that function. Portions of an incident report reflecting "a deliberative review process", rather than objective and/or contemporaneous factual observations, however, may qualify as "confidential". In this case, the Defendant has not yet produced its policies and procedures (even for in camera review by the Trial Court). Therefore ,this Court only has Defendant's say-so that they are confidential or otherwise privileged.

At this stage of the proceedings, the claims of privilege and confidentiality have become moot. First, the Trial Court has a protective order in place to keep the policies and procedures from unwarranted further dissemination. (Def.-Appellant's Ex. A, pp. 2-5.) Second, on appeal, Defendant has conceded that the policies and procedures which Plaintiff seeks "were not mandated by MCL 333.21513, which is intended to ensure quality of care by reducing morbidity and mortality including review of professional practices and granting staff privileges." (Def.-Appellant's Brief on Appeal, p. 26.) Instead, Defendant now maintains, they are "simply internal rules." (Id.) Based ***27** on that representation alone, Defendant's objection based on "privilege" has been unequivocally waived.

CONCLUSION AND RELIEF REQUESTED

In this case, Defendant-Appellant Beaumont Hospital, Grosse Pointe, has not shown that the Trial Court **abused** its discretion in ordering the production of its policies and procedures for the prevention of falls by its patients.

Further, Defendant-Appellant has failed to show that that it has been aggrieved by the Trial Court's order requiring Defendant-Appellant to produce any and all policies and procedures (whether adopted and/or implemented) regarding patient fall prevention where there is a protective order to preserve any claimed "confidentiality" of the policies and procedures. Therefore, Defendant-Appellant lacks standing to invoke this Court's jurisdiction on interlocutory appeal.

Footnotes

1 "Def.-Appellant's Ex." refers to exhibits which Defendant Hospital filed with their brief on appeal in this Court on May 13, 2014.

2 Patient "sitters" (more formally known as "observation assistants"), who may be volunteers or relatives, have been used in some hospitals as a part of safety or care plans for patients who are found to be at increased risk for falling.

3 As explained in Part E, *infra,* Defendant's "privilege" objection has been waived.

4 "Appendix" refers to the one being filed by Plaintiff-Appellee with this brief.

5 Now known simply as "The Joint Commission" (TJC). Formerly known as the Joint Commission on Accreditation of Healthcare Organizations (JCAHO). A brochure from the commission's website indicates, "The Centers for Medicare and Medicaid Services (CMS) and 46 state agencies substantially rely on the Joint Commission's accreditation of hospitals in lieu of conducting their own inspections." "The Value of Joint Commission Hospital Accreditation" (Appendix 2), accessed on-line on June 17, 2014, at http://www.jointcommission.org/assets/1/18/HAP Value Accreditation.pdf.

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