IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Appeal No. 27615, 27626, 27631

RYAN NOVOTNY,

Plaintiff and Appellee,

vs.

SACRED HEART HEALTH SERVICES,
A South Dakota Corporation, d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation,

Defendants and Appellant,

and

ALLEN A. SOSSAN, D.O., also known as ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, P.C., a New York Professional Corporation, LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company,

Defendants and Appellants.

CLAIR ARENS AND DIANE ARENS,

Plaintiffs and Appellees,

vs.

CURTIS ADAMS, DAVID BARNES, MARY MILROY , ROBERT NEUMAYR, MICHAEL PIETIL and DAVID WITHROW,

Defendants and Appellants,

and

ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, also known as ALLEN A . SOSSAN, D.O., SACRED HEART HEALTH SERVIES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, MATTHEW MICHELS, THOMAS BUTTOLPH, DOUTGLAS NEILSON, CHARLES CAMMOCK, LEWIS &CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company, DON SWIFT, DAVID ABBOT, JOSEPH BOUDREAU, PAULA HICKS, KYNAN TRAIL, SCOTT SHINDLER, THOM POSCH,

DANIEL JOHNSON, NUETERRA HEALTHCARE MANAGEMENT, and VARIOUS JOHN DOES and VARIOUS JANE DOES,

Defendants and Appellants.

CLAIR ARENS AND DIANE ARENS,

Plaintiffs and Appellees,

vs.

LEWIS & CLARK SPECIALY HOSPITAL, LLC, a South Dakota Limited Liability Company,

Defendant and Appellant,

and

ALLEN A. SOSSAN, D.O., also known as ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, P.C., a New York Professional Corporation, SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, DON SWIFT, D.M. KYNAN TRAIL, M.D., CURTIS ADAMS, DAVID BARNES, THOMAS BUTTOLPH, MARY MILROY, DOUGLAS NEILSON, ROBERT NEUMAYR, MICHAEL PIETILA, CHARLES CAMMOCK, DAVID WITHROW, VARIOUS JOHN DOES, and VARIOUS JANE DOES,

Defendants and Appellants.

APPEAL FROM THE CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT
YANKTON COUNTY, SOUTH DAKOTA

THE HONORABLE BRUCE V. ANDERSON
CIRCUIT JUDGE

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Petition for Permission to Take Consolidated Appeal of Intermediate Order Filed November 3, 2015
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PRELIMINARY STATEMENT

Plaintiffs from all the cases consolidated in this appeal will be referred to by their name and will be referred to as either "Plaintiffs" or "Appellees" when being referred to collectively. Defendant Alan A. Soosan a/k/a Allen A. Soosan a/k/a Allen A. Soosan D.O. will be referred to as "Soosan." Appellant Sacred Heart Health Hospital services d/b/a Avera Sacred Heart Hospital will be referred to as "ASHH." Appellant Lewis & Clark Specialty Hospital, LLC, will be referred to as "LCSH." Appellants Curtis Adams, David Barnes, Mary Milroy, Robert Neumayr, Michael Pietila, and David Withrow will be collectively referred to as "Peer Review Defendants." ASHH, LCSH, and the Peer Review Defendants will be collectively referred to as "Appellants" or "Defendants." The consolidated cases noted in this Court's December 15, 2015 Order Granting Petition for Permission to Appeal will be referred to collectively as "the Soosan cases."

References to the Circuit Court Record from the *Novotny v. Soosan, et al,* matter (Appeal No. 27615; CIV 14-235) will be by the designation "*Novotny*" followed by the page number(s). References to the Circuit Court Record from the *Arens v. Soosan, et al,* matter (Appeal No. 27626 and 27631; CIV 15-167) will be by the designation "*Arens*" followed by the page number(s).

JURISDICTIONAL STATEMENT

Defendants appeal the decision of the Honorable Bruce V. Anderson's October 23, 2015, "Memorandum Decision: Plaintiffs' Motion to Compel Discovery - Plaintiff's Motion on Constitutionality of Peer Review Statute SDCL 36-4-26.1 - Plaintiff's Motion and Argument Concerning Hospital Liability and Negligent Credentialing." This Court granted Defendants an intermediate appeal on December 15, 2015.

REQUEST FOR ORAL ARGUMENT

Appellees respectfully request the privilege of appearing before this Court for Oral Argument.

STATEMENT OF THE ISSUES

I. Did the Circuit Court correctly rule that, in order to remain constitutional, SDCL § 36-4-26.1 required a crime/fraud exception

Yes. The protection of a privilege is contingent on the proper exercise of that privilege. A "privilege takes flight if the relation is abused." *Clark v. United States*, 289 U.S. 1, 15-16 (1933). Appellants used the peer review privilege to hide information from their patients and the public regarding the danger that Soosan posed to them. Appellants further used peer review to cover up their knowledge and participation in Soosan's deceptive surgery practices.

II. Did the Circuit Court appropriately require Appellants to turn over original source material to Appellees?

Yes. Peer review privilege statutes "erect an outer limit on the peer-review privilege.…" *Pastore v. Samson*, 900 A.2d 1067, 1081 (R.I. 2006). Such statutes put "limitation[s] on the scope of the privilege afforded a health-care provider, rather than a definition of [a] plaintiff's exclusive avenue of discovery." *Id.* Obtaining these outside documents from Appellants, rather than other sources, promotes judicial efficiency and has no negative impact on the strength of the underlying privilege. *Fisher v. United States*, 425 U.S. 391, 403-404 (1975).

INTRODUCTION

Appellants essentially argue that they should be allowed to lie to their patients; to defraud their patients through surgeries the patients do not need; and to commit perjury. In other words, they ask this Court for a license to lie, cheat, and steal. Appellants couch these requests in language discussing the purported virtues of peer review. Underneath that language, however, is their real request: to make sure that they can use South Dakota's peer review privilege to cover up evidence of crimes or frauds and then be allowed to lie about it under oath.

Appellants try to talk about the privilege abstractly. Most, if not all, of their studies lack data to support their conclusion that peer review promotes patient safety. The data, itself, tells a different story.[1] The data indicates that the inviolate peer review privilege Appellants seek actually *undermines quality health care*.[2] Soosan is just the tip of the iceberg. At least one other Appellant also used the secrecy encouraged by the peer review privilege to hide his infection rates and to perform unnecessary procedures for profit.[3]

Judge Anderson was disturbed by the Appellants' pattern of illicit behavior and their cover-up efforts. That is why he ordered that, in order to remain constitutional, South Dakota's peer review privilege required a crime/fraud exception. Judge Anderson also noted that, absent a negligent credentialing cause of action and its attendant evidence, hospitals and other medical organizations, like Appellants and their amici, will continue licensing bad, but profitable, doctors like Soosan. As the United States Supreme

[1] *See* Public Citizen Amicus.
[2] *Id*.
[3] *See* Appendix 3-4, Silvernail Affidavit, ¶¶ 19-20, 26-32.

Court pointed out, the crime/fraud exception is necessary to prevent privileges from creating "dens of thieves." Appellants turned their hospitals into dens of thievery. The peer review privilege should not give them such license.

STATEMENT OF THE CASE

This litigation arose out of hundreds of unnecessary surgeries committed by an orthopedic surgeon, Soosan. Soosan, and the hospitals and other doctors who supported him, convinced dozens of patients to submit to surgery – usually multiple surgeries – through various pitches and artifice. Few of his patients got the relief he "guaranteed."[4] All the while, ASHH, LCSH, and the Peer Review Defendants said one thing to their patients (that Soosan was one of the top doctors in the world)[5] but had a completely different opinion behind closed doors. (*Novotny* 437) ("I felt that I was placed in a terrible situation, in that, I wanted to warn patients but was not a doctor and feared I would lose my job…. Staff members had only two choices; to either put up with Sossan's abuse and practices or leave.").[6]

As a result, Appellees filed over thirty actions against ASHH, LCSH, the Peer Review Defendants, and others because of their participation in Soosan's illegitimate surgical practices. Appellees pled the following causes of action: deceit; fraudulent

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[4] *See e.g.*, (*Novotny* 453, 455, 481, 519, 586, 653) (discussing Soosan's "guarantees").
[5] *See also* (*Novotny* 652) (Zweber Affidavit) ("Dr. Swift said that Sossan was a 'world class doctor. ….' Based on Dr. Swift's representations and the fact that Sossan had privileges at a hospital, I went to see Sossan.") (alteration in original).
[6] *See* Appendix 8, Hall Affidavit, ¶ 30-32, 34 ("On multiple occasions, myself and Michelle Jordan, CEO, had to talk the Anesthesia providers into working with Sossan. They complained constantly that he (Sossan) was unsafe in his care and hostile to work with. The Board was made aware of this issue as well. The board of managers knew exactly what Sossan was doing. Yet, they supported Sossan continuing at Lewis & Clark because he made them so much money.... It [also] became known that Sossan was scheduling follow-up surgeries on patients before the results of the initial surgery was even known.").

misrepresentation; fraudulent concealment; battery; respondeat superior and agency; conspiracy; RICO violations; negligent credentialing (hiring) and retention; unjust enrichment; bad faith peer review; and other causes of action related to the constitutionality of South Dakota's peer review privilege statute.[7] Appellees brought these causes of action because Appellants knew Soosan was a corrupt doctor who performed unnecessary surgeries; because Appellants worked together to enable Soosan to generate massive profits through these unnecessary surgeries; and because Appellants deceived Appellees regarding Soosan's character, skill, training, and Appellees' medical conditions. (*Novotny* 1911). As Judge Anderson noted, "the gravamen of the Plaintiffs claims sounded in fraud and deceit *and were not actions for medical malpractice*…." (*Novotny* 1911) (emphasis added).

Shortly after litigation started, Appellees submitted discovery requests and, as Judge Anderson observed, Appellants provided "little useful information." (*Novotny* 1911). Appellants claimed they did not have to turn over this information, citing the peer review privilege. (*Novotny* 1911). Appellees filed a Motion to Compel. (*Novotny* 969-70). Appellees argued there should be a crime/fraud exception to South Dakota's peer review privilege, and if not, that the statute was unconstitutional. (*Novotny* 294-337). Because Appellees' causes of action sounded in fraud and deceit, Appellees argued that the crime/fraud exception should apply, and Appellants should disclose their peer review documents. *Id.* Furthermore, Appellees argued that, in order for the peer review privilege to comply with due process, there should be an independent source exception for negligent credentialing claims against hospitals or other medical facilities. *Id*. Judge

[7] (*Novotny* 15-29).

Anderson granted Plaintiff's Motion to Compel, holding that in order to remain constitutional, South Dakota's peer review privilege statute needed a crime/fraud exception and an independent source exception for negligent credentialing claims against hospitals and other medical facilities. (*Novotny* 1935-37).

STATEMENT OF THE FACTS

I. Soosan has a History of Criminal, Violent, and Fraudulent Behavior

Soosan was born in Iran, but grew up in Florida. (*Novotny* 1912). While in Florida, Soosan was convicted of felony forgery, grand theft, and bad check charges and later, felony burglary. *Id*.; Appendix 11-13. He then unofficially changed his name from Alan Soosan to "Allen Sossan." *Id*. Sossan attended medical school under his new alias. *Id*.

In 2004, Soosan applied for a medical license in Nebraska in 2004. (*Novotny* 365). In his application, Soosan lied about his true identity and his felony past. *Id*.; Appendix 14-15. After obtaining his Nebraska license, Soosan started practicing as an orthopedic surgeon specializing in spinal fusion surgeries in Norfolk, Nebraska. (*Novotny* 1912). Quickly thereafter, other physicians and staff raised concerns about Soosan's questionable medical practices and his fitness to practice medicine. *Id*.

Soosan was well known for falsifying patient charts and intentionally misreading radiology films to justify unnecessary surgeries. (*Novotny* 1291) ("The most significant problem posed by [Soosan] was that [Soosan] falsified patient charts in order to justify performing unnecessary procedures on his patients." "The most widely known of [Soosan's] fraudulent activities involved [Soosan] disregarding the opinions of the radiologists and creating erroneous chart findings from [Soosan's] personal reading of x-

ray, MRI and CT scans that falsely gave [Soosan] diagnostic criteria to justify otherwise unwarranted surgeries."). In fact, several radiologists at Faith Regional Hospital "complained about [Soosan's] conduct in falsifying radiological results." *Id*. "[Soosan] also did a great deal of injection work and engaged in the performance of unnecessary injections, nerve blocks and radiofrequency ablation." *Id*. Soosan left numerous patients disabled or dead as a result. The settled record contains multiple accounts of how Soosan destroyed his patients' lives. (*Novotny* 441-42 (Dan Meyer); 445-47 (Norma Jeanne Sorenson); 434-35, 452 (Mildred Sloan).

About the same time Soosan lost his privileges in Norfolk, Appellants ASHH and LCSH courted him to come to Yankton. (*Novotny* 1913). ASHH needed an orthopedic surgeon to cover on-call support. (*Novotny* 1159, 1163). LCSH was in financial trouble. (*Novotny* 1914).

Numerous people who worked with Soosan in both Norfolk and Yankton warned ASHH and LSCH against granting Soosan privileges. *Id*. For example, Dr. William Winn, who practiced in both Norfolk and Yankton, personally warned ASHH's medical director that Soosan falsified patients' medical records to justify unnecessary medical procedures. (*Novotny* 1913). Dr. Winn further warned the medical director that Soosan "posed a danger to the public." (*Novotny* 1913, 1291-92). LCSH received similar warnings. (*Novotny* 437, 1246).

Dr. Winn's concerns were consistent with other doctors who have testified against Soosan. (*Novotny* 1913). They all questioned Soosan's fitness as a licensed physician. *Id*. For example, Dr. Robert Suga, an orthopedic surgeon from Sioux Falls, testified that Soosan performed unnecessary surgeries "with the motive of generating bills and income

for himself." (*Novotny* 1913-1914). Dr. Quentin Durward, an orthopedic surgeon from Dakota Dunes, expressed similar concerns. (*Novotny* 1914).

As Judge Anderson observed when evaluating this testimony and Appellees exhibits, there was a significant amount of evidence demonstrating Soosan was a known danger to the public:

> In general, Plaintiffs have amassed a significant amount of evidence that, if proven to be true at trial, would raise a serious question if Dr. Sossan should have never [sic] been licensed, granted privileges, or that when he was, action should have been taken promptly to revoke or restrict his privileges, and that any reasonable person responsible for his medical practice supervision should have known he may have posed a danger to patients and taken appropriate action.

Id.

II. Appellants Knew Soosan was a Corrupt Doctor, but They Wanted the Massive Profits he Could Generate

When Soosan first applied to practice medicine in Yankton, ASHH's medical executive committee ("MEC") denied his application. (*Novotny* 1913). To date, it is unknown exactly what information ASHH's administration fed the MEC,[8] but the MEC members learned through informal channels that Soosan was a "danger to the public." (*Novotny* 1291, 1913) ("When I learned of Sossan's attempt at securing privileges at Avera Sacred Heart Hospital, I personally intervened to report the above-described problems regarding Sossan to Avera Sacred Heart Hospital in the interests of patient safety. In my opinion, Sossan posed a danger to the public."). LCSH received similar warnings. (*Novotny* 437, 1246). Like his application to practice medicine in Nebraska, Soosan submitted false answers on his South Dakota application related to his name and felony past. (*Novotny* 241); Appendix 16-18. He is currently under felony indictment as

[8] (*Novotny* 1913).

a result. *See* Appendix 16-18. Both ASHH and LCSH had the ability to obtain Soosan's background information; they either chose not to look it up or ignored what they found. Appendix 19-20 (Soosan criminal search showing felony record).

Despite the known danger he posed, ASHH's CEO, Pam Rezac, had Matt Michels pressure the MEC to extend Soosan privileges. (*Novotny* 417, 442, 1181). The MEC dutifully reversed course. (*Novotny* 1913). Historically, ASHH utilized its MEC as a perfunctory board to simply "rubber stamp" ASHH's decisions, according to Dr. Don Swift, an Appellant who previously served on the ASHH MEC. *See* Appendix 21. The MEC "really didn't do much except have meetings, and the administration decided what – what was going to happen all the time." *Id*. When asked whether ASHH's administration was worried about Soosan's bad history, another Appellant and MEC member replied, "*They don't give a shit. They don't look at that stuff.*" (*Novotny* 417) (emphasis added). This same doctor noted that ASHH will have no qualms about lying under oath to protect its profits:

> Neumayr: He's gonna lie. Cause if he comes to court and you ask him that and he'll have to lie.
>
> Aaning: Of course they all lie. There's no problem with that.
>
> Neumayr: Oh sure, but then you have to make sure whoever you talk to, lies too.

(*Novotny* 415). LCSH also knew about Soosan's problems but extended him privileges because they believed Soosan would generate enormous profits. (*Novotny* 632).

Shortly after Soosan started practicing in Yankton, "issues and complaints began to arise that should have made it obvious to doctors and other persons in the medical field that there was a serious and substantial question as to Soosan's fitness, competency and

ability to practice medicine in his specialty prompting further inquiry." (*Novotny* 1914). Soosan was open about the fact that he was performing unnecessary surgeries for money. (*Novotny* 603).

ASHH's and LCSH's employees became increasingly concerned about Soosan's behavior and repeatedly reported Soosan to their superiors. ASHH and LCSH, however, told these employees that Soosan was untouchable because of the money he brought in. Jennifer Coffey, a nurse who worked with Soosan at ASHH, was told that Avera kept Soosan despite the numerous complaints because he was a rainmaker. (*Novotny* 660). Kendra Krueger, Soosan's former clinical nurse at LCSH, was told that Soosan was "*untouchable* due to the amount of money [Soosan] brought into Lewis & Clark." (*Novotny* 437).

None of this behavior or any of the employee complaints had any effect on Sossan's privileges. As Judge Anderson stated, "despite the fact that there were numerous complaints and much discussion among the medical community about Dr. Sossan, no action was taken to limit, modify or otherwise terminate his privileges in the Yankton medical community by those who had authority to do so." (*Novotny* 1914). According to Appellees' credentialing expert, ASHH and LCSH demonstrated "willful, wanton, and malicious disregard of the standards of care and administrative community standards applicable to the initial granting privileges and credentials…." (*Novotny* 1915).

ARGUMENT

Appellees causes of action are grounded in fraud, deceit, conspiracy, and RICO. (*Novotny* 1911). Appellants knew about Soosan's propensity to perform unnecessary surgeries, but they gave him hospital privileges anyway. Along the way, Appellants lied

to patients and the public about Soosan's skill, character, and demeanor. Appellees' evidence demonstrates that Appellants used the peer review privilege to hide damaging information about Soosan and to conceal evidence of their own culpability in his illicit practices.

Appellants used the peer review privilege in a manner inconsistent with its purpose. As the United States Supreme Court stated, when the holder of a privilege abuses that privilege, the privilege is waived. *Clark*, 289 U.S. at 15-16. That is because the protection offered by the privilege *only* extends to activities consistent with the purpose of the privilege. *Id*.

Statutory privileges are strictly construed "to avoid suppressing otherwise competent evidence." *State v. Guthrie*, 2001 SD 61, ¶ 61. That is because "[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed" by either party. *United States v. Nixon*, 418 U.S. 683, 709 (1974). In analyzing other statutes pertaining to the practice of medicine, this Court noted that a statute is unconstitutional where it "gives all the benefits to the wrongdoer … while it places all the corresponding detriment to the" injured victim. *Knowles v. United States*, 1996 SD 10, [33]. Furthermore, "[n]ot every exception to a privilege established by statute is legislative in origin. The judiciary has also imposed some limitations…." *Benton v. Superior Court*, 182 Ariz. 466, 469 (Az. App. 1994).

I. Judge Anderson Correctly Concluded the Peer Review Statute Must have Certain Exceptions in order to Comply with Due Process

Appellants incorrectly argue that Appellees waived all issues regarding the constitutionality of South Dakota's peer review statute. Appellees were not required to file a cross appeal because Appellees' original position is consistent with Judge Anderson's ruling: in order for South Dakota's peer review privilege statute to be constitutional, there must be certain exceptions, including a crime/fraud exception and exceptions for discovery of outside materials relied on by peer review committees in negligent credentialing cases.

A. Due Process Requires Certain Exceptions to Privileges

1. Due Process Is the Foundation of the Judicial System

Due process and access to the courts "form[] the bedrock on which the structure of our judicial system is constructed. Essential to the fabric of [these constitutional rights] is the citizen's right of access to the evidence necessary to prove his case, without which mere access to the courts would be vain and useless." *Kammerer v. Sewerage & Water Bd.*, 633 So.2d 1357, 1362 (La.App. 1994).

Judge McMillan from the Federal District Court for the Western District of North Carolina summed up the role of due process:

> Due process -- fair procedure -- is not a bitter medicine which is reserved only for the knowingly wicked. Due process is a simple necessity of any society which believes (as did those who drew our Constitution) that the excesses of governmental power are more dangerous than the risks of personal freedom. Power tends to corrupt us all – even the "good guys" – and due process of law – the command to hear both sides before deciding – is a necessary restraint on the exercise of governmental power.

Poe v. Charlotte Memorial Hosp., 374 F. Supp. 1302 (W.D.N.C. 1974).

2. Procedural Due Process Looks to the Fairness of the Process, Including Fairness in Discovery

"Procedural fairness is provided for in civil due process…. [O]pen testimony, time to prepare and respond to charges, and a meaningful hearing before a competent tribunal in an orderly proceeding are all elements of civil due process." *In re Moseley*, 660 P.2d 315, 318 (Wash. 1983). "Discovery is the quintessence of preparation for trial and, when discovery rights are tramped, prejudice must be presumed." *Scott v. Greenville Housing Auth.*, 579 S.E.2d 151, 158 (S.C. 2003). Discovery is a right guaranteed even in the less formal world of administrative law. *High Horizons v. State Dept. of Transp.*, 575 A.2d 1360 (N.J. 1990) (procedural fairness includes "a chance to know the opposing evidence and argument and to present evidence and argument in response."). Due process is so important it regularly requires that a contrary privilege yield to a litigant's evidentiary rights. *See United States v. Nixon*, 418 U.S. 683 (generalized assertion of Presidential privilege had to yield to the generalized, specific need for evidence in a criminal trial); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (newsman's First Amendment privilege yielded based on due process).

3. Inviolate Absolute Privileges are Questionable, at Best

"Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances." *Herbert v. Lando*, 441 U.S. 153 (1979). Whatever "their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Nixon*, 418 U.S. at 710.

At one point, privileges were presumed to be absolute and inviolate. Edward J. Imwinkelried, The New Wigmore: A Treatise on Evidence, Evidentiary Privileges § 5.4.4

(Richard Freedman ed., 2002). That view has since been questioned due to the problems it creates. Imwinkelried, Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges, 65 U. Pitt. L. Rev. 145, 156-73 (2004). That is because the underlying rationale behind absolute and inviolate privileges is considered untested or flawed. *Id*.

B. Due Process Requires a Crime/Fraud Exception to the Peer Review Privilege Because Appellees' Compelling Procedural Due Process Concerns Outweigh any Substantive Due Process Right

Appellants incorrectly argue that, because the peer review privilege is supposedly absolute, no crime/fraud exception should exist. First, even those privileges historically considered to be "absolute" have specific exceptions like the crime/fraud exception. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 116, (1996) (spousal); *Nixon*, 418 at 705-07 (presidential); *Upjohn*, 449 U.S. at 389 (attorney-client); *In re Grand Jury Proceedings (Violette)*, 183 F.3d 71, 72 (1st Cir. 1999) (psychotherapist); *Clark*, 289 U.S. 153 (juror confidentiality). Second, where there are conflicts between procedural due process rights of remedy and discovery and substantive due process rights regarding privileges, courts regularly find that the procedural due process right to evidence trumps any competing substantive due process concern. *Branzburg, supra* (civil litigant's procedural due process right to evidence from a news reporter's confidential source overrides and defeats reporter's first amendment privilege). Here, Appellants have no substantive due process right under peer review. This undeniably shifts the balance in favor of Appellees' procedural due process rights. *Deming v. Jackson-Madison County Gen.*, 553 F. Supp. 2d 914 (W.D. Tenn. 2008) (holding that peer review does not affect a substantive due process right). *Benjamin v. Schuller*, 400 F. Supp. 2d 1055 (S.D. Ohio 2005) (physicians have no

fundamental rights or liberty interests in peer review decisions). Third, Appellants ignore that courts created *all* of these exceptions. *Id*.; *Benton, supra*.

Even for privileges protected by substantive due process rights, courts require exceptions for fraudulent or criminal behavior. As Justice Cardozo stated, a "privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told." *Clark*, 289 U.S. at 15. That's because a statute cannot legislate away another person's due process rights.

The crime/fraud exception is specifically allowed because the behavior associated with the exception (i.e., criminal or fraudulent acts) is inconsistent with the rights at stake in the privilege. *Clark*, 289 U.S. at 16 ("A privilege surviving until the relation is abused and vanishing when abuse is shown to the satisfaction of the judge has been found to be a workable technique for the protection of the confidences of client and attorney."). In fact, this Court has quoted favorably United States Supreme Court precedence addressing this issue. *See e.g.*, *State v. Catch the Bear*, 352 N.W. 2d 640, 646-47 (S.D. 1983) (*quoting Nixon*, 418 U.S. at 710) ("'Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.'"). Privileges "must be considered in the light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in [the United States Supreme Court's] view that 'the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer.'" *Nixon*, 418 U.S. at 709.

1. Other Privileges with Stronger Foundations than the Peer Review Privilege Require Crime/Fraud Exceptions

a. Privileges Based on Fundamental Rights Require a Crime/Fraud Exception, as Judge Anderson Properly Recognized

Appellants incorrectly claim the legislature intentionally failed to include a crime/fraud exception to the peer review privilege. As a preliminary matter, determining whether a statute is unconstitutional or requires an exception to remain constitutional is emphatically a question for the courts, not the legislature. Furthermore, Appellants' arguments are illogical. Essentially, Appellants state that the South Dakota Legislature endorsed the notion that hospitals can use peer review to cover up crimes or frauds. Such a position would be in direct conflict with South Dakota's criminal and civil statutes related to fraud and deceit. *State v. Mundy-Geidd*, 2014 S.D. 96, ¶ 11 (absurdity in result invalidates strict reading of conflicting statutes).

The Due Process Clause "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Collins v. Harker Heights*, 505 U.S. 115, 125 (1992). It "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Wash v. Glucksberg*, 521 U.S. 702, 720 (1997) (citations omitted). These fundamental rights "are, objectively 'deeply rooted in this Nation's history and tradition.'" *Id*. (citations omitted). Anything that infringes on a fundamental right must be "narrowly tailored to serve a compelling state interest." *Id*. at 722. In other words, an abridgement of a fundamental right must survive strict scrutiny.

The spousal privilege derives from the fundamental right to marriage. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996).[9] As a result, the spousal privilege was considered inviolate at one point, as Appellants argue the peer review privilege should be. *Hawkins v. United States*, 358 U.S. 74, 78 (1958). That approach, however, proved problematic:

> As Jeremy Bentham observed more than a century and a half ago, such a privilege goes beyond making "every man's house his castle," and permits a person to convert his house into "a den of thieves." It "secures, to every man, one safe and unquestionable and ever ready accomplice for every imaginable crime."

Trammel, 445 U.S. at 51-52 (citations omitted).

The United States Supreme Court subsequently narrowed the spousal privilege through a crime/fraud exception to prevent its abuse. *Id*. at 35. South Dakota followed suit. *State v. Witchey*, 388 N.W.2d 893 (S.D. 1986) (recognizing the joint-participant exception to the marital privilege in criminal matters). The Supreme Court applied the exception in a way to balance the need for disclosure under certain circumstances against the need for private communications. *Trammel*, 445 U.S. at 35. Even with the crime/fraud exception, the spousal privilege is still considered absolute.

b. As Judge Anderson Observed, Typically Absolute Privileges Protecting National Security are Subject to the Crime-Fraud Exception

Presidential, or executive, privilege derives from Article II of the United States Constitution. *Nixon*, 418 U.S. at 705-07. Like peer review, the need for candor amongst a President's advisors is an essential element of the privilege:

[9] *See also Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888) (Marriage is "the most important relation in life" and "the foundation of the family and society, without which there would be neither civilization nor progress"); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

> [The President has] the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision making process.

Id. at 705.

The United States Supreme Court recognized that the Presidential privilege "is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Id*. at 708. Additionally, the President has certain immunities not available to the general public. *Id*. (quoting Chief Justice Marshall in *United States v. Burr*, 25 F. Cas. 187, 192 (No. 14,694)).

As the Supreme Court noted, despite its roots in the Constitution, national security, and defense, the Presidential privilege must bow to due process evidentiary needs:

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of the courts that compulsory process be available for the production of evidence needed by the prosecution or by the defense.

Id. at 709.

c. Judge Anderson Properly Noted that the Attorney-Client Privilege is Subject to a Crime/Fraud Exception

The attorney-client privilege is "the most sacred of all legally recognized privileges, and its preservation is essential to the just and orderly operation of our legal system." *United v. Bauer*, 132 F.3d 504, 510 (9th Cir. 1997). The attorney-client

privilege is also "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co*, 449 U.S. at 389. It is grounded in the 5th and 14th Amendment rights to procedural and substantive due process; the 6th Amendment rights to speedy and public trial, to a trial by an impartial jury, to confront witnesses, to compel witnesses to appear in court, and for assistance of counsel; and the 7th Amendment right to a jury trial. U.S. Const. Amend. 5, 6, 7, 14.

Similar to the Presidential privilege and Appellants' arguments about the peer review privilege, the attorney-client privilege "encourage[s] full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice." *Id*. The United States Supreme Court recognized that legal and medical privileges share a general need for confidentiality. *Trammel*, 445 U.S. at 51. Appellants assertions justifying an inviolate peer review privilege apply equally to the attorney-client privilege:

> As a practical matter, if the client knows that damaging information could more easily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.

Fisher, 425 U.S. at 403. However, Appellants' arguments regarding the chilling effect of the crime/fraud exception are undermined by South Dakota statutes specifically permitting physicians to discover peer review material, SDCL 36-4-26.1, and by United States Supreme Court precedence explicitly rejecting the assertion that a crime/fraud exception has *any* effect on candor. *Nixon*, 418 U.S. at 712.

Like any privilege, the attorney-client privilege "is not without its costs." *United States v. Zolin*, 491 U.S. 554, 562 (1989). That is because "the privilege has the effect of

withholding relevant information from the factfinder." *Id*. (citations omitted). As a result, the attorney-client privilege "applies only where necessary to achieve its purpose." *Zolin*, 491 U.S. at 562. In other words, like any privilege, it is "strictly construed." *Trammel*, 445 U.S. at 50. Thus, the attorney-client privilege "does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime." *Zolin*, 491 U.S. at 563 . The same logic unquestionably applies to the peer review privilege.

Like the spousal and Presidential privileges, the attorney-client privilege stems from constitutionally guaranteed rights. The crime/fraud exception to all of these privileges derived from court action, as Judge Anderson did here. Like the spousal privilege, the attorney-client privilege's underlying rights are *fundamental* to the notion of ordered liberty and thus any abridgement of those rights must be "narrowly tailored to serve a compelling state interest." *Glucksberg*, 521 U.S. at 722. The crime/fraud exception both serves a compelling state interest and is sufficiently narrowly tailored to not abuse the right. Creating a crime/fraud exception to the peer review privilege, however, requires no such analysis. There is no fundamental right at stake. There is no need for strict scrutiny. This Court can affirm a crime/fraud exception simply because there is a rational basis to do so. It should.

2. Judge Anderson Correctly Ruled that a Crime/Fraud Exception to the Peer Review Privilege Adequately Protects Appellees' Procedural Due Process Requirements

The peer review privilege is no more special than the attorney-client privilege, the presidential privilege, or the spousal privilege. It has none of the characteristics of a fundamental right or liberty. It should, therefore, not have any greater protection. The

legislature could not get rid of the attorney-client privilege or the spousal privilege. Likewise, the legislature could not repeal the crime/fraud exception to the attorney-client or spousal privileges even if it wanted to. That is because the courts have said, as Judge Anderson did, that privileges like peer review must be subject to a crime-fraud exception.

The crime/fraud exception is required for public safety. Courts balance the need for secrecy with the need to prevent "dens of thieves" that members subject to the privilege can abuse. There is no doubt that privileges can be abused. Appellants knew horrific details about Soosan, yet they let him continue butchering his patients. They allowed him to keep doing it because they wanted the huge distribution checks Soosan's practice allowed. *See* Appendix 8, Hall Affidavit, ¶ 32 ("The board of managers knew exactly what Sossan was doing. Yet, they supported Sossan continuing at Lewis & Clark because he made them so much money."). Appellants knew Soosan was performing unnecessary surgeries. *Id*. ¶ 34 ("It became known that Sossan was scheduling follow-up surgeries on patients before the results of the initial surgery was even known."). Appellants' belief that peer review would shield them from scrutiny allowed greed, rather than patient safety, to guide their decisions. *Id*. ¶ 38 ("I have been in hospital management for over 25 years and Lewis & Clark was the worse [sic] example of how bad it can get when doctors own hospitals and surgery centers. The greed controlled all decisions."). *See also* (*Novotny* 437, 660, 1191).

As Judge Anderson noted, the attorney-client privilege provides excellent guidance on how to apply the crime-fraud exception. Under the attorney client privilege, there is a two-step process to access privileged materials:

1) The moving party must make a threshold showing, using nonprivileged evidence "'of a factual basis adequate to support a

> good faith belief by a reasonable person' that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies."[10]

and

> 2) The trial court may hold an *in camera* review of the privileged communication itself in the form of documents, attorney, testimony, or both.[11]

Whether to conduct the second step of the process is left to the "sound discretion" of the court. *Zolin*, 491 U.S. at 572. The exception applies regardless of whether the privilege holder was a willing or unwitting accomplice to the fraud. *In re Grand Jury Proceedings (Violette)*, 183 F.3d at 79.

Here, independent evidence confirms that Soosan – with Appellants' participation and assistance – continued performing unnecessary surgeries for profit after he came to Yankton:

> [Soosan] was very open about the fact that procedures and surgeries he performed were all about money. When [Soosan] had a particular interest in buying something expensive he would push to schedule more procedures and surgeries. For example, [Soosan] liked fancy cars and one day brought in a picture of a foreign sports car that cost over $200,000. He told the staff to call all the patients who had surgery in the last 6 months to come in so that he could schedule new surgeries to make the money to buy the car

(*Novotny* 603) (emphasis added). Witnesses recounted how Soosan would say whatever it took to get his patients to agree to surgery:

> Many patients expressed anger and frustration about the anterior surgery because [Soosan] never told the patients that there would be two surgeries before the patient agreed to the first surgery….
>
> [Soosan] was extremely convincing and would tell patients whatever it took to get them to have a surgery.

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[10] *Zolin* 491 U.S. at 572 (citations omitted).
[11] *In re Grand Jury Subpoena*, 419 F.3d 329, 343 & n. 12 (5th Cir. 2005).

Id.

Appellants knew what Soosan was doing, but they let him keep doing it for the money. *Id*. This was recently confirmed by some of Appellant Lewis & Clark's then board members. *See* Appendix 23, Posch Deposition at 207:9-14 (confirming that Soosan pushed him to give more vague radiological readings to justify unnecessary surgeries); Hall Affidavit, *supra*. Judge Anderson recounted some of Appellees' evidence in his opinion and concluded by stating, "it is clear to this Court that the plaintiffs have submitted sufficient evidence presently to make out a *prima facie* case of fraud and deceit sufficient for this court to allow access to the peer review records of the Defendants.". (Novotny 1934).

The United States Supreme Court created the crime/fraud exception to privileges affecting fundamental rights because the exception passes strict scrutiny. It promotes a compelling state interest (not creating a safe haven for criminal or fraudulent acts), and it uses the most narrowly tailored means to fulfill that compelling interest (there must be a baseline showing of fraudulent or criminal behavior before the privilege can be invaded). As Public Citizen points out, fraudulent or criminal conduct in a hospital setting is particularly harmful. There is a compelling state interest in making sure that criminal or fraudulent activity does not take place. There is also a compelling state interest in ensuring that peer review committees do not become shelters where corrupt individuals can hide evidence of malfeasance. That defeats the whole purpose of peer review. Medical quality is not enhanced if doctors or hospitals can commit crimes or frauds and then hide the evidence behind peer review.

3. No Crime/Fraud Exception would Lead to an Absurd Result

Appellants' interpretation of the peer review privilege as "absolute" would allow hospitals to commit crime and fraud without fear of legal repercussion. The legislature's intent would never be to condone criminal action. *See e.g., State v. Mundy-Geidd*, 2014 S.D. 96, ¶ 11 ("Under Mundy-Geidd's interpretation, numerous public safety statutes involving alcohol would have been repealed by implication."). In *State v. Mundy-Geidd*, this Court interpreted concurrent statutes where one of the statutes could preclude the enforcement of DUIs from 2012 to 2014. *Id.* This Court rejected this interpretation in part because the defendant's "interpretation leads to absurd results." Id. ¶ 7. Protecting hospitals from fraudulent and criminal activity is as equally absurd. It is also inconsistent with other statutes that condition immunity on peer review members acting in good faith and not immunizing hospitals from liability. SDCL 36-4-25, SDCL 36-4-26. Furthermore, Appellants' interpretation would effectively shield most doctors from criminal prosecution, so long as the evidence is provided to a peer review committee. Appellants' interpretation of peer review would undermine the rule of law and create a class of individuals not subject to civil – *or even criminal* – liability.

4. Judge Anderson Properly Concluded that an in-Camera Review was Unnecessary

Appellants argue that Judge Anderson erred by not performing an *in camera* review of their respective peer review records. Under existing precedence, however, that discretion is left to the trial court. *Zolin*, 491 U.S. at 572. Furthermore, according to the United States Supreme Court, where the threshold for the crime/fraud exception has been met and where there are voluminous records, it would be improper to consistently require *in camera* review:

> There is also reason to be concerned about the possible due process implications of routine use of in camera proceedings…. Finally, we cannot ignore the burdens in camera review places upon the district courts, which may well be required to evaluate large evidentiary records without open adversarial guidance by the parties.

Id., at 554 (internal citations omitted).

Judge Anderson also observed that, if Appellants wanted an *in camera* review, they needed to first produce a privilege log, which they failed to do. (*Novotny* 1935). As such, Appellants' arguments are both factually and legally incorrect.

C. Judge Anderson Correctly Ruled that Due Process Requires Peer Review Discovery for Negligent Credentialing Causes of Action

"It is well settled that it is the unique responsibility of the courts, not the executive or legislature, to resolve a conflict between two competing constitutional interests." *Southwest Cmty. Health v. Smith*, 755 P.2d 40, 44 (N.M. 1988) (*citing Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803)). A privilege violates due process when it invades the "fundamental constitutional right to have a remedy for an injury to person or property by due process of law." *Ernest v. Faler*, 237 Kan. 125, 131 (1985). The right to due process and a fair trial are "so fundamental that they even override exclusionary rules of evidence (i.e. privileges) that are *constitutionally* grounded." *Adams v. St. Francis*, 264 Kan. 144, (1998) (emphasis added); *Branzburg*, 408 U.S.665 (civil litigant's procedural due process right to evidence from a news reporter's confidential source overrides and defeats a reporter's first amendment privilege).

Appellants failed to appeal Judge Anderson's prior decision that negligent credentialing and bad faith peer review are valid causes of action in South Dakota and that the gravamen of Appellees' claims are fraud and deceit. (*Novotny* 2039). That may

be because most every state recognizes negligent credentialing as a cause of action.[12] They do so because, as occurred here, a hospital's failure to adequately screen potential doctors is disastrous for patients. As a result, many courts allow peer review discovery because due process requires it in negligent credentialing cases. For example, Kentucky allows litigants to use peer review information in medical malpractice suits. *Sister's Charity Hospital v. Raikes*, 984 S.W.2d 464 (Ky. 1998). Like South Dakota's statutes, Kentucky only confers immunity if the peer review decision was made in good faith. *Id*. *See* SDCL 36-4-26 (hospitals not immune from all lawsuits regarding peer review decisions); SDCL 36-4-25 (immunity is conferred to members of a peer review committee *only* "if the committee member or consultant acts without malice, has made a reasonable effort to obtain the facts of the matter under consideration, *and* acts in reasonable belief that the action taken is warranted by those facts.") (emphasis added).

In fact, the Kansas Supreme Court declared its peer review privilege statute unconstitutional because it failed to allow peer review discovery in negligent credentialing cases. *Adams*, 264 Kan. 144. Like South Dakota, the Kansas Constitution guarantees its citizens "due course of law." Kan. Bill of Rights § 18. Kansas, however, has a more deferential standard of review for the constitutionality of a statute than South Dakota. Unlike South Dakota's substantial relationship test, in Kansas "[a] statute must clearly violate the constitution before it may be struck down." *Id*. at 157.

The Kansas Supreme Court noted that broad application of the peer review privilege – like Appellants request here – would allow doctors and hospitals to use peer review as a black hole for evidence against them:

[12] For a list of these decisions, see (*Novotny* 312).

> The twelve definitions of peer review listed in Kan. Stat. Ann. § 65-4915 encompasses all, or almost all, aspects of the practice of medicine. Many documents and records generated in a hospital or medical practice could be useful to a peer review officer or committee in performing its duties. If a document was to be privileged solely by the virtue of it being reviewed by a peer review officer or committee and the information in those records could not be discovered or admitted into evidence at trial, it would intolerably thwart legitimate discovery and tend to eliminate medical malpractice cases and the discovery of evidence relevant to the awarding of staff privileges contained in documents, records, and papers submitted to the peer review committee. This cannot, in the court's opinion, be the result intended. Such an interpretation could raise significant constitutional implications.

Id.

As a result, the court noted that if peer review served to "insulate from discovery the facts and information which go to the heart of the plaintiff's claim [it] would deny plaintiffs that right [to due process] and, in the words of the federal court, 'raise significant constitutional implications.'" *Id*. at 173. The court held that the statute should be rejected as unconstitutional because it was overbroad:

> In the present case, we conclude that although the interest in creating a statutory peer review privilege is strong, it is outweighed by the fundamental right of the plaintiffs to have access to all the relevant facts. *The district court's protective order and order granting other discovery relief denied plaintiffs that access and thus violated plaintiffs' right to due process*….

Id. at 173-74 (emphasis added).

Judge Anderson correctly ruled that a limited exception to the peer review statute for negligent credentialing cases is consistent with the overall legislative context surrounding peer review. *See* (*Novotny* 1930) ("Without giving Plaintiff access to this important peer review information, the second clause of the first sentence of SDCL 36-4-25 is rendered completely meaningless…."). That is because peer review committee members do not have immunity if their decisions were made in bad faith. SDCL 36-4-

25. Similarly, hospitals, like ASHH and LCSH do not have immunity for their peer review decisions. SDCL 36-4-26. Appellants' interpretation of the peer review privilege would make those two statutes meaningless. *Mundy-Geidd*, 2014 S.D. 96, ¶ 11.

Further indication that the peer review privilege is not inviolate is found in the privilege itself. SDCL 36-4-26.1 provides: "No person in attendance at any meeting of any committee described in 36-4-42 is required to testify as to what transpired at such meeting." This statute provides that MEC members cannot be "required" to testify. Thus, the privilege can be waived by MEC members who are willing to testify. This is consistent with other privileges which can be waived by clients, patients, or penitents. The peer review privilege can similarly disappear if someone is willing to talk about it. Appellants ignore this inconvenient fact.

If the Legislature were so concerned about the chilling effect of any use of any peer review information, it would have banned *all* testimony in *all* instances. Furthermore, SDCL 36-4-42's permissive testimony exception to peer review is consistent with the public policy exception for whistleblowing. *See Dahl v. Combined Ins. Co.*, 2001 SD 12, ¶ 12 ("Whistleblowing or the reporting of unlawful or criminal conduct to a supervisor or outside agency, plays an *invaluable* role in society. As recognized by courts considering this issue, 'public policy favors the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy.'"). The crime/fraud exception and the whistleblower exception both serve the same goal: they protect the public from illegal or fraudulent acts by those in positions of power.

The crime/fraud exception is also consistent with the model rules of behavior for both lawyers and doctors. An attorney may breach the privilege to prevent the imminent commission of crimes or frauds. *See* ABA Model Rules of Professional Conduct, Rule 1.6(b)(2). The American Medical Association *requires* doctors to report the kind of behavior Soosan exhibited. *See* AMA Code of Medical Ethics, Opinion 9.031. The common denominator for lawyers and doctors is that they must all report specified criminal or fraudulent behavior. This Court should, as Judge Anderson did, require Appellants to do what their own code of medical ethics required them to do.

D. Judge Anderson's Ruling That Appellees can Obtain Original Source Information Directly from Appellants is Consistent with how Other Privileged Evidence is Obtained

Appellants argue the peer review privilege is "absolute." Yet, they concede Judge Anderson correctly ruled that Appellees are entitled to discover original source information considered by their MECs. ASHH Brief at 17-18; Adams Brief at 23. Their concession confirms that SDCL 36-4-26.1 is *not* absolute. Appellants acknowledge that the statute should only protect what the committee itself produces (ex. its proceedings, records, reports, statements, minutes) and that it *does not* protect information the committee obtained or considered from outside sources.

Paradoxically, Appellants never explain why patient complaints about Soosan are not discoverable. Appellants agree that "the protections of 36-4-26.1 do not apply to patient records or observations made by a health care professional during the time of a patient's treatment." Adams Brief at 20. Patient or staff complaints are no different than any other outside sources. Appellants cannot convince this Court that they can also hide patient complaints under the guise of peer review.

Appellants argue that Appellees should have to obtain information generated outside their peer review committees from their original sources. That proposed procedure is judicially inefficient and illogical.

If original source information is not privileged, it should be discoverable from any source that has it. That is because peer review privilege statutes "erect an outer limit on the peer-review privilege…" and any exception to the privilege stops the statutes "from functioning as a shield" for that information. *Pastore*, 900 A.2d at 1081. In other words, exceptions for original source material are "limitation[s] on the scope of the privilege afforded a health-care provider, rather than a definition of [a] plaintiff's exclusive avenue of discovery." *Id*. Courts have rejected Appellants' argument because "[t]o oblige a plaintiff to track down the original source of unprivileged information that is within the custody of a party to the dispute would be to require burdensome labor for no good reason." *Id*.

Appellants have provided no good reason why Appellees should be compelled to obtain the original source information from the various original sources. It would put Appellees in the impossible position of having to divine what original source information the MEC obtained in the first place and then force Appellees to try and track down each original source from each of the relevant jurisdictions. Appellees would then have to try and compel those sources to turn over the relevant evidence. Many of these sources are not under the jurisdiction of this Court, so any order regarding those documents could be rejected. That would require Appellees to redo this entire process for each source of information that is already in Appellants' possession.

The attorney-client and work product privileges are instructive in this regard. Any communication between an attorney and his or her client is protected by the attorney-client privilege. SDCL 19-19-502. During discovery, however, numerous documents that are discoverable are exchanged between the attorney and his or her client. *See cf. Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981) ("A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system…. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.") (citations omitted). Those documents, thus, would be subject to the attorney-client privilege. *Id*. Like the peer review privilege, there is no exception in SDCL 19-19-502 for original source documents. Nonetheless, discovery documents passed from client to attorney are regularly produced in discovery. *Fisher*, 425 U.S. at 403-404 ("The Court and the lower courts have thus uniformly held that pre-existing documents which could have been obtained by court process from the client when he was in possession may also be obtained from the attorney by similar process following transfer by client in order to obtain more informed legal advice."). That is because it would be inefficient for litigants to have to track down all relevant documents from their original sources. Furthermore, there is no privacy interest in documents that are discoverable:

> Pre-existing documents obtainable from the client are not appreciably easier to obtain from the attorney after transfer to him. Thus, even absent the attorney-client privilege, clients will not be discouraged from disclosing the documents to the attorney, and their ability to obtain informed legal advice will remain unfettered.

Id. at 404.

Like the attorney-client privilege, if a document is not protected by privilege, it is discoverable. Appellants cannot play a shell game of evidence, all because they may have made allegedly privileged decisions based on it. Likewise, Appellees should not be required to jump through myriad hoops just to get information that Appellants could provide. Appellees should be able to get original source documentation from Appellants, themselves.

E. Appellants' Purported Controlling Case Law is Inapplicable

Appellants primarily rely on three cases to discuss South Dakota's peer review privilege: *Shamburger v. Behrens*, 380 N.W.2d 659, 665 (S.D. 1986); *Martinmaas v. Engelmann*, 2000 SD 85; and, *Uhing v. Callahan*, 2010 U.S. Dist. LEXIS 70 (D.S.D. Jan. 4, 2010). None of those cases, however, are applicable here.

In *Shamburger*, the only discussion of South Dakota's peer review privilege is in dicta from a summary judgment motion. As Judge Anderson pointed out, "*Shamburger* was a run of the mill malpractice claim where the plaintiff claimed that Dr. Behern [sic] was an alcoholic or otherwise afflicted with habitual intemperance." (*Novotny* 1954). Furthermore, "[t]he only ruling that *Shamburger* made with respect to privileged records concerned the Plaintiff's request to obtain Dr. Behern's [sic] alcohol treatment records from another provider." *Id*. As Judge Anderson observed, "*Shamburger* did not involve claims as are presented in the cases presently before this court where the Plaintiffs allege fraud, deceit, bad faith or RICO claims against the peer review committees involving the peer review process…. *Shamburger* does not help the Defendants here and the court is

not persuaded that it has much applicability, if any at all, to the present cases." (*Novotny* 1955). Furthermore, there was no constitutional challenge, as there is here.

Appellants also contend that, under *Martinmaas*, peer review is an absolute privilege. Like *Shamburger*, *Martinmaas* was a case involving regular negligence claims against a doctor. 2000 SD 85, ¶ 1. The plaintiffs in *Martinmaas* wanted to use the transcript from Engelmann's application for re-issuance of his medical license as evidence that he was negligent in his care and treatment of the plaintiffs. *Id*., ¶ 45. There was no claim against the medical facility in *Martinmaas*, as there is here. There was no claim that Engelmann committed some sort of fraud or deceit, as there is here. There was no claim that the hospital used peer review to perpetuate frauds or deceits, as there is here. As such, there is no applicability of the logic of *Martinmaas* to this case. Additionally, this Court actually found no prejudice against Engelmann for the introduction of peer review evidence.

Finally, Appellants cite to *Uhing v. Callahan*, an unpublished district court case, to support its contention that the peer review privilege is absolute. *Uhing*, however, is factually inapplicable and legally incorrect.

First, *Uhing* is factually inapplicable. Like *Martinmaas* and *Engelmann*, *Uhing* is a run-of-the mill medical malpractice case. The plaintiff's need for the peer review documents had no relationship to crimes, frauds, or even negligent credentialing claims. In fact, the plaintiffs in *Uhing* argued that they needed "the disputed records because Dr. Callahan attributes errors in Plaintiff's back surgery to inexperienced staff. Plaintiffs argue that Dr. Callahan's medical history suggests he should not have been performing surgeries. The disputed records could provide evidence to refute Dr. Callahan's assertion

that he is physically capable of performing surgery." 2010 U.S. Dist. LEXIS 70, [4]-[5]. Those arguments have nothing to do with the appropriateness of the peer review committee's decisions or whether the facilities used the peer review committee to perpetuate crimes, frauds, or deceits. Factually, *Uhing* is inapplicable.

Furthermore, the *Uhing* court relied on this Court's decision in *Pawlovich v. Linke*, 2004 SD 109, for the dicta that the peer review privilege is absolute. *Pawlovich*, however, relies on *Flugge v. Wagner*, 532 N.W.2d 419 (S.D. 1995) and *Waln v. Putnam*, 196 N.W.2d 579 (S.D. 1972)) to make that dicta. Under those decisions, however, "[a]n 'official proceeding' is 'that which resembles judicial and legislative proceedings, such as transactions of administrative boards and quasi-judicial and quasi-legislative proceedings.'" *Flugge*, 532 N.W.2d at 421. (citations omitte).

This Court has *explicitly rejected* Appellants' inference that a board decision by a nonprofit constitutes an "official proceeding" which is afforded absolute privilege:

> Appellants first contend that a meeting of the board of directors of a nonprofit corporation to remove a director is an 'official proceeding authorized by law…' and therefore that the communication in issue here was absolutely privileged. We feel that this contention is without merit. Surely it was not the legislative intent to grant an absolute privilege for every defamatory utterance made in every lawful meeting. *We are persuaded that the 'official proceeding' embraced in the purview of the statute is that which resembles judicial and legislative proceedings*, such as transactions of administrative boards and quasi-judicial and quasi-legislative proceedings, *not a meeting of a board of directors of a nonprofit corporation or the like*.

Waln, 196 N.W.2d at 583 (citations omitted) (emphasis added). Most, if not all, of the documents Appellees request come as the result of meetings of Appellants' boards of directors or MECs that are making routine employment decisions. Even though they perform many of these actions under the color of peer review, it lacks the imprimatur of

an official proceeding authorized by law. Even if it were, such absolute privileges require crime/fraud exceptions to comport with procedural due process. *M.L.B.*, 519 U.S. at 116 (spousal); *Nixon*, 418 at 705-07 (presidential); *Upjohn*, 449 U.S. at 389 (attorney-client); *(Violette)*, 183 F.3d at 72 (psychotherapist); *Clark*, 289 U.S. 153 (juror confidentiality).

II. Judge Anderson's Concerns Regarding Perjury Absent Peer Review Discovery are Valid

At oral argument, Judge Anderson noted his concern about Appellants' willingness to perjure themselves. Appellants' response was that South Dakota's peer review statute allows doctors and hospitals to commit perjury:

> THE COURT: What about when I add this Neumayr problem in there, that he says, you know, they'll lie? How does anybody check that? I mean, if there's perjury, shouldn't somebody be able to hold them to task?
>
> MR. EDEN: Your Honor, I think that's a question for the legislature. They've crafted this statute purposely to shield any and all evidence from any time of proceeding that would come out of the peer review process.

(*Novotny* 1707).

Absent some check on the peer review privilege, Appellants' requested interpretation would encourage rampant perjury. That is why exceptions for perjury are regularly allowed. *See e.g.*, *United States v. Apfelbaum*, 445 U.S. 115, 127 (1980) (perjury exception to Fifth Amendment right against self-incrimination) (the Fifth Amendment "does not endow the person who testifies with a license to commit perjury."). In fact, the perjury exception is an extension of the crime/fraud exception because it relates to a litigant's abuse of a privilege. *Christenbury v. Locke Lord*, 85 F.R.D. 675, 686 (N.D. Ga. 2012).

It should come as little surprise that Appellants are willing to perjure themselves. As Judge Anderson observed, there is sufficient evidence that Appellants used their peer review process to commit and cover up acts of fraud or deceit. (*Novotny* 1934). If Appellants were willing to use peer review to commit fraud and deceit, it is reasonable to believe that they would commit perjury at trial. In fact, they admitted they will. (*Novotny* 415).

CONCLUSION

For the reasons outlined above; as outlined in Judge Anderson's opinion;[13] and, as outlined in Appellees' underlying briefs on the matter,[14] Appellees request this Court to affirm Judge Anderson's order compelling discovery.

Dated this 18th day of April, 2016.

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[13] (*Novotny* 1910-1937)
[14] (*Novotny* 234-293, 294-337, 1101-1122, 1484-1506).

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellee's Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 9,840 words, exclusive of the Table of Contents, Table of Authorities, any addendum materials, and any certificates of counsel.

/s/ Robert D. Trzynka
One of the attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April, 2016, I sent the original and two (2) copies of the foregoing by United States Mail, first class postage prepaid to the Supreme Court Clerk at the following address:

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I also hereby certify that on this 18th day of April, 2016, I sent copies of the foregoing to Appellants' counsel by email and United States Mail, first class postage prepaid, to the following address:

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