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Supreme Court of Texas.

In re LIVING CENTERS OF TEXAS, INC., d/b/a Wharton Manor, Relator.  
No. 04-0176.

September 9, 2004

Appearances:

Thomas C. Cowan, Preston & Cowan, LLP, Houston, TX, for relator.  
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for real party in interest.

Before:

Paul W. GREEN, Chief Justice Wallace B. JEFFERSON, Nathan L.  
HECHT, Harriet O'NEILL, Dale WAINWRIGHT, Scott A. BRISTER, David M.  
MEDINA, Phil JOHNSON.

CONTENTS

ORAL ARGUMENT OF THOMAS C. COWAN ON BEHALF OF THE PETITIONER  
ORAL ARGUMENT OF BERNARD KLIMIST ON BEHALF OF THE RESPONDENT  
REBUTTAL ARGUMENT OF THOMAS C. COWAN ON BEHALF OF THE PETITIONER

JUSTICE: Thank you. You may be seated. The Court is ready to hear argument in 04-0176. In re Living Centers of Texas, Inc.

SPEAKER: May it please the Court. Mr. Thomas Cowan representing argument [inaudible] five minutes of rebuttal.

ORAL ARGUMENT OF THOMAS C. COWAN ON BEHALF OF THE PETITIONER

MR. COWAN: May it please the Court. Good morning [inaudible]. Your Honors, we're basically here today under discovery [inaudible] which this Court has addressed in several occasions and I believe the gist of the case was expressed by Justice Owen in the Irving Healthcare case when she said that there's nothing worse than a halfhearted privilege and we believe very strongly today that if this Court needs to make it clear that the privilege that a physician may have in a hospital is just as applicable, just as necessary, if we're going to establish a goal of peer review for nurses and nursing assistants in hospitals and in nursing homes which in fact was the ruling of this Court after the trilogy cases which Irving was one of [inaudible]. So, we feel that if we're going to have the criteria which was set on Memorial case of why we have to have peer review which was exactly critical analysis of the competence and performance of physicians and as Justice Owen said when -- she did not say [inaudible] position. She said somewhat clairvoyantly and other healthcare providers will result in better healthcare. I don't think my opponent or anyone in the Court does not believe that that is a valid statement.

More importantly or just as important to a peer review privilege is an atmosphere of confidentiality is required for meaningful communication. The records used filed it by the peer review committee are not ordinary business records which would negate the peer review statutes that was also held in the Memorial case. Basically, what we're saying today is nothing more than what was said in the trilogy which is the Memorial, Irving and Brownwood which basically hold that the applications for work in a nursing home where we have to do criminal background checks, we have to call and make sure that they have never, you know, done anything abusive to someone else.

For a nursing assistant or a nurse is the same function, maybe even somewhat more important function in the nursing home arena, as it is for the credentialing of the physicians which were done in the Memorial case and the Irving case. So, we feel very strongly that the only way to have a peer review Methodism in nursing homes is to have it just like we have it elsewhere. In other words, if we [inaudible] and we have seen it time and time again on the trial courts to somehow distinguish the function of a peer review quality assurance in the nursing home situation as opposed to hospitals or doctors.

So, we believe that the legislative intent is clear in all of the cases that we have reviewed that a peer review should be in place for nursing homes. The second main point that I think should be made is that Wharton Manor [inaudible] was very, very aware of the trilogy cases which came down in 1996 when this discovery dispute came about. Nursing homes had been pretty beaten up on these issues for quite awhile. So, when the trilogy came, it came on like the big screen TV. It was good news. It was important news in the nursing homes and so when we started filing our answers to discovery and we've gotten to the trial court level, we made sure that we did exactly to the team what was put forth in Memorial, in particular, that sets out the criteria and secondly, in the Irving case.

JUSTICE: Mr. Cowan, do you believe that your position was not vindicated to trial court in part because the trial judge didn't review all of the documents under the sampling?

MR. COWAN: First, I do think it is vindicated and secondly, you do recall that he was given that opportunity and decided not to do it.

JUSTICE: My question is do you think the trial judge should have reviewed all of them? By not seeing that some of the documents were reproduction of some, that perhaps, otherwise, would not have if --

MR. COWAN: Well, [inaudible] in the Memorial case, again, as I was saying, we tried to follow that script that those sample documents were given in Memorial and in a later case called [inaudible] which we also cited in our brief. The identical thing that was done [inaudible] was get further on with Texas Code of Civil Procedure 193.4. It alludes to the fact that a sample of documents can be [inaudible]. So, again, we believe that the road map was provided to us on the affidavit which has been talked about -- the affidavits in the Memorial case, Trinity case, and the Brownwood case, and the Learner case and the U.T. at Tyler case were affidavits that were provided by a member of the committee, of the peer review committee. So, what did we do? We picked the Virginia Ross who was the [inaudible] that means the Director of Nursing to provide the Court an affidavit. We feel, again, we did exactly what we were taught to do in the trilogy and in that affidavit -- it's been attacked that's gone beyond the quality assurance and assessment plan. Well, in all the other cases it was a quality or assurance assessment plan put in place which is basically the enabling statute, if you will, to use in an analogy. It says by law, we have to have peer review and it has

to be set forth in our governing body so we have that document but that is the [inaudible] umbrella. It's the person holding the umbrella which is important in all the trilogy cases and that's the [inaudible] who describes we're complying with law. We're complying with what the governing body of our facility wants to do and this is our function.

And I believe, it's quite evident even on page 21 of my opponent's brief that the documents involving the [inaudible] care to feeding and some of the medical things have been conceded as certainly part of our peer review function and that the only thing that seems to be left are the credentialing or application type of documents that we do for our nurses and nursing assistants. And again, if you look at on the affidavit of Ms. Ross and again, if you think about just plain common sense not being in the healthcare industry but knowing what you need to do to make sure you've given quality of care, it has to be part of -- part of that has to be evaluation of your people. That is an extremely important part of what nursing homes do, is to evaluate, check the credentials and call the preceding employer. All of the things that were done in Brownwood and Irving with those two doctors where they would call up and talk to the former hospitals, all of those things were done and in those cases, this Court held that those documents, the exact same equivalent documents for nursing assistants or a nurse were, indeed, a privilege.

As you all know, in the Irving case, CBS was being sued for libel and slander by a doctor who was -- allegedly had done something inappropriately and the press took him to test. Well, to defend a libel and slander case, the truth is, you know, it is a defense. And so, CBS argued very strongly. If there was ever a case where we need to see the documents about credentialing and about, you know, what he had done to somebody or what he may have said about somebody else, whatever important. It was in that context and this Court, again, Justice Owen held that, you know, that the legislature in its wisdom has had to do with balancing test between different interests, quality of care versus civil types of lawsuits and even under that analysis, a libel and slander case with the exact issue was what the doctor had said and done and those [inaudible] was relevant and this Court held that the privilege was to be maintained. In a case such as this, where you're talking about nurses and nursing assistants, we will not get as expressed in the trilogy that a frank and free colloquy or dialogue from a first year nursing assistant talking about what a doctor may have done or what a nurse had done or anybody else that comes to a nursing home, if that smaller person, meaning smaller in terms of pay scale, smaller in terms of what he or she may be able to do, if that person doesn't have the knowledge that whatever he or she says in front of a committee is going to be [inaudible].

So, everything that was enunciated by this Court in 1996 in the trilogy of cases and everything that has come afterwards, the U.T at Tyler case says very specifically that the affidavit -- that if it's not stamped, that it's an actual document of the peer review committee doesn't mean that it's not part of the peer review committee. That was addressed directly in Brownwood.

The affidavit of Ms. Ross went unchallenged, unchallenged in the trial court. All the issues that have anything to do with waiver were not challenged. It's not even -- were not challenged at the trial court and there's not even in the section of my opponent's brief entitled Waiver of the Privilege. He attacks the privilege on the issue that Ms. Ross's affidavit goes beyond the QA plan. Again, we rely on the cases of the trilogy where that, in fact, was what was done. The affidavit



went beyond the quality assurance plan or the by-laws in those cases. It was nothing about the fact that a privilege exists that was challenged in the trial court. The other thing that was in the waiver challenge, the fact that only a sample was given, I think, I've addressed with Justice Wainwright's questions. Again, in the trial court record, there is nothing to impeach the ability of our privilege. There is no argument on any type of waiver that we may or may not have had and there is no case law cited to say that this is an ordinary -- that this is a record kept [inaudible]. There's no case law cited by the plaintiff for the proposition that applications and evaluations of these people are, in fact, kept in the ordinary business records and the reason that there's no case law in my opponent's brief on that point, is that this [inaudible] -- already from the exact opposite because again Memorial and Irving, in particular, came to this point because, particularly in Memorial, there's been a change in the law to the occupation code and there was, in fact, some confusion about what an ordinary business record could be and the Court reconciled that I thought very appropriately but now it's somewhat moot because the statutes have been cleared up but the Court, I thought, substantially cleared that up by saying that if it's a record such as treatment of a patient or a financial record of a patient, that is going to be considered ordinary course of business and it can be gotten be done in another source but if it's a document that the committee looked at, reviewed, or even promulgated then it's very clear that that is not a business record and again the trilogy case is reviewed that point for us.

JUSTICE: I'm not sure [inaudible] clear about this. Are there any documents that you withheld that were generated in the ordinary course but then were later reviewed by the peer review commission or committee?

MR. COWAN: I didn't hear the last point.

JUSTICE: Were there any documents that were generated in the ordinary course that had the patient's name on it, that dealt with the patient's condition or [inaudible] the patient that were not generated at the request of the committee but were later reviewed by the committee?

MR. COWAN: In this particular case or --

JUSTICE: Yes.

MR. COWAN: I don't know --

JUSTICE: Because it would seem to me, you can't ask the committee what they looked that assuming that [inaudible] but if they generically ask for all documents that mentions this patient's name, it seems to me you have to give them the document if it was produced in the ordinary course of business. Even if the peer review committee looked at it, you wouldn't have to tell them that the peer review committee looked at it but the fact that they later looked at it doesn't shield it from getting it some other way [inaudible].

MR. COWAN: Well, any records that were medical treatment records that -- and I don't know if they were reviewed but if they were, that we're not saying that -- we're saying that that is an ordinary business record. But if you're saying that if we're looking at documents that have something to do with this particular resident and then are we saying that those are privileged. We're saying that privileged, yes, from the point of view of the committee. We cannot get them from the committee which is what they're seeking to do but you probably already have them anyway because you have all the medical records, the nurse's notes and everything [inaudible].

JUSTICE: Any other questions?

JUSTICE: [inaudible] that sample that you gave [inaudible] offered [inaudible] to the trial court? Does that [inaudible] this Court?

MR. COWAN: Yes Sir.

JUSTICE: Okay. Thank you.

MR. COWAN: It's in appendix 3 or 4, if I remember correctly.

JUSTICE: All right. Thank you, Counsel. The Court is ready to hear argument from the real parties in interest.

ORAL ARGUMENT OF BERNARD KLIMIST ON BEHALF OF THE RESPONDENT

MR. KLIMIST: Thank you.

JUSTICE: May it please the Court. Mr. Bernard Klimist's will represent argument for the real party in interest.

MR. KLIMIST: May it please the Court. I'd like to start off, first of all, addressing Justice Wainwright's question as to did it matter whether or not the trial court reviewed the documents. The 13th Court of Appeals denied the mandamus without any reason. One of the reasons that could be considered is that the documents in the transcript you have attached to the relator's brief. He stated to the trial court and this Court, there were boxes and boxes and boxes of documents but we only selected a few of them. Since we're dealing with a variety -- we're not dealing with a sampling as in here is a [inaudible]. We're dealing with personnel files, incident reports and various documents. Because of that, what he has done is taken a very limited sampling which obviously favors this side of it and said courts we want to exclude of the privilege applying to all these thousands of documents. It is reasonable to believe that the 13th Court of Appeals said, "No, you haven't met your burden on establishing the privilege because you did not produce the documents."

JUSTICE: [inaudible] what would you have to do.

MR. KLIMIST: Well, under all the cases in the trilogy, in Memorial going back to Barnes, the distinguishing thing is the defendant's -- one of them is they did produce the documents of the trial --

JUSTICE: But I thought one of the objections was this is really burdensome and they're privileged to let us give you a sample to show you their privilege. In that way, we don't have to go through [inaudible] just to --

MR. KLIMIST: I understand that but in those cases and let me just jump a little bit here. In the trilogy cases which as he said, Justice Owen, you not only stated that fortuitous conversations or documents obtained the privilege with regard to a physician's credentialing but then you've qualified it -- but that doesn't always mean that those documents are privileged because physicians are different.

As to the burden, those dealt with a physician. So there was limited number of documents. In those cases, I understand they [inaudible] because there may have only been one personnel, excuse me, one personnel file but in this case Judge Sklar, the trial court judge, conducted a hearing and issued a ruling. He just didn't say I'm going to deny it. He said what I'm gonna find is that under the medical peer review committees, these documents that is a statutory [inaudible]. These documents number one have to be reports or records generated by that committee or for that committee and secondly, because the by-laws by statute create the medical review committee and hence, the

privilege, their by-laws specifically state that they shall put a written disclaimer on every document that the peer review wants to review so there isn't any question. Judge Sklar excluded those documents. He found that if they met those two standards, we didn't get them. So --

JUSTICE: [inaudible] -- the second one seems a little [inaudible] to conclusion.

MR. KLIMIST: Well, it would be except that the by-law which creates, the statute that creates the peer review privilege, they put it in there, we're gonna put this disclaimer on the documents. It has to be on there. That is [inaudible] later on being able to say, well, you know as they've done employee applications, correspondents, paycheck stuff -- as long as --- and their position in their briefs, make no mistake is, we touched it, we breathed on it, it's a privilege. That's what the committee gets to do and that committee consists of the administrator, the director of nursing, and the nursing staff. They can pick at least three other members and not to jump around so do I think the burden is too much? Not when we're considering that there is guidelines and they could have filed in for review because of the nature of the documents. It's not identical documents. It's there in the documents that could have been sorted through. I don't think they met the burden --

JUSTICE: So if you bring them in, then we've got 200 boxes here. Judge says, "Give me your samples." "No, Judge. You have to touch each one of these. We insist that you touch each one of these because if we don't do that, you'd wait."

MR. KLIMIST: No, I think what's happened here is that the primary issue that they're raising is personnel files. In fact, three personnel files were submitted before the mandamus was issued because they were under order to do so as here's what we're holding back. They were approximately a quarter inch thick at that. We're talking about maybe two dozens of those. I don't know where the boxes come from which [inaudible] me but we're not talking about a [inaudible] case or a complex case against a hospital. We're talking about a limited number of documents in this case.

JUSTICE: So, whether you can use the sample depends on how big the nursing home is?

MR. KLIMIST: No, I think it depends on the nature of the documents you're seeking to protect. I think if you can represent honestly to the Court that the sampling is a fair sampling that is identical in each file, then I think you could do it but in this case the three files that they produced are diametrically opposite as you go through them. It is not the case here.

Also, go back to a statement that my opponent made and a followup with Justice Owen's, if you have a document in the ordinary course of business just because the peer review committee reviews it, does it become privilege. That is their position. An employment application, an incident report that merely recites facts, no evaluation, no finding, no recommendation. If they look at it, it's privileged. They have attached it to every document in the file, in their nursing home. They're running the nursing home out of the peer review committee. The intent behind that are three things. Number one, and I say intent, Mr. Palen keeps using nurse and nurse's aides, assistants as if they're the same. They're not.

Statute defines the training necessary between the two. Nursing homes are not hospitals. Nurses are not doctors and quite honestly, credentialing is not hiring. They want the Court to find that hiring,



interviewing a janitor, interviewing a \$6-an-hour nurse's assistant which makes up the majority of the employees at these homes that's taking care of these people is the same as credentialing a doctor or physician.

JUSTICE: Well, on the other hand, do you contend that the care was in any way inadequate because of those people? Because it seems like if you do then they ought to be some peer review and if you don't, then what's the relevance?

MR. KLIMIST: I think the relevance, your Honor, is that number one I think there was as to the nurse's aide, there was negligence on their part in the way it was handled but the peer review as assessed by the statute [inaudible] evaluation, what they're trying to do is extend the evaluation to be anything and everything touching those people. Secondly, do I know whether or not those janitors, nurse's aides were complicit in this? No, because I don't have files to go with [inaudible] to find out.

One of the underlying causes here was that our client was molested by another patient who was admitted with a sexual propensity two days before. We didn't get any records. We found out when a nurse broke down crying about it in deposition. Had we gotten the access to the records, we would have known that. That is a public policy we're trying to protect.

Protection of abuse and neglect cloaked under as I said I think in the [inaudible] case it came down from the Austin Court last month or two or three months ago. You can't just cloak documents with privilege by saying we let a peer review you look at them. That's what they're trying to do. The --

JUSTICE: The standard that both sides seemed to be arguing about seems awfully amorphous to me. I'm just having trouble trying to think of this as a black letter rule in a book somewhere --

MR. KLIMIST: Well --

JUSTICE: You say, well, whether used in the deliberate process or not, this page 21 --

MR. KLIMIST: That's correct, your Honor.

JUSTICE: But should -- that -- what we're gonna do? Get a big rubber stamp that says I thought about this and I mean that's not very much harder than what they've done.

MR. KLIMIST: If I could address two fold. First of all, with regards to, say, the personnel files of nurses. I think the Tyler Court made their distinction in the [inaudible] by saying section [inaudible] their position only. That's the [inaudible] to the peer review. The nursing part [inaudible] three of the statute is written differently. It goes to what goes on in that committee meeting only as to what's in the committee meeting. I think the distinction that court was making is we have a paramount policy to protect doctors. They're at the top. They're the controlling factor and a hospital is made up of medical treaters under doctor's cares. These are nursing homes. Most of the care is rendered by six to seven dollar in an hour nurse's assistant. They distinguished between the two that it didn't apply as to what is included. If it's a document, I would suggest, that is normally produced, normally taken in the normal course of business: hiring, firing, evaluating as long as it does not entail and I would take that last back. If it doesn't entail the evaluation of how to improve the quality at the nursing home, it does not get that privilege. They're trying to say --

JUSTICE: But you say that it will improve the quality if we hire this guy?

MR. KLIMIST: Well, the trouble is that if you take the position of the nursing homes' function is to improve the quality of care for all patients then all acts would be.

JUSTICE: Now that's why I wonder what the rule is going to be as a result of this.

MR. KLIMIST: I think the rule needs to be that if it is a document or a communication that is subject to deliberation within the peer review as to an evaluation purpose only and remediation kind of like the subsequent remedial measures taken [inaudible] it's privileged. If on the other hand, it's a document such as an application for employment, a factual presentation of an incident report; those kind of documents --they're kept pursuant to the policies of the nursing homes and state regulations. They are in no way limited to evaluations. They have to fill them out and they don't give any condemnation or [inaudible]. As they say, here's what happened. I mean, when they say in the affidavit of Virginia Ross that every document that we looked at for personnel is privileged and confidential, how did they call somebody in with a phone number to say that personnel call him in and ask him to come to work. How do they send them with their paychecks? But in her affidavit, she is claiming that every single function of employment goes to peer review and is therefore, privileged. You can't run a business without those normal functions. What we're suggesting is number one, they have to have the documents reviewed and secondly, that there has to be a threshold as to what documents it applies to. Even the rilogy cases, Memorial, the capital cases that have come down, the Tyler cases, have had a common theme of, if it's a fortuitous statement or document, if it's a document that should be kept in a normal course of business, we're not gonna let you cloak as privileged. What they're asking to do is to have nursing homes treated differently. Treat them like medical providing hospitals and doctors and let us now run them in a cloak of secrecy.

JUSTICE: But you would agree, wouldn't you that a nursing home has a higher standard for care or residents than an apartment complex.

MR. KLIMIST: Yes.

JUSTICE: In terms of the care of the residents.

MR. KLIMIST: Absolutely.

JUSTICE: But you think it's not the same standard as a hospital would have.

MR. KLIMIST: No, I don't and that's some --

JUSTICE: Although some states have felt that. I don't know that we've addressed that in Texas.

MR. KLIMIST: I don't think we have and I don't think it is because long-term care, extended care necessitates lengthy stays, years where the care is feeding and administering medication. When a patient or a resident in a nursing home has an acute care problem, they are sent to a hospital. Why? Because that hospital will render a short-term acute care to that patient and then return them back [inaudible] --

JUSTICE: So that's a different type of treatment?

MR. KLIMIST: Yes.

JUSTICE: You'd say that's also a lower standard of care for the nursing home?

MR. KLIMIST: Yes. I do. Well, I think that what we had is that a nursing home's general practice is a lower standard of care than a hospital. Yes, I believe that.

JUSTICE: Are the residents diagnosed to some degree when they're admitted at the nursing home?

MR. KLIMIST: To my understanding, they are by a physician. Most



nursing homes have a medical director who is a physician, who is on call or on their staff when he's needed for the purposes such as that and then I think there are by-laws in these cases as well [inaudible] statute is there to have to have an RN. One RN per eight-hour shift and that's it. You'd never find a hospital [inaudible].

The only other issue that I would raise is that the self-regulating that was raised in [inaudible]. To take this case one step farther and allow the nursing homes by statute, by ruling to say we're going to create medical peer review committees. We're gonna empower them to review every act, every document that goes to our nursing home and that privilege is going to attach to that and we'll make sure that we regulate ourselves. If it needs to, we'll report it to the State to the TDHS, we all know many instances and in this case, instances of falls, breaks are not recorded.

So, what they're asking is to be made self-regulating by this. I guess, my problem here is Mr. Cowan has, my opponent has asked the Court to only consider here the uncontroverted position that we need to extend quality control the peer review privilege. This issue is far more reaching that were dealing with here than that. What we're dealing with here is do we treat nurse's aides with little education and training the same as a physician? Do we call credentialing the same as hiring? Do we give the nursing homes the ability to take ordinary course of business documents and extend the privilege which you all recognized that says you don't have to turn those over.

JUSTICE: But it seems to me from a policy point of view again, if your complaint is that those people are not acting professionally enough, that they're not acting up to some standard, that's not just an ordinary person walking down the street, then surely is a policy matter, there ought to be some review of how those people are doing.

MR. KLIMIST: I absolutely agree with that and I believe that if the peer review committee conducts an evaluation which is the phrase used in the statute of those persons within their committee and issues a report or record, that's privileged and that's what Judge Sklar ruled in the trial court. What I'm saying they don't get to say we've hired 15 nurses' aides and we're going to run everything to do with them from their applications to their paychecks through this committee and cloak it with privacy --

JUSTICE: The paychecks --

MR. KLIMIST: -- that's what they don't [inaudible] consider.

JUSTICE: [inaudible] the paychecks but the application, why is it that like a doctor presenting his credentials to the committee to get privileges to practice. I mean, does [inaudible] they were gonna do investigations, background checks on these nurses' aides and in -- [inaudible] they did have [inaudible] qualifications to be hired? So, why isn't that part of the peer review?

MR. KLIMIST: Because I believe that hiring is different than credentialing. Unlike the argument they're making, I believe that credentialing of physicians is a different animal than hiring of your staff.

JUSTICE: But if you've got ongoing peer reviews of the nurses' aides to make sure their skills and their performance is adequate, why wouldn't you make that same sort of determination on the threshold to make sure that they haven't had issues in prior job experiences [inaudible] you would really check them out before you would let them in on in a nursing [inaudible]

MR. KLIMIST: Well, you would hoped they would --

JUSTICE: -- [inaudible] peer review [inaudible]

MR. KLIMIST: But what they'd done then is make your HR department a peer review department.

JUSTICE: I'm sorry, your what?

MR. KLIMIST: Their HR, Human Resource Department of a hospital or a nursing home becomes your peer review committee by extension. There are documents contained in the employment file. They have no relevance to evaluation --

JUSTICE: Well, then I would agree with you. They're not -- if they're used for different purposes --

MR. KLIMIST: Right.

JUSTICE: -- you can't cloak them with privileges by [inaudible] them through a committee but if you can't ask the committee court, then you got to get them some other way.

MR. KLIMIST: Right and there's no other way to get there.

JUSTICE: But if they were [inaudible] and that's the only reason that they're there then it seems to be they're privileged.

MR. KLIMIST: If there is an evaluation such as a nurse's practice on drug usage that is conducted through the peer review committee of the nurses and that I think would be a record generated by the peer review for evaluation [inaudible]. I agree with you. If there are documents they're trying to protect, give me an example. Who is the employer? Who is the owner of the nursing home? That will be reflected on pay stubs, on applications, on documents [inaudible]. It has no bearing whatsoever on evaluation but it has a bearing on who the responsible party and the owner of the nursing home is. But by cloaking that document with the secrecy of the privilege, it prevents the disclosure and use of trial court of the ownership and management documents that are contained.

For instance, if the paychecks all come from one company but they're claiming another company operates the nursing home. If you don't get that [inaudible] the ownership which is not there for evaluated purposes, it's cloaked and it's not. It would be [inaudible]. An incident report --

JUSTICE: -- [inaudible] pay stub?

MR. KLIMIST: Yes. That is in one of the files that they said would be privileged. The incident report -- if an incident report merely recites here's what happened without any kind of evaluation, recommendation, commendation. It just says fill in the blanks. Date, time, and what happened. Here. That should not be evaluated. Now, if there is a section that says what do you think we should do better than if that's done for evaluated purposes to increase the quality of care to the peer review, that's privilege. [inaudible] document should be privileged

JUSTICE: [inaudible] for that portion?

MR. KLIMIST: Absolutely.

JUSTICE: Well, [inaudible] evidence show as to who ordered the incident reports to be made and where there's supposed to be sent?

MR. KLIMIST: Well, that's not a contradictory because they're saying that the part of the peer review is ordering and investigating of all incidents but their policy manuals call for an incident report and says the [inaudible] to be prepared anytime there is a fall or an incident at your home. So, it's hard to say which one of are they're preparing [inaudible]. It's my position that if they have a policy manual that says anytime there's an incident you fill up the factual recitation. That is not a part of a peer review evaluation.

JUSTICE: Counsel, [inaudible]. I wanna make sure I understand your position in distinguishing between types of care versus standard of

care for a particular treatment. If a nursing home resident contracts a cold which could potentially lead to something more serious, pneumonia, for instance. With the treatment of that nursing home resident come under a different standard of care than a patient at a hospital who contracts a cold?

MR. KLIMIST: Absolutely not.

JUSTICE: What about as to bed sores? If there's a patient in a hospital that's in a coma and he's there for an extended period of time turning the patient to make sure the patient doesn't have bed sores, same standard of care between a hospital and a nursing home?

MR. KLIMIST: Same standard of care, your Honor, because what you're dealing with there is the standard of care to the nursing or the physician practice not the care rendered by the home.

JUSTICE: So, really what you were talking about earlier was the different types of treatment in a hospital --

MR. KLIMIST: That's correct --

JUSTICE: -- compared to a nursing home, not lower standard of care.

MR. KLIMIST: Absolutely, absolutely. I was referring to the different care given but the standard of care for treating a medical condition remains the same.

JUSTICE: Okay.

JUSTICE: Yeah. This is really quick --

MR. KLIMIST: Yes --

JUSTICE: I asked about this sample that was offered to the judge but not reviewed, is that correct?

MR. KLIMIST: -- [inaudible] --

JUSTICE: -- that's what happened in trial court. There was a sample, so called sample of the --

MR. KLIMIST: That's my understanding.

JUSTICE: And are those actual documents that -- can this Court -- lodged with this Court? Do we have the access to those [inaudible]

MR. KLIMIST: You would have to ask Mr. Cowan but we have not been provided that information.

JUSTICE: Okay. So, as far as you know, they're not?

MR. KLIMIST: I have no idea.

JUSTICE: Okay. Thanks.

JUSTICE: [inaudible]. Thank you, Counsel.

MR. KLIMIST: Thank you.

REBUTTAL ARGUMENT OF THOMAS C. COWAN ON BEHALF OF THE PETITIONER

MR. COWAN: In answer to Justice Smith's question yes, they are in the record. The Exhibit 4 of the sample was Exhibit 9 [inaudible].

JUSTICE: So, we got the sample but not all of it.

MR. COWAN: No and the [inaudible]

JUSTICE: So, that's your appendix.

MR. COWAN: The sample law [inaudible].

JUSTICE: But you didn't -- okay. So, you didn't offer to the trial court the actual document?

MR. COWAN: Sorry, I misquote the actual exhibits are not in the record. The sample [inaudible] is in the --

JUSTICE: I thought we had the actual documents?

JUSTICE: The sample that you offered to the trial judge or



whatever that was that he didn't look at --

MR. COWAN: Right --

JUSTICE: -- we don't have an opportunity to look at that.

MR. COWAN: Yeah. But if you have that, you have the sample but not all of the documents that the judge did not want to [inaudible].

JUSTICE: Okay and where is the sample --

MR. COWAN: -- the samples are there in the record --

JUSTICE: -- [inaudible]

JUSTICE: -- we got.

JUSTICE: I don't think we did it [inaudible] --

MR. COWAN: Your Honor, again on these records, I would like to read part of what happened in the trial court. Mr. [inaudible] and my associates said I would like to offer this in camera we have for your inspection. I will let the Court know and plaintiff's counsel that these are not the entire documents that we're claiming as privileged but we do have a sample of all the documents that you claim that are privileged in there [inaudible] to review. Otherwise, we could just bring the boxes up here or actually not boxes but and Mr. Klimist's response with a proviso that you've been able to select the ones you want the Court to review and that's understandable. There is no objection in the record to this procedure and yet it is the identical procedure which was done in the trilogy cases and all of those cases. There were sample documents given.

On a few other items that were brought up, on the quality assurance plan, please note that when it says stamped documents it's talking about documents that it generates would be [inaudible] and that goes back to what I said earlier that was quoted from the U.T. Tyler case where again this Court found that there was, and this is at page 2 -- some of the documents [inaudible] that they are records of a peer review and then down towards the bottom of the page in response to Ms. McClains deposition notice that she was also the affiant. She searched the [inaudible] control committee records which were segregated from the other records at a hospital. She located responsive documents and confirmed that all of them were by or at the request of the committee in connection with an evaluation of the medical care received by McClain and the other --

JUSTICE: What is the privileged about the pay stubs, for example?

MR. COWAN: We gave them the pay stubs.

JUSTICE: What's privileged about incident reports that don't contain an evaluation. [inaudible] factual presentation of what happened.

MR. COWAN: The incident report is something that a peer review whether in a hospital or a nursing home requests that is done. So, it can do its function.

JUSTICE: But is it also done -- do you have to -- the State require you to do as well?

MR. COWAN: Yes.

JUSTICE: Does the State say that's gonna be open for public inspection [inaudible] that?

MR. COWAN: My understanding is that that it's not open for public inspection although you do have an obligation to give [inaudible].

JUSTICE: So, they have to do all functions?

MR. COWAN: Yes.

JUSTICE: [inaudible] but if they have dual functions then -- or at least with respect to the [inaudible] peer review requested in a report, why would they be privileged? You know, if you take that aside and they're required to be [inaudible] what's the basis of the

privilege?

MR. COWAN: The basis of the privilege is the function that would go back to, is that if you have to chart -- let's say someone falls and breaks their hip, that would be charted in the patient's record but often in the incident report if you're going to have free and frank discussion, it may have something in there like, you know, she slipped on a banana peel or something like that which would be part -- much more a part of quality assurance than --

JUSTICE: What does the State require you to say about that incident?

MR. COWAN: That the State will require an incident report with the name of the patient, the vital signs, any injury, a witness, and you, know, it wasn't reported to the physician.

JUSTICE: That's a separate document --

JUSTICE: So, the State wants to know that people got hurt but it has no interest in why or how.

MR. COWAN: No. There's a section -- the lady -- let's say, she slipped and, you know, either fell because of the banana peel or because she had a, you know, another [inaudible] it would say that.

JUSTICE: It's indicated in the briefing that withheld documentation from the Texas Department of Health and Texas Department of Human Services about violations, deficiencies and the like. Is that true?

MR. COWAN: I didn't catch the first part.

JUSTICE: The briefing says that there's documentation from the Texas Department of Health and the Texas Department of Human Services and other agencies regarding conclusions, deficiencies that was given to you by or your client by the State or the departments of the state and that's been withheld. Is that true?

MR. COWAN: Generally, it was a public record. Those portions at the public record --

JUSTICE: That was gonna be one of my questions [inaudible]

MR. COWAN: [inaudible]

JUSTICE: Have they been withheld?

MR. COWAN: -- understand that language that says you can get them just as well you can get.

JUSTICE: Have they been withheld?

MR. COWAN: I don't know. No. They were not. We gave it to them.

JUSTICE: Okay. So, public records from these two departments have been produced to the extent your client has them.

MR. COWAN: Yes Sir.

JUSTICE: Any other questions?

MR. COWAN: [inaudible].

JUSTICE: Thank you. This is case is submitted on the briefs of the argument and the Marshal will adjourn the Court.

SPEAKER: All rise. Oyez, oyez, oyez. The Honorable Supreme Court Justice [inaudible].

2004 WL 5597664 (Tex.)