

**IN THE SUPREME COURT OF THE
STATE OF NORTH DAKOTA**

St. Alexius Medical Center,
a North Dakota Corporation,
d/b/a CHI St. Alexius Health Bismarck,

Supreme Court No. 20220005
Case Type: Supervisory Writ

Petitioner,

v.

The Honorable Pam Nesvig, Judge of District Court,
South Central Judicial District, Daniel Dixon, M.D.,
The Bone & Joint Center, P.C., and Kevin McKibbage,

Respondents.

BRIEF OF RESPONDENT KEVIN MCKIBBAGE

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STATEMENT OF THE ISSUE PRESENTED

[¶1] Whether this Court should issue a supervisory writ to the district court to vacate its order compelling St. Alexius to produce a privilege log—pursuant to North Dakota Rule of Civil Procedure 26(b)(5)—containing the information and documents it claims are privileged under the peer review statute, North Dakota Century Code section 23-34-01 *et. seq.*¹

¹ McKibbage is opposed to this Court considering written submissions or oral argument from Respondents Daniel Dixon and The Bone and Joint Center as the Order at issue did not involve said parties.

STATEMENT OF THE CASE

[¶2] Nearly three years ago, Kevin McKibbage sued Daniel Dixon, M.D., The Bone & Joint Center, P.C., and St. Alexius Medical Center for medical malpractice and related claims. (*Complaint*, Doc. 2).

[¶3] During the course of discovery, St. Alexius asserted the peer-review privilege, pursuant to North Dakota Century Code section 23-34-01 *et. seq.*, but refused to produce a privilege log compliant with North Dakota Rule of Civil Procedure 26(b)(5). As a result, McKibbage brought a motion to compel (*see* Pet'r's App. 033-40).

[¶4] The district court largely granted McKibbage's motion and ordered St. Alexius to produce a privilege log with the following information: (1) the date(s) the documents described were created, (2) the identity of the person who created it and the position at the time of creation, and (3) the identity of the person(s) who received the document along with their position for peer review. (*Order*, Pet'r's App. 053, at ¶ 5).

[¶5] After failing to comply with the district court's order, St. Alexius moved to stay the order pending its petition for a supervisory writ. The district court granted that motion. Following the filing of the petition, this Court ordered McKibbage to file a response brief. Oral argument is scheduled for February 24, 2022.

STATEMENT OF THE FACTS

[¶6] In March 2017, Kevin McKibbage underwent a lumbar fusion surgery performed by Daniel Dixon, M.D, then employed by The Bone & Joint Center. (*Complaint*, Doc. 2, at ¶ 8). Post-operatively—because of the manner in which Dr. Dixon performed the surgery—McKibbage developed signs and symptoms of cauda equina syndrome: a dangerous condition requiring immediate surgical intervention to prevent lifelong neurological deficits, including bowel and bladder dysfunction and lower extremity pain and disability. Dr. Dixon and the St. Alexius hospital staff neglected McKibbage’s symptoms and failed to timely treat McKibbage’s cauda equina syndrome, leaving McKibbage permanently disabled. (*Id.* at ¶ 9).

[¶7] At the time of McKibbage’s surgery, Dixon was an employee of The Bone & Joint Center, P.C., and was credentialed to perform surgery at St. Alexius Medical Center, where McKibbage’s surgery and post-operative care occurred. (*Id.* at ¶¶ 20, 24).

[¶8] Approximately three months after McKibbage’s surgery, physician-partners at Bone & Joint demanded that Dixon take a leave of absence after Nicolette Johnson—St. Alexius’ director of risk management and patient safety—discussed with Dr. Ackerman—a surgeon at Bone & Joint—that St. Alexius had concerns about Dixon’s professional competency (*Carlson Dep.*,

Doc. 290, at 45). Around the same time, St. Alexius suspended Dixon's credentials.

[¶9] In the days following the beginning of his leave of absence, Dixon tried to convince his partners that he was a good spine surgeon, but to no avail. Bone & Joint had assembled Dixon's unplanned return-to-surgery statistics which showed that in the twelve (12) months preceding May 2018, Dixon's cases accounted for nearly 50% of all return-to-surgery cases performed by the 10 surgeons in the practice.

[¶10] In 2019, McKibbage brought this case against Dixon, Bone & Joint, and St. Alexius. Relevant here, McKibbage's complaint alleged that St. Alexius negligently credentialed, supervised, and retained Dixon (*Complaint*, Doc. 2, at ¶¶ 22-25). McKibbage also brought a vicarious liability and joint enterprise claims against St. Alexius. (*Id.* at ¶¶ 26-28).²

[¶11] In its discovery responses, St. Alexius objected to nearly every request, asserting the peer review privilege (*Responses*, Doc. 289). However, St. Alexius did not produce a privilege log in compliance with North Dakota Rule of Civil

² There are four other cases venued in the South Central Judicial District arising from Dr. Dixon's negligence during his 20 month tenure at Bone & Joint Center. See *The Estate of Raymond Schuh v. Daniel Dixon, M.D., and The Bone & Joint Center, P.C.*, Case No. 08-2019-CV-00641; *Nagle v. The Bone & Joint Center, P.C.*, Case No. 08-2019-CV-01908; *The Estate of Michael D. Dowe v. The Bone and Joint Center, P.C.*, Case No. 08-2019-CV-03184; *Gentry v. The Bone & Joint Center, P.C.*, Case No. 08-2019-CV-02600.

Procedure 26(b)(5). Despite meet-and-confer efforts, St. Alexius refused to produce a privilege log.

[¶12] When McKibbage brought a motion to compel a privilege log compliant with North Dakota Rule of Civil Procedure 26(b)(5) (*Motion*, Pet’r’s App. 033-40) the district court rightly ordered that St. Alexius produce a privilege log with the following information:

- (1) the date(s) the documents described were created,
- (2) the identity of the person who created it and the position at the time of creation, and
- (2) the identity of the person(s) who received the document along with their position for peer review.

(*Order*, Pet’r’s App. 053, at ¶ 5). Notably, the district court denied McKibbage’s request that St. Alexius be required to describe the documents being withheld.

(*Id.* at ¶ 6).³

[¶13] St. Alexius then petitioned for a supervisory writ.

ARGUMENT

[¶14] St. Alexius boldly asks this Court to declare that no “peer review organization” is required to establish that withheld information is *actually* protected by the peer review statute—or that the information even exists. This request is directly contrary to the declarations of this Court and the North

³ McKibbage believes this portion of the district court’s order was erroneous. This issue is discussed below.

Dakota Rules of Civil Procedure. If this Court exercises its jurisdiction and grants the writ requested, it will allow—for the first time—a party to unilaterally withhold from disclosure documents **it alone** claims are privileged without any way for its opponent to challenge the claim of privilege. This would be an assault on our system of justice. The writ must be denied.

I. The peer review statute does not protect the mere existence of information.

[¶15] The peer review privilege is established by statute. *See* N.D.C.C. § 23-34-01 *et. seq.* Albeit broad, the privilege is not without limits, though St. Alexius pretends otherwise. St. Alexius must meet its “heavy burden of demonstrating that the materials sought to be protected fall within the statutory privilege.” *Trinity Medical Ctr. v. Holum*, 544 N.W.2d 148, 156 n.3. And it certainly cannot do so by failing to disclose the existence of information.

[¶16] The statute protects “peer review records” as privileged and not subject to subpoena or discovery or introduction into evidence. N.D.C.C. § 23-34-03(1). Thus, the definition of “peer review records” is essential in determining whether the privilege applies. “Peer review records” means:

- (1) Data, information, reports, documents, findings, compilations and summaries, testimony, and any other records generated by, acquired by, or given to a peer review organization as a part of any professional peer review, regardless of when the record was created; and
- (2) Communications relating to a professional peer review, whether written or oral, between:

- (a) Peer review organization members;
- (b) Peer review organization members and the peer review organization's staff; or
- (c) Peer review organization members and other individuals participating in a professional peer review, including the individual who is the subject of the professional peer review.

N.D.C.C. § 23-34-01(4)(a)(1)-(2).

[¶17] In short, the statute protects from disclosure (1) “peer review records” (2) that are a part of any “professional peer review” (3) conducted by a “peer review organization.”

[¶18] Furthermore, there are two primary exceptions to the privilege:

- (1) Records gathered from any original source that is not a peer review organization.
- (2) Testimony from any person as to matters within that person’s knowledge, provided the information was not obtained by the person as a result of the person’s participation in a professional peer review.

N.D.C.C. § 23-34-03(1)(a)-(b).

[¶19] The mere existence of “peer review records” is not protected by the statute. *See Order Regarding Discovery Dispute, Kraft v. Essentia Health*, No. 20-cv-121 at p. 12 (D.N.D. Aug. 2, 2021) (ECF No. 79). To hold otherwise would abolish this Court’s declaration that a party claiming a privilege must satisfy the “heavy burden of demonstrating that the materials sought to be protected fall within the statutory privilege.” *Holum*, 544 N.W.2d at 156 n.3 (N.D. 1996).

[¶20] More importantly, interpreting the peer review statute to allow a party to deny the mere existence of allegedly privileged information would allow—for the first time—a litigant to unilaterally assert a privilege with no means for an opposing party, or the court itself, to assess the claim. This would be an absurd result. *See State v. Jelliff*, 251 N.W.2d 1, 7 (N.D. 1977) (“We have held repeatedly that statutes must be construed to avoid ludicrous and absurd results”).

II. A separate set of rules do not apply to the peer review privilege.

[¶21] St. Alexius has presented to this Court a nice summary of the peer review statute and the policy goals supporting it. But that does not make the peer review privilege any different from other privileges. As with any other privilege, the party asserting the peer review privilege has the burden of proving the statute protects the withheld information.

[¶22] There is no doubt that there is an important policy behind the creation of the privilege: “to encourage physician participation in the peer review process.” *Holum*, 544 N.W.2d at 155.

[¶23] But every privilege has a similar policy goal. *See, e.g., W. Horizons Living Ctrs. v. Feland*, 2014 ND 175, ¶ 15, 853 N.W.2d 36 (“The purpose of the lawyer-client privilege is to provide clients the freedom to discuss personal matters with their lawyer and to encourage clients or their representatives to freely communicate with their lawyer or their lawyer's representative without fear of

disclosure.”); *Heartview Found. v. Glaser*, 361 N.W.2d 232, 235 (N.D. 1985) (counselor-client privilege). No law has declared the peer review privilege is more important or superior to any other privilege, as if it were in a league of its own.

[¶24] Thus, regardless of which privilege, the party asserting a privilege has the “heavy burden” of proving the withheld materials are protected from disclosure. *Holum*, 544 N.W.2d at 156 n.3 (peer review privilege); *Stormon v. Weiss*, 65 N.W.2d 475, 520 (N.D. 1954) (attorney client privilege); *State ex rel. Gullickson v. Gruchalla*, 467 N.W.2d 451, 455 (N.D. 1991) (privilege against self-incrimination).

III. This Court in *Holum* already addressed the obligations of parties asserting the peer review privilege.

[¶25] Absent from St. Alexius’ petition is any discussion of this Court’s directives to parties asserting the peer review privilege. *See Holum*, 544 N.W.2d at 156 n.3. This is understandable when one considers that St. Alexius clearly violated those directives.

[¶26] In *Holum*—the seminal case on the peer review privilege in North Dakota—the Supreme Court stated its review of the privilege was hampered by defendant’s failure to “at least provide[] specific descriptions of the types of information, the sources of documents, and the specific committee or department which generated or collected the information.” 544 N.W.2d at 156

n.3. It discouraged “only vague, generic descriptions of the types of information” a defendant claims are privileged. *Id.*

[¶27] The *Holum* court finally stated that “[w]e would strongly encourage future claimants of the privilege to provide a better record when attempting to meet their heavy burden of demonstrating that the materials sought to be protected fall within the statutory privilege.” *Id.*

[¶28] In this case, St. Alexius violated this directive by submitting only meaningless descriptions of groups of documents (*see* Pet’r’s App. 031-33). The document is not worthy of the term “privilege log.” This not only violates *Holum*, it also prevents the parties and the court from evaluating St. Alexius’ assertion that certain documents are privileged.

IV. The Rules of Civil Procedure require production of a privilege log.

[¶29] The North Dakota Rules of Civil Procedure are dispositive on the issue of whether St. Alexius must produce a privilege log. Rule 26(b)(5) requires that any party withholding “information otherwise discoverable” on the basis that the information is privileged “must” provide the following information:

- (i) expressly make the claim; and
- (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed, and do so in a matter that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

The obligation to produce a privilege log pursuant to Rule 26(b)(5) is “mandatory.” See, e.g., *Johnston v. Transocean Offshore Deepwater Drilling, Inc.*, No. 18-491, 2019 U.S. Dist. LEXIS 61608, at *5 (E.D. La. Apr. 10, 2019) (“The use of the word ‘must’ in the privilege log requirement indicates that production of a privilege log is mandatory, not to be ignored”); *Black v. Pilot Travel Ctrs., LLC*, 2011 U.S. Dist. LEXIS 86495, at *7 (D.S.D. Aug. 4, 2011); . *Potter v. Am. Family Ins.*, No. C16-5406 BHS, 2017 U.S. Dist. LEXIS 66815, at *2 (W.D. Wash. May 2, 2017).⁴

[¶30] Rule 26 does not provide an exception to the privilege log requirement for information or documents withheld on the basis of the peer review privilege. And St. Alexius has not identified any court that has created such an exception. All privileges are treated equally under the Rule.

[¶31] The courts that have addressed the privilege log requirement in relation to the peer review privilege have required production of a detailed privilege log. McKibbage is unaware of any court exempting a party asserting the peer review privilege from producing a meaningful privilege log.

[¶32] Recently, the U.S. District Court for the District of North Dakota held that Rule 26(b)(5) requires the production of a privilege log when withholding

⁴ “Although not binding, federal court interpretations of a corresponding federal rule of civil procedure are highly persuasive in construing our rule.” *PHI Fin. Servs., Inc. v. Johnston Law Office, P.C.*, 2016 ND 114, ¶ 11, 881 N.W.2d 216.

information and documents pursuant to the North Dakota peer review statute. Specifically, the court held that a party asserting the privilege must produce a privilege log with the following information:

(1) the date on which it was created, (2) identity of the person who created it and the position held by that person at the time the document was created, (3) identity of persons who received the document and their positions, (4) a description of the subject matter of the document, (5) inclusive document identification numbers, and (6) specific reference to the portion of the North Dakota [] privilege the document is asserted to meet.

Order Regarding Discovery Dispute, Kraft v. Essentia Health, No. 20-cv-121, at 12 (D.N.D. Aug. 2, 2021).⁵ The court held that it would not read the peer review statute as “protecting the very existence of documents which may be entitled to a peer review privilege.” *Id.*

[¶33] The court’s holding in *Kraft* is certainly not an outlier. For example, in another recent decision, the United States District Court for the District of South Dakota ordered that—pursuant to Rule 26(b)(5)—the defendant-hospital was required to produce a privilege log for documents it claimed were protected by the South Dakota peer review statute. *See Namugisha v. Avera McKennan Hosp.*, No. 4:19-CV-04087, 2021 U.S. Dist. LEXIS 31267, at *25 (D.S.D. Feb. 19, 2021).

⁵ Magistrate Judge Senechal’s order was affirmed by Chief District Court Judge Peter D. Welte. *Order, Kraft v. Essentia Health*, No. 20-cv-121, 2021 U.S. Dist. LEXIS 174497 (D.N.D. Sept. 7, 2021).

[¶34] And in *Allred v. Saunders*, the Utah Supreme Court granted a petition for interlocutory review and held that, on remand, the defendant hospital was required under its Rule 26(b)(5) counterpart to produce “a sufficient privilege log” that contained “sufficient individualized information on all withheld documents or items in order to ensure that any non-privileged documents or items (such as patient medical records) that have made their way into a care-review or peer-review file are not shielded from discovery.” 342 P.3d 204, 211-12 (Utah 2014).

[¶35] The high court of West Virginia followed suit. *See State ex rel. Wheeling Hosp., Inc. v. Wilson*, 782 S.E.2d 622 (W. Va. 2016). There the court held that “a party wishing to establish the applicability of the peer review privilege . . . should submit a privilege log which identifies each document for which the privilege is claimed by name, date, and custodian.” *Id.* at 574. The court further stated that the “privilege log also should contain specific information regarding (1) the origin of each document, and whether it was created solely for or by a review committee, and (2) the use of each document, with disclosures as to whether or not the document was used exclusively by such committee.” *Id.* Finally, the court held that “the privilege log should provide a description of each document and a recitation of the law supporting the claim of privilege.” *Id.*

[¶36] These four cases are just a small sample of decisions ordering a detailed privilege log be produced when asserting the peer review privilege, consistent with longstanding rules of discovery. *See also William Beaumont Hosp. & S. Oakland Anesthesia Assocs., P.C. v. Medtronic, Inc.*, No. 09-CV-11941, 2010 U.S. Dist. LEXIS 39093, at *20 (E.D. Mich. Apr. 21, 2010); *Earhart v. Elder*, No. 5:18-CV-01000, 2019 U.S. Dist. LEXIS 19427, at *12 (S.D. W.Va. Feb. 5, 2019); *Powers v. Mem'l Sloan Kettering Cancer Ctr.*, 20-cv-2625, 2020 U.S. Dist. LEXIS 187204, at *6-7 (S.D.N.Y. Oct. 8, 2020); *Cornejo v. Mercy Hosp. & Med. Ctr.*, No. 12 C 1675, 2014 U.S. Dist. LEXIS 129586, at *4 (N.D. Ill. Sep. 15, 2014); *Elkharwily v. Mayo Holding Co.*, No. 12-3062, 2015 U.S. Dist. LEXIS 98380 (D. Minn. July 21, 2014); *Holland v. Muscatine Gen. Hosp.*, 971 F.Supp. 385, 393 (S.D. Iowa 1997).

[¶37] This Court should follow the holdings of every other court to address the issue at hand and deny St. Alexius' petition for a supervisory writ.

V. The Court should clarify that descriptions of the documents withheld must be included in the privilege log.

[¶38] In denying St. Alexius' petition, this Court should clarify that—contrary to the district court's decision—parties asserting the peer review privilege, like St. Alexius, must provide a description of the documents/information withheld.

[¶39] In the district court, McKibbage asked the court to compel St. Alexius to include “a description of the subject matter of the document” in its privilege log

(Pet'r's App. 050). The court denied this request finding that “[m]ost certainly disclosure of the general subject is a violation of the even the most basic ‘summary’ and is prohibited by law.” (Pet'r's App. 054). This portion of the district court's order is erroneous.

[¶40] First, Rule 26(b)(5) requires a party to “describe the nature of the documents . . . and do so in a matter that, without revealing information itself privileged or protected, will enable other parties to assess the claim.” This rule does not require St. Alexius to provide a “summary” of the withheld document, only a description sufficient to evidence grounds for a claim of privilege. Such a description need not reveal privileged information, *see, e.g., Order, Kraft*, No. 20-cv-121, at 12-13 (ECF No. 79), and is required by Rule 26(b)(5).

[¶41] Second, as previously discussed, this Court in *Holum* already held that parties should “at least provide[] specific descriptions of the types of information” and should avoid providing “only vague, generic descriptions of the types of information” a defendant claims are privileged. 544 N.W.2d 148, 156 n.3.

[¶42] In conclusion, North Dakota law requires parties to include a description of the information/documents withheld. To hold otherwise would prevent the other parties and the court from meaningfully assessing whether the peer review privilege applies. As such, this Court should clarify that at least a

“general description” of the information/documents withheld must be included in a privilege log.

VI. *In camera* review is not a substitute for a privilege log.

[¶43] In the district court, St. Alexius—in the alternative—proposed the court perform an *in camera* review of the withheld documents (Pet’r’s App. 046). The district court did not address this argument/request in its Order. This Court, however, should clarify that *in camera* review is not a substitute for a privilege log.

[¶44] There would be several issues with allowing an *in camera* review in place of a privilege log. First, failure to produce a privilege log would not allow the *parties* to assess the claim of privilege. Second, without reviewing a privilege log, a party would not have the information necessary to appeal any ruling as to whether a particular document is privileged (or even assess whether it should be appealed). Lastly, it would burden district courts if they had to perform an *in camera* review of all allegedly privileged documents in all medical malpractice cases.

[¶45] Other courts addressing this issue support McKibbage’s position. In *Allred*, the Utah Supreme Court held that parties must first provide a privilege log, followed by review and objections by the parties, only after which the district court may, in its discretion, review documents in camera. 342 P.3d at 211. The federal district court in *Kraft* held the same: “The privilege log should

be prepared in a manner that will allow plaintiffs to meaningfully assess the claim of privilege and minimize need for in camera view.” *Order, Kraft*, No. 20-cv-121, at 12-13 (ECF No. 79).

[¶46] For these reasons, this Court should clarify that a privilege log must be produced before a district court may review any documents *in camera*.

CONCLUSION

[¶47] This Court should deny the petition for a supervisory writ and leave in place the district court’s order to compel, modified only to add that the privilege log must include a description of the documents.

Dated: February 10, 2022

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CERTIFICATE OF COMPLIANCE

[¶48] Pursuant to Rule 32(e) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 17 pages (excluding the table of contents, table of authorities, and this certificate).

Dated: February 10, 2022

CONLIN LAW FIRM LLC

By: /s/Taylor B. Cunningham
Taylor B. Cunningham, 9377

**IN THE SUPREME COURT OF THE
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Respondents.

Supreme Court No. 20220005
Burleigh Co. No. 08-2019-CV-00640

CERTIFICATE OF SERVICE

[1] The undersigned hereby certifies that on February 10, 2022, a true and correct copy of the Brief of Respondent Kevin McKibbage in the above-entitled matter was filed electronically with the Clerk of Court of the North Dakota Supreme Court through the Supreme Court E-Filing Portal and served by electronic mail upon:

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[2] I declare under penalty of perjury that everything I have stated in this document is true and correct.

Dated: February 10, 2022

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