

staffing and administrative services for its emergency room. Both MVH and ERMI claim that the PRPA's statutory evidentiary privilege protects from disclosure the performance file of Marcellus Boggs, M.D. ("Dr. Boggs") that had been prepared and maintained by Brenda Walther, M.D. ("Dr. Walther"), who served as the director of MVH's emergency department and was Dr. Boggs' supervisor.¹ Dr. Boggs and Dr. Walther were employees of ERMI. Under the facts presented in this case and the applicable statutory language of the PRPA, neither ERMI nor MVH may claim the evidentiary privilege. ERMI is not a "professional health care provider" under the PRPA, and the performance file at issue here was not generated or maintained by MVH's peer review committee. We therefore affirm the decision of the Superior Court upholding the trial court's ruling that PRPA's evidentiary privilege has no application in this case.

In January 2011, Eleanor Reginelli was transported by ambulance to MVH's emergency department with what she reported at the time to be gastric discomfort. She was treated by Dr. Boggs. Mrs. Reginelli and her husband, Orlando Reginelli, allege that Dr. Boggs failed to diagnose an emergent, underlying heart problem and discharged her without proper treatment. Several days later, Mrs. Reginelli suffered a heart attack.

In 2012, the Reginellis filed an amended complaint containing four counts. Count I asserts a negligence claim against Dr. Boggs with respect to his treatment of Mrs. Reginelli. Count II is a claim for corporate negligence against MVH, alleging that it failed to hire appropriately trained staff, to oversee staff and to adopt adequate policies. Count III sets forth negligence claims against MVH and ERMI, contending that they are

¹ The American Medical Services Association and the Pennsylvania Medical Society have filed amicus curiae briefs on behalf of ERMI, Dr. Boggs and MVH. The Pennsylvania Association for Justice has filed an amicus brief on behalf of the Reginellis.

vicariously liable for the acts of their agents (ostensible and/or actual), employees and/or servants. Count IV asserts a claim for loss of consortium against all defendants. The defendants filed their respective answers and new matter. In the year that followed, the Reginellis deposed, inter alia, Dr. Boggs and Dr. Walther. At her deposition, Dr. Walther testified that she prepared and maintained a “performance file” on Dr. Boggs as part of her regular practice of reviewing randomly selected charts associated with patients treated by Dr. Boggs (and other ERMI-employed emergency department physicians). N.T., 2/5/2014, at 62-63.² In response, the Reginellis filed discovery requests directed to MVH³ requesting, among other things, “the complete ‘performance file’ for [Dr. Boggs] maintained by [Dr. Walther.]” MVH objected to production of the performance file, asserting that it was privileged by, inter alia, the PRPA.

On June 12, 2014, the Reginellis filed a motion to compel discovery directed to MVH, seeking production of Dr. Boggs’ performance file. In its written reply to the motion to compel, MVH argued that “the requested items are created and used for the purpose of reviewing the services being rendered at [MVH’s] emergency room and other departments and fall squarely under the protection of the [PRPA].” Reply to Plaintiffs’ Motion to Compel, 6/19/2014, ¶ 14. In an accompanying brief in support, MVH further indicated that “it is difficult, if not impossible, to understand how these reports and files could not be seen as evaluating the quality and efficiency of services ordered or

² Dr. Walther’s deposition testimony appears in the original record as Exhibit B to Appellees’ Motion for Sanctions and to Recomence the Depositions of Marcellus Boggs and Brenda Walther.

³ The Reginellis did not seek to compel Dr. Boggs or ERMI to produce those records and/or information.

performed by health care providers.” MVH’s Brief in Opposition to Plaintiffs’ Motion to Compel, 6/19/2014, at 6 (citing 63 P.S. § 425.2).

On August 29, 2014, the trial court granted the motion to compel, ordering that MVH produce Dr. Boggs’ performance file to the Reginellis. In its order, the trial court stated that the “documentation shall remain confidential with Plaintiff’s counsel, and shall not be copied or reproduced in any fashion, and in the event that [it] determines same is not relevant evidence in the case sub judice, same shall be returned to [MVH].” Order, 9/29/2014.

ERMI and Dr. Boggs⁴, who had not previously participated in the above-described discovery proceedings, filed a motion for a protective order, asserting its entitlement to claim the evidentiary privilege under the PRPA for the peer review work performed by its employee, Dr. Walther. ERMI contended that Dr. Walther created and maintained the performance file solely “on behalf of [ERMI].” Motion for Protective Order, 9/22/2014, ¶ 21. ERMI explained that while MVH has a peer review committee, Dr. Walther’s work was “separate ‘outside’ peer review [] conducted by [ERMI].” *Id.* Moreover, contrary to the Reginellis’ repeated claims that any privilege claim had been waived when ERMI provided Dr. Boggs’ performance file to MVH, ERMI insisted that the performance had at all times remained in Dr. Walther’s sole possession. *Id.*, ¶ 16 (“The file at issue in the present matter was maintained solely by Dr. Walther as part of her review and evaluation of Dr. Boggs’ performance.”). Because the performance file had not been shared with MVH, ERMI argued that it had no relevance in this case because, first, Dr. Walther had

⁴ As their positions are the same, ERMI and Dr. Boggs will be referred to collectively as “ERMI.”

not selected Mrs. Reginelli's file for review; and second, no claim for corporate negligence had been asserted against ERMI, and since Dr. Boggs' performance file constituted a review of the work of an ERMI employee, it was irrelevant to the claim of corporate negligence asserted against MVH. *Id.*, ¶ 22.

MVH filed a motion for reconsideration of August 29, 2014 order. Contrary to ERMI's claim that Dr. Walther created and maintained performance files "on behalf of ERMI," MVH posited that Dr. Walther's peer review work of the performance of emergency department physicians was performed "on behalf of both ERMI and MVH." Motion for Reconsideration, 9/22/2014, ¶ 11. Similar to its initial arguments in opposition to the motion to compel, MVH argued that Dr. Walther's performance reviews were "for the evaluation of the quality and efficiency of health care services, ensuring compliance with laws and regulations and evaluating and improving the quality of health care rendered by emergency department physicians, as set forth in the PRPA." *Id.*, ¶ 21. MVH also offered to produce Dr. Boggs' performance file to the trial court for in camera review "in order to satisfy this [h]onorable [c]ourt of the applicability of the PRPA and its prohibitions of disclosure of such information to that file at issue." *Id.*, ¶ 22.

Before the trial court could rule on either ERMI's motion for protective order and MVH's motion for reconsideration, both entities appealed the trial court's August 29, 2014 order to the Superior Court. In an order dated September 26, 2014, the trial court granted MVH's motion to include Dr. Boggs' performance file in the judicial record under seal and to retain it under seal during the pendency of the action. In the trial court's written opinion pursuant to Rule 1925 of the Pennsylvania Rules of Appellate Procedure, it first ruled that any evidentiary privilege was waived when Dr. Walther and ERMI shared the documents

with MVH. Trial Court Opinion, 11/24/2014, at 2 (“The PRPA privilege, like other privileges, applies only to information which remains exclusive.”). The trial court further ruled that even if Dr. Walther had kept the documents exclusively to herself, “she was not employed by [MVH], and was in fact an agent of ERMI, an entirely distinct entity,” and, as a result, “it is untenable that [MVH] could claim a privilege for documents that it neither generated nor maintained.” *Id.* at 2-3.

On appeal to the Superior Court,⁵ MVH reasserted its contention that Dr. Walther, as the director of emergency medical services at MVH, “is regularly involved in peer review of all of the emergency department physicians and the quality assurance process for the emergency department, on behalf of both ERMI and MVH.” MVH’s Superior Court Brief, 1584 WDA 2014, at 24. MVH argued that the information contained in Dr. Boggs’ review file “is exactly the type of information protected from disclosure by the PRPA.” *Id.* at 29. MVH insisted that the privilege had not been waived merely because Dr. Walther was an employee of ERMI, since ERMI contracts with MVH to provide emergency room services to MVH, and that Dr. Walther, while an employee of ERMI, is also a member of the medical staff of MVH and thus serves MVH as an independent contractor. *Id.* at 31. According to MVH, privileges are equally applicable to independent contractors or consultants as they are to employees as long as that independent contractor has a similar role to that of an employee, and no provision of the PRPA limits the evidentiary privilege to employees. *Id.* at 31-32. Given her dual roles as a member of MVH’s medical staff and an employee of ERMI, MVH contended that the two entities shared the PRPA’s

⁵ The Superior Court granted the appeal as a collateral order pursuant to Rule 313 of the Pennsylvania Rules of Civil Procedure. None of the parties have appealed this ruling.

evidentiary privilege, because “the two entities are contractually bound together to provide medical services, where both entities have obligations to oversee the practice of physicians, and where both entities are, in essence, sharing the medical and managerial prowess of Dr. Walther.” *Id.* at 33.

In contrast to MVH’s arguments, before the Superior Court ERMI continued to maintain that Dr. Walther’s peer review work was “created and maintained solely by Dr. Walther on behalf of her employer.” ERMI’s Superior Court Reply Brief, 1585 WDA 2014, at 6. ERMI also repeated its assertion that Dr. Boggs’ performance file “was not reviewed by and/or disseminated to [MVH’s] Peer Review Committee.” *Id.* at 16. Rather than arguing that it shared the evidentiary privilege with MVH, ERMI insisted that ERMI and Dr. Boggs, as “as Dr. Walther’s employer and as the person whose ‘performance file’ is to be disclosed by the Trial Court’s August 29, 2014, Order,” are the entities “entitled to claim protection under the [PRPA].” *Id.* at 25.

The Superior Court affirmed the trial court’s order requiring production of Dr. Boggs’ performance file. *Reginelli v. Boggs*, 1584 WDA 2014, 2015 WL 6456401 (Pa. Super. Oct. 23, 2015). It first concluded that ERMI was not entitled to claim the PRPA evidentiary privilege, ruling that “ERMI, as an independent contractor, is not an entity enumerated in the [PRPA] as being protected by peer review privilege.” *Id.* at *3. The Superior Court also held that MVH could not claim the privilege based upon the trial court’s factual finding that MVH “neither generated nor maintained Dr. Boggs’ performance file.” *Id.* at *2. The Superior Court further indicated that even if either party could claim an entitlement to the privilege, “ERMI shared the file with [MVH] ... [and thus] any privilege for Dr. Boggs’ performance file that may have existed was destroyed via

disclosure to [MVH].” *Id.* at *3. In so ruling, the Superior Court disagreed with ERMI’s assertion that the performance file had remained exclusively in Dr. Walther’s possession, and indicated that “it is apparent that ERMI shared the file with [MVH], since the Reginellis sought the file from [MVH] and [MVH] has provided it in camera.” *Id.*

ERMI and MVH appealed the Superior Court’s rulings to this Court, each claiming an entitlement to the PRPA’s evidentiary privilege with respect to Dr. Boggs’ performance file.⁶ Our task in this regard is primarily one of statutory interpretation, which presents

⁶ With respect to MVH, we granted review of the following issues:

1. Whether the Superior Court erred by holding an outside medical provider’s peer review proceedings regarding its employees who staff a hospital’s Emergency Department under a contract with that hospital are not entitled to protection from disclosure under the [PRPA]?
2. Whether the sharing of peer review records by a third-party medical provider that operates a hospital’s Emergency Department with the administration of that hospital constitutes a waiver of peer review protection as to those records?
3. Whether a hospital that contracts with a third-party medical provider to operate the hospital’s Emergency Department may claim protection under the [PRPA] for records of peer review proceedings conducted by the medical provider regarding its employees who staff the hospital’s Emergency Department?

Reginelli v. Boggs, 141 A.3d 439 (Pa. 2016) (per curiam). With respect to ERMI and Dr. Boggs, we granted review of two issues:

1. Whether the Superior Court’s holding directly conflicts with previous Superior Court holdings that an outside entity can be appointed or retained by a hospital to conduct peer review and that the review is entitled to protection under the [PRPA]?
2. Whether the Superior Court’s holding directly conflicts with the intent of the [PRPA] and this Court’s holdings that the

issues of law requiring that we exercise a de novo standard of review and a plenary scope of review. See, e.g., *Bowling v. Office of Open Records*, 75 A.3d 453, 466 (Pa. 2013). As with all questions of statutory interpretation, our object is to ascertain and effectuate the intention of the General Assembly, giving effect, if possible, to all provisions of the statutory provisions under review. 1 Pa.C.S. §§ 1921(a). The best indication of legislative intent is the statute’s plain language. 1 Pa.C.S. § 1921(b).

Pennsylvania courts have recognized the laudable goal of the PRPA, which was enacted “to serve the legitimate purpose of maintaining high professional standards in the medical practice for the protection of patients and the general public” based upon the General Assembly’s determination that “because of the expertise and level of skill required in the practice of medicine, the medical profession itself is in the best position to police its own activities.” See, e.g., *McClellan v. Health Maint. Org. of Pa.*, 686 A.2d 801, 805 (Pa. 1996) (plurality) (citing *Cooper v. Delaware Valley Medical Center*, 630 A.2d 1, 7 (Pa. Super. 1993), *aff’d*, 654 A.2d 547 (Pa. 1995)); *Sanderson v. Frank S. Bryan, M.D., Ltd.*, 522 A.2d 1138, 1140 (Pa. Super. 1987) (“[t]hrough these immunity and confidentiality provisions [§§ 425.3, 425.4] ... the Legislature has sought to foster free and frank discussion by review organizations”) (citing *Steel v. Weisberg*, 500 A.2d 428, 430 (Pa. Super. 1985)); *Robinson v. Magovern*, 83 F.R.D. 79, 86 (W.D.Pa. 1979) (in enacting the PRPA, the General Assembly’s intent was to “encourage peer evaluation of health care provided so as to (1) improve the quality of care rendered; (2) reduce morbidity and

provision of peer review materials to the hospital does not constitute a waiver of the [PRPA]?

Reginelli v. Boggs, 141 A.3d 438 (Pa. 2016) (per curiam).

mortality; and (3) keep within reasonable bounds the costs of health care”); see also 63 P.S. § 425.1, Historical and Statutory Notes (indicating that the PRPA is “[a]n Act providing for the increased use of peer review groups by giving protection to individuals and data who report to any review group”).

In interpreting its provisions, however, we may not ignore the unambiguous statutory language of the PRPA “under the pretext of pursuing its spirit.” 1 Pa.C.S. § 1921(b). Such is particularly true in the present context, since “evidentiary privileges are not favored, as they operate in derogation of the search for truth.” *In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d 204, 215 (Pa. 2014). As we have stated, “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.” *Commonwealth v. Stewart*, 690 A.2d 195, 197 (Pa. 1997) (quoting *Hutchison v. Luddy*, 606 A.2d 905, 908 (Pa. Super. 1992)). Statutory privileges reflect public policy determinations by the General Assembly, and “where the legislature has considered the interests at stake and has granted protection to certain relationships or categories of information, the courts may not abrogate that protection on the basis of their own perception of public policy unless a clear basis for doing so exists in a statute, the common law, or constitutional principles.” *McLaughlin v. Garden Spot Village*, 144 A.3d 950, 953 (Pa. Super. 2016) (quoting *V.B.T. v. Family Servs. of W. Pa.*, 705 A.2d 1325, 1335 (Pa. Super. 1998), *aff’d*, 728 A.2d 953 (Pa. 1999) (per curiam)).

Before considering the arguments of the parties, we first set forth the provisions of the PRPA at issue here, beginning with the definition of “peer review:”

“Peer review” means the procedure for evaluation by professional health care providers of the quality and efficiency

of services ordered or performed by other professional health care providers, including practice analysis, inpatient hospital and extended care facility utilization review, medical audit, ambulatory care review, claims review, and the compliance of a hospital, nursing home or convalescent home or other health care facility operated by a professional health care provider with the standards set by an association of health care providers and with applicable laws, rules and regulations. Peer review, as it applies to veterinarians, shall mean the procedure for evaluation by licensed doctors of veterinary medicine of the quality and efficiency of veterinary medicine ordered or performed by other doctors of veterinary medicine with the standards set by an association of doctors of veterinary medicine and with applicable laws, rules and regulations.

63 P.S. § 425.2.

The PRPA also defines the terms “professional health care providers” and “review organization” as follows:

“Professional health care provider” means

(1) individuals or organizations who are approved, licensed or otherwise regulated to practice or operate in the health care field under the laws of the Commonwealth, including, but not limited to, the following individuals or organizations:

- (i) a physician;
- (ii) a dentist;
- (iii) a podiatrist;
- (iv) a chiropractor;
- (v) an optometrist;
- (vi) a psychologist;
- (vii) a pharmacist;
- (viii) a registered or practical nurse;
- (ix) a physical therapist;

(x) an administrator of a hospital, nursing or convalescent home or other health care facility; or

(xi) a corporation or other organization operating a hospital, nursing or convalescent home or other health care facility; or

(2) individuals licensed to practice veterinary medicine under the laws of this Commonwealth.

* * *

“Review organization” means any committee engaging in peer review, including a hospital utilization review committee, a hospital tissue committee, a health insurance review committee, a hospital plan corporation review committee, a professional health service plan review committee, a dental review committee, a physicians' advisory committee, a veterinary review committee, a nursing advisory committee, any committee established pursuant to the medical assistance program, and any committee established by one or more State or local professional societies, to gather and review information relating to the care and treatment of patients for the purposes of (i) evaluating and improving the quality of health care rendered; (ii) reducing morbidity or mortality; or (iii) establishing and enforcing guidelines designed to keep within reasonable bounds the cost of health care. It shall also mean any hospital board, committee or individual reviewing the professional qualifications or activities of its medical staff or applicants for admission thereto. It shall also mean a committee of an association of professional health care providers reviewing the operation of hospitals, nursing homes, convalescent homes or other health care facilities.

Id.

Finally, the PRPA's evidentiary privilege is set forth in section 425.4.

The proceedings and records of a review committee shall be held in confidence and shall not be subject to discovery or introduction into evidence in any civil action against a professional health care provider arising out of the matters which are the subject of evaluation and review by such committee and no person who was in attendance at a meeting

of such committee shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings of such committee or as to any findings, recommendations, evaluations, opinions or other actions of such committee or any members thereof: Provided, however, That information, documents or records otherwise available from original sources are not to be construed as immune from discovery or used in any such civil action merely because they were presented during proceedings of such committee, nor should any person who testifies before such committee or who is a member of such committee be prevented from testifying as to matters within his knowledge, but the said witness cannot be asked about his testimony before such a committee or opinions formed by him as a result of said committee hearings.

63 P.S. § 425.4.

We begin our analysis by considering ERMI's assertion of its entitlement to claim the section 425.4 evidentiary privilege. ERMI's contends that the Superior Court, in ruling that it is "not an entity enumerated in the [PRPA] as being protected by peer review privilege," interpreted the PRPA too narrowly. *Reginelli*, 2015 WL 6456401 at *3. According to ERMI, the expansive language of the PRPA establishes that the privilege protects from discovery any documents that "flow from peer review activity," and that because Dr. Boggs' performance file is the result of the peer review activities of its employee (Dr. Walther), the documentation in the file is necessarily privileged. ERMI's Brief at 23-24. In other words, "[i]f peer review activity occurs," the PRPA's evidentiary privilege applies. *Id.* at 24. ERMI also contests the Superior Court's ruling that it does not qualify as a "professional health care provider" under the PRPA. Although ERMI admits that it does not fit squarely within any of the twelve listed types of professional health care providers in the statutory definition, it insists that it is "close enough" to at least two of the listed categories. First, referencing subsection (i), ERMI argues that although

it is not a “physician,” it is a “physician organization comprised of hundreds of individual emergency medicine physicians ... that exists specifically to provide emergency medical services.” *Id.* at 25. According to ERMI, “what matters is that ERMI delivers medical care to patients through its physicians.” *Id.* at 26. Second, ERMI posits that it also qualifies under subsection (xi), as it is a corporation that “provides staffing and Emergency Services to hospitals,” and thus “should be treated no differently than a corporate entity that physically operates a hospital.” *Id.* at 27. In this regard, ERMI focuses on the “including, but not limited to” language in the definition, noting that in *McClellan* a plurality of this Court indicated that the “including, but not limited to” language in this definition should be interpreted to include “persons or things of the same general kind or class as those specifically mentioned in the list of examples.” *Id.* (citing *McClellan*, 686 A.2d at 805).

Despite its protestations to the contrary, ERMI is not a “professional health care provider” under the PRPA’s definition of that term. In its brief filed with this Court, ERMI describes itself as “a physician organization comprised of hundreds of individual emergency medicine physicians ... that exists specifically to provide emergency medical services.” Brief of ERMI at 25. This is accurate as far as it goes. ERMI is a business entity that provides hospitals and other health care facilities, pursuant to contractual agreements, with staff involved with the provision of emergency medical services. While it is true that a plurality of this Court in *McClellan* identified the provision of health care services as one requirement for a professional health care provider, *McClellan*, 686 A.2d at 806, the express language of the PRPA’s definition provides a more fundamental requisite for qualification – that the individual or organization be “approved, licensed or

otherwise regulated to practice or operate in the health care field under the laws of the Commonwealth.” 63 P.S. § 425.2. Even if we read subsections (i) and (xi) of the definition expansively, as ERMI demands, ERMI does not meet this basic requirement. In its brief filed with this Court, ERMI does not even mention this entry level requirement, much less point to any evidence in the certified record to establish that it satisfies it. No principled reading of the definition of “professional health care provider” permits any entity to qualify if it is not approved, licensed or otherwise regulated to practice or operate in the health care field under the laws of Pennsylvania. As such, while ERMI is an organization that is comprised of hundreds of “professional health care providers” (namely, physicians), it is not itself a “professional health care provider” because it is unregulated and unlicensed.⁷

It does not matter that the documents at issue here were generated and maintained by an employee of ERMI (Dr. Walther) during her review of the performance of another employee of ERMI (Dr. Boggs).⁸ In this regard, we agree with the well-

⁷ The PRPA was enacted in 1974 and last amended in relevant part in 1978 (references to veterinary medicine were added in 1996). Entities similar to ERMI existed at or around this time. See *Com., Dep't of Pub. Welfare v. Forbes Health Sys.*, 422 A.2d 480, 481 (Pa. 1980) (discussing Medicaid reimbursements to “private independent physician groups which contract with hospitals to provide emergency room physician coverage”).

⁸ At a fundamental level, ERMI misconstrues the scope of the evidentiary privilege created by the PRPA. Contrary to ERMI’s contention, the privilege does not apply anytime that an activity consistent with the PRPA’s definition of “peer review” occurs. ERMI’s Brief at 23-24. Instead, the PRPA strictly limits the evidentiary privilege to the “proceedings and records of a review committee.” 63 P.S. § 425.4. A review committee is defined in the PRPA as “any committee engaged in peer review[.]” 63 P.S. § 425.2. Peer review is “a procedure for evaluation by professional health care providers of the quality and efficiency of services ordered or performed by other professional health care providers[.]” *Id.* Accordingly, the PRPA’s evidentiary privilege may be asserted only with respect to “proceedings and records of a review committee,” and only when one professional health care provider is evaluating the performance of another professional health care provider. Moreover, with respect to discovery requests for the production of

reasoned decision of the Superior Court in *Yocabet v. UPMC Presbyterian*, 119 A.3d 1012 (Pa. Super. 2015). In that case, the defendant hospital asserted the PRPA's evidentiary privilege with respect to investigative reports prepared by, inter alia, the Pennsylvania Department of Health. The Superior Court affirmed a special master's decision that the documents were not entitled to protection from discovery under the PRPA, indicating that the Department of Health was not a "professional health care organization" because it "was not [an] organization[] approved, licensed, or otherwise regulated to practice or operate in the health care field." *Id.* at 1022. The Superior Court further rejected UPMC Presbyterian's contention that the Department of Health qualified as a professional health care provider because its investigation was conducted by its employee doctors and nurses who themselves qualified as professional health care providers. *Id.* at 1023. The Superior Court held that "an entity that is not itself a professional health care provider does not become one merely because it hires a professional health care provider to conduct its investigation," ruling that the Department of Health "is a fictitious entity that can only operate through its agents and employees," and that the "qualifications of a person hired by the Department of Health does not alter either what it does or its purposes." *Id.*

In the present case, ERMI does not qualify as a professional health care provider under the PRPA because it is not approved, licensed or otherwise regulated to practice or operate in the healthcare field in Pennsylvania, and it did not become one because one of its employees (Dr. Walther) conducted an evaluation of another of its employees

documents, the evidentiary privilege in section 425.4 protects from production only those records of a peer review committee that it utilized when it "engaged in peer review." 63 P.S. § 425.2; 63 P.S. § 425.4.

(Dr. Boggs). Accordingly, we affirm the Superior Court's determination that ERMI was "not an entity enumerated in the [PRPA] as being protected by peer review privilege." *Reginelli*, 2015 WL 6456401 at *3.

We turn next to MVH's contention that it, unlike ERMI, is a professional health care provider and is thus entitled to claim the PRPA's evidentiary privilege. MVH argues that the Superior Court erred in concluding that the documents in question were not "generated nor maintained" by MVH because Dr. Walther was not employed by the hospital, since Dr. Walther is the medical director of its emergency department and a member of its medical staff. MVH's Brief at 14. MVH contends that a "performance review by one member of a hospital's medical staff of the performance of another member of the hospital's medical staff is precisely the kind of review" that should qualify for protection under the PRPA. *Id.* at 15 (citing, *e.g.*, *Sanderson*, 522 A.2d at 1139). According to MVH, physicians who hold staff privileges, but are not employed by a hospital, nevertheless serve important administrative functions, and hospitals, which routinely contract with independent physician groups (like ERMI), could not function without them. *Id.* at 16.

We cannot agree with these arguments. As discussed above, the PRPA's evidentiary privilege is reserved only for the "proceedings and documents of a **review committee**[" 63 P.S. § 425.4 (emphasis added). MVH does not contend that Dr. Walther was a member of the hospital's peer review committee, and the certified record contains no evidence to support such a finding. Instead, MVH argues that Dr. Walther acted, ostensibly, as a "separate" peer review committee for the ERMI-supplied emergency department physicians. MVH's Brief at 13. Although Dr. Walther is an individual rather

than a committee, MVH contends that this is a distinction without a difference, as the second sentence of the definition of “review organization” refers to any “hospital board, committee **or individual** reviewing the qualifications or activities of its medical staff or applicants for admission thereto.” 63 P.S. § 425.2 (emphasis added). Relying upon the Superior Court’s decision in *Troescher v. Grody*, 869 A.2d 1014, 1022 (Pa. Super. 2005), MVH insists that a “review organization” is any “entity or individual engaged in peer review,” as the PRPA uses the terms “committee” and “individual” interchangeably. MVH’s Brief at 13-14.

Contrary to MVH’s contention, the PRPA does not use the terms “committee” and “individual” interchangeably.⁹ If the two terms were interchangeable, the reference to both (“committee or individual”) in the second sentence of the definition of “review organization” would constitute unnecessary surplusage, which is not permissible under basic statutory construction principles. *See, e.g., Burke by Burke v. Independence Blue Cross*, 174 A.3d 252, 260 (Pa. 2017); *see also* 1 Pa.C.S. § 1921(a) (“Every statute shall be construed, if possible, to give effect to all its provisions.”). Moreover, and more importantly, the terms “review committee” and “review organization” are not interchangeable, as they connote distinct types of entities under the PRPA. The first sentence of the definition of “review organization” defines the type of entity that constitutes a “review committee,” namely, “any committee engaging in peer review.” 63 P.S. § 425.2. The second sentence, in contrast, contains no reference to peer review, and instead refers to a “hospital board, committee or individual” involved in the review of

⁹ For this reason, we disapprove of *Troescher* and its Superior Court progeny (*e.g., Piroli v. Lodico*, 909 A.2d 846 (Pa. Super. 2006)) in this regard.

“the professional qualifications or activities of its medical staff or applicants thereto” by a “hospital board, committee or individual.”¹⁰ *Id.* This second category of “review organizations” does not involve peer review, as that term is defined in the PRPA, which is limited to the evaluation of the “quality and efficiency of services ordered or performed” by a professional health care provider. Review of a physician’s credentials for purposes of membership (or continued membership) on a hospital’s medical staff is markedly different from reviewing the “quality and efficiency of service ordered or performed” by a physician when treating patients. Accordingly, although “individuals reviewing the professional qualifications or activities of its medical staff or applicants for admission thereto,” 63 P.S. § 425.2, are defined as a type of “review organization,”¹¹ such individuals

¹⁰ Professional “qualifications” would include, for instance, a physician’s continuing maintenance of his or her board certifications, and “activities” could include clinical research initiatives, continuing education, service on professional committees or organizations and, more broadly speaking, other qualifications deemed necessary by the hospital. Credentials review permits a hospital to retain, and then maintain, a medical staff of quality professionals.

¹¹ The General Assembly defined the more expansive term “review organization” for a purpose unrelated to the evidentiary privilege, as section 425.3 provides for various criminal and civil immunities available to persons providing information to a “review organization” (with limited exceptions), and to individuals serving as members of a “review organization.” 63 Pa.C.S. § 425.3.

are not “review committees”¹² entitled to claim the PRPA’s evidentiary privilege in its section 425.4.¹³

For these reasons, while it is possible that Dr. Walther, as an individual, may qualify as a “review organization” under the second sentence of the PRPA’s definition of that term,¹⁴ the PRPA does not extend its grant of the evidentiary privilege to that category of “review organization” (i.e., credentials review). Individuals conducting peer review are not defined as a “review committee” under the PRPA, even if they qualify as another type of “review organization.” As a result, we must conclude that Dr. Walther, as an individual, was not a “review committee” engaging in peer review, and thus MVH is not entitled to claim the PRPA’s evidentiary privilege based upon her work as a member of its medical staff.

¹² While the title to section 425.4 contains a reference to “review organizations,” section 1924 of the Statutory Construction Act provides that titles to statutory sections “shall not be considered to control.” 1 Pa.C.S. § 1924. Although titles to statutory sections may in some circumstances be used to aid in the construction of ambiguous statutory language, *id.*, they will have no effect when the statutory language is unambiguous and thus are not in need of construction. *See, e.g., Commonwealth v. Shafer*, 621, 202 A.2d 308, 312 (Pa. 1964). The reference to “review committee” in the statutory language of section 425.4 is not ambiguous.

¹³ For this reason, we must also disapprove of Superior Court decisions to the extent that they hold that credentialing review is entitled to protection from disclosure under the PRPA’s evidentiary privilege. *See, e.g., Troescher*, 869 A.2d at 1022; *Dodson v. DeLeo*, 872 A.2d 1237, 1243 (Pa. Super. 2005).

¹⁴ Whether Dr. Walther performed credentialing work for MVH is not entirely clear from the certified record. At her deposition, she testified that while ERMI recommended physicians to work in the emergency room, it was entirely up to MVH to do the credentialing work to decide whether to accept them as members of the medical staff. N.T., 2/5/2014, at 43-44 (“Q. So the control of the hospital is to either credential them or not? A. “Correct.”). On the other hand, with respect to “recredentialing” someone for continuing membership on the medical staff, Dr. Walther described this process as a “joint decision between the hospital and ERMI.” *Id.* at 67-69.

Finally, we must address the argument presented by both ERMI and MVH that the lower courts erred in refusing to apply PRPA's evidentiary privilege because a hospital's peer review committee may conduct protected peer review activities through an outside entity pursuant to a contract. ERMI insists that the Superior Court ignored "the clear evidence that the information at issue was generated **on behalf of [MVH], at the request of [MVH], pursuant to ERMI's contract with [MVH].**" ERMI's Brief at 32 (emphasis in original). MVH similarly argues, "Here, [MVH], unquestionably a 'professional health care provider,' retained an external organization, ERMI, to staff its Emergency Department and to provide, among other services, evaluation of the qualifications and performance of the Emergency Department physicians practicing within its walls." MVH's Brief at 18-19. According to MVH, to the extent that a "professional health care provider" must initiate the peer review process, "that requirement was satisfied when [MVH] entered into the contract with ERMI that included peer review among the services to be provided." *Id.* at 19. As such, both ERMI and MVH contend that no statutory provision in the PRPA precludes a hospital (like MVH) from entering into a contract with a staffing and administrative services entity (like ERMI) to conduct peer review services for the hospital's peer review committee.

Based upon our review of the certified record, we conclude that MVH and ERMI failed to preserve this issue for appeal to this Court. See Pa.R.A.P. 302(a) (providing for waiver of issues not first raised in lower court). For reason of either strategy or oversight, neither MVH nor ERMI included the contract between them in the record in the trial court proceedings. With respect to MVH, in neither its initial response to the Reginellis' discovery request for production of Dr. Boggs' performance file nor in its motion for

reconsideration of the trial court's adverse ruling, did it argue that it had contracted with ERMI to conduct peer review services for the use of its (MVH's) hospital peer review committee. Similarly, in its motion for a protective order, ERMI made no mention of any such contractual provision. To the contrary, ERMI indicated that Dr. Walther created and maintained Dr. Boggs' performance file solely "on behalf of [ERMI]." ERMI further described Dr. Walther's peer review of the ERMI-employed emergency department physicians as "separate" from any peer review efforts conducted by MVH's peer review committee. In direct contradiction to its current "contract" argument, in the trial court ERMI claimed that Dr. Boggs' performance file "has absolutely no relevance to the corporate negligence claim asserted against MVH in this case." If, however, MVH contracted with ERMI to perform peer review services on its behalf, such a contractual provision would be highly relevant to the Reginellis' corporate negligence count against MVH, particularly in response to the allegation that MVH failed to "oversee all persons who practiced medicine within the Hospital's walls." Amended Complaint, 12/19/2012, ¶ 26.

Likewise, neither MVH nor ERMI raised the issue in their initial briefs in the Superior Court. While MVH referenced that the two entities were contractually bound together "to provide medical services," it did not argue that a specific provision of the contract between them obligated ERMI (by and through Dr. Walther) to perform peer review services on MVH's behalf.¹⁵ ERMI similarly raised no such argument before the

¹⁵ MVH raised this issue for the first time in its reply brief in the Superior Court, arguing that the contract between ERMI and MVH provided for ERMI to conduct peer review functions on its behalf for the emergency room physicians placed there by ERMI. MVH's Superior Court Reply Brief, 1584 WDA 2014, at 1-6. It did so, however, only after the Reginellis attempted, unsuccessfully, to include the ERMI-MVH contract in the certified record before the Superior Court by filing a supplemental reproduced record. See

Superior Court, instead continuing to insist that Dr. Boggs' performance file was created and maintained by Dr. Walther solely on behalf of ERMI, and that the performance file was not reviewed by and/or disseminated to MVH's peer review committee. While it now represents to this Court that ERMI performed peer review services on behalf of MVH pursuant to their contractual agreement, ERMI's Brief at 32-35, it offers no explanation for its prior representations to the lower courts that the performance file was created and maintained solely on behalf of ERMI and that it was never disseminated to MVH (as one would expect it would be if ERMI was performing the peer review now at issue for the benefit of MVH).

Even if the issue had been preserved for appeal, we must conclude that it lacks merit.¹⁶ As noted, because the contract between ERMI and MVH was not included in the

Commonwealth v. Bracalielly, 658 A.2d 755, 763 (Pa. 1995) ("An item does not become part of the certified record by simply copying it and including it in the reproduced record").

As this Court has ruled, the opportunity for, and the extent of, a reply brief is limited, as the Pennsylvania Rules of Appellate Procedure make clear that an "appellant may file a brief in reply to matters raised by appellee's brief not previously raised in appellant's brief." Pa.R.A.P. 2113(a). Therefore, an appellant is prohibited from raising new issues in a reply brief. *Commonwealth v. Fahy*, 737 A.2d 214, 219 (Pa. 1999).

¹⁶ Because it has been waived and no support in the certified record exists to support it, the issue is not presently before us as to whether a hospital may claim the PRPA's evidentiary privilege after entering into a contract with a staffing and administrative services entity to conduct peer review services for use by a hospital's peer review committee. We note that in *Yocabet*, the Superior Court suggested that, consistent with the PRPA's privilege provisions, a professional health care provider could retain outside entities composed of professional health care providers to perform peer review services. *Yocabet*, 119 A.3d at 1022. It declined to apply this principle, however, because the Department of Health was not a professional health care provider. *Id.* The factual predicate in the present case differs from that in *Yocabet*, since in that case no contract existed between UPMC Presbyterian and the Department of Health for the provision of peer review services (to be performed by professional health care providers employed by the Department of Health). Accordingly, we take no position with respect to this portion of the decision in *Yocabet*.

record before the trial court, it is likewise not included in the certified record on appeal before this Court. As a result, we may not consider it. See, e.g., *Commonwealth v. Jordan*, 65 A.3d 318, 335 (Pa. 2013). For this reason, the certified record here contains no conclusive documentary evidence to establish, one way or the other, whether MVH contracted with ERMI to conduct peer review on its behalf including, in particular, the creation of the performance file that Dr. Walther maintained for Dr. Boggs. ERMI and MVH instead rely heavily upon a snippet of Dr. Walther's deposition testimony in which she indicated that her peer review activities were performed "for the benefit of both [ERMI] and MVH." N.T., 2/5/2014, at 64-66. This testimony, however, was not in response to any question relating either to the terms of the ERMI-MVH contract or the legal relationship between those two entities. Instead, Dr. Walther was merely explaining her understanding of the day-to-day workings of the peer review processes at both ERMI and MVH. *Id.* In this regard, she tellingly described her work as "internal" to the emergency department and indicated that she only shared her peer review records with MVH's peer review committee when there was a "care issue." *Id.* at 66. Counsel for MVH repeatedly objected to questions directed to Dr. Walther regarding the terms of the contract, see *id.* at 49, and when she was permitted to answer, Dr. Walther admitted that she did not "know what their contractual agreement was." *Id.* at 59.¹⁷

For these reasons, the order of the Superior Court is hereby affirmed.

Justices Baer, Dougherty and Mundy join the opinion.

¹⁷ In connection with ERMI's motion for a protective order, Dr. Walther also submitted an affidavit in which she represented that "I have no input or firsthand knowledge regarding the contract entered into by my employer, [ERMI], and [MVH]." Motion for Protective Order, 9/22/2014, Ex. D.

Justice Wecht files a dissenting opinion in which Chief Justice Saylor and Justice Todd join.

**[J-25A-2017, J-25B-2017, J-25C-2017 and J-25D-2017] [MO: Donohue, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT**

ELEANOR REGINELLI AND ORLANDO REGINELLI : No. 20 WAP 2016
: :
: Appeal from the Order of the Superior
: Court entered October 23, 2015 at No.
v. : 1584 WDA 2014, affirming the Order of
: the Court of Common Pleas of
: Washington County entered August 29,
: 2014 at No. 2012-5172.
MARCELLUS BOGGS, M.D., :
MONONGAHELA VALLEY HOSPITAL, : ARGUED: April 4, 2017
INC., AND UPMC EMERGENCY :
MEDICINE, INC., D/B/A EMERGENCY :
RESOURCE MANAGEMENT, INC. :
:
:
:
APPEAL OF: MONONGAHELA VALLEY :
HOSPITAL, INC. :

ELEANOR REGINELLI AND ORLANDO REGINELLI : No. 22 WAP 2016
: :
: Appeal from the Order of the Superior
: Court entered October 23, 2015 at No.
v. : 1584 WDA 2014, affirming the Order of
: the Court of Common Pleas of
: Washington County entered August 29,
: 2014 at No. 2012-5172.
MARCELLUS BOGGS, M.D., :
MONONGAHELA VALLEY HOSPITAL, : ARGUED: April 4, 2017
INC., AND UPMC EMERGENCY :
MEDICINE, INC., D/B/A EMERGENCY :
RESOURCE MANAGEMENT, INC. :
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APPEAL OF: UPMC EMERGENCY :
MEDICINE, INC. AND MARCELLUS :
BOGGS, M.D. :

ELEANOR REGINELLI AND ORLANDO REGINELLI : No. 21 WAP 2016
: :
: Appeal from the Order of the Superior
: Court entered October 23, 2015 at No.
v. : 1585 WDA 2014, affirming the Order of
: the Court of Common Pleas of

records might discourage candid and effective peer review. The Act is not a model of clarity. That lack of clarity prompts me to dissent respectfully from the Majority's holding.

At issue in this case² is whether Monongahela Valley Hospital ("MVH") and UPMC Emergency Medicine, Inc. ("ERMI") (collectively, "Appellants") can invoke the peer review privilege enshrined in the PRPA under the circumstances of this case. The following principles govern how we interpret the Act:

[O]ur object is to ascertain and effectuate the intention of the General Assembly, giving effect, if possible, to all provisions of the statute under review. Generally, the best indication of legislative intent is the statute's plain language. Further, the plain language of each section of a statute must be read in conjunction with [the others], construed with reference to the entire statute. We presume that the General Assembly does not intend a result that is absurd, impossible of execution, or unreasonable, and that the General Assembly intends the entire statute to be effective and certain.

When words of a statute are . . . ambiguous, a reviewing court looks to other principles of statutory construction, among them: the occasion and necessity for the statute; the circumstances under which the statute was enacted; the mischief to be remedied; the object to be attained; [and] the consequences of a particular interpretation

Bowling v. Office of Open Records, 75 A.3d 453, 466 (Pa. 2013) (citations omitted); see 1 Pa.C.S. §§ 1921-22.

Generally, the party invoking an evidentiary privilege bears the burden of showing that the privilege applies. Once the party has done so, the burden shifts to the adverse party to establish that an exception applies or that the privilege has been waived. *Yocabet v. UPMC Presbyterian*, 119 A.3d 1012, 1019 (Pa. Super. 2015);

² For purposes of my discussion, I incorporate by reference the Majority's account of the factual and procedural background that led to this appeal. See Maj. Op. at 1-9.

see *In re Investigating Grand Jury of Phila. Cty. No. 88-00-3503*, 593 A.2d 402, 406 (Pa. 1991).

The learned Majority aptly explains certain principles governing the interpretation and application of evidentiary privileges in general:

“[E]videntiary privileges are not favored, as they operate in derogation of the search for truth.” *In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d 204, 215 (Pa. 2014). As we have stated, “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.” *Commonwealth v. Stewart*, 690 A.2d 195, 197 (Pa. 1997) (quoting *Hutchison v. Luddy*, 606 A.2d 905, 908 (Pa. Super. 1992)).

Maj. Op. at 11. Thus, an evidentiary privilege may contravene truth-seeking only when it serves “a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.” *Id.* (quoting *In re Grand Jury Investigation*, 918 F.2d 374, 383 (3d Cir. 1990)).

But our view of evidentiary privileges becomes less restrictive when the General Assembly has created the privilege. The Majority elaborates on statutory privileges as follows:

Statutory privileges reflect public policy determinations by the General Assembly, and “where the legislature has considered the interests at stake and has granted protection to certain relationships or categories of information, the courts may not abrogate that protection on the basis of their own perception of public policy unless a clear basis for doing so exists in a statute, the common law, or constitutional principles.” *McLaughlin v. Garden Spot Vill.*, 144 A.3d 950, 953 (Pa. Super. 2016) (quoting *V.B.T. v. Family Servs. of W. Pa.*, 705 A.2d 1325, 1335 (Pa. Super. 1998), *aff’d*, 728 A.2d 953 (Pa. 1999) (*per curiam*)).

Maj. Op. at 11-12.

In my view, it is precisely because the General Assembly’s judgment is presumptively embodied in the specific statutory provisions that, where the statute provides for certain specific exceptions to the privilege, we generally may not

manufacture additional exceptions to that privilege by judicial fiat . Thus, in *Castellani v. Scranton Times, L.P.*, 956 A.2d 937 (Pa. 2008), where the Shield Law that protected a reporter from disclosing his sources was subject to one statutory exception, we held that “we are not at liberty to create other[exceptions] that the Legislature, in its wisdom, chose not to include in the text of the statute.” *Id.* at 951; *cf. Commonwealth ex rel. Maurer v. Witkin*, 25 A.2d 317, 319 (Pa. 1942) (invoking and describing the interpretive principle of *expressio unius est exclusio alterius*, providing that the mention of one thing in a law implies the exclusion of the things not expressed)

The peer review privilege that Appellants invoke here is defined broadly:

§ 425.4 Confidentiality of review organization’s records

The proceedings and records of a review committee shall be held in confidence and shall not be subject to discovery or introduction into evidence in any civil action against a professional health care provider arising out of the matters which are the subject of evaluation and review by such committee and no person who was in attendance at a meeting of such committee shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings of such committee or as to any findings, recommendations, evaluations, opinions or other actions of such committee or any members thereof: Provided, however, [t]hat information, documents or records otherwise available from original sources are not to be construed as immune from discovery or used in any such civil action merely because they were presented during proceedings of such committee, nor should any person who testified before such committee or who is a member of such committee be prevented from testifying as to matters within his knowledge, but the said witness cannot be asked about his testimony before such a committee or opinions formed by him as a result of said committee hearings.

63 P.S. § 425.4.

The Act defines “peer review” as follows:

“Peer review” means the procedure for evaluation by professional health care providers of the quality and efficiency of services ordered or performed by other professional health care providers, including practice analysis, inpatient hospital and extended care facility utilization review,

medical audit, ambulatory care review, claims review, and the compliance of a hospital, nursing home or convalescent home or other health care facility operated by a professional health care provider with the standards set by an association of health care providers and with applicable laws, rules and regulations. . . .

63 P.S. § 425.2.

The Reginellis seek discovery of the performance file for Marcellus Boggs, M.D. Brenda Walther, M.D., prepared the file on behalf of ERMI, her employer, and furnished it to MVH. The Majority holds that the privilege applies only if Dr. Walther acted as a “review organization” in preparing the performance file. The Act defines that term broadly as well:

“Review organizations” means [a]ny committee engaging in peer review, including a hospital utilization review committee, a hospital tissue committee, a health insurance review committee, a hospital plan corporation review committee, a professional health service plan review committee, . . . a physicians’ advisory committee, . . . a nursing advisory committee, any committee established pursuant to the medical assistance program, and any committee established by one or more State or local professional societies, to gather and review information relating to the care and treatment of patients for the purposes of (i) evaluating and improving the quality of health care rendered; (ii) reducing morbidity or mortality; or (iii) establishing and enforcing guidelines designed to keep within reasonable bounds the cost of health care. It shall also mean any hospital board, committee or individual reviewing the professional qualifications or activities of its medical staff or applicants for admission thereto. It shall also mean a committee of an association of professional health care providers reviewing the operation of hospitals, nursing homes, convalescent homes or other health care facilities.

Id.

The Majority’s analysis builds upon the premise that, the language of the Act being plain and unambiguous, we must follow it where it leads, no matter how unintuitive or even counterintuitive the result. In finding the Act unambiguous in all relevant particulars, the Majority’s approach falls into tension with the contrary conclusion of several members of this Court in *McClellan v. Health Maintenance*

Organization of Pennsylvania, 686 A.2d 801 (Pa. 1996). The Opinion in Support of Affirmance (“OISA”) in that case observed that, “[w]hile the definition of ‘professional health care provider’ set forth in the Act does not specifically include IPA[-] model HMOs, its terms are broad enough that we may or may not read the Act as explicitly excluding such organizations. The words of the Act defining ‘health care provider,’ then, are ambiguous.” *Id.* at 805. And in his Opinion in Support of Reversal (“OISR”), Justice Nigro observed that “whether HMOs are in the same general class as administrators of health care facilities or organizations operating health care facilities is subject to interpretation.” *Id.* at 808 (Nigro, J., OISR). Furthermore, the Superior Court has noted ambiguity specifically with regard to the definition of a “review organization” under the Act. See *Atkins v. Pottstown Mem’l Med. Ctr.*, 634 A.2d 258, 260 (Pa. Super. 1993) (“[I]t is questionable whether a risk manager is a ‘review organization’ to whom the protection of the [PRPA] extends.”); see also *Sanderson v. Frank S. Bryan, M.D., Ltd.*, 522 A.2d 1138, 1140 (Pa. Super. 1987) (“We are bound to ascertain the intent of the legislature in enacting the [PRPA] as we find the confidentiality section at issue in this appeal to be unclear.”).

The Majority rejects MVH’s contention that Dr. Walther’s preparation and maintenance of a performance file for Dr. Boggs constituted “peer review” in the first instance, as defined by Section 425.2. This alone would suffice to nullify the privilege, and the Majority need go no farther. Indeed, the Majority rejects the proposition that any individual review of another doctor’s performance can ever qualify as peer review in the relevant sense. In effect, the only “peer” that can qualify for the privilege is, in fact,

a “review committee,” *i.e.*, a *group* of peers.³ However, the Majority goes on to find that ERMI, which employed Drs. Walther and Boggs, is not a “professional health care provider”⁴ as described by 63 P.S. § 425.2, which the Majority finds is a necessary predicate to application of the privilege in this case. The Majority maintains that ERMI does not qualify as such because it is not “approved, licensed or otherwise regulated to practice or operate in the health care field,” as required of a “professional health care provider” by the Act. *Maj. Op.* at 15. The Majority also rejects ERMI’s and MVH’s claim that ERMI performed any peer review that *did* occur on MVH’s behalf, and thus qualified for the privilege as a third-party professional health care provider retained to perform that function, *id.* at 22-26, here as part and parcel of its staffing, management, and exclusive operation of MVH’s emergency department (“Department”). In this regard, the Majority first finds that MVH and ERMI failed to preserve this issue for appeal in the courts below. *Id.* at 22-24. In the alternative, the Majority effectively rejects any claims regarding what responsibilities arose under the contract between the parties because the contract was not introduced into the certified record, and because the parties’ various assertions and arguments on the nature of that contract varied before the trial court. *Id.* at 24-25. I disagree with each of these conclusions.

The legislative intent underlying the PRPA is not controversial:

³ The Majority allows that an individual physician qualifies as a “review organization” to the extent she serves as an “individual reviewing the professional qualifications or activities of its medical staff or applicants for admission thereto.” 63 P.S. § 425.2. However, as discussed below, the Majority maintains that any such review of a physician’s “qualifications or activities” necessarily goes only to credentialing, which is not at issue in this case. See *Maj. Op.* at 20-21.

⁴ The Reginellis and the Majority do not appear to dispute that Dr. Walther and MVH are professional health care providers.

Peer review is the common method for exercising self[-]regulatory competence and evaluating physicians for privileges. The purpose of this privilege system is to improve the quality of health care, and reflects a widespread belief that the medical profession is best qualified to police its own. Thus, it is beyond question that peer review committees play a critical role in the effort to maintain high professional standards in the medical practice.

Cooper v. Del. Valley Med. Ctr., 654 A.2d 547, 551 (Pa. 1995) (citation omitted). Similarly, the *McClellan* OISA, drawing from the statutory definition of a review organization, reaffirmed the legislature’s desire to “foster the greatest candor and frank discussion at medical review committee meetings,” and to “encourage peer evaluation of health care provided” in order to improve quality, reduce negative results, and minimize costs. *McClellan*, 686 A.2d at 805 (quoting *Robinson v. Magovern*, 83 F.R.D. 79, 86 (W.D.Pa. 1979)). The two OISRs agreed. See *id.* at 808 (Zappala, J., OISR) (observing that the PRPA “shield[s] the discussions that take place in medical review meetings to foster candor and frank opinions concerning prospective doctors’ qualifications and patient care”); *id.* at 809 (Nigro, J., OISR) (“Through confidentiality, the state hoped to encourage peer evaluation of health care and improve the quality of the care rendered.”). It is against this backdrop that we must evaluate the application and effect of the PRPA.

Dr. Walther performed peer review under the Act.

Appellants argue that, in defining a “review organization” to include, *inter alia*, “any hospital board, committee or individual reviewing the qualifications or activities of its medical staff or applicants for admission thereto,” the General Assembly intended to identify a review organization as “an entity or an individual engaged in peer review.” Brief for MVH at 13 (emphasis omitted) (quoting *Troescher v. Grody*, 869 A.2d 1014, 1022 (Pa. Super. 2005)). They assert that the Superior Court in *Piroli v. Lodico*,

909 A.2d 846 (Pa. Super. 2006), correctly held that “[w]hether a multi-person committee or an individual conducts the review is inconsequential—the overriding intent of the [l]egislature is to ‘protect peer review records.’” *Id.* at 849 (internal quotation marks omitted).

Appellants contend that the Superior Court “failed to appreciate” that Dr. Walther was the Department’s medical director, and thus was responsible for reviewing the performance of the physicians in her department. Brief for MVH at 14; see Walther Dep., 2/5/2014, at 46 (acting as “medical director”), 63-64 (explaining her responsibility for peer review).⁵ As part of her oversight responsibilities, Dr. Walther pulled a cross-section of cases for each of her staff physicians on a quarterly basis and used them to evaluate the quality of care given by each, maintaining performance files to preserve her findings. Walther Dep., 2/5/2014, at 63-64. Appellants argue that the review of one physician by another is among the category of activities the Act is designed to protect.

The Reginellis only briefly address whether Dr. Walther acted as a review organization under the Act. In the paragraph they dedicate to the question, they note little more than that the Act is “replete with references to hospital committees,” and argue that, “[o]bviously, the legislature and this Court are looking to protect the

⁵ To similar effect, the American Medical Association (“AMA”) and Pennsylvania Medical Society (“PMS”), as *amici curiae*, observe that the Superior Court “fail[ed] to recognize the cooperative nature” of the arrangement among the Appellants. *Amici Curiae* Brief for AMA/PMS at 18. “Dr. Walther may have been [an] ERMI employee, but she was also a credentialed member of [MVH’s] staff and effectively the Department Chairman. At bottom, [MVH] was sharing with itself.” *Id.*

collaborative work of committees.” Brief for the Reginellis at 18 (emphasis omitted).⁶
The Majority agrees.

The statutory definition of a review organization effectively consists of three discrete parts, two of which are relevant to the question presented, and only one of which refers to an “individual.” In its lengthy first sentence, the statute identifies a series of “committees” that are “engag[ed] in peer review . . . to gather and review information relating to the care and treatment of patients for the purposes of (i) evaluating and improving the quality of health care rendered; (ii) reducing morbidity or mortality; or (iii) establishing and enforcing guidelines designed to keep within reasonable bounds the cost of health care.” 63 P.S. § 425.2. In its second sentence, the statute identifies a second category of “review organization”: “[A]ny hospital board, committee *or individual* reviewing the professional qualifications or activities of its medical staff or applicants for admission thereto.” *Id.* (emphasis added).

The Majority finds no room in the second category to recognize an individual as conducting peer review, focusing upon the fact that the repeated usage of the term “committee” in the first category of review organization suggests that the absence of same from the second category means that whatever it is the second category of review organization is doing, it cannot be peer review. If “committee” and “individual” are used interchangeably, the Majority finds, then “the reference to both (‘committee or individual’) in the second sentence of the definition of ‘review organization’ would constitute unnecessary surplusage, which is not permissible under basic statutory

⁶ The Reginellis have submitted materially similar, but nonetheless distinct, responsive briefs to the separate briefs of MVH and UPMC. All citations to the Reginellis’ briefing in this case refer to their MVH brief, at 20 and 21 WAP 2016.

construction principles.” Maj. Op. at 19 (citing, *inter alia*, 1 Pa.C.S. § 1921(a)). The Majority further notes that “review committee” and “review organization” refer to “distinct types of entities under the PRPA,” with only the former associated with “peer review.” *Id.* at 20. To give discrete effect to the second sentence, the Majority identifies “professional qualifications or activities” as addressing solely “a physician’s credentials for purposes of membership (or continued membership) on a hospital’s medical staff.” *Id.* at 20.

There is some appeal to this reading. However, to exclude a given physician’s patient care from “professional activities” is at odds with a common understanding of that term in its statutory context. No “activity” is more tied to a health care provider’s profession than the delivery of care. Moreover, if “professional qualifications and activities” refer, together, only to “credentials,” then we encounter a different surplusage, given that “qualifications” and “credentials” effectively are synonyms. This calls into question how “activities” separately contribute to the “credentialing” process. *Compare* “*qualification*,” AMERICAN HERITAGE COLLEGE DICTIONARY (3d ed. 1993) (“1. The act of qualifying or the condition of being qualified. 2. A quality, an ability, or an accomplishment that makes a person suitable for a particular position or task. 3. A condition or circumstance that must be met or complied with.”) *with* “*credentials*,” *id.* (“Evidence or testimonials concerning one’s right to credit, confidence, or authority.”).

The bright line that the Majority seeks to draw between a review organization and a review committee cannot be sustained by the statutory text read holistically. In effect, the distinction breaks down in Section 425.4, which is the section that confers confidentiality. That section, entitled “confidentiality of review *organization’s* records,”

refers in its text *only* to “review committees.” If in all PRPA uses we are to understand “organization” as distinct and more broadly inclusive than “committee,” then the second definition of review organization, at least to the extent it pertains to individuals and hospital boards, enjoys no confidentiality at all. The Majority seems to allow that *individuals* may invoke the confidentiality provision of Section 425.4, but only in connection with the “credentialing” process. It so holds because the first sentence of the definition of “review organization,” which expressly cites “peer review,” refers only to committees in that connection. But that is true, as well, of Section 425.4. Extending the Majority’s own reasoning with respect to Section 425.2 to Section 425.4, the privilege described *cannot apply to an individual*, regardless of the nature of the review in question—whether peer review or credentialing. In assessing whether the statute is ambiguous, we must view the text in its full context. Viewing the statute as a whole, I find that the meanings of “review organization” and “review committee” ultimately confound the bright-line distinction the Majority attempts to draw.

The meaning of these terms being less than clear, the Court should turn to consider “[t]he occasion and necessity for the statute,” “[t]he mischief to be remedied,” “[t]he object to be attained,” and “[t]he consequences of a particular interpretation.” 1 Pa.C.S. § 1921. Under the Majority’s account—in which “committee” in all uses means that and nothing else—no record is confidential if it pertains to reviews by any review organizations that are not described as “committees,” and indeed is not peer review at all (despite the fact that the protection of “Peer Review” is the sole subject in

the Act's title⁷). Accordingly, any information provided to an individual in connection with assessing the "professional qualifications or activities"—including, for example, information regarding prior malpractice or professional misconduct—would be discoverable. This, notwithstanding that the risks associated with disclosure, including the provision of information necessary to candid, informed assessments of a given professional's quality of care, are no less present in that context than in a committee-conducted peer review process. To say the least, this is an unreasonable interpretive result in the context of a compact, focused statute expressly labeled the "Peer Review Protection Act." This is especially so given the broad account of the intent underlying the Act that has been offered by this Court, echoed in lower court opinions several times over the years, and is acknowledged by the Majority itself herein. The Majority's reading leaves the door open to precisely the same chilling effect upon free and frank discussions aimed to ensure and improve an appropriate quality of care that the PRPA strives to vitiate.

I am reluctant to impute to the General Assembly the belief that effective peer review, and the objects it seeks to advance, can be achieved only when engaged in by two or more qualified professionals, so as to constitute a "committee." Under this account, no one supervisor can assess a given physician's performance negatively without risking exposure as the source of criticism, but if he or she does so with a colleague, and calls the twosome a "committee," precisely the same assessment is

⁷ See 1 Pa.C.S. § 1924 ("The title . . . of a statute may be considered in the construction thereof.").

privileged.⁸ If the legislature intended to protect health care providers who render candid opinions that serve the overarching goal of improving the quality of care, this interpretation undermines that intent. In doing so, it violates our presumption that “the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.” 1 Pa.C.S. § 1922(1).

Dr. Walther’s performance file for Dr. Boggs contains charts documenting Dr. Boggs’ management of dozens of cases other than the one that underlies this litigation. Dr. Walther pulled these charts to assess the quality of care provided by Dr. Boggs. Dr. Walther plainly is a professional *peer* to whom fell the responsibility to *review the quality of services performed* by Dr. Boggs, a physician under Dr. Walther’s oversight, for patients in the department Dr. Walther managed. I believe that this was a species of peer review performed by an individual as provided by the second sentence of Section 425.2’s definition of “review organization,” and that applying the privilege would best serve the General Assembly’s intent.

ERMI is a professional health care provider.

The Superior Court ruled that “ERMI, as an independent contractor staffing the Hospital’s emergency room, is not an entity enumerated in the Act as being protected by [the] peer review privilege.” Super. Ct. Mem. at 6. The Majority substantially agrees. Once again, the Majority proceeds from the premise that the plain language compels this result.

⁸ This same stringent reading informs the Majority’s reliance upon the fact that, while MVH was given and maintained possession of Dr. Boggs’ performance file, that file did not specifically reside with MVH’s “peer review committee.” Maj. Op. at 24.

Hospital reliance upon contractors to operate departments⁹ is not a new or rare phenomenon. This device has been employed by hospitals to increase efficiency as well as to reduce exposure to malpractice liability. See, e.g., *Simmons v. Tuomey Reg'l Med. Ctr.*, 533 S.E.2d 312 (S.C. 2000) (considering hospital liability where emergency department was run by a contractor which retained the physician as an independent contractor); Martin C. McWilliams, Jr., & Hamilton E. Russell, III, *Hospital Liability for Torts of Independent Contractor Physicians*, 47 S.C. L. REV. 431, 432-33 (1996) (reviewing hospital's efforts to rely upon premise that principals are not liable for the physical torts of independent contractors). *Amici curiae* the American Medical Association ("AMA") and the Pennsylvania Medical Society ("PMS") note that such arrangements are especially common in specialties that must be staffed around the clock, such as emergency medicine, radiology, anesthesiology, and pathology. See *Amicus Curiae* Brief for AMA/PMS at 18, 19 n.7; see also Maj. Op. at 16 n.7 (citing *Commonwealth, Dep't of Pub. Welfare v. Forbes Health Sys.*, 422 A.2d 480, 481 (Pa. 1980)).

The Act furnishes the following definition:

"Professional health care provider" means:

(1) individuals or organizations who are approved, licensed or otherwise regulated to practice or operate in the health care field under the laws of

⁹ The Majority understates the degree of ERMI's control of MVH's emergency room. See Maj. Op. at 2-3 (observing that MVH contracted with ERMI "to provide staffing and administrative services for its emergency room"). The Reginellis themselves provide a more expansive account of ERMI's role at MVH. See Brief for the Reginellis at 15 (noting that ERMI provides "physicians, non-physicians, legal services, billing/code services and facility planning services to contracting hospitals"). Furthermore, Dr. Walther testified that she functioned as the Emergency Department's "medical director." See Walther Dep., 2/5/2014, at 46 (acting as "medical director"). There is no dispute on this latter point.

the Commonwealth, including, but not limited to, the following individuals or organizations:

- (i) a physician;
- (ii) a dentist;
- (iii) a podiatrist;
- (iv) a chiropractor;
- (v) an optometrist;
- (vi) a psychologist;
- (vii) a pharmacist;
- (viii) a registered or practical nurse;
- (ix) a physical therapist;
- (x) an administrator of a hospital, nursing or convalescent home or other health care facility; or
- (xi) a corporation or other organization operating a hospital, nursing home or other health care facility

63 P.S. § 425.2. Notably, the definitional section of the PRPA provides no definition that informs its uses of “other health care facility.”

Although no opinion in *McClellan* commanded a Majority, the case offers some insight. In *McClellan*, the Court considered whether the peer review privilege extended to an “individual practice association” (“IPA”)-model HMO. In her OISA, Justice Newman (joined by Justice Cappy, with Justice Nix concurring only in the result) contended that it did not. The OISA focused upon the distinction between the IPA-model HMO at issue in that case, “which combines the delivery and financing of health care and which provides basic health services to voluntarily enrolled subscribers for a fixed prepaid fee”; a staff-model HMO, which “delivers services through its own physicians who are paid employees or staff of the HMO”; and a group-model HMO,

which “contracts with a medical group, partnership, or corporation composed of health care professionals licensed to practice medicine or osteopathy as well as other health professionals necessary for the provision of health services.” *McClellan*, 686 A.2d at 802 n.1.

First, the OISA observed that the Act’s definition of professional health care provider was broad enough that the Court might or might not read it to exclude IPA-model HMOs. Thus, as an ambiguous statute, review pursuant to our principles of statutory construction was warranted. Turning to the Act, the OISA addressed the “including, but not limited to” language in the definition of professional health care provider in tandem with the enumerated list that followed it, and explained as follows:

It is widely accepted that general expressions such as “including, but not limited to” that precede a specific list of included items should not be construed in their widest context, but apply only to persons or things of the same general kind or class as those specifically mentioned in the list of examples. Under our statutory construction doctrine *ejusdem generis* (“of the same kind or class”), where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. Where the opposite sequence is found, *i.e.*, specific words following general ones, the U.S. Supreme Court and the courts from several other jurisdictions recognize that the doctrine is equally applicable, and restricts application of the general term to things that are similar to those enumerated.

Id. at 805-806 (citations and internal quotation marks omitted); see *Dechert LLP v. Commonwealth*, 998 A.2d 575, 581 (Pa. 2010) (“[T]he introductory verbiage ‘including, but not limited to,’ generally reflects the intent of the legislature to broaden the reach of the statute, rather than a purpose to limit the scope of the law to those matters enumerated therein.”).

The OISA noted that, of eleven enumerated terms in the definition, nine specify individual health care workers, with the remaining two comprising “an administrator, and

a corporation or other organization operating or administering,” *inter alia*, a hospital or other health care facility. *McClellan*, 686 A.2d at 806. Thus, the HMO qualified for the privilege only if it could be regarded as an administrator of a medical facility. The OISA observed that an IPA-model HMO contracts with an individual physician or practice association, who typically work in their own offices, use their own equipment, and keep their own records. Thus, an IPA-model HMO generally has no health care facility and does not oversee patient care. Accordingly, it could not be regarded as the administrator or operator of a health care facility and was not a professional health care provider under the Act. *Id.* at 806-807.

In his OISR, Justice Zappala (joined by Justice Castille) rejected such a restrictive account, because HMOs are “held to have the same duties as hospitals to select and retain competent physicians.” *McClellan*, 686 A.2d at 807 (Zappala, J., OISR). Among the core functions served by peer review are the selection, retention, and supervision of competent physicians. Thus, Justice Zappala opined that IPA-model HMOs were “of the same general nature or class” as hospitals and should be protected by the PRPA privilege. *Id.* In his own OISR, Justice Nigro noted that HMOs are obligated to “provide or arrange for patient care,” including physicians’ services, whether “directly or through arrangements with others.” *Id.* at 808 (Nigro, J., OISR) (citing 40 P.S. § 1554(b)). Justice Nigro concluded that this “puts HMOs in the same class as administrators of health care facilities and organizations operating health care facilities which also provide or arrange for patient care.” *Id.* at 809. Thus, the OISA’s more restrictive reading “ignore[d] the reality of health care today.” *Id.*

The OISA, read in tandem with Justice Zappala's OISR, strongly suggests a common view among a majority of the then-sitting Justices. The OISA suggested a relatively expansive view of what constitutes the administration or operation of a health care facility, implying that it would be satisfied on that point if the entity in question employed its own physicians who practiced in facilities that were controlled by that entity. Justice Zappala, for his part, would have deemed the HMO a professional health care provider under the Act, *despite* its lack of staff or facility, simply because it was of the same general nature or class as those specifically enumerated under the Act. In this case, ERMI undisputedly maintained a staff of professional health care providers sufficient to administer and operate MVH's emergency department.

Appellants argue that it is "nonsensical" to find that the physicians and other individuals who comprise ERMI and define its commercial activities fall within the rubric of "professional health care provider" under item (i) of the definition, while ERMI itself lies outside it. Brief for ERMI at 29. They also argue that item (xi) includes corporations and organizations operating "health care facilities" as professional health care providers, and that ERMI, in staffing and operating the emergency department, qualifies. They further note that the lower courts' determinations that ERMI is a "business," and, as such, not a "health care provider" under the Act is belied by the Reginellis' own pleadings, which expressly asserted a "professional liability claim" against ERMI. See Plaintiffs' Amended Complaint ¶ 6.

To exclude ERMI, Appellants conclude, would confound the PRPA's intent by "ignor[ing] the reality of modern health care, where outside physician practice groups routinely staff and are integral to the operation of hospitals." Brief for Boggs and ERMI

at 26 (emphasis omitted); see Brief for MVH at 17 (“[T]he Superior Court’s decision to withhold peer review protection from reviews conducted by hospital staff members simply because they are employed by an independent physician group or similar independent contractor leads to an absurd and unworkable result.”). They further argue that, even if we find no quarter for ERMI in items (i) or (xi), they nonetheless must be protected because the definition’s employment of the “including, but not limited to” clause signals the legislature’s intent that a professional health care provider not be limited to the specific terms of that list. See Brief for MVH at 20.

Conversely, the Reginellis contend that ERMI “merely employs health care providers,” providing “physicians, non-physicians, legal services, billing/coding services and facility planning services to contracting hospitals.” Brief for the Reginellis at 15. They note that the definition requires an individual or entity that is “approved, licensed, or otherwise regulated to practice or operate in the health care field” under Pennsylvania law, and assert that ERMI is not so licensed or regulated. *Id.* at 16.

The Majority agrees, finding that “no principled reading” of the definition enables ERMI to overcome the qualification that a professional health care provider be “approved, licensed or otherwise regulated to practice or operate in the health care field under the laws of the Commonwealth.” Maj. Op. at 16; see 63 P.S. § 425.2.

As noted, the statutory definition encompasses, *inter alia*, “a corporation or other organization operating a hospital, nursing home or other health care facility.” 63 P.S. § 425.2. Furthermore, the list of eleven categories of individuals and entities who may be considered professional health care providers under the Act is expanded by the phrase “including, but not limited to,” which invites the principled expansion of the list to

include other individuals and organizations that share the relevant characteristics with those enumerated. See *Dechert*, 998 A.2d at 581.

“Hospital” and “health care facility” are used separately in item (xi) of the definition of “professional health care facility.” Thus, the Court must assume that the legislature understood a “health care facility” to be broader than, if not simply distinct from, a “hospital.” See 1 Pa.C.S. § 1921(a) (directing that we must “give effect to all [of a statute’s] provisions”). Neither the lower courts nor the Reginellis specifically contend that the emergency department does not qualify as a constituent part of MVH or as a health care facility in its own right, and I have difficulty conceiving how any such contention could be true under a common understanding of those terms. Consequently, in reviewing item (xi), our focus should turn to the meaning of “a corporation or other organization” and what it means to “operate” a facility. ERMI plainly is a corporation; indeed, that is an essential premise to the Reginellis’ argument. See Brief for the Reginellis at 16 (“ERMI . . . is merely a business entity.”). Furthermore, by any fair definition, ERMI “operates” the department.¹⁰

With respect to the “approved, licensed or otherwise regulated to practice or operate under the laws of the Commonwealth” qualification, the Majority relies for all practical purposes upon its determination that ERMI was neither licensed nor regulated to practice or operate in the health care field. Its plain language account is incomplete for failing to account for the word “approved” in a way that describes something other than the state of being “licensed” or “regulated.” Maj. Op. at 16. The Majority’s account

¹⁰ See “*operate*,” AMERICAN HERITAGE COLLEGE DICTIONARY (3d ed. 1993) (“*tr.* 1. To control the function of; run. 2. To conduct the affairs of; manage.”).

also leaves little room for any unenumerated entity that might qualify under the “including, but not limited to” expansion of the enumerated class, rendering it a null set. Like several justices in *McClellan*, I believe that these gaps at least create ambiguity regarding whether ERMI qualifies as a “professional health care provider” under the Act.

Setting aside licensure for present purposes, and further setting aside “regulated” without conceding that it does not apply to a corporation whose agents operate a regulated health care facility, “approved” nonetheless must be given meaning and effect that is not encompassed in the terms “licensed” or “regulated.” Thus, the Majority’s apparent conclusion that ERMI is not a “corporation . . . operating a . . . health care facility” is suspect, given that ERMI operates an entire hospital department, with all the hiring, oversight, and administration that this entails.

The question becomes one of approval or, perhaps, regulation. The Department, its staff providers, and MVH writ large are subject to myriad regulations, and MVH operates only with the approval of the Commonwealth and its agencies. *Cf.* 35 P.S. § 448.806(a) (“No person shall maintain or operate or hold itself out to be a health care facility without first having obtained a license therefor issued by the department.”). Regardless of whom MVH hires to operate its facility, it has a non-delegable duty to ensure that the care administered within its four walls meets applicable standards, which includes the “duty to oversee all persons who practice medicine within its walls as to patient care.” *See Thompson v. Nason Hosp.*, 591 A.2d 703, 707 (Pa. 1991). Thus, MVH has final responsibility for ERMI’s operation within the Commonwealth’s statutory and regulatory requirements—and subject to the Commonwealth’s approval, whatever

discrete import we find in that term. Furthermore, as ERMI employees, Drs. Walther and Boggs are licensed and regulated by the Commonwealth.

We have noted, and the Majority does not dispute, that the Act aims to encourage full and frank assessments of health care providers by other health care providers who are best qualified for that task. Whether the licensure, approval, or regulation requirement that undisputedly applies to MVH and its emergency department applies by extension to the contractor through its promise to ensure that the hospital complies with all state requirements seems beside the point: to exclude ERMI on the basis that it is not a professional health care provider under the expansive statutory definition would create a circumstance in which application of the peer review privilege to proceedings associated with a hospital department depends solely upon whether the hospital operates its own department or contracts with an outside corporate entity to do so. Put simply, if MVH, as the employer of the physicians staffing the Emergency Department, conducts peer review activities, then the information generated for those purposes is protected. However, if ERMI, as the employer of the same physicians staffing the same department at the same hospital, conducts the same peer review activities, the Act offers no protection for information of precisely the same nature.

This Court should not adopt an unreasonable or impractical interpretation that so clearly frustrates legislative intent. See 1 Pa.C.S. § 1922 (directing us to assume that the General Assembly “intends the entire statute to be effective and certain,” and that it “does not intend a result that is absurd, impossible of execution or unreasonable”). Thus, I would hold that ERMI is an operator of a health care facility by virtue of having taken sole responsibility for operating the Department. The Majority’s contrary

interpretation guts the privilege, given that such contractual staffing and administrative agreements are commonplace.

Sharing the performance file with MVH did not waive the privilege.

Also addressed in the courts below, and subject to our allowance of appeal, is whether, assuming the peer review privilege applied to Dr. Walther and ERMI, such privilege was waived when Dr. Walther provided the file to MVH. While the Majority touches upon this question, its conclusions that the file did not constitute peer review and that ERMI was not a professional health care provider render the issue moot, and the question only appears as a corollary to the Majority's primarily waiver-driven rejection of the proposition that Dr. Walther performed peer review for MVH as a function of the contract between the parties. However, were my above-stated views to prevail, the question would be ripe. Accordingly, I take it up briefly.

In ruling in the alternative that Dr. Walther compromised any applicable privilege by sharing the file, the Superior Court attached great consequence to one sentence fragment drawn from Dr. Boggs and ERMI's joint Reply Brief in that court to the effect that the performance file was "created and maintained solely by Dr. Walther on behalf of her employer." Super. Ct. Mem. at 6 (quoting Super. Ct. Reply Brief for Boggs and ERMI at 6). Based upon that alone, the Superior Court concluded that MVH "cannot claim that the file is [MVH's] privileged peer review, since, as the trial court noted, 'it is untenable that [MVH] could claim a privilege for documents that it neither generated nor maintained.'" *Id.* (quoting Trial Ct. Op., 11/25/2014, at 2-3). The Majority agrees, and posits that contrary testimony constituted only "a snippet of Dr. Walther's deposition

testimony in which she indicated that her peer review activities were performed for the benefit of both [ERMI] and MVH.” Maj. Op. at 23, 25.

Although the Superior Court provided no further information, the trial court’s assertion in this regard was based upon the proposition that “[t]he PRPA privilege, like other privileges, applies only to information which remains exclusive.” Trial Ct. Op., 11/25/2014, at 2 (citing *Dodson v. Deleo*, 872 A.2d 1237, 1243 (Pa. Super. 2005)). Notably, though, it is MVH toward which the motion at issue is directed, and MVH generally has maintained that Dr. Walther’s peer review activities were conducted on behalf of both ERMI and MVH. See, e.g., Super. Ct. Brief for MVH at 24 (“Dr. Walther is regularly involved in peer review of all of the [Department] physicians and the quality assurance process for the [Department], *on behalf of both ERMI and MVH.*”) (emphasis added). What the Majority diminishes as derivative of a mere “snippet” of Dr. Walther’s testimony, which in fact appeared in several variations in the proceedings below,¹¹ the Majority rebuts by reference to its own chosen snippets. However, even the Reginellis’

¹¹ See, e.g., Walther Dep., 2/5/2014, at 64-66 (Dr. Walther testifies that she performed various peer review activities “on behalf of [MVH] and ERMI,” and that, if an issue emerges during peer review, she forwards it to MVH’s peer review committee and to her superior at ERMI); *cf. id.* at 67 (indicating that retention decisions, where there’s “a care issue involved,” are “joint” decisions of MVH and ERMI); Motion for Reconsideration of the Court’s August 29, 2014 Order of Court and for In Camera Review, 9/22/2014, at 4 (“Dr. Walther is regularly involved in peer review for all the [emergency department] physicians and the quality assurance process . . . on behalf of both ERMI and MVH.”), 5 (“[F]or peer review, [Dr. Walther] reviews records of patient files when an issue is raised or a review is requested by staff or administration of MVH or ERMI”); N.T., 6/9/2014, at 71-72 (counsel for MVH, arguing in opposition to the Motion to Compel: “Dr. Walther, as part of our—as our supervisor, if you will, of the emergency department, *part of our contractual relationship with ERMI*, . . . it’s all part of that package that we do core measures and these other things [E]verything [the Reginellis] are asking for is an ongoing, everyday activity that the hospital does and is required to do in order to stay on top of this stuff.” (emphasis added)).

own attorney at one point provided support for Dr. Walther's account. See Boggs Depo, 4/18/2013, at 203 (counsel for the Reginellis: "[Dr. Boggs], there are some indications in this contract [*i.e.*, the contract between MVH and ERMI] that your employer required physicians to prepare and maintain in connection with your services all necessary and appropriate reports, records, correspondence in connection with the services performed, *all of which documentation shall be the property of the hospital.*") (emphasis added).

If MVH had Dr. Boggs' performance file in its possession, as it plainly did, it was provided to it by Dr. Walther or another agent of ERMI. Furthermore, it "maintained" that file at least to the extent that it never threw it away and to the extent that it knew where to find it when asked. This contradicts any suggestion that the file was never intended to serve MVH's benefit, or was not sought by MVH as part and parcel of its business relationship with ERMI. MVH's possession and actual production of the performance file necessarily provides support for Dr. Walther's account regarding for whose benefit she reviewed Dr. Boggs and with whom she shared the consequent performance file.

Appellants argue that the practical consequences of affirming the lower courts' rulings are untenable:

It is extremely common, and should be encouraged, for health care entities to work together to meet the public's needs, while sharing information to maintain and improve health care quality. It is logical for an outside entity, like ERMI, to review its own employee who is being supplied to staff a hospital, and for the information to be shared with that hospital, which of course has an interest in quality control regarding the members of its medical staff. To discourage the sharing of valuable information thwarts the goals of the PRPA [and] conflicts with legislative intent

Brief for Boggs and ERMI at 38-39.

The lower courts' apparent reliance on "exclusivity" is at odds with the Act's broad definition of "review organization," which clearly anticipates possession of such records by an array of individuals and groups concerned with evaluating and improving the quality of health care, reducing adverse events, and controlling costs. Among the entities named therein are a hospital, health insurance tissue or review committee, "a hospital plan corporation review committee," "any committee established pursuant to the medical assistance program, and any committee established by one or more State or local professional societies." 63 P.S. § 425.2. Necessarily, these are third parties relative to those who delivered the care subject to review. Nothing in Section 425.2 suggests that the sharing or dual possession of a single peer review record necessarily vitiates an otherwise valid privilege. Indeed, the scope of the Act itself is difficult to understand *except* as authorizing the simultaneous possession of peer review materials by multiple individuals and entities. Taking the Reginellis' argument to its logical conclusion, any professional health care provider that shared its records with any of these bodies, or among two or more enumerated entities or groups, would waive the peer review privilege. There is no way to reconcile this with the legislature's manifest intent.

In light of the broad intent reflected by the Act, I believe that the privilege here at issue was intended to capture an entire sector of conduct performed by a swath of individuals, committees, and government bodies on behalf of providers, both human and institutional, to ensure the quality of health care and the accountability of providers. As noted, *supra*, where the legislature creates a statutory privilege and specifies exceptions to that privilege, we must consider that as evidence that it intended not to

allow for other unspecified exceptions. See *Commonwealth, Dep't of Transp. v. Taylor*, 841 A.2d 108, 113 (Pa. 2004) (upholding a statutory privilege barring disclosure of accident investigations and safety studies prepared for the purposes of determining the causes of traffic accidents, noting that “the General Assembly is well aware of how to provide for such exceptions” to statutorily-defined privileges); *Castellani*, 956 A.2d at 951 (“[W]e are not at liberty to create other[exceptions to the Shield Law] that the Legislature, in its wisdom, chose not to include in the text of the statute.”); see also 1 Pa.C.S. § 1924 (“Exceptions expressed in a statute shall be construed to exclude all others.”).

Like the Shield Law in *Castellani*, the PRPA delineates exceptions.¹² I see no reason to approach this case differently, especially because the benefits of the Act plainly are realized when it encourages broader rather than narrower peer review and provider accountability. Furthermore, this avoids the destabilizing effect of making a privilege designed to ensure peer accountability contingent upon the corporate structure or staffing model of a given health care provider, which the provider adopts for reasons entirely distinct from provider accountability and quality of care. I would find that the

¹² See 63 P.S. § 425.4 (denying the privilege as to “information, documents or records otherwise available from original sources . . . merely because they were presented during proceedings of such committee”; allowing an individual who appears before or is a member of a peer review committee to testify “as to matters within his knowledge,” although he “cannot be asked about his testimony [in] or opinions formed by him as a result of said committee hearings”); cf. 63 P.S. § 425.3 (immunizing certain persons involved in peer review from criminal culpability or civil liability for information provided *unless* the person knew, or had reason to believe, that the information was false).

inclusion of specific statutory exceptions to the privilege indicates the legislature's intent to create no other.

A hospital *must* monitor the performance of its credentialed physicians, whether they are employed directly by the hospital or by a contractor, not least because plaintiffs in claims involving alleged medical malpractice are likely to claim corporate negligence against that entity when they believe that the hospital has violated its non-delegable duty to ensure the quality of care—as the Reginellis have alleged in this case. See *Thompson, supra*. It also seems obvious that the administrator of a given hospital department—whether employed by the hospital or an entity retained by the hospital to assume such duties—is best positioned to review the physicians who staff that department.

For all practical purposes, MVH, ERMI, and Drs. Walther and Boggs comprise a collective responsible for ensuring that the care delivered in the Department, and specifically the care provided by Dr. Boggs, and more specifically still the care provided by Dr. Boggs to Mrs. Reginelli, satisfied the standard of care. The well-established statutory mechanism for doing so is professional peer review, and the legislature clearly has found that confidentiality is critical to such review. Nothing in the PRPA suggests that sharing review materials among a chain of vertically integrated providers who collectively are responsible for a given health care facility should result in waiver of that confidentiality. See *Armstrong v. Dwyer*, 155 F.3d 211, 220 (3d Cir. 1998) (“The bar against discovery [of peer review-related documents] runs with the documents or information, not with the organization or individuals who happen to possess the

documents or information at any given time.”). Thus, I would find that the lower court erred in finding otherwise. Accordingly, I respectfully dissent.

Chief Justice Saylor and Justice Todd join this dissenting opinion.