

Nos. A05-1698 and A05-1701

State of Minnesota
In Court of Appeals

MARY AND MICHAEL LARSON,

Respondents,

v.

JAMES PRESTON WASEMILLER, M.D.,

Appellant (A05-1698),

Defendant (A05-1701),

PAUL SCOT WASEMILLER, M.D. and DAKOTA CLINIC, LTD.,

Defendants (A05-1698),

ST. FRANCIS MEDICAL CENTER,

Appellant (A05-1701).

**BRIEF AND APPENDIX OF APPELLANT
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STATEMENT OF ISSUES

1. **Does Minn. Stat. §§ 145.61-145.67 grant immunity from or otherwise limit the liability of a hospital or other review organization for a claim of negligent credentialing/privileging of a physician?**

The district court held in the negative.

Apposite authorities:

Minn. Stat. §§ 145.61-145.67

Campbell v. St. Mary's Hosp., 312 Minn. 379, 252 N.W.2d 581 (1977)

In re Fairview-University Med. Center, 590 N.W.2d 150 (Minn. Ct. App. 1999)

Amaral v. St. Cloud Hosp., 586 N.W.2d 141 (Minn. Ct. App. 1998),
aff'd 598 N.W.2d 379 (Minn. 1999)

2. **Does the State of Minnesota recognize a common law cause of action for negligent credentialing/privileging of a physician against a hospital or other review organization?**

The district court held that Minnesota should recognize such a cause of action.

Apposite authorities:

Kraushaar v. Austin Med. Clinic, P.A., 393 N.W.2d 217 (Minn. Ct. App. 1986)

Leubner v. Sterner, 493 N.W.2d 119 (Minn. 1992)

Fabio v. Bellomo, 504 N.W.2d 758 (Minn. 1993)

Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231 (Minn. 1998)

STATEMENT OF THE CASE

This is a medical malpractice case arising out of gastric bypass surgery performed on Respondent Mary Larson on April 4, 2002. Respondents Mary and Michael Larson commenced this action against Appellant James Wasemiller, M.D. ("Dr. Wasemiller"), Paul Wasemiller, M.D. and Dr. Paul Wasemiller's employer, Dakota Clinic, Ltd., alleging they negligently responded to post-surgical complications Ms. Larson experienced. (A. 1).¹

Respondents brought a motion to amend the complaint to add Appellant St. Francis Medical Center ("St. Francis") as a defendant based upon alleged negligence in credentialing or granting surgical privileges to Dr. Wasemiller. (A. 19). Dr. Wasemiller opposed the motion because such a claim is not viable due to Minnesota's Peer Review Statute set forth in Minn. Stat. §§ 145.61-.67 and Minnesota does not recognize a cause of action for negligent credentialing/privileging. On November 17, 2004, the district court, the Honorable Gerald Seibel presiding, granted the motion to amend. (A. 21). The trial court ordered Respondents not to include or reference any exhibit in the Amended Complaint. (A. 21).

Respondents served an Amended Complaint adding St. Francis to the case. (A. 23). St. Francis then brought a motion under Rule 12.02 of the Minnesota Rules of Civil Procedure to dismiss the Amended Complaint based upon the lack

¹ References to "A." are to the Appendix to Appellant Wasemiller's Brief.

of a viable negligent credentialing/privileging claim under Minnesota law. (A. 41). Dr. Wasemiller joined in the motion, which was heard on June 7, 2005. (A. 42). The district court issued an Order and Memorandum denying the motion on June 29, 2005, concluding that Minnesota recognizes at common law a professional tort against hospitals and review organizations. (A. 42). The court also decided that Minnesota's Peer Review Statute does not explicitly or implicitly bar such claims under Minn. Stat. §§ 145.63 and 145.64. Finally, the district court certified the following two questions as important and doubtful under Rule 103.03 of the Minnesota Rules of Appellate Court Procedure:

- A. Does the State of Minnesota recognize a common law cause of action of negligent credentialing/privileging of a physician against a hospital or other review organization? The district court has ruled in the affirmative.
- B. Does Minn. Stat. §§ 145.63-145.64 grant immunity from or otherwise limit liability of a hospital or other review organization for a claim of negligent credentialing/privileging of a physician? The district court has ruled in the negative.

(Id.).

Dr. Wasemiller and St. Francis filed separate, timely appeals from the district court's June 29, 2005 Order. (A. 58-62). This Court consolidated the two appeals by Order filed on September 16, 2005. (A. 64).

STATEMENT OF FACTS

This case involves the appropriateness of post-operative medical care provided to Respondent Mary Larson to address a complication which arose after

Ms. Larson underwent gastric bypass surgery. Dr. Wasemiller performed the gastric bypass surgery with the assistance of Dr. Paul Wasemiller on April 4, 2002 at St. Francis Medical Center. Dr. Wasemiller's pre-operative evaluation of Ms. Larson included physical examination, laboratory testing, and psychological evaluation. (A. 23 at ¶¶ VII-VIII).

On April 12, 2002 a CT scan was performed to evaluate symptoms of a potential complication. The scan revealed a potential leak of fluids in the abdomen. Dr. Paul Wasemiller performed surgery later that day to address this medical condition. (*Id.* at ¶¶ XVI-XVII). On April 22, Dr. Paul Wasemiller transferred Ms. Larson to a long-term care facility in Fargo, North Dakota. She underwent additional surgeries for further complications at MeritCare Hospital and was discharged on June 28, 2002. (*Id.* at ¶¶ XXII-XXIII).

Respondents subsequently brought this action alleging Dr. Wasemiller and Dr. Paul Wasemiller were negligent in their care and treatment of Ms. Larson with respect to the timeliness of intervention for the post-operative complication. Respondents claim this alleged negligence caused injuries to Ms. Larson. (*Id.* at ¶¶ XXV, XXXI-IV).

In their Amended Complaint, Respondents allege:

XXVI. At all times material herein, Defendant St. Francis Medical Center owed a duty to its patients to exercise reasonable care in issuing credentials to physicians seeking privileges to treat and care for patients of the hospital.

XXVII. On or before April 2002, St. Francis Medical Center was asked by James P. Wasemiller to grant privileges to him to perform

surgery on patients at St. Francis Medical Center, including bariatric surgical procedures.

XXVIII. On or before April 2002, St. Francis Medical Center knew or should have known that James P. Wasemiller posed an unreasonable danger of harm to patients seeking bariatric surgery at the hospital.

XXIX. On or before April 2002, St. Francis Medical Center breached its duty to Mary Larson by granting privileges to James P. Wasemiller to perform bariatric surgery at the hospital.

(A. 23).

ARGUMENT

This appeal presents two related issues of first impression: is creation of a common law negligent credentialing/privileging claim barred by Minnesota's Peer Review Statute, and should Minnesota recognize such a tort? The Peer Review Statute, codified at Minn. Stat. §§ 145.61-145.67, explicitly grants immunity to review organizations with respect to almost all of their work and prohibits disclosure of information obtained through and concerning the peer review process. Both this Court and the Minnesota Supreme Court have recognized the Peer Review Statute serves the important policy of improving the quality of health care and its restrictions on disclosure of peer review information must be enforced.

Recognition of the tort claim Respondents advocate implicates the strong public policy that underlies the Peer Review Statute and presents significant evidentiary problems for the parties. Physicians such as Dr. Wasemiller will be substantially and unfairly prejudiced by facing negligent credentialing/privileging claims that are irrelevant to the issue of medical negligence in a particular case. The Peer Review Statute will deny St. Francis and its medical expert access to important evidence necessary to defend the negligent credentialing/privileging allegations.

In addition to the evidentiary impediments to prosecuting and defending this new tort, recognition of a new cause of action requires careful consideration of its necessity. Respondents already have recourse under Minnesota law for alleged medical malpractice against health care providers, including physicians, surgeons,

and hospitals. Therefore, there is no need for this additional proposed tort. Given the policy and evidentiary difficulties that would accompany a negligent credentialing/privileging claim, this Court should refrain from recognizing this new tort.

I. STANDARD OF REVIEW

A Rule 12.02 motion to dismiss a pleading will be granted if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded. *Northern States Power Co. v. Franklin*, 265 Minn. 391, 394-95, 122 N.W.2d 26, 29 (Minn. 1963). When reviewing cases dismissed for failure to state a claim on which relief can be granted, the only question before the appellate court is whether the complaint sets forth a legally sufficient claim for relief. *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997); *See Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984) (the reviewing court must consider only the facts alleged in the complaint.). The standard of review is de novo. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003).

The only factual information presented for a Rule 12.02 motion is that which is disclosed by the pleadings as a whole. *Northern States Power Co. v. Franklin*, 265 Minn. at 394-95, 122 N.W.2d at 29. When the district court considers only the statements pled in the complaint, the appellate court's review is limited to the complaint. *Martens v. Minnesota Mining & Mfg. Co.*, 616 N.W.2d 732, 739-40 (Minn. 2000).

Here, the trial court decided St. Francis' motion based on the allegations of the Amended Complaint and applicable law as required by Rule 12.02. The district court properly declined to consider factual allegations outside of the pleadings in deciding the Rule 12.02 motion despite Respondents' effort to incorporate factual allegations contained in the October 7, 2004 Affidavit of William J. Maddix. (A. 21-22). The scope of this Court's review is likewise confined to the pleadings themselves and Minnesota law.

II. THE MINNESOTA PEER REVIEW STATUTE PRECLUDES CLAIMS AGAINST A HOSPITAL OR OTHER REVIEW ORGANIZATION FOR NEGLIGENT CREDENTIALING / PRIVILEGING OF A PHYSICIAN.

A. Creation Of A Common Law Claim For Negligent Credentialing/Privileging Would Thwart The Important Purposes Of The Peer Review Statute.

The Peer Review Statute defines a peer review organization broadly to include "an organization of professionals from a particular area or medical institution..." that is established by an entity such as a hospital "to gather and review information relating to the care and treatment of patients for the purposes of ... determining whether a professional shall be granted staff privileges in a medical institution..." Minn. Stat. § 145.61, subd. 5(i). Respondents' claim against St. Francis is based upon a decision to grant privileges to Dr. Wasemiller, by St. Francis' review organization, as that term is defined under Minn. Stat. § 145.61, subd. 5 (i).

The Peer Review Statute reflects the Legislature's determination that the public is best served and the quality of health care is improved by permitting medical review organizations to operate in a confidential setting without fear of litigation. In addition to determining whether to grant a medical professional staff privileges, hospital review organizations perform many other important and necessary functions, including:

- (a) evaluating and improving the quality of health care;
- (b) reducing morbidity or mortality;
- (c) obtaining and disseminating statistics and information relative to the treatment and prevention of diseases, illness and injuries;
- ...
- (f) developing and publishing guidelines designed to improve the safety of care provided to individuals;
- ...
- (q) participating in a standardized incident reporting system ... to share information for the purpose of identifying and analyzing trends in medical error and iatrogenic injury.

Minn. Stat. §§ 145.61, subd. 5(a-q). The Peer Review Statute immunizes almost all activities performed by medical review organizations, § 145.63, subd. 1, and extends confidentiality protections to the proceedings and records of review organizations, § 145.64, subd. 1.

Both this Court and the Minnesota Supreme Court have recognized the Peer Review Statute's important policy goals. The Minnesota Supreme Court first considered the Peer Review Statute in *Campbell v. St. Mary's Hospital*, 312 Minn.

379, 252 N.W.2d 581 (Minn. 1977) where a physician sued the defendant hospital's review group for defamation and interference with business relationships. In rejecting Campbell's claim based on immunity, the Court stated:

The clear import of [the review organization statute] is to encourage the medical profession to police its own activities with a minimum of judicial interference ... courts are ill-equipped to pass judgment on the specialized expertise required of a physician, particularly when such a decision is likely to have a direct impact on human life.

Id. at 309, 252 N.W.2d at 597. More recently in *Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 387 (Minn. 1999), where two physicians sought access to their own peer review information, the Supreme Court confirmed that the Peer Review Statute "reflect[s] a legislative judgment that improvements in the quality of health care will be fostered by granting certain statutory protections to health care review organizations."

Likewise, this Court has noted that the purpose of the peer review privilege is "to assure that the discussions necessary to improve patient care are carried on, despite threats of malpractice and defamation actions." *In re Fairview-University Med. Center*, 590 N.W.2d at 153, quoting *Matter of Parkway Manor Healthcare Center*, 448 N.W.2d 116, 120 (Minn. Ct. App. 1989).

The statute provides limited discretion to the review organization to disclose information "to the extent necessary to carry out one of the purposes of the review organization." Minn. Stat. § 145.64. This discretion belongs solely to the organization. *In re Fairview-University Med. Center*, 590 N.W.2d at 154. Moreover, the importance of maintaining confidentiality is reinforced by a

provision making unauthorized disclosure of data or information acquired by a review committee or of what transpired at a meeting a crime. Minn. Stat. § 145.66.

Here, the district court acknowledged that medical review organizations serve legitimate public purposes, many of which are identified in Minn. Stat. § 145.61, subd. 5. (A. 48), but failed to recognize the impact negligent credentialing/privileging claims would have on these organizations. The immunity and confidentiality provisions of the Peer Review Statute operate together to ensure that review organizations are able to engage in open and frank discussions aimed at improving the quality of patient care. The creation of a negligent credentialing/privileging claim would attack the very underpinning of the Peer Review Statute – medical review organization members would no longer be willing to participate in peer review work because of possible involvement in medical malpractice cases and the threat of defamation actions. *Amaral v. St. Cloud Hosp.*, 598 N.W.2d at 387. Creation of a negligent credentialing/privileging tort would render the immunity and confidentiality provisions of the Peer Review Statute wholly ineffective, thus jeopardizing the quality of patient care.

B. The Confidentiality Provisions Of Minn. Stat. § 145.64 Preclude Negligent Credentialing/Privileging Claims Because The Statute Bars Parties From Disclosing Or Obtaining Facts Essential to Such Claims.

As noted above, the Peer Review Statute prohibits the disclosure of all peer review information, in effect precluding any claim based upon the peer review process:

§ 145.64, subd. 1. Confidentiality of records of review organization

... data and information acquired by a review organization, in the exercise of its duties and functions, or by an individual or other entity acting at the direction of a review organization, shall be held in confidence, shall not be disclosed to anyone except to the extent necessary to carry out one or more of the purposes of the review organization, and shall not be subject to subpoena or discovery. No person described in section 145.63 shall disclose what transpired at a meeting of a review organization except to the extent necessary to carry out one or more of the purposes of a review organization. The proceedings and records of a review organization shall not be subject to discovery or introduction into evidence in any civil action against a professional arising out of the matter or matters which are the subject of consideration by the review organization. Information, documents or records otherwise available from original sources shall not be immune from discovery or use in any civil action merely because they were presented during proceedings of a review organization, nor shall any person who testified before a review organization or who is a member of it be prevented from testifying as to matters within the person's knowledge, but a witness cannot be asked about the witness' testimony before a review organization or opinions formed by the witness as a result of its hearings...

Minn. Stat. § 145.64, subd. 1. The Peer Review Statute imposes a substantial criminal penalty for disclosure of information: "Any disclosure other than that authorized by section 145.64, of data and information acquired by a review

committee or of what transcribed at a review meeting, is a misdemeanor.” Minn. Stat. § 145.66.

This Court strictly applied these confidentiality provisions in *In re Fairview-University Medical Center*, 590 N.W.2d 150 (Minn. Ct. App. 1999), where this Court refused to order production of medical staff credentialing files to the Minnesota Board of Medical Practice. The Court rejected the Board’s attempt to subpoena the hospital credentialing files of two physicians as part of a Board investigation in an administrative proceeding. *Id.* at 152. This Court also rejected the Board’s argument that the peer review privilege only applies to discovery in a “civil action” rather than an administrative action, and held that the privilege applies to documents generated and acquired by the organization. *Id.* Finally, this Court noted that the peer review statute serves the strong public interest in improving the quality of health care by assuring that discussions necessary to improve patient care are carried on without the risk of malpractice and defamation actions. *Id.* at 153.

The limited exceptions to the disclosure prohibitions contained in the Peer Review Statute do not apply to disclosure of information in connection with a claim of negligent credentialing/privileging. The first exception permits a review organization to release non-patient-identified aggregate trend data on medical errors and to file certain legally required information. Minn. Stat. § 145.64, subd. 1(b). This exception is not applicable or relevant to negligent credentialing/privileging claims.

The second exception to confidentiality allows access by professionals seeking data, information, or records relating to their medical staff privileges, membership, or participation status. Minn. Stat. § 145.64, subd. 2. However, this section further provides that “any data so disclosed in such proceedings shall not be admissible in any other judicial proceeding than those brought by the professional to challenge an action relating to the professional’s medical staff privileges or participation status.” *Id.*

A professional may only obtain this information if he challenges a decision of the review organization. In *Amaral v. St. Cloud Hosp.*, 586 N.W.2d 141 (Minn. Ct. App. 1998), *aff’d* 598 N.W.2d 379 (Minn. 1999), two neurosurgeons sought information relating to their own staff privileges. The hospital refused their request, asserting the confidentiality protections of Minn. Stat. § 145.64. *Amaral*, 586 N.W.2d at 142. This Court agreed with the hospital, holding that documents relating to their credentialing process undertaken in granting physician staff privileges are not subject to discovery unless the professional is challenging an action relative to that individual’s credentials. *Id.* at 144, *citing* Minn. Stat. § 145.64, subd. 2.

The Minnesota Supreme Court agreed, noting that the purpose underlying the statute is the strong public interest in improving the quality of health care. *Amaral v. St. Cloud Hosp.*, 598 N.W.2d at 387. The Supreme Court also discussed the reluctance of professionals to participate freely in peer review proceedings if full participation includes the possibility of being compelled to

testify against a colleague in a medical malpractice action and the possibility of being subjected to a defamation suit by another professional. *Amaral*, 598 N.W.2d at 387. The Supreme Court concluded that the physicians' right to the review organization information does not outweigh the strong public interest in quality health care. *Id.* at 388.

The third privilege exception contained in the Peer Review Statute allows access by the commissioner of health to original information, documents, or records acquired by a review organization, but does not provide for access by any other individual or entity. Minn. Stat. § 145.64, subd. 5. This exception does not apply to negligent credentialing/privileging claims.

A claim of negligent credentialing against St. Francis for the actions of its review organization would require disclosure and admission of data acquired in the exercise of the duties and functions of St. Francis' medical review committee. This is undeniably privileged information under Minnesota law. Information regarding what transpires at a meeting of a hospital's credentialing committee may not be disclosed, thereby rendering it impossible for St. Francis to fully and adequately defend itself against a negligent credentialing claim under Minnesota law. *See* Minn. Stat. § 145.64. The statute's protections are broad, and unauthorized disclosure carries significant consequences. *See* Minn. Stat. § 145.66.

The district court erred in evaluating the respective impact the confidentiality provisions have on parties prosecuting and defending negligent

credentialing/privileging claims. The court acknowledged that Minn. Stat. § 145.64 “poses a handicap” with respect to the ability of St. Francis to defend itself, but concluded that the restriction also limits Respondents and therefore “the playing field is level.” The district court concluded that since the Respondents have the burden of proof, this “goes a long way in balancing any inequities that the limitation upon disclosure might impose.”

This analysis fails to consider two important facts. First, Respondents presumably have evidence of negligent credentialing or they would not assert the claim. Second, and most importantly, the district court’s analysis ignores the unfairness of allowing a claim against St. Francis but denying St. Francis the opportunity to present evidence concerning the actual credentialing process - the most relevant and powerful evidence in its defense. The credentialing process includes analysis of written and oral information which provides the basis for a decision. Without such information, St. Francis and any other review organization would be substantially prejudiced because it cannot adequately refute a plaintiff’s allegations.

Physicians would also be severely prejudiced by recognition of a negligent credentialing/privileging claim. St. Francis’ inability to adequately defend itself casts a shadow over Dr. Wasemiller who will face an indirect, but powerful one-sided attack on his credentials by Respondents. Most, if not all of the evidence relative to a negligent credentialing/privileging claim would be irrelevant and highly prejudicial to a physician in a medical negligence case. Recognition of this

new tort would create a strong incentive for all plaintiffs to make this claim a part of their lawsuits against physicians as a mechanism to present irrelevant, prejudicial evidence concerning issues that are properly reserved for a peer review committee.

Finally, the district court erred in concluding that Minn. Stat. § 145.67 provides an exception to the confidentiality protection afforded to review organizations. § 145.67 provides: “Nothing contained in sections 145.61 to 145.67 shall be construed to relieve any person of any liability which the person has incurred or may incur as a result of furnishing health care to such patient.” Minn. Stat. § 145.67. “Health care” is defined to mean “professional services rendered by a professional or an employee of a professional and services furnished by a hospital, sanitarium, nursing home or other institution for the hospitalization or care of human beings.” A review committee that considers credentialing or granting privileges is engaged in a peer review function. The committee is not “furnishing health care to a patient” under any reasonable reading of the statute. Minn. Stat. § 145.67 only protects claims against health care providers arising out of health care services provided to a patient, such as Respondents’ malpractice claims arising out of the post-operative care provided to Ms. Larson. It does not protect claims of negligent credentialing/privileging against hospitals or their peer review committees and/or committee members.

In summary, the peer review privilege as interpreted by Minnesota’s Appellate Courts broadly bars disclosure of all data, information, and records of a

review organization; testimony, proceedings, and meetings of the review organization; and opinions formed as a result of hearings of the review organization. *See* Minn. Stat. § 145.64. Unauthorized disclosure of such information is a misdemeanor. *See* Minn. Stat. § 145.66. By precluding all parties from acquiring and/or utilizing this evidence, the peer review statute impliedly bars negligent credentialing/privileging claims.

C. The Immunity Provisions Of Minn. Stat. § 145.63 Bar Respondents' Negligent Credentialing/Privileging Claim.

The Peer Review Statute protects the review organization and its participants from liability toward the subject of their review and others:

§ 145.63. Limitation on liability for sponsoring organizations, review organizations, and members of review organizations

No review organization and no person who is a member or employee, director, or officer of, who acts in an advisory capacity to, or who furnishes counsel or services to, a review organization shall be liable for damages or other relief in any action brought by a person or persons whose activities have been or are being scrutinized or reviewed by the review organization, by reason of the performance by the person of any duty, function, or activity of such review organization, unless the performance of such duty, function or activity was motivated by malice toward the person affected thereby. No review organization and no person shall be liable for damages or other relief in any action by reason of the performance of the review organization or person of any duty, function, or activity as a review organization or member of a review committee or by reason of any recommendation or action of the review committee when the person acts in the reasonable belief that the action or recommendation is warranted by facts known to the person or the review organization after reasonable efforts to ascertain the facts upon which the review organization's action or recommendation is made...

Minn. Stat. § 145.63. These immunity provisions protect a review organization and its members from claims by a person whose activities have been reviewed by the organization, as well as from other claims arising out of the performance of the organization's duties, functions or activities.

The Minnesota Supreme Court has applied the first immunity provision in favor of a review organization and its members in *Campbell v. St. Mary's Hospital*, 312 Minn. 379, 252 N.W.2d 581 (Minn. 1977) in which a physician brought suit after his surgical staff privileges were terminated. The Supreme Court addressed the claims against individual review board staff members and held that these claims could not stand in the absence of malice because of the legislatively granted immunity to members or employees of medical review organizations under Minn. Stat. § 145.63. *Id.*

After noting the strong public policy established in the Peer Review Statute, the *Campbell* court reviewed plaintiff's affidavits and evidence most favorable to his claims and was "unconvinced ... that his broad allegations of malice are anything more than unsubstantiated speculation as to the reasons for the revocation of his surgical privileges." Therefore, the immunity provisions fully applied, entitling defendants to summary judgment. *Id.*; also see *Doctor's Med. Clinic v. City of Jackson*, 581 N.W.2d 30, 31 (Minn. 1998) (upholding grant of summary judgment against physician in suit against hospital and members of professional review bodies based in part on immunity afforded by Minn. Stat. § 145.63).

The second immunity provision relieves a review organization and its members from liability arising out of the activities of the review organization "... when the person acts in the reasonable belief that the action or recommendation is warranted by facts known to the person or review organization after reasonable efforts to ascertain the facts upon which the review organization's action or recommendation is made..." Minn. Stat. § 145.63. The limited claims that are not subject to immunity involves only cases where a plaintiff demonstrates the review organization failed to make reasonable efforts to obtain pertinent and information failed to act in the reasonable belief that the organization's action is warranted.

As in *Campbell*, this Court should find St. Francis is immune from a negligent credentialing/privileging claim as a matter of law. Analysis of the Amended Complaint demonstrates Respondents do not allege that St. Francis failed to act in the reasonable belief that its action regarding the credentialing/privileging of Dr. Wasemiller was warranted or that St. Francis failed to make reasonable efforts to ascertain the relevant facts. St. Francis is immune from any claim relative to its decision to grant Dr. Wasemiller surgical privileges.

The *Campbell* court's rationale that Minn. Stat. § 145.63 is intended to encourage the medical profession to police its own activities with minimal judicial interference applies to Respondents' claim against St. Francis, just as it applies to claims by physicians who are the subjects of the peer review process. The district court's decision allowing this claim to proceed should be reversed.

III. THE STATE OF MINNESOTA SHOULD NOT RECOGNIZE A COMMON LAW CAUSE OF ACTION FOR NEGLIGENT CREDENTIALING/ PRIVILEGING OF A PHYSICIAN AGAINST A HOSPITAL OR OTHER REVIEW ORGANIZATION.

A. Minnesota Law Prevents Access To And The Use Of Evidence Necessary To Prosecute And Defend Negligent Credentialing/ Privileging Claims.

This Court rejected a negligent credentialing claim in *Kraushaar v. Austin Medical Clinic, P.A.*, 393 N.W.2d 217 (Minn. Ct. App. 1986). *Kraushaar* is instructive concerning the fundamental problem of proof inherent in such claims.

In *Kraushaar*, a patient and her husband sued St. Olaf Hospital, Austin Medical Clinic, and four physicians arising out of a physician's inadvertent removal of a small portion of her infected fallopian tubes during an exploratory laparotomy. During the surgery, Dr. James Dennis discovered a severe pelvic infection requiring removing adhesions and draining abscesses. While removing an adhesion, he inadvertently removed small portions of her infected fallopian tubes, which she claims caused permanent sterility. *Kraushaar*, 393 N.W.2d at 218. Plaintiffs claimed the clinic and physicians negligently diagnosed and treated her condition.

Plaintiffs' only claim against the hospital was based on its alleged negligence in granting surgical staff privileges to Dr. Dennis and allowing him to operate when it knew that he was right-handed and was missing the tip of his right index finger. *Kraushaar*, 393 N.W.2d at 220. This Court affirmed summary

judgment in favor of the hospital because the Plaintiffs failed to present any evidence of negligence by the hospital. *Id.* at 220-21.

Kraushaar highlights a crucial roadblock to the prosecution and defense of a negligent credentialing/privileging claim in Minnesota. As noted above, the Peer Review Statute bars disclosure of facts concerning the credentialing process under penalty of criminal prosecution. It is precisely these facts, that none of the parties can disclose and use in court and to which only the review organization itself has access, that are crucial for all parties involved with such a claim. *See* Minn. Stat. § 145.64. Given this restriction on discovery and admissibility, a negligent credentialing/privileging claim would always present speculative allegations and evidence. A plaintiff could present a plethora of purportedly relevant evidence about a physician's background and argue that the medical review committee should have considered such evidence without ever knowing whether and how the committee reviewed such information. A defendant review committee would have access to the relevant information but could not defend itself by presenting evidence about the actual credentialing process it underwent due to the prohibitions of Minn. Stat. § 145.64. A defendant physician, while not directly facing liability for a negligent credentialing/privileging claim, would also be confronted with extensive claims and allegations about her professional experience and abilities that would not be implicated in a routine medical malpractice case. The defendant physician would be substantially prejudiced by

her inability to access favorable information obtained or developed during the peer review process.

In addition, the disclosure prohibitions prevent the parties to a negligent credentialing/privileging claim from presenting all necessary expert testimony. Expert testimony is required in support of a negligence claim against a hospital. *See* Minn. Stat. § 145.682, subd. 1. Moreover, the expert witness must have a proper foundation for testifying. Rule 602 of the Minnesota Rules of Evidence prohibits a witness from “testify[ing] to a matter unless evidence is introduced sufficient to support a finding that the witness had personal knowledge of the matter.” Rule 703 of the Minnesota Rules of Evidence addresses the foundation requirements as well as the evidentiary use of the foundation that serves as the basis for the expert testimony. “The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived or made known to the expert at or before the hearing.” Minn. R. Evid. 703(a). If no facts or data are provided to Respondents’ expert to rely upon in opining that St. Francis negligently credentialed Dr. Wasemiller, any such opinion offered by Respondents’ expert would be speculative and thus inadmissible at trial.

Also, the “underlying expert data must be independently admissible in order to be received upon direct examination.” Minn. R. Evid. 703(b). Since any information or documents relating to the credentialing process involving Dr. Wasemiller are statutorily inadmissible in a civil action, there is no foundation to demonstrate to the jury that there is a basis for Respondents’ expert opinions.

Without having any basis for such opinions, such opinions would be unreliable and inadmissible.

If this Court upholds the peer review privilege, which it should do as a matter of law, Respondents would lack evidence in support of such a claim. Moreover, their expert would lack the personal knowledge with regard to the credentialing of Dr. Wasemiller since the expert would have no information or documents about St. Francis' credentialing process or any information relating to the consideration or decision to grant Dr. Wasemiller surgical privileges.

B. Rejection Of Negligent Credentialing/Privileging Claims Is Consistent With Minnesota's Cautious Approach To Recognizing New Causes Of Action, Particularly In The Area Of Medical Negligence.

This Court has specifically noted the "presumption against a change in the common law that is especially strong where the change would be contrary to public policy." *In re Will of Kipke*, 645 N.W.2d 727, 731 (Minn. Ct. App. 2002), citing *Kelly v. First Minneapolis Trust Co.*, 178 Minn. 215, 226 N.W. 696, 697 (Minn. 1929). Here, the Legislature announced the public policy in the Peer Review Statute. Recognition of a negligent credentialing/privileging claim would be contrary to the important policies set forth in the Peer Review Statute.

1. Application of the *Lake v. Wal-Mart* Analysis Does Not Support Recognition Of A Negligent Credentialing / Privileging Claim.

In developing Minnesota's common law, Minnesota courts do not simply follow the majority rule. See e.g. *Goeb v. Theraldson*, 615 N.W.2d 800 (Minn.

2000) (Minnesota Supreme Court rejected Daubert standard regulating the admissibility of expert opinion testimony). The Supreme Court has discussed the process it utilizes in exercising its power to recognize and abolish common law doctrines. *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 233 (Minn. 1998), citing *Anderson v. Stream*, 295 N.W.2d 595 (Minn. 1980) (abolishing parental immunity); *Nieting v. Blondell*, 306 Minn. 122, 235 N.W.2d 597 (Minn. 1975) (abolishing state tort immunity). This process is instructive regarding whether to recognize a negligent credentialing/privileging claim.

The plaintiffs in *Lake* sued the Wal-Mart corporation for invasion of privacy. The district court dismissed the privacy claims because Minnesota does not recognize a common law tort action for invasion of privacy. The Supreme Court noted the issue was one of first impression in Minnesota and discussed how the Court considers novel causes of action and legal theories.

The *Lake* Court observed that the common law must evolve over time as society itself changes: “It must be remembered that the common law is the result of growth, and that its development has been determined by the social needs of the community which it governs. It is the result of conflicting social forces, and those forces which are for the time dominant leave their impression upon the law.” *Lake*, 582 N.W.2d at 233. In determining the common law, the *Lake* Court looked to the law in other states and England. *Id.* After fully considering the nature of the privilege claims and case law from other jurisdictions, the Supreme Court recognized the invasion of privacy tort, holding “[t]he right to privacy is an

integral part of our humanity; one has a public persona, exposed and active, and a private persona, guarded and reserved. The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close.” *Id.* at 235.

The present case is different from *Lake* in several important respects. First, this Court is not writing on a blank slate. The Minnesota Peer Review Statute (Minn. Stat. §§ 145.61-.67) directly bears on the viability of a cause of action for negligent credentialing/privileging, barring such claims directly and impliedly, and therefore deserves special consideration. The Legislature passed this statute in 1971 to protect medical review organizations so they could fully perform their many important functions. There is no indication that the strong public policy of improving patient care through thoughtful and informed peer review has ebbed in the intervening years. In short, the social needs of the community are unchanged and there is no need to create a negligent credentialing/privileging tort.

Second, there is no need to recognize a negligent credentialing/privileging claim because Minnesota law already provides individuals with avenues of relief against health care providers. Unlike *Lake*, where the plaintiffs had no other potential claim related to Wal-Mart’s unauthorized distribution of plaintiff’s nude photographs, Respondents may and have brought medical malpractice claims against the two physicians and a medical employer. Minnesota’s medical malpractice statute does not limit a plaintiff’s monetary relief and there are no common law impediments to the recognition of damages in malpractice actions.

The absence of damage caps or other limitations on tort recovery distinguishes Minnesota from many other states and demonstrates this Court does not need to recognize a new cause of action.

Third, the Minnesota Supreme Court has historically approached the expansion of medical negligence claims and liability in the health care arena with caution due to concern regarding speculative claims. For example, in *Leubner v. Sterner*, 493 N.W.2d 119 (Minn. 1992), the Court declined to recognize a cause of action for negligent aggravation of a preexisting condition. Leubner alleged Dr. Ronald Jensen and his clinic negligently failed to timely diagnose and treat her breast cancer, and that the delay increased the chance her cancer would recur and resulted in additional surgery and treatment. *Id.* at 121-22.

The district court rejected plaintiff's "loss of chance" theory as a matter of law. The Supreme Court affirmed, citing the well-settled requirement that a plaintiff establish more probably than not that an injury was the result of a health care provider's negligence. *Leubner*, 493 N.W.2d at 121, citing *Plutshack v. Univ. of Minnesota Hosp.*, 316 N.W.2d 1 (Minn. 1982); *Cornfeldt v. Tongen*, 295 N.W.2d 638, 640 (Minn. 1980). The Court rejected the proposed "loss of chance" claim because of its speculative nature and lack of causation, noting that aggravation of a pre-existing condition is a measure of damages rather than a theory of liability. *Id.* at 122. See also *Fabio v. Bellomo*, 504 N.W.2d 758 (Minn. 1993) (no right of recovery under Minnesota law for "loss of chance").

The Supreme Court's concern regarding speculative claims applies to a claim for negligent credentialing/privileging because the factual basis of the claim cannot be disclosed by the peer review committee, rendering the claim purely speculative. Since the plaintiff would lack any evidence regarding the actions of the peer review committee, the plaintiff cannot establish that the alleged negligent actions of the committee more likely than not resulted in injury to the plaintiff. Therefore, this claim should not be recognized by this Court.

2. The district court erred in relying on case law from other jurisdictions to support recognition of negligent credentialing/privileging claims in Minnesota.

In its Order recognizing a cause of action for negligent credentialing/privileging, the district court stated that "the majority of courts in other jurisdictions have recognized a duty on the part of hospitals to exercise reasonable care in granting privileges to physicians to practice medicine at the hospital," citing six cases from other jurisdictions. Analysis of these cases demonstrates they are not instructive in this case. (A. 49).

None of the six cases considered the effect a state's peer review statute would have on a negligent credentialing/privileging cause of action. None of the other states have peer review statutes that imposes a criminal penalty for disclosure of confidential peer review material. *See Humana Med. Corp. of Ala. v. Traffanstedt*, 597 So. 2d 667 (Ala. 1992) (no peer review discussion; Alabama peer review statute, Ala. Code § 6-5-333, no criminal penalty); *Elam v. College Park Hosp.*, 183 Cal Rptr. 156 (Cal. Ct. App. 1982) (no peer review discussion;

California peer review statute, Cal. Health & Safety § 1370, no criminal penalty); *Insinga v. LaBella*, 543 So. 2d 209 (Fla. 1989) (no peer review discussion; Florida peer review statutes, Fla. Stat. Ann. § 466.022 and 766.101(5), no criminal penalty); *Mitchell County Hosp. Auth. v. Joiner*, 189 S.E.2d 412 (Ga. 1972) (no peer review discussion; Georgia peer review statute, Ga. Code Ann. § 31-7-133, no criminal penalty); *Rule by Rule v. Lutheran Hosp. & Homes Soc. of Am.*, 835 F.2d 1250 (8th Cir. 1987) (no peer review discussion; Nebraska peer review statute, Neb. Rev. Stat. § 71-147.01, no criminal penalty); *Johnson v. Misericordia Community Hosp.*, 301 N.W.2d 156 (Wis. 1981) (no peer review discussion; Wisconsin peer review statute, Wis. Stat. § 146.38, no criminal penalty).

Absent meaningful analysis of how a negligent credentialing/privileging claim interacts with statutory peer review protections, the above cases are not persuasive authority. The district court erred in relying on these cases to support recognition of a negligent credentialing/privileging claim.

CONCLUSION

The district court's decision to recognize Respondents' claim of negligent credentialing/privileging against St. Francis arising out of its grant of surgical privileges to Dr. Wasemiller should be reversed based upon the Minnesota Peer Review Statute. Creation of this new tort is incompatible with the confidentiality and immunity provisions of the peer review statute and would undermine its important policies. Minnesota should refuse to recognize this claim due to the

significant discovery and evidentiary problems it presents, and the fact that such a claim is unnecessary.

Dated: November 2, 2005

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CERTIFICATE

Pursuant to Rule 132.01, subd. 3(a)(1), the undersigned set the type of the foregoing memorandum of law in Times New Roman, a proportional 13-point font, on 8 ½ by 11 inch paper with written matter not exceeding 6 ½ by 9 ½ inches. The resulting principal brief contains 6,895 words, as determined by employing the word counter of the word-processing software, Microsoft Word XP, used to prepare it.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).