

CASE NOS. A05-1698 and A05-1701

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**State of Minnesota**  
**In Court of Appeals**

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MARY LARSON AND MICHAEL LARSON,  
*Respondents,*

vs.

JAMES PRESTON WASEMILLER, M.D.,  
*Appellant (A05-1698)*  
*Defendant (A05-1701),*  
 PAUL SCOT WASEMILLER, M.D. AND DAKOTA CLINIC, LTD.,  
*Defendant (A05-1698),*  
 ST. FRANCIS MEDICAL CENTER,  
*Appellant (A05-1701),*  
 MINNESOTA HOSPITAL ASSOCIATION, MINNESOTA MEDICAL  
 ASSOCIATION, AND AMERICAN MEDICAL ASSOCIATION  
 MINNESOTA DEFENSE LAWYERS ASSOCIATION,  
*Amicus Curiae.*

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**BRIEF AND APPENDIX OF APPELLANT  
 ST. FRANCIS MEDICAL CENTER**

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## STATEMENT OF THE ISSUES

**I. DOES MINN. STAT. §§ 145.63–145.64 GRANT IMMUNITY TO A HOSPITAL OR OTHER REVIEW ORGANIZATION FROM A COMMON LAW CAUSE OF ACTION FOR NEGLIGENT CREDENTIALING OF A PHYSICIAN?**

The District Court held: In the Negative.

- Amaral v. Saint Cloud Area Hosp., 598 N.W.2d 379 (Minn. 1999)
- In re Fairview-Univ. Med. Ctr., 590 N.W.2d 150 (Minn. Ct. App. 1999)
- Campbell v. St. Mary's Hosp., 312 Minn. 379, 252 N.W.2d 581 (1977)
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**II. DOES THE STATE OF MINNESOTA RECOGNIZE A COMMON LAW CAUSE OF ACTION AGAINST A HOSPITAL OR OTHER REVIEW ORGANIZATION FOR NEGLIGENT CREDENTIALING OF A PHYSICIAN?**

The District Court held: In the Affirmative.

- Amaral v. Saint Cloud Area Hosp., 598 N.W.2d 379 (Minn. 1999)
- Campbell v. St. Mary's Hosp., 312 Minn. 379, 252 N.W.2d 581 (1977)

## STATEMENT OF THE CASE

This appeal is from an Order of Judge Gerald J. Seibel, Wilkin County District Court, which (1) denied St. Francis Medical Center's motion to dismiss for failure to state a claim, and (2) certified as important and doubtful the issue of whether Minnesota recognizes negligent credentialing as a common law cause of action. (Appellant's Appendix ("A.A."), A.A. 178-193.)

On March 19, 2003, plaintiffs Mary Larson and Michael Larson commenced a medical malpractice lawsuit against defendants Dr. James Wasemiller, Dr. Paul Wasemiller and the Dakota Clinic, Ltd. In their Complaint plaintiffs claimed that both doctors were negligent in providing post-operative care to Mary Larson following surgery performed by Dr. James Wasemiller to treat Ms. Larson's morbid obesity. The plaintiffs claimed that the Dakota Clinic, Ltd, as employer of Dr. Paul Wasemiller, was vicariously liable for his negligence. The plaintiffs also claimed that all three defendants were engaged in a joint enterprise and/or joint venture with respect to the provision of care to Ms. Larson. (A.A. 1-11.)

On November 17, 2004, the Trial Court granted plaintiffs' motion to amend the Complaint to add St. Francis Medical Center as a defendant. (A.A. 12-13.)

On or about November 23, 2004, plaintiffs served an Amended Complaint on St. Francis Medical Center. In the Amended Complaint plaintiffs claimed that St. Francis Medical Center was negligent for granting Dr. James Wasemiller privileges to perform

bariatric surgery<sup>1</sup> at the hospital. Plaintiffs also claimed that St. Francis and the other defendants were engaged in a joint enterprise and/or joint venture with respect to the provision of medical care to Ms. Larson. (A.A. 14-25.)

On May 6, 2005, St. Francis Medical Center brought a motion for dismissal of the Amended Complaint pursuant to Minn. R. Civ. P. 12.02(e) on the ground that the claims of negligent credentialing and joint venture/joint enterprise failed to state a claim upon which relief can be granted. (A.A. 30-31; A.A. 32-61.)

On June 29, 2005, the Trial Court denied the motion of St. Francis for dismissal. However, it certified the following questions as important and doubtful under Minn. R. Civ. App. P. 103.03(i):

- 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?
- 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?

(A.A. 178-193.)

On August 26, 2005, St. Francis Medical Center filed its Notice of Appeal. (A.A. 194-195.)

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<sup>1</sup> Bariatrics is the treatment of obesity. Stedman's Medical Dictionary, 26<sup>th</sup> Edition, p. 189.

## STATEMENT OF FACTS

Plaintiffs' Amended Complaint contains the following factual allegations:

- In March, 2002, plaintiff Mary Larson consulted with Dr. James P. Wasemiller about gastric bypass surgery to treat her obesity. (A.A. 15-16.) Dr. Wasemiller was a physician licensed to practice medicine in the State of Minnesota and specialized in general surgery. (A.A. 15.) Dr. Wasemiller performed an evaluation of Ms. Larson, including a physical examination, laboratory tests, and a psychological evaluation. Based on the evaluation, Dr. Wasemiller approved Ms. Larson for gastric bypass surgery. (A.A. 15-16.) There is no claim that Dr. Wasemiller's evaluation or approval of Ms. Larson for the surgery was negligent. There is no claim that gastric bypass surgery was contraindicated in Ms. Larson's case. (A.A. 21.)
- On April 4, 2002, Ms. Larson underwent gastric bypass surgery. Dr. James Wasemiller was the surgeon. Dr. Paul Wasemiller assisted. The surgery was performed at St. Francis Medical Center. (A.A. 16.) St. Francis is a hospital located in Breckenridge, Minnesota. (A.A. 15.) There is no claim that the surgery was negligently performed. (A.A. 21.)
- Following surgery, Ms. Larson remained hospitalized at St. Francis until April 22, 2002. (A.A. 20.) During this time a gastric leak developed at the location where surgery had been performed. The leak was diagnosed on April 12, 2002, as a

result of a CT scan of the abdomen<sup>2</sup> and exploratory surgery performed by Dr. Paul Wasemiller. (A.A. 22.) Plaintiffs claim that the leak started sometime between April 5, 2002 and April 12, 2002, and that Dr. James Wasemiller was negligent for failing to timely diagnose the leak by performing diagnostic tests or performing exploratory surgery. (A.A. 21.) There is no claim that onset of the leak was caused by negligent care. There is also no claim that any of the care provided by the St. Francis Medical Center nurses was negligent. (A.A. 21.)

- As of April 4, 2002, Dr. James Wasemiller had privileges to perform bariatric surgical procedures at St. Francis Medical Center. (A.A. 15.) Plaintiffs claim that Dr. James Wasemiller posed an unreasonable danger of harm to patients seeking bariatric surgery, and therefore St. Francis was negligent by granting Dr. Wasemiller privileges to perform bariatric surgery at the hospital. (A.A. 22.)

For purposes of the motion for dismissal pursuant to Minn. R. Civ. P. 12.02(e) it was assumed that the above factual allegations are true.

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<sup>2</sup> CT scan (computed tomography) is an x-ray study which shows images of the body in the cross-sectional plane. Stedman's Medical Dictionary, 26<sup>th</sup> Edition, p. 1819.

## LEGAL ARGUMENT

### **I. STANDARD OF REVIEW**

A Rule 12.02(e) motion to dismiss for failure to state a claim tests only the legal sufficiency of the claim as stated. The focus of a motion to dismiss for failure to state a claim is the adequacy of the Complaint. Group Health Plan, Inc. v. Philip Morris Inc., 621 N.W.2d 2, 14 (Minn. 2001).

The district court may not go outside of the pleadings, but must examine only the claim as stated by the party asserting it; if any matters outside those raised by the Complaint need to be considered to resolve the motion, the district court should treat the motion as a motion for summary judgment under Rule 56. Defenders of Wildlife v. Ventura, 632 N.W.2d 707, 711 (Minn. Ct. App. 2001). A motion to dismiss for failure to state a claim is converted to a summary judgment motion if the district court considers matters outside the pleadings. Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. Ct. App. 1993).

In response to St. Francis Medical Center's Rule 12.02(e) motion to dismiss, respondents' memorandum of law to the district court included a number of factual allegations regarding Dr. James Wasemiller and St. Francis Medical Center that had not been included in plaintiff's Complaint. (A.A. 62-63.) The District Court, however, did not treat St. Francis Medical Center's Rule 12.02(e) motion to dismiss as a Rule 56 summary judgment motion. (See generally A.A. 178-193.). It is clear from Judge Seibel's Order denying St. Francis Medical Center's motion to dismiss that it was not necessary for the District Court to consider matters outside of plaintiff's Complaint and

that the District Court did not consider matters outside of plaintiffs' Complaint. (See *id.*) This Court, therefore, should review St. Francis Medical Center's appeal of the District Court's June 29, 2005, Order as an appeal of denial of a Rule 12.02(e) motion to dismiss and not as denial of a Rule 56 summary judgment motion. Accordingly, it would be improper for respondents to submit to this Court, and to ask this Court to consider, facts not included in plaintiff's Complaint.

In reviewing cases involving a grant or denial of a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12.02(e), the question before this Court is whether the Complaint sets forth a legally sufficient claim for relief. Barton v. Moore, 558 N.W.2d 746, 749 (Minn. 1997). The standard of review is therefore de novo. See Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n., 358 N.W.2d 639, 642 (Minn. 1984) ("[A]n appellate court need not give deference to a trial court's decision on a legal issue.").

## **II. MINNESOTA'S PEER REVIEW STATUTES ABROGATE ANY COMMON LAW CAUSE OF ACTION FOR NEGLIGENT CREDENTIALING.**

Respondents urge this Court to adopt a common law tort of negligent credentialing. The plain language of the peer review confidentiality provisions of Minn. Stat. § 145.64, which expressly prohibits disclosure, discovery, or introduction of evidence necessary for defense against a claim of negligent credentialing, demonstrates the legislature's intent to bar such claims. A plain-language analysis of Minn. Stat. § 145.63, which limits liability of peer review organizations, does not support respondents' argument that it can be inferred from the statute that the Legislature "contemplated" a

cause of action for negligent credentialing. Instead, the language of the statute evidences legislative intent to protect review organizations from claims for damages in any action by reason of the performance of the review organization. Finally, as clearly articulated by Minnesota's appellate courts in numerous cases, the legislative purpose underlying the entire peer review statutory scheme, at Minn. Stat. §§ 145.61-.67, is the promotion of quality health care *through the use of the peer review system*, not through the creation of a civil cause of action for negligent credentialing. Accordingly, the legislature's grant of broad confidentiality privileges and protections to the information and proceedings of peer review organizations cannot coexist with a cause of action for negligent credentialing. Minnesota's peer review statutes therefore abrogate such a cause of action.

**A. The Confidentiality Provisions of Minn. Stat. § 145.64 Preclude Defense Against Claims of Negligent Credentialing.**

**1. The Plain Language of the Confidentiality Provisions of the Statute Precludes Hospitals from Defense Against Claims of Negligent Credentialing.**

The plain language of Minn. Stat. § 145.64 mandates confidentiality of hospital peer review records and therefore precludes a hospital from disclosing peer review and credentialing information vital for adequate defense against a claim that the hospital unreasonably conducted its credentialing process with regards to a particular physician. The plain language of the statute thus strongly implies a legislative intent to bar claims against hospitals based upon claims that it unreasonably credentialed a physician.

The relevant portions of Minn. Stat. § 145.64, entitled “[c]onfidentiality of records or review organization,” provide:

**Subdivision 1. Data and information.** (a) . . . *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. For purposes of this subdivision, records of a review organization include Internet-based data derived from data shared for the purposes of the standardized incident reporting system described in section 145.61, subdivision 5, clause (q), and reports submitted electronically in compliance with sections 144.706 to 144.7069.

\* \* \*

(c) The confidentiality protection and protection from discovery or introduction into evidence provided in this subdivision shall also apply to the governing body of the review organization and shall not be waived as a result of referral of a matter from the review organization to the governing body or consideration by the governing body of decisions, recommendations, or documentation of the review organization.

\* \* \*

Minn. Stat. § 145.64 (2003) (Emphasis added).

A review organization is defined broadly under Minn. Stat. § 145.61 and includes “an organization of professionals from a particular . . . medical institution . . .” whose duties include “. . . determining whether a professional shall be granted staff privileges in

a medical institution. . . ." Minn. Stat. § 145.61, subd. 5(i). Accordingly, St. Francis' credentialing committee is subject to the requirements of the confidentiality provisions of Minn. Stat. § 145.64.

The legislature has made violation of the confidentiality provisions of Minn. Stat. § 145.64 a crime:

Any disclosure other than that authorized by section 145.64, or data and information acquired by a review committee or of what transpired at a review meeting, is a misdemeanor.

Minn. Stat. § 145.66.

When analyzing the confidentiality mandates of Minn. Stat. § 145.64, well-established rules of statutory interpretation apply. The court's role is to discover and effectuate the legislature's intent. In re Fairview-University Med. Ctr., 590 N.W.2d 150, 153 (Minn. Ct. App. 1999) (citing State v. Bealieu v. RSJ, Inc., 552 N.W.2d 695, 701 (Minn. 1996)). "If the legislature's intent is clearly manifested by [the] plain and unambiguous language of the statute, statutory construction is neither necessary nor permitted." Id. A statutory provision is only ambiguous when the language of the provision may be reasonably subject to more than one interpretation. Amaral v. Saint Cloud Area Hosp., 598 N.W.2d 379, 384 (Minn. 1999). In construing statutes, words and phrases must be construed according to rules of grammar and according to their common and approved usage unless to do so would involve a construction inconsistent with the manifest intent of the legislature. Minn. Stat. § 645.08.

In deciding whether to adopt a new cause of action for negligent credentialing, this Court does not need to look any further than the plain language of the statute to determine

that the legislature has made it impossible for a hospital to adequately defend itself against such claims. The crux of a negligent credentialing claim against a hospital is either that the hospital's credentialing committee did not conduct a reasonable investigation of the physician, or, even if the committee did conduct a reasonable investigation, that it made an unreasonable decision to grant privileges to the physician based upon the information and data the committee reviewed.

Where a negligent credentialing claim is based upon allegations of unreasonable investigation, the central issue is what the hospital *should have known* about the physician had it conducted a reasonable investigation. To adequately defend itself against a claim that it should have known certain facts about a physician, a hospital would be required to disclose and admit into evidence the data and information its credentialing committee gathered and reviewed in its investigation of the physician to whom staff privileges were ultimately extended. The plain language of Minn. Stat. § 145.64, however, unambiguously precludes a hospital from disclosing "data and information acquired by [the hospital's credentialing committee] in the exercise of its duties and functions." Minn. Stat. § 145.64. Because under the statute, a hospital could never prove what its credentialing committee *actually knew*, there is no way a hospital could defend itself against claims that it *should have known* certain facts about the physician granted privileges.

Where a negligent credentialing claim is based upon allegations that a hospital made an unreasonable decision to extend privileges to a physician in light of the information known about that physician, the central issue is, of course, the

reasonableness of the decision of the hospital's credentialing committee. This determination hinges on more than just the data and information reviewed by the committee, but also upon the deliberative processes by which the decision was made, and the outcome of those processes. To adequately defend against a claim that it unreasonably granted privileges to a physician, it would be necessary for a hospital to disclose and admit into evidence information about how facts regarding the physician were presented to committee members, and information about how such facts were reviewed, discussed and weighed by the committee in its consideration of the physician's application for staff privileges. Adequate defense would also require admission of testimony and documentation regarding the committee's consideration of: facts supportive of the physician's application for admission to the hospital's staff, facts that might be construed as favoring denial of privileges, mitigating factors considered by the committee, and explanation of how the committee weighed supportive, unsupportive, and mitigating facts in the process of making its ultimate determination. Finally, adequate defense against a claim that the decision of a hospital's credentialing committee to extend privileges to a particular physician was unreasonable would require disclosure and admission into evidence of the ultimate outcome of the credentialing process.<sup>3</sup> The confidentiality provisions of the peer review statute, however, provide that "[n]o person . . . shall disclose what transpired at a meeting of a review organization. . . ." Minn. Stat. §

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<sup>3</sup> Although the fact that a physician has been granted staff privileges certainly becomes public information, to disclose that a physician's privileges have been restricted or limited in some fashion by the credentialing committee (one possible outcome of the credentialing process) would be to disclose "what transpired at a meeting of a review organization. . ." in violation of Minn. Stat. § 145.64.

145.64. Thus, the plain language of the statute precludes a hospital from fully and fairly defending itself because it absolutely prohibits the hospital from disclosing the deliberative processes by which the credentialing decision was made and the outcome of the decision.

**2. The Language of Minn. Stat. § 145.64 Regarding Information from “Original Sources” Would Not Allow Adequate Defense to Claims of Negligent Credentialing.**

Respondents argued to the District Court that the following language from Minn. Stat. § 145.64 would allow hospitals adequate defense against negligent credentialing claims:

“[i]nformation, 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. . .”

Minn. Stat. § 145.64. Respondents even argued to the district court, based upon this language, that “[t]he statute specifically contemplates that credentialing and privileging decisions may be at issue in a civil trial. . . .” (See A.A. 76.) Neither assertion is supported by the actual language of the statute.

First, the evidence made discoverable and admissible by the language of this clause is plainly insufficient to allow hospitals to adequately defend against negligent credentialing claims. As explained above, a negligent credentialing claim is, by definition, a claim that a hospital did not reasonably investigate a physician or that the hospital unreasonably made its decision to grant staff privileges to the physician in

question. Because determination of the merits of such claims require evidence of what the credentialing committee knew, how it knew it, how the committee used what it knew to arrive at a decision, and the ultimate outcome of the committee's decision, including any limitations or restrictions of privileges, mere introduction of "[i]nformation, documents or records otherwise available from original sources" or of testimony of a "person who testified before a review organization or who is a member of it. . . as to matters within the person's knowledge. . ." would be wholly insufficient to allow for adequate defense against a negligent credentialing claim. In short, "information, documents or records otherwise available from original sources" can only establish what a hospital *should have known* about a particular physician, and cannot establish what the hospital *actually knew*, or how such information was used by the hospital. The interpretation of the original sources language urged by respondents, therefore, would allow plaintiffs in negligent credentialing cases to meet their burden of production, but would completely preclude defendant hospitals from meeting their burden, thereby denying hospitals adequate defense to negligent credentialing claims.

Second, although the statute provides for discovery and admission of documents from original sources in a "civil action," the plain language of the statute in no way supports an inference that the statute "contemplates that credentialing and privileging decisions may be at issue in a civil trial." The language of the statute provides no guidance as to what sorts of "civil action[s]" it contemplates. Minn. Stat. § 145.64. Furthermore, the language "review organization," refers to more than simply a hospital's credentialing committee, but to peer review of any sort, as long as it is conducted by a

“review organization.” The statute, therefore, provides for confidentiality of peer review of patient care unrelated to credentialing. In light of these ambiguities, the most reasonable interpretation is that the “civil action[s]” contemplated by the legislature are most likely medical negligence actions against physicians or hospital staff, and not negligent credentialing claims. This language simply assures that hospitals cannot use peer review to convert evidence otherwise discoverable in medical negligence actions into privileged evidence.

**3. Minnesota’s Appellate Courts Have Strictly Interpreted Minn. Stat. § 145.64 to Prohibit Disclosure, Discovery or Introduction of the Kind of Evidence Necessary for Defense of Negligent Credentialing Claims.**

This Court has firmly upheld the statutory protections given to information provided to, or gathered by, a review organization, along with the review organization’s proceedings and deliberations. See Amaral v. St. Cloud Hosp., 586 N.W.2d 141 (Minn. Ct. App. 1998), aff’d 598 N.W.2d 379 (Minn. 1999); In re Fairview-Univ. Med. Ctr., 590 N.W.2d 150.

In Amaral, two physicians sought to obtain a hospital’s records relating to their own staff privileges. The hospital asserted the confidentiality protections of Minn. Stat. § 145.64 and withheld the records. Id. at 142. This Court agreed with the hospital and held that documents related to the credentialing process were not, under the statute, subject to discovery. Id. at 144. The Minnesota Supreme Court upheld this Court’s ruling and noted that the purpose of the peer review statute is to encourage medical professionals to conduct peer review with a minimum of judicial interference and to serve the strong

public interest in improving the quality of health care. Amaral, 598 N.W.2d at 383. The Supreme Court also emphasized the possible reluctance of professionals to freely participate in peer review for fear of being compelled to testify against a colleague. Id.

This Court has also affirmed a district court's refusal to order production of credentialing committee materials to the Minnesota Board of Medical Practice. In re Fairview-University Med. Ctr., 590 N.W.2d 150. The Court rejected the Board's arguments in support of its attempt to subpoena hospital credentialing files of two physicians as part of a Board investigation in an administrative hearing. Id. at 152. The hospital moved for an Order to quash the subpoenas on the grounds that under Minn. Stat. § 145.64, the information sought was confidential and not subject to discovery. This Court upheld the district court's Order quashing the subpoenas. Id. at 155. The Board argued that the confidentiality requirements of the statute covered only documents generated by a review organization and not documents acquired by a review organization. Id. at 154. This Court held that the peer review confidentiality provision covers "all data and information acquired by a review organization." Id. As this Court noted, the "otherwise available" sentence simply points out that documents available from other sources remain discoverable from the other sources. Id.

In In re Fairview-Med. Ctr. Univ. Med. Ctr., this Court acknowledged the potential, under certain circumstances, for abuse of such an absolute statutory privilege, but stated that even if the potential for abuse exists, peer review materials are privileged under the language of the statute. Id. This Court noted: "[t]he legislature is free to perpetrate injustice so long as it does not violate the constitution; if a statute is clear the

remedy is amendment not construction.” Id. (citing Coduti v. Hauser, 219 Minn. 297, 303, 17 N.W.2d 504, 507-08 (1945) (quoting Timo v. Juvenile Court, 188 Minn. 125, 128, 129, 246 N.W. 544, 546 (1933))). Accordingly, this Court concluded in In re Fairview-Univ. Med. Ctr., that if a remedy is called for, the remedy is legislative rather than judicial. 590 N.W.2d at 154. Here too, the redress respondents seek should properly be put to the legislature and not to this Court. If the plaintiffs’ bar seeks to create a cause of action for negligent credentialing in Minnesota, it must first convince the legislature to amend Minn. Stat. § 145.64.

**B. Minn. Stat. § 145.63 Evinces Legislative Intent to Protect Review Organizations From Claims For Damages In Any Action By Reason of the Performance of the Review Organization and Does Not Contemplate a Negligent Credentialing Cause of Action.**

Minn. Stat. § 145.63, subd. 1, in relevant part, provides:

\* \* \*

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 a 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. . . .

The protections from liability provided in this subdivision shall also apply to the governing body of the review organization and shall not be waived as a result of referral of a matter from the review organization to the governing body or consideration by the governing body of decisions, recommendations, or documentation of the review organization.

Minn. Stat. § 145.63.

Respondents argued to the district court that the legislature's use of the word "reasonable," in front of the word "belief," and in front of the word "efforts," indicates that the legislature "contemplated" negligent credentialing claims. (See A.A. 72-73.) This tortured attempt at "plain language" interpretation ignores canons of statutory interpretation and directly conflicts with the far less ambiguous language of Minn. Stat. § 145.64, subd. 1. Moreover, it would create an absurd result whereby different provisions of the same statutory scheme act to create or acknowledge a cause of action for negligent credentialing while, at the same time, act to preclude defendants in negligent credentialing claims from disclosing or introducing evidence required to defend against such claims.

Under basic canons of statutory construction, Minnesota's appellate courts "construe words and phrases according to rules of grammar and according to their most natural and obvious usage unless it would be inconsistent with the manifest intent of the legislature." Amaral, 598 N.W.2d at 384 (citing Minn. Stat. § 645.08, subd. 1.; Homart Dev. Co. v. County of Hennepin, 538 N.W.2d 907, 911 (Minn. 1995)). "Every law shall be construed, if possible, to give effect to all its provisions." Id. (citing Minn. Stat. § 645.16.) This Court presumes the legislature intended to favor public interest over a private interest. Id. (citing Minn. Stat. § 645.17, subd. 5).

Respondents' assertion that the above-described uses of the word "reasonable" indicate a legislative intent to create or acknowledge a cause of action for negligent credentialing is not supported by the actual language of the statute. First, the language of the statute does not explicitly announce an intention to create such a cause of action.

Second, the first use of the word “reasonable” appears before the word “belief” which, if read according to respondents’ argument, would not create an objective negligence standard of “reasonable care,” but would instead create an entirely subjective standard of “reasonable belief.”

Third, respondents’ interpretation renders the second sentence of Minn. Stat. 145.63, subd. 1, practically meaningless. If the sentence creates or “contemplates” negligent credentialing claims, why would the legislature have found it necessary include this language? If the legislature contemplated a cause of action for *negligent* credentialing, the duty imposed, of course, would be the duty of reasonable care, as it is in all torts of negligence. This entire sentence thus becomes superfluous under respondents’ interpretation.

Finally, and most importantly, respondents’ interpretation of this language asks this Court to interpret Minn. Stat. § 145.63 in complete ignorance of the unambiguous language of Minn. Stat. § 145.64 which, as discussed above, would preclude hospitals from defending against claims of negligent credentialing. It is nonsensical to suggest that the language of Minn. Stat. § 145.63 shows that the legislature “contemplated” hospitals would be held liable for negligent credentialing claims, where the very next statute so clearly precludes hospitals, on penalty of criminal prosecution, from disclosing evidence that the credentialing decision made was “reasonable.” The legislature’s use, in Minn. Stat. § 145.63, subd. 1, of the phrase “by facts known to the person or the review organization,” in particular, makes it clear that it did not “contemplate” a negligent

credentialing cause of action, as Minn. Stat. § 145.64 so clearly precludes disclosure of “facts known to . . . the review organization.” See Minn. Stat. § 145.64, subd. 1.

To the extent the two uses of the word “reasonable” create ambiguity when Minn. Stat. § 145.63 is construed to give effect to all provisions of Minnesota’s peer review statutory scheme at Minn. Stat. § 145.61-.67, it is clear that Minn. Stat. § 145.63 does not create or “contemplate” a cause of action for negligent credentialing, but instead bars claims against a review organization “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 a member of a review committee or by reason of any recommendation or action of the review committee. . . .” Minn. Stat. § 145.63, subd. 1.

**C. Respondents’ Interpretation of Minn. Stat. § 145.67 Is Not Supported By the Plain Language of the Statute.**

Respondents argued to the district court that Minn. Stat. § 145.67 prohibits Minnesota’s courts from interpreting the peer review statutes at Minn. Stat. §§ 145.61-.67 so as to abrogate a cause of action for negligent credentialing. (A.A. 75-76.)

Minn. Stat. § 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 to *a patient as a result of furnishing health care to such patient.*

Minn. Stat. § 145.67 (Emphasis added).

Because a hospital is in no way “furnishing health care to [a singular] patient” when it conducts the process of credentialing a physician, respondents’ interpretation of Minn. Stat. § 145.67 is preposterous. “Health care” is defined by Minn. Stat. § 145.61 as:

“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.*” Minn. Stat. § 145.61, subd. 4. (Emphasis added). The statutes do not define “services.” In their Memorandum to the district court, respondents argued that the phrase “as a result of furnishing health care to such patient” should be read: “as a result of furnishing [services furnished by a hospital] to such patient.” (See A.A. 75-76.) Thus respondents’ argument on this point boils down to their assumption that appellant St. Francis “furnished health care” to respondent Mary Larson when it extended staff privileges to Dr. Wasemiller. The interpretation urged by respondents defies common usage and ordinary meaning. Because St. Francis was in no way providing health care to Mary Larson when it extended privileges to Dr. Wasemiller, Minn. Stat. § 145.67 cannot be credibly interpreted as respondents suggest. The language of the statute, instead, simply ensures that plaintiffs with meritorious medical negligence claims are not barred from recovery in actions against physicians or hospital staff by Minnesota’s peer review statutes.

**D. The Legislature’s Consideration of Public Policy Supports St. Francis Medical Center’s Interpretation of Minn. Stat. §§ 145.61 To 145.67.**

The Minnesota Supreme Court has noted that Minnesota’s peer review statute provides a broad grant of confidentiality for the proceedings and records of medical peer review organizations. Amaral, 598, N.W.2d 384. The Supreme Court has identified the underlying legislative purpose of the peer review statute in several cases. See e.g.,

Amaral, 598 N.W.2d 379; Kalish v. Mount Sinai Hosp., 270 N.W.2d 783 (Minn. 1978); Campbell v. St. Mary's Hosp., 312 Minn. 379, 252 N.W.2d 581 (1977).

In Campbell, the Supreme Court stated that the clear purpose of the statute is “to encourage the medical profession to police its own activities with a minimum of judicial interference.” Campbell, 312 Minn. at 389, 252 N.W. 2d at 587. Similarly, in Kalish, a medical negligence case, the Supreme Court stated Minn. Stat. §§ 145.61-67 “. . . are designed to serve the strong public interest in improving the quality of health care. The statutes reflect a legislative judgment that improvements in the quality of health care will be fostered by granting certain statutory protections to health care review organizations.” Kalish, 270 N.W.2d at 785 (emphasis added).

In Amaral, the Supreme Court stated the policy underlying the peer review statutes as “improving the quality of health care *through the use of the peer review system. . .*” and noted that in pursuit of this goal, the legislature recognized that professionals would be reluctant to participate freely in peer review proceedings if full participation includes the possibility of being compelled to testify against a colleague in a medical negligence action, and the possibility of being subjected to a defamation suit. Amaral, 598 N.W.2d at 387 (Emphasis added). The Court concluded that the legislature, accordingly, granted broad confidentiality privileges to the information and proceedings of peer review organizations in an effort to encourage full participation in peer review. Id. at 387.

This Court should not be persuaded by respondents’ argument that holding hospitals civilly liable for negligent credentialing furthers the goal of improving the quality of health care. This argument misses the point. For better or worse, the

legislature made a policy judgment designed to encourage the medical profession to police its own activities with a minimum of judicial interference. Campbell, 312 Minn. at 389, 252 N.W.2d at 587. The legislature, therefore, decided to promote quality health care, not through the creation or acknowledgement of a cause of action for negligent credentialing, but instead *through the use of the peer review system*. Amaral, 598 N.W.2d at 387. Accordingly, the legislature granted broad confidentiality privileges and protections to the information and proceedings of peer review organizations as evinced by relevant language in Minn. Stat. §§ 145.64 and 145.63, which, for the reasons stated above, cannot coexist with a common law cause of action for negligent credentialing. They therefore abrogate any such cause of action. While respondents may disagree with the legislature's policy choice on this issues, their remedy should be sought from the legislature and not from the courts.

### **III. MINNESOTA'S COMMON LAW DOES NOT SUPPORT A COMMON LAW CAUSE OF ACTION FOR NEGLIGENT CREDENTIALING.**

No Minnesota appellate court has ever recognized a cause of action against a hospital for negligent credentialing of a physician. Whether this court should recognize this or any new common law cause of action depends primarily on whether such cause of action would promote or conflict with public policy. Public policy has been defined as "matters regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society." State v. Stone, 572 N.W.2d 725, 730, Fn. 5 (Minn. 1997). With regard to the issue of peer review versus allowing an additional tort cause of action against a hospital for negligent credentialing, our legislature has already declared

that the public policy of this state is improving the quality of health care through the peer review system. This declaration represents the public policy of Minnesota. Park Const. Co. v. Independent School Dist. No. 32, 296 N.W. 475, 477 (Minn. 1941) (“Public policy, where the legislature has spoken, is what it has declared that policy to be.”)

In those cases where the legislature has not spoken, Minnesota appellate courts have considered public policy and acknowledged its significance as a factor when deciding whether to recognize a new cause of action. The Minnesota Supreme Court in Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 234 (Minn. 1998), quoting Tuttle v. Buck, 119 N.W. 946, 947 (Minn. 1909), stated the following:

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 resultant of conflicting social forces, and those forces which are for the time dominant leave their impress upon the law. It is of judicial origin, and seeks to establish doctrines and rules for the determination, protection and enforcement of legal rights. Manifestly it must change as society changes and new rights are recognized. To be an efficient instrument, and not a mere abstraction, it must gradually adapt itself to changed conditions.

119 N.W. at 947 (Emphasis added). Similarly, the Supreme Court acknowledged the significance of public policy as a factor in deciding whether to impose a tort duty of care on a defendant. Erickson v. Curtis Inv. Co., 447 N.W.2d 165 (Minn. 1989). In that case the court stated:

Whether a duty is imposed depends, therefore, on the relationship of the parties and the foreseeable risk involved. *Ultimately, the question is one of policy.*

447 N.W.2d at 168-169 (Emphasis added). See also, K.L. v. Riverside Med. Ctr., 524 N.W.2d 300, 303 (Minn. Ct. App. 1994).

St. Francis submits that allowing an additional cause of action against hospitals would provide no benefit to the people of Minnesota and specifically no improvement in the quality of health care. What it would do is (1) discourage the openness and candor that is so vital to the credentialing process, (2) discourage physicians and other health care professionals from participating in the credentialing process, and (3) fail to provide any substantive benefit to Minnesota's existing tort law system.

**A. Openness And Candor**

Credentialing is a form of peer review. It is action taken by a hospital in (1) deciding whether to grant a physician privileges to practice medicine in the hospital and (2) deciding what specific medical procedures the physician may perform in the hospital. Credentialing occurs when a physician makes an initial application for privileges and also when a physician with existing privileges makes an application for re-appointment at two year intervals. Although this action is ultimately taken by the hospital's governing body, it is based on the recommendation of the hospital's credentials committee following evaluation of the qualifications and skills of the applicant. The credentials committee is composed of physicians who are on the hospital's medical staff. The work of the credentials committee is considered peer review because evaluation of the qualifications and skills of the applicant is done by other physicians, i.e., the applicant's peers. In addition to the credentials committee, the hospital has other peer review committees which evaluate the quality of a variety of medical services provided at the hospital. Jeanne Darricades, Comment, Peer Review: How is it Protected by the Health Care Quality Improvement Act of 1986?, 18 J. Contemp. L. 263, 263 (1992)

Peer review is recognized as the primary method of evaluating and improving the quality of health care at a hospital. Its effectiveness is based on the requirement that communications among those participating must be completely open and unrestrained.

The peer review process has been described as follows:

The function of peer review is an exacting critical analysis of the competence and performance of physicians and other health care providers. Effective critical analysis requires an environment conducive to candor by the peer review participants. Free, uninhibited communication of information to and within the peer review committee is imperative to the professed goal of critical analysis of professional conduct. A peer review privilege adequately ensures that the proper environment for critical analysis is maintained.

Richard L. Griffith & Jordan M. Parker, With Malice Toward None: The Metamorphosis of Statutory and Common Law Protections for Physicians and Hospitals in Negligent Credentialing Litigation, 22 Tex. Tech L. Rev. 157, 159 (1991). This critical analysis has been described as an “objective, candid, and sometimes brutally critical evaluation.” Butler, Records and Proceedings of Hospital Committees Privileged Against Discovery, 28 S. Tex. L. Rev. 97, 101 (1987).

The goal of peer review is *improvement* in the quality of health care. Hospitals, physicians, and other health care professionals are dedicated to the idea of advancement, of always finding better treatments and better ways to provide care to their patients. Stated another way, the goal of peer review is more than maintaining the status quo, i.e., more than maintaining what the law would consider “ordinary care,” or “reasonable care.” This goal of improving the quality of health care is not well served by layering onto the peer review process the threat of malpractice litigation. That threat, with all its

professional, personal and financial implications, discourages the free, uninhibited communication of information and opinions among peers that is necessary for a true critical analysis of professional conduct. As stated by the Minnesota Supreme Court in

Amaral:

In pursuit of their goal of improving the quality of health care through the use of the peer review system, state legislatures have recognized that professionals will be reluctant to participate freely in peer review proceedings if full participation includes: (1) the possibility of being compelled to testify against a colleague in a medical malpractice action, and (2) the possibility of being subjected to a defamation suit by another professional. See Berdice v. Doctors Hosp. Inc., 50 F.R.D. 249, 250 (D.D.C. 1970), *aff'd* without opinion, 479 F.2d 920 (D.C. Cir. 1973) (“Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor’s suggestion will be used as a denunciation of a colleague’s conduct in a malpractice suit.”); Holly v. Auld, 450 So.2d 217, 220 (Fla. 1984) (“A doctor questioned by a review committee would reasonably be just as reluctant to make statements, however truthful or justifiable, which might form the basis of a defamation action against him as he would be to proffer opinions which could be used against a colleague in a malpractice suit.”).

598 N.W.2d at 387.

**B. Participation**

The effectiveness of the peer review process is also based on the requirement that physicians and other health care professionals participate in it, because these individuals are in the best position to evaluate the qualifications and performance of their peers. Without physicians and other health care professionals who are voluntarily willing to participate, meaningful peer review (and meaningful credentialing) simply cannot occur. The Court in Campbell recognized the importance of physician participation in credentialing when it noted:

Our ignorance of such multisyllabic terms found in the present record as “parathyroidectomy” and “aneurysmectomy” is no less than that shared by the general public. Simply stated, 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.

252 N.W.2d at 587.

Participation in credentialing will not occur if the consequences of participation are (1) greater exposure to lawsuits, and (2) inability to defend those lawsuits because of the confidentiality provisions of Minn. Stat. Sec. 145.64. As noted by Griffith and Parker:

One may legitimately argue that, in isolated instances, holding the hospital and its peer review assemblage liable for the negligent grant or retention of hospital privileges to an incompetent physician will improve the quality of medical care in the hospital. However, in the long run, the reverse is more likely to occur. Peer review is the most effective means to maintain quality medical care and isolate those individuals who fail to perform to an acceptable standard. If physicians are subject to liability for credentialing decisions without adequate protection, the time will come when some physicians will simply refuse to participate out of fear of being sued. After all, most professional peer review is done without charge out of a sense of professional obligation and physicians already face enormous malpractice costs for their regular practices. Indeed, involvement in peer review activities is generally not covered in malpractice policies. The thought of additional insurance costs to ward off a new theory of liability may be the straw that breaks the physician’s resolve to participate in professional peer review.

22 Tex. Tech L. Rev. at 208.

### C. Minnesota’s Tort Law System

To establish a cause of action against a hospital for negligent credentialing of a physician, the plaintiff must first prove that the physician’s care was negligent and that the negligent care caused harm. See Johnson v. Misericordia Comm. Hosp., 301 N.W.2d

156, 158 (1981); Humana Med. Corp. of Ala. v. Traffanstedt, 597 So.2d 667, 669 (Ala. 1992); Strubhart v. Perry Memorial, 903 P.2d 263, 278 (Okla. 1995).

However, under Minnesota's existing tort system, a plaintiff who proves that the physician's care was negligent and that the negligent care caused harm is, by definition, entitled to receive full compensation for all harm directly from the physician, and also directly from the physician's employer pursuant to the rule of respondeat superior. See Schneider v. Buckman, 433 N.W. 2d 98, 101 (Minn. 1988) ("This court has adopted the well established principle that an employer is vicariously liable for the torts of an employee committed within the course and scope of employment."). A plaintiff is also entitled to receive full compensation for the physician's negligence from any co-defendant engaged in a joint enterprise with that physician. See Dang v. St. Paul Ramsey Med. Ctr., Inc., 490 N.W.2d 653, 657 (1992) ("The joint enterprise concept has also been recognized in medical malpractice cases."). In Minnesota, a plaintiff's entitlement to full compensation is not limited by any legislative cap on damages. Therefore, under Minnesota's current tort law system, plaintiffs in medical malpractice cases do have the means of obtaining full compensation for all damages. Adopting an additional cause of action against a hospital for negligent credentialing provides no benefit whatsoever to an injured plaintiff in terms of either proof of liability or entitlement to full compensation. All it provides is an additional source of recovery for the same damages when there are already multiple sources of recovery under existing Minnesota law.

Respondents argue that Minnesota should recognize a cause of action for negligent credentialing because a majority of other states have done so. While a majority of other states have recognized a cause of action for negligent credentialing, in none of the cases from these other states is there any discussion about a peer review statute, like Minn. Stat. § 145.66, which makes it a crime to disclose data and information acquired by a review committee or what transpired at a review meeting. Furthermore, a number of states have expressly declined to recognize a cause of action for negligent credentialing.

For example, Gafner v. Down East Comm. Hosp., 735 A.2d 969 (Me. 1999), was a birth injury case brought against a treating obstetrician and the hospital. The plaintiff claimed the hospital was negligent for failing to have policies in place that would have controlled the obstetrician's treatment, and urged the court to adopt a common law cause of action against hospitals known as "corporate liability." The Maine Supreme Court declined to do so, and made the following statement, which is apropos to our situation in Minnesota:

Private Hospitals in Maine are extensively regulated. The Legislature has created duties and guidelines for the actions of those hospitals in a number of areas. Before the expansion of tort liability into an area that has been significantly controlled by the Legislature, we should allow the Legislature to address the policy considerations and determine whether imposing such a duty constitutes wise public policy.

735 A.2d at 979.

Similarly, St. Lukes Episcopal Hosp. v. Agbor, 952 S.W.2d 503 (Tex. 1997) was a birth injury case in which the plaintiffs sued the hospital for negligent credentialing of the obstetrician. In affirming the trial court's grant of summary judgment in favor of the hospital, the Texas Supreme Court reserved for a future day the issue of whether it would or would not recognize a common law cause of action for negligent credentialing. 952 S.W.2d at 508. See also Garland Comm. Hosp. v. Rose, 156 S.W.3d 541, 542, Fn. 1 (Tex. 2004). The court held that any claim of negligent credentialing, if it did exist, was controlled by the state's peer review statutes (i.e., the Texas Medical Practice Act). The court held that those statutes barred any claim against a hospital for negligent credentialing unless the plaintiff could prove malice.<sup>4</sup>

In commenting on the applicability of the peer review statutes, the Texas Supreme Court stated:

The legislature is free to set a course for Texas jurisprudence different from other states. Once the legislature announces its decision on policy matters, we are bound to follow it within constitutional bounds.

952 S.W.2d at 509.

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<sup>4</sup> The applicable statute state the following:

(l) A cause of action does not accrue against the members, agents, or employees of a medical peer review committee or against the health-care entity from any act, statement, determination or recommendation made, or act reported, *without malice*, in the course of peer review as defined by this Act.

(m) A person, health-care entity, or medical peer review committee, that, *without malice*, participates in medical peer review activity or furnishes records, information, or assistance to a medical peer review committee or the board is immune from any civil liability arising from such an act.

Tex. Rev. Civ. Stat. Ann. Art. 4495b, § 5.06(l), (m) (emphasis added).

In McVay v. Rich, 874 P.2d 641 (Kan. 1994), the plaintiff claimed that the surgeon was negligent in performing a hysterectomy, and that the hospital was negligent in its credentialing of the surgeon. The Kansas Supreme Court held that the legislature had barred any claims for negligent credentialing when it enacted Kan. Stat. § 65.442(b), which provided:

There shall be no liability on the part of and no action for damages shall arise against any licensed medical care facility because of the rendering of or failure to render professional services within such medical care facility by a person licensed to practice medicine and surgery if such person is not an employee or agent of such medical care facility.

The Kansas Supreme Court, like the Texas Supreme Court in St. Lukes Episcopal Hosp. v. Agbor, acknowledged that the Legislature had decided the issue of whether negligent credentialing would be recognized as a cause of action. It stated:

Whatever reasons may exist for the adoption in Kansas of a corporate negligence theory in regard to hospital liability, we simply do not reach this question. The clear, unambiguous language of K.S.A. 65-442(b) and K.S.A. 40-3403 (h) requires the conclusion that those statutes bar McVay's claim against the hospital.

874 P.2d at 645.

### CONCLUSION

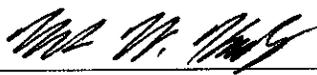
Minnesota's peer review statutes at Minn. Stat. §§ 145.61 to 145.67 abrogate any common law cause of action for negligent credentialing. Minnesota's common law does not support a common law cause of action for negligent credentialing. Accordingly, appellant St. Francis Medical Center respectfully requests the Court reverse the district court's June 29, 2005, Order denying St. Francis Medical Center's motion to dismiss

respondents' claim that St. Francis negligently provided hospital credentials to Dr. James Wasemiller.

Dated: November 2, 2005

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, Subds. 1 and 3, for a brief produced with a proportionally-spaced 13-point Times New Roman font. The length of this Brief contains 8,244 words. This Brief was prepared using Microsoft Word 2000.

Dated: November 2, 2005

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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).