

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).

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INTRODUCTION

In their effort to persuade this Court to create a negligent credentialing/privileging¹ claim, Respondents Mary and Michael Larson (“Respondents”) fail to address the irreconcilable conflict between the strict confidentiality afforded the peer review process under Minnesota’s Peer Review Statute (Minn. Stat. § 145.61-.67) and a peer review committee’s fundamental right to defend itself. All parties agree the peer review privilege (Minn. Stat. § 145.64) precludes the discovery and presentation of any evidence concerning the peer review process. Therefore, consideration of whether to recognize a negligent credentialing claim in Minnesota necessarily raises a critical question: Without the ability to present any evidence concerning the peer review process, including the identity and contents of documents reviewed and the identity and testimony of witnesses testifying before the committee, how can a peer review committee fairly and adequately defend itself? It cannot.

Respondents also wholly disregard the significant impact recognition of a negligent credentialing claim would have on a physician involved in such a case. Not only would the physician be required to defend her particular conduct, but she would face discovery and evidentiary issues that go far beyond the parameters of a medical negligence claim. By inserting a negligent credentialing claim into a malpractice action, discovery would be conducted in areas that are irrelevant, prejudicial, and inadmissible in a medical negligence case. Bifurcated trials could alleviate some of this prejudice but

¹ Both negligent credentialing and negligent privileging claims will be collectively referred to as “negligent credentialing” in this Brief.

would significantly increase the costs of litigation. Because negligent credentialing claims are effectively precluded by the Peer Review Statute and unnecessary, the trial court's decision should be reversed.

ARGUMENT

I. RECOGNITION OF A NEGLIGENT CREDENTIALING CLAIM WOULD CONFLICT WITH MINNESOTA LAW AND UNDERMINE PUBLIC POLICY.

A. The Confidentiality Provision of the Peer Review Statute Cannot Be Reconciled With the Proposed Negligent Credentialing Claim.

1. Minnesota's Peer Review Statute Broadly Protects the Confidentiality of the Peer Review Process.

Respondents misunderstand and/or ignore the critical conflict between the broad grant of confidentiality afforded to the peer review process, *Amaral v. St. Cloud Hospital*, 598 N.W.2d 379, 384 (Minn. 1999), and the unfairness this imposes on a committee that must defend against a claim of negligently carrying out that process and the physician who is the subject of the claim. This is most prominently demonstrated by Respondents' characterization of Appellants' concerns about eroding the peer review process by breaching the confidentiality provisions as the "reddest of all herrings." (Respondents' Brief at 22). The point is simple. A peer review committee facing a negligent credentialing claim would have to choose between upholding the confidentiality of the peer review process as required by statute (Minn. Stat. § 145.64) and losing its critical defenses or violating the statute by presenting evidence about the process in order to defend itself against a negligent credentialing claim, thereby compromising the integrity

of the peer review process and subjecting themselves to misdemeanor prosecution (Minn. Stat. § 145.66).²

The answer to this dilemma does not lie in the Peer Review Statute's provision that information "otherwise available from original sources" may be subject to discovery and used in trial. Minn. Stat. § 145.64, subd. 1; *In re Fairview-University Med. Ctr.*, 590 N.W.2d 150, 154 (Minn. Ct. App. 1999). The fact that litigants may obtain such things as medical records, reports or general hospital guidelines or policies that are available from sources other than the review committee itself does not change the fact that the litigants cannot find out about or, in the case of the peer review entity, disclose anything about the review process itself. The peer review committee cannot even disclose what documents it obtained and reviewed as a part of its process. *In re Fairview*, 590 N.W.2d at 154. Respondents cite to the trial court's finding that parties may "obtain information that the credentialing committee **may have used** from 'original sources' to pursue or defend credentialing claims." (Respondents' Brief at 23 (emphasis added)). Because the parties to a negligent credentialing claim are unable to identify the specific information the review committee examined, let alone how such information was evaluated, any evidence offered at trial would be speculative.

² Respondents minimize the significance of this statutory provision by arguing "that Minnesota may criminalize disclosure of protected peer review information when other states may not is irrelevant." (Respondents' Brief at 28-29). Minnesota does criminalize the unauthorized disclosure of data or information acquired by a review committee what transpired at a meeting, an indication that this privilege is stronger in Minnesota than elsewhere. Minn. Stat. § 145.66.

Respondents also mistakenly contend that a jury would be able to determine what St. Francis' review committee knew or should have known about Dr. Wasemiller when it granted privileges, and whether a reasonable hospital would have granted such privileges under the circumstances. (Respondents' Brief at 23). However, a jury would never be able to determine what the committee actually knew because that information is privileged. Instead, St. Francis would be required to defend against allegations about what it "should have known" but would not be able to present any evidence about what it knew and how it evaluated such information, creating extreme prejudice.

The characterization of the protected peer review information as merely "one subset of the universe of evidence otherwise available to the parties" misconstrues the critical nature of this evidence. The information the peer review committee considers and its deliberative process comprise the most relevant and essential evidence for a negligent credentialing claim. Respondents' argument that "all litigants face this challenge every day by virtue of the existence of privileges and the rules of evidence" is incorrect. The confidentiality provision of the Peer Review Statute cannot be waived like the medical or attorney client privileges. Minn.R.Civ.P. 35.03; (Rule 1.6(b)(8), Minn.R.Prof.C.(2005)). Rather, the Peer Review Statute contains a mandatory prohibition on disclosure by a peer review entity. Given the almost absolute protection the Legislature has granted to the confidentiality of the peer review process it would be virtually impossible for a peer review entity to fully defend negligent credentialing claims.

2. Cases From Other Jurisdictions Are Inapposite in That 32 Do Not Even Mention Peer Review Legislation, and the Others Are Distinguishable and Unpersuasive.

Respondents cite thirty-five cases from outside of Minnesota in an attempt to persuade this Court to follow the leader and adopt a cause of action for negligent credentialing. (Respondents' Brief at 16-17). These cases are not instructive. Aside from the obvious fact that these foreign decisions are not controlling law, in thirty-two of the thirty-five cases cited, the issue of peer review statutes or the confidentiality given to peer review committees is not even mentioned, let alone discussed or considered in any detail.

Of the three cases that do discuss the effect of a peer review privilege on negligent credentialing claims, none is directly on point with the issues before this Court. In *Browning v. Burt*, 613 N.E.2d 993 (Ohio 1993) the Court focused primarily on whether the defendant hospital was immune from a negligent credentialing claim by virtue of a peer review statute. Citing the "original source" language of the statute, the *Browning* court summarily rejected the hospital's argument that the confidentiality provision made it impossible for the hospital to defend such claims. *Id.* at 562-563. *See also Greenwood v. Wierdsma*, 741 P.2d 1079 (Wyo. 1987) (Court recognized negligent credentialing claim and held that the discussions, thoughts or decision-making processes of a peer review committee are protected without discussing effect this will have on ability to defend against such a claim).

The Vermont case similarly has little to no persuasive value. In *Wheeler v. Central Vt. Med. Ctr., Inc.*, 582 A.2d 165 (Vt. 1989)), the defendant hospitals attempted to use peer review records to cross-examine the plaintiff's expert after objecting to the use of peer review materials on the ground of privilege earlier in the case. The *Wheeler* court noted that the parties presumed the hospital could waive the peer review privilege but the court did not address the issue. Rather, the court held that the plaintiff's expert had not testified about matters protected by the peer review privilege. In a footnote, the *Wheeler* court observed that "a strong argument could be made" that a hospital cannot waive the peer review privilege because the statute "arguably announces a mandatory policy against disclosure." *Id.* at 89, fn 3.

The other cases Respondents cite for the proposition that "other jurisdictions have rejected the notion that litigants cannot adequately pursue or defend negligent credentialing claims when peer review materials are confidential" (Respondents' Brief at 25) likewise prove to be unpersuasive. See *Ex parte Qureshi*, 768 So.2d 374 (Ala. 2000) (Fails to address effect peer review statute will have on defense of negligent credentialing claim); *Humana Hosp .Desert Valley v. Superior Court*, 742 P.2d 1382 (Ariz. Ct. App. 1987) (no discussion of impact peer review statute has on the defense of a negligent credentialing claim); *Shelton v. Morehead Mem'l. Hosp.*, 347 S.E.2d 824 (N.C. 1986) (No discussion of problems faced in defending a negligent credentialing claim).

In the final analysis, the co-existence of a negligent credentialing claim and Minnesota's Peer Review Statute presents a question of Minnesota law. The Statute itself

and prior decisions of Minnesota's appellate courts provide a sound basis for this Court to conclude that negligent credentialing claims cannot lie in Minnesota.

3. There is no Compelling Reason for This Court to Create a New Cause of Action.

Respondents do not present a persuasive argument why this Court should disregard the insurmountable evidentiary hurdle created by Minnesota's Peer Review Privilege (Minn. Stat. § 145.64) and recognize a negligent credentialing claim. Moreover, the function of this Court is decisional and error correcting, rather than legislative or doctrinal. *Engler v. Wehmas*, 633 N.W.2d 868, 873 (Minn. Ct. App. 2001) ("it is not the function of this court to create new law").

Respondents' reliance on a provision in the Minnesota Constitution providing that "every person is entitled to a certain remedy in the law for all injuries or wrongs which he may receive to this person ... and to obtain justice freely ... conformable to the laws" is misplaced. (Respondents' Brief at 13-14, *citing* Minn. Const., art. I, § 8). Respondents already have a remedy for Ms. Larson's alleged injuries in the form of medical malpractice claims which she has already asserted against Appellant Wasemiller, Dr. Paul Wasemiller and the Dakota Clinic. Second, a defendant is also entitled to due process under Minnesota law. *See* Minn. Const. art. I, § 7. Due process would be denied by requiring a committee to defend against a claim without the ability to present any evidence concerning the process being criticized.

B. The Creation of a Negligent Credentialing Claim would Thwart the Important Public Policy Embodied in the Peer Review Statute.

1. Minnesota's Public Policy is Directed Toward Strengthening the Confidentiality of the Peer Review Process.

Notably absent from Respondents' discussion of the Peer Review Statute is a discussion of Minnesota case law that recognizes and supports the confidential nature of peer review. Minnesota courts have repeatedly deferred to the broad legislative policy of improving health care through the operation of a vital, confidential peer review process. Both this Court and the Minnesota Supreme Court have acknowledged the Legislature's goal of improving the quality of health care by granting statutory protections to health care review organizations so that they can police their own activities with minimal judicial interference. *See Campbell v. St. Mary's Hosp.*, 252 N.W.2d 581, 597 (Minn. 1977); *Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379 (Minn. 1999). Creation of a negligent credentialing claim will necessarily threaten the integrity of the process by eroding the confidentiality component.

Respondents argue that recognition of a negligent credentialing claim will somehow "enhance[e] our health care system," but they fail to address precisely how that would occur. (Respondents' Brief at 39). Moreover, Respondents fail to discuss how a negligent credentialing action would proceed without implicating the overarching policies advanced by the Peer Review Statute. Protecting the privilege afforded to peer review deliberations will truly enhance the health care system. Threatening peer review

committees and their members with litigation over their decision making will undermine the quality of health care.

The suggestion that justice requires recognition of this new cause of action fails for at least two reasons. First, it fails to consider the significant injustice that recognition would cause to peer review committees and their members if such a claim were recognized in Minnesota. Requiring a committee to defend itself against a claim of negligence but not allowing it to present direct evidence of its conduct would be unjust. Second, it does not acknowledge the remedies already available to patients injured through the negligence of physicians and hospitals.

2. The Recent Adverse Health Event Legislation Further Demonstrates the Importance the Legislature Places on the Peer Review Function.

The Minnesota Adverse Health Legislation recently enacted in Minnesota reflects this State's continued strong commitment to improving the quality of health care. *See* Minn. Stat. §§ 144.706–144.7069. Minnesota's leadership in this area is reflected by the fact that it was the first State to pass such legislation. (*See* Brief of Amici Minnesota Hospital Association, Minnesota Medical Association, and American Medical Association for further discussion of this statute). As discussed by Amici, the legislation requires hospitals to report adverse health events on a confidential basis, as well as to create and implement their own corrective action plans as part of their peer review programs. Minn. Stat. § 144.7065, subd. 8. In furtherance of their longstanding commitment to confidentiality as part of the peer review process, the hospital's review of adverse health events is subject to the same strict confidentiality as the hospital's

credentialing program. Minn. Stat. § 145.61, subd. 5(q). The policy behind the peer review process weighs strongly against creating a cause of action that would challenge the confidentiality that forms the bedrock of the review process.

3. Creation of a Negligent Credentialing Claim Should Be Left to the Legislature Due to the Irreconcilable Conflict Between Peer Review Privilege and Cause of Action.

This Court has expressed reluctance to recognize new causes of action, explaining that “principles of judicial restraint forbid us from creating new causes of action which the legislature has not expressed or implied.” *Valtakis v. Putnam*, 504 N.W.2d 264, 266 (Minn. Ct. App. 1993), citing *Bruegger v. Faribault County Sheriff’s Dept.*, 497 N.W.2d 260, 262 (Minn. 1993). “We believe the task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court.” *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. Ct. App. 1987); *Stubbs v. North Mem. Med. Ctr.*, 448 N.W.2d 78, 81 (Minn. Ct. App. 1989) (“It is not, however, the function of this court to establish new causes of action.”)

Two points are clear regarding a negligent credentialing claim. First, the Minnesota Peer Review Privilege absolutely protects the peer review process from disclosure, precluding a plaintiff from obtaining access to such evidence and a peer review committee from disclosing it, even if a negligent credentialing claim has been asserted against the committee. See Minn. Stat. § 145.64. Second, fundamental principles of justice and fairness require that a peer review committee have a fair opportunity to defend itself against such a claim by presenting evidence concerning the

evaluation process supporting its decision. Since these two principles conflict under Minnesota law, the Legislature should be given an opportunity to decide whether such a claim should be created and how it will relate to the Peer Review Statute. *See* Minn. Stat. §§ 145.61–.67.

II. RECOGNITION OF A NEGLIGENT CREDENTIALING CLAIM WOULD BE UNFAIR TO PEER REVIEW ENTITIES AND PHYSICIANS.

A. The Playing Field Is Not Level Between the Parties to a Negligent Credentialing Claim.

Even if a negligent credentialing action were not barred outright by the Peer Review Statute, allowance of such claims would unfairly prejudice physicians and peer review committees. Respondents' argument that negligent credentialing claims will not affect the confidentiality or integrity of peer review implicitly relies on the assumption that a peer review committee will not be able to rely on the review process it followed to defend itself. If this assumption is correct, the unfairness to the committee of recognizing a negligent credentialing claim is clear.

The trial court agreed that the peer review privilege (Minn. Stat. § 145.64) “poses a handicap” on a defendant peer review committee defending against such a claim, but then mistakenly concluded that both parties would be equally prejudiced: “the restriction necessary ties one of the Plaintiffs’ [Respondents’] hands, as well. So, in that sense, the playing field is level.” (Appellant Wasemiller’s Appendix at p. 53). The trial court concluded that the plaintiff’s obligation to bear the burden of proof “goes a long way in balancing any inequities that the limitation upon disclosure of information might impose.” *Id.* However, allowing the claim to proceed with publicly available

information would impose significantly greater difficulty and prejudice for the defending peer review committee than the plaintiff. A plaintiff could present negative evidence about a physician and argue that the committee failed to obtain critical information or failed to properly evaluate the information. The committee could not directly respond to these allegations because the Peer Review Statute bars the committee from even disclosing what information it obtained let alone its analysis and conclusions regarding such information. *In re Fairview-University Med. Ctr.*, 590 N.W.2d at 154.

B. Recognition of a Negligent Credentialing Claim Would Unfairly Prejudice Physicians.

1. Recognition Would Have a Chilling Effect on Participation in the Peer Review Process.

As noted above, a peer review committee facing a negligent credentialing claim would be compelled to choose between honoring the confidentiality mandate (and compromising its ability to defend itself) or disclosing peer review information in violation of the law. The existence of this dilemma, and the prospect that in some cases a peer review committee may opt for disclosure, significantly threatens the integrity of the peer review system. Committee members, including physicians who are routinely asked to evaluate their colleagues' conduct as a part of peer review, would not feel free to express themselves and ultimately to even participate in the process. This would directly undermine the statute's goal of assuring "that the discussions necessary to improve patient care are carried on, despite threats of malpractice and defamation actions." *In re Fairview-University Med. Ctr.*, 590 N.W.2d 150, 153 (Minn. Ct. App. 1999), quoting

Matter of Parkway Manor Healthcare Center, 448 N.W.2d 116, 120 (Minn. Ct. App. 1989).

2. Recognition Would Unfairly Prejudice Physicians Defending Medical Negligence Cases.

Recognition of a negligent credentialing claim would unfairly prejudice physicians who are the subject of such a claim and find themselves facing a medical negligence claim in the same case. The physician would be unable to access the favorable information obtained and developed in the course of the peer review process. *See Amaral v. St. Cloud Hosp.*, 586 N.W.2d 141 (Minn. Ct. App. 1998), *aff'd* 598 N.W.2d 379, 387 (Minn. 1999) (physicians cannot obtain peer review information relating to their own privileging unless they challenge the peer review committee's action). A physician would be forced to respond to the negative information the plaintiff presents but be unable to offer or even discover important evidence in the physician's favor.

Allowing negligent credentialing claims would also unfairly prejudice physicians with respect to their defense of a malpractice claim itself. Respondents' recitation of alleged "facts" regarding Dr. Wasemiller's board certification status, prior malpractice claims, board restrictions, insurance coverage, and personal financial matters in support of their proposed negligent credentialing claim demonstrates the inherent unfairness of permitting such a claim to proceed in the context of a standard malpractice case.

First, the plaintiff will serve discovery upon the physician concerning these areas that would otherwise be irrelevant to the malpractice claim, thereby increasing the costs of litigation and hampering the physician's defense. Moreover, a plaintiff could conduct

discovery fishing expeditions in order to exert pressure on a physician regarding the malpractice claim. Resisting such discovery would be difficult due to the existence of the credentialing claim.

Second, the introduction of such evidence at trial will unfairly prejudice the physician by presenting irrelevant, harmful evidence to the jury. Such evidence is patently unfair to physicians who have been sued for medical negligence arising out of a single claim because this evidence is generally not admissible as it lacks relevance and is highly prejudicial. In addition, trials will become significantly more expensive and time-consuming as parties conduct mini-trials regarding such evidence.

In order to establish a prima facie case of medical malpractice, a plaintiff must introduce expert testimony setting forth the applicable standard of care required from a physician, a physician's departure from that standard, and that it was more likely than not that an injury occurred due to the physician's negligence rather than from anything else. *Walton v. Jones*, 286 N.W.2d 710, 714-15 (Minn. 1979); *Leubner v. Sterner*, 493 N.W.2d 119, 121 (Minn. 1992). These essential elements of a malpractice claim establish the parameters of what evidence is relevant. Minn.R.Evid. 401.

Recognition of a negligent credentialing claim against a peer review committee would allow a plaintiff to conduct extensive discovery and present evidence concerning facts and issues that go far beyond the scope of evidence relevant to a medical negligence claim. For example, a defendant physician's board certification status is generally not admissible at trial because it is irrelevant and unfairly prejudicial. In *Campbell v. Vinjamuri*, 19 F.3d 1274, 1276-77 (8th Cir. 1994), the Eighth Circuit Court of Appeals

held that testimony concerning a defendant physician's failures to pass board examinations to become a certified anesthesiologist were irrelevant and could not be used to challenge the defendant's credibility. The *Campbell* court held it would be improper for the jury to use the evidence to conclude that because a physician was unable to pass his board exams, he was negligent on a specific occasion. *Id.* at 1277, citing *Beis v. Dias*, 859 S.W.2d 835 (Mo. Ct. App. 1993) (ability to pass a board examination only goes to a physician's test taking abilities and does not make his or her negligence on one particular day more likely than not).

The Alaskan Supreme Court similarly held that a physician's failure to achieve board certification in general surgery was irrelevant and inadmissible in a malpractice case. *Marsingill v. O'Malley*, 58 P.3d 495, 500 (Alaska 2002). As in Minnesota, licensed physicians are allowed to practice surgery in Alaska without board certification. *Id.* Thus, a physician's failure to pass the examination does not prove that the physician lacks minimally necessary surgical skills or knowledge. The *Marsingill* Court noted that "By adopting as a matter of public policy a medical licensing standard that authorizes physicians to perform general surgery without obtaining board certification, Alaska law establishes a baseline standard that precludes expert witnesses from dictating a more rigorous certification requirement." *Id.* See also *Gossard v. Kalra*, 684 N.E.2d 410 (Ill. App. Ct. 1997); *Jackson v. Buchman*, 996 S.W.2d 30 (Ark. 1999).

Likewise, district courts generally exclude evidence regarding prior lawsuits involving a defendant physician because it is not relevant, may result in undue delay, confusion of the issues, misleading of the jury, and is prejudicial. See, e.g., *Barr v.*

Plastic Surgery Consultants, Ltd., 760 S.W.2d 585 (Mo. Ct. App. 1988) (evidence of seven other lawsuits against surgeon and medical association was inadmissible in medical malpractice action on issue of surgeon's competence; any probative value toward issue of competency was at best slight and potential for prejudice and confusion of jury was large); *see also Heshelman v. Lombardi*, 454 N.W.2d 603 (Mich. Ct. App. 1990) (evidence that expert witness had been named as defendant in prior medical malpractice action was not admissible for impeachment purposes). *Also see* Brief of Amici Minnesota Hospital Association, Minnesota Medical Association, and the American Medical Association at 16-17.

In a different context, this Court held that a party may not offer evidence of other claims or injuries to prove liability with respect to a particular event. In *Green v. City of Coon Rapids*, 485 N.W.2d 712 (Minn. Ct. App. 1992), the plaintiff brought a claim against the city arising out of alleged exposure to nitrogen dioxide gas emitted from a Zamboni in a city ice arena on a particular date. The trial court excluded evidence about individuals allegedly exposed to nitrogen dioxide on other dates. *Id.* at 715. This Court affirmed, stating the trial court "did not err in wariness of the danger that the jury might improperly conclude that if harmful conditions existed on one day, they must have existed on the day on which the Green was present." *Id.* at 717. Similarly, evidence regarding prior lawsuits against a physician is not reliable due to the different circumstances underlying each matter.

Evidence of prior board discipline or restrictions placed on a physician is similarly not admissible. *See Shea v. Esensten*, 622 N.W.2d 130 (Minn. Ct. App. 2001) (evidence

that a physician has been professionally disciplined is inadmissible impeachment evidence); *Francis v. Reynolds*, 450 S.E.2d 876, 877 (Ga. Ct. App. 1994) (“Treating the Board’s findings as outcome determinative on this issue would be tantamount to relieving plaintiff of this burden of proof at trial and would impermissibly invade the province of the jury as the sole arbitrator of disputed or contested facts.”).

Financial information regarding a physician is not relevant to a medical malpractice claim. *See Shea v. Esensten*, 622 N.W.2d 130 (Minn. App. 2001) (financial incentive evidence is not relevant). In *Shea*, the plaintiff sought to introduce evidence that a managed care agreement encouraged physicians to keep costs down by not referring patients to specialists. The trial court excluded the evidence as irrelevant and prejudicial. This Court upheld the exclusion: “The elements of malpractice do not require the plaintiff to show a physician’s reasons or motivations for departing from acceptable standards. Instead, it is proof that the physician in fact departed from the standard of care that is critical.” *Id.* at 134-35. In addition, the evidence was not admissible under Minn.R.Evid. 403 because it would confuse, mislead, and prejudice a jury. *Id.* at 136.

Recognition of a negligent credentialing claim will result in the discovery and admission at trial of the foregoing categories of evidence and possibly others, unfairly prejudicing physicians in malpractice cases. Trial courts will not be able to protect against this unfair prejudice by precluding discovery and/or presentation of such evidence. Because this unfairness cannot be mitigated, this Court should decline to recognize a negligent credentialing cause of action.

3. Recognition of a Negligent Credentialing Claim Would Cause Delay and Increase the Cost of Litigation.

In order to address the prejudice at trial, physicians would be forced to request bifurcated proceedings. Minnesota Rules of Civil Procedure, Rule 42.02, states that “the court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of one or any number of claims, cross-claims, counterclaims, or third-party claims, or of any separate issues.” Trials may be bifurcated where multiple claims or parties exist. *Emporium of Jazz v. City of Mendota*, 374 N.W.2d 825, 828 (Minn. Ct. App. 1985).

Even if the trial court is willing to bifurcate the trial, a number of procedural problems would exist. First, what would be the proper scope of discovery with respect to the parties? Would a plaintiff be allowed to request extensive, irrelevant discovery regarding prior lawsuits and other areas noted above from a physician against whom a medical negligence case has been brought, even though such topics are generally irrelevant to a malpractice claim and therefore limited in terms of discovery? It would be unfair and unreasonable for a plaintiff to rely on a physician to provide “publicly available information” to the plaintiff regarding a separate claim brought against another party.

Second, what would be the scope and timing of bifurcation? Would the malpractice case proceed to trial first, without any evidence regarding the credentialing claim? Respondents argue that the latter claim is a direct claim, separate from a medical malpractice case. If so, would a plaintiff be allowed to proceed to trial on the

credentialing claim first? There would be significant problems with that procedure, particularly the unfair prejudice to the physician defending the subsequent malpractice claim before the same jury. Moreover, if the credentialing claim is tried first and liability is found, the physician could not subsequently obtain a fair trial on the malpractice claim because the jury would be predisposed to find liability.

Third, the mechanics of the trial would be complex and cause delays. For example, would jury selection occur jointly? If so, unfair prejudice would result when questioning of potential jurors involved issues relating to the credentialing process.

These are just a few of the complicated procedural issues that would arise if this Court recognizes the claim of negligent credentialing in Minnesota. Resolving these issues will add to the expense of litigation and the eventually the costs of health care. Respondents' attempt to minimize these issues does not negate these realities.

III. THE COURT SHOULD DISREGARD RESPONDENTS' "STATEMENT OF FACTS" BECAUSE THEY ARE NOT RELEVANT ON APPEAL FROM A RULE 12 MOTION AND ARE INACCURATE AND MISLEADING.

This Court should strike Respondents' "Supplemental Facts" because they are outside the scope of the pleadings upon which Appellant St. Francis' motion to dismiss is based and upon which the trial court relied in its decision. Respondents appear to pin their hopes on a one-sided version of "facts" to compensate for the fact that Minnesota law and public policy do not support recognition of the new cause of action Respondents propose.

Appellant Wasemiller set forth the applicable standard of review for a motion to dismiss under Rule 12.02(e) of the Minnesota Rules of Civil Procedure in his initial Brief. (See Appellant Wasemiller's Brief at 7-8). Respondents did not express any disagreement with that discussion in their Response Brief, nor did they include any discussion of the applicable standard of review. The standard is clear - where the district court only considers the statements pled in the pleadings, the appellate court limits its review to the pleadings. *Martens v. Minnesota Mining & Mfg. Co.*, 616 N.W.2d 732, 739-40 (Minn. 2000); Appellant Wasemiller's Brief at 7-8. The district court did not discuss any of the facts outside the pleadings in its decision denying St. Francis' motion to dismiss, instead basing its decision on legal grounds. (Order and Memorandum of June 29, 2005).

If this Court declines to strike Respondents' irrelevant, misleading, and inflammatory "supplemental facts," the Court should consider that Respondents do not cite any statements Appellants made in their initial briefs that purportedly require rebuttal or clarification. (Respondents' Brief at 2). Moreover, Respondents themselves present misleading and/or argumentative allegations characterized as "facts," contrary to the rule requiring that "the facts must be stated fairly, with complete candor..." Minn.R.Civ.App.P. 128.02, subd. 1(b) and subd. 2.

The truth is that the other parties will dispute most, if not all, of Respondents' alleged "facts" at trial, including the opinions of Respondents' purported expert. For purposes of this appeal, Dr. Wasemiller is compelled to bring to the Court's attention only the most egregious of Respondents' factual misstatements. Contrary to

Respondents' assertions, Dr. Wasemiller's insurance coverage is not "limited." (Respondents' Brief at 9). Dr. Wasemiller has \$1 million in malpractice coverage to respond to Respondents' claim. (Exh. D., James Wasemiller, M.D. Dep. Exh. 1, Aff. of William Maddix).

Respondents' description of the status of Dr. Wasemiller's licensure is unfair and misleading because it omits the critical fact that Dr. Wasemiller's license was not under any restriction at the time he treated Ms. Larson in 2002; restrictions on his license ended in 1995. (Ex. D, James Wasemiller, M.D. Dep. Exh. 1 at 3, Aff. of William Maddix; Ex. C, James Wasemiller, M.D. Dep. at 69-70).

Finally, Respondents allege that Dr. Wasemiller "admitted" in a deposition in a prior case that "a number of his gastric bypass patients had suffered serious complications and that one had died." (Respondents' Brief at 6). That is false. Dr. Wasemiller responded that he had other patients who experienced complications but he did not say he had "a number" of them. (Ex. C at p. 116). Respondents then misstate Dr. Wasemiller's testimony by alleging that "none of these cases resulted in malpractice claims." (Respondents' Brief at 6). To the contrary, Dr. Wasemiller was asked whether that was true and he responded: "I'm not aware of any" instances of complications in which a suit was not brought. (Ex. C at p. 119).

CONCLUSION

Minnesota courts have long recognized the strong public policy established by the Peer Review Statute. The courts have supported the Legislature's determination that the confidentiality of peer review proceedings is essential. Recognition of a negligent

credentialing claim would violate the law and be fundamentally unfair to physicians. The Court should answer the first certified question in the affirmative and the second question in the negative. Minnesota law does not permit negligent credentialing claims.

Dated: December 15, 2005

Respectfully Submitted,

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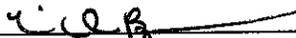
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CERTIFICATE

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 6,341 words, as determined by employing the word counter of the word-processing software, Microsoft Word 2002, used to prepare it.

Dated: December 15, 2005.

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