**Nos. A05-1698 and A05-1701**

State of Minnesota

# In Court of Appeals

MARY AND MICHAEL LARSON,

*Respondents,*

v.

JAMES PRESTON WASEMILLER, M.D.,

*Appellant (A05-1698),*
*Defendant (A05-1701),*

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

*Defendants (A05-1698),*

ST. FRANCIS MEDICAL CENTER,

*Appellant (A05-1701).*

## BRIEF OF RESPONDENTS MARY AND MICHAEL LARSON


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## STATEMENT OF THE ISSUES

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

The trial court ruled in the affirmative.

**Apposite Authorities:**

*Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231 (Minn. 1998)
*Welsh v. Bulger*, 698 A.2d 581 (Pa. 1997)
*Wheeler v. Central Vt. Med. Ctr.*, 582 A.2d 165 (Vt. 1989)
Article I, § 8, Minn. Const.

**II. Do Minn. Stat. §§ 145.63 and 145.64 grant immunity from or otherwise limit liability of a hospital or other review organization for a claim of negligent credentialing/privileging of a physician?**

The trial court ruled in the negative.

**Apposite Authorities:**

Minn. Stat. §§ 145.61-.67
*Summers v. R & D Agency, Inc.*, 593 N.W.2d 241 (Minn.App. 1999)
*Wheeler v. Central Vt. Med. Ctr.*, 582 A.2d 165 (Vt. 1989)
*Ex Parte Qureshi*, 768 So.2d 374 (Ala. 2000)

## SUPPLEMENTAL STATEMENT OF THE FACTS

Respondents Mary and Michael Larson must set forth the facts to rebut or clarify many of the factual statements and assumptions made by appellants and amici. These facts will (1) show that the Larsons rely only on public information, not on protected peer review information, to prove their case; (2) show that the Larsons pursue a direct, not a vicarious, liability claim against St. Francis Medical Center; (3) allow the court to address policy and legal questions in a setting informed by events giving rise to this case. This court's ultimate task is to decide the case and controversy before it, and it cannot do so without a thorough understanding of the facts–how those facts will be used to prove a claim of direct liability against St. Francis, and how those facts are intertwined with the legal issues before the court.

### I. NEGLIGENCE OF WASEMILLERS.

On April 4, 2002 Plaintiff Mary Larson suffered from morbid obesity and underwent a gastric bypass surgery performed by Dr. James Wasemiller at St. Francis Medical Center in Breckenridge, Minnesota. James Wasemiller's brother and co-defendant, Dr. Paul Wasemiller, assisted. (A.A. 15–16).

Gastric bypass surgery involves creation of a small pouch at the top of the stomach to limit food intake. The surgeon then connects the pouch to the small intestine. This connection is called an "anastomosis." A well-known known complication of the surgery is that the anastomosis will begin to leak after the surgery. If a leak develops, the gastric contents in the pouch seep into the peritoneal cavity and infection sets in, placing the

patient at risk for peritonitis, sepsis, multi-organ failure, and death if the surgeon does not diagnose and correct the leak in a timely manner. During the post-operative phase, the surgeon must be vigilant for any signs of infection.

After Mary Larson had surgery, she remained hospitalized at St. Francis Medical Center and under the care of James Wasemiller. During the next seven days, she started exhibiting signs of an anastomotic leak and developing peritonitis. These signs included tachycardia (rapid heart rate), elevated white blood count, bandemia, shortness of breath, low urine output, copious purulent wound drainage, anxiety, and pain. (A.A. 16-18). Despite this constellation of symptoms, James Wasemiller failed to diagnose and treat the leak. (A.A. 16-18, 21).

By April 12, 2002, Mary Larson was in critical condition. Paul Wasemiller performed emergent surgery that day and found a belly full of pus and inflammation throughout the abdomen. He irrigated and cleaned the area, but abandoned any effort to repair the anastomotic leak. (A.A. 18-19). During the next several days at the hospital, Mary Larson continued to show signs of unresolved leak and ongoing peritonitis. Rather than transfer Mary Larson to a facility where she could receive a definitive repair of the leak, the Wasemillers transferred her to a long-term care facility with no plan to follow her or have a surgeon follow her progress. (A.A. 19-20).

Within a few hours of her arrival at the care facility, Mary Larson drank a glass of cranberry juice. The juice flowed through the unrepaired leak and spurted from her surgical wound. The facility arranged for Mary Larson's immediate ambulance transport to MeritCare Hospital in Fargo, North Dakota. Mary Larson underwent emergent surgery

through the night and remained hospitalized there for months, undergoing additional surgeries and enduring a long and rocky course of recovery that is not yet complete. (A.A. 20-21).

## II. NEGLIGENCE OF ST. FRANCIS MEDICAL CENTER.

Public documents show that prior to Mary Larson's surgery in April 2002, James Wasemiller had a long and storied history of serious practice deficiencies, medical malpractice claims, board discipline, inability to obtain malpractice insurance, and financial turmoil. Patients harmed by James Wasemiller included gastric bypass patients who had either died or suffered serious complications under the same circumstances as those involved in Mary Larson's case.

Plaintiffs' expert, Dr. John Linner, a Professor of Surgery at the University of Minnesota and a world-renown authority on bariatric surgery, has reviewed the public facts about James Wasemiller and rendered an opinion that St. Francis Medical Center departed from accepted standards of care by granting privileges to James Wasemiller to perform complex gastric bypass surgery at its hospital. (Maddix Aff., Oct. 7, 2004, Ex. B).[1] Dr. Linner based his opinions on the public information set forth below.

### A. JAMES WASEMILLER'S TRAINING.

James Wasemiller attended medical school at Loma Linda University. After medical school, he started a general surgical residency at Kettering Memorial Hospital in Ohio in 1972, but after only two years "left" the residency program. (Maddix Aff.,

[1] The Affidavit of William J. Maddix, October 7, 2004, and attached exhibits are contained in the trial court record and not separately produced in a supplemental record.

Exhibit D (J. Wasemiller Depo. Ex. 43))[2]. Loma Linda University allowed him to continue his surgical residency at its facility, and he completed two additional years of residency. (Maddix Aff., Ex. D (Depo. Ex. 1, Answer to Interrog. No. 1 (h))). During his residency, James Wasemiller had minimal exposure to gastric bypass procedures. (Maddix Aff., Ex. C (JW Depo. at 15-18)).

**B. FAILURE TO OBTAIN BOARD-CERTIFICATION.**

When James Wasemiller ended his training at Loma Linda, he applied for board certification through the American Board of Surgery. Board certification demonstrates that the applicant meets the minimum requirements to comply with accepted standards of care in field in which the applicant seeks certification. Wasemiller failed his oral board exams in 1978, 1979, and 1980. After his third failure, the board informed him that he needed one more year of surgical residency and that he would have to complete that before reapplying for certification. To this day, James Wasemiller has chosen not to take another year of surgical residency and has not obtained board certification. (Maddix Aff., Ex. C (JW Depo. at 25-33)).

**C. ESTABLISHMENT OF PRACTICE.**

After leaving Loma Linda, James Wasemiller set up a general surgical practice in Wahpeton, North Dakota. His father, E.R. Wasemiller, was already a surgeon in the community. Most surgeries were performed across the river at St. Francis Medical Center in Breckenridge, Minnesota. Because none of the local surgeons performed

[2] Exhibit D contains the individually numbered exhibits from the deposition of James Wasemiller.

gastric bypass surgery when James Wasemiller set up his practice, he decided that he would offer this procedure to patients. (Maddix Aff., Ex. C (JW Depo. at 19-20)).

Between 1976 and 1987, James Wasemiller performed one, maybe two bariatric surgeries per year. (Maddix Aff., Ex. C (JW Depo. at 20-22)). In a 1987 deposition, Wasemiller admitted that a number of his gastric bypass patients had suffered serious complications and that one had died. (Maddix Aff., Ex. C (JW Depo. at 115-18)). None of these cases resulted in malpractice claims. (Maddix Aff., Ex. C (JW Depo. at 119)).

Gastric bypass procedures are highly complex surgical procedures that should only be performed by highly skilled and trained surgeons in the setting of major medical facilities. Neither Dr. Wasemiller nor St. Francis Medical Center met these conditions. As Dr. Linner explained:

> Gastric bypass procedures are complicated, difficult procedures. The complication rate is significant. They are most successfully done by surgeons with significant experience in performing them, at a facility equipped with special equipment required, and with a team of experienced nurses, internists, and infectious disease specialists most commonly available at major medical centers. If these resources are not readily available, the surgery ought to be done elsewhere.

(Maddix Aff., Ex. B (Plaintiffs' Answer to Interrogatories, No. 17)).

## D. HISTORY OF MALPRACTICE CLAIMS.

Between 1979 and 2000, patients made at least ten malpractice claims against James Wasemiller. Most were settled. (Maddix Aff, Ex. D (Depo. Ex. 1, Answers to Interrog. No. 4)). Two of the cases settled involved postoperative mismanagement of gastric bypass patients who developed peritonitis–one who died, and one who suffered catastrophic injuries. A third case involved post-operative mismanagement of a patient

who suffered an esophageal leak and developed peritonitis. All three involved the same conduct that led to Mary Larson's injuries.[3]

## E. RESTRICTIONS ON PRIVILEGES/BOARD DISCIPLINE.

On August 10, 1990, St. Francis Medical Center imposed several restrictions upon James Wasemiller. The hospital required him to (1) obtain medical consultation from a board-certified or well-trained internist or family practitioner on all hospitalized patients with a diagnosis or history of gastroenterology, cardiology, fluid and electrolytes, or infectious disease; (2) complete 80 hours of classes in the previously listed areas; (3) complete 80 hours of classes in basic surgical management and proper utilization of antibiotics; (4) comply with a number of other requirements to bring his conduct up to the standard of care, including submitting to the supervision of another physician who would

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[3] In *Nicholson v. Wasemiller,* Vicki Nicholson, age 25, underwent a gastric bypass performed by James Wasemiller at St. Francis Medical Center in 1984. Postoperatively Ms. Nicholson exhibited signs of an anastomotic leak and developing infection that were not diagnosed and treated in a timely manner. She developed sepsis and died, leaving behind a five-year-old son. (*Id.,* Ex. D (Depo. Ex. 60) & Ex. C (JW Depo. at 108-11; 122; 138-39)). Wasemiller's malpractice carrier settled the case. (*Id.,* Ex. D (Depo. Ex. 60)).

In *Little v. Wasemiller,* Terri Little underwent a gastric bypass performed by James Wasemiller in 1999. Postoperatively Ms. Little exhibited signs of a an anastomotic leak and developing infection that were not diagnosed and treated in a timely manner. She developed severe medical problems and ultimately was transferred to the Mayo Clinic where she remained for over two months. (Maddix Aff, Ex. D (Depo. Ex. 5)). She required additional surgeries and care, and by June 2000 had incurred over $1 million in medical bills. (Maddix Aff., Ex. D (Depo. Ex. 58)). James Wasemiller's malpractice carrier settled the case. (Maddix Aff., Ex. D (Depo. Ex. 1, Answer to Interrog. No. 4)).

In *Metzen v. Wasemiller,* Celeste Metzen underwent a nissen fundoplication performed by James Wasemiller in 1994. After the surgery, she exhibited signs of an esophageal leak and developing infection. These signs included tachycardia, fever, chest pain, and x-rays suggestive of pleural effusions and air in Ms. Metzen's chest. Ms. Metzen required emergent surgery to repair the leak and stop the developing infection, but James Wasemiller did nothing for days. He ultimately transferred her care to a surgeon at MeritCare who later served as an expert witness for Ms. Metzen. (Maddix Aff., Ex. D (Depo. Ex. 59)). Wasemiller's malpractice carrier settled the case. (Maddix Aff., Ex. D (Depo. Ex. 1, Answer to Interrog. No. 4)).

monitor his conduct. (Maddix Aff., Ex. D (Depo. Ex. 9)). Wasemiller's father, E.R, reportedly supervised him during this period. (Maddix Aff., Ex. C (JW Depo. at 48-49)).

During 1991 and 1992, James Wasemiller chose not to comply with the restrictions placed by St. Francis. In 1992, the Minnesota Board of Medical Practices learned of Wasemiller's noncompliance and investigated. In November 1992, Wasemiller signed a stipulation allowing the board to restrict his privileges, order additional training, supervision, and audits, and suspend him if he did not comply with the restrictions placed by the board. (Maddix Aff., Ex. C (JW Depo. at 48-49)).

In a separate disciplinary matter in 1992, the Minnesota Board of Medical Practices conditioned Wasemiller's license on his successful completion of a pharmacology course at the University of Minnesota, a chemical dependency awareness course at St. Mary's Hospital, and a pain management course at Sister Kenny Institute. He was given nine months to comply. (Maddix Aff., Ex. D (Depo. Exs. 10 & 11)).[4]

By January 14, 1994, Wasemiller still had not complied with the conditions imposed by the Minnesota Board in 1992. The North Dakota Commission on Medical Competency filed a complaint with the North Dakota Board of Medical Examiners, citing Wasemiller's non-compliance and asking that the board revoke his privileges to practice medicine. (Maddix Aff., Ex. D (Depo. Ex. 49)).

[4] The North Dakota Board of Medical Examiners learned of the latter instance of discipline by the Minnesota Board and ordered Wasemiller to comply with the conditions laid out by the Minnesota Board if he wanted to keep his license. (Maddix Aff., Ex. D (Depo Ex. 48)).

## F. DENIAL OF MALPRACTICE INSURANCE COVERAGE.

James Wasemiller practiced medicine for less than ten years before malpractice carriers in the private sector refused to cover him anymore. They considered him too "high risk." (Maddix Aff., Ex. D (Depo. Ex. 32). Since 1987, he has only been able to obtain limited coverage through the Minnesota Joint Underwriter's Association. (Maddix Aff., Ex. D. (Depo. Exs. 29, 54, 53, 24, 11, 37, 34 & 38)). MJUA is a creature of statute that must offer malpractice insurance to "high risk" physicians who cannot obtain insurance in the private sector. (Maddix Aff., Ex. D (Depo. Ex. 53)).

## G. FINANCIAL PROBLEMS.

Given the limited insurance coverage available to "high risk" doctors like Wasemiller and in particular the documented financial problems that Wasemiller has encountered, Wasemiller's ability to pay any excess judgment obtained by a patient is suspect at best.

Consideration of Wasemiller's financial circumstances warrants discussion for two reasons. First, Wasemiller's failure to pay debts, specifically tax obligations, is grounds for discipline by the Minnesota Board of Medical Practice. Minn. Stat. § 147.091, subd 7. Second, and more importantly, appellants allege that the Larsons can obtain full compensation from Wasemiller and that pursuing a negligent credentialing and privileging claim against St. Francis would provide no benefit to them. The Larsons do not agree.

Court records from 1987 show that Wasemiller owed $445,000 in secured debt, $39,000 in credit card debt, $175,000 on promissory notes to banks and other creditors,

$90,000 to the IRS for tax years 1985 and 1986, and unknown amounts to the IRS for years before 1985, and $12,000 to the State of North Dakota for tax years 1985 and 1986. (Maddix Aff., Ex. D (Depo. Ex. 41)).

Court records from 1994 show that St. Francis Medical Center itself obtained a judgment against Wasemiller for $39,553 for failure to pay off a promissory note, office rental, and hospital lab fees. (Maddix Aff., Ex. D (Depo. Ex. 57)).

Court records from 1999 show that Wasemiller failed to comply with his financial obligations under a divorce decree. At that time, he was nearly $15,000 in arrears in child support obligations, and the IRS had garnished his ex-wife's funds to pay off the federal tax liens that Wasemiller had been ordered to pay in 1987. (Maddix Aff., Ex. D (Depo. Ex. 41) (Findings and Order, Jan. 12, 1999)).

Court records from 2002 show that the State of North Dakota docketed a judgment for unpaid state taxes. The amount docketed was $28,695. (Maddix Aff., Ex. D (Depo. Ex. 56)).

## H. DR. LINNER'S EXPERT OPINION.

After reviewing the above information, Dr. Linner opined as follows:

> I am quite familiar with hospitals credentialing requirements, the NIH consensus statement on surgery for morbid obesity, and the American Society of Bariatric Surgeons. . . .
>
> I have served on and even chaired credentialing committees in the hospital setting for a period of time. The credentialing process serves as a means for a hospital to assure that the doctors who want to practice medicine at the hospital are competent and able to provide safe and reasonable care to the patients served at the hospital. Doctors who have been granted privileges to practice at the hospital must

reapply for privileges every two years so that the hospital can verify that the doctor should be permitted to continue having privileges.

**In fulfilling its duties to its patients, the hospital credentialing committee gathers various types of information from and about the physician seeking privileges. The information gathered includes whether the physician has been disciplined by licensing authorities, the frequency of discipline, the reasons for the discipline, and what the physician has done to correct the deficiencies in his practice. The committee also gathers information about claims made against the physician, the types of claims made, and whether claims made against the physician have resulted in payments to the claimant. The hospital is required to check with a national data bank that records when payments have been made to a patient or a patient's family when the doctor's malpractice has injured the patient. The investigation as a whole seeks to assure that a physician granted privileges at the hospital will provide safe, competent, and reasonable care to the patients served by the hospital. . . .**

**Credentialing committees can certainly limit the surgical privileges granted to a surgeon, depending on the surgeon's level of competence and the hospital's ability to serve patients undergoing certain types of surgical procedures.**

Gastric bypass surgery requires a high level of surgical expertise and experience, and any hospital allowing such surgeries should have available a host of other specialists ready to intervene in the event that complications develop, particularly in the post-operative setting. That is particularly true when a surgeon also performs a panniculectomy, another major surgical procedure, at the same time a gastric bypass is performed. The danger of post-operative complications in that setting multiplies four-fold, further endangering the patient if the appropriate teams of specialists are not readily available to care to the needs of the patient.

**It is quite apparent from the information elicited at the deposition of Dr. James P. Wasemiller and many of the exhibits offered in that deposition that St. Francis Medical Center knew or should have known about Dr. James P. Wasemiller's serious practice deficiencies – particularly in complex surgical cases like surgery for morbid obesity.** Dr. James P. Wasemiller did not meet minimum requirements reasonably necessary to have surgical privileges for

> procedures of morbid obesity. Allowing Dr. James P. Wasemiller to perform these surgeries was a departure from accepted standards of practice for St. Francis Hospital well before and certainly at the time Mrs. Larson had her surgery. St. Francis Medical Center's choice to allow Dr. Wasemiller to continue these surgeries as of April 2002 was a direct and substantial cause of injuries suffered by Mary Larson in this matter. The hospital clearly failed to protect patients from the catastrophic complications demonstrated in this and similar cases in Dr. James P. Wasemiller's practice history. Absent surgical privileges for this procedure, had Dr. James P. Wasemiller not operated on Mrs. Larson, and not have engaged in the negligent post operative management demonstrated in this case, Mrs. Larson would have been spared the devastating course she has experienced. Hospitals, like physicians and surgeons in practice with colleagues, have an obligation to police the health care profession and to protect patients from those not equipped to treat them properly. This case demonstrates a tragic failure of that obligation of the health care community.

(Maddix Aff., Ex. B (emphasis added)).

## SUMMARY OF ARGUMENT

Appellate courts in thirty two states have decided the issue of whether to recognize a common law cause of action for negligent credentialing and privileging, and all have ruled in the affirmative. The trial court correctly ruled that Minnesota should follow these states. (A.A. 182-86). The trial court also correctly ruled that nothing in Minn. Stat. §§ 145.63 or 145.64 evinces any intent on the part of the legislature to abrogate or otherwise immunize hospitals from common law claims for negligent credentialing and privileging. (A.A. 186-89).

The trial court recognized that the plain language of Minn. Stat. § 145.63 is in harmony with a common law duty to use reasonable care in making credentialing decisions because the statute limits liability of a hospital only when the hospital has acted reasonably. (A.A. 189). The trial court further recognized that the confidentiality

provisions of Minn. Stat. § 145.64 do not prevent any litigant from pursuing or defending a negligent credentialing claim. In addition to the confidentiality provisions, the statute expressly provides that "information, documents or records otherwise available from original sources shall not be immune from discovery or use in any civil action" and that persons testifying before a credentialing committee and committee members themselves may testify in a civil action about matters within their knowledge. The Larsons base their entire case on evidence "otherwise available from original sources." St. Francis can base their defense on the same, non-confidential sources. Other jurisdictions with statutory provisions mirroring Minn. Stat. § 145.64 have considered and rejected the very same arguments advanced by appellants.

## ARGUMENT

### I. MINNESOTA COURTS SHOULD RECOGNIZE A CAUSE OF ACTION FOR NEGLIGENT CREDENTIALING AND PRIVILEGING.

#### A. PATIENTS HAVE A CONSTITUTIONAL RIGHT TO A REMEDY FOR HARM CAUSED TO THEM BY THE WRONGFUL CONDUCT OF HOSPITALS.

Article I, Section 8 of the Constitution of the State of Minnesota provides as follows:

> **REDRESS OF INJURIES OR WRONGS.** Every person is entitled to a certain remedy in the law for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, and without denial, promptly and without delay, conformable to the laws.

Negligent credentialing and privileging claims are not vicarious liability claims premised on the underlying negligence of the physician. Rather, they are direct liability claims

based on a hospital's wrongful conduct. When wrongful conduct plays a substantial role in causing injuries suffered by a patient, Article I, § 8 guarantees the patient shall have a remedy.

### B. MINNESOTA DISTRICT COURTS HAVE RECOGNIZED COMMON LAW CAUSES OF ACTION FOR NEGLIGENT CREDENTIALING AND PRIVILEGING DECISIONS.

No Minnesota appellate court has decided whether our courts should recognize a common law cause of action for negligent credentialing or privileging. In *Kraushaar v. Austin Medical Clinic, P.A.*, 393 N.W.2d 217, 220 (Minn. App. 1986), the court affirmed the trial court's grant of summary judgment to the defendant hospital on a claim of negligent credentialing not because the court did not recognize such a cause of action, as Wasemiller contends (Wasemiller Brief at 21), but because the plaintiffs had not presented sufficient evidence to support their claim to avoid summary judgment. *Id.* The court did not address the preliminary issue of whether a cause of action existed for negligent credentialing.

Prior to the trial court's decision in this case, two Minnesota district courts had decided that Minnesota recognized a common law claim for negligent credentialing and privileging: *Toepher v. Miller*, Hennepin County D. Ct., File No. 94-2703 (Oct. 14, 1994) and *Franke v. Miller*, Dakota County D. Ct., File No. C7-95-10358 (Aug. 29, 1996). (Maddix Aff., Oct. 7, 2004, Ex. E.). Both cases involved hospitals that had continued to grant privileges to a doctor who, like James Wasemiller, had a long and storied history of medical malpractice and serious practice deficiencies. Although these district court

decisions are not binding on the appellate court, they show that other district court judges have reached the same conclusion as the district court judge in this case.

### C. METHOD FOR DECIDING WHETHER TO RECOGNIZE CAUSE OF ACTION.

The Minnesota Supreme Court has stated that our courts possess the "power to recognize and abolish common law doctrines." *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 233 (Minn. 1998) (recognizing cause of action for invasion of privacy). If the issue is whether to recognize a new cause of action, the trial courts are directed to consider what other states have decided, *id.* at 233, with an eye toward identifying and following the majority rule, *see id.* at 235.

This inherent power of the judicial branch recognizes that the common law is a living body of principles that evolves over time to reflect and embody our collective sense of justice. As a society, our sense of justice springs from our innate sense of what is right and what is wrong, and to assure that those harmed by the wrongful conduct of another have recourse in our civil courts.

As the Minnesota Supreme Court explained,

> the common law is the embodiment of broad and comprehensive unwritten principles, inspired by natural reason, an innate sense of justice, adopted by common consent, for the regulation and government of the affairs of men. It is the growth of the ages, and an examination of many of it principles, as enunciated and discussed in the books, discloses a constant improvement and development in keeping with advancing civilizations and new conditions of society. Its guiding star has always been the rule of right and wrong, and in this country its principles demonstrate that there is in fact, as well as theory, a remedy for all wrongs.

*Id., quoting State ex rel. City of Minneapolis v. St. Paul M & M Ry. Co.*, 108 N.W. 261, 268 (Minn. 1906).

### D. EVERY STATE THAT HAS SQUARELY ADDRESSED THE ISSUE OF WHETHER TO RECOGNIZE A CAUSE OF ACTION FOR NEGLIGENT CREDENTIALING AND PRIVILEGING HAS RULED IN THE AFFIRMATIVE.

Negligent credentialing and privileging claims are not "new" claims, but rather one type of general negligence claims. *Lemuz v. Fieser*, 933 P.2d 134, 142 (Kans. 1997). Negligent credentialing and privileging claims are based upon a hospital's duty to use reasonable care when granting privileges to physicians. *Welsh v. Bulger*, 698 A.2d 581, 585 (Pa. 1997). The duty runs directly from the hospital to the patient. The hospital is "held directly liable, as opposed to vicariously liable, for its own negligent acts." *Id.* To recover against the hospital, the patient "need not rely on the negligence of a third party, such as a doctor or nurse, to establish a cause of action." *Id.*

Thirty two states have squarely addressed the issue of whether a common law cause of action exists for negligent credentialing and privileging. All have held in the affirmative. *See Humana Med. Corp. v. Traffanstedt*, 597 So.2d 667 (Ala. 1992); *Fletcher v. Peninsula Hosp.*, 71 P.3d 833, 843 (Alaska 2003); *Tucson Medical Ctr. Inc. v. Misevech*, 113 Ariz. 34, 545 P.2d 958 (1976); *Elam v. College Park Hosp.*, 183 Cal.Rptr 156 (Cal. 1982); *Kitto v. Gilbert*, 39 Colo. App. 374, 570 P.2d 544, 550 (1977); *Register v. Wilmington Med. Ctr.*, 377 A.2d 8 (Del. 1977); *Insinga v. LaBella*, 543 So.2d 209 (Fla. 1989); *Mitchell County Hosp. Auth. v. Joiner*, 229 Ga. 140, 189 S.E.2d 412 (1972); *Domingo v. Doe*, 985 F.Supp. 1241, 1245 (D.Hawaii 1997) (interpreting Hawaii state law); *Darling v. Charleston Community Memorial Hosp.*, 33 Ill. 2d 326, 211 N.E.2d

253 (1965), cert. den., 383 U.S. 946, 86 S.Ct. 1204, 16 L.Ed.2d 209; *Johnson v. St. Bernard Hosp.*, 79 Ill. App. 3d 709, 399 N.E. 2d 198 (1979); *Sibley v. Board of Sup'rs of La. State Univ.*, 477 So.2d 1094 (La. 1985); *Copithorne v. Framingham Union Hosp.*, 520 N.E.2d 139 (Mass. 1988); *Ferguson v. Gonyaw*, 64 Mich. App. 685, 236 N.W.2d 543 (1976); *Taylor v. Singing River Hosp.*, 704 So.2d 75 (Miss. 1977); *Gridley v. Johnson*, 476 S.W.2d 475, 484 (Mo. 1972); *Hull v. Morth Valley Hosp.*, 498 P.2d 136 (Mont. 1972); *Foley v. Bishop Clarkson Mem. Hosp.*, 350 A.2d 534 (Ne. 1970); *Corleto v. Shore Memorial Hosp.*, 138 N.J. Super. 302, 350 A.2d 534 (1975); *Diaz v. Feil*, 881 P.2d 745 (N.Mex.App. 1994); *Sledziewski v. Cioffi*, 137 A. D. 2d 186, 528 N.Y.S.2d 913 (1988); *Bost v. Riley*, 44 N.C. App. 638, 262 S.E.2d 391 (1980); *Benedict v. St. Lukes Hosps*, 365 N.W.2d 499, 504 (N.Dak. 1985); *Browning v. Bert*, 613 N. E. 2d 993 (Ohio 1993) (subsequent history omitted); *Albain v. Flower Hosp.*, 50 Ohio St. 3d, 553 N. E. 2d 1038 (1990); *Strubhart v. Perry Memorial Hosp.*, 903 P.2d 262 (Ok. 1995); *Thompson v. Nason Hosp.*, 591 A.2d 703 (Pa. 1991); *Rodrigues v. Miriam Hosp.*, 623 A.2d 456 (R.I. 1993); *Strickland v. Madden*, 448 S.E.2d 581, 586 (S.C. Ct.App. 1994); *Crumley v. Memorial Hosp., Inc.*, 509 F.Supp. 531 (E.D.Tenn. 1978) (interpreting Tennessee law), aff'd 647 F.2d 164 (6th Cir. 1981); *Rose v. Garland Comm. Hosp.*, 156 S.W.3d 541 (Tex. 2004), *on remand*, 169 S.W.3d 353 (Tex.App. 2005); *Wheeler v. Central Vt. Med. Ctr.*, 582 A.2d 165 (Vt. 1989); *Pedroza v. Bryant*, 677 P.2d 166, 170 (Wash. 1984); *Roberts v. Stevens Clinic Hosp., Inc.*, 176 W. Va. 492, 345 S.E.2d 791 (1986); *Greenwood v. Wirdsma*, 741 P.2d 1079 (Wyo. 1987).

These state court decisions reflect a societal judgment that hospitals owe a duty to patients to exercise reasonable care when making credentialing and privileging decisions, and that when hospitals breach that duty, they must be held legally accountable. Minnesota likewise should recognize this claim. No man, woman, or child who enters a hospital in the state of Minnesota should be exposed to a physician the hospital knows to be dangerous without the hospital being held accountable. That St. Francis Medical Center, Minnesota Hospital Association, Minnesota Medical Society, and American Medical Association suggests otherwise should not cause this court to question our society's most fundamental notions of right and wrong, justice and injustice.

### E. CONTRARY TO ST. FRANCIS' CONTENTIONS, NO COURTS HAVE REFUSED TO RECOGNIZE COMMON LAW CAUSES OF ACTION FOR NEGLIGENT CREDENTIALING.

St. Francis cites cases from Texas, Maine, and Kansas to support the proposition that common law claims for negligent credentialing and privileging were not recognized in those states because the legislatures there had already decided to bar such claims. (St. Francis Brief at 31-32). St. Francis misinterprets these cases.

Texas recognizes a common law cause of action for negligent credentialing and privileging. *See, e.g., Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212 (Tex. 2005); *Rose v. Garland*, 168 S.W.3d 352 (Tex.App. 2005), *on remand from Rose*, 156 S.W.3d 541 (Tex. 2004). The Texas legislature has not barred these causes of action, but only expressly required patients in such actions to prove that a credentialing committee acted maliciously before liability could attach. *Romero*, 166 S.W.3d at 214-15. Minnesota's

peer review statute has no malice requirement for patients seeking redress. Minn. Stat. § 145.63.

Kansas recognizes that negligent credentialing and privileging claims are viable as a type of general negligence claim for which relief lies. *Lemuz v. Fieser*, 933 P.2d 134, 142 (Kans. 1997). St. Francis, however, cites *McVay v. Rich*, 874 P.2d 641 (Kan. 1994), for the contrary proposition. *McVay* merely recognized that the Kansas legislature had expressly precluded any type of claim, negligent credentialing or otherwise, by a patient against a hospital if the physician was an independent contractor and/or the physician had excess insurance coverage beyond his primary policy through the state's Health Care Stabilization Fund. *Id.* at 642. Minnesota's statutes have no corollary to these Kansas statutes.

Maine has not decided whether a common law cause of action exists for negligent credentialing and privileging.[5] In *Gafner v. Down E. Comm. Hosp.*, 735 A.2d 969 (Me. 1999), cited by St. Francis, the patient had abandoned the claim for negligent privileging prior to appeal. *Id.* at 979 n.13. The court decided a separate issue—whether hospitals had a common law duty to have explicit policies in place to control independent physicians. *Id.* at 979. The court declined to recognize this cause of action because only three other jurisdictions had recognized such a cause of action. The court distinguished this situation from the situation in which large number of jurisdictions had recognized negligent privileging causes of action. *Id.* at 979 & nn. 14 & 15.

[5] In fairness to St. Francis' counsel, respondents' counsel also misread the *Gafner* decision when this matter was briefed for the trial court.

## F. MINNESOTA COURTS DO NOT HAVE A TRADITION OF REFUSING TO RECOGNIZE NEW THEORIES OF LIABILITY AGAINST HEALTH CARE PROVIDERS.

Appellant Wasemiller cites *Luebner v. Sterner*, 493 N.W.2d 119 (Minn. 1992) and *Fabio v. Bellomo*, 504 N.W.2d 758 (Minn. 1993) for the proposition that the Minnesota Supreme Court has historically approached the "expansion of medical negligence claims and liability in the health care arena with caution due to concern regarding speculative claims. Wasemiller then states that the Larsons' negligent credentialing and privileging claims would be speculative because "the plaintiffs would lack any evidence regarding the actions of the peer review committee." (Wasemiller Brief at 27-28).

Wasemiller misunderstands *Luebner* and *Fabio*. Both dealt with the issue of whether plaintiffs could recover damages for the future injuries that were possible, but not probable, to occur. The cases addressed the quantum of proof necessary to prove damages, not whether a new theory of liability should be accepted or whether our courts should treat health care defendants any differently than others.[6]

## G. NEGLIGENT CREDENTIALING CLAIMS ARE DIRECT LIABILITY CLAIMS, NOT VICARIOUS LIABILITY CLAIMS.

Appellants and amici consistently treat credentialing claims as if they were vicarious liability claims and not direct liability claims. (St. Francis Brief at 28); (MHA, MMA, AMA Brief at 20-22). Vicarious liability involves imposition of liability on a

[6] The *Fabio* court cited its earlier decision in *Luebner v. Sterner*, 493 N.W.2d 119 (Minn. 1992) to note that the court had previously rejected a "theory of recovery for 'negligent aggravation of a preexisting condition.'" *Fabio* at 763. *Luebner* specifically stated that "[a]ggravation of a preexisting physical condition is a measure of damages, not a theory of liability, even if one puts the word 'negligent' in front of the phrase." 493 N.W.2d at 122.

non-negligent entity because of the entity's unique relationship with a tortfeasor, such as the relationship between an employer and employee. Direct liability, on the other hand, involves imposition of liability on a negligent entity for its own acts of negligence independent of any negligence on the part of a co-defendant.[7]

Amicus MHA contends that this court cannot recognize a common law cause of action for negligent credentialing because this would make hospital vicariously liable for the torts of independent contractors—a holding that would be contrary to long-standing principles of Minnesota law. (MHA Brief at 20-22). Negligent credentialing claims, however, are direct liability claims, and the court should disregard MHA's position.

St. Francis is more subtle in its efforts to have this court treat a negligent credentialing claim as a vicarious liability claim. St. Francis contends that hospitals can only be liable for negligent credentialing claims if the patient first proves that the physician's care was negligent and that the physician's negligence caused harm. (St. Francis Brief at 28-29). St. Francis cites three cases from other jurisdictions to support its position. St. Francis and the cases upon which St. Francis relies are simply wrong and inconsistent with over a century of jurisprudence in this state that holds negligent parties responsible for any harm that is a direct and substantial result of their negligence.

The Pennsylvania Supreme Court correctly analyzed this issue in *Welsh v. Bulger*, 698 A.2d 581, 585 (Pa. 1997). In the setting of vicarious liability, all defenses available

[7] It is black letter law that there can be more than one cause of an injury. Our state recognizes that the negligence of multiple tortfeasors, as we have in this case, can be a concurrent cause of the plaintiff's injury. Our state also recognizes that a tortfeasor's actions can be a substantial cause of the injury without being the only cause of the injury.

to the tortfeasor are by definition available to non-negligent defendant who could be held vicariously liable for the actions of the tortfeasor. Thus, a non-negligent employer can use any defense available to its allegedly negligent employee to defend itself because the employer can be vicariously liable for the negligent acts of its employee.

In the setting of a direct liability case, our courts do not permit independently negligent tortfeasors to "borrow" defenses from one another. Such a right does not exist in Minnesota because each negligent defendant must answer for its own torts in accordance with Article I, § 8 of the state constitution and the common law. St. Francis can no more use defenses available to James Wasemiller to escape liability than Wasemiller can use defenses available to St. Francis.

That health care providers can be legally liable for injuries caused to a patient without any underlying malpractice on the part of a physician—specifically, in the setting where informed consent is not obtained from a patient—is not a foreign concept to our jurisprudence. Holding negligent actors responsible for harm they cause is foundation of our tort system.

## H. NEGLIGENT CREDENTIALING CLAIMS WILL NOT AFFECT THE CONFIDENTIALITY OR INTEGRITY OF PEER REVIEW.

Appellants and amici devote inordinate time and effort attempting to convince this court that allowing negligent credential and privileging claims will undermine and destroy the peer review system. This is the reddest of all herrings delivered to the court.

The Larsons and the trial court recognized that no parties have a right under Minn. Stat. § 145.64 to obtain any confidential peer review information or testimony of any sort

to use in the negligence lawsuit. What happens in the peer review committee stays in the committee. Health care providers who wish to participate in the peer review process can continue to do so with full confidence that they can speak openly and with candor.

## I. LITIGANTS CAN PURSUE AND DEFEND NEGLIGENT CREDENTIALING CLAIMS WITHOUT USE OF PROTECTED PEER REVIEW INFORMATION.

Appellants and amici argue that the parties cannot possibly litigate negligent credentialing claims without accessing and using protected peer review information. They contend that hospitals cannot possibly defend themselves due to the confidentiality provisions of Minn. Stat. § 145.64, and that nobody can ever know what information the credentialing committee actually considered or how it made its decision. (Coincidentally, this argument is directly contrary to their argument that permitting negligent credentialing claims would destroy the confidentiality of peer review proceedings and undermine the process.)

As the trial court recognized, Minn. Stat. § 145.64 permits parties to obtain information that the credentialing committee may have used from "original sources" to pursue or defend credentialing claims. Second, a jury will be able to determine what St. Francis knew and what it should have known about James Wasemiller when it granted him privileges and whether a reasonable hospital would have granted privileges under the circumstances of the case. The law requires nothing more.

### 1. Minn. Stat. § 145.64 Allows Use of Original Information and Knowledge.

Minn. Stat. § 145.64, entitled "Confidentiality of records of review organization," shields from discovery all records and proceedings of the review organization. The statute provides, however, that

> Information, documents, or records otherwise available from original sources shall not be immune from discovery or use in any civil action[8] 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.

Appellants and amici claim that the statute does not allow a hospital ample opportunity to gather information to defend itself. This simply is not true. The statute merely precludes the discovery of and use at trial of one subset of the universe of evidence otherwise available to the parties. All litigants face this challenge every day by virtue of the existence of privileges and the rules of evidence. Both patients and hospitals may face obstacles when litigating negligent credentialing and privileging claims, but they can do so without running afoul of the proscriptions of Minn. Stat. § 145.64. Indeed, the hospital may not use peer review records, but it certainly may use information considered by the committee from original sources.

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[8] St. Francis complains that the legislature gave no guidance as to what it meant by "any civil action" and that the court cannot presume that "any civil action" includes a civil action based on negligent credentialing or a civil trial that occurs as part of the process. (St. Francis Brief at 14). "Poppycock" is the word that comes to mind because "any civil action" means "any civil action." The plain language of the phrase is all-inclusive.

### 2. Other Jurisdictions Have Rejected the Notion that Litigants Cannot Adequately Pursue or Defend Negligent Credentialing Claims When Peer Review Materials are Confidential.

In *Ex Parte Qureshi*, 768 So.2d 374 (Ala. 2000), the patient alleged a negligent credentialing claims against a hospital. The patient sought discovery of confidential peer review materials. The records sought were confidential under Alabama Stat. § 22-21-8(b). The Alabama statute provided, however, that

> Information, documents, or records otherwise available from original sources are not to be construed as being unavailable for discovery or use in any civil action merely because they were presented or used in preparation of accreditation, quality assurance or similar materials nor should any person involved in preparation, evaluation, or review of such materials be prevented from testifying as to matters within his knowledge, but the witness testifying should not be asked about any opinions or data given to him in preparation, evaluation, or review of accreditation, quality assurance or similar materials.

*Id.* at 376-77. This statute mirrors Minn. Stat. § 145.64.

The patient alleged that she could not pursue her claim by merely relying on information from original sources, and that if the confidentiality provisions of the statute were interpreted to bar access to confidential documents, then the statute would violate her constitutional right to pursue a remedy for the harm that had been done to her. *Id.* at 378-79. The court rejected the argument, holding that the statute permitted the patient a means to gather evidence from original sources to pursue her claim. *Id.* at 380. *Accord Humana Desert Valley v. Superior Court*, 742 P.2d 1382 (Ariz.App. 1987); *Shelton v. Morehead Mem. Hosp.*, 347 S.E.2d 824 (N.C. 1986).

In *Wheeler v. Central Vt. Med. Ctr., Inc.*, 582 A.2d 165 (Vt. 1989), the Vermont Supreme Court rejected a similar argument made by a defendant. In that case, Rose

Wheeler underwent a gastroplasty (weight-loss surgery) performed by Dr. Arthur Wright. Postoperatively, Ms. Wheeler showed numerous symptoms of complications and Dr. Wright did nothing until she went into a coma. Ms. Wheeler sued Dr. Wright and the hospital, alleging that the hospital negligently granted privileges to Dr. Wright. Dr. Wright was not a hospital employee, but an independent contractor. *Id.* at 166.

Peer review information was confidential under Vt. Stat. § 1443, but like Minn. Stat. § 145.64, provided that:

> Information, documents, or records otherwise available from original sources are not to be construed as being immune from discovery or use in any such action merely because they were presented during the proceedings of such committee, nor shall any person who testifies before such committee or who is a member of such committee be prevented from testifying as to matters within his knowledge, but such witness shall not be asked about his testimony before such committee or about opinions formed by him as a result of such committee hearings.

*Id.* at 88.

Ms. Wheeler gathered evidence from original sources showing that Dr. Wright had a long and storied history of involving failure to diagnose, improper treatment, and incompetent surgery. Her expert, Dr. John Potterfield, had experience in serving on credentialing committees and how the process worked. He considered the evidence gathered from original sources and he opined at trial that the hospital was negligent for granting privileges to Dr. Wright. *Id.* at 88.

When the hospital's attorney attempted to cross-examine Dr. Potterfield with confidential peer review records, the trial court barred the use of the records. On appeal, the hospital argued that it should have been permitted to use the confidential records

because Dr. Potterfield's testimony "left the clear impression that nothing had been done by the peer review committees." *Id.* at 88-89. The court rejected the appeal, noting that Dr. Potterfield's opinions were based on information from original sources, not confidential materials. The court also held that the plaintiff need only show what a reasonable hospital would have done about Dr. Wright, not what the hospital actually did or did not do. *Id.* at 90-91.

Like the plaintiff in *Wheeler*, the Larsons have obtained their evidence from original sources and had that evidence reviewed by an expert with experience and knowledge about the credentialing process. Moreover, the Larsons have developed significant amounts of evidence from original source of what St. Francis knew and what it should have known when it continued to grant privileges to James Wasemiller every two years.

The Larsons can prove the following: St. Francis granted privileges to James Wasemiller to perform highly complex bariatric surgical procedures. St. Francis did so even though it knew or certainly should have known that James Wasemiller was not a board-certified surgeon, had minimal training in bariatric procedures, had a number of bariatric patients suffer severe complications or die, and was so "high risk" that private insurers refused to cover him starting in the 1980's. In addition, St. Francis had actual knowledge[9] of all malpractice claims against Wasemiller resulting in payments and the

[9] Under 45 CFR §§ 60.2 & 60.7-.9, insurers, boards of medical practice, hospitals, and other entities are required to report malpractice payments and the conduct surrounding the payment, board discipline, and adverse actions on privileges to the National Practitioners Data Bank ("NPDB"). Under 45 CFR § 60.10, hospitals must request this information from the NPDB

circumstances surrounding these claims, all instances of board discipline in Minnesota and North Dakota, and all restrictions placed on his privileges, including restrictions placed by St. Francis itself. A jury will have ample evidence to decide whether the hospital acted reasonably in granting privileges to James Wasemiller.

Similarly, St. Francis can defend itself by gathering evidence from original sources. As the trial court noted, hospitals have a decided advantage in identifying and locating and using original sources to defend themselves. St. Francis can have James Wasemiller explain his training, experience and skills to the jury. St. Francis can have other physicians and health care providers testify that Wasemiller is a careful, competent and concerned physician. St. Francis can employ a credentialing expert to review information from original sources and opine that the hospital could reasonably grant privileges to Wasemiller.

## J. OTHER POLICY OBJECTIONS RAISED BY APPELLANTS AND AMICI DO NOT WARRANT REJECTION OF NEGLIGENT CREDENTIALING AND PRIVILEGING CLAIMS.

### 1. Misdemeanor for Disclosure of Protected Peer Review Information.

Minnesota's peer review statute mirrors those in practically all other states. Peer review information is shielded from disclosure. Litigants are left to obtain information from original sources to pursue or defend negligent credentialing claims. That Minnesota may criminalize disclosure of protected peer review information when other states may

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when a physician initially applies for hospital privileges AND every two years thereafter as long as the physician continues to have privileges at the hospital. Any hospital that fails to request the information as required "is presumed to have knowledge of any information reported to the Data Bank concerning this physician."

not is irrelevant. Appellants' assumption that health care providers in other states are not respecting the confidentiality provisions of their peer review statutes, or that courts in other states are permitting discovery of and introduction into evidence of protected confidential information, has no basis in fact.

### 2. Negligent Credentialing Claims Will Benefit Patients.

Appellants St. Francis contends that negligent credentialing claims will provide no benefits to patients because they are entitled to full compensation from physicians who commit malpractice on them. (St. Francis Brief at 29). St. Francis, however, must be held accountable for harm caused by its own negligence irrespective of any negligence by James Wasemiller. In addition, full recovery against Wasemiller is certainly not guaranteed as St. Francis suggests. Wasemiller has only limited insurance coverage because he can only obtain "high risk" insurance through the Minnesota Joint Underwriters Association. He has a history of unpaid debts, including child support and tax judgments and liens that are superior to any judgment lien obtained for an excess verdict in this matter. St. Francis itself has had to sue Wasemiller for unpaid debts.

### 3. Improvement of Health Care.

The Institute of Medicine estimates that medical errors result in the death of between 44,000 to 98,000 American citizens each year. (MHA Amicus Brief, Add. 8). Holding hospitals legally accountable for negligent credentialing decisions can only enhance our health care system. Hospitals serve as gatekeepers to protect their patients from dangerous and unqualified physicians. If hospitals can elude all responsibility for

exposing their patients to incompetent physicians, our public policy goal of improving health care will take a step backward, not forward.

**4. Litigation Impact.**

Recognition of credentialing claims against hospitals will not open a floodgate of litigation. Documentation of the number of negligent credentialing claims in our jurisprudence shows three cases at the district court level during the past fourteen years (this case and the *Miller* cases cited above) and one case at the appellate level. There are reasons for this. Most hospitals comply with their obligations to use reasonable care in credentialing physicians. For those handful of hospitals that may not, the availability of information available from original sources to prove up a claim is limited. Many malpractice claims never get filed in courts and are settled confidentially. If the claims are filed in court, these files are often sealed if the case settles before trial.

Recognizing negligent credentialing claims will not mean that hospitals will be added as defendants in every malpractice case. Patients pursuing negligent credentialing claims must have credible evidence to support such a claim. In the rare instance when such evidence can be marshaled, hospital will be added as proper defendants not to serve as "excess insurers" for physicians, but to answer for their own wrongdoing and the harm caused by it.

As to any unresolved issues related to how these claims will be litigated, those issues are not now before the court. Our courts are fully capable of resolving any new issues that arise in the context of negligent credentialing claims. They are in the business of making decisions on a daily basis.

## II. MINNESOTA'S PEER REVIEW STATUTE DOES NOT ABROGATE THE COMMON LAW CAUSE OF ACTION FOR NEGLIGENT CREDENTIALING AND PRIVILEGING.

Minnesota's peer review statute is set forth at Minn. Stat. § 145.61 to 145.67. Appellants and amici contend that the peer review statute abrogates any common law causes of action for negligent credentialing and privileging. As the trial court held, this argument is based on a disregard of the plain and unambiguous language of Minnesota's peer review statute.

### A. RULES OF STATUTORY INTERPRETATION AND CONSTRUCTION.

When analyzing Minnesota's peer review statute, well-established rules of statutory interpretation and construction govern the method of analysis. The object of statutory interpretation is to give effect to the legislature's intent. *State by Beaulieu 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 statute is ambiguous only when its language is subject to more than one reasonable interpretation. *Tuma v. Commissioner of Econ. Sec.*, 386 N.W.2d 702, 706 (Minn. 1986). If statutory construction is necessary, words and phrases are construed according to the rules of grammar and their most natural and obvious usage unless to do so would be inconsistent with the manifest intent of the legislature. Minn. Stat. § 645.08. "Unless a statute manifests a legislative intent to modify the common law, it presumably will not alter the common law." *Summers v. R & D Agency, Inc.*, 593 N.W.2d 241, 245 (Minn.App. 1999).

### 1. Minn. Stat. § 145.63, Subd. 1.

Appellants and amici contend that Minn. Stat. § 145.63 supports their contention that the legislature abrogated common law causes of action for negligent credentialing and privileging. This section is entitled "Limitation on liability for sponsoring organizations, review organizations, and members of review organizations." Subdivision 1 of this section is entitled "Members, directors, and officers."

When interpreting the first paragraph of Subdivision 1, the court must note that the paragraph contains two sentences that are similar in many respects, but have profoundly different meanings and application to the case. The first sentence of subdivision 1 provides as follows:

> **No review organization and no person** who is a member or employee, director, or officer of, who acts in an advisory capacity to, or who furnishes counsel or services to, a review organization **shall be liable for damages** or other relief **in any action brought by a person or persons whose activities have been scrutinized or reviewed by a review organization**, by reason of the performance by the person of any duty, function, or activity of such review organization, **unless the performance of such duty, function, or activity was motivated by malice toward the person affected thereby**.

This first sentence applies only to actions "brought by a person or persons whose activities have been scrutinized or reviewed by a review organization . . . ." The plain meaning of this language is that any limitation imposed in this first sentence applies only to health professionals whose activities have been scrutinized or reviewed by a review organization (e.g., denied surgical privileges to a surgeon). If the aggrieved health professional initiates a legal action against the hospital, the professional will have to show that the review organization was motivated by malice toward the health

professional. This first sentence of subdivision 1 has absolutely no bearing to an action initiated by a patient as a result of care she received at a hospital and, accordingly, provides no support for appellants' position.

The second sentence of subdivision 1 provides as follows:

> **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 . . .

Appellants contend that the second sentence of subdivision 1 supports their contention that the legislature intended to prohibit common law claims of negligent credentialing and privileging against hospitals. As the trial court recognized, appellants ignore the plain language of the statute. The plain meaning of the second sentence of subdivision 1 is that the hospital can avoid liability for its credentialing and privileging decisions only when such decisions are made "in the reasonable belief" that such decisions are warranted and "after reasonable efforts to ascertain the facts" have been made.

Contrary to appellants' assertions, neither the Larsons nor the trial court take the position that this statutory language creates a cause of action. The trial court and the Larsons merely point out that the language of statute evidences no legislative intent to abrogate the common law duty to use reasonable care in credentialing decisions. That is the issue. As the trial court correctly noted, the statutory language above is in harmony

with, not in opposition to, the common law duty to use reasonable care in credentialing decisions. To find that a statute has abrogated the common law, the language of the statute must evidence an unequivocal legislative intent to abrogate the common law; otherwise the court will presume that the legislature had no intent to abrogate the common law. *Summers v. R & D Agency, Inc.*, 593 N.W.2d 241, 245 (Minn.App. 1999). The plain language of Minn. Stat. § 145.63 contains no evidence of a legislative intent to abrogate common law claims for negligent credentialing and privileging.

**2. Minn. Stat. § 145.64.**

Minn. Stat. § 145.64, entitled "Confidentiality of records of review organization," shields from discovery and use in a civil all records and proceedings of the review organization. The statute provides, however, that

> Information, documents, or records otherwise available from original sources shall not be immune from discovery or use in any civil action[10] 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.

As discussed in detail above, Minn. Stat. § 145.64 permits litigants to gather information considered by the credentialing committee from original sources. The statute further provides that information from original sources, including matters within the

[10] St. Francis complains that the legislature gave no guidance as to what it meant by "any civil action" and that the court cannot presume that "any civil action" includes a civil action based on negligent credentialing or a civil trial that occurs as part of the process. (St. Francis Brief at 14). "Poppycock" is the word that comes to mind because "any civil action" means "any civil action." The plain language of the phrase is all-inclusive.

personal knowledge of witnesses and committee members, can be discovered and used in "any civil action." This language, as recognized by cases cited above from other jurisdictions, provides both patients and health care providers ample opportunity to pursue and defend negligent credentialing claims in a court of law.

For purposes of deciding whether Minn. Stat. § 145.64 abrogates the common law cause of action for negligent credentialing, the issue is whether the statute evinces an unequivocal legislative intent to abrogate the common law. The trial court correctly held the language of the statute evidences no such intent. Appellants point to no language of such intent because there is none.

### 3. Minn. Stat. § 145.67.

Minn. Stat. § 145.67 is entitled "Protection of patient." This statute provides as follows:

> 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. § 145.61 provides the definitions for §§ 145.61 to 145.67. It does not define "person." Because "person" is not defined here, the legislature directs us to Minn. Stat. § 645.44 for the definition.[11] Minn. Stat. § 645.44, subd. 7, defines "person" as follows: "'Person' may extend and be applied to bodies politic and corporate, and to partnerships and other unincorporated associations." St. Francis Medical Center, therefore, is a "person" for purposes of Minn. Stat. § 145.67.

[11] Minn. Stat. § 645.44, subd. 1 states that the "words, terms, and phrases used in Minnesota Statutes or any legislative act shall have the meanings given them in this section, unless another intention clearly appears."

St. Francis also furnished "health care" to a patient (i.e., Mary Larson) for purposes of Minn. Stat. § 145.67 because "health care" is defined to include "services furnished by a hospital." Minn. Stat. § 145.61, subd. 4. Because St. Francis is a "person" that furnished "health care" to Mary Larson, "[n]othing contained in sections 145.61 to 145.67 shall be construed to relieve [St. Francis] of any liability [St. Francis] has incurred . . . to [Mary Larson] as a result of furnishing health care to [Mary Larson]." Minn. Stat. § 145.67 expressly forbids this court from construing the peer review statute in the manner urged by St. Francis.

St. Francis contends that hospitals are not furnishing "services" to patients when hospitals make credentialing decisions. (St. Francis Brief at 20-21). St. Francis provides no support for this position. Credentialing decisions are intimately intertwined with health care delivered to the patient within the hospital. In *Garland Comm. Hosp. v. Rose*, 156 S.W.2d 541 (Tex. 2004), the Texas Supreme Court stressed that the hospital credentialing process was "inseparable" from the medical services provided by a hospital. The court emphasized that the credentialing process was "an inseparable part of the medical services" a patient receives and that the quality of a hospital's medical staff is "intimately connected with patient care." As the court stated, "a hospital's credentialing of doctors is necessary to that core function and is, therefore, an inseparable part of the health care rendered to the patient." *Id.* at 545.

As the trial court noted, Minn. Stat. § 145.67 further cut against any argument that §§ 145.63 and 145.64 could be interpreted as evincing a legislative intent to abrogate common law credentialing claims. Indeed, Minn. Stat. § 145.67 evinces an unequivocal

legislative intent to protect patients like Mary Larson and preserve their rights under the law. In enacting this section of the peer review statute, the legislature made it abundantly clear that the peer review statute cannot be construed to limit the liability of health care professionals and hospitals whose negligence has been a substantial cause of harm to patients.

## CONCLUSION

Respondents Mary and Michael Larson respectfully request that this court answer the issues certified to it as follow: (1) that Minnesota recognizes a common law cause of action for negligent credentialing and privileging, and (2) that Minn. Stat. §§ 145.63 and 145.64 do no abrogate this common law cause of action.

Respectfully submitted,

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

Dated this 2nd day of December, 2005.

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## CERTIFICATE

Pursuant to Rule 132.01, subd. 3(a)(1), the undersigned set the type of the foregoing brief in Times New Roman, a proportional 13-point font, on 8 1/2 by 11 inch paper with written matter not exceeding 6 1/2 by 9 1/2 inches. The resulting principal brief contains 9,576 words, as determined by employing the word counter of the word-processing software, Microsoft Word 2003, used to prepare it.

Respectfully submitted,

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

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