

Nos. A05-1698 and A05-1701

State of Minnesota
In Supreme Court

MARY AND MICHAEL LARSON,

Appellants,

v.

JAMES PRESTON WASEMILLER, M.D.,

Respondent (A05-1698),

Defendant (A05-1701),

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

Defendants (A05-1698),

ST. FRANCIS MEDICAL CENTER,

Respondent (A05-1701).

**BRIEF AND APPENDIX OF
 RESPONDENT JAMES PRESTON WASEMILLER, M.D.**

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STATEMENT OF ISSUES

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

The appellate court held in the negative based on the substantial policy implications of creating such an action, the legislature's superior ability to consider such competing policies, the incompatibility of such claims with the extensive confidentiality the legislature afforded to the peer review process, and its limited role as an error-correcting court.

Apposite authorities:

Minn. Stat. § 145.64

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

Cracraft v. City of St. Louis Park, 279 N.W.2d 801 (Minn. 1979)

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

The appellate court held these statutes do not provide immunity to review organizations but limit their potential liability to cases where the organization fails to act in the reasonable belief the action is warranted after making reasonable efforts to ascertain the facts upon which its action is based.

Apposite authorities:

Minn. Stat. §§ 145.61-145.67

Amaral v. St. Cloud Hospital, 586 N.W.2d 141 (Minn. Ct. App. 1988), aff'd 598 N.W.2d 379 (Minn. 1999)

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

STATEMENT OF THE CASE

This is a medical negligence case arising out of gastric bypass surgery Respondent James Wasemiller, M.D. (“Dr. Wasemiller”) performed on Appellant Mary Larson (“Larson”) on April 4, 2002 at Respondent St. Francis Medical Center (“St. Francis”). Appellants Mary and Michael Larson commenced this action against Dr. Wasemiller, Paul Wasemiller, M.D., and Dr. Paul Wasemiller’s employer, Dakota Clinic, Ltd., alleging they negligently responded to post-surgical complications Larson experienced.

The district court granted Appellants’ motion to amend the complaint to assert a claim against St. Francis based on alleged negligence in credentialing or granting surgical privileges to Dr. Wasemiller. (A.60)¹ Appellants served an Amended Complaint adding St. Francis to the case. (A.48)

St. Francis brought a Rule 12.02 motion to dismiss the Amended Complaint as a matter of law because Minnesota law does not recognize or permit negligent credentialing claims. (A.41)² Dr. Wasemiller joined in the motion. By order dated June 29, 2005, the district court denied the motion but certified the following questions as important and doubtful under Rule 103.03 of the Minnesota Rules of Civil Appellate Procedure:

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

¹ References to “A.*” are to the Appendix to Appellants’ Brief.

² Both negligent credentialing and negligent privileging claims will be collectively referred to as “negligent credentialing” in this Brief.

negligent credentialing/privileging of a physician? The Trial Court has ruled in the negative.

(A.25)

Dr. Wasemiller and St. Francis filed separate, timely appeals from the district court's order (R. 1, 4)³ and the Court of Appeals consolidated the two appeals. (R. 6)

In a unanimous, well-reasoned decision, the appellate court held that Minnesota law does not recognize a claim for negligent credentialing. *Larson v. Wasemiller*, 718 N.W.2d 461 (Minn. Ct. App. 2006). The Court of Appeals acknowledged that creation of a negligent credentialing tort would represent a significant change in the common law that has implications for other areas of the law, would compromise the strong public policy embodied in the Peer Review Statute and would potentially prejudice physicians and hospitals. *Id.* at 467-68. Because of the complexity of the policy issues involved, the appellate court suggested creation of a negligent credentialing action is a matter this Court may determine “would be best handled by the legislature.” *Id.*

The Court of Appeals answered the second certified question in two parts. First, the court held Minn. Stat. §§ 145.63 and 145.64 do not immunize hospitals from negligent credentialing claims. *Id.* at 469. Second, the court held these statutory provisions do limit a hospital's liability for negligent credentialing to cases where a hospital's actions are “not made in the reasonable belief that the action or recommendation is warranted by facts known to it after reasonable efforts to ascertain the facts on which its action or recommendation is made.” *Id.* at 470.

³ References to “R. 1, 4” are to the Appendix to this Brief.

By Order dated October 17, 2006, this Court granted Appellants' Petition for Review. (A.1)

STATEMENT OF THE FACTS ⁴

Dr. Wasemiller is a licensed Minnesota physician. On April 4, 2002, he performed gastric bypass surgery on Larson with the assistance of Dr. Paul Wasemiller. (A.50) Larson subsequently displayed signs of post-surgical complications and underwent a diagnostic CT scan on April 12, 2002. (A.52) Dr. Paul Wasemiller performed surgery later that day to address this medical condition. On April 22, 2002, Dr. Paul Wasemiller transferred Larson from St. Francis to a long-term care facility in Fargo, North Dakota. (A. 54) Larson underwent additional surgeries for further complications at MeritCare Hospital and was discharged on June 28, 2002. (*Id.*)

Appellants brought this action alleging Dr. Wasemiller and Dr. Paul Wasemiller were negligent in their care and treatment of Larson with respect to the timeliness of the intervention for her post-operative complications. (A. 50) Appellants claim this negligence caused injuries to Larson. They also allege St. Francis was negligent in granting Dr. Wasemiller the privilege to perform surgery, including bariatric surgical procedures, at St. Francis. Dr. Wasemiller denied Appellants' claims in their entirety. (A. 45)

⁴ Once again, Appellants have chosen to ignore the Minnesota Rules of Civil Procedure and clear precedent concerning the scope of the record the court considers when deciding a Rule 12 motion. *See, e.g. Martens v. Minnesota Mining & Mfg. Co.*, 616 N.W.2d 732, 739-40 (Minn. 2000). The Court of Appeals expressly declined to consider any facts beyond those stated in the pleadings. Dr. Wasemiller respectfully asks the Court to likewise disregard the Appellants' inaccurate and misleading factual allegations.

ARGUMENT

I. SUMMARY OF ARGUMENT AND STANDARD OF REVIEW.

Some issues present complex, competing policy considerations that are best left to the legislature, rather than the courts, to address in the first instance. This case presents such an issue. The legislature has carefully considered the important policy objective of improving the quality of health care in Minnesota and clearly expressed the critical role of peer review in meeting this goal. Minnesota's Peer Review Statute (Minn. Stat. §§ 145.61-67) establishes a firm foundation of confidential review and decision-making concerning medical professionals and systems from which many important health care programs and initiatives flow. The Minnesota Adverse Health Care Events Reporting Act of 2003, which utilizes peer review programs to effectuate its goals, is but one example of the legislature's commitment to improving health care and the critical importance of confidentiality in meeting that goal. Minn. Stat. §§ 144.706-7069.

Recognition of a negligent credentialing tort would create an irreconcilable conflict between the strict confidentiality the legislature affords the peer review process and the ability of hospitals and physicians to defend themselves in litigation. In suggesting this conflict is overcome by virtue of the fact that documents available from original sources are both discoverable and admissible in court, Appellants overlook the critical fact that defendant hospitals and other review organizations are strictly prohibited from presenting any evidence about the peer review process itself- a process that culminated in a decision favorable to the physician. Moreover, Appellants wholly disregard the substantial prejudice to the physician involved in such a case who would

face discovery into matters that go far beyond the well-established parameters of a medical negligence case and the admission of highly prejudicial evidence at trial. It would be virtually impossible for hospitals and physicians to fully and fairly defend themselves in cases involving negligent credentialing claims without violating the Peer Review Statute.

Creation of a negligent credentialing action requires legislative action. The Court of Appeals properly acknowledged the legislature's superior ability to conduct hearings, explore and weigh competing interests and concerns. Given the centrality of peer review to the legislature's many health care initiatives, legal developments that threaten peer review should be subject to the legislative process.

On review of cases involving a Rule 12.02 motion to dismiss for failure to state a claim on which relief can be granted, the only question before the appellate court is whether the complaint sets forth a legally sufficient claim for relief. *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997); *Frost-Benco Elec. Ass'n. v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984). The standard of review is de novo. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003).

II. NEGLIGENT CREDENTIALING CLAIMS WOULD CONFLICT WITH MINNESOTA LAW AND UNDERMINE PUBLIC POLICY.

Minnesota's Peer Review Statute broadly protects the confidentiality of records and proceedings of peer review entities. *Amaral v. St. Cloud Hospital*, 598 N.W.2d 379, 384 (Minn. 1999). Minn. Stat. § 145.64 does not simply grant a privilege to hospitals and

other peer review organizations that they may choose to waive. Rather, the statute prohibits peer review entities from disclosing their records and proceedings under the penalty of criminal prosecution. Minn. Stat. § 145.66. This Court has recognized the significant role of confidentiality in improving health care and honored the legislature's intention that the medical profession be permitted to address medical mistakes and issues in a constructive manner without fear of defamation claims or other retribution. Negligent credentialing claims go to the heart of the peer review process and challenge the very confidentiality that undergirds the system. The appellate court properly determined there is no way to reconcile the clear terms of the Peer Review Statute with the defense and trial of negligent credentialing claims. This Court should decline to create a common law claim that will jeopardize important public policy.

A. The Peer Review Statute Establishes the Public Policy of Improving Health Care Through Confidential Peer Review.

What has come to be known as the "Peer Review Statute" is contained in Chapter 145 as part of comprehensive legislation governing health care in Minnesota. The Peer Review Statute reflects the legislature's determination that the public is best served and the quality of health care is improved by encouraging health care providers to gather and review information about patient care and treatment, candidly discuss their findings and exercise their professional judgment in making decisions about future patient care. The legislature broadly defined peer review organizations to include "an organization of professionals from a particular area or medical institution" that is established by an entity such as a hospital "to gather and review information relating to the care and treatment of

patients for the purposes of ... determining whether a professional shall be granted staff privileges in a medical institution..." Minn. Stat. § 145.61, subd. 5(i).⁵

The legislature recognized that the goal of promoting effective peer review that improves the quality of patient care is best advanced by permitting review organizations to operate in a confidential manner. To that end, the Peer Review Statute provides:

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

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

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

⁵ In addition to making privileging and credentialing decisions, hospital review organizations perform many other important functions including evaluating and improving the quality of health care, reducing mortality, gathering and providing information regarding disease treatment and prevention, publishing guidelines to improve the safety of patient care and reducing medical error. Minn. Stat. §§ 145.61, subd. 5 (a), (b), (c), (f) and (q).

section 145.64, of data and information acquired by a review committee or of what transpired at a review meeting, is a misdemeanor.” Minn. Stat. § 145.66.

This Court has recognized the Peer Review Statute’s important policy goals and the centrality of confidentiality to the peer review process. The Court first considered the Peer Review Statute in *Campbell v. St. Mary’s Hospital*, 312 Minn. 379, 252 N.W.2d 581 (Minn. 1977) where a physician sued the hospital’s review group for defamation and interference with business relationships. In rejecting Campbell’s claim based on immunity, the Court stated:

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

Id. at 389, 587. The Court further stated in *Kalish v. Mount Sinai Hospital*, 270 N.W.2d 783, 785 (Minn. 1978), that the Peer Review Statute “reflect[s] a legislative judgment that improvements in the quality of health care will be fostered by granting certain statutory protections to health care review organizations.”

Confidentiality is one of these statutory protections, and this Court consistently applies the Peer Review Statute to maintain the confidentiality of peer review records and proceedings. In *Amaral v. St. Cloud Hospital*, 598 N.W.2d at 388, where two physicians sought access to their own peer review information, the Court interpreted the provider exception narrowly to further the “overarching purpose of the peer review process, improving the quality of patient care[.]” The Court noted the reluctance of professionals to participate freely in peer review proceedings if full participation includes the

possibility of being compelled to testify against a colleague in a medical malpractice action and being subjected to a defamation suit by another professional. *Id.* at 388. In denying the two physicians' requests for their own peer review information, the Court held that their interests in obtaining information about themselves did not outweigh the strong public interest in effective peer review. *Id.*

B. This Court Should Decline to Exercise its Authority to Create a Common Law Negligent Credentialing Tort Because it Would Conflict with Established Public Policy.

This Court has the power to develop the common law through the creation of tort claims. *See, e.g., Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 233-34 (Minn. 1998). In *Lake*, the plaintiffs sued Wal-Mart on various invasion of privacy theories after an employee circulated nude photographs of the plaintiffs in their community. *Lake*, 582 N.W.2d at 233. The district court dismissed the privacy claims because Minnesota law did not recognize a common law tort action for invasion of privacy. *Id.* This Court observed that the common law must evolve over time as society itself changes: "It must be remembered that the common law is the result of growth, and that its development has been determined by the social needs of the community which it governs. It is the resultant of conflicting social forces, and those forces which are for the time dominant leave their impress upon the law." *Id.* at 234. In determining the common law, the *Lake* court looked to the law in other states and England. *Id.* After fully considering the nature of the privacy claims and existing law, this Court recognized three of the four proposed privacy torts. *Id.* at 235-36..

The *Lake* court's decision not to recognize a false light publicity tort is instructive. The Court declined to create this tort for two essential reasons: it was unnecessary and the tort would conflict with established law. Specifically, the Court noted that claims for false light publicity are similar to defamation claims but lack the well-developed restrictions that balance the interests in a free press and discourage frivolous claims. *Id.* at 236. The Court also expressed concern that false light claims would inhibit the free speech guaranteed by the First Amendment: "Although there may be some untrue and hurtful publicity that should be actionable under false light, the risk of chilling speech is too great to justify protection for this small category of false publication not protected under defamation." *Id.*

1. Negligent credentialing claims would conflict with Minnesota law and public policy.

The instant case presents concerns similar to those the *Lake* court considered when declining to recognize the false light publicity tort. First, creation of a negligent credentialing claim would conflict with the Peer Review Statute and the strong public policy supporting confidential peer review. This Court is not writing on a blank slate or considering negligent credentialing claims in a vacuum. The Minnesota legislature has spoken clearly on the importance of peer review to Minnesota's medical community and the people it serves. The Peer Review Statute, with confidentiality as its firm foundation, reflects the public policy of Minnesota. *Park Const. Co. v. Indep. Sch. Dist. No. 32*, 209 Minn. 182, 186, 296 N.W. 475, 477 (1941) ("Public policy, where the legislature has spoken, is what it has declared that policy to be.") In cases where the legislature has

spoken there is a strong presumption against changing the common law where the change would be contrary to public policy. *Kelly v. First Minneapolis Trust Co.*, 178 Minn. 215, 218, 226 N.W.696, 697 (1929).⁶

Here, the legislature has spoken clearly on the protection afforded to hospital review organizations with respect to credentialing decisions. The legislature expressly stated that individuals who participate in peer review are immune from tort liability in most cases and peer review records and proceedings must be held in strict confidence in virtually all cases.⁷ This is the public policy of Minnesota. There is no indication that the strong public policy of improving patient care through thoughtful and informed peer review has ebbed in the intervening years. Indeed, enactment of the Minnesota Adverse Health Care Events Reporting Act of 2003 underscores the importance the legislature places on confidential peer review.

As more fully set forth below, negligent credentialing claims are inherently incompatible with the strict confidentiality afforded the peer review process. The Peer Review Statute prevents review organizations from presenting **any evidence** about the process it followed in reaching its credentialing decision. The unfairness of subjecting a review organization to liability for actions it cannot describe or explain is evident. This

⁶ Principles of judicial restraint also militate against creating new tort claims which the legislature has not expressed or implied. *Bruegger v. Faribault County Sheriff's Dept.*, 497 N.W.2d 260, 262 (Minn. 1993).

⁷ The limited statutory exceptions permit disclosure of non-patient-identified aggregate data on medical errors, access to information about a professional's staff privileges when the professional is challenging a decision of the review organization, and production of information to the Commissioner of Health. Minn. Stat. §§ 145.64, subd's. 1(b), 2 and 5. None of these exceptions permit disclosure of confidential peer review information in connection with a negligent credentialing claim.

unfairness extends to the physicians who are the subject of such claims and cannot obtain favorable information from the review organization and face discovery and evidentiary issues that go far beyond the parameters of a medical negligence claim. These circumstances weigh heavily against establishment of a common law negligent credentialing claim.

Creation of a negligent credentialing claim would also conflict with existing common law concerning a hospital's responsibility for incidents that occur within its walls. While hospitals owe duties toward entrants to maintain their premises in a safe manner, Minnesota law does not impose liability on a hospital for a physician's conduct unless the physician is a hospital employee. *Moeller v. Hauser*, 237 Minn. 368, 378-79, 54 N.W.2d 639, 645-46 (1952). That is essentially what Appellants ask the Court to do in this case. As the Court of Appeals noted, adoption of the cause of action Appellants advocate conflicts with the common law precluding negligence claims against the employer of an independent contractor and would "have implications that far exceed the narrow focus of hospitals and independent physicians[.]" *Larson v. Wasemiller*, 718 N.W.2d at 466.

2. Negligent credentialing claims are not needed to promote accountability, reduce medical error or provide an avenue for recovery.

There is no need to recognize a negligent credentialing claim because Minnesota law already promotes the enhancement of medical care and provides individuals with avenues of relief against health care providers. As with the false light publicity claim the *Lake* court rejected, the legal claims that would be asserted in a negligent credentialing

claim are very similar to the existing medical malpractice claim individuals such as Appellants may assert against physicians and their employers in situations involving alleged medical negligence. Minnesota's medical malpractice statute does not cap or otherwise limit a plaintiff's monetary recovery, and there are no common law impediments to tort recovery. The absence of damage caps or other limitations on tort recovery distinguishes Minnesota from many other states and demonstrates additional tort theories are not necessary.

Appellants will likely respond that malpractice lawsuits may not fully compensate a claimant in a particular case due to any number of unique factors. It may be true that, as in *Lake*, the overlap between existing medical negligence jurisprudence and the proposed negligent credentialing cause of action is not precise. That is not required. The risk that a specific claimant may not make the same recovery on a medical malpractice claim as he might on a negligent credentialing claim is insufficient to justify jeopardizing the peer review process. The conflict between the proposed negligent credentialing claim and the Peer Review Statute and the strong public policy it embodies is substantial and irreconcilable. As in *Lake*, the Court should decline to create the common law claim Appellants propose.

In addition to the alternative remedies available to patients in cases involving claimed medical negligence, the care and treatment medical professionals provide is subject to scrutiny by the Minnesota Board of Medical Practice ("the Board"). Minn. Stat. § 147.02 vests the responsibility for licensing physicians such as Dr. Wasemiller with the Board. The legislature charged the Board "to protect the public from the

unprofessional, improper, incompetent, and unlawful practice of medicine[.]” Minn. Stat. § 147.001. The Board’s responsibilities include investigation of alleged performance deficiencies and the Board is authorized to impose discipline ranging from placing limitations on a physician’s practice to revoking her license. Minn. Stat. §§ 147.091, subd. 1b, Minn. Stat. § 147.141 (1) and (4). Given this rigorous oversight and existing medical negligence claims against physicians, hospitals and other medical providers, public policy does not compel recognition of a new common law tort claim.

Simply stated, the Court would be unable to fashion a negligent credentialing action that was procedurally and substantively fair to all of the parties to a negligent credentialing action without running afoul of the Peer Review Statute. Creation of a negligent credentialing claim would require amendment of the confidentiality, immunity and other provisions of the Peer Review Statute. Only the legislature can conduct the hearings, gather the information and fully examine and weigh the competing policy implications to determine whether such amendments would comport with the strong public policy embodied in the Peer Review Statute. As the Court noted in *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 808 (Minn. 1979), some proposed changes in the law are best left to the legislative process. This case presents one of those situations. Creation of a negligent credentialing claim should be left to the legislature.

3. The common law developed in other jurisdictions is not persuasive and does not aid the Court in construing Minnesota’s unique Peer Review Statute.

Appellants cite thirty-five cases from outside of Minnesota in an attempt to persuade this Court to reflexively adopt a cause of action for negligent credentialing.

(Appellants' Brief at 19-21). These cases are not instructive. In thirty-two of the cited cases the issue of peer review statutes or the confidentiality given to peer review proceedings is **not even mentioned**, let alone analyzed in any detail. None of the jurisdictions have peer review statutes that impose a criminal sanction for disclosing confidential information.

Of the three cases that do discuss the effect of a peer review statute on negligent credentialing claims, none is directly on point with the issues before this Court. In *Browning v. Burt*, 613 N.E.2d 993, 1001-03 (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 1007. *See also Greenwood v. Wierdsma*, 741 P.2d 1079, 1087-90 (Wyo. 1987) (court held that peer review privilege statute did not preclude negligent credentialing claims where statute only applied to the discussions, thoughts or decision-making processes of a peer review committee; no discussion of impact statute would 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, 167 (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. *Wheeler*, 582 A.2d at 167. Rather, the court held that the plaintiff's expert had not testified about matters protected by the peer review privilege. *Id.* 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 167, fn 3.

The other cases Appellants cite for the proposition that negligent credentialing claims may be fairly litigated while maintaining the confidentiality of peer review materials likewise prove to be inapposite and unpersuasive. (Appellants' Brief at 30-31) These cases focus on a **plaintiff's** ability to obtain sufficient evidence to prosecute a negligent credentialing claim. *See Ex Parte Qureshi*, 768 So.2d 374 (Ala. 2000) (does not 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). Not one of these cases even mentions the significant unfairness to review organizations and physicians occasioned by defending claims without all of the pertinent information or without the ability to use the information.

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 Peer Review Statute itself and existing Minnesota case law provide a sound basis for this Court to conclude that negligent credentialing claims cannot lie in Minnesota.

4. The creation of a negligent credentialing claim would thwart the important public policy embodied in the Peer Review Statute.

Notably absent from Appellants' 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. This Court has 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.*, 312 Minn. at 389, 252 N.W.2d at 597; *Amaral v. St. Cloud Hospital*, 598 N.W.2d at 388. Creation of a negligent credentialing claim will necessarily threaten the integrity of the process by eroding the confidentiality component.

Appellants argue that recognition of a negligent credentialing claim will somehow enhance patient safety but they fail to address precisely how that would occur. (Appellants' Brief at 26). Moreover, Appellants fail to discuss how a negligent credentialing action would proceed without implicating the overarching policies advanced by the Peer Review Statute. Protecting the strict confidentiality 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.

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. 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.

III. NEGLIGENT CREDENTIALING CLAIMS WOULD BE UNFAIR TO REVIEW ORGANIZATIONS AND PHYSICIANS.

Contrary to Appellants' suggestion, Dr. Wasemiller is not challenging the constitutionality of the Peer Review Statute. Rather, Dr. Wasemiller contends that it would be unfair to create a common law negligent credentialing cause of action because

the confidentiality mandated by the Peer Review Statute would prevent hospitals and physicians who are the subject of the review proceedings from fully defending against such claims. Because of the inherent unfairness to review organizations and physicians, the Court should defer to the legislature to consider the merits of a negligent credentialing action and how such an action could be reconciled with the existing statutory framework.

A. The Availability of Information From “Original Sources” does not Level the Playing Field Between the Parties to a Negligent Credentialing Claim.

Even if a negligent credentialing action were not barred outright by the Peer Review Statute, which Dr. Wasemiller contends it is, permitting such claims would unfairly prejudice physicians and peer review committees. Appellants’ 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 district court agreed that the Peer Review Statute “poses a handicap” for a peer review organization defending against such a claim, but then mistakenly concluded that both parties would be equally prejudiced: “the restriction necessarily ties one of the Plaintiffs’ hands, as well. So, in that sense, the playing field is level.” (A. 36) The district 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.* The appellate court correctly rejected this conclusion and

Appellants' assertion that the availability of information from "original sources" negates any prejudice to defendants resulting from the confidentiality mandate. (A.19)

Allowing the claim to proceed with publicly available information would impose significantly greater difficulty and prejudice for the defending review organization and physician than the plaintiff. A plaintiff could present negative evidence about a physician and argue that the review organization failed to obtain critical information or failed to properly evaluate the information. The review organization 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. Minn. Stat. § 145.64, sub. 1(a) ("data and information acquired by a review organization . . . shall be held in confidence.")

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

1. Negligent credentialing claims would have a chilling effect on participation in the peer review process.

A peer review organization 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 review organization may opt to violate the law and disclose information, significantly threatens the integrity and very existence 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 face unprecedented liability, not just for defamation claims but other tort claims as

well. Once confidentiality is breached for one purpose, participants in review organizations will lose their faith in the system. Physicians would no longer be able to express themselves fully and candidly and, ultimately, would be discouraged from even participating in the process. Peer review proceedings would no longer be an open discussion about improving patient care in which “one professional may speak freely about a colleague’s performance without fear of retaliation.” *Amaral*, 598 N.W.2d. at 388. Without full participation of physicians and other medical professionals in peer review, it will lose its effectiveness and patient care in Minnesota will suffer.

2. Negligent credentialing claims 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 Hospital*, 586 N.W.2d at 387 (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 unfair negative information the plaintiff presents but be unable to offer or even discover importance evidence in the physician’s favor.

The Court need look no further than Appellants’ unauthorized attempt to place their negative, one-sided version of “facts” before the Court in their Supplemental Record to appreciate the prejudice physicians would face. Presumably, Appellants would seek to

introduce evidence concerning everything from Dr. Wasemiller's prior litigation experience to his insurance status, marital difficulties and financial situation. The very type of evidence a plaintiff would need to introduce to support a negligent credentialing claim would destroy any chance the involved physician would have to receive a fair trial on the issue of medical negligence in the particular case.

The unfair prejudice would occur at both the discovery and trial stages of a negligent credentialing case. Appellants' own discovery efforts in this case illustrate the scope of pre-trial inquiry into a physician's past personal and professional history that is unprecedented under Minnesota law. As the district court stated when certifying the issues in this case as important and doubtful, a negligent credentialing claim "is a fairly devastating allegation in a small rural community. . . [i]f it is not a viable cause of action, the harm to reputation and livelihood caused by trying the case . . . might not be capable of being undone." (A. 40)

First, the plaintiff will serve discovery upon the physician concerning areas that would otherwise be irrelevant to the malpractice claim, thereby increasing the costs of litigation and hampering the physician's defense. A plaintiff would likely conduct fishing expeditions during discovery in order to exert pressure on a physician to settle the malpractice claim. Resisting such potentially limitless discovery would be nearly impossible given the broad scope of evidence relevant to a 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 because 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 short, the extent of discovery and scope of the allegedly “relevant” evidence in a combined negligent credentialing and malpractice case would go well beyond the parameters of a malpractice case. 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 the departure directly caused an injury. *Walton v. Jones*, 286 N.W.2d 710, 714 (Minn. 1979); *Leubner v. Sterner*, 493 N.W.2d 119, 121 (Minn. 1992). In other words, the focus is on whether the physician exercised the degree of care with a specific patient that a reasonable physician would exercise under like circumstances. These essential elements of a malpractice claim establish the parameters of what evidence is relevant and admissible. Minn.R.Evid. 401.

Trying a negligent credentialing claim along side the malpractice case would represent a substantial and prejudicial departure from established law. For example, a defendant physician’s board certification status is generally not admissible at trial because it is irrelevant to the issue of whether the physician’s conduct was commensurate with what a reasonable physician would do, 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 physician’s failure to pass board certification

examinations 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 Alaska 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, evidence regarding prior lawsuits involving a physician are generally excluded because such evidence is prejudicial and irrelevant and may cause undue delay, confuse the issues and mislead the jury. See, e.g., *Barr v. Plastic Surgery Consultants, Ltd.*, 760 S.W.2d 585, 587 (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); *see also Heshelman v. Lombardi*, 454 N.W.2d 603, 609 (Mich. Ct. App. 1990) (evidence that expert witness had been named as defendant in prior medical malpractice action was not admissible for impeachment purposes).

The Minnesota Court of Appeals properly determined evidence of prior Board discipline or restrictions placed on a physician is similarly inadmissible. *Shea v. Esensten*, 622 N.W.2d 130, 137 (Minn. Ct. App. 2001) (evidence that a physician has been professionally disciplined is inadmissible impeachment evidence). *See also 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 also irrelevant to a medical malpractice claim. *See Shea*, 622 N.W.2d at 136 (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. *Id.* The trial court excluded the evidence as irrelevant and prejudicial. *Id.* at 133. The *Shea* 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 135. In addition, the evidence was not admissible under Minn.R.Evid. 403 because it would confuse, mislead, and prejudice a jury. *Id.* at 136.

Contrary to Appellants’ suggestion, a physician’s claim or discipline history is not relevant to a negligent nondisclosure claim. The informed consent claim focuses on whether a physician disclosed visits associated with a particular treatment and the existence of alternative treatment plans. *Bigay v. Garvey*, 575 N.W.2d 107, 111 n.3 (Minn. 1998). The law does not impose a duty on physicians to disclose personal or professional information as Appellants contend. Moreover, such information does not go to the physician’s “credibility” in any meaningful sense.

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 facing malpractice claims. Appellants’ suggestion that the confusion and prejudice that would surely occur if a physician such as Dr. Wasemiller found his entire professional career and personal life “on trial” in connection with a malpractice claim could be addressed by a curative or limiting instruction fails upon even a cursory analysis. As a practical matter, jurors cannot listen to the kind of extensive historical evidence necessary to prove a negligent credentialing cause of action and turn around and forget all of it when deciding whether the physician’s conduct conformed with the standard of care on a particular day with a specific patient. Curative or limiting instructions are primarily designed to address evidentiary error. *State v. Forcier*, 420 N.W.2d 884, 886-87 (Minn. 1988). A cautionary instruction is not sufficient where the evidence admitted “is of such as exceptionally prejudicial character that its withdrawal

from the jury cannot remove the harmful effects caused by its admission[.]” *State v. Bergland*, 290 Minn. 249, 254, 187 N.W.2d 622, 626 (1971). Limiting instructions cannot remedy the substantial prejudice that occurs when two or more claims that simply cannot be fairly joined are tried in a single case.

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. Rule 42.02 of the Minnesota Rules of Civil Procedure provides a 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.” The court must exercise its discretion and bifurcate actions for trial if undue confusion or prejudice might result from a single trial. *Fitzer v. Bloom*, 253 N.W.2d 395, 401-02 (Minn. 1977).

Even if the district court is willing to bifurcate the trial, a number of procedural problems would exist. First, the proper scope of discovery would present an issue. Would a plaintiff be allowed to conduct 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 not subject to 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, the scope and timing of bifurcation presents a dilemma. Would the malpractice case proceed to trial first, without any evidence regarding the credentialing claim? Appellants argue negligent credentialing 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 increase the expense of litigation and, eventually, the costs of health care. Appellants’ attempt to minimize these issues does not negate these realities.

IV. THE PEER REVIEW STATUTE'S LIMITATION OF LIABILITY FURTHER EVINCES THE LEGISLATURE'S INTENT TO PRECLUDE NEGLIGENT CREDENTIALING CLAIMS.

The Peer Review Statute expressly limits the potential liability of review organizations and their participants for general negligence and other tort claims:

§ 145.63. Review organizations, advisory capacity; immunity.

No review organization and no person who is a member or employee, director, or officer of, who acts in an advisory capacity to, or who furnishes counsel or services to, a review organization shall be liable for damages or other relief in any action brought by a person or persons whose activities have been or are being scrutinized or reviewed by 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. 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....

Minn. Stat. § 145.63. The immunity provision restricts the right of persons who are the subject of peer review to bring a claim against the review organization to cases involving malice. The limitation of liability provision significantly narrows the universe of claims other persons may bring against review organizations.

This Court applied the immunity provision in favor of a review organization and its members in *Campbell v. St. Mary's Hospital*, finding that a physician whose surgical privileges were terminated could not assert tort claims against the individual review board members in the absence of malice. 312 Minn. at 389, 252 N.W.2d at 587. The *Campbell* Court noted the legislature's clear intent to "encourage the medical profession

to police its own activities with a minimum of judicial interference.” *See also Doctor’s Med. Clinic v. City of Jackson*, 581 N.W.2d 30, 31 (Minn. 1998) (affirming summary judgment against physician in suit against hospital and members of review board based in part on the immunity afforded by Minn. Stat. § 145.63).

This Court has not addressed the limited liability provision. The Court of Appeals correctly held that the statute does not fully immunize review organizations and participants from all liability but limits their potential liability to cases where a review organization fails to act with a “reasonable belief” based on known facts after making “reasonable efforts” to obtain information. (A.23) This limit is significant. The scope of permitted claims against review organizations is far narrower than claims based on a general failure to exercise reasonable care. Here, Appellants did not allege St. Francis failed to act in the reasonable belief that its decision to grant credentials to Dr. Wasemiller was warranted or that St. Francis failed to make reasonable efforts to ascertain the relevant facts. Rather, Appellants asserted a claim that sounds in general negligence. As such, Appellants’ claims do not fall within the narrow scope of liability claims permitted by Minn. Stat. § 145.63. While Dr. Wasemiller recommends that the Court affirm the appellate court’s answers to the second certified question, Appellants’ claims fail under the Statute’s clear terms.

The Peer Review Statute’s limitation of liability provision further demonstrates the inherent conflict and tension between the Statute and the proposed common law negligent credentialing claim. Because a review organization may not disclose any information about the documents it obtained and reviewed and the process it followed in evaluating

the documents and other information, it would be virtually impossible for a Court and/or jury to determine whether a review committee acted with a “reasonable belief” based on facts known after making “reasonable efforts” to obtain information. The Court should leave to the legislature the decision of whether and how to fashion a negligent credentialing action.

CONCLUSION

No one can disagree with Appellants’ expressed desire to improve the quality of health care in Minnesota. The legislature determined long ago that peer review fosters this important goal. This Court has long recognized the strong public policy established by the Peer Review Statute, including the legislature’s determination that confidentiality is essential to maintaining the integrity and effectiveness of peer review. Recognition of a negligent credentialing claim would threaten public policy, violate the law and be fundamentally unfair to physicians. The Court should answer the second certified question in the negative. Minnesota law does not and should not permit negligent credentialing claims.

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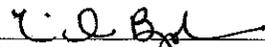
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CERTIFICATE

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 8,688 words, as determined by employing the word counter of the word-processing software, Microsoft Word XP, used to prepare it.

Dated: December 18, 2006

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