

State of Minnesota
In Supreme Court

MARY LARSON AND MICHAEL LARSON,
Appellants,

vs.

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),

MINNESOTA HOSPITAL ASSOCIATION, MINNESOTA MEDICAL
ASSOCIATION, AND AMERICAN MEDICAL ASSOCIATION

MINNESOTA DEFENSE LAWYERS ASSOCIATION,
Amicus Curiae.

BRIEF AND APPENDIX OF RESPONDENT
ST. FRANCIS MEDICAL CENTER

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

Terry Wade, Esq. (#113426)
William Maddix, Esq. (#188530)
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402
(612) 349-8500

Attorneys for Appellants

GERAGHTY, O'LOUGHLIN
& KENNEY

Professional Association
Robert Mahoney, Esq. (#66643)
Mark W. Hardy, Esq. (#0311121)
Suite 1400 Ecolab University Center
386 North Wabasha Street
Saint Paul, Minnesota 55102
(651) 291-1177

Attorneys for Respondent
St. Francis Medical Center

(Additional Counsel Listed on Following Page)

BASSFORD REMELE

Mark Whitmore, Esq. (#232439)
Charles E. Lundberg, Esq. (#6502X)
33 South Sixth Street
Suite 3800
Minneapolis, Minnesota 55402
(612) 333-3000

*Attorneys for Amicus Minnesota
Hospital Association, Minnesota
Medical Association and American
Medical Association*

RIDER BENNETT, L.L.P.

Diane B. Bratvold, Esq. (#18696X)
33 South Sixth Street
Suite 4900
Minneapolis, Minnesota 55402
(612) 340-8900

*Attorneys for Amicus Minnesota
Defense Lawyers Association*

MEAGHER & GEER, P.L.L.P.

Rodger A. Hagen, Esq. (#158860)
33 South Sixth Street
Suite 4200
Minneapolis, Minnesota 55402
(612) 338-0661

*Attorneys for Defendants Paul Scot
Wasemiller, M.D. and Dakota Clinic
Ltd.*

LARSON KING, L.L.P.

Louise Dovre Bjorkman (#166947)
Mark A. Solheim, Esq. (#213226)
Charles A. Gross, Esq. (#254174)
2800 Wells Fargo Place
30 East Seventh Street
Saint Paul, Minnesota 55101
(651) 312-6503

And

VOGEL LAW FIRM

M. Daniel Vogel, Esq.
Post Office Box 1389
Fargo, ND 58107-1389
(701) 237-6983

*Attorneys for Respondent
James Preston Wasemiller, M.D.*

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STATEMENT OF THE ISSUE

I. SHOULD THE STATE OF MINNESOTA ADOPT A COMMON LAW CAUSE OF ACTION FOR NEGLIGENT CREDENTIALING OR PRIVILEGING OF A PHYSICIAN AGAINST A HOSPITAL OR OTHER REVIEW ORGANIZATION?

The Minnesota Court of Appeals, in a published decision, held in the negative.

Apposite Authorities:

- Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231 (Minn. 1998)
- Amaral v. Saint Cloud Area Hosp., 598 N.W.2d 379 (Minn. 1999)
- In re Fairview-Univ. Med. Ctr., 590 N.W.2d 150 (Minn. Ct. App. 1999)
- Campbell v. St. Mary's Hosp., 312 Minn. 379, 252 N.W.2d 581 (1977)
- Minn. Stat. § 145.64
- Minn. Stat. § 145.63
- Minn. Stat. § 145.66
- Minn. Stat. § 145.61

STATEMENT OF THE CASE

On March 19, 2003, plaintiffs Mary Larson and Michael Larson (“Appellants”) commenced a medical malpractice lawsuit against defendants Dr. James Wasemiller, Dr. Paul Wasemiller and the Dakota Clinic, Ltd. In their Complaint, Appellants claimed that both doctors were negligent in providing post-operative care to Mary Larson following surgery performed by Dr. James Wasemiller to treat Ms. Larson’s morbid obesity.

On November 17, 2004, the district court granted Appellants’ motion to amend the Complaint to add St. Francis Medical Center as a defendant. (Appellants’ Appendix (“A.A.”) 60-61.)

On or about November 23, 2004, Appellants served an Amended Complaint on St. Francis Medical Center. In the Amended Complaint Appellants claimed that St. Francis Medical Center was negligent for granting Dr. James Wasemiller privileges to perform bariatric surgery¹ at the hospital. Appellants also claimed that St. Francis and the other defendants were engaged in a joint enterprise and/or joint venture with respect to the provision of medical care to Ms. Larson. (A.A. 48, 56-57.)

On May 6, 2005, St. Francis Medical Center brought a motion for dismissal of the Amended Complaint pursuant to Minn. R. Civ. P. 12.02(e) on the ground that the claims of negligent credentialing and joint venture/joint enterprise failed to state a claim upon which relief can be granted. (A.A. 41.)

¹ Bariatrics is the treatment of obesity. Stedman’s Medical Dictionary, 26th Edition, p. 189.

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

- Does the State of Minnesota recognize a common law cause of action of negligent credentialing/privileging of a physician against a hospital or other review organization?
- Do Minn. Stat. §§ 145.63–145.64 grant immunity from, or otherwise limit liability of, a hospital or other review organization for a claim of negligent credentialing/privileging of a physician?

(A.A. 26-40.)

St. Francis Medical Center and James P. Wasemiller appealed the decision of the district court. (A.A. 9.) On July 25, 2006, the Court of Appeals issued its decision answering the certified questions. (A.A. 9-24.) As to the first question, the Court of Appeals held that Minnesota does not recognize a common law cause of action for negligent credentialing or privileging. (A.A. 24.) As to the second question, the Court of Appeals held that Minn. Stat. § 145.63 does not grant review organizations immunity from negligent credentialing or privileging actions, but it does limit liability to actions or recommendations 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. (A.A. 24.) The court further concluded that Minn. Stat. § 145.64 “limits the evidence that could be used to support or defend against such a claim in a manner that appears to affect the fundamental fairness of recognizing such a

claim as the most effective means of monitoring the credentialing or privileging process.”
(A.A. 24.)

On October 17, 2006 this Court granted Appellants’ Petition for Review of the decision of the Court of Appeals. (A.A. 1.) Appellants seek review of the answer of the Court of Appeals to the first certified question wherein the court declined to adopt a new common law cause of action in the State of Minnesota for negligent credentialing or privileging. (Appellants’ Brief, at 4-5, 18-27, 38.)

STATEMENT OF THE FACTS

I. FACTS STATED BY APPELLANTS IMPROPERLY GO BEYOND THE FACTS STATED IN THE COMPLAINT.

St. Francis Medical Center’s motion before the district court challenged only the legal sufficiency of a claim of negligent credentialing. For purposes of the motion, it was assumed that all the facts alleged in the Complaint were true. (A.A. 27-28.) The district court’s Order addressed only the legal sufficiency of the claim of negligent credentialing. In doing so it did not consider any facts outside of the Complaint. (A.A. 25-40.) Likewise, the Court of Appeals explicitly stated in its decision that it had not considered any facts beyond those stated in the pleadings because the matter had been decided by the district court pursuant to a motion to dismiss for failure to state a claim. Larson v. Wasemiller, 718 N.W.2d 461, 464 (Minn. Ct. App. 2006). This Court, in reviewing the decision of the Court of Appeals should determine only the legal sufficiency of the claim of negligent credentialing or privileging; that is, whether under any set of facts, negligent credentialing is a recognized cause of action. Royal Realty Co. v. Levin, 244 Minn. 288,

290, 69 N.W.2d 667, 670 (Minn. 1955) (“the only question before us is whether the complaint sets forth a legally sufficient claim for relief. It is immaterial to our consideration here whether or not the plaintiff can prove the facts alleged.”)

II. FACTUAL ALLEGATIONS MADE IN APPELLANTS’ BRIEF ARE NOT PROVIDED IN A FAIR AND CANDID MANNER.

In addition to improperly stating facts outside of their own Complaint, Appellants do so in a manner that is not fair or candid, as required by Minn. R. Civ. App. 128.02, subd. 1(c) (“The facts must be stated fairly, with complete candor, and as concisely as possible.”). Specifically, they omit the following information:

- The claims of negligent care are disputed. Dr. Wasemiller testified in his deposition that in his opinion the post-operative care he provided to Ms. Larson was reasonable and that there was no unreasonable delay in diagnosing the gastric leak. (S.R. 36; J. Wasemiller Depo., at 256-257, 259, 260, 261-262.) The reasonableness of Dr. Wasemiller’s care of Ms. Larson is supported by expert witness Dr. Paul Severson. Dr. Severson is a practicing general surgeon in Crosby, Minnesota. He has 21 years of private practice experience. He will testify that the post-operative care provided by Dr. Wasemiller was reasonable and that there was no delay in diagnosing the gastric leak. (R.A. 1-2; Defendant Wasemiller’s Supplemental Answers to Plaintiffs’ Interrogatories.)
- Dr. Wasemiller did more than just “attend” Loma Linda University Medical School. He timely and successfully completed the 4-year medical school program

and obtained a Medical Degree from that University in 1972. (S.R.36; J. Wasemiller Depo., at 9.)

- Dr. Wasemiller timely and successfully completed a 4-year general surgery residency program at Loma Linda University in 1976, and served as Chief Resident in his final year. (S.R. 36, Ex. D; J. Wasemiller Depo., at 11, 23-24.) Upon graduation from medical school, Dr. Wasemiller started a surgical residency at Kettering Memorial Hospital in Ohio and successfully completed the first 2 years of that program. (R.A. 13.) He then transferred back to Loma Linda University for the final 2 years because he had the opportunity to do so, not because of any problems with his performance. (S.R. 36; J. Wasemiller Depo., at 13, and R.A. 13,14.)
- Dr. Wasemiller has practiced medicine continuously from 1976 to the present – a period of 29 years. During this time he has performed approximately 100 gastric bypass surgeries. (S.R. 36; J. Wasemiller Depo., at 22.) His complication rate is 3%. (S.R. 36; J. Wasemiller Depo., at 155.) This complication rate is significantly lower than the national complication rate of 10%, as acknowledged by the National Institute of Health in its Consensus Statement On Gastrointestinal Surgery for Severe Obesity, and also acknowledged by Respondents' expert. (S.R. 24.)
- On of July 8, 1995, the Minnesota Board of Medical Practice removed all restrictions on Dr. Wasemiller's medical license and reinstated Dr. Wasemiller's unconditional license to practice medicine. From July 8, 1995 through the time he

treated Mary Larson in 2002, Dr. Wasemiller maintained his unconditional license to practice medicine without any restrictions. (S.R. 36; J. Wasemiller Depo., at 47,60-63, 66,68,69-70; and, Depo. Ex. No.1.)

- Prior to treating Mrs. Larson, Dr. Wasemiller had been named as a defendant in ten medical malpractice cases over a time span of 26 years. Of those cases, two resulted in verdicts in favor of Dr. Wasemiller, one was dismissed, one resulted in a settlement of \$3,500, and one resulted in a settlement of \$13,500. (S.R. 36; J. Wasemiller Depo., at 104, 107; and, S.R. 117.) Two cases involved complications following gastric bypass surgery: one performed in 1984 at St. Francis Medical Center, and the other performed in 2000 at a hospital in North Dakota. Both cases were settled without any finding that Dr. Wasemiller's was negligent in providing medical care. (S.R. 36; J. Wasemiller Depo., at 114; and, S.R. 117.)

SUMMARY OF THE ARGUMENT

The Minnesota Supreme Court has the power to adopt or decline to adopt common law causes of action new to the State of Minnesota. The Court may decline to adopt new common law doctrine where the proposed doctrine conflicts with public policy or is not adapted to conditions existing in the state. Appellants argue that the Court of Appeals erred because it failed to follow other jurisdictions with peer review statutes that have recognized negligent credentialing or privileging as a cause of action. Contrary to the assertions made in Appellants' Brief, however, when considering the adoption of a new common law tort, this Court looks at more than simply whether other states have adopted the proposed cause of action. Rather, this Court primarily considers whether the new cause of action is adapted to conditions of the State of Minnesota and whether the new cause of action would promote or conflict with public policy in the state.

This Court should not adopt a common law cause of action for negligent credentialing or privileging because such a cause of action is not adapted to conditions in Minnesota and would conflict with public policy.

A cause of action for negligent credentialing or privileging cannot co-exist with the strict confidentiality requirements or limitations on liability created by Minnesota's peer review statutes. The strict confidentiality provisions of Minn. Stat. § 145.64 would preclude hospitals from defending against claims of negligent credentialing or privileging. No other state has a peer review statute which imposes criminal liability on review organizations or their members for disclosure of data and information acquired by review organizations or for disclosure of anything that transpires at meetings of review

organizations. See Minn. Stat. §§ 145.64 and 145.66. The Minnesota legislature has thus created a statutory impediment to fair litigation of negligent credentialing claims unique among the jurisdictions in which claims of negligent credentialing are actionable. Additionally, the liability limitations created by Minn. Stat. § 145.63 subd. 1 logically preclude a cause of action for negligent credentialing or privileging.

A new tort for negligent credentialing or privileging would fail to provide any substantive benefit to Minnesota's existing tort law system, but would substantially interfere with, and undermine, the legislature's sound policy choice to improve and ensure quality health care through confidential peer review. Adoption of a negligent credentialing or privileging cause of action would have a chilling effect on peer review by discouraging openness and candor vital to effective peer review, and by discouraging physicians and other health care professionals from participating in peer review in the first place. Adoption of a cause of action for negligent credentialing or privileging would also raise difficult questions regarding fair litigation of such claims.

Because the legislature has chosen confidential peer review as the most appropriate means to improve and maintain the quality of healthcare in Minnesota, and because claims of negligent credentialing or privileging could not be fairly litigated under the strict confidentiality mandates of Minnesota's peer review statutes, the question of whether Minnesota should adopt a new cause of action for negligent credentialing or privileging should be resolved by the legislative process. Accordingly, this Court should leave undisturbed the decision of the Court of Appeals not to adopt a new common law cause of action for negligent credentialing or privileging.

ARGUMENT

I. STANDARD OF REVIEW

A Rule 12.02(e) motion to dismiss for failure to state a claim tests only the legal sufficiency of the claim as stated. The focus of a motion to dismiss for failure to state a claim is the adequacy of the Complaint. Group Health Plan, Inc. v. Philip Morris Inc., 621 N.W.2d 2, 14 (Minn. 2001). The district court may not go outside of the pleadings, but must examine only the claim as stated by the party asserting it. Defenders of Wildlife v. Ventura, 632 N.W.2d 707, 711 (Minn. Ct. App. 2001).

In response to St. Francis Medical Center's Rule 12.02(e) motion to dismiss, Appellants' memorandum of law to the district court included a number of factual allegations regarding Dr. James Wasemiller and St. Francis Medical Center that had not been included in plaintiffs' Complaint. It is clear from the district court's Order denying St. Francis Medical Center's motion to dismiss that it did not consider facts outside of those pleaded in plaintiff's Complaint. (A.A. 29.)

Nonetheless, Appellants improperly included in their brief to the Court of Appeals, numerous factual allegations outside of those pled in their Complaint in their brief to this Court. The Court of Appeals explicitly stated in its decision that it had not considered any facts beyond those stated in the pleadings because the matter had been decided by the district court pursuant to a motion to dismiss for failure to state a claim. Larson v. Wasemiller, 718 N.W.2d 461, 464 (Minn. Ct. App. 2006). Nonetheless, Appellants improperly include over ten pages of factual allegation outside of their Complaint in their brief to this Court. (Appellants' Brief, at 5-15.) This Court should

ignore the pages of factual allegations included knowingly and improperly by Appellants in their Brief and should determine only the legal sufficiency of the claim of negligent credentialing or privileging. Royal Realty Co., 244 Minn., at 290, 69 N.W. 2d, at 670.

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

II. THIS COURT MAY DECLINE TO ADOPT NEW COMMON LAW CAUSES OF ACTION THAT CONFLICT WITH PUBLIC POLICY OR ARE NOT ADAPTED TO CONDITIONS OF THE STATE OF MINNESOTA.

The Minnesota Supreme Court has the power to adopt or reject common law causes of action new to the State of Minnesota. See Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231 (Minn. 1998) (adopting the tort of invasion of privacy, but declining to adopt a cause of action for false light publicity). This Court "may modify the common law, adopting such of its principles as are applicable and rejecting such others as are inapplicable." Silesky v. Kelman, 281 Minn. 431, 433, 161 N.W.2d 631, 632 (Minn. 1968) (overruled on other grounds by Anderson v. Stream, 295 N.W.2d 595, 601 (Minn. 1980)). This Court may abolish existing common law doctrine or decline to adopt new common law doctrine where the common law is not "adapted to conditions" existing in

the state. See Mattfeld v. Nester, 226 Minn. 106, 135, 32 N.W.2d 291, 310 (Minn. 1948); Jung v. St. Paul Fire Dep't Relief Ass'n, 223 Minn. 402, 404, 27 N.W.2d 151 (Minn. 1947); Campion v. Village of Graceville, 148 Minn. 398, 232 N.W. 917 (Minn. 1930); State v. Storey, 182 N.W. 613 (Minn. 1921).

Contrary to the assertions made in Appellants' Brief, when considering the adoption of a new common law tort this Court looks at more than simply whether other states have adopted the proposed cause of action and instead primarily considers whether the new cause of action would promote or conflict with public policy in the state of Minnesota. See Salin v. Kloempken, 322 N.W.2d 736, 737 (Minn. 1982) (whether to adopt a cause of action for loss of parental consortium in personal injury cases is a question of public policy.) Public policy has been defined as "matters regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society." State v. Stone, 572 N.W.2d 725, 730, fn. 5 (Minn. 1997).

This is precisely the method this Court followed in Wal-Mart when it adopted one new common law cause of action and declined to adopt another new cause of action. See Wal-Mart Stores Inc., 582 N.W.2d, at 231. In Wal-Mart this Court adopted three variations of the tort of invasion of privacy (intrusion upon seclusion, appropriation, and publication of private facts), but declined to adopt a fourth: false light publicity. Id. at 235. In adopting the tort of invasion of privacy the Court followed a majority of jurisdictions which had adopted the cause of action prior to Minnesota. Id. at 234. In deciding not to adopt the tort of false light publicity, however, the Court declined to follow the majority of jurisdictions that had adopted that cause of action. See Bueno v.

Denver Publishing Co., 32 P.3d 491, 495 (Colo. App. 2001) (citing to cases in 24 states indicating recognition of the cause of action prior to this Court's decision in Wal-Mart); see also Denver Publishing Co. v. Bueno, 54 P.3d 893, 897 (Colo. 2002) (citing to cases in an additional 2 states indicating recognition of the cause of action prior to this Court's decision in Wal-Mart).

Central to the Court's decisions in Wal-Mart, to adopt the tort of invasion of privacy and not to adopt the tort of false light publicity, was the Court's consideration of whether each cause of action would promote or conflict with public policy. In support of its decision to adopt a cause of action for invasion of privacy, the Court's opinion includes a detailed discussion of the importance of privacy as a component of personal liberty, going so far as to state: "the heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close." Wal-Mart Stores, Inc., 582 N.W.2d, at 234-35. The Court's opinion also includes detailed discussion of reasons the Court declined to adopt a cause of action for false light publicity including: concerns that the cause of action would conflict with constitutional guarantees of free speech, as well as the concern that the tort would bear a similarity to the tort of defamation without the common law and statutory limitations and privileges that apply to defamation claims. Id. at 234-35.

Thus, this Court should not focus simply on whether other states have adopted a common law cause of action for negligent credentialing or privileging, but rather on whether adoption of such a cause of action in Minnesota is appropriate given the overriding and broad scope of Minnesota's peer review statutes, the clear legislative and

judicial policy favoring confidential peer review as the chosen means to improve and ensure quality health care in Minnesota, the significant erosion of peer review that will occur should the state adopt a cause of action for negligent credentialing or privileging, and the thorny issues of fairness that would arise regarding litigation of such claims.

III. THIS COURT SHOULD NOT ADOPT A COMMON LAW CAUSE OF ACTION FOR NEGLIGENT CREDENTIALING OR PRIVILEGING BECAUSE SUCH A CAUSE OF ACTION WOULD CONFLICT WITH PUBLIC POLICY AND IS NOT ADAPTED TO CONDITIONS OF THE STATE OF MINNESOTA.

A new common law cause of action for negligent credentialing or privileging cannot co-exist with the strict confidentiality requirements or limitations on liability created by Minnesota's peer review statutes. Adoption of a negligent credentialing or privileging cause of action would have a chilling effect on peer review by discouraging openness and candor vital to effective peer review and by discouraging physicians and other health care professionals from participating in peer review in the first place. A new tort for negligent credentialing or privileging would fail to provide any substantive benefit to Minnesota's existing tort law system, but would substantially interfere with, and undermine, the legislative policy choice to improve and ensure quality health care through confidential peer review. Adoption of a cause of action for negligent credentialing or privileging would also raise difficult questions regarding fair litigation of such claims in addition to the significant questions of fairness raised by the confidentiality requirements of the peer review statutes.

A. A CAUSE OF ACTION FOR NEGLIGENT CREDENTIALING OR PRIVILEGING CANNOT CO-EXIST WITH THE STRICT CONFIDENTIALITY REQUIREMENTS OR LIMITATIONS ON LIABILITY CREATED BY MINNESOTA'S PEER REVIEW STATUTES.

1. The Confidentiality Provisions of Minn. Stat. § 145.64 Preclude Hospitals from Defending Against Claims of Negligent Credentialing or Privileging.

a. The Plain Language of the Statute Precludes Adequate Defense to Negligent Credentialing or Privileging Claims.

Appellants urge the Court to adopt a new cause of action in Minnesota for negligent credentialing or privileging. In deciding whether to adopt a new cause of action for negligent credentialing, this Court does not need to look any further than the plain language of Minn. Stat. §§ 145.64 and 145.66 (making violation of the confidentiality provisions of Minn. Stat. § 145.64 a crime) to determine that creation of a negligent credentialing or privileging cause of action would create an irreconcilable conflict between the strict confidentiality mandates of the peer review statutes and the fundamental right of a hospital or review committee to defend itself against such claims.

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

Subdivision 1. Data and information. (a) . . . *data and information acquired by a review organization, in the exercise of its duties and functions, or by an individual or other entity acting at the direction of a review organization, shall be held in confidence, shall not be disclosed to anyone except to the extent necessary to carry out one or more of the purposes of the review organization, and shall not be subject to subpoena or discovery. No person described in section 145.63 shall disclose what transpired at a meeting of a review organization except to the extent*

necessary to carry out one or more of the purposes of a review organization. The proceedings and records of a review organization shall not be subject to discovery or introduction into evidence in any civil action against a professional arising out of the matter or matters which are the subject of consideration by the review organization. Information, documents or records otherwise available from original sources shall not be immune from discovery or use in any civil action merely because they were presented during proceedings of a review organization, nor shall any person who testified before a review organization or who is a member of it be prevented from testifying as to matters within the person's knowledge, but a witness cannot be asked about the witness' testimony before a review organization or opinions formed by the witness as a result of its hearings. For purposes of this subdivision, records of a review organization include Internet-based data derived from data shared for the purposes of the standardized incident reporting system described in section 145.61, subdivision 5, clause (q), and reports submitted electronically in compliance with sections 144.706 to 144.7069.

* * *

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

* * *

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

A review organization is defined broadly under Minn. Stat. § 145.61 and includes “an organization of professionals from a particular . . . medical institution . . .” whose duties include “. . . determining whether a professional shall be granted staff privileges in a medical institution. . .” Minn. Stat. § 145.61, subd. 5(i). Accordingly, St. Francis’ credentialing committee is subject to the requirements of the confidentiality provisions of Minn. Stat. § 145.64.

The legislature has made violation of the confidentiality provisions of Minn. Stat.

§ 145.64 a crime:

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

Minn. Stat. § 145.66.

By definition, a negligent credentialing claim against a hospital is either a claim that: 1) the hospital did not conduct a reasonable investigation of the physician, or, 2) even if the investigation was reasonable, the decision to grant privileges was unreasonable.

Where a claim is based upon allegations of unreasonable investigation, the key issue is what the hospital *should have known*. The only way a hospital can defend itself against such a claim is to establish the facts that the hospital *actually knew*. Minn. Stat. § 145.64, however, unambiguously prohibits a hospital from disclosing what it *actually knew*. See Minn. Stat. § 145.64. Accordingly, there is no way a hospital could defend itself against a claim that it negligently investigated a physician.

Where a claim is based upon allegations that a hospital made an unreasonable credentialing or privileging decision, the issue becomes the reasonableness of the decision. Determination of the reasonableness of a credentialing or privileging decision naturally hinges upon the processes by which the decision was made, and the outcomes of the decision. Thus, defense against a claim that a credentialing or privileging decision was unreasonable, would require disclosure of information about the deliberative process

by which the credentialing or privileging decision was made, and of the ultimate outcome of the credentialing or privileging process.² Minn. Stat. § 145.64, however, clearly prohibits disclosure of the deliberative processes by which the credentialing or privileging decision was made and the outcome of the decision, thereby precluding hospitals from defending themselves against claims of negligent credentialing or privileging based upon allegations that the decision was made unreasonably.

Both of these arguments were clearly asserted in St. Francis' briefs to the Court of Appeals. The Court of Appeals, in its decision in this case, emphasized that Minn. Stat. § 145.64 "limits the evidence that could be used to support or defend against such a claim in a manner that appears to affect the fundamental fairness of recognizing such a claim as the most effective means of monitoring the credentialing or privileging process." Larson, 718 N.W.2d, at 470. Appellants' Brief to this Court, however, fails to offer any direct response to the Respondents' arguments or to the decision of the Court of Appeals and instead argues simply and unpersuasively that both plaintiffs and defendants could adequately litigate negligent credentialing or privileging claims with evidence from original sources.

² As stated in St. Francis' Appellate Brief, disclosure that a physician's privileges have been restricted or limited in some fashion by the credentialing committee amounts to disclosure of "what transpired at a meeting of a review organization. . ." in violation of Minn. Stat. § 145.64.

b. Information from “Original Sources” Would Not Allow Adequate Defense to Claims of Negligent Credentialing or Privileging.

Appellants argue that the following “original sources” language from Minn. Stat. § 145.64 would allow hospitals adequate defense to negligent credentialing and privileging claims:

“[i]nformation, documents or records otherwise available from original sources shall not be immune from discovery or use in any civil action merely because they were presented during proceedings of a review organization, nor shall any person who testified before a review organization or who is a member of it be prevented from testifying as to matters within the person's knowledge. . .”

Minn. Stat. § 145.64. Appellants’ assertion on this point is not supported by the language of the statute, or by logic.

Information available from original sources would be wholly insufficient to allow hospitals adequate defense to negligent credentialing or privileging claims. Determination of the merits of a negligent credentialing or privileging claim would require the trier of fact to consider evidence of what the hospital *actually knew*, how the hospital knew it, how the hospital used what it knew to make its credentialing or privileging decision, and the ultimate outcome of the credentialing or privileging decision. Mere introduction of information from original sources could never allow for adequate defense because *information available from original sources can only establish what a hospital should have known, and cannot establish what the hospital actually knew, or how such information was used by the hospital.* The interpretation of the original sources language urged by Appellants would allow plaintiffs with negligent credentialing

or privileging claims to meet their burden of production, while completely precluding defendant hospitals and review organizations from meeting their burden.

In its decision in this case, the Court of Appeals correctly stated “the availability of original-source information does not satisfactorily explain how a hospital can adequately defend against a claim that its credentialing or privileging decision was not based on a reasonable belief that the action was warranted when the hospital cannot disclose what was actually considered or discussed by a review organization that recommended the decision.” Larson, 718 N.W.2d, at 467. The court noted that no known decisions from other jurisdictions have addressed “how a hospital that cannot even disclose *whether* such information was considered, let alone *how* it was used in decision-making, can actually use such information in its defense.” Id.³

³ Appellants cite a number of cases from foreign jurisdictions for the proposition that “other jurisdictions have recognized that similar peer review statutes in those states permit the parties to litigate negligent privileging claims in a manner that assures peer review proceedings remain confidential and comports with due process.” (Appellants Brief, at 28.) This is a gross mischaracterization of the cases cited by Appellants for this proposition.

As noted by the decision of the Minnesota Court of Appeals in this case, in the Ohio decision of Browning v. Burt, 613 N.E.2d 993 (Ohio 1993) the court failed to address how a hospital that cannot disclose *whether* information gathered from original sources was considered by the review organization, let alone *how* it was used in the credentialing or privileging process, can actually use such information in its defense. Larson, 718 N.W.2d, at 467.

The only peer review issue in Wheeler v. Central Vt. Med. Ctr. Inc., was whether the trial court properly prohibited defendant’s use of confidential peer review information to cross examine plaintiff’s expert witness *after* defendants had objected to, and the court had precluded, use of such confidential peer review information by plaintiff in direct examination of her expert witness. 582 A. 2d 165 (Vt. 1989). Significantly, both parties and the trial court appeared to have agreed that the defendant hospital could have waived the privilege created by Vermont’s peer review confidentiality statute at the time of plaintiff’s direct examination of her expert witness. Id., at 167. It is abundantly clear that under Minn. Stat. §§ 145.64 and 145.66 no such waiver is possible in Minnesota.

On this point, Appellants' Brief fails to address the logic of Respondents' arguments and of the decision of the Court of Appeals and instead makes vague assertions that the statute merely "precludes the discovery of and use at trial of one subset of evidence otherwise available to the parties. . . ." (Appellants' Brief, at 27.) This is a gross misstatement. For the reasons stated above, it is clear that the statute precludes the discovery of, and use at trial, of *the only subset* "of evidence otherwise available to the parties" in which directly exculpatory evidence could possibly be found.

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

Minnesota's appellate courts have firmly upheld the statutory protections given to information provided to, or gathered by, a review organization, along with the review organization's proceedings and deliberations. See Amaral v. St. Cloud Hosp., 586 N.W.2d 141 (Minn. Ct. App. 1998), aff'd 598 N.W.2d 379 (Minn. 1999); In re Fairview-Univ. Med. Ctr., 590 N.W.2d 150 (Minn. Ct. App. 1999). Not surprisingly, these cases are not addressed by and do not appear in Appellants' Brief. Although these cases do not address claims of negligent credentialing or privileging, the rulings of the Minnesota

The last three cases cited by respondents do not address adequate defense at all, and instead address only whether the availability of information from original sources might provide plaintiffs with adequate means to gather evidence in support of their claims. See Ex Parte Qureshi, 768 So.2d 374 (Ala. 2000); Humana Desert Valley v. Superior Court, 742 P.2d 1382 (Ariz. App. 1987); Shelton v. Moorehead Mem. Hosp., 347 S.E.2d 824 (N.C. 1986). Whether information from original sources might provide a plaintiff with adequate evidence to prove what a hospital *should have known*, is entirely irrelevant to whether a hospital can adequately defend itself against such claims where it may not disclose what it *actually knew*.

Court of Appeals and of this Court in these cases clearly prohibit disclosure, discovery or introduction of the kind of evidence necessary for defense of negligent credentialing or privileging claims. See Amaral, 586 N.W.2d 141, aff'd 598 N.W.2d 379; In re Fairview- Univ. Med. Ctr., 590 N.W.2d 150.

In Amaral, two physicians sought to obtain a hospital's records relating to their own staff privileges. The hospital asserted the confidentiality protections of Minn. Stat. § 145.64 and withheld the records. Id. at 142. The Court of Appeals agreed with the hospital and held that documents related to the credentialing process were not, under the statute, subject to discovery. Id. at 144. This Court upheld the ruling of the Court of Appeals and noted that the purpose of the peer review statute is to encourage medical professionals to conduct peer review with a minimum of judicial interference and to serve the strong public interest in improving the quality of health care. Amaral, 598 N.W.2d, at 383. This Court also emphasized the possible reluctance of professionals to freely participate in peer review for fear of being compelled to testify against a colleague. Id.

The Court of Appeals has also affirmed a district court's refusal to order production of credentialing committee materials to the Minnesota Board of Medical Practice. In re Fairview-University Med. Ctr., 590 N.W.2d at 154. The Court rejected the Board's arguments in support of its attempt to subpoena hospital credentialing files of two physicians as part of a Board investigation in an administrative hearing. Id. at 152. The hospital moved for an Order to quash the subpoenas on the grounds that under Minn. Stat. § 145.64 the information sought was confidential and not subject to discovery. The Board argued that the confidentiality requirements of the statute covered only documents

generated by a review organization and not documents acquired by a review organization. Id. at 154. The Court upheld the district court's Order quashing the subpoenas. Id. at 155. The Court held that the peer review confidentiality provision covers "all data and information acquired by a review organization." Id. As the Court of Appeals noted, the "otherwise available" sentence simply points out that documents available from other sources remain discoverable from the other sources. Id.

The Court of Appeals in In re Fairview Univ. Med. Ctr. also acknowledged the potential, under certain circumstances, for abuse of such absolute confidentiality, but stated that even if the potential for abuse exists, peer review materials are privileged under the language of the statute. Id. The court noted: "[t]he legislature is free to perpetrate injustice so long as it does not violate the constitution; if a statute is clear the remedy is amendment not construction." Id. (citing Coduti v. Hauser, 219 Minn. 297, 303, 17 N.W.2d 504, 507-08 (1945) (quoting Timo v. Juvenile Court, 188 Minn. 125, 128, 129, 246 N.W. 544, 546 (1933))). Accordingly, the court concluded in In re Fairview-Univ. Med. Ctr., that if a remedy is called for, the remedy is legislative rather than judicial. 590 N.W.2d, at 154. Here too, the redress Appellants seek should properly be put to the legislature and not to this Court. If the plaintiffs' bar seeks to create a cause of action for negligent credentialing in Minnesota, it must first convince the legislature to amend Minn. Stat. § 145.64.

2. **The Liability Limitations Created by Minn. Stat. § 145.63, subd. 1 Logically Preclude a Cause of Action for Negligent Credentialing or Privileging.**

Minn. Stat. § 145.63 is entitled: “Limitation on liability for sponsoring organizations, review organizations, and members of review organizations.” The second sentence of subdivision 1 of the statute provides:

No review organization and no person shall be liable for damages or other relief in any action by reason of the performance of the review organization or person of any duty, function, or activity as a review organization or a member of a review committee or by reason of any recommendation or action of the review committee when the person acts in the reasonable belief that the action or recommendation is warranted by facts known to the person or the review organization after reasonable efforts to ascertain the facts upon which the review organization's action or recommendation is made. . . .

Minn. Stat. § 145.63, subd. 1.

The Court of Appeals held that Minn. Stat. § 145.63 does not grant outright immunity to review organizations and hospitals from claims of negligent credentialing and privileging. Larson, 718 N.W.2d, at 469. However, the Court further held that the statute “unambiguously limits the liability of hospitals and review organizations for acts relating to credentialing or privileging . . . to actions or recommendations 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. The Court emphasized that “failing to act with a ‘reasonable belief’ based on known facts after ‘reasonable efforts’ to obtain facts is narrower than the universe of failing to act with reasonable care.” Id. The Court declined to define the parameters of

the scope of the limitation on liability created by the statute.⁴ Id. The Court of Appeals further acknowledged that Minn. Stat. § “145.64 limits the evidence that could be used to support or defend against such a claim in a manner that appears to affect the fundamental fairness or recognizing such a claim as the most effective means of monitoring the credentialing or privileging process.” Id. at 470.

Because the Court of Appeals declined to define the parameters of the limitation on liability created by the statute, it remains an open question as to whether the limitations on liability set out by the second sentence of Subdivision 1 of Minn. Stat. § 145.63 effectively preclude a cause of action for negligent credentialing or privileging.

While Appellants do not challenge the Court of Appeals conclusions regarding Minn. Stat. § 145.63, they nonetheless ask this Court to recognize a cause of action for negligent credentialing and privileging apparently believing that the limitations on liability contained therein allow for claims of negligent credentialing or privileging. (Appellants’ Brief, at 34 and 38.) This cannot be so. Such an interpretation of Minn. Stat. § 145.63 defies the plain language of the statute, would render the second sentence of subdivision 1 meaningless, conflict with the clear purpose of the statute, and directly conflict with the strict confidentiality mandates of Minn. Stat. § 145.64. The language of the second sentence of subdivision 1 cannot be interpreted to allow claims of negligent credentialing or privileging because, as emphasized by the Court of Appeals, liability under the peer review statutes premised upon a failure to act “with a ‘reasonable belief’

⁴ The Court further concluded that the legislature likely did not envision or contemplate negligent credentialing or privileging actions when it enacted the peer review statutes. Id.

based on facts known after ‘reasonable efforts’ to obtain such facts” is a standard far more narrow than the negligence standard of “reasonable care.” *Id.* at 469. Where the plain language of the statute clearly limits liability of review organizations and hospitals to cases where the duty allegedly breached is narrower than a duty to act with reasonable care, logic dictates that the plain language of the statute must be interpreted to preclude claims for *negligent* credentialing or privileging and their broader standard of reasonable care.

Appellants’ assumption that Minn. Stat. § 145.63 would allow claims of negligent credentialing or privileging also depends upon an interpretation of the statute that renders the second sentence of subdivision 1 meaningless. The default standard for common law torts is, of course, negligence. If the second sentence of subdivision 1 of the statute is interpreted to allow *negligent* credentialing or privileging claims against review organizations, the sentence becomes completely superfluous. Because common law allows plaintiffs to hold tort-feasors liable for negligent conduct, there can be no reason for the legislature to draft and enact statutory language which essentially provides that a review organization may be held liable for negligent conduct.

Interpretation of the statute to allow negligent credentialing or privileging claims also directly conflicts with the clear purpose of the statute as evinced by its title: “*Limitation on liability for sponsoring organizations, review organizations, and members of review organizations.*” *See* Minn. Stat. § 145.63. The clear and unambiguous purpose of the statute is to place *limitations on liability* for sponsoring organizations, review organizations and members of review organizations. If the statute is interpreted to allow

claims of negligent credentialing or privileging, in light of the stated purpose of the statute, such an interpretation would again make the second sentence of subdivision 1 meaningless. If review organizations can be held to a negligence standard, how has liability been *limited* at all? Under such an interpretation, the second sentence of subdivision 1 would provide no limitation on liability. If the legislature had merely intended to create protections from claims brought by health professionals scrutinized by review committees, it would have stopped after drafting and enacting the first sentence of subdivision 1.

Finally, interpretation of the limitation on liability created by the second sentence of subdivision 1 of Minn. Stat. § 145.63 to allow claims of negligent credentialing or privileging would create an absurd result whereby different provisions of the same statutory scheme act to create or acknowledge a cause of action for negligent credentialing or privileging while, at the same time, they act to preclude defendants from defending against negligent credentialing or privileging claims. Under basic canons of statutory construction, Minnesota's appellate courts, if possible, construe every law to give effect to all its provisions. Amaral, 598 N.W.2d at 384 (citing Minn. Stat. § 645.16). Under Appellants' interpretation, the provisions of Minn. Stat. § 145.63 subd. 1, would directly conflict with unambiguous language of Minn. Stat. § 145.64, subd. 1.

The second sentence of Subdivision 1 of Minn. Stat. § 145.63 must be construed to give effect to its plain language, so as not to be meaningless, to be consistent with the clear purpose of the statute, and to give effect to all provisions of Minnesota's peer review statutory scheme. Accordingly, the parameters of the limitation on liability

created by the statutory language must be defined so as to preclude claims of negligent credentialing or privileging.

3. **Public Policy, as the Legislature and the Courts have Concluded, Supports St. Francis Medical Center's Interpretation of Minn. Stat. §§ 145.63 and 145.64.**

This Court has noted that Minnesota's peer review statute provides a broad grant of confidentiality for the proceedings and records of medical peer review organizations. Amaral, 598, N.W.2d 384. This Court has identified the underlying legislative purpose of the peer review statute in several cases. See e.g., Amaral, 598 N.W.2d 379; Kalish v. Mount Sinai Hosp., 270 N.W.2d 783 (Minn. 1978); Campbell v. St. Mary's Hosp., 312 Minn. 379, 252 N.W.2d 581 (1977).

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

In Amaral, this Court stated the policy underlying the peer review statutes as "improving the quality of health care *through the use of the peer review system.* . ." and noted that in pursuit of this goal, the legislature recognized that professionals would be reluctant to participate freely in peer review proceedings if full participation includes the

possibility of being compelled to testify against a colleague in a medical negligence action, and the possibility of being subjected to a defamation suit. Amaral, 598 N.W.2d, at 387 (emphasis added). This Court concluded that the legislature, accordingly, granted broad confidentiality privileges to the information and proceedings of peer review organizations in an effort to encourage full participation in peer review. Id. at 387.

This Court should not now be persuaded by Appellants' argument that holding hospitals civilly liable for negligent credentialing furthers the goal of improving the quality of health care. Appellants' argument on this point is not only incorrect, it completely misses the point. For better or worse, the legislature made a policy judgment to encourage the medical profession to police its own activities with a minimum of judicial interference through confidential peer review. Campbell, 312 Minn. at 389, 252 N.W.2d, at 587. The legislature, therefore, decided to promote quality health care, not through the creation or acknowledgement of a cause of action for negligent credentialing, but instead *through the use of the peer review system*. Amaral, 598 N.W.2d, at 387. Accordingly, the legislature has mandated strict confidentiality of the information and proceedings of peer review organizations and has substantially limited liability of review organizations, as evinced by relevant language in Minn. Stat. §§ 145.64 and 145.63, which, for the reasons stated above, cannot coexist with a common law cause of action for negligent credentialing or privileging. While Appellants may disagree with the legislature's policy choices on these issues, their remedy should be sought from the legislature and not from the courts.

4. **Appellants' Arguments Regarding the "Due Process Analysis" of the Court of Appeals are Misplaced.**

In Section V. of Appellants' Brief, they first mischaracterize Respondent St. Francis's arguments regarding Minn. Stat. § 145.64 in the Court of Appeals as an improper due process challenge to the statute. Appellants next assert that the Court of Appeals improperly considered whether negligent credentialing or privileging claims could be fairly litigated in light of the strict confidentiality requirements of the statute. (See Appellants' Brief at 35-38.) This Court should not be distracted by this obvious red-herring.

Appellants have asked the district court, the Court of Appeals, and now this Court to adopt a *new* cause of action for negligent credentialing or privileging. No appellate court in the state of Minnesota has previously recognized a cause of action for negligent credentialing or privileging. The district court ruled in favor of adoption of such a cause of action, but certified the issue as important and doubtful. (A.A. 25.) The Court of Appeals rightly declined to adopt a cause of action for negligent credentialing or privileging, in large part, due to the fundamental unfairness that would result to hospital defendants upon adoption of such a cause of action where hospitals and other review organizations are at the same time held to the strict confidentiality provisions of Minnesota's peer review statutes. Larson, 718 N.W.2d, at 470. Appellants now ask this Court to adopt such a cause of action. St. Francis argued to the district court, the Court of Appeals and to this Court that, for the reasons stated above, a cause of action for negligent credentialing or privileging cannot coexist with the strict confidentiality

requirements of the peer review statutes. That argument, however, does not amount to a challenge to the constitutionality of the relevant peer review statutes as the questions of fundamental fairness that troubled the Court of Appeals in this case, see id., at 466-67, 469-70, only arise if a common law cause of action for negligent credentialing or privileging indeed is adopted by this Court or the Legislature.

B. A CAUSE OF ACTION FOR NEGLIGENT CREDENTIALING WOULD CONFLICT WITH PUBLIC POLICY.

A cause of action for negligent credentialing should not be recognized because it would conflict with the strong public policy goal of improving the quality of health care in Minnesota. Specifically, recognition of such a cause of action would (1) discourage openness and candor that is vital to the credentialing process, (2) discourage participation by physicians and other health care professionals that is vital to the credentialing process, and (3) provide no substantive benefit to Minnesota's existing tort law system.

1. Negligent Credentialing or Privileging Claims Would Discourage Open and Candid Peer Review.

Credentialing is a form of peer review. Minn. Stat. § 145.61, subd. 5(i). It is action taken by a hospital in (1) deciding whether to grant a physician privileges to practice medicine in the hospital and (2) deciding what specific medical procedures the physician may perform in the hospital. Credentialing occurs when a physician makes an initial application for a grant of privileges and also when a physician with existing privileges makes an application for a renewal of privileges at 2-year intervals. Although these decisions are ultimately made by the hospital's governing body, they are based on recommendations of the credentials committee following evaluation of information

regarding the qualifications and skills of the applicant, including data and information about licensure, training, experience, performance of professional medical services, and outcomes. The work of the credentials committee is considered peer review because evaluation of the qualifications and skills of the applicant is done by other physicians, i.e., the applicant's peers. Christopher S. Morter, Note, The Health Care Quality Improvement Act of 1986: Will Physicians find Peer Review More Inviting?, 74 Va. L. Rev. 1115, 1117 (1988); Jeanne Darricades, Comment, Peer Review: How is it Protected by the Health Care Quality Improvement Act of 1986, 18 J. Contemp. L. 263, 263 (1992). In addition to the credentials committee, a hospital has other peer review committees which evaluate every aspect of health care provided within the hospital for the purposes of improving quality, improving patient safety, and reducing morbidity and mortality. Minn. Stat. § 145.61, subd. 5(a-f). Without question, improving the quality of care, improving patient safety, and reducing morbidity and mortality serve a strong public interest. Kalsih v. Mount Sinai Hospital, 270 N.W. 2d 783, 785 (Minn. 1978.)

Peer review is recognized in Minnesota and elsewhere as the primary method of achieving improvements in health care. As one commentator stated:

In order to understand the implications of those laws protecting peer review, the importance of peer review as a process should be understood. Essentially, peer review committees serve two important functions. First, they provide an efficient method of self-regulation. The process ensures the standardization of the most effective and appropriate medical procedures at a minimal administrative cost. Second, and most apparent, the system serves the interest of public health by effectively policing those procedures, institutions, and healthcare providers that might pose a risk to patients. As such, peer review serves an important public policy role for healthcare on a national level.

George E. Newton, II, Maintaining the Balance: Reconciling the Social and Judicial Costs of Medical Peer Review Protection, 52 Ala. L. Rev. 723, 735 (2001).

The effectiveness of peer review as a process for improving health care is based on the requirement that communications among those participating is completely open and candid. Without openness and candor true peer review does not occur and undertaking the process is a wasted exercise. The importance of openness and candor has been described as follows:

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

Richard L. Griffith & Jordan M. Parker, With Malice Toward None: The Metamorphosis of Statutory and Common Law Protections for Physicians and Hospitals in Negligent Credentialing Litigation, 22 Tex. Tech. L. Rev. 157, 159 (1991). The critical analysis that takes place during peer review is an “objective, candid, and sometimes brutally critical evaluation.” Butler, Records and Proceedings of Hospital Committees Privileged Against Discovery, 28 S. Tex. L. Rev. 97, 101 (1987). It must be stressed that the result of openness and candor is effective peer review, and the ultimate result of effective peer review is *improvement* in the quality of health care. Hospitals, physicians, and other health care professionals are dedicated to the idea of advancement, of finding better treatments and better ways to provide care to patients, rather than just maintenance of the

status quo. Openness and candor are the key features that make peer review the process that is most responsive to the strong public interest of *improving* the quality of health care.

The threat of negligent credentialing litigation is destructive of the peer review process because it discourages openness and candor. That threat, with all its professional, personal and financial implications, discourages the free, uninhibited communication of information and opinions among peers that is necessary for true critical analysis of professional conduct. This Court in Amaral recognized the impact potential litigation has on openness and candor in the peer review setting:

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

598 N.W. 2d at 387.

2. **Negligent Credentialing or Privileging Claims Would Discourage Physicians and Other Health Care Professionals from Participating in the Credentialing or Privileging Process.**

The effectiveness of peer review as a process for improving health care is also based on the requirement that physicians and other health care professionals participate in it, because these individuals are in the best position to evaluate the qualifications and skills of their peers. Without participation by physicians and other health care professionals, meaningful peer review (and meaningful credentialing) simply cannot occur. In Campbell, 312 Minn. 379, 252 N.W. 581, this Court acknowledged that the medical profession, not the legal profession, is in the best position to achieve improvements in health care and thereby serve the strong public interest. This Court stated:

The clear import of this statute [§ 145.63] is to encourage the medical profession to police its own activities with a minimum of judicial interference. And the wisdom of this legislative policy is obvious. Our ignorance of such multisyllabic terms found in the present record as “parathyroidectomy” and “aneurysmectomy” is no less than that shared by the general public. Simply stated, courts are ill-equipped to pass judgment on the specialized expertise required of a physician, particularly when such a decision is likely to have a direct impact on human life.

312 Minn., at 389, 252 N.W. 2d, at 587.

Participation in credentialing (which is voluntary) will not occur if the consequences of participation are (1) greater exposure to lawsuits, and (2) inability to defend those lawsuits because of the confidentiality provisions of Minn. Stat. § 145.64.

As noted by Griffith and Parker:

One may legitimately argue that, in isolated instances, holding the hospital and its peer review assemblage liable for the negligent grant or retention of

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

22 Tex. Tech. L. Rev. at 208.

3. **Negligent Credentialing or Privileging Claims Would Fail to Provide Any Substantive Benefit to Minnesota's Existing Tort Law System.**

To establish a cause of action against a hospital for negligent credentialing physician, the plaintiff must first prove that the physician's care was negligent and that the negligent care caused harm. See Johnson v. Misericordia Comm. Hosp., 301 N.W. 2d 156, 158 (Wis. 1981); Humana Med. Corp. of Ala. v. Traffanstedt, 597 So. 2d 667, 669 (Ala. 1992); Strubhart v. Perry Memorial, 903 P. 2d 263, 278 (Okla. 1995).

However, under Minnesota's existing tort system, a plaintiff who proves that the physician's care was negligent and that the negligent care caused harm is, by definition, entitled to receive full compensation for all harm directly from the physician, and also directly from the physician's employer pursuant to the rule of respondeat superior. See Schneider v. Buckman, 433 N.W. 2d 98, 101 (Minn. 1988) ("This court has adopted the well established principle that an employer is vicariously liable for the torts of an

employee committed within the course and scope of employment.”). A plaintiff is also entitled to receive full compensation for the physician’s negligence from any co-defendant engaged in a joint enterprise with the physician. See Dang v. St. Paul Ramsey Med. Ctr., Inc., 490 N.W. 2d 653, 657 (Minn. App. 1992) (“The joint enterprise concept has been recognized in medical malpractice cases.”).

Further, in Minnesota, a plaintiff’s entitlement to full compensation is not limited by any legislative cap on damages. Therefore, under Minnesota’s current tort law system, plaintiffs in medical malpractice cases do have the means of obtaining full compensation for all damages. Adopting an additional cause of action against a hospital for negligent credentialing provides no benefit whatsoever to an injured plaintiff in terms of either proof of liability or entitlement to full compensation. All it provides is an additional source of recovery for the same damages when there are already multiple sources of recovery under existing Minnesota law. Providing for nothing more than an additional source of recovery should not be a legitimate reason to adopt a new cause of action. In Thompson v. Nason Hosp., 591 A.2d 703, 709 (Pa. 1991), Justice Flaherty, in a dissenting opinion, stated the following with regard to such rationale for adopting negligent credentialing as a cause of action:

In adopting this new theory of liability, the majority is making a monumental and ill-advised change in the law of this Commonwealth. The change reflects a deep pocket theory of liability, placing financial burdens upon hospitals for the actions of persons who are not even their own employees. At a time when hospital costs are spiraling upwards to a staggering degree, this will serve only to boost the health care costs that already too heavily burden the public. Traditional theories of liability, such as respondeat superior, have long proven to be perfectly adequate for establishing corporate responsibility for torts.

591 A.2d at 709.

Appellants argue that recognition of a cause of action for negligent credentialing will enhance patient safety because in the absence of such cause of action hospitals will have “little incentive to protect patients from incompetent doctors,” and that “[m]ore complications, longer hospital stays, and greater morbidity and mortality can be expected.” (Appellants’ Brief at 26.) Appellants have offered no evidence or authority to support this argument as applicable to Minnesota hospitals. In fact, Appellants have never claimed that Minnesota’s present peer review system is ineffective or doesn’t work. To the contrary, Appellants have already acknowledged that “most hospitals comply with their obligations to use reasonable care in credentialing physicians.” (Plaintiffs’ (Respondents) Court of Appeals Brief, at 30.) Moreover, Appellants have offered no explanation as to how the threat of negligent credentialing litigation will encourage physicians to serve on credentialing committees, or promote openness and candor during the credentialing process. Appellants’ policy argument about enhancement of patient safety is just argument without any explanation or factual support.

Appellants argue that recognition of a cause of action for negligent credentialing is required by the Remedies Clause of the Minnesota Constitution, Article I, Section 8. That is incorrect. The Remedies Clause does not apply to a cause of action not yet recognized in Minnesota. Olson v. Ford Motor Company, 558 N.W. 2d 491, 497 (Minn. 1997) (“The Remedies Clause does not guarantee redress for every wrong, but instead enjoins the legislature from eliminating those remedies that have *vested at common law* without a legitimate purpose.”) Here, it is undisputed that a negligent credentialing cause

of action has not been recognized in Minnesota. Larson, 718 N.W. 2d, at 464. (“All parties to this action agree that no appellate court in Minnesota has recognized a cause of action for negligent credentialing or privileging of a physician against a hospital or other review organization.”) Also, the Remedies Clause does not apply when there is already a “certain remedy” in place. Under existing Minnesota law, a plaintiff who brings a medical malpractice case already has a “certain remedy” in that he or she may pursue recognized causes of action against the negligent physician, the physician’s employer, and those engaged in a joint enterprise with the physician. Schweich v. Ziegler, Inc., 463 N.W.2d 722, (Minn. 1990) (“What constitutes ‘an adequate remedy’ or ‘a certain remedy’ is not determined by any inflexible rule found in the constitution, but is subject to variation and modification, as the state of society changes.”)

Appellants argue that recognition of a cause of action for negligent credentialing is required because a hospital’s act of credentialing a physician is equivalent to a hospital’s act of providing of health care to its patient. Such argument is unsupported by the statutory definition of “health care” and common sense. Health care” is defined by Minn. Stat. § 145.61 as: “professional services rendered by a professional or an employee of a professional and *services furnished by a hospital*, sanatorium, nursing home, or other institution *for the hospitalization or care of human beings.*” Minn. Stat. § 145.61, subd. 4. (Emphasis added.) Neither credentialing nor any of the other many peer review activities performed by a hospital are included within this definition. As a matter of common sense, St. Francis was in no way furnishing health care to Mary Larson when it granted privileges to Dr. Wasemiller. Garland Community Hospital v. Rose, 156 S.W.

3d 541 (Tex. 2004) does not support Appellants' argument because that case had nothing to do with whether the credentialing of physicians was considered the providing of health care. In Garland, the sole issue was whether a "negligent credentialing claim" was considered a "health care liability claim" for purposes of imposing on the plaintiff the expert witness report requirements of the Texas Medical Liability and Insurance Improvement Act. Included within the statutory definition of "health care liability claim" was a "claimed departure from accepted standards of medical care, or health care or safety." Tex. Rev. Civ. Stat. Art. 4590i, sec. 1.03(a)(4). The court in Garland ruled only that negligent credentialing claims came within the statutory definition because they "involve claimed departures from accepted standards of health care." 156 S.W. 3d at 544.

Appellants argue that hospitals themselves have created a legal duty to protect patients from incompetent doctors by their undertaking of credentialing. Voluntary assumption of a duty does not automatically translate into the creation of cause of action. For that to happen, the assumed duty must first and foremost be in accord with the state's public policy. Erickson v. Curtis Inv. Co., 447 N.W. 2d 165, 168 (Minn. 1989). ("Whether a duty is imposed depends, therefore, on the relationship of the parties and the foreseeable risk involved. *Ultimately the question is one of policy.*") (Emphasis added.) Funchess v. Cecil Newman Corp., 632 N.W. 2d 666, 675 (Minn. 2001). ("Transforming a landlord's gratuitous provision of security measures into a duty to maintain those measures and subjecting the landlord to liability for all harm occasioned by a failure to maintain that security would tend to discourage landlords from instituting security measures for fear of being held liable for the actions of a criminal."). For all the reasons

expressed above, allowing lawsuits to be brought against hospitals because of their credentialing decisions would violate Minnesota's established public policy of improving the quality of health care through the peer review system. Tomfor v. Mayo Foundation, 450 N.W.2d 121 (Minn. 1990), relied on by Appellants, is neither a negligent credentialing nor an assumption of duty case. Tomfor involved a claim that the hospital was negligent in monitoring a hospitalized psychiatric patient and preventing his suicide. The sole issue before the court was whether at trial the hospital was entitled to a capacity based comparative fault instruction. There was no issue about either credentialing or voluntary assumption of a duty. Moreover, the credentialing of physicians is a process that is required for a hospital to participate in the Federal Medicare program (42 CFR sec. 482.22(a)) and obtain accreditation from the Joint Commission on Accreditation of Healthcare Organizations (SR. 214). It is a process directed to patient safety generally, not to a specific patient. This court has held that undertaking a general duty does not give rise to a negligence action against either a private tortfeasor or public entity. Cracraft v. City of St. Louis Park, 279 N.W. 2d 801, 805 (Minn. 1979). ("The distinction between public duty and special duty applies to alleged private tortfeasors as well as alleged public tortfeasors.").

4. **Appellants' Proposals for Litigating Negligent Credentialing/Privileging Claims are Contrary to Minnesota Law.**

a. **Abandoning Proof of Causation as a Requirement to Establish a Cause of Action for Negligent Credentialing/Privileging.**

Appellants propose that in order to establish a cause of action against a hospital for negligent credentialing or privileging of a physician, a plaintiff need not prove that the involved physician was negligent. Stated another way, Appellants assert that a plaintiff is entitled to recover damages against a hospital for negligent credentialing or privileging of a physician even if that physician in all respects exercised reasonable care and caused no harm to the patient. Such assertion is in direct conflict with basic Minnesota negligence law. Minnesota courts have universally held that in order to establish a negligence cause of action *of any kind*, proof of a causal connection between defendant's negligence and plaintiff's damages is required. Schweich, 463 N.W. 2d at 729 ("The basic elements for a negligence claim are (1) duty; (2) breach of that duty; (3) *that the breach of duty be the proximate cause of plaintiff's injury*; and (4) that the plaintiff did in fact suffer injury.) (Emphasis added.) Minnesota courts have universally held that in order to establish a medical negligence cause of action *of any kind*, proof of causation is required. Fabio v. Bellomo, 504 N.W. 2d 758, 762 (Minn. 1993) (negligent diagnosis); Smith v. Knowles, 281 N.W. 2d 653, 656 (Minn. 1979) (negligent treatment); Cornfeldt v. Tongen, 295 N.W. 2d 638, 640 (Minn. 1980) (negligent non-disclosure of risks and treatment alternatives); Larsen v. Yelle, 310 Minn. 521, 526, 246 N.W.2d 841, 895 (Minn. 1976) (negligent failure to refer to a specialist).

Courts in jurisdictions that have recognized negligent credentialing as a cause of action have also specifically held that proof of physician negligence is required as proof of causation. Strubhart v. Perry Memorial, 903 P. 2d 263, 278 (Okla. 1995) (“To show causation, a plaintiff must prove some negligence on the part of the doctor involved to establish a causal relation between the hospitals’ negligence in granting or continuing staff privileges and a plaintiff’s injuries.”). Humana Med. Corp. of Ala. V. Tranfanstedt, 597 So. 2d 667, 669 (Ala. 1992) (“Implicit in those cases applying the corporate liability theory is the requirement that some underlying negligent act, either that of the physician whose treatment of the patient caused the injury or that of another staff member, be established before the hospital can be held liable.”). Johnson v. Misericordia Comm. Hosp., 301 N.W. 2d 156, 158 (Wis. 1981) (“It was incumbent upon the plaintiff to prove that Salinsky [the physician] was negligent in this respect to establish a causal relation between the hospital’s alleged negligence in granting Salinsky orthopedic surgical privileges and Johnson’s injuries.”). Contrary to Appellants’ argument, these cases do not regard the requirement of physician negligence as a means of treating negligent credentialing as a vicarious liability claim.

b. Combining of Trials of Negligent Credentialing /Privileging Claims and Underlying Medical Negligence Claims.

Appellants propose that negligent credentialing/privileging claims against a hospital and the underlying medical negligence claims against the physician be tried together. If that happens jurors will be subjected to irrelevant and highly prejudicial evidence about the physician’s other medical malpractice claims, board discipline, and

difficulty in purchasing malpractice insurance, all for the purpose of persuading jurors that the physician was negligent in treating a particular patient. (Appellants' Brief, at 9). Such evidence has no place in a trial where the focus should be whether the specific treatment provided by the physician to that particular patient conformed to the standard of care and whether such treatment caused the patient harm. If Appellants have their way, jurors in medical negligence cases will hear evidence about completely unrelated medical negligence claims having no factual connection with the patient and having never been proved, board discipline having no factual connection with the patient and concluding by reinstatement of the physician's unconditional license to practice medicine years before he first met the patient, and difficulty purchasing malpractice insurance caused in large part by the marketplace and the physician's specialty. Minnesota law prohibits admission of evidence that is not relevant, Minn. R. Evid. 402, and defines relevant evidence as "having any tendency to make the existence of any fact *that is of consequence to the determination of the action* more probable or less probable than it would be without the evidence." Minn. R. Evid. 401 (emphasis added). The relevance rule is of utmost importance in the fair administration of disputes, as the leading treatise in the field states: "We could have a rational system of proof without the opinion rule or the hearsay rule, but the rule excluding evidence that is irrelevant serves to restrict the scope of the inquiry to some finite sphere and thus to make decisions more predictable." Wright & Graham, Federal Practice and Procedure: Evidence § 5162 (1978). See Shea v. Esensten, 622 N.W.2d 130 (Minn. App. 2001) (holding that evidence of managed care

contracts and prior board discipline is irrelevant and inadmissible in the trial of a medical malpractice case).

Jurors in medical negligence trials have a difficult task. They must learn medicine, evaluate the conflicting opinions of expert witnesses, and make decisions about whether the physician's treatment of a particular patient met the standard. Their task should not be made more difficult by subjecting them to evidence that has nothing to do with the issues they must decide.

C. FOREIGN JURISDICTION CASES CITED BY APPELLANTS DO NOT ADDRESS THE PUBLIC POLICY ISSUES UNIQUE TO MINNESOTA INCLUDING ITS SINGULARLY STRICT POLICIES FAVORING CONFIDENTIAL PEER REVIEW.

To support their argument that Minnesota "should" recognize a cause of action for negligent credentialing, Appellants string-cite thirty-five cases from other jurisdictions asserting that the cases evidence a "broad national consensus" favoring a negligent credentialing cause of action. The suggestion is that all these cases are in lock step on the issue of negligent credentialing. That is not so. In none of the cases did the appellate courts discuss or consider peer review statutes as comprehensive as those in Minnesota. In none of the cases did the appellate courts discuss or consider whether there was a legislative public policy decision to promote advances in the quality of health care through the peer review system rather than through litigation. Some of the cited cases did not involve a claim of negligent credentialing.⁵ In other cases, the existence of a cause of

⁵ Darling v. Charleston Community Memorial Hosp., 211 N.E.2d 253, 258 (Ill. 1965) (negligent supervision of emergency physician employed by the hospital); Johnson v. St. Bernard Hosp., 399 N.E.2d 198, 206 (Ill. Ct. App. 1979) (negligent failure of the hospital to arrange for an

action for negligent credentialing was assumed, but certainly was not discussed or considered by the appellate courts.⁶ In thirty-one of the cited cases peer review statutes were not mentioned at all. In two cases peer review statutes were considered, but they were dissimilar to Minnesota's peer review statutes in that they permitted discovery of some peer review information. Tucson Medical Center, Inc. v. Misevch, 545 P. 2d 958, 961 (Ariz. 1976) ("Statements and information considered by the committee are subject to subpoena for the determinations of the trial judge, but the reports and minutes of the medical review committees are not"); Greenwood v. Wierdsma, 741 P.2d 1079, 1089 (Wyo. 1987) ("The privilege protects from discovery the records concerning the internal

orthopedic consultation); Sibley v. Bd. of Supervisors of La. State Univ., 477 So.2d 1094, 1098 (La. 1985) (negligent treatment of psychiatric patient by using the team approach without independent patient care review); Foley v. Bishop Clarkson Mem. Hosp., 173 N.W.2d 881, 885 (Neb. 1970) (negligent failure of hospital employed intern and nurses to notify attending physician of patient's condition); Gridley v. Johnson, 476 S.W.2d 475, 483 (Mo. 1972) (negligent failure of the hospital to use tests to diagnose the patient's pregnancy); Register v. Wilmington Med. Ctr., Inc., 377 A.2d 8, 9 (Del. 1977) (negligent failure of hospital to supervise employed resident physician during delivery.)

⁶ Ferguson v. Gonyaw, 236 N.W.2d 543, 551 (Mich. App. 1976) (directed verdict for defendant hospital affirmed in negligent credentialing case because of insufficient evidence of causation); Hull v. North Valley Hosp., 498 P.2d 136 (Mont. 1972) (directed verdict for hospital affirmed in negligent credentialing case because of insufficient evidence of notice to the hospital of physician incompetence); Sledziewski v. Coffi, 528 N.Y.S.2d 913 (1988) (summary judgment for hospital granted in negligent credentialing case because of plaintiff's failure to raise any factual issues relating to the hospital's credentialing of the defendant physician); Roberts v. Stevens Clinic Hosp., Inc., 345 S.E.2d 791, 798 (W.Va. 1986) (denial of directed verdict for hospital affirmed in negligent credentialing case without discussion about whether such cause of action is or should be recognized); Strickland v. Madden, 448 S.E.2d 581, 586 (S.C. 1994) (summary judgment for hospital affirmed in negligent credentialing case because of an absence of evidence regarding the standard of care "even if we recognized a duty owed by Providence to review the competence of its staff physicians"); Garland Community Hosp. v. Rose, 156 S.W.3d 541, 542 (Tex. 2004) (statutory expert witness disclosure requirements for medical malpractice cases held applicable to negligent credentialing cases, with the court noting "This Court has never formally recognized the existence of a common-law cause of action for negligent credentialing, but we will assume for purposes of this case that such a claim exists.")

proceedings of the hospital committee but does not exempt from discovery materials which the committee reviews in the course of carrying out its function, nor action which may be taken thereafter by the hospital as may be influenced by the committee decision.”) In one case the peer review statutes were dissimilar to Minnesota’s because they were interpreted to provide immunity to all persons serving on the peer review committees but not the hospital itself. Browning v. Burt, 613 N.E.2d 993, 1007 (Ohio 1993) (“The statute also seeks to protect those serving on committees and committee employees for the obvious reason that it could be difficult to staff a committee absent such protections.”) In one case the appellate court considered only whether that state’s peer review statute prohibited use of peer review information in cross-examining plaintiff’s expert witness at trial. Wheeler v. Central Vt. Med. Ctr., 582 A.2d 165, 167 (Vt. 1989) (“But as viewed by the parties, the issue raised by the attempted use of peer review materials by defendant in cross-examination is one of whether plaintiff’s examination of Dr. Porterfield referred to peer review materials in violation of the statutory prohibition and the ground rules established by the court early in the trial and assented to by both sides.”) In sum, the cases cited by Appellants support only the general assertion that a common law cause of action for negligent credentialing is recognized in a majority of other jurisdictions. However, the cases offer no guidance in answering the question of whether Minnesota should adopt such a cause of action because they do not involve interpretation of peer review statutes identical to Minnesota’s, nor do they involve any consideration of whether recognition of a cause of

action for negligent credentialing would conflict with established legislative public policy to promote improvements in the quality health care through the peer review system.

IV. THE MINNESOTA LEGISLATURE IS IN THE BEST POSITION TO CONSIDER THE ISSUE OF WHETHER TO ADOPT A NEW CAUSE OF ACTION FOR NEGLIGENT CREDENTIALING OR PRIVILEGING.

As stated above, The Minnesota Supreme Court has the power to adopt or reject common law causes of action new to the State of Minnesota. See Wal-Mart Stores, Inc., 582 N.W.2d 231 (adopting the tort of invasion of privacy, but declining to adopt a cause of action for false light publicity). Although adoption of a new cause of action may be appropriate in areas of the law that the legislature has not addressed, in this case, the legislature has comprehensively addressed the subject of quality assurance of health care in Minnesota. Minnesota's peer review statutes, with the strict confidentiality mandates of Minn. Stat. §§ 145.64 and 145.66 at their core, reflect the public policy choice of the Minnesota legislature to rely upon comprehensive confidential and protected peer review as the most appropriate and effective means to maintain the high level of health care enjoyed by the people of Minnesota. In short, peer review is the means chosen by Minnesota to ensure quality health care within the state. Park Const. Co. v. I.S.D. #32, 296 N.W. 475, 477 (Minn. 1941) ("Public policy, where the legislature has spoken, is what it has declared that policy to be.")

The legislature recently affirmed its commitment to improving and ensuring quality health care in Minnesota through confidential peer review by enacting the Minnesota Adverse Health Care Events Reporting Act of 2003. Minn. Stat. §§ 144.706-7069. The Act requires hospitals, as part of peer review, to report adverse health events

on a confidential basis and to create and implement their own corrective action plans as part of their peer review programs. Minn. Stat. § 144.7065, subd. 8. Adverse event review by hospitals is subject to the strict confidentiality mandates of peer review. Minn. Stat. § 145.61, subd. 5(q).

Certain issues of law and public policy that are best left to the legislature and the legislative process. Respondent St. Francis respectfully submits that this case presents such an issue. For the reasons stated above, creation of a new cause of action for negligent credentialing or privileging claim would create an irreconcilable conflict between the strict confidentiality mandates and liability limitations of the peer review statutes and the fundamental right of a hospital or review committee to defend itself against such claims.

In addition to the substantial prejudice hospital defendants would experience in defense of negligent credentialing or privileging claims, recognition of this new tort would result in significant ramifications for the entire medical community. The peer review statutes reflect the legislature's determination that the medical profession should "police its own activities with a minimum of judicial interference." Campbell, 252 N.W.2d at 587. Creation of a new cause of action that so clearly threatens to undermine and erode the peer review system crafted by the legislature should be subject to the legislative process. As the Court stated in Campbell, "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. Minnesota's medical community has the right to have a voice in the debate over whether a negligent

credentialing or privileging cause of action should be created in Minnesota. Addressing the issue through the legislative process would allow for thorough evaluation with opportunity for participation by hospitals, physicians, and patients in the determination of whether a cause of action for negligent credentialing or privileging might enhance or threaten the quality of health care in Minnesota.

For these reasons, Respondent St. Francis respectfully suggests that the legislature, and not this Court, is the best forum for exploring and weighing the competing policy concerns raised by Appellants' request that Minnesota adopt a new cause of action for negligent credentialing or privileging.

CONCLUSION

This Court should not adopt a common law cause of action for negligent credentialing or privileging because such a cause of action is not adapted to conditions of Minnesota and would directly conflict with public policy.

The proposed cause of action for negligent credentialing or privileging cannot co-exist with the singularly strict confidentiality requirements or with the limitations on liability created by Minnesota's peer review statutes. Indeed, a cause of action for negligent credentialing or privileging would fail to provide any substantive benefit to Minnesota's existing tort law system. Instead, such a cause of action would substantially interfere with, and undermine, the legislature's policy choice to improve and ensure quality health care through confidential peer review. The proposed cause of action would have a chilling effect on peer review by discouraging openness and candor vital to effective peer review, and by discouraging physicians and other health care professionals

from participating in peer review. Because the legislature has chosen confidential peer review as the most appropriate means to improve and maintain the quality of healthcare in Minnesota, and because claims of negligent credentialing or privileging could not be fairly litigated under the strict confidentiality mandates of Minnesota's peer review statutes, the question of whether Minnesota should adopt a new cause of action for negligent credentialing or privileging should be resolved by the legislative process.

For these reasons, Respondent St. Francis Medical Center respectfully requests that this Court leave undisturbed the decision of the Court of Appeals not to adopt a new common law cause of action for negligent credentialing or privileging.

Dated: December 18, 2006

Respectfully submitted,

GERAGHTY, O'LOUGHLIN & KENNEY,
Professional Association

By 
Robert M. Mahoney (#66643)
Mark W. Hardy (#311121)
Suite 1400, 386 North Wabasha Street
Saint Paul MN 55102
(651) 291-1177

Attorneys for Respondent St. Francis Medical Center

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, Subds. 1 and 3, for a brief produced with a proportionally-spaced 13-point Times New Roman font. The length of this Brief contains 13,375 words. This Brief was prepared using Microsoft Word 2000.

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Respectfully submitted,

GERAGHTY, O'LOUGHLIN & KENNEY,
Professional Association

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Robert M. Mahoney (#66643)
Mark W. Hardy (#311121)
Suite 1400, 386 North Wabasha Street
Saint Paul MN 55102
(651) 291-1177

Attorneys for Respondent St. Francis Medical Center

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).