MINNESOTA STATE LAW LIBRARY

NO. A10-101

State of Minnesota
In Court of Appeals

Alan and Keri Bearder, individually and as parents and natural guardians of Josiah and Alexa Bearder, minors; et al.,

Appellants,

vs.

State of Minnesota,
Minnesota Department of Health,
and Dr. Sanne Magnan, Commissioner
of the Minnesota Department of Health,

Respondents.

APPELLANTS' REPLY BRIEF

FARRISH JOHNSON LAW OFFICE, CHTD.
Randall G. Knutson (#0229891)
Daniel J. Bellig (#0389075)
1907 Excel Drive
Mankato, MN 56001
(507) 625-2525

Attorneys for Appellants

ATTORNEY GENERAL OF
THE STATE OF MINNESOTA
Jocelyn F. Olson (#0082016)
Assistant Attorney General
445 Minnesota Street, Suite 1200
St. Paul, MN 55101-2130
(651) 296-9412

Attorney for Respondents

2010 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

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ARGUMENT

The core issue in this case is whether a cause of action exists for the collection, storage, use, and dissemination of newborn blood samples, DNA, and test results without consent. The Court's decision on this core issue will affect hundreds of thousands of Minnesota citizens. In order to obfuscate this core issue, Respondents seek to unduly expand the scope of this appeal.

The district court dismissed Appellants' claims on one basis – that under its reading of the GPA and view of tort and constitutional law, no cause of action existed. The district court did not reach the issue of whether Appellants created genuine issues of material facts. Nor did the district court rule on whether Respondents were entitled to any form of immunity. Now, without filing a notice of review with this Court, Respondents suggest the district court should be affirmed on issues it did not consider.

Respondents assert that no genuine issues of fact were raised concerning the use of Appellants' blood samples, and seek refuge under government immunity. In district court, Appellants prayed for further discovery to provide addition evidence to create genuine issues of material fact with respect each cause of action and the immunity claims. The district court did not reach that issue because it limited its decision to the threshold question. This court should abstain from considering these additional issues and allow the district court, on remand, to determine the adequacy and necessity of further discovery.

Alternatively, if this Court expands the scope of its review, it will find that Appellants has already raised genuine issues of material fact with respect to most of their claims, particularly the constitutional and statutory violations. This Court will also notice

that the immunity claims do not dispose of this lawsuit because Respondents are not immune from Appellants' claims for injunctive relief.

A. **Appellants are entitled to further discovery. Summary judgment, beyond mere legal questions as to the existence of a cause of action, was premature.**

The district court dismissed Appellants' claims based solely on its interpretation of the GPA. (*See* AA, pp. 276-277.) After interpreting the GPA, the district court dismissed the constitutional and tort claims as "moot." (AA, p. 277.) The district court did not make any findings regarding the existence of material fact questions. (*See* AA, pp. 276-277.) This is understandable since, by the time the district court heard Respondents' motion to dismiss or in the alterative for summary judgment, only preliminary discovery was complete. (AA, pp. 14-15.) Indeed, Appellants certified there was insufficient discovery to defend against a summary judgment motion:

> [T]o the extent Defendants rely on "undisputed facts" to invoke immunities or suggest there is no issue for trial on any of Plaintiffs' causes of action, their motion should be denied. Plaintiffs are entitled to conduct complete discovery before being called upon to defend a motion for summary judgment. Minn. R. Civ. P. 56.06. Given the preliminary stages of this litigation, there has been little discovery. Defendants have produced voluminous documents in response to written requests, but there has been insufficient time to review nearly 8,000 documents. Furthermore, there have been no depositions and no opportunity for Plaintiffs to follow up with further discovery based on disclosures to date.

(Plaintiff's Memorandum of Law, p. 20.) (*See also* AA, pp. 14-15.) It was impossible for Appellants to complete discovery before the district court entered judgment on Respondents' summary judgment motion. That is because, given the procedural posture of the case, ***Respondents never Answered the Complaint or Amended Complaint.*** (AA, p. 15.) Thus, Respondents did not admit or deny allegations or necessarily disclose all of their affirmative defenses.

In depth discovery can be pointless and wasteful before a defendant answers the allegations, identifies all of its affirmative defendants, and asserts any potential counter-claims. It is also extremely wasteful when there are significant threshold disputes about whether a cause of action exists in the first place.

Discovery in this case is complex and involves thousands of documents, and numerous witnesses. In addition, "Sufficient time for discovery is considered especially important when the relevant facts are exclusively in the control of the opposing party.... Indeed, the majority of the continuances granted... involve cases in which one party has exclusive knowledge of the relevant facts... [I]t probably is felt that granting a continuance in these situations is appropriate because extracting information from an opposing party may be a more difficult process than obtaining information from a disinterested source." *Rice v. Perl*, 320 N.W.2d 407, 412 (Minn. 1982) *quoting* C. Wright & A. Miller, *Federal Practice and Procedure* § 2741 at 733-734 (1973). For this reason, continuances should be liberally granted, especially when the party had insufficient time to conduct discovery. *Id.* Thus, had the district court reached the issue of whether Appellants raised genuine issues of material fact, it would have been compelled to grant a continuance under Rule 56.06, as Appellants requested. (Plaintiff's Memorandum of Law, p. 20.) (*See also* AA, pp. 14-15.)

On appeal, Respondents rely on factual issues to assert no cause of action exists. For example, Respondents repeatedly assert there is no cause of action because blood samples are not compelled, and parents may choose not to have their infant tested. (Respondents' Brief, pp. 25, 27, 28.) Respondents allege they did not subject Appellants to unwanted blood sampling, and state that Appellants "did not alleged that MDH tested their blood

specimens in defiance of any "opt out" parental directive. (Respondents' Brief, p. 40.) Respondents cavalierly allege that "there is no evidence that the State has in any way mishandled, misused, or disseminated the minor Plaintiffs' blood samples..." (Respondents' Brief, p. 36) (*See also* Respondents' Brief, p. 39.) Respondents want the court to ***presume*** that the blood samples and testing results were securely stored. (Respondents' Brief, p. 26)

Respondents further assert immunity because they allegedly had no reason to believe that their conduct was unlawful, and because it was based on discretionary decision making. Respondents suggest standing issues with respect to the constitutional privacy and GPA claims because Appellants did not show that their blood samples were subject to testing beyond newborn screening. (Respondents' Brief, pp. 12, 21, 21 n. 12, 38 n. 29.) But preliminary discovery suggests otherwise.

First, genuine issues of material fact exist as to whether or not the blood samples are compelled and whether parents can, in fact, opt-out of testing. The Affidavit of Shay Rohde establishes that she was not provided with any information about the reasons for the taken of the blood test at the hospital. (AA, p. 10) A pediatrician then spoke to her and procured a blood sample by stating there would be no DNA test. (AA, p. 11.) Plaintiff Andrea Kish-Bailey and her husband had a similar experience.[1] (AA, p. 12.) With the delivery of their child Megan, they objected to the taking of the blood sample but it was taken anyway. (AA, p. 12.) With their second child, Clinton, they objected to

[1] Respondents, for the first time, argue that Affidavit of Andrea Kish-Bailey does not meet the evidentiary threshold because it is unsigned. However, this objection was not made in district court and therefore is waived on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

taking of the blood sample but the nurse took a sample for the screening anyway. (AA, p. 12.)

Second, preliminary discovery establishes that genuine issues of fact exist, or may exist after further discovery, regarding the mishandling of blood samples. For example, there is no dispute that Respondents continue to store some of Appellants blood and test results without consent. (*See* Respondents' Brief, pp. 11-12 (Respondents received blood specimens and has NSB test results for 23 of the minor children).) Storage, in and of itself, is a violation of the GPA.[2] Minn. Stat. § 13.386, subdiv. 3 (3) (genetic information about an individual "may be ***stored*** only for a period of time to which the individual has given written informed consent..."). Preliminary discovery shows that genuine issues of fact exist concerning de-identification of blood samples dissemination to third-parties for research. (Appellants' Principal Brief, pp. 24-25; Plaintiffs Memorandum of Law, p. 33 ("Based on preliminary discovery in this matter (with minimal opportunity for its review), there is evidence that Defendants disseminate blood samples and test results to private organizations with information that could lead to the identification of the specimen's donor."), p. 35 (Opportunity to fully review Defendants disclosures and conduct further discovery may yield additional evidence that the Department disseminates the blood samples and test results with identifying information.").)

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[2] Respondents suggest that parents could simply request that the blood samples and test results be destroyed. However, the GPA provides for an opt-in system, in which the government must obtain consent. The GPA forbids an opt-out approach, preferred by Respondents, in which parents must take affirmative action to ensure the state does not violate genetic privacy laws. Accordingly, whether or not the parents can or should have requested destruction of the sample and results does not alleviate Respondents of liability under the GPA.

It is also undisputed that the department cannot account for whether or not two blood samples were permitted to be used in health studies. (AA, p. 181.) This raises questions of spoliation and potential sanctions (including adverse inference instructions) for this mishandling. (*See* Plaintiff's Memorandum of Law, pp. 35-36 ("Discovery is warranted to see whether it can be ascertained whether these children's blood samples were used in private testing following the GPA's enactment date, why the Department apparently cannot account for the use or dissemination of blood samples in their control, and whether there are issues of spoliation.").) The allegation that there is no evidence as to what MDH has done to test or disseminate the blood or test results of the particular plaintiffs will be easily resolved with the opportunity to request additional, more precisely tailored discovery.

Even more alarming is a recent news article which appeared after this appeal was commenced. That Texas news article revealed that a Minnesota government agency actually provided the United States Armed Forces with DNA samples. Emily Ramshaw, *DNA Deception*, The Texas Tribune, February 22, 2010 (available online).[3] The Armed Forces are constructing a national and potentially international mitochondrial DNA registry. *Id.* Armed Forces researchers "wanted 'anonymous and maternally unrelated' blood samples from [a Texas newborn screening program for] Caucasians, African-Americans and Asians – and from Hispanics and Native Americans in particular – to round out their genetic record." *Id.* Researchers took samples "from prison populations

[3] Last accessed February 22, 2010, at: <http://www.texastribune.org/stories/2010/feb/22/dna-deception/>

and infant blood screening in other states, including Florida, Minnesota and California." *Id.*

Before concluding that information was not "mishandled", or there is "no evidence" of dissemination, the Court must first permit Appellant to complete discovery. If Respondents provided this information to the Armed Forces, they must explain why they did not reveal this information in discovery and must disclose whether any of the Plaintiffs' genetic material was provided to the Armed Forces in violation of the GPA or their privacy rights.

Third, regarding immunity claims, Respondents improperly rely on self-serving affidavits. In district court, Appellants made clear that further discovery was needed to resolve the immunity claims and at least verify the truthfulness of allegations made in the self-serving affidavits. (Plaintiffs' Memorandum of Law, p. 45 (Even if Defendants were to provide additional information in their reply brief and affidavits to support the claim for statutory immunity, the claim is premature as Plaintiffs have the right to verify the veracity of the information through discovery, which is incomplete at the preliminary stages of litigation."))

Fourth, resolving this dispute based upon a lack of evidence, before any meaningful discovery can be completed, will not resolve Appellant's core claim that Respondents are engaged in perhaps one of the most egregious privacy violations in history. Appellants are not suing simply on their own personal claims. The seek relief for all newborns, past, present, and future under the data practices private attorney general statute 13.08 (AA, p. 9) and intend to bring this matter as a class action once this Court determines whether a cause of action exists. (AA, p. 3 ("Plaintiffs are parents and

children suing for violation of their statutory, common law and constitutional privacy rights and for enforcement of Minnesota's prohibition on the collection and storage of genetic information without informed written consent. In the future, and with leave of the court, Plaintiffs may represent a class of aggrieved individuals.")

Finally, the issue of whether sufficient facts were presented to defeat summary judgment is not even before this Court because this issue was not ruled upon by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). But if this case is to be resolved by looking, not at the threshold questions of whether a cause of action exists, but at whether genuine issues of fact exist to support the causes of action, Appellants should be allowed to complete discovery before final disposition. Remand is appropriate for further investigation after this Court has determined the threshold questions of whether a cause of action exists.

B. Respondents are not entitled to immunity for the unlawful collection, storage, use, and dissemination of Appellants' blood, DNA, and test results.

Respondents are not immune from their unlawful collection, storage, use, and dissemination of Appellants' blood, DNA, and test results. As a preliminary matter, the issue of immunity is not properly before this court. The issue was not decided by the district court and appellate courts should not consider unadjudicated issues. Even so, Respondents immunity claims are defeated as a matter of law. Respondents failed to meet their burden of proof on immunity issues and the record shows that Respondents either maliciously and willfully violated well-established law when they began using Appellants genetic material without consent. Finally, Appellants' claims for injunctive relief are not subject to any immunity claims.

1. Immunity issues are not properly before this Court.

The district court did not rule on any immunity issues. (*See* AA, pp. 276-277; Respondents' Brief, pp. 1-3.) The district court's sole basis for dismissing the Amended Complaint was failure to state a claim. (AA, p. 277.) Accordingly, the various immunity claims raised by Respondents are not properly before this Court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Raising the issue in district court is not enough. *Id.* The trial court must rule on an issue before it can be reviewed on appeal. *Id. See also Rehberger v. Project Plumbing Co., Inc.*, 205 N.W.2d 126, 127 (Minn. 1973). This prohibition applies particularly when facts surrounding the issue are in dispute. *Id.* Though there are cases were the Court has considered issues in the interest of justice, that exception is not triggered here. As discussed in the preceding section, Appellants in district court argued that summary judgment on the immunity claims was premature because of inadequate discovery. The district court has the discretion under Minn. R. Civ. P. 56.06 to permit further discovery. Because the district court did not reach the immunity issues, it did not rule on the whether to permit further discovery. Appellants should have a district court decision on the adequacy of discovery before being having to defend Respondents' numerous immunity claims on appeal.

2. Respondents' are not entitled to sovereign immunity as a matter of law.

Defendant Magnan is subject to suit in her individual capacity for her various constitutional violations under 42 USC §1983. All Respondents are subject to damages claims for violation of Minnesota's constitution. (Appellants Principal Brief, pp. 47-50.) And, regardless of their immunity to suit for damages, sovereign immunity does not bar

claims against Respondents for prospective injunctive relief. *Heartland Academy Community Church v. Waddle*, 4t27 F.3d 525, 530 (8th Cir. 2005).

3. Respondents are not entitled to statutory or official immunity for failure to meet their burden of proof.

Respondents are not entitled to statutory or official immunity because they failed to meet their burden of proof. "The burden of proof that immunity applies is on the party claiming immunity." *Brown v. City of Bloomington*, 706 N.W.2d 519, 522 (Minn. Ct. App. 2005) *review denied* Feb. 22, 2006. On a summary judgment motion, the government must establish that is actions are immune from civil liability. *Id* (burden of proof is on government when claiming official immunity).

"[Statutory immunity] protects the government only when it can produce evidence its conduct was of a policy-making nature involving social, political, or economic considerations, rather than merely professional or scientific judgments. The burden is on the [government] to show it engaged in protected policy-making and is entitled to statutory immunity." *Conlin v. City of St. Paul*, 605 N.W.2d 396, 402 (Minn. 2000). "Where the government has not provided any evidence as to how it made the decision for which it claims immunity, [the supreme court] has held that the government was not entitled to statutory immunity. *Id.*

Likewise, official immunity extends only to discretionary decisions that require professional judgment to balance multiple factors. *Brown*, 706 N.W.2d at 522. "Where a job is simple and definite, as when a public official has a clear duty to adhere to ordinances and states, the official is not entitled to immunity." *Id.* at 523 (internal

quotations omitted). The burden of proof rests with the individuals claiming official immunity. *Id.* at 522.

In support of their summary judgment motion, Respondents offered no insight into how they came about the decision to indefinitely store, use, and disseminate Plaintiffs' genetic material and test results. Respondents assert that their decision to store blood samples and test results involved "policy decisions at the planning level." (Respondents Brief, p. 39.) This is a mere conclusory statement unsupported by the record. *See id.* at 402-403 (conclusory statements in affidavit merely identifying generalized concerns without incorporating specific facts demonstrating that a policy decision was in fact made are insufficient to prove entitlement to statutory immunity). Further, this statement is not necessarily true nor is this policy decision discretionary on its face. For example, this decision could be motivated by personal interests or private interests (such as the Mayo contract for $6 million), rather than political interests and therefore not based on any public policy considerations. Respondents had the burden to provide substantial evidence that their unauthorized conduct was, in fact, discretionary. Respondents failed to meet their burden.

Alternatively, if Respondents provided ample information in their district court submissions to support their immunity, the claim is premature as Appellants had the right to verify the veracity of the information through discovery, which was incomplete at the preliminary stages of litigation.

4. Respondents are not entitled to qualified, statutory, official, or vicarious official immunity because they maliciously violated well established law.

Well-established constitutional and statutory law protects Appellants' privacy and property interests in their blood and DNA. Lacking discretion to indefinitely store, use, and disseminate Appellants' genetic material and test results without consent, Respondents are guilty of willfully violating existing law and are therefore not entitled to qualified, statutory, or official immunity.

Magnan seeks refuge in the qualified immunity doctrine. An official is not entitled to qualified immunity if she violates a clearly established constitutional right. *Harlow v. Fitzgerald*, 102 S. Ct. 2727, 2738-2739 (1982) ("Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action."). All Respondents assert statutory immunity. Statutory immunity protects discretionary acts and is meant to prevent judicial second guessing of legislative or executive policy decisions through tort suits. *Janklow v. Minnesota Board of Examiners for Nursing Home Administrators*, 552 N.W.2d 711, 715 (Minn. 1996). "Statutory immunity does not protect all governmental conduct." *Conlin*, 605 N.W.2d at 400. Official immunity protects public officials for conduct occurring the course of their official duties," so long as they do not exceed the discretion granted them by law." *Janklow*, 552 N.W.2d at 715-716. Government entities and officials do not have discretion to engage in conduct that violates the law. *Synder v. City of Minneapolis*, 441 N.W.2d 781, 787 (Minn. 1989) *rehearing denied* July 13, 1989. Public officials have no immunity for intentional or malicious wrongdoing. *Janklow*, 552 N.W.2d at 716.

Respondents did not have discretion to violate the well-established state and federal constitutional privacy protections. The U.S. Supreme Court made clear, over forty years ago, that collection and analysis of blood samples is a search under the Fourth Amendment. *Schmerber v. State of California*, 86 S. Ct. 1826 (1966). *See also Skinner v. Railway Labor Executives' Association*, 109 S. Ct. 1402, 1412-1413 (1989). And recently, a federal district court recently permitted a Fourth Amendment claim for the indefinite storage of blood spots without the consent of parents to proceed after a Rule 12 challenge. *Beleno v. Lakey*, No. SA-09-CA-188-FB (W.D. Texas, Sept. 17, 2009) (Order Regarding Defendants' Motion to Dismiss or for Summary Judgment Based on Mootness). According, to the court, the plaintiffs "pleaded enough facts to state a claim for relief under the Fourth Amendment which is plausible on its face..." *Id.* at 15.

Respondents essentially argue they are entitled to ignore over 40 years of well-established constitutional law. Granted, no case explicitly stated that a plaintiff, such as Shay Rohde, who did not consent to a DNA test of her child, may assert a constitutional privacy claim on behalf of her child. (*See* AA, p. 10-11.) But such explicit authority is not necessary to put Respondents on notice that their unwarranted and unwanted search of Respondent Rohde's child was unconstitutional. "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 122 S.Ct. 2508, 2516 (2002). The U.S. Supreme Court explicitly rejected the requirement that case law be "fundamentally similar" to give notice to officials. *Id.* Rather, officials need only a "fair warning" that their conduct is unconstitutional. *Id.* Respondents had fair warning from *Skinner*, where the U.S. Supreme Court explicitly held, "***The ensuing chemical analysis of the [blood] sample to obtain physiological data***

is a further invasion of the [individual's] privacy interests." 109 S. Ct. at 1412-1413 (1989) (emphasis added). Further, Respondents were on notice after the decision in *Welfare of C.T.L.*, where the Minnesota Court of Appeals essentially held that the state has no interest in the unwarranted collection of and analysis of biological specimen from those, like the newborn children, not convicted of an offense. 722 N.W.2d 484, 491-492 (Minn. Ct. App. 2006). *See also State v. Gray*, 413 N.W.2d 107, 110 (Minn. 1987) (right of privacy guaranteed by Minnesota Constitution); *Jarvis v. Levine*, 418 N.W.2d 139 (Minn. 1988) *rehearing denied* Aug. 22, 1988 (right to privacy includes right to bodily integrity and not to have it invaded without consent).

It is also important for the Court to note, that in the constitutional context, it is undisputed that Respondents current conduct is not the most appropriately tailored approach. MDH explicitly denies that requiring informed written consent for their conduct would in any way compromise their ability to effectively operate. (AA-143 (admission 21).) Therefore, any claim that the state did not have notice that its approach was not sufficiently tailored to meet constitutional scrutiny does not comport with the record.

Second, Respondents argument that immunity defeats the damages claims for unlawful taking of property under U.S. Const., Amend. V and Minn. Const., Art. 1 § 13 is disingenuous. Respondents themselves assert property interests in Appellants' blood and take the position that their property interest in Appellants' blood trumps federal rules controlling use of blood specimens in human subject research. (AA, p. 128.) It is not equitable to allow the government to assert a protected property interest in newborn blood but then allow it to do so for the purposes of immunity. This is particularly so

when applied to qualified immunity. The government cannot at one hand say they have an interest in newborn blood but then in order to invoke immunity for damages say they had no notice that such an interest ever existed. Accordingly, Respondents should be estopped from denying that there is a protected property interest in blood and further be estopped from alleging it was not on notice that such a property interest existed.

Finally, Respondents did not have discretion to violate the Genetic Privacy Act. The Genetic Privacy Act explicitly prohibits the collection, storage, use, or dissemination of "genetic information." Minn. Stat. 13.386. Respondents argue that Minn. Stat. § 144.125 provides that MDH may retain the blood samples. But Minn. Stat. § 144.125 provides no such authorization. That provision directs the person who performs newborn screening to merely inform parents that the results or tissues may be retained by MDH. This provision makes sense when one considers that MDH is required to keep a registry of positive testing results, *see* Minn. Stat. § 144.128, and when read in connection with Respondents' assertion that they are required to retain test results for up to two years. (*See* Respondents' Brief, p. 6, n. 5.) But the provision provides no authorization for MDH to retain blood specimens or test results indefinitely without written informed consent. The provision provides no authorization for the dissemination of the blood spots or test results or further testing of the blood spots. Indeed, the GPA provides exactly the opposite.

Under the GPA, Respondents must obtain written informed consent before collecting, using, storing, or disseminating Appellants' genetic material or tests results beyond the need for newborn screening and follow-up care for positive cases. Respondents were well aware of their violations. They were explicitly warned in the ALJ

opinion (AA, pp. 28, 56-57) and by numerous legislators (*see e.g.* AA, pp. 72-74, 80-81). Respondents' flagrant disregard for the GPA is malicious and willful and abrogates any immunity claim.

5. Respondents are not immune to suit or damages for their violation of the Genetic Privacy Act.

Respondents are not entitled to immunity for their violation of the GPA. Minn. Stat. § 13.08 ("The state is deemed to have waived any immunity to a cause of action brought under this chapter.").

6. Appellants are entitled to injunctive relief, regardless of Respondents' immunity from damages.

Respondents are not immune to injunctive relief. If any cause of action exists, remand is necessary to impose injunctive relief. Even if the this Court finds a basis for granting immunity to the damages claims, sovereign immunity does not bar claims for prospective injunctive relief. *Heartland Academy Community Church v. Waddle*, 427 F.3d 525, 530 (8th Cir. 2005); *L.K. v. Gregg*, 425 N.W.2d 813, 818 n.3 (Minn. 1988) (discretionary or qualified immunity is not available as a defense in actions for declaratory or injunctive relief). Here, Appellants seek an injunction preventing Respondents from continuing to collect, store, use, and disseminate blood samples and test results without written informed consent. (AA, p. 9.)

Sufficient evidence was proffered to create a genuine issue of fact on the claims for injunctive relief. For the claims of prospective injunctive relief, it is only necessary to know the undisputed fact that MDH has not received any consent for its activities and has nonetheless continued to store over 1,500,000 test results, continues to store over 800,000 blood samples, and admits to disseminating without consent over 50,000 blood samples

for research. All Appellants have standing to seek an injunction and order compelling compliance with the GPA. Minn. Stat. § 13.08. It is not important for injunctive relief that Appellants blood samples or test results, in particular, were disseminated without consent.

If this Court holds that Appellants have a cause of action for violation of the GPA, constitution, or in tort, this case would be remanded for the imposition of injunctive relief. In this interests of judicial economy and fairness, this Court should abstain from considering the claims for immunity or from deciding whether Appellants met their burden in providing evidence of genuine issues of fact because, on remand for imposition of injunctive relief, Appellants' will have additional opportunity for discovery and would be able to have the district court determine the other claims on their merits.

CONCLUSION

The Court should limit its review of this case to the scope of the district court's holding. The district court dismissed Appellants claims solely on the basis of its interpretation of the GPA and whether the tort and constitutional claims were viable causes of action. The district court did not determine whether Appellants failed to raise genuine issues of material fact. And the district court did not determine any immunity issues. If this Court finds that Appellants Amended Complaint states a cause of action, whether for damages or injunctive relief, the case should be remanded for further discovery and further pre-trial proceedings.

FARRISH JOHNSON LAW OFFICE

Dated: 3-22-10

Randall G. Knutson (0229891)
1907 Excel Drive
Mankato, MN 56001
Phone: 507.625.2525
Fax: 507.625.4394

Dated: 3-22-2010

Daniel J. Belkg (0389075)
1907 Excel Drive
Mankato, MN 56001
Phone: 507.625.2525
Fax: 507.625.4394

Attorneys for Appellants