

Nos. A05-1698 and A05-1701

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State of Minnesota  
**In Court of Appeals**

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MARY LARSON AND MICHAEL LARSON,

*Respondents,*

vs.

JAMES PRESTON WASEMILLER, M.D.,

*Appellant (A05-1698),*

*Defendant (A05-1701),*

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

*Defendants (A05-1698),*

ST. FRANCIS MEDICAL CENTER,

*Appellant (A05-1701).*

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## STATEMENT OF INTEREST

The Minnesota Defense Lawyers Association (“MDLA”), founded in 1963, is a non-profit Minnesota corporation whose members are trial lawyers in private practice.<sup>1</sup> MDLA devotes a substantial portion of its efforts to the defense of civil litigation. MDLA is affiliated with the Minnesota State Bar Association and Defense Research Institute. Over the past 42 years, MDLA has grown to include representatives from over 180 law firms across Minnesota, with 800 individual members.

The MDLA has a public interest in protecting the rights of litigants in civil actions, promoting the high standards of professional ethics and competence, and improving the many areas of law in which its members regularly practice. Those interests translate into concerns regarding the practical impact of developing law within the civil justice system. To that end, and for the reasons articulated in this brief, the MDLA urges the Court to refuse to recognize a common law cause of action for negligent credentialing/privileging<sup>2</sup> of a physician against a hospital or other review organization.

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<sup>1</sup> The undersigned counsel for Amici authored the brief in whole, and no persons other than Amici made a monetary contribution to the preparation or submission of the brief. This disclosure is made pursuant to Minn. R. Civ. App. P. 129.03.

<sup>2</sup> Throughout the remainder of this brief, MDLA will refer to the new cause of action sought by Plaintiffs as negligent credentialing, while recognizing the claim involves aspects of both credentialing and privileging.

## ARGUMENT

When adopting a new cause of action, Minnesota courts look beyond any logical symmetry or sympathetic appeal and recognize that not every loss is compensable in money damages. Minnesota law already provides adequate relief for medical malpractice by allowing claims against physicians and hospitals for their direct negligence. Minnesota courts and the legislature have been careful not to broaden the scope of medical malpractice liability. This Court should not now allow collateral claims to propagate.

A number of factors determine whether a proposed cause of action maintains the delicate balance between allowing compensation for injured persons and ensuring proper limits on liability. For example, public policy concerns and Minnesota precedent strongly influence the judiciary's decision-making process. Minnesota courts also may examine the decisions of other jurisdictions to gain insight concerning a particular issue. Even consistent decisions among numerous jurisdictions, however, do not determine whether this state will recognize a cause of action. Finally, Minnesota courts carefully evaluate the procedural questions that arise from the adoption of a new cause of action and seek to avoid an unnecessary strain on our judicial system.

**I. ALLOWING NEGLIGENT CREDENTIALING CLAIMS WOULD BE CONTRARY TO PUBLIC POLICY AS SEEN IN MINNESOTA'S EXISTING STATUTORY AND CASE LAW**

The common law is a product of the judicial system and develops case by case in response to societal needs. *Lundman v. McKown*, 530 N.W.2d 807, 819 (Minn. Ct. App. 1995) (citing *Sullivan v. Minneapolis & Rainy River Ry.*, 121 Minn. 488, 494-95, 142 N.W. 3, 5 (1913)). One fundamental principle underlying the common law is that at some point in a course of factually related events, there must be an end to liability. *Salin v. Kloempken*, 322 N.W.2d 736, 738 (Minn. 1982) (“In delineating . . . responsibility for damages . . . the courts must locate the line between liability and non-liability at some point.”). When deciding whether to recognize a new cause of action for negligent credentialing, this Court should consider public policy interests as well as existing case law regarding medical malpractice claims and statutory protections that already exist for review organizations.<sup>3</sup> *Id.* at 742 (rejecting new cause of action based on countervailing

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<sup>3</sup> In pertinent part, a “review organization” is defined as:

[A] nonprofit organization acting according to clause (l), a committee as defined under section 144E.32, subdivision 2, or a committee whose membership is limited to professionals, administrative staff, and consumer directors . . . and which is established by . . . a hospital . . . to gather and review information relating to the care and treatment of patients for the purposes of:

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(i) determining whether a professional shall be granted staff privileges in a medical institution, membership in a state or local association of professionals, or participating status in a nonprofit health service plan corporation, health maintenance organization, community integrated service network, preferred provider organization, or insurance company, or

public policy considerations and Minnesota precedent). Allowing negligent credentialing claims would be contrary to the direction taken by the Minnesota legislature and courts and an illogical extension of medical malpractice doctrine.

Historically, Minnesota's legislative and judicial bodies have been careful to avoid broadening the scope of liability in the context of medical malpractice cases. While Respondents extol the public interest in improving health care quality, they ignore the public's concern over the rapidly increasing cost of health care, which is in part attributed to the ever-rising number of medical malpractice cases. To hold down health care costs that have arisen due to litigation, the Minnesota legislature implemented an affidavit requirement for medical malpractice lawsuits. This requirement keeps down unnecessary litigation costs by preventing frivolous lawsuits. *See, e.g.,* Minn. Stat. § 145.682 (requiring plaintiffs to serve on defendants two affidavits concerning expert review and identification); *Maudsley v. Pederson*, 676 N.W.2d 8, 12 (Minn. Ct. App. 2004) (holding the legislature created Minn. Stat. § 145.682 to eliminate frivolous claims).

Allowing a claim for negligent credentialing would broaden the scope of liability for hospitals and other review organizations, foster additional litigation, and inevitably lead to higher health care costs. Health care costs would escalate not only because of more litigation, but also because hospitals would incur costs in added efforts to avoid litigation. Just like physicians who practice "defensive medicine" for fear of being sued

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whether a professional's staff privileges, membership, or participation status should be limited, suspended or revoked.

Minn. Stat. § 145.61, subd. 5(i).

for malpractice, hospitals and other review organizations will likely require more, but mostly unnecessary, supervision and review of physicians to whom they grant privileges. While respondents may argue these added steps make hospitals safer, the new procedures also add costs that are passed on to insurers and patients. In the end, these protective measures will likely limit access to health care.

The legislature has also developed statutes specifically pertaining to review organizations that effectively limit the potential blame that may be placed on such organizations when physicians allegedly commit malpractice. For example, guidelines established by review organizations are inadmissible in proceedings brought by or against a professional by a person to whom that professional rendered services. Minn. Stat. § 145.65. In addition, Minn. Stat. §§ 145.63 and 145.64 protect review organizations and credentialing bodies by providing confidentiality for their proceedings and records as well as immunity from liability. The Minnesota Supreme Court has confirmed the validity of the legislature's initiative in decisions that apply these statutes. *See Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 386-88 (Minn. 1999); *Kalish v. Mount Sinai Hosp.*, 270 N.W.2d 783, 786 (Minn. 1978).

Minnesota currently provides adequate relief for medical malpractice victims by allowing negligence claims against physicians and hospitals for breaching the standard of care in medical treatment. Minnesota also has statutory limitations on liability for hospital review organizations. If this Court allows claims for negligent credentialing, it provides patients with more avenues for recovery, but may allow plaintiffs to receive a windfall, which is against public policy. *Cf. Wakefield v. Federated Mut. Ins. Co.*, 344

N.W.2d 849, 854 (Minn. 1984) (noting limitation on liability is compatible with public policy if it seeks to avoid a windfall). In *Salin*, 322 N.W.2d at 740, the Minnesota Supreme Court discussed the problem of double recovery when it declined to recognize a cause of action for parental loss of consortium. The court noted a claim for parental loss of consortium might allow double recovery by a child-plaintiff because a jury may compensate both the child and a surviving parent for lost economic support as well as indirectly factor in a child's emotional loss through an award to the surviving parent. *Id.* A similar threat will exist if Minnesota recognizes a negligent credentialing claim. Negligent credentialing claims open the possibility that a jury may factor in damages caused by the physician's negligence, for which the plaintiff is likely separately compensated, when arriving at a damages award against a hospital or other review organization.

The recognition of negligent credentialing as a cause of action does not constitute a natural progression of existing medical malpractice doctrine. Minnesota has worked hard to achieve a proper balance between public policy concerns that allow recovery for plaintiffs while at the same time protecting hospitals and other review organizations from unnecessary liability. Moreover, Minnesota has moved away from imposing liability on review organizations rather than toward it. While neither the legislature nor the courts have specifically opined on the propriety of recognizing negligent credentialing as a cause of action, the enactment of statutes protecting review organizations imply that the legislature decided to protect review organizations in different manner than ordinary

physicians and others directly caring for patients. Thus, this Court should not recognize negligent credentialing as a cause of action.

## II. DECISIONS IN OTHER JURISDICTIONS ARE NOT DISPOSITIVE

Minnesota courts have declined to recognize a new cause of action or new doctrine relating to an established cause of action contrary to decisions in a majority of jurisdictions. Minnesota courts often look to other jurisdictions when deciding whether to recognize a new cause of action. *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 234 (Minn. 1998). That other jurisdictions recognize a particular cause of action is not always dispositive. For example, Minnesota appellate courts have not hesitated to stand apart from the majority rule regarding claims for negligent infliction of emotional distress and the accrual of an insured's cause of action against an insurer for UIM benefits.

In *Carlson v. Illinois Farmers Insurance Co.*, 520 N.W.2d 534, 537 (Minn. Ct. App. 1994), this Court declined to recognize a cause of action for negligent infliction of emotional distress from harm inflicted on a third party. The Court held as such despite the fact that most other jurisdictions allow recovery for that claim under certain circumstances. *Id.* Minnesota remains one of only four states that do not allow recovery under any circumstances for emotional distress caused by witnessing negligent injury to another. See Dale J. Gilsinger, Annotation, *Recovery Under State Law for Negligent Infliction of Emotional Distress Due to Witnessing Injury to Another Where Bystander Plaintiff Must Suffer Physical Impact or Be in Zone of Danger*, 89 A.L.R. 5th 255, at § 2(a) (2004).

Minnesota courts are similarly unconstrained by doctrines adopted in other jurisdictions that pertain to causes of action already recognized in Minnesota. In *Oanes v. Allstate Insurance Co.*, 617 N.W.2d 401, 404 (Minn. 2000), the Minnesota Supreme Court considered when an insured's action against its insurer for UIM benefits accrues for purposes of commencing the statute of limitations period. In previous cases, the court had declined to adopt the majority rule that the statute of limitations for a UIM claim begins to run when the insurer denies the claim. *Id.* Upon reconsideration of the issue in *Oanes*, the court again declined to adopt the majority rule and instead adopted a third option for the accrual date for UIM claims. *Id.* at 406; *see also Dieseth v. Calder Mfg. Co.*, 275 Minn. 365, 368-69, 147 N.W.2d 100, 102 (1966) (noting Minnesota followed the minority view regarding the appealability of an order quashing service of a summons).

Minnesota courts do not simply follow the lead of other jurisdictions on issues that will greatly impact its citizens. Minnesota courts can, and do, decide to recognize or reject a new cause of action based on policy considerations and statutory and case law, even if Minnesota's rule differs from that in other jurisdictions. While a number of jurisdictions recognize negligent credentialing as a cause of action, those decisions should not weigh heavily in the Court's decision.

### **III. PROCEDURAL UNCERTAINTIES RELATED TO NEGLIGENT CREDENTIALING CLAIMS WILL RESULT IN SIGNIFICANT ADDITIONAL LITIGATION**

Minnesota courts also consider the implications of adopting a new cause of action, including both procedural problems and the impact a new cause of action may have on

other substantive areas of law. *See, e.g., Lake*, 582 N.W.2d at 235-36 (considering how false light claims may impact constitutional right to free speech); *Salin*, 322 N.W.2d at 741 (noting the additional expense of litigation and settlement if claim allowed for loss of parental consortium); *see also Oanes v. Allstate Ins. Co.*, 617 N.W.2d at 406 (adopting new rule for when a cause of action accrues for UIM action by considering interplay between the statute of limitations for UIM claims and the rule precluding a UIM claimant from proceeding with claim until resolution of the underlying tort action). Simply put, Minnesota courts may reject a new cause of action if the adverse effects will outweigh the potential benefits.

A negligent credentialing claim raises several procedural problems that this Court should consider before recognizing the claim. First, it is unclear what statute of limitations applies. In other jurisdictions, negligent credentialing claims have spawned litigation over which statute of limitations – the statute of limitation for medical malpractice or personal injury – should apply to negligent credentialing claims. In Minnesota, different limitations periods apply to medical malpractice and personal injury claims. *See* Minn. Stat. § 541.076 (four year statute of limitations applies to medical malpractice claims); Minn. Stat. § 541.05, subd. 1(5) (six year statute of limitations applies to personal injury claims).

Several states have held that the medical malpractice statute of limitations applies to claims for negligent credentialing. In holding that a hospital's duty to select and review physicians arose under the medical malpractice statute, one court reasoned that negligent treatment was necessary and connected to the negligent credentialing claim

against the hospital. *St. Anthony's Hosp., Inc. v. Lewis*, 652 So. 2d 386, 387 (Fla. Dist. Ct. App. 1995). Another court reasoned that providing health care services encompasses supervision, selection, and retention of staff physicians, and that the legislature intended the medical malpractice statute of limitations to govern all claims for negligent performance of medical services. *Bronson v. Sisters of Mercy Health Corp.*, 438 N.W.2d 276, 279-80 (Mich. Ct. App. 1989). Other states have held the negligence statute of limitations applies. *Browning v. Burt*, 613 N.E.2d 993, 1004 (Ohio 1993); *Sheehy v. Angerosa*, 488 N.Y.S.2d 371, 53-54 (1985). If negligent credentialing is created by common law instead of legislative enactment, future litigation on the applicable limitations period is inevitable.

Second, it is unclear whether a plaintiff must first establish liability for medical malpractice before the plaintiff can establish a negligent credentialing claim. The courts recognizing negligent credentialing as a cause of action are split on this issue, although it appears more courts have held that a claim for negligent credentialing must be predicated on physician negligence. See Benjamin J. Vernia, Annotation, *Tort Claim for Negligent Credentialing of Physician*, 98 A.L.R. 5th 533 (2002) (citing cases). For example, in *Trichel v. Caire*, 427 So. 2d 1227, 1233 (La. Ct. App. 1983), the court correctly reasoned that where a physician's negligence did not cause the injury, a hospital's grant of privileges to the physician could not be the cause of a plaintiff's complications. *Id.*; *Dicks v. U.S. Health Corp.*, No. 95 CA 2350, 1996 WL 263239, at \*\*2, 4 (Ohio Ct. App. May 10, 1996) (noting previous Ohio decisions indicating injury resulting from physician negligence is a prerequisite to establishing a negligent credentialing claim). A contrary

holding makes it possible for a hospital to be liable for the bad results of a medical procedure as opposed to harm caused by physician error despite an obvious break in the chain of causation. *See, e.g., Welsh v. Bulger*, 698 A.2d 581, 585 (Pa. 1997) (holding a negligent credentialing claim is not contingent on negligence of a third party physician). If this Court recognizes a claim for negligent credentialing, then it also should hold that a hospital cannot be liable for negligent credentialing absent a finding of physician negligence.

The question logically following is whether negligent credentialing and medical malpractice claims require separate trials or a trial-within-a-trial. An Ohio court held severance is appropriate in cases in which a plaintiff asserts both a negligent credentialing and a medical malpractice claim. *Davis v. Immediate Med. Servs., Inc.*, No. 94 CA 0253, 1995 WL 809478, at \*7 (Ohio Ct. App. Dec. 12, 1995), *rev'd in part on other grounds*, 684 N.E.2d 292 (Ohio 1997). The court reasoned that the plaintiff's negligent credentialing claim did not become ripe until a jury found the subject physician liable for medical malpractice. *Id.* Moreover, bifurcating the issues avoided undue prejudice and bias, and avoided further confusing the jury. *Id.* The Amicus Brief filed jointly by the Minnesota Hospital Association, Minnesota Medical Association, and American Medical Association contains a thorough discussion of the different issues and evidence that would be included in proving a negligent credentialing case, but which would also unduly delay and prejudice the defense in a medical malpractice trial. *See* Joint Amicus Br., § III.

These concerns are real, and probably justify separate trials for the two claims. *See Corrigan v. Methodist Hosp.*, 160 F.R.D. 55 (E.D. Pa. 1995). Two trials, however, would result in additional expense and delay, and require additional resources on the part of the plaintiff and the court. *Id.* at 57-58 (ordering single trial because severance of the issues would require the plaintiff to put on two trials and would result in delay for the plaintiff and the court). Because negligent credentialing claims will likely arise in most if not all medical malpractice claims, the judicial resources expended on medical malpractice claims may nearly double.

Finally, as discussed *supra* section I, Minnesota imposes an affidavit requirement on patients who bring medical malpractice claims. *See* Minn. Stat. § 145.682. If Minnesota recognizes negligent credentialing as a cause of action, future litigation will inevitably arise as to whether the affidavit requirement also applies to that claim. States that recognize negligent credentialing claims and institute pre-suit requirements have reached differing conclusions. At least one court has held that plaintiffs seeking recovery under a negligent credentialing theory must first comply with a statutory certification requirement applicable to medical malpractice claims; the decision reasoned the plaintiff must first prove she suffered from medical malpractice. *See Winona Mem'l Hosp., Ltd. P'ship v. Kuester*, 737 N.E.2d 824, 828 (Ind. Ct. App. 2000). In contrast, in *Estate of Waters v. Jarman*, 547 S.E.2d 142, 145 (N.C. Ct. App. 2001), the court held negligent credentialing claims related to the administration or management of a hospital were not subject to a pre-suit certification requirement while claims arising out of clinical care were subject to the requirement.

Minnesota will also need to address whether complying with an affidavit or other pre-suit requirement for the medical malpractice portion of a plaintiff's complaint is sufficient compliance for any negligent credentialing claim. Other jurisdictions have resolved this issue with varying results. *See, e.g., Columbia/JFK Med. Ctr. Ltd. P'ship v. Brown*, 805 So. 2d 28, 29 (Fla. Dist. Ct. App. 2001) (holding compliance adequate for both claims); *Jacobs v. Rush N. Shore Med. Ctr.*, 673 N.E.2d 364, 367 (Ill. Ct. App. 1996) (holding compliance not adequate for negligent credentialing claim).

Minnesota courts are certainly capable of resolving the above issues. But one thing is certain: these and other new issues related to negligent credentialing claims will spawn time-consuming and expensive litigation beyond this case. This court promotes justice but also judicial economy. *See Wessling v. Johnson*, 424 N.W.2d 795, 799 (Minn. Ct. App. 1988) (noting policy interest in judicial economy). In light of the adequate remedy already available for medical malpractice plaintiffs against both physicians and hospitals, these procedural issues will be resolved at some cost to our judicial system yet yield little benefit to medical malpractice plaintiffs. The adverse effects of recognizing negligent credentialing as a cause of action will outweigh the potential benefits.

### **CONCLUSION**

Minnesota adequately protects patients by providing relief for the direct negligence of hospitals and physicians. The recognition of negligent credentialing as a cause of action will increase health care costs by broadly and unnecessarily expanding liability in medical malpractice cases. Minnesota courts should not countermand legislative efforts that have created practical limitations on medical malpractice litigation

and provided protections for review organizations. Recognizing negligent credentialing as a cause of action would not be a logical extension of Minnesota policy or legal precedent. While other states have recognized negligent credentialing as a cause of action, Minnesota does not recognize causes of action simply because other states have done so.

Finally, negligent credentialing claims pose procedural problems and will inevitably spawn additional litigation. Significantly, negligent credentialing does not present merely a one-time burden on the court system as legitimate legal questions are litigated, but separate trials are likely for each and every medical malpractice and negligent credentialing claim. This will increase the burden on an already overloaded judicial system. With those concerns in mind, the MDLA urges this Court to answer the second certified question in the negative.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the Minn. R. Civ. App. P. 132.01, subd. 3, for a brief produced using the following font:

Proportional serif font, 13-point or larger.

The length of this brief is 3,547 words. This brief was prepared using Microsoft Word 2000.



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