

CASE NOS. A05-1698 and A05-1701

State of Minnesota
In Court of Appeals

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.,
Defendant (A05-1698),

ST. FRANCIS MEDICAL CENTER,
Appellant (A05-1701),

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

MINNESOTA DEFENSE LAWYERS ASSOCIATION,
Amicus Curiae.

REPLY BRIEF OF APPELLANT
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LEGAL ARGUMENT

I. FACTS STATED BY RESPONDENTS IMPROPERLY GO BEYOND THE FACTS STATED IN THE COMPLAINT AND ARE NOT PRESENTED IN A FAIR OR CANDID MANNER.

In their Brief, Respondents state that they must set forth facts outside the Complaint to “rebut or clarify many of the factual statements and assumptions made by Appellants and Amici.” (Respondents’ Brief, at 2.) What factual statements and assumptions? St. Francis Medical Center’s Brief contains a recitation of the facts alleged by the Respondents in their Complaint and nothing more. 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. 34.) The Trial Court, in its 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. 180-181.) This Court, in reviewing the Trial Court’s Order, likewise should determine only the legal sufficiency of the claim of negligent credentialing; that is, whether under any set of facts negligent credentialing is a recognized cause of action. Royal Realty Co. v. Levin, 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.”).

In addition to improperly stating facts outside of their own Complaint, Respondents do so in a manner that is not fair or candid. Specifically, they omit the following information:

- The claims of negligent care are disputed. Dr. Wasemiller testified 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. (Maddix Aff., Exhibit D; 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. (Gross Aff., Ex. 4; Defendant Wasemiller's Supplemental Answers to Plaintiffs' Interrogatories at 2-6.)
- Dr. Wasemiller did more than just "attend" Loma Linda University Medical School. He successfully completed the 4-year medical school program and obtained a Medical Degree from that University in 1972. (Maddix Aff., Ex. D; J. Wasemiller Depo., at 9.)
- Dr. Wasemiller successfully completed a 4-year general surgery residency program at Loma Linda University in 1976, and served as Chief Resident in his final year. (Maddix Aff., 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. (Maddix Aff., Ex. D; J. Wasemiller Depo., Ex. 43.) 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. (Maddix Aff., Ex. D; J. Wasemiller Depo., at 13, and Ex. 43, 44.)

- 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. (Maddix Aff., Ex. D; J. Wasemiller Depo., at 22.) His complication rate is 3%. (Maddix Aff., Ex. D; 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. (Maddix Aff., Ex. B (Linner disclosure, at 5.)
- 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. (Maddix Aff., Exhibit D; 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. (Maddix Aff., Exhibit D; J. Wasemiller Depo., at 104, 107; and, Depo. Ex. No. 1). 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. (Maddix Aff., Ex. D; J. Wasemiller Depo., at 114; and, Depo. Ex. No. 1).

II. A CAUSE OF ACTION FOR NEGLIGENT CREDENTIALING CANNOT CO-EXIST WITH THE LEGISLATURE'S GRANT OF BROAD CONFIDENTIALITY PRIVILEGES AND PROTECTIONS TO PEER REVIEW ORGANIZATIONS.

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

1. The Plain Language of the Statute Precludes Adequate Defense to Negligent Credentialing Claims.

Respondents urge the Court to adopt a new cause of action in Minnesota for negligent credentialing. 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 the legislature has made it impossible for a hospital to adequately defend itself against such claims.

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 decision, the issue becomes the reasonableness of the decision. Determination of the reasonableness of a credentialing 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 decision was unreasonable, would require disclosure of information about the deliberative process by which the credentialing decision was made, and of the ultimate outcome of the credentialing process.¹ Minn. Stat. § 145.64, however, clearly prohibits disclosure of the deliberative processes by which the credentialing decision was made and the outcome of the decision, thereby

¹ 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.

precluding hospitals from defending themselves against claims of negligent credentialing based upon allegations of unreasonable credentialing.

Both of these arguments were clearly asserted in St. Francis' Appellate Brief, yet Respondents' Brief fails to offer any direct response to these arguments and instead argues unpersuasively that both plaintiffs and defendants could adequately litigate negligent credentialing claims with evidence from original sources.

2. Information from "Original Sources" Would Not Allow Adequate Defense to Claims of Negligent Credentialing.

Respondents argue that the "original sources language of Minn. Stat. § 145.64 would allow hospitals adequate defense to negligent credentialing claims. This assertion 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 claims. Determination of the merits of a negligent credentialing 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 decision, and the ultimate outcome of the credentialing 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 Respondents would allow plaintiffs with negligent

credentialing claims to meet their burden of production, while completely precluding defendant hospitals from meeting their burden.

Respondents' Brief fails to address the logic of this argument and instead makes vague assertions that the statute "merely precludes the discovery of and use at trial of one subset of the universe of evidence otherwise available to the parties." (Respondents Brief, at 24.) 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 "the universe of evidence otherwise available to the parties" in which directly exculpatory evidence might be found.²

² Respondents cite a number of cases from foreign jurisdictions for the proposition that "other jurisdictions have rejected the notion that *litigants* cannot adequately pursue or defend negligent credentialing claims when peer review materials are confidential." (Respondents' Brief, at 25-28 (emphasis added)). Each of these cases is readily distinguishable, and for reasons stated below, each is irrelevant to the question of whether negligent credentialing claims may be adequately defended with evidence gathered from original sources.

The first 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*.

The 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.

3. Minnesota's Appellate Courts Have Strictly Interpreted Minn. Stat. § 145.64.

As described in detail in St. Francis' Appellate Brief, this Court, and the Minnesota Supreme Court, 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, Respondents' Brief. Although these cases do not address claims of negligent credentialing, the rulings of this Court and the Supreme Court in these cases clearly prohibit disclosure, discovery or introduction of the kind of evidence necessary for defense of negligent credentialing 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.

B. Minn. Stat. § 145.63 Evinces Legislative Intent to Protect Review Organizations From Claims For Damages In Any Action By Reason of the Performance of the Review Organization.

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.

Respondents' interpretation of Minn. Stat. § 145.63 would render the second sentence of Subdivision 1 meaningless, conflict with the clear purpose of the statute, and directly conflict with Minn. Stat. § 145.64.

Respondents argue the legislature's use, in the second sentence of Subdivision 1, of the word "reasonable," in front of the word "belief," and in front of the word "efforts," indicates that the legislature intended that a "hospital can avoid liability for its credentialing and privileging decisions only when such decisions are made 'in the reasonable belief' that such decisions are warranted and 'after reasonable efforts to ascertain the facts' have been made." (Respondents' Brief, at 33.) Respondents essentially argue that if a statute includes the use of the word "reasonable," the legislature must have envisioned a negligence cause of action. Respondents' "plain language" interpretation simply doesn't make sense in light of the language of the statute, the clear purpose of the statute, and the clear confidentiality provisions of Minn. Stat. § 145.64.

Respondents' "plain language" arguments are not persuasive. Under the interpretation urged by Respondents, the second sentence of Minn. Stat. § 145.63, Subd. 1 ceases to have meaning. The default standard for common law torts is, of course, negligence. If, as Respondents argue, the legislature intended the second sentence of Subdivision 1, to allow *negligent* credentialing claims against review organizations, the sentence is rendered completely superfluous. If this sentence indicates legislative

contemplation of negligent credentialing claims, why would the legislature have found it necessary include this language? Because common law allows plaintiffs to hold tortfeasors 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. Furthermore, if the legislature envisioned a cause of action for *negligent* credentialing, the duty imposed, of course, would be the *duty of reasonable care*. “Reasonable care” however, is not the language the legislature chose to use when it drafted or amended Minn. Stat. § 145.63; instead, the legislature used the phrase “reasonable belief.” Minn. Stat. § 145.63, Subd. 1. Respondents interpretation would thus create an entirely subjective duty, and not the objective duty of reasonable care required by common law negligence.

Respondents’ interpretation 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. Quite obviously, the purpose of the statute is to place *limitations on liability* for sponsoring organizations, *review organizations* and members of review organizations. Respondents urge the Court to adopt an interpretation of the statute which, in light of the stated purpose of the statute, would again render 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 Respondents’ 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. The second sentence of Subdivision 1 must be interpreted to have meaning and it must be interpreted to be consistent with the clearly stated purpose of the statute to limit liability of review organizations, members of review organizations, and sponsoring organizations.

Finally, the interpretation urged by Respondents 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 while, at the same time, they act to preclude defendants from defending against negligent credentialing 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 384 (citing Minn. Stat. § 645.16). Under Respondents' interpretation, the provisions of Minn. Stat. § 145.63 Subd. 1, would directly conflict with unambiguous language of Minn. Stat. § 145.64, Subd. 1.

To the extent the two uses of the word "reasonable" create ambiguity when the second sentence of Subdivision 1 of Minn. Stat. § 145.63 is construed 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 at Minn. Stat. § 145.61-.67, it is clear that the legislature did not envision a cause of action for negligent credentialing when it enacted the statute. Instead Minn. Stat. § 145.63 must be interpreted to bar claims against a review organization "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. . . .” Minn. Stat. § 145.63, Subd. 1.

III. CASES CITED BY RESPONDENTS DO NOT ADDRESS THE ISSUE OF WHETHER PEER REVIEW STATUTES SIMILAR TO THOSE IN MINNESOTA ABROGATE A CAUSE OF ACTION FOR NEGLIGENT CREDENTIALING

To support their argument that Minnesota “should” recognize a cause of action for negligent credentialing, Respondents string cite thirty five cases from other jurisdictions asserting that the cases have “squarely addressed” the issue and affirmatively held that such cause of action exists. 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.³ In other cases, the existence of a cause of action for negligent credentialing was assumed, but certainly was not “squarely

³ 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. App. 1979) (negligent failure of the hospital to arrange for an 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 Medical Ctr., Inc., 377 A. 2d 8, 9 (Del. 1977) (negligent failure of hospital to supervise employed resident physician during delivery).

addressed” by the appellate courts.⁴ 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 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

⁴ 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, 137 A.D. 2d 186, 189, 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.”).

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. Medical Center, 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 Respondents support only the general assertion that a common law cause of action for negligent credentialing is recognized in a majority of other jurisdictions. However, they offer no guidance in answering the certified questions 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. RECOGNIZING A CAUSE OF ACTION FOR NEGLIGENT CREDENTIALING WILL NOT PROMOTE IMPROVEMENT IN THE QUALITY OF HEALTH CARE.

Respondents argue that recognition of a cause of action for negligent credentialing will benefit patients because (1) the hospital should be held accountable for harm it

causes irrespective of any negligence of the co-defendant physician, and (2) full recovery against a co-defendant physician for his or her own negligence may not be guaranteed. Neither is correct. A negligent credentialing claim against a hospital is entirely dependent on a finding of causal negligence on the part of the physician. Cases from jurisdictions recognizing negligent credentialing specifically hold 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 Respondents’ arguments, these cases do not regard the requirement of physician negligence as a “borrowed defense” from a co-defendant or a subtle means of treating negligent credentialing as a vicarious liability claim.

Providing a “guarantee” of a full recovery for the negligence of a co-defendant should not be a legitimate reason to adopt a new cause of action. In Thompson v. Nason

Hospital, 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.

Respondents argue that allowing negligent credentialing litigation “can only enhance our health care system.” How would the threat of negligent credentialing litigation cause an enhancement in health care? Respondents don’t say. Such threat will certainly not encourage physicians and other health care professionals to serve on peer review committees. Nor will such threat promote openness and candor, which are the prerequisites for true critical analysis of professional qualifications and conduct during peer review. Furthermore, Respondents don’t claim that negligent credentialing litigation is needed because Minnesota’s peer review system is ineffective or doesn’t work. To the contrary, Respondents acknowledge that “most hospitals comply with their obligations to use reasonable care in credentialing physicians.” (Respondents’ Brief at 30.) Ultimately, Respondents’ argument about enhancement in health care is just a statement without any explanation or factual support.

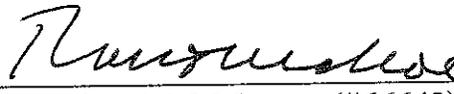
CONCLUSION

For the foregoing reasons, and for the reasons stated in its initial Appellate Brief, St. Francis Medical Center respectfully requests the Court reverse the district court's June 29, 2005, Order denying St. Francis Medical Center's motion to dismiss Respondents' claim that St. Francis negligently provided hospital credentials to Dr. James Wasemiller.

Dated: December 15, 2005

Respectfully submitted,

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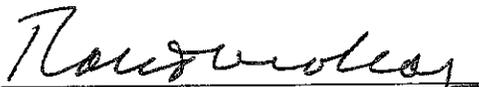
CERTIFICATE OF COMPLIANCE

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 3,875 words. This Brief was prepared using Microsoft Word 2000.

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